

**THE BEST INTERESTS OF THE
CHILD AND SOUTH AFRICAN
DEFAMATION LAW:
RECONSIDERING *LE ROUX V DEY***

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Submitted in partial fulfilment of the requirements for the degree of
Master of Laws by Coursework and Research Report
at the University of the Witwatersrand, Johannesburg

Date: 28 February 2025

DECLARATION

I, Thabang Gladys Mashifane (2746006), declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Word Count: 9792 [Incl. the body of your report, footnotes BUT excl. title page, declaration, abstract, table of contents and bibliography]

ABSTRACT

This research report investigates whether the common law of defamation is consistent with the principle of the “best interests of the child” entrenched in section 28(2) of the Constitution. An analysis of the judgments in *Le Roux v Dey* considers whether a child-centred approach to defamation law involving a child wrongdoer and an adult victim requires development to preclude an adult victim’s claim for damages.

In this report I first seek to understand the current law and its rationale, by reviewing how the judgments in *Le Roux* grappled with the child/adult dynamic and applied the prima facie elements of defamation as well as the possible defences available to child defendants. Secondly, I consider the constitutional imperatives when there are conflicting constitutional rights, focusing on the rights to freedom of expression and human dignity and a third complicator being the best interests of the child. By conducting a balancing act of these rights with guidance from leading defamation law cases, I conclude that there is no need to further develop the common law of defamation as it is compliant to the Constitution and strikes a delicate balance between the three main rights.

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1 INTRODUCTION

This research report seeks to analyse both the minority and majority judgments in the case of *Le Roux and Others v Dey*,¹ with the aim of establishing whether the South African common law of defamation is consistent with the principle of the “best interests of the child”,² as entrenched in section 28(2) of the Constitution of the Republic of South Africa, 1996.

I will consider both the minority and majority judgments in *Le Roux*, in an attempt to ascertain whether there is scope to further develop the common law of defamation towards a child-centred approach in the information era where images, recordings and the like are readily available on handheld devices such as cellular phones.³ A child-centred approach to defamation law, as argued in the litigation preceding the judgment of *Le Roux*, could require that a special dispensation be implemented for child wrongdoers. My understanding is that some of the judgments in *Le Roux* suggest that where the defendant is a child wrongdoer in a defamation case, the application of the common law should be lenient towards children at the expense of the adult victim.⁴

I argue that such an approach to defamation law (consistent with the best interests of the child) will have to be balanced against a victim’s constitutional right to dignity, enshrined in section 10 of the Constitution. Thus, the main purpose of this research report is to determine whether the common law of defamation ought to be developed to preclude an adult defamation victim’s claim for damages against a child wrongdoer.

In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd*,⁵ the Constitutional Court laid down the principles upon which a court should set out to develop the common law:

‘It must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely

¹ *Le Roux and others v Dey* 2011 (3) SA 274 (CC).

² As defined by section 28(3) of the Constitution of the Republic of South Africa, 1996, a “child” means a person under the age of 18 years.

³ Note a commentary by Julie E Cohen ‘The Regulatory State in the Information Age’ (2016) 17(2) *Theoretical Inquiries in Law* 369 at 371. See also Julie E Cohen ‘Internet Utopianism and the Practical Inevitability of Law’ *Duke Law & Technology Review* 18 (2019-2020) 85. The writer refers to it as an ‘era of informationalism’ where ‘internet utopianism’ is seen as possessing ‘powerful and inherently informational mechanisms by which existing protections for human rights are increasingly outflanked and coopted.’

⁴ *Le Roux* supra note 1 paras 34-5, 46-7, 51-4 and 71-9.

⁵ 2016 (1) SA 621 (CC).

how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.’⁶

Considering steps (a) and (b) of the *Mighty Solutions* formula, we must first understand the current law and the rationale thereof. Therefore, in Part 2 of this paper, I will review the minority and majority judgments in *Le Roux*, focusing on the themes of the requirements for a defamation claim and the remedies available to defamation victims under common law. I will specifically consider how both the minority and the majority grappled with the child/adult dynamic in that case. The aim will be to determine the current legal position of child wrongdoers vis-à-vis adult victims, and other non-binding alternative legal possibilities. I will analyse the various legal positions and scholarly commentary in this context and draw a conclusion on the way forward.

Secondly, in Part 3, I will discuss the constitutional imperatives embodied in the Bill of Rights and the balancing act when there are conflicting constitutional rights, with specific focus on section 16, the right to freedom of expression, the right to human dignity as entrenched in section 10 of the Constitution, and the best interests of the child in terms of section 28. This will be done in accordance with paragraph (c) of the *Mighty Solutions* formula.

Thirdly, in Part 4, I will discuss the issue of whether an adult who is defamed by a minor should be precluded from claiming damages against a child wrongdoer. Against this backdrop, I will consider whether the *Le Roux* judgments will have an impact on individuals seeking to enforce their right to claim against minor defendants under the common law of defamation. This will comply with paragraphs (d) and (e) of the *Mighty Solutions* formula.

⁶ Ibid para 39. It should be noted that in the original judgment the cited paragraph is 38.

2 THE CURRENT LAW AND ITS RATIONALE IN *LE ROUX V DEY*

2.1 *The facts*

A high school learner (Le Roux) aged 15, transposed the faces of the school principal and the deputy principal onto the bodies of two naked gay bodybuilders sitting next to each other in a sexually suggestive and intimate circumstances.⁷

The image was published by cell phone amongst many schoolchildren and a copy of the image was printed and posted on the school noticeboard by Le Roux's schoolmates (Gildenhuys and Janse van Rensburg, both aged 17 years old), also applicants.

2.2 *The Constitutional Court majority judgment on prima facie case of defamation*

As I already indicated earlier, applying the *Mighty Solutions* formula steps (a) and (b), we must first understand the current law and its rationale.⁸

The majority judgment was penned by Brand AJ, with Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J and Nkabinde J concurring. The court revisited the elements applicable in the legal principles of the law of defamation set out in *Khumalo v Holomisa*.⁹ It said the following:

‘...the elements of defamation are “(a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff”. Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional.’¹⁰

⁷ *Le Roux* supra note 1 para 13-14. Note a critical commentary by Jaco Barnard-Naudé & Pierre de Vos ‘The heteronormative observer: The Constitutional Court’s decision in *Le Roux v Dey*’ (2011) 128 *SALJ* 407. The writers argue that the suggestion that the reading of the picture depicting ‘promiscuous men’ and the situation being associated with sexual immorality is unwelcomed in the current constitutional dispensation; that such assumption is heteronormative as it perpetuates the stereotype that people who engage in same-sex activity are promiscuous.

⁸ *Mighty Solutions* supra note 5 para 38/39.

⁹ *Le Roux* supra note 1 at para 84.

¹⁰ *Ibid* para 85 (footnotes omitted). See alternatively the definition provided by Neethling, Potgieter & Roos *Neethling on Personality Rights* (2019) at 199. ‘The intentional infringement of another’s right to his good name, or, more comprehensively, the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermine his status, good name or reputation.’

