

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: CCT 45/2010**

In the matter between:-

**HENDRICK PIETER LE ROUX**

First Applicant

**BURGERT CHRISTIAAN GILDENHUYS**

Second Applicant

**REINARDT JANSE VAN RENSBURG**

Third Applicant

and

**LOUIS DEY**

Respondent

**FREEDOM OF EXPRESSION INSTITUTE**

First Amicus Curiae

**RESTORATIVE JUSTICE CENTRE**

Second Amicus Curiae

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SUBMISSIONS OF THE RESTORATIVE JUSTICE CENTRE

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## INTRODUCTON

1. It is significant that there is a complete absence of case law pertaining to child defendants in defamation suits in South African Law.<sup>1</sup> This seems to indicate that defamatory comments by children have not been a major social problem until now, and incidents have presumably been dealt with as they arose in the community and school context. As can be seen from the case law cited by all the parties in this matter, most of the law on defamation relates to publication by mass media.<sup>2</sup> Until recently, children did not have the resources or access to media, apart from student newspapers, which would allow widespread dissemination of information, defamatory or otherwise.
2. The advent of the Internet and mobile phone technology has created a sea change in the way in which children can disseminate information. However, children may not always be aware of the consequences of distributing information on the Internet or on their

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<sup>1</sup> See *Die Spoorbond and Another Appellants v South African Railways Respondent* 1946 AD 999.

<sup>2</sup> Interestingly, Roman-Dutch law did not recognize claims for defamation against persons who had not attained majority. In 1793 Voet stated: "n Persoon sal tevergeefs 'n klag by die regters indien aangaande 'n onreg deur minderjariges gepleeg aangesien hulle nie toegelaat is om vir valsheid vatbaar te wees vanweë hulle ouderdom en onskuld aan opset." This position may not be consistent with the current law on the liability of children but one can draw an analogy between what Voet referred to as innocence and what we recognize today as a lack of maturity, a tendency to act impulsively and an inability to foresee the legal consequences of their actions. Translated from latin by Davitsz, GJ "Animus injuriandi as vereiste vir aanspreekheid op grond van privaatregtelike laster" (1976) LLD. *S v Lehnberg en 'n Ander* 1975 (4) SA 553(A); *Centre for Child Law v Minister of Justice and Constitutional Development and others* 2009 (6) SA 632 (CC).

mobile phones and are less blameworthy for ill-conceived decisions or attempts at humour.<sup>3</sup>

3. The law of defamation needs a method of differentiating between published comments that are obnoxious or inappropriate from those that are truly damaging and vicious. The law of defamation usually focuses on the plaintiff and there is currently very little scope for treating the child defendant differently from the adult defendant.
  
4. In the United States the debate seems to have centred on children's right to free speech in terms of the first amendment and the school's right to discipline students for both on and off-campus speech.<sup>4</sup> The United States Supreme Court has never pronounced on the subject but case law supports expanding the domain of school discipline in the area of student speech and children therefore have a limited right of freedom of speech in the school environment. Gurney cautions, however, that:

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<sup>3</sup> Gurney "My Space, Your Reputation: A call to change libel laws for juveniles using social networking sites" (2009) 82 *Temple Law Review* 241. See also the evidence of Dr Kriegler at pages 15 to 16 of the High Court Judgment, page 508 to 509 of the Record.

<sup>4</sup> *Tinker v Des Moines Ind Cmty Sch Dist* 393 US 503 (1969); *Hazelwood School District v Kuhlmeier* 484 US 260 (1988); *Morse v Frederick* 127 S Ct 2618 (2007); *Layshock v Hermitage Sch Dist* 496 F Supp 2d 587 (WD Pa 2007).

*'[i]f students are to receive in-school punishments for their off-campus speech, it is inappropriate to also hold them responsible in court for a tort that does not recognize their status as juveniles. Therefore, it should be decades-old defamation law that bends, as judges can be confident that school officials will fill the regulating role traditionally held by libel law.' Courts should hold minor defendants in libel actions to a different standard in part out of concerns of fairness; immature teenagers who have already been punished at school do not need to learn another lesson by further discipline in court.*<sup>5</sup>

## **CHILDREN SUBJECTED TO THREE SEPARATE PROCESSES RESULTING IN A DISPROPORTIONATE RESPONSE**

5. The RJC is concerned about a disproportionate response to children's wrongdoing due to the fact that if their infringement occurs in a school (or other institutional) setting they are likely to be held liable in three different ways.
  
6. In this case the boys were subjected to:
  - 6.1. A school disciplinary hearing resulting in the loss of merit points, being stripped of 'honours' recognition and eligibility, and 5 sessions of detention;

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<sup>5</sup> Gurney "My Space, Your Reputation: A call to change libel laws for juveniles using social networking sites" (2009) 82 *Temple Law Review* 241.

- 6.2. Criminal charges which entailed being taken to the police station and being required to give a warning statement, appearing at court, being referred to probation services, being required to undertake 56 hours of community service; and
- 6.3. Being sued civilly for damages for the initial amount of R300 000, which entailed preparing for trial, testifying at the trial, having damages of R45 000.00 awarded against them, and pursuing subsequent appeals.
7. While recognising that there is a difference between the aims of a civil claim for damages for defamation and a criminal charge of *crimen injuria*, a consideration of the principles that are applied in the child justice system is helpful.
8. It is well understood in international law that when it comes to young offenders, responses should be proportionate. This is captured in rule 5 of the Standard Minimum Rules for the Administration of Juvenile Justice which reads as follows:

5. *Aims of juvenile justice:*

*5.1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.*

9. In the commentary to this rule<sup>6</sup> ‘the principle of proportionality’ is described as an instrument for curbing punitive sanctions. The commentary goes on to say that rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime, and that ‘new and innovative types of reactions are desirable as precautions against any undue widening of the net of formal social control over juveniles’.
10. The first guiding principle of the Child Justice Act 75 of 2008, set out at s 3(a) is that ‘all consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society’.
11. The second guiding principle (s 3(b)) is that ‘a child must not be treated more severely than an adult would have been treated in the same circumstances’. At first glance this principle might seem odd – why would a child ever be treated more severely than an adult?

