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Cornelius Visser

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VONNISSE

THE LAW OF PERSONALITY, THE "*INIURIA* APPROACH", AND A FALSE POSITIVE

KAB v National Union of Metal Workers of South Africa (NUMSA)
2023 ILJ 2554 (FSB)

OPSOMMING

Die persoonlikheidsreg, die "*iniuria*-benadering" en 'n vals positief

Hierdie vonnisbespreking analiseer *KAB v National Union of Metal Workers of South Africa (NUMSA)* 2023 ILJ 2554 (FSB) binne die konteks van die "*iniuria*-benadering" en die konsep van 'n "vals positief". Die "*iniuria*-benadering" vereenvoudig menswaardigheid en die menslike persoonlikheid tot subjektiewe gevoelens van selfwaarde wat die grondwetlike ontwikkeling van die gemeenregtelike persoonlikheidsreg verhinder. Die *KAB*-uitspraak blyk aanvanklik 'n meer omvattende benadering te ondersteun deur verskeie persoonlikheidsregte in dieselfde feitestel te erken, maar 'n dieper ontleding onthul dat hierdie erkenning misleidend is en steeds die gebreke van die "*iniuria*-benadering" handhaaf. Hierdie vonnisbespreking beklemtoon dat die *KAB*-uitspraak nie 'n werklike erkenning van die samestellende aard van die menslike persoonlikheid verteenwoordig nie – dus 'n "valse positief", en waarsku teen die gevolge van 'n onvoldoende regsraamwerk wat nie die dinamiese en komplekse aard van menswaardigheid en die menslike persoonlikheid beskerm nie.

1 Introduction

Within the paradigm of transformative constitutionalism, the human personality ought to be articulated as a composite legal interest in the positive common law of personality (Visser "The doctrine of subjective rights, the *actio iniuriarum* and the Constitution: A convergent doctrinal basis for the law of personality" 2021 *Stell LR* 275). This axiom finds its origin in the doctrines animating the common law of personality and in the "objective normative value system" of the Constitution of the Republic of South Africa, 1996, which informs these doctrines (*Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54).

Doctrinally, as a composite legal interest, the human personality consists of various personality rights that protect unique and distinctive characteristics of the human image as facilitated by the framework of the common law of personality (Joubert *Grondslae van die persoonlikheidsreg* (1953) 10, 18, 130–131). For example, the doctrine of subjective rights conceives these distinctive characteristics, while the *actio iniuriarum* translates and differentiates them into separate justiciable personality rights (*ibid* 11–12, 123–124).

On a constitutional level, human dignity, as an overarching multifaceted fundamental right and constitutional value, imbues the human personality with

"absolute inner human worth" (Steinmann "The core meaning of human dignity" 2016 *PER/PELJ* 5–8). This worth derives from unique characteristics such as bodily integrity, physical liberty, self-worth, reputation, privacy, and feelings (Neethling, Potgieter & Roos *Neethling on personality rights* (2019) 25–38). Collectively, these characteristics enable an individual to exercise self-creation and self-realisation, unlocking their full potential to lead a meaningful life (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 23). By implication, these characteristics also facilitate an individual's personal integrity, denoting the complexity and dynamism of the human condition (*Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35).

With the above in mind, the Supreme Court of Appeal in *Dendy v University of the Witwatersrand* 2007 5 SA 382 (SCA) highlighted a potential convergence between the common law of personality and the Constitution, particularly regarding the composite nature of the human image (paras 15, 24). Both sources recognise the same series of personality rights, demonstrating a convergence in substance, and articulate and adjudicate these rights through the elements of the *actio iniuriarum*, further demonstrating a convergence in method (*ibid*). This convergence seemingly paved the way for the symbiotic development of the common law and the Constitution (Neethling, Potgieter & Roos *et al* 16–17).