A prima facie case of defamation is established by the plaintiff through elements (c) to (e) from *Khumalo*. On the reading above, once the prima facie case has been established, a defendant bears the full onus to rebut one or other presumption, including a duty to adduce evidence. Such must be discharged on a preponderance of probabilities. A bare denial is insufficient as a defence as it ought to be pleaded and proven.¹¹

In this part of this research report, I will consider the prima facie elements of ‘publication’, ‘defamatory matter’, and ‘concerning the plaintiff’.¹²

As a start, the court defined:

‘ “Publication” means the communication or making known to at least one person other than the plaintiff. It may take many forms. Apart from the obvious forms of speech or print, the injurious information can be published through photographs, sketches, cartoons or caricatures.’¹³

The statement conveyed was evaluated using an objective two-stage enquiry into the ordinary meaning of the picture; first, to determine the meaning of what is communicated; and second, to determine whether the meaning was defamatory.¹⁴ The reasonable observer’s understanding of the picture in its context is used to determine whether the meaning of a statement was defamatory.¹⁵ The court had regard to established principle in ascertaining whether ‘a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published.’¹⁶ The court found that defamatory statements included caricatures or cartoons ‘likely to humiliate or belittle the plaintiff’, with the tendency to make one ‘look foolish, ridiculous or absurd’, resulting in loss of respect in the eyes of their ‘peers’.¹⁷

The picture was found to have ‘clearly communicated’ a statement concerning Dr Dey and the principal and was widely published at the school.¹⁸ The court’s duty was to apply the two-stage enquiry, by objectively interpreting ‘the primary or ordinary meaning of the picture’ through

¹¹ Ibid.

¹² Dario Milo & Pamela Stein *A Practical Guide to Media Law* (2013) para 2.2 at 20.

¹³ *Le Roux* supra note 1 para 86.

¹⁴ Ibid para 89.

¹⁵ Ibid.

¹⁶ Ibid para 91.

¹⁷ Ibid.

¹⁸ Ibid para 93.

the eyes of the reasonable observer ‘in its proper context.’¹⁹ The court described the picture and its explicit depiction and the context in which it would probably have been understood.²⁰

The picture was accepted as ‘an obvious and crude manipulation’ and therefore no reasonable person would regard the faces pasted as those of the principal and Dr Dey.²¹ The image was neither a caricature nor cartoon.²² Nonetheless, some association could be made regardless of it not being of an actual person.²³ The court found that cartoons fall within the sphere of defamation including caricatures and sketches notwithstanding that they are ‘not a true depictions of the persons’.²⁴ Therefore, the two-stage test applies in determining whether or not cartoons or caricatures are defamatory.²⁵

The query was whether the message conveyed by the picture would be regarded by the reasonable observer ‘likely to undermine the respect enjoyed by Dr Dey.’²⁶ It held that the average person would view the picture as defamatory of Dr Dey.²⁷ Applying the ‘whole purpose and the effect’ rationale of the association created by the picture, the court found its effect was to tarnish Dr Dey and the principal’s image who represented the authority at the school and reduce their authority.²⁸ The ‘net effect’ was to ‘belittle and humiliate him as a person’.²⁹ Additionally, it found that the distinction between Dr Dey as a person and a figure of authority was irrelevant.³⁰

Regarding defamatory effect, it was argued on behalf of the applicants that the reasonable observer would have considered that ‘the picture was plainly created by schoolchildren.’³¹ The judges agreed that ‘the reasonable observer would accept that the teachers are often the butt of jokes by their learners and that these jokes must not be taken too seriously.’³² They agreed with the lower courts that ‘there is a line that may not be crossed’; that ‘teachers are entitled to the

¹⁹ Ibid para 97.

²⁰ Ibid para 98.

²¹ Ibid para 102.

²² Ibid para 103.

²³ Ibid.

²⁴ Ibid para 104.

²⁵ Ibid para 105.

²⁶ Ibid para 106.

²⁷ Ibid.

²⁸ Ibid para 109.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid para 117.

³² Ibid.

protection of their dignity and reputation’ equal to ‘the protection of their bodily integrity.’³³ The court pronounced that ‘learners are not exempted from delictual liability.’³⁴ The court’s view was that the protection applied to ‘bodily integrity and damage to property’ ought to be applied in defamation notwithstanding that the line is not as ‘bright and sometimes wavering’.³⁵ Such is ‘crossed when the joke becomes hurtful’ and depicts ‘teachers as foolish, ridiculous and unworthy of respect.’³⁶ It concurred with the lower courts by finding the line had been crossed.³⁷

Milo and Stein succinctly outlined that *Le Roux* highlights ‘the requirements of publication to third parties by distinguishing defamation from the delict of injury to dignity’. In that a dignity claim concerns an individual restoring a privately held self-esteem as opposed to a claim by a plaintiff to restore the esteem held in public.³⁸ This matter was a first of its kind where the principles of the law of defamation were applied in response to a publication and the meaning of defamatory matter involving schoolchildren concerning a figure of authority in a school and as a person. Below I discuss the bone of contention in relation to the aspect of schoolchildren.

2.3 *The Constitutional Court majority judgment on children and defences*

Once the plaintiff has proven, as per the objective test, that the published, defamatory material concerns himself, it is presumed that the statement was both wrongful and intentional.³⁹ To avoid liability for defamation, the ‘defendant must then raise a defence which excludes either wrongfulness or intent.’⁴⁰

On wrongfulness, the FXI (Freedom of Expression Institute) had contended for the children that they should be allowed to experiment with satire as part of their right to freedom of expression under section 16 of the Constitution.⁴¹ The court noted that this approach leaned towards a defence of justification for wrongfulness. It confirmed that grounds of justification

³³ Ibid para 118.

³⁴ Ibid.

³⁵ Ibid para 119.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Milo & Stein op cit note 12 at para 2.2.1.

³⁹ *Le Roux* supra note 1 at para 85.

⁴⁰ Ibid.

⁴¹ Ibid para 120.

describe defences and exclude wrongfulness.⁴² It must be noted that there are traditional grounds of justification such as privilege, fair comment, and truth and public interest.⁴³ The list is not exhaustive as established in *Bogoshi*, where the court further added the reasonable publication defence also referred to as ‘media privilege defence’.⁴⁴ The constitutional findings made in *Khumalo* were affirmed, that the common law allows the court to strike a balance between two conflicting fundamental rights, being the right to freedom of expression and the right to dignity, including reputation.⁴⁵ It further confirmed that a balancing act of competing rights can only be performed after establishing all pertinent facts. The defendant seeking the balancing act bears the onus of pleading and establishing the defence.⁴⁶

The court observed that no justification grounds were pleaded by the applicants.⁴⁷ Furthermore, the ‘potential defence relating to the right of children to develop their satirical skills’ by the FXI was never argued before the courts below and is not supported the law as it stands.⁴⁸ Therefore, there was no opportunity to perform an explicit or special balancing act between the freedom of expression of schoolchildren and the dignity of teachers and their reputation.⁴⁹ Such would include the repercussions on the respect for teachers and discipline in schools.⁵⁰ The court noted that on the evidence presented on behalf of Dr Dey, respect was a ‘precondition for discipline’ also an ‘essential requirement for the functioning of the school system.’⁵¹ It found that the ‘right of children to develop their satirical skills’ was a ‘rather radical ground’ and would be ‘irresponsible to allow the extension of the reasonable publication defence’ as argued by the FXI, ‘without proper investigation into the potential repercussions.’⁵² The balancing act of competing rights will be discussed in detail later in this research report.