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<sup>6</sup> The Commentary is incorporated into the Standard Minimum Rules and is read as part of the rules, aiding in interpretation.

The principle arises from the concern that due to their status as children, they are often subjected to multiple responses to their wrongdoing.

12. In this respect the Standard Minimum Rules for the Administration of Juvenile Justice are extended more broadly than the juvenile justice system, as follows:

3. *Extension of Rules:*

- 3.1 *The relevant provisions of the Rules shall be applied not only to juvenile offenders but also to juveniles who may be proceeded against for any specific behaviour that would not be punishable if committed by an adult.*

13. Although defamation could give rise to both criminal and civil responses for adults it is most unlikely that adults would have to contend with a third set of rules and punishments. It might arise for an adult where the defamation has occurred in the work place. However, it is far more likely that children will have to contend with institutional responses as well as criminal and civil, because for most of their childhood they attend school.

14. Taken together, as in this case, the response to the wrongdoing is disproportionate. This is another reason why a restorative justice

process is preferable: One process could in fact deal with all of the issues.

15. The use of restorative justice in schools is a practice gaining momentum internationally,<sup>7</sup> and is in fact encouraged by the South African Department of Education.<sup>8</sup>
16. In the High Court trial in this matter, a great deal of attention was paid to the issue of school discipline.<sup>9</sup> This raises a concern about whether the compounding of responses to the three boys in this case was in fact aimed at trying to restore school discipline by making an example of this incident.
17. In ***Dikoko***, Mokgoro J<sup>10</sup> points out that an award for defamation should be ‘solace to a plaintiff’s wounded feelings and not to penalise or deter people from doing what the defendant has done. Even if a compensatory award may have a deterrent effect, its

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<sup>7</sup> Hopkins *Just schools, a whole school approach to restorative justice* (2004), Stutzman Amstutz and Mullet *The little book of restorative discipline for schools* (2005), Hopkins ‘Restorative approaches in UK schools’ (2007) 3 *International Journal of Restorative Justice* 93, Hendry *Building and restoring respectful relationships at school: A guide to using restorative practice* (2009).

<sup>8</sup> *Learner Discipline and School Management* (2007) Department of Education, Western Cape.

<sup>9</sup> High Court judgment page 501 to 502 of the Record.

<sup>10</sup> Para 75, Mokgoro cites the case of *Lynch v Agnew* 1929 TPD 974.

purpose is not to punish. Clearly, punishment and deterrence are functions of the criminal law. Not the law of delict.<sup>11</sup>

## **DEFINING RESTORATIVE JUSTICE AND ITS APPLICATION TO VARIOUS AREAS OF THE LAW**

18. Restorative justice is defined in the Child Justice Act 75 of 2008<sup>12</sup> as ‘an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the event and promoting reconciliation’.

19. The UN Handbook on Restorative Justice Programmes defines a restorative process as;

*‘...any process in which the victim and the offender, and where appropriate any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.’<sup>13</sup>*

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<sup>11</sup> Id at 978.

<sup>12</sup> The Act came into operation on 1 April 2010.

<sup>13</sup> United Nations Office on Drugs and Crime 2006 *Handbook on Restorative Justice Programmes* United Nations Criminal Justice Handbook Series available at [http://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf) [last accessed 4 December 2008].

20. Although these definitions refer to offenders, criminal law is not the only area of legal process where restorative can or should be applied.
21. In the case of ***Dikoko v Mokhatla* 2006 (6) SA 235 (CC)**, Sachs J observed that although the principles of restorative justice (and the closely related philosophy of *ubuntu-botho*) have usually been invoked in relation to criminal law, and especially with reference to child justice, there is no reason why it's application should be restricted to those areas. He went on to point out that it has already influenced our jurisprudence in divergent issues<sup>14</sup> such as capital punishment,<sup>15</sup> eviction<sup>16</sup> and adults found guilty of murder.<sup>17</sup>
22. In ***Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)** (hereafter '***PE Municipality***') Sachs J also mentioned labour law and family law<sup>18</sup> as areas where an attempt at mediation was required or encouraged.<sup>19</sup> This court has also applied restorative justice in the case of ***S v M* 2007 (2) SACR 539**

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<sup>14</sup> Para 115.

<sup>15</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

<sup>16</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

<sup>17</sup> *S v Maluleke* 2008 (1) SACR 49 (T). This case was unreported at the time of the *Dikoko* judgment.

<sup>18</sup> See, for example, the recent case of *MB v NB* 2010 (3) SA 220 (GS).

<sup>19</sup> Para 40.