However, in subsequent legal developments, the South African judiciary followed the so-called *iniuria* approach that abates the composite nature of the human personality (Visser "Transformative constitutionalism and the framework of the common law of personality" 2023 *Stell LR* 321–324). This approach, in its current form, was authoritatively introduced by the Constitutional Court in *Le Roux v Dey* 2011 3 SA 274 (CC) and followed in a number of decisions (*Pieterse v Clicks Group Ltd t/a Clicks Stores* 2015 5 SA 317 (GJ) para 5; *Jankielsohn v Booysen* [2020] 1 All SA 214 (FB) para 44; *Du Toit v Coetzee* (A122/2021) [2022] ZAFSHC 105 (2 June 2022); *Mdhlovu v National Director of Public Prosecutions* [2023] 1 All SA 458 (MM) para 10). Essentially, this approach reduces human dignity, the human personality, and the various personality rights to subjective feelings of self-worth and achieves this methodologically in positive law by ambiguously and indistinctly applying the elements of the *actio iniuriarum* (*ibid*). A noteworthy characteristic of this approach is the prevention of the articulation of multiple personality rights from the same factual matrix (*ibid*).

The recent judgment of the High Court in *KAB v National Union of Metal Workers of South Africa (NUMSA)* 2023 ILJ 2554 (FSB) appeared to add another dimension to the *iniuria* approach. Instead of preventing the articulation of various personality rights, the court, conversely, found that multiple personality rights were implicated in the same factual matrix. Notably, the court did this on the basis that the various implicated personality rights stemmed from the plaintiff's subjective feelings of self-worth without distinctively and separately applying the elements of the *actio iniuriarum*. Therefore, substantively and methodologically, it appears that the *KAB* judgment is still rooted in the *iniuria* approach while offering a different outcome.

This case note aims to interrogate this aspect of the *KAB* judgment, confirming that its approach remains a variation of the *iniuria* approach. I shall highlight that uncritically accepting multiple personality rights from the same factual matrix, without properly applying the elements of the *actio iniuriarum*, frustrates the constitutional development of the common law of personality. Following this

introduction, a brief analysis of the *iniuria* approach will demonstrate its anti-transformative nature. Subsequently, a survey of the *KAB* judgment will be provided, followed by an application of the *iniuria* approach to this judgment.

2 A synopsis of the "*iniuria* approach"

In reducing the human personality to subjective feelings of self-worth, substantively and methodologically, the *iniuria* approach frustrates the constitutional development of the common law of personality by creating a substantial mismatch between the common law and the Constitution (Visser (2023) 324). Each of these considerations in terms of substance, method, the frustration of constitutional development, and creating a mismatch will be highlighted.

Substantively, the *iniuria* approach seeks the lowest common denominator between human dignity and the various recognised personality rights to sustain a claim under the *actio iniuriarum* (*idem* 323). This denominator is the plaintiff's subjective feelings of self-worth (*ibid*). Arguably, this approach proceeds from the flawed premiss that the conceptual core of the human personality is rooted in subjective feelings of self-worth, as the human condition entails deeply personal experiences (*idem* 328). Notably, the plaintiff's subjective experiences are not objectively verified or measured against societal expectations (*ibid*).

Methodologically, to give expression to these highly subjective personal experiences in the common law of personality, the concomitant judicial reasoning process focuses solely on a negative impairment of these experiences (*idem* 324). To achieve this, the *iniuria* approach collapses the elements of the *actio iniuriarum* – factual violation, wrongfulness, and intent – into a broad inquiry as to whether the defendant's conduct infringed the plaintiff's subjective feelings of self-worth (*idem* 323–324). This collapse leads to an ambiguous and indistinct application of the factual violation and wrongfulness elements (*idem* 327). The judicial reasoning process fails to interrogate which specific personality right or rights are implicated by the defendant's conduct, often conflating different rights to fit this broad notion of impairing subjective feelings of self-worth (*ibid*).

Traditionally, the factual violation element articulates different personality rights in positive law by requiring a demonstrable infringement of a recognised personality interest, such as bodily integrity, physical liberty, self-worth, reputation, privacy, and feelings (Neethling & Potgieter *Law of delict* 8 ed (2021) 288–290). Distinctive and finely calibrated tests have developed for these personality interests, ensuring that the composite nature of the human personality is maintained by addressing specific infringements (*ibid*). In contrast, the focus of the *iniuria* approach is on subjective feelings of self-worth as the sole measure of a factual violation diminishes the nuance and specificity of traditional tests, obfuscating the unique characteristics of different personality rights (Visser (2023) 327).

