



CONSTITUTIONAL COURT OF SOUTH AFRICA

**Hendrick Pieter Le Roux and Others v Louis Dey
(Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)**

**CCT 45/10
[2011] ZACC 4**

Judgment Date: 8 March 2011

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 8 March 2011, the Constitutional Court delivered judgment in a matter in which the applicants, Hendrick Pieter Le Roux, Burgert Christiaan Gildenhuys and Reinardt Janse van Rensburg, sought leave to appeal against a judgment and order of the Supreme Court of Appeal that upheld an award of damages made by the North Gauteng High Court, Pretoria (High Court) to the respondent, Dr Louis Dey.

At the centre of the litigation was the publication by the applicants, then schoolchildren, of a computer-created image in which the face of Dr Dey, then a deputy principal of their school, was super-imposed alongside that of the school principal on an image of two naked men sitting in a sexually suggestive posture. The school crests were super-imposed over the genital areas of the two men.

Dr Dey instituted action in the High Court for recompense on the basis of two claims – one based on defamation and the other on the injury to his feelings. The High Court upheld both claims, and granted a composite award of R45 000 in damages. But the Supreme Court of Appeal held that to uphold both claims entailed an impermissible accumulation of actions. The majority of that Court upheld the defamation claim, and found accordingly that the additional claim based on affront to dignity was ill-founded and required no further consideration. The Supreme Court of Appeal nevertheless confirmed the amount the trial court awarded.

In the Constitutional Court, the applicants disputed the correctness of all the findings of the High Court and the Supreme Court of Appeal. Dr Dey gave each finding his support.

The applicants' argument was underpinned by certain constitutional elements which, according to their submission, had relevance to the case. They emphasized, in particular, the right to freedom of expression. The applicants were joined in their effort to highlight the constitutional dimensions of the case by two amici curiae. The first amicus, the Freedom of Expression Institute, stressed the rights of children to freedom of expression and, in particular, to satirical expression. The Restorative Justice Centre was admitted as the second amicus. The Centre elaborated on the importance of engagement as a dispute resolution mechanism in matters of this kind.

In a judgment by Brand AJ, (Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J and Nkabinde J concurring) the majority of the Court affirmed the finding of the majority of the Supreme Court of Appeal that the image was defamatory of Dr Dey. Brand AJ holds that the reasonable observer would understand the image or statement conveyed by the picture as associating or connecting Dr Dey and the principal with the indecent situation that the picture portrays and that the average person would regard the picture as defamatory of Dr Dey. The majority further concluded that if the defamation claim had not prevailed the image was in any event an injury to Dr Dey's feelings.

The Court nevertheless sets aside the orders granted in the High Court and the Supreme Court of Appeal. In their stead, the Court ordered the applicants to pay Dr Dey R25 000 as compensation. In addition, the applicants were ordered to tender an unconditional apology to Dr Dey for the injury they caused him. The applicants were ordered, jointly and severally, to pay Dr Dey's costs in the High Court. There was no order as to costs in this Court and in the Supreme Court of Appeal.

In their judgment Cameron J and Froneman J held that the image was not defamatory, but that it infringed upon Dr Dey's personal dignity. They would have awarded the same relief for that infringement as the majority did for the defamation.

Yacoob J held however that the image was neither defamatory nor an infringement of Dr Dey's injured feelings. He held that the average reasonable observer in a constitutional state would bear in mind the constitutional provisions relating to freedom of expression and the rights and interests of children. This reasonable observer, knowing that the image was created at school would have regarded it more as an immature attempt at an attack on the authority exercised by Dr Dey rather than an attack on Dr Dey's person. Skweyiya J agreed with Yacoob J but on a slightly different basis.