(CC) which dealt with the responsibilities of a court when sentencing a primary care-giver of children.<sup>20</sup>

23. In **Dikoko**, Mokgoro J highlighted that 'our law should be developed in the light of the values of *ubuntu* emphasising restorative rather than retributive justice'.<sup>21</sup> Mokgoro J further stated that 'courts should be proactive, encouraging apology and mutual understanding where possible'.<sup>22</sup>

24. Mokgoro J and Sachs J (together with Nkabinde J) were in the minority on the issue of quantum in **Dikoko**. Moseneke J, writing for the majority on quantum, stated that although the line of reasoning advanced by Mokgoro J and Sachs J in their separate but concurring dissenting judgments on quantum were persuasive, they raised issues that were not confronted by the trial court and therefore did not properly arise before the court.<sup>23</sup> In the **Dikoko** case, unlike in this matter, there was no attempt at an apology.

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<sup>20</sup> In this case the primary care-giver had been convicted of numerous counts of fraud. See also *S v Saayman* 2008 (1) SACR 393 (E) which dealt with the correct application of restorative justice in numerous counts of fraud.

<sup>21</sup> Para 69.

<sup>22</sup> *Ibid.*

<sup>23</sup> Para 86.

25. These submissions will return to the inter-linked themes of restorative justice, *amende honourable* and *ubuntu-botho* in the submissions relating to development of the common law, set out below. The aim here has been to demonstrate that restorative justice is a concept that is understood by our courts, and has been applied in a range of contexts.

## RESTORATIVE JUSTICE THEORY AND PRACTICE

26. In restorative justice theory, it is well understood that the central question to be asked following an incident is 'who has been harmed?', followed by 'what can be done to repair that harm?'. This is in contrast with the standard criminal justice response to an incident which is 'who has committed the deed?', followed by 'How can he or she be punished?'.<sup>24</sup>

27. In the *Dikoko* judgment Sachs J described the following elements of restorative justice: encounter, reparation, reintegration and participation.<sup>25</sup>

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<sup>24</sup> See Zehr *Changing Lenses* (1990) 186.

<sup>25</sup> *Dikoko* para 114.

28. **Encounter**, which Sachs J also refers to as dialogue, enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Encounter is sometimes also referred to as 'engagement'.
29. The second element of restorative justice, **reparation**, is described as focusing on 'repairing the harm that has been done rather than on doling out punishment'.
30. The third element is **reintegration into the community**, which 'depends on the achievement of a mutual respect for and mutual commitment to one another.'
31. The fourth element is **participation**, which 'presupposes a less formal encounter between the parties that allows other people close to them to participate'.
32. Restorative justice has a special resonance with African customary law processes.<sup>26</sup> In such processes disputes are treated in much the same way whether they are civil or criminal, and this tendency to avoid a strong distinction between civil and criminal wrongs is

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<sup>26</sup> Kgosimore 'Restorative justice as an alternative way of dealing with crime' 2002 *Acta Criminologica* 69; Roche 'Restorative justice and the regulatory State in South African townships' 2002 *British Journal of Criminology* 514; Tshehla 'The restorative justice bug bites the South African criminal justice system' 2004 *SACJ* 1.

also a feature of restorative justice. Acceptance of responsibility, making restitution and promoting harmony are the key outcomes in all kinds of disputes.<sup>27</sup>

## THE RESTORATIVE JUSTICE DEVELOPMENTS IN CHILD LAW

### Child Justice Act

33. In this section of our submissions, we emphasise the developments in South African law that have infused restorative justice processes into the law relating to children, both in the criminal and civil law spheres. We do so to provide a basis for our submission that the civil law relating to defamation, particularly where the defendants are children, is ripe for development.

34. The Child Justice Act 75 of 2008, has the following objectives, in which *ubuntu* and restorative justice feature prominently:

*S2 The objects of this Act are to*

*...*

*promote the spirit of ubuntu in the child justice system through-  
fostering children's sense of dignity and worth;*

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<sup>27</sup> With regard to defamation it is interesting to note that s 93(1) of the Code of Zulu Law contains a proviso that no action lies where a defamatory statement was made during a heated quarrel and where 'within a short time thereafter the statement is publicly withdrawn with apology'. See further Bekker *Seymour's customary law in South Africa* (1989) 344.

- (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;*
- (iii) supporting reconciliation by means of a restorative justice response; and*
- (iv) involving parents, families, victims, and where appropriate, other members of the community affected by the crime in procedures in terms of this Act.*

35. The restorative justice orientation of the Act means that while it is primarily focused on the child offender, the Act places the needs of the victim in a prominent position. The Child Justice Act is thus the first Act in South Africa that includes the opportunity for victim impact statements,<sup>28</sup> and also requires the involvement of victims in decisions to be made about diversion of the child offender.<sup>29</sup>
36. Holding the wrongdoer accountable is an important part of restorative justice. Taking responsibility is a key element of restorative justice. Under the Child Justice Act, children who have criminal capacity can be diverted. This is a pre-trial measure that holds a child accountable but avoids that child being taken through the formal criminal court system. In essence, it is a conditional withdrawal of charges, in which the child is required to do something to make amends. If the child successfully completes

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<sup>28</sup> S 70.

<sup>29</sup> S 52(2).

what is required of him or her, then the matter is not taken up further through the courts, and the child thus avoids a criminal record. It is important to note that a child can only be diverted if he or she acknowledges responsibility for the offence.<sup>30</sup>

37. Diversion programmes are varied, but included in the list of possible options are ‘an oral or written apology to a specified person or persons or institution’,<sup>31</sup> ‘provision of some service or benefit by the child to a specified victims or victims’, ‘payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this’.
38. In addition a magistrate may order a child (prior to and *in lieu* of trial) to appear at family group conference or victim offender mediation, or order any other restorative justice option. Sections 61 and 62 set out a detailed description of family group conference and victim offender mediation processes respectively.