Finally, the applicants contended that ‘they lacked animus iniuriandi or intent.’ In broad terms it is ‘the subjective intent to injure or defame’,⁵³ with the knowledge that that the consequence will be wrongful.⁵⁴ The applicants’ defence was first, that they intended the picture as a joke

⁴² Ibid para 121.

⁴³ Neethling, Potgieter & Roos op cit note 10 at 217.

⁴⁴ Milo & Stein op cit note 12 para 2.5 at 32.

⁴⁵ *Le Roux* supra note 1 para 123-4.

⁴⁶ Ibid para 125.

⁴⁷ Ibid para 127.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid para 128.

⁵³ Ibid para 129.

⁵⁴ Neethling, Potgieter & Roos op cit note 10 at 240.

and with no intent to injure or defame.⁵⁵ Second, they did not appreciate the wrongfulness of their conduct. Similar to the position in our criminal law, the defendant's motivation does not count and a defendant relying on this defence bears the onus on a preponderance of probabilities.⁵⁶

On the second aspect of the defence of lack of intent, the court considered the argument by the applicants based on the 'absence of knowledge of wrongfulness.'⁵⁷ The court found that the applicants appreciated the reason why other learners would find the joke funny as it subjected the two figures of authority to humiliation and ridicule.⁵⁸ The court rejected this argument. Additionally, it found that it was never argued on their behalf that they were 'unaccountable or culpae incapax' due to lack of emotional and intellectual development therefore unable to distinguish right from wrong.⁵⁹ Theirs, it said was a bare denial about being aware of the wrongfulness of their actions.⁶⁰ It thus supported the lower courts' finding that the applicants knew that their conduct was wrongful.⁶¹

Further, the court held that the applicants failed to rebut the onus to establish their defence of absence of knowledge of wrongfulness on a preponderance of probabilities and disagreed with the view by Harms DP that 'knowledge of wrongfulness required familiarity with the existence of a particular delict.' It found it unnecessary for the SCA judgment to have embarked on this enquiry.⁶²

As discussed earlier, the court's approach to this matter involved applying the principles of the law of defamation notwithstanding that the statement was published by schoolchildren. Childhood alone was not sufficient to avoid civil liability and played no substantial role in the determination of the children's liability.

Judges Froneman et Cameron lauded the majority judgement's treatment of the law of defamation but disagreed with the application.⁶³ A shift in focus is noticeable below as the minority judgments pay closer attention to the children.

⁵⁵ *Le Roux* supra note 1 para 130.

⁵⁶ *Ibid.*

⁵⁷ *Ibid* para 134.

⁵⁸ *Ibid* para 132.

⁵⁹ *Ibid* para 134.

⁶⁰ *Ibid.*

⁶¹ *Ibid* para 135.

⁶² *Ibid* para 137.

⁶³ *Ibid* para 153.

2.4 *The Constitutional Court minority judgments:*

2.4.1 Yacoob J:

In his consideration of the issues, the judge noted that when a court assesses whether a publication is defamatory, it must do so ‘through the prism of the Constitution’ and concern itself with ‘the interpretation, protection and enforcement of the Constitution.’⁶⁴ Furthermore, this assessment must be ‘decided with acute appreciation and the responsiveness to the rights of children in the Constitution.’⁶⁵ In relation to the dignity claim Yacoob J pointed out that the assessment involved the balancing of the rights to dignity and privacy with the right to freedom of expression and the rights of children.⁶⁶

When construing the image, the judge highlighted the importance of taking into account the relevant circumstances.⁶⁷ The judge noted that constitutional imperatives should be applied when weighing up the rights to dignity and privacy against the right to freedom of expression, equal to the right to dignity of children.⁶⁸ Section 28 of the Constitution became a focal point of discussion.⁶⁹ The judge concluded that the reasonable observer should take cognisance of the schooling environment against the oversensitive reaction to the conduct of immature children by people in authority.⁷⁰

The Justice found that the image was not defamatory because it was an expression of feelings by a learner at a school in relation to exercise of authority.⁷¹ It was critical of the way in which authority was exercised and the manner in which discipline was maintained at the school.⁷² To this end, Yacoob J found that there was no correlation between school discipline and the expectation of rights of a ‘good name’ as far as a person of authority was concerned. Instead, he found this approach harmful to the children’s interests.⁷³

⁶⁴ Ibid para 31.

⁶⁵ Ibid para 32.

⁶⁶ Ibid paras 34 & 44.

⁶⁷ Ibid para 46.

⁶⁸ Ibid.

⁶⁹ Ibid para 48-50.

⁷⁰ Ibid para 57.

⁷¹ Ibid para 66.

⁷² Ibid.

⁷³ Ibid para 68.

The judge found it inappropriate ‘for civil claims to be brought to court to punish children where criminal proceedings and school disciplinary forums were available and had been used.’⁷⁴ The judge sympathised with the children served with summons and less for Dr Dey.⁷⁵ Ultimately, he held ‘the image was neither defamatory of nor injurious of Dr Dey’s dignity and that wrongfulness was not established.’⁷⁶ He did not investigate the issues of intention and awareness of unlawfulness and the quantum of damages.⁷⁷ This judgment viewed the world through the eyes of a child and saw no room for civil action by aggrieved adults from children’s immature actions in a school environment.

2.4.2 Froneman J et Cameron J:

This judgment agreed with the minority judgment of Yacoob J that the defamation claim should be dismissed. Contrariwise, it upheld the dignity claim (i.e., the claim for violated self-esteem or insult). The judgment concurred with Yacoob J on the evaluation of the image.⁷⁸

The judgment did not find the image to be defamatory.⁷⁹ The judges found that reasonable observer would have had regard to the school setting when assessing the image and would have seen it as a ‘childish, if tasteless or cruel, prank.’⁸⁰

Further, the average reasonable viewer in that setting would not associate the image with Dr Dey.⁸¹ The contextual average reasonable school viewer would have seen the ‘crude joke’ hence the children faced disciplinary action.⁸²

This minority found that, objectively, Dr Dey’s reputation was not impaired by the prank but he experienced deep disrespect to his personal dignity.⁸³ The enquiry was whether his right to dignity, together with his right to privacy were impaired.⁸⁴ The court highlighted that a successful dignity claim in terms of common law required the elements of ‘a deliberately inflicted, wrongful act, that impairs the plaintiff’s dignity.’⁸⁵ Therefore, Dr Dey had to establish

⁷⁴ Ibid para 76.

⁷⁵ Ibid.

⁷⁶ Ibid para 78.

⁷⁷ Ibid.

⁷⁸ Ibid para 153.

⁷⁹ Ibid para 162.