The wrongfulness element traditionally weighs the interests of the plaintiff and defendant against those of the greater collective, determining whether it is reasonable to impose liability for a personality infringement (*Universiteit van Pretoria v Tommie Meyer Foms (Edms) Bpk* 1977 4 SA 376 (T) 387). This element assesses the objective reasonableness of a plaintiff's subjective interest in a specific personality right, addressing the spectre of limitless liability and ensuring that undue burdens are not placed on society (*Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 62–63). The *iniuria* approach, however,

unduly focuses on a plaintiff's subjective interests without meaningfully considering the interests of the greater collective. It appears to usurp the primary function of the wrongfulness element.

An undue focus on subjective feelings of self-worth fundamentally distorts the conceptualisation of an individual as a complex and dynamic being, essential for establishing and developing personal integrity (*Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27). This destabilises an individual's sense of an "authentic self" in the pursuit of a meaningful life (Visser (2023) 330). Additionally, this undue focus on subjective feelings of self-worth threatens the stability of the greater collective (Bhana & Visser "The concurrence of breach of contract and delict in a constitutional context" 2019 *SAJHR* 109–110). There is a substantial risk that society may become shackled to the negative impairments of individuals when these are not measured against societal expectations to determine their reasonableness (*ibid*). Consequently, liability for a personality infringement may become embedded in individual idiosyncrasies rather than doctrinally clear and ascertainable criteria sensitive to the transformative dictates of the Constitution. Ultimately, the reductionist and doctrinally ambivalent nature of the *iniuria* approach is counterintuitive to the transformative constitutionalism paradigm (Visser (2023) 327).

In turn, these substantive and methodological adjustments to the composite nature of the human personality create a substantial mismatch between the common law of personality and the Constitution, resulting in a "defective conversion" (*idem* 319). A defective conversion denotes an unsatisfactory alignment between the common law and Constitution, giving rise to an incoherent and unstructured "constitutionalised" body of law (*ibid*). The decision of the Supreme Court of Appeal in *Dendy* highlights the potential for proper convergence between the common law and the Constitution: human dignity ought to be conceptualised as a multifaceted concept that imbues the human personality with unique characteristics and which is facilitated in positive law by the traditional methodological roles of the factual violation and wrongfulness elements (Visser (2023) 331–332). However, the *iniuria* approach starkly opposes such meaningful convergence and undermines the doctrinal clarity essential for robust protection of the compositeness of human personality. Furthermore, the *iniuria* approach, leading to an imprecise and ambiguous application of the law, fails to align the common law with a nuanced understanding of human dignity that should permeate the human personality in positive law, frustrating the constitutional development of the common law of personality.

Despite the tendency of the *iniuria* approach to prevent the articulation and actionability of multiple personality rights, the *KAB* judgment diverges by acknowledging that multiple personality rights can be implicated within the same set of facts. This notable variation, where the court's reasoning process leads to a different outcome, presents an opportunity to assess critically the *KAB* judgment against both the *iniuria* approach and the transformative constitutionalism paradigm.

3 The *KAB* judgment

Starting with the facts, this case revolved around a defamation action instituted by the plaintiff against three defendants concerning the unauthorised disclosure of the plaintiff's HIV status (para 1). The first defendant was the plaintiff's current employer in whose organisation the unauthorised disclosure was facilitated

by two of its employees – the second and third defendants (para 6). The second defendant, the immediate supervisor of the plaintiff, disclosed the plaintiff's HIV status during a formal grievance meeting (paras 4–6). Background details revealed that the third defendant, a colleague of the plaintiff, disclosed the latter's HIV status to the second defendant (para 6). Building on these background details, it is important to note that, in 2007, the plaintiff confided her HIV status to the third defendant, who was perceived as a trusted confidante at the time (paras 7, 24). This context becomes crucial as, in 2010, when the second defendant inquired about the plaintiff's health and concomitant absence from work, it prompted the third defendant to disclose the plaintiff's HIV status (paras 21, 24).