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<sup>30</sup> S 52(1)(a).

<sup>31</sup> S 53(3)(a)

39. A section in the Child Justice Act dealing with ‘minimum standards applicable to diversion’ states that diversion programmes must, where reasonably possible, ‘include a restorative justice element which aims at healing relationships, including the relationship with the victim’<sup>32</sup> and ‘include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution’.<sup>33</sup>

40. The Child Justice Act also contains unique sentencing provisions.

The sentencing objectives<sup>34</sup> are to:

- a. *encourage the child to understand the implications of and be accountable for the harm caused;*
- b. *promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;*
- c. *promote the reintegration of the child into the family and community;*
- d. *ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and*
- e. *use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.*

41. The available sentences include ‘community based sentences’,<sup>35</sup> ‘restorative justice sentences’,<sup>36</sup> and ‘fines or alternatives to

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<sup>32</sup> S 55(2)(b).

<sup>33</sup> S 55(2)(c).

<sup>34</sup> S 69.

<sup>35</sup> S 72.

finer'.<sup>37</sup> With regard to the latter, the options for 'alternatives to a fine' include 'symbolic restitution', obligation to provide a service or benefit' or 'payment of compensation' to a person or charity, where the child or his or her family is able to afford this. In each instance the restitution, service or compensation can be made or provided to a person, charity or welfare organisation.

## Children's Act

42. One of the general principles of the Children's Act 38 of 2005 provides that

*'[i]n any matter concerning a child an approach which is conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided'.<sup>38</sup>*

43. The general principles are in fact aimed more broadly than the ambit of the Children's Act, as indicated by s 6(1) which states that

*'The general principles set out in this section guide*  
*(a) the implementation of all legislation applicable to children, and*  
*(b) **all proceedings**, actions and decisions by any organ of state in any matter concerning a child or children in general'.*

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<sup>36</sup> S 73.

<sup>37</sup> S 74.

<sup>38</sup> S 6(4)(a).

44. Restorative justice processes have also been introduced into the children's court processes under the Children's Act.<sup>39</sup> Section 69 of that Act provides that a pre-hearing conference may be held with the parties to a matter in the children's court in order to mediate between the parties and settle disputes to the extent possible. Section 70 provides for a family group conference to 'find solutions for any problems involving the child' and section 71 provides for other lay forums, expressly including a traditional authority, in order to 'attempt to settle the matter by way of mediation out of court.'<sup>40</sup>
45. With regard to parental responsibilities and rights, the law has introduced compulsory mediation as a pre-cursor to approaching the courts in two instances. Firstly, where an unmarried father and the mother of a child have a dispute about whether the father qualifies to acquire parental responsibilities and rights, the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.<sup>41</sup>
46. In similar vein, parents who are experiencing difficulties in exercising their parental responsibilities and rights must first

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<sup>39</sup> See generally de Jong 'Family mediation as an alternative to traditional court proceedings' in Boezaart (ed) *Child Law in South Africa* (2009) 113-131.

<sup>40</sup> Matters involving alleged abuse or sexual abuse of a child are excluded.

<sup>41</sup> S 21(3).

attempt to agree on a parenting plan before seeking the intervention of a court, and they must seek the assistance of a family advocate, social worker or psychologist or mediation through a social worker or other suitably qualified person.<sup>42</sup>

47. The above paragraphs demonstrate that there have been important developments in criminal law, which benefit both the child offender and the victim of the offence. In family law and care and protection matters, alternative dispute resolution methods have also been introduced, and in some instances are compulsory. However, the civil law relating to delictual claims has not been developed in this manner.

### **THE APPLICATION OF RESTORATIVE JUSTICE AS AN ALTERNATIVE TO A CIVIL CLAIM IN THIS MATTER**

48. The RJC is of the view that the application of a restorative justice approach, as a first step, is likely to have obviated the need for a civil claim for defamation in this matter. If a properly facilitated restorative justice process had taken place instead of or even in

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<sup>42</sup> S 33(2), read with s 33(5).

addition to the school disciplinary measures, the matter could have ended there.

49. Restorative justice starts with an inquiry about the harms, needs and obligations that the offending behaviour brings about. In this context, Dr Dey's feelings about how the boys' behaviour had harmed his reputation (and/or his dignity) would have been heard. His need for the recognition and validation of his feelings would have taken central position in such a restorative process. The boys could have been made to understand the impact of their behaviour, and arising from that, would have seen that they then had obligations to put things right. The parties themselves would have determined the correct measures for making amends.
50. Whilst respecting that Dr Dey has his own sense of the harm done and the needs arising there from, it is useful to consider that victims generally express satisfaction from restorative justice processes.
51. Strang has pointed out that '[v]ictims studies over the past decade repeatedly show that what victims want most is not material

reparation but instead symbolic reparation, primarily an apology and a sincere expression of remorse'.<sup>43</sup>

52. Much of the energy expended in the three tiers of litigation of this case has gone into detailed consideration of the legal concepts pertaining to the *actio iniuriarum*. This is understandable because this area of the law has very specific rules. The RJC wishes to point out, in this regard, that unlike criminal and civil legal proceedings, restorative justice does not focus on the elements of an offence or delict, or on detailed legal rules. If someone has been hurt, that is sufficient to trigger the need for a restorative justice process, for the perpetrator to be held accountable and to be required make amends.
  