⁸⁰ Ibid para 163.

⁸¹ Ibid para 167.

⁸² Ibid.

⁸³ Ibid para 174.

⁸⁴ Ibid.

⁸⁵ Ibid.

that his feelings were subjectively violated by what he understood by what the image portrayed; also, that when assessed objectively, his portrayal by the image was wrongful as it intended to injure him.⁸⁶

The superimposition of Dr Dey's face to the image contributed to his subjective feelings of being violated and thus established the element of a subjectively injured dignity.⁸⁷ The depiction was found to be wrongful.⁸⁸ The judges noted that not every 'subjective slight' required a court's intervention.⁸⁹ Hence, the necessity for an objective reasonableness test.⁹⁰ The judges noted that the enquiry would yield different outcomes where the reasonable observer would not have taken the image seriously to think less of Dr Dey and yet still consider the image reasonably insulting to Dr Dey's sense of injury.⁹¹ The dignity claim protects the injured interest of self-esteem, or injured feelings whereas the defamation claim in a public esteem or reputation.⁹² The objective reasonableness test does not take into consideration the audience of the publication but the individual's hurt feelings.⁹³ The judges found that the test must incorporate and give effect to constitutional values and norms.⁹⁴ The actionable injury must be linked with further 'imputation of indignity associated with it'⁹⁵ and pleaded.⁹⁶ A reasonable person in Dr Dey's position, whether gay or not, would understandably be deeply hurt by being associated with the image.⁹⁷ The court found that hurt feelings should be protected and were actionable therefore compensable.⁹⁸

It held that intention was established by the applicants' awareness that despite image being intended as a joke the manipulation of the image was wrong.⁹⁹ The judges accepted intention was proven at a 'private and individual level.'¹⁰⁰

The court found the image injurious to Dr Dey's feelings and was 'an actionable injury to his dignity' and entitled him to an apology. It ordered compensation and an apology.¹⁰¹ In its quest

⁸⁶ Ibid para 175.

⁸⁷ Ibid.

⁸⁸ Ibid para 177.

⁸⁹ Ibid.

⁹⁰ Ibid para 178.

⁹¹ Ibid para 179.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid para 180.

⁹⁵ Ibid para 186.

⁹⁶ Ibid para 188.

⁹⁷ Ibid para 190.

⁹⁸ Ibid.

⁹⁹ Ibid para 192.

¹⁰⁰ Ibid.

¹⁰¹ Ibid para 203.

for the protection of the children the minority judgements continued as it becomes evident below. In my view, the importance of this judgment for child/adult defamation is the importance of having a contextual perspective particularly, the environment where an action arises and the conduct of the child wrongdoer. Contrariwise, the constitutional imperatives command the protection of the right to dignity of the adult victim in such circumstances.

2.4.3 Skweyiya J:

The justice noted as a fact that the case concerned children.¹⁰² The judge concurred with the judgment of Yacoob J on this basis and remarked on the aspect regarding the action brought against children. This judgment dealt with the provisions of section 28 of the Constitution. Particularly, the provisions of section 28(2), emphasising that the children's best interests are of paramount importance in every matter although not absolute.¹⁰³ He also noted that the children had been subjected to additional rounds of punishment and the 'legal wrangle' took it too far.¹⁰⁴ Therefore found it unnecessary for the children to be subjected to litigious court proceedings and held that a civil claim against learners for an action for defamation or in the alternative, an infringement of dignity must fail.¹⁰⁵ In my view, the importance of this judgment for child/adult defamation is what we might call the 'child-factor dynamic' that requires consideration be given to the children's level of maturity and the suitable punishment appropriate for their actions.

After all that has been said above, one may ask: What lessons have we learned from these judgments about children and their interaction with defamation law?

2.5 *The five main take aways from Le Roux on children and defamation:*

In my view, the key highlights regarding child wrongdoers in South African defamation law can be summarised as follows:

¹⁰² Ibid para 207.

¹⁰³ Ibid para 210-1.

¹⁰⁴ Ibid para 214.

¹⁰⁵ Ibid para 215.

- (1) Children are not, as an absolute rule, exempt from delictual liability.¹⁰⁶
- (2) In the determination of the ‘defamatory effect’ of an image in a case involving children, the legal principles of defamation will be applied and not changed just because the wrongdoer is a child. The whole purpose and effect of a publication of a statement is what matters most and its effect on the plaintiff.¹⁰⁷ Where children are producers and publishers of material in whatever form, such publication will be assessed objectively according to the reasonable observer standard as required by the prescripts of our defamation law.
- (3) On the issue of intent, the court’s finding that the children ‘appreciated’ the reason for subjecting the authorities to ridicule, effectively proved their intent. By pleading a bare denial because of lack of awareness of wrongfulness of their action, such resulted in them failing to discharge the required onus. It is important to note in this regard that the psychological state of mind of the children is closely linked to their capacity for fault: the ability to distinguish between right and wrong and to act accordingly.¹⁰⁸ Neethling and Potgieter explain that children can escape liability for defamation if they lack capacity because of their youthfulness: Children under 7 years can never have capacity; between 7 and 14 they are rebuttably presumed to lack capacity; and from 14 years onwards they are rebuttably presumed to have capacity. This provides children with some minimum legal protection against delict litigation,
- (4) Childish pranks especially in school settings or any other context may potentially injure personal dignity, and subjective feelings may be objectively viewed as wrongful and that common law requirements are consistent with the Constitution’s protection of the inherent right to dignity.¹⁰⁹ The implication is that jokes and/or pranks, regardless of the surrounding circumstances, even in the absence of defamatory effect may result in the impairment of dignity.
- (5) Child wrongdoers cannot seek the application of the best interests of the child in terms of section s 28(2) at an advanced stage of the case as a last cry. If child wrongdoers want to craft new defences based on their position as children, a case for common law development must be pleaded from the start, otherwise their defence would fall short like it did here.

¹⁰⁶ *Le Roux* supra note 1 para 118.

¹⁰⁷ *Ibid* paras 117 and 162.

¹⁰⁸ This discussion on capacity is based on J Neethling & JM Potgieter *Law of Delict* (2020) at 157.

¹⁰⁹ *Le Roux* supra note 1 para 173-175.

2.6 Academic commentary

It is interesting that a wide range of academic commentators have expressed concern about the fact that the majority judgment of the Constitutional Court did not adequately consider the interests and nature of children. The court's finding that the image conveyed a statement and created an association between Dr Dey and the principal with the 'bodybuilder', despite it being a caricature or cartoon was criticised by Fagan.¹¹⁰ He argued that court's conclusion that the image communicated a message by 'mere association' without any words linking Dr Dey and the principal with the actions of 'bodybuilders'. I understand him to say that a cartoon or a picture made by a child without words cannot amount to defamation solely because of characters depicted in it.¹¹¹

Stubbs has weighed in on the matter and added that the consequence of the Constitutional Court majority judgment is that children could be sued for 'doing things that normal children' do which includes to doodle and send. He proposes that a child-friendly approach should have been adopted where statements or images collated by a child on a computer or doodled (intentional or inadvertently) without an assertion would not be sufficient to attract a defamation suit.¹¹² Alternatively, where the aim is to protect children it is proposed that the courts should have the discretion to not find the children liable on the basis of protecting their interests as children even where an assertion is deemed defamatory.