The crux of the legal dispute centred on an incident that took place in 2021 at a second seating of a grievance meeting (para 22). According to various testimonies, the first seating was arranged where employees raised various grievances against the second defendant as their immediate supervisor (para 22). The second seating was arranged where the second defendant purported to address the grievances raised in the first seating (*ibid*). The second seating was attended by 14 individuals including the plaintiff, colleagues (including the third defendant), and management personnel (including the second defendant) (paras 4–6). Before the meeting formally commenced, the second defendant raised queries about the source of the lodged grievances, sparking discussions on confidentiality (para 5). Amid indications of discord during this meeting, the second defendant disclosed the plaintiff's HIV-positive status, attributing this revelation to the third defendant (para 6).

According to the plaintiff's testimony, she did not (a) consent to the various disclosures; (b) have knowledge of the disclosure between the second and third defendants; or (c) receive advanced notice that her HIV status was to be disclosed at the second seating (paras 6, 9). The impact of these unauthorised disclosures was profound, leading to significant distress for the plaintiff and disruptions in her work environment (para 8). Accordingly, the plaintiff claimed that the unauthorised disclosures constituted defamation and sought general damages from the respective defendants (para 3).

Proceeding with its judgment, the court addressed the legal question of whether these disclosures constitute defamation on the part of the defendants.

To start off with, the court cited the Constitutional Court judgment of *Le Roux v Dey* to highlight the definitional elements of the delict of defamation as follows (para 27): "The wrongful and intentional publication of a defamatory statement concerning the Plaintiff." The court proceeded to elucidate the relevant legal and criteria to establish a case of defamation (paras 28–29).

In the first instance, the court noted that "[t]he Court in determining whether a statement is defamatory, has to establish the ordinary meaning of the words and whether that meaning is defamatory in that it has the likelihood to injure the Plaintiff's reputation or good name as defamation laws are generally aimed at protecting a person's right to an unimpaired reputation and good name" (para 28).

Following from this, it would seem that the court found, with reference to *NM v Smith* 2007 5 SA 250 (CC), that the unauthorised disclosure of an individual's HIV status can be defamatory (para 34). More specifically, the court held that there "is nothing shameful about suffering from HIV/AIDS"; however, various social stigma attach to this disease that promote "fear, ignorance and discrimination" that "fuel prejudice towards people living with HIV/AIDS" (*ibid*).

Secondly, it would further seem that the court noted that there is a subjective dimension to the delict of defamation (para 29). The court noted the following (*ibid*):

> "The Plaintiff … is further required to show she suffered an impairment to her dignity. This will involve whether the Plaintiff's subjective feelings have been violated and her dignity has been impaired."

On the available evidence, the court found that the plaintiff's subjective feelings had been violated (paras 30–31, 37). The court remarked that the available evidence had shown that the plaintiff suffered visible emotional distress, as she cried during the second seating of the grievance meeting and the trial (*ibid*). The available evidence further showed that the plaintiff was shocked, surprised, and humiliated by the manner and circumstances in which her HIV status was disclosed (*ibid*).

On this basis, the court made the following striking determination: "The Second Defendant to disclose in a meeting of 14 people, the HIV status of the Plaintiff should be regarded as public defaming of one's privacy, dignity and reputation of her name" (para 35).

Proceeding from this determination, the court ventured into the privacy dimensions of the unauthorised disclosures (paras 35, 37). Without providing any further context, the court noted the following: an individual's HIV status is private medical information that cannot be disclosed without the necessary consent; further, an individual's HIV status is sensitive private information which ought to receive the most protection under the Constitution (*ibid*).

Ultimately, the court was persuaded that the unauthorised disclosures "defamed the [p]laintiff's dignity, reputation, and further violated her right to privacy of personal information" (para 38). Accordingly, the court awarded general damages in favour of the plaintiff, against the various defendants, jointly and severally (paras 39–52). In quantifying the general damages, the court relied on criteria only applicable to the delict of defamation (*ibid*).

4 An analysis of the *KAB* judgment

As highlighted above, the *KAB* judgment noted that the unauthorised disclosure of the plaintiff's HIV status "defamed" her privacy, dignity, and reputation (para 35). At first blush, despite the questionable terminology used, this judgment seems to challenge the *iniuria* approach by presenting a finding that multiple personality rights are implicated in the same set of facts. Additionally, it appears that this judgment aligns better with the doctrines of the common law of personality within the transformative constitutionalism paradigm by recognising the composite nature of the human personality. However, upon further analysis of the reasoning in the judgment, it becomes evident that the supposed endorsement of the composite nature of the human personality constitutes a so-called false positive.