53. This is significant because if, as the RJC will propose, restorative justice solutions become the first line of response to defamation, especially where children are involved, the need for detailed forensic explorations such as those necessitated in this case would only be resorted to in those, presumably few, cases that would reach the courts.

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<sup>43</sup> Strang 'Is restorative justice imposing its agenda on victims?' in Zehr & Toews (eds) *Critical Issues in Restorative Justice* (2004) 98. See further Davis and Snyman (eds) *Victimology in South Africa* (2005) 126.

## DEVELOPMENT OF THE COMMON LAW

54. The RJC submits that the common law should be developed in such a manner as to require an attempt to be made to resolve the harm done to personality rights through a restorative justice process prior to the institution of a civil claim for damages, particularly where the defendant is a child.
55. We will first consider the concept of *amende honourable* and posit that the court should develop an analogous remedy based on this ancient concept, infused with the African concept of *ubuntu-botho* and the modern theory and practice of restorative justice.
56. We will then consider how the courts might introduce this approach into our common law, based on the way that the courts have developed housing law through the introduction of a requirement of meaningful engagement.

## **AMENDE HONORABLE, UBUNTU-BUTHU AND RESTORATIVE JUSTICE**

57. South African legal academic Mukheibir makes a case for the ‘resuscitation’ of the *amende honourable*.<sup>44</sup> In a 2004 article she describes the origins of the *amende honourable* in some detail.<sup>45</sup> She explains that it can be traced back to medieval canon law, although it is often mistakenly regarded as having originated in Roman-Dutch law.
58. Citing Zimmerman,<sup>46</sup> Mukheibir states that the basis of the *amende honourable* is that of Christian forgiveness, as opposed to its punitive counterpart *amende profitable*.<sup>47</sup>
59. In medieval times the *amende honourable* arose through praying for pardon in a case of slandering another person. The remedy entailed three aspects: a declaration that the statement was made without intention to defame, a retraction of the defamatory words to repair the injured person’s honour, and an acknowledgment of wrongdoing and a request for forgiveness.

<sup>44</sup> Mukheibir ‘Reincarnation or hallucination? The revival (or not?) of the *amende honorable*’ 2004 *Obiter* 2.

<sup>45</sup> Mukheibir ‘*Ubuntu* and the *amende honorable* – a marriage between African values and medieval canon law’ 2007 *Obiter* 583. See also Mukheibir ‘The wages of delict – Compensation, satisfaction, punishment?’ (Unpublished thesis, University of Amsterdam 2007) 38-39.

<sup>46</sup> Zimmerman *The law of obligations – Roman foundations of the civilian tradition* (1990) 1072.

<sup>47</sup> Mukheibir 2007 *Obiter* 583 at 584. See *Hare v White* (1865) 1 Roscoe 246 247, *Ward-Jackson v Cape Times Ltd* 1910 WLD 257 263.

60. Both the *amende honourable* and the *amende profitable* became part of Roman Dutch law. The *amende profitable* developed into the present day *actio iniuriarum*,<sup>48</sup> and it was thought, until recently, that the *amende honourable* was no longer part of South African law.<sup>49</sup>
61. The academic debates have ranged from whether it has fallen into desuetude and if so, whether it should be revived. Whilst most authors seem to be positive about its 'reincarnation', there is disagreement about whether its reintroduction and development should be as a defence or a remedy. Writing in 1995, Burchell postulated that retraction and apology should be developed as a complete defence. In other words, where a suitable retraction and apology has been forthcoming, no claim for compensation will lie.<sup>50</sup>
62. Midgley,<sup>51</sup> on the other hand, was not persuaded by this argument. The reasons he provides are that there may be cases where an apology will be insufficient to assuage the loss suffered, particularly if there is a long delay between the infringement and the apology. Furthermore, an apology will not always be able to

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<sup>48</sup> Midgley 'Retraction, apology and right to reply' 1995 THRHR 288 290.

<sup>49</sup> Mukheibir 2007 *Obiter* 583 585.

<sup>50</sup> Burchell The Law of Defamation in South Africa 315-319.

<sup>51</sup> Midgley 1995 THRHR 288.

reach all who were aware of the original. A published apology might also compound harm (by airing the issues again) and finally, such a defence could be open to manipulation.

63. In Mukheibir's words, the *amende honourable* has recently 'made a comeback'.<sup>52</sup> The recent case law considers the existence or revival of the *amende honourable*, and in each case the discussion appears to approach the concept as a remedy, rather than a complete defence. However, the discussions about *amende honourable* in the case law point to a remedial shift that is more comprehensive than a mere consideration of apology as a mitigating factor. These submissions will return to a description of the shape that such a remedial shift might take following the discussion of the relevant case law.
64. In ***Mineworkers Investment Co (Pty) Ltd v Modibane 2002 (6) SA 512 (W)***<sup>53</sup> Willis J held that although the remedy of *amende honourable* seemed to have fallen into disuse did not mean that it had been abrogated by disuse. He detected a cautious approach by the courts, and identified the core of their reluctance to be the fact that enforcement of the remedy was achievable through civil

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<sup>52</sup> Mukheibir 2007 *Obiter* 583 585.  
<sup>53</sup> At 525 D-H.

imprisonment. A further factor he considered as to why the remedy had not been used was an over-reliance on English law. He concluded that *amende honourable* had simply been forgotten: '[A] little treasure lost in a nook of our legal attic'.