Couzens argues that the majority judgment had no regard for the rights of the children and relied on the legal construct of the reasonable observer.¹¹³ She argues that the constitutional rights of children were ignored and unaccommodated especially by the common law and that the majority failed to consider the children.¹¹⁴ She opined the case could have benefited from a childhood friendly approach treatment in 'the construction of legal arguments' and that consideration should have been given to the application of section 9(1) (equal protection of the

¹¹⁰ Anton Fagan 'The Constitutional Court loses its (and our) sense of humour: *Le Roux v Dey*' (2011) 128 *SALJ* 395 at 399.

¹¹¹ *Ibid* at 407.

¹¹² Mkhululi Stubbs 'In Loco Parentis: *Le Roux v Dey* [Discussion of *Le Roux v Dey* (Freedom of Expression Institute and another as amici curiae) 2011 (3) SA 274 (CC)'] (2013) 24 *Stell LR* 377 at para 6.

¹¹³ Meda Couzens '*Le Roux v Dey* and Children's Rights Approaches to Judging' *Potchefstroom Electronic Law Journal* (2018) (21) 1 at 10-11.

¹¹⁴ *Ibid* at 18.

law) or section 10, additional to section 28(2) of the Constitution.¹¹⁵ It is not clear how this would be achieved but it is worth considering further.

Buthelezi contrariwise argues that the youthfulness of minors in litigation cannot be used to absolve their liability but as a consideration during mitigation of damages.¹¹⁶

Mills criticised the Constitutional Court judgments for their lack of ‘systematic examination or elaboration on children’s rights especially the best interests of the child.’¹¹⁷

2.7 My Analysis:

Given the varying views in the judgments in *Le Roux* and the different scholarly opinion, this matter evoked and challenged the status quo in the information era. The principles of defamation have been established and applied over the years, but the courts are now being challenged to apply a softer and child-centred approach especially with the knowledge that children are not exempt from delictual liability.

The child dynamic adds a complication as correctly pointed out by Stubbs that children will always be children, and that they will do immature things including pranks. Therefore, the call for a mechanism to assess defamatory effect by considering the level of maturity and accountability where such is published by children should eliminate this complication.

As correctly pointed out by Mills, the balancing exercise needs to take place even when the child-wrongdoer does not fit the mould of an innocent child.¹¹⁸ The best interests of the child principle should consider the children’s maturity and right to ‘certain procedural safeguards’ including raising pertinent questions where their legal counsel fails.¹¹⁹

The findings by the respective judgments collectively have affirmed that the law of defamation, when applied, should be aligned with the constitutional imperatives. Clearly, we need to do a deeper evaluation of the law laid down in *Le Roux* compared to relevant constitutional considerations – especially the best interests of the child, but also the rights to dignity and freedom of expression. Thus, I now turn to the constitutional provisions of sections 16, 10 and

¹¹⁵ Ibid.

¹¹⁶ Michael Celumusa Buthelezi ‘In dissent: A critical Review of the minority judgment of Yacoob J: *Le Roux v Dey*’ (2012) 33 (3) *Obiter* 719 at 730.

¹¹⁷ Lize Mills ‘Failing children: The courts’ disregard of the best interest of the child in *Le Roux v Dey*’ (2014) 131 *SALJ* 847 at 857.

¹¹⁸ Ibid at 860.

¹¹⁹ Ibid.

28 of the Constitution. In terms of step (c) in *Mighty Solutions* formula, we must determine whether the existing rule(s) offend(s) the spirit, purport and object of the Bill of Rights and so if development is required.

3 THE CONSTITUTIONAL IMPERATIVES

3.1 *Bill of Rights and the Balancing Act*

Now moving on to discuss the Bill of Rights and the balancing act where there are conflicting constitutional rights, in particular, the right of freedom of expression and the right to dignity. Also, the best interests of the child which featured prominently in *Le Roux*. It is necessary to start with the background on the Bill of Rights as per step (c) of the *Mighty Solutions* formula: whether the rule(s) offends the spirit, purport and object of the Bill of Rights and if development is required.

Section 8(2) of the Constitution provides that the Bill of Rights is binding to natural or juristic persons, taking into account the nature of the right and the nature of any duty imposed by the right. Courts are therefore empowered, in section 8(3), to give effect or develop the common law where such does not give effect to that right and to develop rules of the common law to limit the right in accordance with section 36.¹²⁰

The balancing task was undertaken in *Khumalo v Holomisa*¹²¹ where the key question was whether the common law of defamation had to be developed to include an element of untruthfulness of the defamatory statement in question. *Khumalo v Holomisa* is hailed as the most authoritative example of defamation cases involving the right to freedom of expression and human dignity.¹²² The court also noted that the law of defamation intersects with the freedom of speech and the protection of reputation or good name.¹²³ It confirmed that the 'law of defamation seeks to protect an individual's legitimate interest in their reputation', thus supporting the value of human dignity.¹²⁴ (The point about balancing will be further elaborated below under my discussion of the right to freedom of expression.) The court accepted that the

¹²⁰ Section 8(3) of the Constitution.

¹²¹ 2002 (5) SA 401 (CC).

¹²² Dario Milo *Defamation and Freedom of Speech* (2008) at 6.

¹²³ Ibid para 26.

¹²⁴ Ibid para 28.

law of defamation affects the right of freedom of expression and that the provisions of section 8(2) find direct horizontal application.¹²⁵

The court did not see the need to develop the common law following such an exercise in *Bogoshi* where the defence of reasonable publication was developed. It confirmed that ‘the defence of reasonableness struck a balance between the constitutional interest of plaintiffs and defendants and thus avoided the ‘zero-sum result’.¹²⁶ Noting that even though the persons in the public eye may have a diminished right to privacy, their right to dignity persists and that while the media’s responsibility in fostering transparency and democracy, the defence avoids ‘winner-takes all result’ by striking a proper balance between the freedom of expression and the value of human dignity.¹²⁷ The applicants’ appeal in *Khumalo* was unsuccessful as they had failed to show that the common law as developed was inconsistent with the Constitution.¹²⁸ The subject of the balancing of rights has been investigated by scholars in the past. As it will be elaborated below.

Bilchitz has examined the different theories of balancing and weighting of rights,¹²⁹ and proposes applying formal and substantive elements to avoid placing the rights at the same level with other normative considerations by recognising ‘the relationship between the structural aspect of rights and their substantive justification and content.’¹³⁰

He concurs with Dworkin that rights flow from “equal importance of individual lives” and that this approach aligns with the Constitution and its fundamental values, “human dignity, equality and freedom.”¹³¹

Burns refers to the rights being reconciled ‘by recognising a limitation upon the exercise of one right to the extent that it is necessary in order to accommodate the exercise of the other ...according to what is required by the particular circumstances and within the constraints that are imposed by section 36’.¹³²

As I had indicated earlier in the introduction this research report, the balancing of the Bill of Rights must be undertaken and now we consider it against the right to freedom of expression

¹²⁵ Ibid para 33.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid para 45.

