

Constitutional Court Litigation

Le Roux v Dey

Three school boys at Waterkloof Hoerskool, manipulated a photograph to make a cartoon-like picture of the school principal and deputy principal. The photograph showed two naked men, sitting side by side. The heads of the principal and deputy principal had been superimposed onto the naked bodies. The private parts of the figures were then covered by the school crest. The manipulation was amateurish and did not look like a real depiction. The photograph ended up on the school notice board for approximately 30 minutes and was then removed. The electronic image was forwarded by sms within the school and was seen by many pupils.

Once the boys were identified as the persons behind the act, they were disciplined by their school in an internal disciplinary hearing, where they were stripped of all their scholastic achievements and positions as well as being sent for school detention. The boys apologised to the principal who accepted their apology and took no further action. The boys also tried to apologise to the deputy principal, Dr Dey, but he told them his lawyers had advised him not to accept their apology.

Dr Dey also charged the boys with the criminal offence of *crimen injuria*. The boys were placed on a diversion program by the Court and as a result performed 56 hours of community service cleaning the cages at the Pretoria Zoo. Extraordinarily, the boys were also sued for damages arising from defamation and injuria by Dr Dey. The basis for this civil action rests on the proposition that Dr Dey felt he was portrayed as a homosexual and as masturbating in public. He asked for damages in the amount of R 600 000.00

The North Gauteng High Court found in favour of Dr Dey, awarding R45 000.00 in damages. The court found that the boys had acted in a wrongful manner, with intent to injure and were liable for defamation. The boys appealed to the Supreme Court of Appeal, but their appeal was dismissed and the High Court's order for damages was upheld.

In the Constitutional Court appeal heard in August 2010. The boys argued that the image was not defamatory. It was not representative of reality and a reasonable viewer would not have understood it as conveying any actual facts about the plaintiff. Furthermore, even if Dr Dey

felt subjectively that his dignity had been impaired by the picture, this was not objectively justified.

The Restorative Justice Centre entered as amicus curiae in *Le Roux v Dey*, represented by the Centre for Child Law. Their submissions argued the common law should be developed to include a procedural step requiring reasonable engagement before court proceedings can be lodged. This way attempts to apologise must be the first resort, that failing, court proceedings may then be implemented. This is particularly important in cases involving children, as they are still developing and will naturally make mistakes as they grow and develop. The submissions were largely successful.

In a judgment was handed down on the 8 March 2011, the Constitutional Court upheld the appeal but reduced the quantum of damages to R25 000 and ordered the boys make an unconditional apology to Dr Dey. Certain significant adjustments were made to the costs awards, in favour of the boys. The majority of the Constitutional court found that the image did amount to defamation. There were two dissenting judgments, the first is the joint judgment by Froneman J and Cameron J. They find that Dr Dey was not defamed, but that his dignity was actionably injured. The second dissenting judgment is that of Yacoob J who concluded that Dr Dey's claim should have failed entirely. Skweyiya J concurs with Yacoob J, and sets out his reasons in a separate judgment. Both of these latter judgments are based strongly on child law principles.

It is significant that the only portion of the judgment that is ascribed to by the whole court are the paragraphs of the judgment about apology. The court develops the Roman Dutch Common Law. They point out that at present the only claim for one who has suffered an infringement of a personality right is one of damages. There is no provision enabling one to claim an apology even if that apology would be the most effective way of restoring the dignity of that specific person. A person who is genuinely sorry about an infringement of another's rights cannot raise an immediate apology and retraction as a defence to a claim for damages. The court found that had our Roman Dutch law given due recognition to the value of an apology and retraction things might have turned out differently. Instead the matter went to court which deepened and steepened the conflict. The Court stated that 'it is time for our Roman Dutch common law to recognise the value of this kind of restorative justice' The

court was of the view that this could be done in a way that draws from the shared values of fairness in both our common law and customary law systems.

The Court discusses the two Roman Dutch law remedies for injury, the *amende honorable* (honourable amends) and the *amende profitable* (profitable amends). The *amende honorable* which consisted of retraction and apology, seems to have fallen into disuse over the years, and the court did not reinstate it, but rather developed the law in accordance with equitable principles also rooted in Roman Dutch law. The court explains their reasons for doing so at para 202 as follows:

‘Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other’s dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another’.