65. He further remarked that if he was wrong, and that *amende honourable* was no longer part of South African law, then sound reasons exist for an analogous remedy:

*"[I]f the only other remedy available in a defamation action is damages, then very often an appropriate balance will not be struck between the protection of reputation on the one hand and freedom of expression on the other. It fails in two respects: (i) often it does not afford an adequate protection to reputation and (ii) it can, at least indirectly, impose restrictions on the freedom of expression. Awards of damages can ruin defendants financially and this risk can operate to restrict information being published which may indeed be in the public interest."*

66. In addition to Willis J's judgment in ***Mineworkers' Investment v Modibane***, the concept was also discussed and considered (as a remedy) in ***Young v Shaikh 2004 (3) SA 46 (C)***. In this case Nel J was intent on sending out a message that would have a 'chilling' effect on baseless and selfish attacks on integrity, and considered

that the *amende honourable* would not serve the interests of justice in that particular case.<sup>54</sup>

67. See also ***Mthembi-Mahanyele v Mail and Guardian Ltd 2004 (6) SA 329 (SCA)*** and ***NM v Smith [2005] 3 All SA 457 (W)*** where the concept of *amende honourable* was discussed but the court did not have to decide on the facts of those cases whether or not *amende honourable* was part of South African law or if it should be revived.
68. In **Dikoko**, the minority judgments of Mokgoro J and Sachs J (Nkabinde J concurring) argue for a remedial shift based on the revival of the *amende honourable*, fused with the concept of *ubuntu-botho* and the theory and practice of restorative justice.
69. Both Mokgoro J and Sachs J highlight the importance of a more restorative justice centred approach. Accordingly, it should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties rather than to enlarge the hole in the

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<sup>54</sup> In her critique of this judgment Mukheibir (Obiter (2004) 455 460) observes 'In short, it is clear that Nel was intent on punishing this particular defendant and secondly to make certain that he deterred future defendants from acting in a similar fashion. He saw no reason to use the *amende honourable* or a similar remedy in this instance, because all the reasons which had been given for using it by Willis J in *Modibane* where kindling to his cause and he was adamant not to let this defendant get off lightly'.

defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin.

70. The primary purpose of a compensatory measure, after all, is to restore the dignity of the plaintiff who has suffered the damage and not to punish the defendant.<sup>55</sup> Focussing on a more apology-centred approach, Mokgoro J states:<sup>56</sup>

*'The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reputation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of ubuntu, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the amende honourable is part of our law or not, **our law in this area should be developed in the light of the values of ubuntu emphasising restorative rather than retributive justice.** The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social interdependence. **It is an area where courts should be proactive, encouraging apology and the mutual understanding wherever possible.**'*

<sup>55</sup> *Lynch v Agnew* 1929 TPD 974 978. See further Neethling "Die action iniuriarum en bestraffende genoegdoening" in Visser *Vita perit, lobo non moritur* LexisNexis (2008) at 184. See further Mukheibir ((2007) *Obiter* 583 at 585) who states that the *actio iniuriarum* is 'regarded by leading authors on the South African law of damages as having retained an element of punishment and even revenge (Visser and Potgieter *Law of Damages* (2003)). In this respect it is anomalous within a system which purports to be compensatory'.

<sup>56</sup> At para 69.

71. In concurring with Mokgoro J, Sachs J proposes a remedial shift in the law of defamation from '*an almost exclusive preoccupation with monetary awards*' to '*a more flexible and broadly based approach that involves and encourages apology*.'<sup>57</sup>
72. In these circumstances, a greater scope and encouragement for enabling the reparative value of retraction and apology to be introduced into proceedings, is advocated for. The principal goal should be repair rather than punishment.
73. In this regard, Sachs J referred to the spirit of *ubuntu-botho*. The spirit of *ubuntu-botho* has been described as a concept highly consonant with the rapidly revolving international notions of restorative justice. Deeply rooted in our society, it links up with worldwide striving to develop restorative justice based on reparative rather than purely punitive principles.<sup>58</sup>
74. Sachs J recorded that although *ubuntu-botho* and the *amende honourable* are expressed in different languages intrinsic to separate legal cultures, they share the same underlying philosophy and goal. 'Both are directed towards promoting face-to-face

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<sup>57</sup> At para 105.

<sup>58</sup> At paragraph 114.

encounter between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community. In both legal cultures the centre-piece of the process is to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted.'

75. While finding that there is a need for a significant remedial shift, Sachs J did not suggest that the new, more restorative approach should completely replace the *actio iniuriarum*. He found that 'money, like cattle' could have symbolic value. Sometimes an apology may not be sincere, sometimes it may not be enough. What is required is more flexibility and innovation concerning the relation between apology and money awards.
76. In modern restorative justice practice financial compensation does sometimes play a part in restorative justice outcomes, which is usually where there has been actual financial loss, such as where there has been physical injury or the loss of or damage to property.
77. The approach could be similar to that used by this Court in ***Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217***

(CC). In a unanimous judgment, this Court underlined the need for attempted engagement or mediation prior to eviction in terms of the Prevention of Illegal Eviction Act 19 of 1998 (hereafter PIE).<sup>59</sup>

78. Links were made with the African philosophy of *ubuntu*,<sup>60</sup> which combines individual rights with a communitarian philosophy. A role for the courts was identified in developing a dignified model of sustainable reconciliation of the competing interests involved.<sup>61</sup> The envisaged role for the courts was described as being to encourage the parties to ‘engage with each other in a proactive and honest endeavour to find mutually acceptable solutions’.
79. This Court proposed that wherever possible, ‘respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.’<sup>62</sup> Furthermore, a Court could consider whether mediation had been undertaken as a pertinent factor in deciding whether an eviction order would be just and equitable.