¹²⁹ David Bilchitz ‘Does balancing adequately capture the nature of rights?’ (2011) 25 *SAPL* 423 at 426-427.

¹³⁰ Ibid at 441.

¹³¹ Ibid at 443.

¹³² Yvonne Burns *Communications Law* 3 ed (2015) para 5.5 at 156-57.

below. The effect of the balancing approach allows the courts to ‘distinguish between types of expression in order to assess its respective value and how heavily it weighs in the limitation’.¹³³ I will now elaborate on each of the two traditional rights to be balanced, the right to freedom of expression and right to dignity, respectively, after which, I will also discuss the best interests of the child which featured *Le Roux* as a third ‘complicating’ right.

3.2 The Right to Freedom of Expression

Section 16(1) of the Constitution provides as follows:

‘Everyone has the right to freedom of expression, which includes – (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; (d) academic freedom and freedom of scientific research.’¹³⁴

Section 16(2) states:

‘The right in subsection (1) does not extend to (a) propaganda of war; (b) incitement of imminent violence; or (b) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.’¹³⁵

In *Le Roux* it was argued that because of the right to freedom of expression, children need to be allowed to experiment with satire. This right is explored fully below.

Malherbe opines in his analysis of *Jamiat-ul-Ulama v Johncom Media Investment Ltd* (case no 1127/06 unreported), the qualification in section 16(2) does not require justification in terms of section 36. It acts as an exception to what constitutes protected expression.¹³⁶ In determining the constitutionality of any other infringement of a constitutional right against freedom of expression, there are factors that require consideration such as the ‘importance of the rights involved and relationship between the infringement and its purpose.’¹³⁷ Botha advocates for a ‘communitarian free-speech model, consisting of a balanced and nuanced approach that

¹³³ Dario Milo, Glenn Penfold & Anthony Stein ‘Freedom of Expression’ in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2008) Ch 42 at 13.

¹³⁴ Section 16(1) of the Constitution.

¹³⁵ Section 16(2) of the Constitution.

¹³⁶ Rassie Malherbe ‘The Mohammed cartoons of expression and the infringement of the right to religious dignity’ 2007 TSAR 332.

¹³⁷ Ibid at 336.

reconciles the tension between the conflicting rights integrated into a model designed to complement the constitutional paradigm.’¹³⁸

To recap what I said earlier: In *Le Roux*,¹³⁹ the FXI argued that ‘the picture was obviously created by schoolchildren’ and that the children’s right to freedom of expression under s16 of the Constitution, should include experimenting with satire.¹⁴⁰ The majority judges noted the argument alluded to a defence for justification, they pointed to the constitutional advancements made in *Bogoshi* in respect of the limitless list of justification grounds and *Khumalo* with regard to the striking of balance between conflicting fundamental rights.¹⁴¹ Such balancing act between potentially conflicting fundamental rights should only be performed only after all pertinent facts had been established.¹⁴² This approach is aligned to the view presented by Bilchitz, referring to Kumms’ proportionality test, demanding a theoretical engagement by the decision-maker ‘informed by practical reasoning and not just intuition-based classificatory labelling’.¹⁴³

The importance of the right for the schoolchildren to experiment with satire in *Le Roux* was not examined against the infringement of the dignity of teachers and its purpose. This leads to next discussion below on the right to dignity.

3.3 The Right to Dignity

In his analysis of the word “dignity”, Woolman eloquently sets out that dignity is a founding value in section 1(a) of the Constitution and ‘acts as a cornerstone of both democracy and the Bill of Rights.’¹⁴⁴ Section 10 of the Constitution affirms that: ‘Everyone has inherent dignity and the right to have their dignity respected and protected’. Therefore, Woolman highlights that dignity in section 10 is a first order rule and a correlative right that gives rise to enforceable

¹³⁸ Joanna Botha ‘Towards a South African free-speech model’ (2017) 134 *SALJ* 778 at 819-820. See also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) at paras 102 & 125.

¹³⁹ *Le Roux* supra note 1 para 120.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* para 120-3.

¹⁴² *Ibid* para 125.

¹⁴³ Bilchitz op cit note 129 at 427.

¹⁴⁴ Stuart Woolman ‘Dignity’ in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2008) ch 36 p 36-55 at para 36.3.

claims.¹⁴⁵ He states that there are instances where ‘dignity as a value’ is used to justify a limitation of a right.¹⁴⁶

In the words of former Chief Justice Chaskalson, ‘respect for human dignity is crucial to accommodate conflicting interests; so too is respect for other foundational values-democracy, equality and freedom.’¹⁴⁷ He has further highlighted the role that dignity plays as an abstract value in informing the content of all concrete rights in a balancing process ‘to bring different rights and values into harmony.’¹⁴⁸

Neethling adds that dignity is recognised as an independent personality interest in South African law.¹⁴⁹ In *S v Makwanyane*¹⁵⁰ the Constitutional Court held that ‘the rights to life and dignity are the most important of all human rights and the source of all other personal rights...’. Thus, the two rights are required to be valued above all others.¹⁵¹

In *Dawood v Minister of Home Affairs*,¹⁵² O’Regan J confirmed that human dignity is a constitutional value of central significance in the limitations analysis and that section 10 in addition to being a value fundamental to the Constitution, ‘it is a justiciable and enforceable right that must be respected and protected’.¹⁵³ Cowen argues that a legal right is established through the judicial process for a claim to be enforced and that sections 7, 36 and 39 of the Constitution and that the courts are duty bound when making decisions to consider legal meaning and justification of their limitation.¹⁵⁴

In *Khumalo v Holomisa*¹⁵⁵ O’Regan J held that ‘the value of human dignity in our Constitution’ in addition to the individual’s sense of self-worth but also affirms their worth the society. Thus, ‘personal sense of worth’ and an ‘individual’s public estimation of the worth are interlinked, such that the right to privacy as entrenched in section 14 of the Constitution is said to foster human dignity.’¹⁵⁶

¹⁴⁵ Ibid p 36-23.

¹⁴⁶ Ibid p 36-24.

¹⁴⁷ Arthur Chaskalson ‘Human dignity as a foundational value of our constitutional order’ (2000) 16 *SAJHR* 193 at 201.

¹⁴⁸ Ibid at 204.

¹⁴⁹ Neethling, Potgieter & Roos op cit note 10 at 271.

¹⁵⁰ 1995 (2) SACR 1 (CC).

¹⁵¹ Ibid para 144.

¹⁵² 2000 (3) SA 936 (CC).

¹⁵³ Ibid para 35.

¹⁵⁴ Susie Cowen ‘Can dignity guide South Africa’s equality jurisprudence?’ (2001) 17 *SAJHR* 34 at 47.

¹⁵⁵ *Khumalo* supra note 121.

¹⁵⁶ Ibid para 27.

