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G.P.-S.59968—1970-71—2 500 J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

S. A. ASSOCIATED NEWSPAPERS LTD. & ANOTHER. *Appellant,*

versus

EST. LATE P. C. PELSER. *Respondent*

Appellant's Attorney WEBBER & NEL
Prokureur vir Appellant NEL REITZ & P

Respondent's Attorney DEP. STATE ATT BFN
Prokureur vir Respondent

Appellant's Advocate S. Kentridge
Advokaat vir Appelland C. Langhorne

Respondent's Advocate HJ O VAN HEERDEN SC.
Advokaat vir Respondent H.P. VILJOEN.

Set down for hearing on S. Kentridge 15.8.75
Op die rol geplaas vir verhoor op July Log. (NPD) 14.5.79.

Coram Van Blerk JA, Wessels, Jansen, Rabie et Hoexter JJA

9.45 - 11.00 Kentridge
11.15 - 12.00 "
12.10 - 12.45 Van Heerden
2.15 - 3.45 "
4.00 - 4.20 Kentridge

C.A.V.

The Court dismisses the said appeal with costs, including

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

SOUTH AFRICAN ASSOCIATED
NEWSPAPERS LIMITED .....First Appellant

B. VAN D. VAN NIEKERK .....Second Appellant

and

THE ESTATE OF THE LATE
P.C. PELSER .....Respondent

Coram: Van Blerk, A.C.J., Wessels, Jansen, Rabie et Hofmeyr, JJ.A.

Heard: 15 August 1975

Delivered: 19 September 1975

J U D G M E N T

WESSELS, J.A.:

This is an appeal, with leave, from a judgment of Hill, A.J., in the Natal Provincial Division, dismissing with costs exceptions taken by appellants to the particulars of claim filed by the late Mr. Pelser in a defamation action instituted by him against them. His death occurred after the delivery of

the.....2/

the abovementioned judgment. This Court was informed by counsel for the appellants that his executors had been substituted in his place, in terms of a notice dated 14 May, 1975, given under rule 15(3) of the Uniform Rules of Court.

The action arose out of an article published by the first appellant in the Sunday Times (a weekly newspaper) of 15 April 1973. A copy of the article is annexed to the particulars of claim, and it reads as follows:

> ANTI-HANGING MAN LASHES GOVERNMENT FOR LETTING MAKINITHA DIE
>
> Sunday Times Reporter
>
> Professor Barend van Niekerk, director of the Society for the Abolition of Capital Punishment, has criticised the Government for not stopping the execution of a Black man this week - after re-prieving his White partner in crime.
>
> He was commenting on the fate of the two condemned murderers, Kenneth George Wilson and Zacharia Makinitha. Wilson was reprieved last month. Makinitha was executed on Thursday.
>
> Both were sentenced to death last May for the murder of Mr George Marinacos. Wilson appealed, but the appeal failed. The families of both men petitioned for clemency.

Professor.....3/

Professor van Niekerk, Professor of Law at the University of Natal, told me: 'The execution of Makinitha must fill all South Africans with shame.

'Two persons of different races commit the same crime and are sentenced to the same punishment by a court of law; yet they are treated differently by the executive on the plea of mercy.

'One would have expected the Government to save the life of Makinitha, to avoid the obvious inference of discrimination; that they did not do so speaks volumes for their lack of concern for justice and the reputation of our law.'

Professor van Niekerk said that if extenuating circumstances meriting reprieve were present in Wilson's case, they were also present in Makinitha's case.

* There was an indication that the Black man was under the influence of the White man.

* The Black man, 21, was three years younger than the White man.

* The Black man did not have the benefit of an appeal. 'Why an appeal was not lodged - especially after leave to appeal had been granted to the White man - leaves me aghast. The General Bar Council recently asked for an automatic appeal in cases where capital punishment was imposed.'

* Wilson was obviously better educated than Makinitha."

It appears.....4/

It appears from the particulars of claim that since 1960, and at all material times thereafter, the late Mr. Pelser was the Minister of Justice of the Republic of South Africa, responsible in terms of section 95 of Act No. 32 of 1961 for the exercise and performance of all the administrative powers, functions and duties affecting the administration of justice in the Republic and, as such, a member of the Executive Council thereof. It is averred, further, that first respondent is, and has since earlier than 1973 been, the proprietor and the printer of the newspaper in question, and that second respondent is, and since 1971 has been, a professor of law and the director of the Society for the Abolition of the Death Penalty in South Africa. I shall hereafter refer to the appellants as the defendants and to the respondent as the plaintiff.