<sup>59</sup> Prevention and Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>60</sup> Mokgoro (‘Ubuntu and the law in South Africa’ 1998 *Buffalo Human Rights Law Review* 15) explains that *ubuntu* does not lend itself to simple definition, nor is it easily translated into English. It is commonly explained by way of drawing together strands of concepts such as *ubuntu ngumuntu ngabantu* which can be translated as ‘a person is a person through other people’. *Ubuntu* is a Nguni word, its *seSotho* equivalent in *botho*. In *seSotho* ‘a person is a person through other people’ may be translated as *motho ke motho ba batho ba bangwe*.

<sup>61</sup> *PE Municipality* para 37.

<sup>62</sup> *Id* para 39.

*'Absent special circumstances, it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted'.<sup>63</sup>*

80. A court could, in appropriate circumstances, order the parties to attempt mediation.<sup>64</sup> In this regard the Court noted that the compulsion lies in participating in the process, not in reaching a settlement.<sup>65</sup>

81. The ***P E Municipality*** approach was endorsed by a number of judgments in the High Court.<sup>66</sup> This Court has also, on several occasions subsequent to ***P E Municipality*** stressed the importance of mediation in the context of eviction. In these judgments, the Court has mostly adopted the terminology of 'meaningful engagement', which includes mediation.<sup>67</sup>

***Occupiers of 51 Olivia Road & 197 Main Street v City of Johannesburg 2008 (3) SA 308 (CC)***

***Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others (Centre on Housing Rights and Evictions and another, Amici Curiae) 2010 (3) SA 454 (CC)***

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<sup>63</sup> Para 43.

<sup>64</sup> Para 39. In *PE Municipality* the Court found that too much water had flowed under the bridge, and it was not appropriate to order mediation.

<sup>65</sup> Para 40.

<sup>66</sup> *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 (1) SA 332 (T); *Sailing Queen Investments v The Occupants La Colleen Court* 2008 (6) BCLR 666 (W); *Lingwood Unlawful Occupiers* 2008 (3) BCLR 325 (W).

<sup>67</sup> The term 'meaningful engagement' was first used by the Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 87.

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82. It is submitted that the approach taken by this Court in the ***PE Municipality*** case (and the cases which have followed it) has developed the law regarding eviction, by introducing a procedural step requiring an attempt at meaningful engagement.
83. The effect of this legal development is that all applicants for eviction must engage meaningfully before instituting eviction proceedings. A failure to do so will be a negative factor for consideration when deciding whether an eviction was lawful. The Courts have ordered parties to mediate where such an order is appropriate.
84. The RJC submits that the law relating to civil claims for damage to reputation can be developed in a similar way by requiring that there must be an attempt to engage in a restorative justice process prior to the institution of a civil claim for damages in cases of defamation, at least in cases where the defendants are children. This would provide a procedural step that is likely to prevent the matter proceeding to litigation. The absence of such an attempt

might lead to the court making an order that it be done, and ultimately would have an effect on the award.

85. The way in which the *amende honourable* operated was that the plaintiff's initial letter of demand made a demand (without prejudice) for an apology and retraction, failing which an action for a civil claim for damage would be instituted.
86. An improved approach – and one more likely to lead to satisfactory results for both the plaintiff and the defendant – would be to demand that a meaningful engagement should take place to deal with the infringement. This would allow for a restorative justice process in which hurt feelings can be expressed and in which a sincere apology can be given space to emerge.
87. Obviously, if the defendants refuse to engage or if engagement does not result in a satisfactory outcome, then the path would be cleared for the institution of a civil claim.

## **THE AWARD**

## Youthfulness as mitigating factor

88. We submit that, in the event that a monetary award is granted for defamation, there are two factors unique to children that should be considered when assessing the award in order to differentiate between adult defendants and child defendants:

88.1. The age or youthfulness of the child; and

88.2. The financial position of the child.

89. The court *a quo* took cognisance of the youthfulness of the defendants and applied it as a mitigating factor in the assessment of damages.<sup>68</sup>

*“Ek neem in ag dat dit gaan om kinders se onbesonne optrede wat, hoewel onregmatig, hulle nie met skuld moet belas wat hulle toekoms kan belemmer nie.”*

90. The majority in the Supreme Court of Appeal determined that this was a misdirection by the court *a quo*.

*“Assessment of compensation is a matter for the trial court and a court of appeal may interfere under limited circumstances only. One is where the court had misdirected itself on a material issue. The parties were agreed that the court indeed misdirected itself. It dealt with the matter as if the assessment of quantum were similar to the determination of sentence in a criminal case. Factors taken into account*

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<sup>68</sup> Page 31 to 32 of the High Court Judgment at page 524 to 525 of the Record.

*were that the perpetrators should not at this young age be burdened with a debt that might affect their future; and that their interests should be considered.”*<sup>69</sup>

91. The Respondents argue that the youthfulness of the defendants were taken into account by the majority in the Supreme Court of Appeal when addressing the context of the case<sup>70</sup> i.e. that fact that the publication took place in the school environment and that the majority therefore did consider the interests of the children. We submit that the age of the defendants and the context of the case are two separate factors that should be taken into account and should not be conflated.
92. Visser and Potgieter include youth as a relevant factor when assessing damages.<sup>71</sup> The age of the defendant relates to the personal circumstances of the defendant, it does not relate to the legal capacity of the children. It is accepted that a child above the age of 14 has legal capacity for purposes of civil law.<sup>72</sup> However, where youthfulness is part of the personal circumstances of the defendant then the “defendant is considered to be less

<sup>69</sup> Le Roux and others v Dey 2010 (4) SA 210 (SCA) para 42 at page 225D-E.