Justice Lewis noted in *Mthembi-Mahanyele v Mail & Guardian Ltd*¹⁵⁷ that when balancing the right to dignity and the freedom of expression, the Bill of Rights grants both rights special protection.¹⁵⁸ Thus she held there should not be a ‘hierarchy of rights and that sufficient weight must be given to the right to dignity and that the right to freedom of expression must not be elevated above this right.’¹⁵⁹ In *The Citizen 1978 (Pty) Ltd v McBride*,¹⁶⁰ Ngcobo CJ affirmed that failure to uphold the value of human dignity is a violation of a constitutional right as a founding principle.¹⁶¹

It has been suggested by Moshikaro that ‘dignity as a status owed to all human beings is exactly what grounds dignitas or the “hurt feelings” aspect of actio iniuriarum’.¹⁶² This gives rise to the ‘dignity claim’ or ‘personal dignity claim’ focusing on self-esteem to be tested against the objective criterion of reasonableness held by justices Froneman and Cameron.¹⁶³ Botha opines that ‘dignity requires respect for the constitutive role of culture, religion, family and community.’¹⁶⁴ Gowar and Visser have argued that the constitutional right to human dignity and common-law dignity are ‘different concepts in scope and content’ and that the constitutional protection of ‘human dignity includes fama and corpus’ whereas the common law concept is ‘distinct and independent from fama and corpus’ in terms of which certain conducts can implicate different interests in public or private spheres and requiring different enquiry approaches.¹⁶⁵ Therefore, Milo suggests that the objective test is necessary in a society where defamation law protect the individual’s interests but also the community’s interests in upholding the compliance to ‘rules of civility’.¹⁶⁶

As discussed earlier, the balancing exercise as demonstrated in *Khumalo v Holomisa*, set the tone for the competing constitutional rights under the law of defamation and confirmed same to be constitutionally compliant.¹⁶⁷ The majority and minority judgments of Froneman J et

¹⁵⁷ 2004 (6) SA 329 (SCA).

¹⁵⁸ Ibid para 33.

¹⁵⁹ Ibid para 42.

¹⁶⁰ 2011 (4) SA 191 (CC).

¹⁶¹ Ibid para 143.

¹⁶² Khomotso Moshikaro ‘Unjust Contempt as the Gist of Defamation Law’ (2022) 12 *Constitutional Court Review* 59-86 at 83.

¹⁶³ Ibid.

¹⁶⁴ Henk Botha ‘Human dignity in comparative perspective’ (2009) 20 *Stell LR* 171-370 at 220.

¹⁶⁵ Christin Gowar & CJ Visser ‘Actio Iniuriarum – One Action, but Only One Iniuria? *Le Roux v Dey* 2011 3 SA 274 (CC)’ (2013) 76 *THRHR* 490 at 497.

¹⁶⁶ Dario Milo ‘The Cabinet Minister, the Mail & Guardian, and the Report Card: The Supreme Court of Appeal’s Decision in the *Mthembi-Mahanyele* Case’ (2005) 122 *SALJ* 28 at 33.

¹⁶⁷ Michael Dafel ‘The directly enforceable constitution: Political parties and the horizontal application of the Bill of Rights’ (2015) 31 *SAJHR* 56 at 69.

Cameron J in *Le Roux*, in considering the issues at hand, particularly the balancing of children's rights and other rights have consistently applied the constitutional imperatives.¹⁶⁸ Perhaps the difference would be to apply a more child-centred approach as proposed by scholars within the ambit of our Constitution in a way that accommodates and facilitates relationships.¹⁶⁹ This brings us to the discussion below on the best interests of the child.

3.4 The Best Interests of the Child

Section 28(2) of the Constitution states as follows: 'A child's best interests are of paramount importance in every matter concerning the child.' Section 9 of the Children's Act¹⁷⁰ provides that: 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.' In *Minister of Welfare and Population Development v Fitzpatrick*¹⁷¹ the court held that the provisions of section 28(2) create an independent right.¹⁷²

Friedman and Pantazis argue that 'the common law standard applied by the High Court' as the 'upper guardian of minor children', equates 'the constitutional standard applied' in section 28(2) "every matter concerning the child".¹⁷³ They opine that (a) the concept of child's best interests as contained in section 28(2) 'is used to interpret the protection in section 28(1) or vice versa', thus read together; (b) that the criteria may be used to 'determine the ambit of another right in the Bill of Rights or at the limitation stage of application analysis of this other right.'¹⁷⁴ Skelton concurs with this reasoning and states that section 28(2) is 'a right in itself' more than an interpretation principle for other rights.¹⁷⁵

On the meaning of 'paramount importance' the Friedman and Pantazis propose that this section must be read with the following understanding: (a) the child's interests must be taken into account in every matter 'substantially' involving the child, (b) in terms of section 28(2) children's interests are constitutional rights only for the children and (c) 'section 28(2) involves

¹⁶⁸ *Le Roux* supra note 1 paras 127 and 153.

¹⁶⁹ Ann Skelton 'General Principles' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) ch 9 at 2-15.

¹⁷⁰ 38 of 2005.

¹⁷¹ 2000 (3) SA 422 (CC).

¹⁷² Ibid para 17.

¹⁷³ Adrian Friedman & Angelo Pantazis 'Children's Rights' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2008) ch 47 at para 47.10 (a).

¹⁷⁴ Ibid.

¹⁷⁵ Ann Skelton 'Children' in Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* (2013) ch 27 at 619.

a weighing up process' of the interests of the children bearing in mind that they are not 'paramount' but of 'paramount importance'.¹⁷⁶ This systematic child centred approach in my view represents Mills' expectation as stated in her critique in *Le Roux* judgments in the High Court and Constitutional Court.¹⁷⁷ Conversely Skelton argues that there is no 'pre-determined formula in a 'true child-centred approach' irrespective of the circumstances, but 'in-depth consideration of the needs and rights of the child.'¹⁷⁸ She has noted that court decisions have been providing an explanation of what is not 'paramountcy' instead of what is.'¹⁷⁹ However, she warns that the best-interests principle should not be spread "too thin" and resulting in the loss of its meaning and intent to protect the rights of children.¹⁸⁰ She has advocated for the conceptualisation of the best interests of the child and proposed for further investigation into and the effects of paramountcy as a right, standard and rule of procedure in practice.¹⁸¹

In *De Reuck v Director of Public Prosecutions*,¹⁸² the Constitutional Court held that 'constitutional rights are mutually interrelated and interdependent and form a single constitutional value system' and thus 's 28(2) like other rights enshrined in the Bill of Rights is subject to limitations that are reasonable and justifiable in compliance with s 36.'¹⁸³

In *Le Roux* Skweyiya J took this further and even suggested that Article 3(1) of the Convention on the Rights of the Child read with section 28(2) of the Constitution should 'form the basis and a starting point from which the matter is to be considered' and that such a consideration will not result in the artificial elevation of the best interests of the child over all others.¹⁸⁴ In *W v Atoll Media (Pty) Ltd*¹⁸⁵ Davis J applied the provisions of section 28(2) in a matter relating to the publication of a provocative photograph of a 12 year old minor in a commercial publication and found the publishers to have failed the standard of the reasonable publishers.¹⁸⁶

Having regard to Mills' approach, we might ask: Did the issues presented in *Le Roux* allow for the striking of the balancing act between the freedom of expression and the best interests of the

¹⁷⁶ Friedman & Pantazis op cit note 173.