A false positive in this context refers to the superficial appearance that the *KAB* judgment embraces the composite nature of the human personality. However, this perceived endorsement is misleading because the judgment does not substantively and methodologically depart from the traditional *iniuria* approach. As a matter of fact, it perpetuates the same flaws.

To begin with, although the court cited the recognised definitional elements of the delict of defamation, which impairs the personality right to reputation, it

failed to engage with the definitional elements of the delicts of impairment of dignity or breach of privacy (para 27). Nowhere in the judgment does the court explicitly discuss the elements of these delicts as represented by the elements of the *actio iniuriarum*. Despite this, the court concluded that multiple personality rights were implicated.

On this basis, the court proceeded to highlight the relevant legal criteria for the delict of defamation – the determination of the publication's meaning, and whether it was likely to injure the good name of the plaintiff (para 28). Doctrinally, the traditional criteria for the delict of defamation are: (a) the defendant's conduct took the form of a publication that communicated information to a third party, (b) it concerned a specific and identifiable plaintiff; and (c) there was a defamatory effect – harm to the plaintiff's reputation according to the objective criterion of the reasonable person that resulted in a rebuttable presumption of (d) wrongfulness and (e) intent (*Khumalo v Holomisa* para 18; *Le Roux v Dey* para 84). Assuming that the first two criteria were not contentious on the facts, the court noticeably formulated the defamatory effect component without reference to the reasonable person standard.

Without expressly extracting a meaning and a concomitant determination of a likelihood of injury, the court, with reference to *NM v Smith*, found that the unauthorised disclosure of an individual's HIV status could be defamatory as a result of the social stigma associated with this disease (para 34). The court should be applauded for its sensitive and insightful understanding that an individual's HIV status can lead to social exclusion and ostracisation, which strikes at the heart of the personality interest to reputation. However, its application of the relevant criteria became imprecise and ambiguous, particularly because of the lack of the use of the criterion of the reasonable person.

This imprecision and ambiguity were further amplified when the court noted that an additional element to defamation must be satisfied – whether the plaintiff's subjective feelings had been violated (para 29). Apart from the fact that such a subjective violation does not form part of the traditional elements of the delict of defamation, the court framed this "additional" element in the greatest terms of abstraction. Particularly, the court omitted to explain towards which recognised personality interest(s) these subjective feelings must be directed. Without much rigorous interrogation, the court found that this additional element had been met (paras 30–31, 37).

Perhaps, out of an interpretative generosity, the court inquired simultaneously into the violation of the plaintiff's common-law dignity. However, the court failed to highlight the objective dimension of the traditional delict of impairment of dignity, as part of the traditional criteria for this delict, as evident in the wrongfulness element – a determination of the objective unreasonableness of the violation with the reference to the *boni mores* (*De Lange v Costa* 1989 2 SA 857 (A) 861). The court probably did not err in its outcome with this particular aspect, given the circumstances and available evidence. However, the court's reasoning, thus far, focussed predominantly on the plaintiff's subjective feelings.

Further adding to this imprecision and ambiguity regarding the traditional criteria of the mentioned personality rights, the court made a contextual statements about the right to privacy (paras 35, 37). Most notably, and correctly, the court highlighted that consent plays an important role in breach of privacy cases and that some aspects, like a person's HIV status, ought to receive maximum legal protection (*ibid*). However, the court had done so without

referring to the doctrinal elements of the delict of breach of privacy. Briefly, this entails: (1) a factual violation of the plaintiff's subjective expectation of privacy, which is (2) wrongful, in that the plaintiff's expectation is objectively reasonable, and (3) intent that will be rebuttably presumed (*Bernstein v Bester* 1996 2 SA 751 (CC) para 68). Again, the court's position on the subjective and objective aspects of this delict was ambivalent.