<sup>70</sup> Para 47.

<sup>71</sup> Visser, PJ and Potgieter, JM *Law of Damages* (2003) 460

<sup>72</sup> Boezaart ‘Aspects of Private Law relating to children’ in Boezaart (ed) *Child Law in South Africa* (2009) Juta 37. Although not relevant to the factual ambit of this case, it is interesting to note that the common law still defines puberty to be 12 for girls and 14 for boys, making girls civilly liable at a young age. This is another example of the way in which the civil law of delict has not kept pace with developments in criminal law (where the age of criminal responsibility has long been the same for boys and girls, and where recently the age of consent to sexual intercourse has been equalised through statutory amendment). See obiter view that this may be discrimination based on gender in *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) 511 G-H.

accountable or less blameworthy and accordingly should pay less satisfaction.”<sup>73</sup>

93. As stated earlier, we have been unable to find any case law in which children were defendants in defamation matters. In the matter of *Clark v Marais 1908 EDC 311* the court mentioned that an adult man’s youth was a factor diminishing the award of damages. In light of section 28(2) of the Constitution, the factor of youth should count as an even stronger consideration in mitigation where the defendants are not merely young adults but children under the age of 18.
94. We submit that the Supreme Court of Appeal’s decision that youth was not a mitigating factor when assessing damages, was not correct and furthermore fails to recognise the importance of section 28(2) of the Constitution.
95. A further factor to be considered where child defendants are concerned is the financial position of the defendant. Visser and Potgieter state that it is controversial whether the financial position

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<sup>73</sup> Visser and Potgieter (2003) 461. See also Burchell *Defamation* 302. See also the evidence of Dr Kriegler at pages 15 to 16 of the High Court Judgment, page 508 to 509 of the Record.

of the defendant should be taken into account.<sup>74</sup> However, we submit that when children are the defendants, their financial position becomes highly relevant.

96. Children are dependant on their parents for financial support. In the majority of cases, children will not have their own financial resources from which to pay an award for damages. The burden will therefore fall on their parents or a child will, as stated by the court *a quo*, be burdened with a debt at a young age that will affect their future.
97. We accept that this will not apply in matters where the plaintiff suffered patrimonial damages, however, we submit that section 28(2) requires that the interests of the children must be taken into account during the assessment of non-patrimonial damages.

### **Apology as mitigating factor**

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<sup>74</sup> Visser and Potgieter (2003) 461.

98. It is clear in South African law that a mitigating factor in a claim for defamation is the tendering of an apology by a defendant.<sup>75</sup> However, an apology must encompass the following in order for it to be taken into consideration:
- 98.1. It must be unconditional and a complete retraction of the defamatory allegations;
  - 98.2. It has to be made as soon as reasonably possible; and
  - 98.3. The same prominence has to be given to the apology as was originally enjoyed by the defamatory allegations.
99. It is relatively easy to see how this might have been achieved in this case. The boys' rather clumsy attempts to make an apology would have been better facilitated if it were part of a restorative justice process. An oral apology directly to Dr Dey and the principal would have been appropriate, as well as a written apology communicated to the school in a manner that ensured it was given the same prominence as the original picture.
100. In the High Court, Du Plessis J accepted that there was an attempt at an apology in person by Christiaan and Reinhardt, and that the

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<sup>75</sup> *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 2 SA 242 (SCA) 259-260.

fact that boys seemed to be smirking ('smalend') was perhaps just a subjective impression of Dr Dey.<sup>76</sup>

101. In the Supreme Court of Appeal, however the attempted apology was characterised as being 'somewhat suspect'. The court points out that the attempt was made long after the event and on the advice of a third party - a social worker. Dr Dey refused to entertain their apology – also on the advice of a third party – his lawyer.<sup>77</sup> The court went on to say that their conduct at the trial showed disrespect and indicated that they were not apologetic. At the end of this paragraph of the judgment concerning apology<sup>78</sup> the Court found all this to be 'aggravating'.

102. It would appear therefore that the system first of all does nothing to facilitate an apology, but sees an apology, if it occurs spontaneously, as being mitigating. This in turn encourages the plaintiff's lawyers to discourage apology for fear of reducing the amount of money that will be awarded. However, the absence of an apology (or even a ham-fisted attempt at one, as in this case) is seen as aggravating. This shows an incoherent approach to the

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<sup>76</sup> Pages 7 and 31 of the High Court Judgment, page 500 and 524 of the Record. The Record indicates that Hennie also apologised in his warning statement, at page 236 to 237 of the Record.

<sup>77</sup> Page 75, vol 1 of the Record.

<sup>78</sup> Para 45.

value of apology in the South African law. Defendants – particularly if they are children – should be given opportunities and assistance to offer an apology in an appropriate way. Legal representatives should not stand in the way of such efforts.<sup>79</sup>

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**PRETORIA**

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<sup>79</sup>As per Sachs J in *Dikoko* para 117: 'The whole forensic mindset, as well as the way evidence is led and arguments are presented, is functionally and exclusively geared towards enlarging or restricting the amount of damages to be awarded, rather than towards securing an apology. In my view, this fixed concentration on quantum requires amendment. Greater scope has to be given for reparatory remedies.'

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