¹⁷⁷ Mills op cit note 117.

¹⁷⁸ Skelton op cit note 175 at 622.

¹⁷⁹ Ann Skelton 'Children's Rights' in Jason Brickhill (ed) *Public Interest Litigation in South Africa* (2018) ch 10 at 266.

¹⁸⁰ Ann Skelton 'Constitutional Protection of Children's Rights' in Trynie Boezaart (ed) *Child Law in South Africa* 2 ed (2018) ch 11 at 349.

¹⁸¹ Skelton op cit note 169 at 2-14.

¹⁸² 2004 (1) SA 406 (CC).

¹⁸³ Ibid para 55.

¹⁸⁴ *Le Roux* supra note 1 para 211.

¹⁸⁵ 2010 (4) All SA 548 (WCC).

¹⁸⁶ Ibid para 45.

children against Dr Dey's right to dignity as guided in *Khumalo*? Couzens argues that the majority judgment did not take into account the applicability of section 28(2) of the Constitution (the best interests) as commanded in *S v M* and speculates that perhaps 'the law of defamation is poorly equipped to accommodate children's specificities, unlike family law or juvenile justice where the common law makes allowance for such.'¹⁸⁷

The *Le Roux* matter was peculiar as it involved an adult plaintiff aggrieved by the conduct of children. The case they were called to answer did not allow for their status as children to be given preference without substantiated facts. As pointed out by judges Froneman and Cameron, the weighing up of the right to freedom expression involving children albeit 'thought-provoking', the Constitution required a more conventional approach.¹⁸⁸ In *H v Fetal Assessment Centre*,¹⁸⁹ Froneman J, in considering a child's claim against a foetal assessment clinic commented that the best interests of the child are paramount in any matter including the law of delict.¹⁹⁰

Moyo argues that 'the paramountcy principle casts an individualistic and "bossy" image of the child' and that when strictly interpreted the principle requires the decision makers to do what is best for the child and he regards this to mean 'only the best interests of the child be considered'.¹⁹¹ In *M v S (Centre for Child Law Amicus Curiae)*¹⁹² it was stated that 'a balancing exercise had to be undertaken on a case-by-case basis. It becomes a matter of context and proportionality.'¹⁹³ The court stated that 'courts are to be imbued with a child-centred approach and the courts must as a rule, judiciously consider a child's interests.'¹⁹⁴ The paramountcy principle requires application in a manner that does not unduly obliterate other constitutionally protected rights.¹⁹⁵ Bonthuys has argued for a proper proportionality analysis of the constitutional rights when it comes to children and other family members to balance the competing rights and benefits with one another.¹⁹⁶ Thus, scholars have submitted that the best

¹⁸⁷ Ibid.

¹⁸⁸ Ibid para 153.

¹⁸⁹ 2015 (2) BCLR 127 (CC).

¹⁹⁰ Ibid para 52.

¹⁹¹ Admark Moyo 'Reconceptualising the 'paramountcy principles': Beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* 142 at 144-45.

¹⁹² 2007 (12) BCLR 1312 (CC).

¹⁹³ Ibid para 37.

¹⁹⁴ Ibid para 122.

¹⁹⁵ Skelton op cit note 169 at 2-17.

¹⁹⁶ Elsje Bonthuys 'The best interests of children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family* 23 at 38.

interests of a child may be limited in terms of the Constitution as they are ‘a primary consideration’ rather than ‘the primary consideration’.¹⁹⁷

4 DOES THE SOUTH AFRICAN LAW OF DEFAMATION REQUIRE DEVELOPMENT?

The main purpose of this research report was whether the common law of defamation ought to be developed to preclude an adult defamation victim from claiming against a child wrongdoer. With the guidance of *Mighty Solutions*, (a) the common law position and its rationale in *Le Roux* was investigated and (b) now it is up to me to argue whether it offends the spirit, purport and object of the Bill of Rights.

The principles of defamation were found to be constitutionally compliant (in balancing dignity and freedom of expression) in *Khumalo*. I have discussed these rights at length in part 3 of this research report. To disrupt this delicate balance, I would argue that we would need very good reasons.

Section 34 of the Constitution says everyone has the right to access to courts. Additionally, section 38 states that anyone acting in their own interests where their right in the Bill of Rights has been infringed or threatened, has a right to approach a competent court and the court may grant appropriate relief, including a declaration of rights. I would argue that these provisions strongly weigh against prohibiting adults from approaching courts to vindicate their reputations that have been harmed by children.

The question that remains is whether the best interests of the child (discussed in detail in part 3 of this research report) should disrupt the current understanding of defamation law. The current law of defamation takes into account the available defence that may be raised on account of children lacking capacity for fault. As indicated earlier in this research report, the majority judgment in *Le Roux* affirmed that children are not exempted from delictual liability as a general rule. Children would be liable for damages resulting from bodily injury to the teachers and/or damage to their property and so it stands to reason that the same applies in defamation cases too.

¹⁹⁷ JA Robinson ‘Reflections on the Conflict of Interests of Children and Parents’ (2013) 76 *THRHR* 400 at 420.

The issue of capacity and accountability was only dealt with in this research report relating to the court's finding in *Le Roux* that intent had been proven against the applicants. I argue that children are already protected by the common law as it considers a child's best interests when we evaluate their capacity for fault.¹⁹⁸ Particularly vulnerable children, for example those under 7 years, would irrebuttably lack capacity for fault and would be exempt from delictual liability, while children between 7 and 14 are rebuttably presumed to lack capacity for fault.¹⁹⁹ In light of the fact that the best interests of the child are already implicitly protected in our defamation law, I argue that the principle of the best interests of the child should not be stretched any further, otherwise we risk destabilising the balance between freedom of expression and dignity, that the court has already laid down in *Khumalo*.

For the above reasons, I would argue that the common law of defamation is constitutionally compliant and needs no developing.

5 CONCLUSION

In this research report, I have sought to answer the question whether the common law of defamation ought to be developed to preclude an adult victim's claims against a child wrongdoer. I have illustrated how the child/adult dynamic featured in the case of *Le Roux v Dey* and canvassed the current law on this issue. I have found that children are currently not, as a general rule, exempt from liability for defamation committed against adults. Thereafter, I explored the constitutional rights that are at stake in a defamation case involving adults and children: dignity, freedom of expression, and the best interests of the child. Having considered the common law and the constitutional provisions, I have argued that the common law, as it stands, delicately balances these three main rights, and thus needs no further development. This is further bolstered by adult victims' rights to access to courts and effective remedies. Thus, when all is said and done, unlawful conduct of children must be followed by suitable consequences.

¹⁹⁸ Buthelezi op cit note 116 at 729.

¹⁹⁹ Emile Zitzke 'Transforming age-related capacity for fault in delict' (2021) 138 *SALJ* 367 at 372-375.

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