More specifically, without direct reference to the "subjective expectation of privacy", as associated with the subjectivity of the factual violation element, and the "continuum of privacy", as associated with the objectivity of the wrongfulness element, it becomes apparent that a clear distinction was not drawn between these elements (*National Media Ltd v Jooste* 1996 3 SA 262 (A) 271–272; *NM v Smith* paras 33, 41–45). On the one hand, the concept "informational privacy" posits that a plaintiff themself determines which facts about them are private and the ambit, purpose, method, or conditions of their disclosure (Neethling, Potgieter & Roos 32). On the other hand, the concept "continuum of privacy" determines the reasonableness of the plaintiff's expectation of privacy – whether the *boni mores* should accept the facts in question as legally private and deserving protection (*idem* 221). The *boni mores* is then conceptualised as a continuum in terms of which the more a person interacts with the world, the less protection a person will receive for their subjective expectation to privacy (*ibid*). Therefore, it seems that the court placed a strong emphasis on the plaintiff's subjective feelings. Also, it further seems that the court regarded the exposure of another's HIV status without their consent as unreasonable, without using the *boni mores* standard. With this in mind, is it clear that the court did not systematically apply the elements of the *actio iniuriarum*, especially the factual violation and wrongfulness elements, to the personality right to privacy.

Ultimately, in awarding damages to the plaintiff, the court considered only criteria applicable to the personality interest of reputation and none of the other personality interests implicated (*KAB* paras 39–52). Additionally, similar to previous judgments before the *iniuria* approach came to prominence (*Independent Newspapers Holdings Ltd v Suliman* [2004] 3 All SA 137 (SCA) paras 14, 53; *Minister of Safety and Security v Tyulu* 2009 5 SA 85 (SCA) paras 24–25), the court afforded no express recognition that the implication of multiple personality rights ought to have an effect on the damages award. To be clear, courts award a globular amount for a personality infringement or infringements, not separate amounts (*Independent Newspapers Holdings v Suliman* (*supra*) para 57). However, this should not detract from the fact that a court can remedy multiple infringements with a globular amount and, in doing so, provide concrete recognition of the composite nature of the human personality.

With this foundational analysis in mind, the approach of the court in *KAB* is still precarious in terms of substance and method (mirroring the anti-transformative dimensions of the *iniuria* approach).

For example, although the court highlighted that the plaintiff's right to common-law dignity, reputation, and privacy had been "defamed", read as infringed, it would seem that it has done so on the basis of the substantive common denominator of the *iniuria* approach – subjective feelings of self-worth, rather than on the uniqueness and distinctiveness of the various personality rights. Traditionally, and within a transformative context, the specific rights ought to be more distinctive and nuanced. For example, the personality right to common-law dignity encompasses an individual's interests in their self-worth,

which reflects an acknowledgement of their absolute inner worth and the perception of being a valuable member of society (*Jackson v NICRO* 1976 3 SA 1 (A) 11; Chazan *The moral self* (1998) 13). The personality right to reputation protects an individual's interest in their public esteem, referring to the good name and status they enjoy in the estimation of others as grounded in their full and equal membership in society based on absolute inner worth (*O'Keeffe v Argus Printing and Publishing Co* Ltd 1954 3 SA 244 (C) 247–248; Van der Merwe & Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 445–446). The personality right to privacy protects an individual's informational self-determination, enabling them to control their private facts and choices regarding their absolute inner worth within a personal sphere of autonomy in harmony with the greater collective (*Mistry v Interim National Medical and Dental Council* 1998 4 SA 1127 (CC) para 14; Post "Three concepts of privacy" 2000–2001 *Georgetown LR* 2092).

Arguably, the conceptual origin of these personality rights lies in an individual's absolute inner worth rather than their subjective feelings. Furthermore, these personality rights ought to protect unique dimensions of the human image that arise from this absolute inner worth. Accordingly, the ideological core of these personality rights – absolute inner worth – should not be collapsed into subjective feelings of self-worth, as this betrays the dynamism and complexity of a constitutional vision on the human personality. The *KAB* judgment, arguably adopting the same substantive reasoning as the *iniuria* approach, falls short of this constitutional vision with its reductionist conception.

Moving to the methodological aspects of the reasoning of the court, it did not meaningfully venture beyond an inquiry into subjective feelings, which resulted in an imprecise and ambiguous application of the *actio iniuriarum*. As demonstrated above, this is the result of the court's ambivalent treatment of the factual violation and wrongfulness elements. In addition, the paramountcy of these subjective feelings was exaggerated, as the court failed to engage with available objective criteria such as the reasonable person standard and the *boni mores* provided by the wrongfulness element. Accordingly, the court ignored the specificity provided by the factual violation and wrongfulness elements in respect of the different personality interests. This, effectively, provided no methodological basis for the articulation of distinct personality rights in the positive law, despite the court's outcome.

Therefore, the court's methodological reasoning does not amount to a rigorous constitutional analysis where the framework of the common law of personality is systematically and coherently constructed within the transformative aspirations of the Constitution (Woolman "The amazing, vanishing Bill of Rights" 2007 *SALJ* 763–764). Rather, the court's methodological approach represents a type of simplistic and deductive reasoning as it cannot surpass the primacy of the plaintiff's subjective feelings, which places an undue burden on the greater collective (Zitzke "Stop the illusionary nonsense! Teaching transformative delict" 2014 *Acta Academia* 61). This not only resembles the *iniuria* approach but is also anti-transformative, as such reasoning cannot give specific content and meaning to constitutional concepts in the framework of the common law while enabling the Constitution to adjust this framework to fit a transformative constitutionalism paradigm (*Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) para 36).

Upon final analysis, the *KAB* judgment is merely a variation of the *iniuria* approach, and the false positive it creates remains anti-transformative. This false positive does not represent a concrete acknowledgement of the composite nature of the human personality. Not only does it fail to articulate and protect the multifaceted nature of the human personality with its distinct characteristics but it risks entrenching a simplistic and inadequate legal framework. Ultimately, this false positive creates a defective conversion, as its superficial reliance on common law and constitutional concepts cannot enable the symbiotic growth between these two sources of law regarding (i) a multifaceted understanding of human dignity, (ii) a composite construction of the human personality, and (iii) a rigorous methodological process that expresses these concepts in positive law.

5 Conclusion

The *KAB* judgment, while ostensibly recognising the composite nature of the human personality, ultimately perpetuates the flawed *iniuria* approach. By inadequately applying the elements of the *actio iniuriarum* and focusing on subjective feelings of self-worth, the judgment fails to fulfil the transformative aspirations of the Constitution. This anti-transformative stance risks entrenching a reductive legal framework that inadequately protects the multifaceted human personality. To achieve true constitutional alignment, the judiciary must adopt a nuanced and rigorous methodology that recognises and articulates distinct personality rights. This approach will foster a symbiotic relationship between common law and constitutional principles, ensuring robust protection for the diverse aspects of human dignity and the personality. Only then can the common law of personality evolve in a manner that genuinely reflects the transformative vision of the Constitution.

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THE CORRECT APPROACH TO THE BURDEN OF PROOF IN THE CRIME OF RAPE: RECENT CASE LAW

***Jantjies v S* (532/2022) [2023] ZASCA 3 (15 January 2024); *Ximba v S* (957/2022) [2023] ZASCA 6 (19 January 2024); *Sekoala v S* (579/2022) [2024] ZASCA 18 (21 February 2024)**

OPSOMMING

Die korrekte benadering tot die bewyslas by die misdaad van verkragting: Onlangse regspraak

Vanweë die hoë misdaadsyfer en geslagsgebaseerde geweld in Suid-Afrika dien vervolgings vir die misdaad verkragting dikwels voor die strafhowe. Veroordeelde beskuldigdes wend hul dan na die Appèlhof in 'n poging om die vonnis vry te spring. Die vervolging in 'n strafsaak moet die beskuldigde se aanspreeklikheid bo redelike twyfel bewys. Dikwels beskik die vervolging slegs oor die getuienis van 'n enkelgetuie – die klaagster self. In die verlede is 'n verkeerde benadering dikwels tot die evaluering van die beskikbare getuienis

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TO WHOM IT MAY CONCERN

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The following contribution met these requirements and was published in 2025:

- C Visser "The law of personality, the "*iniuria* approach", and a "false positive" – *KAB v National Union of Metal Workers of South Africa (NUMSA)* 2023 44 ILJ 2554 (FSB)" (2025) 88(1) THRHR 139–148



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