In so far as second defendant is concerned, it is averred, inter alia, in the particulars of claim that the article in question was based on a statement concerning the execution

of.....5/

of Makinitha and the reprieve of Wilson which he had supplied to the editorial staff of the Sunday Times, intending that it, or excerpts from it, or a summary or paraphrase of it should be published therein and read throughout the Republic by many members of the public.

For present purposes it is sufficient to set out the following further averments in the particulars of claim (as amended) to wit :

"

25.

The said report contained remarks, being all those attributed in it to the Second Defendant, which comprised, reflected and were confined to:

(a) a correct, accurate and complete version of the said statement;

(b) alternatively, correct and accurate excerpts from the said statement;

(c) alternatively, a correct and accurate summary or paraphrase of the said statement.

26.

When the said report was printed and published in the said newspaper, many members of the public throughout the said Republic knew that:

(a) the said.....6/

(a) the said State President was bound to and always did accept and follow the advice of the said Executive Council with regard to the grant and refusal of reprieves;

(b) the members of the said Executive Council had therefore been the persons responsible for the decision that the said Wilson was to have been reprieved but that the said Makinitha was not to have been;

(c) the Plaintiff was, and for a number of years he had been, the Minister of Justice of the said Executive Council;

(d) the Plaintiff had therefore been one of the persons responsible for the decision that the said Wilson was to have been reprieved but that the said Makinitha was not to have been.

27.

The said remarks meant that, when deciding that the said Wilson was to have been reprieved but that the said Makinitha was not to have been, the persons responsible for the said decision, including the Plaintiff, had:

(a) not behaved honestly, impartially, fairly and justly;

(b) behaved shamefully;

(c) been actuated or influenced by improper considerations and impulses, including racial bias in favour of the said Wilson and against the said Makinitha.

(d) displayed a gross lack of concern for justice.

28. To.....7/

28.

To the extent of their said meanings, the said remarks were:

(a) calculated, and intended by the Second Defendant, by the First Defendant and by its said employee or employees who wrote the said report, to injure and to impair the dignity, reputation and prestige of the persons responsible for the said decision, including the Plaintiff;

(b) defamatory of the persons responsible for the said decision, including the Plaintiff;

29.

As the result of the publication in the said newspaper of the said remarks:

(a) the Plaintiff's dignity, reputation and prestige were injured and impaired;

(b) the Plaintiff suffered damage in the sum of R30 000."

In the result, plaintiff claimed judgment against the defendants, jointly and severally, for payment of damages in the sum of R30 000 and costs.

After further particulars (not relevant hereto) had been furnished by plaintiff, a separate notice of exception to the particulars of claim was filed on behalf of each of the defendants. In so far as it is material hereto, first defendant's exception to plaintiff's particulars of claim was based on the

ground.....8/

ground that they are bad in law and disclose no cause of action and/or lack averments necessary to sustain a cause of action, more particularly in that

> "(a) The report complained of is not reasonably capable of a defamatory meaning.
>
> (b) The report is not reasonably capable of any of the meanings assigned in paragraph 27 of the plaintiff's particulars of claim to the remarks allegedly contained therein.
>
> (c) The remarks complained of are not reasonably capable of being understood as being defamatory of the plaintiff as alleged in paragraph 28 of the plaintiff's particulars of claim, and are not reasonably capable of being understood to refer to the plaintiff, more particularly in that the remarks refer only to the Government of the Republic of South Africa and not to any individual."

In so far as second defendant is concerned, two exceptions were taken, the second of which is substantially the same as that taken by first defendant. In second defendant's heads of argument it is stated that he associates himself

with.....9/

with the argument to be presented on first defendant's behalf and adopts it as if his own. The issues raised in his first exception do not arise for determination by this Court.

The argument addressed to this Court by counsel on defendants' behalf was based on the following three propositions, namely,

1. The article cannot reasonably be read as referring to any member of the Executive Council in his individual capacity.

2. The article cannot reasonably be read as conveying a meaning defamatory of any individual Cabinet Minister, including the plaintiff.

3. The article would be read and understood by the reasonable reader as a legitimate exercise of the subject's right to criticise the Executive and its policies, and that to read and understand it otherwise would be to allow the Government to vex the subject with defamation actions in an attempt to vindicate its executive decisions and policies.

In so far.....10/

In so far as the last-mentioned proposition is concerned, it was submitted by counsel appearing for plaintiff, firstly, that it was not raised as a separate and distinct issue in either of the notices of exception and, secondly, that, in any event, as formulated it cannot constitute a separate and distinct legal issue triable by the Court at the exception stage.

In my opinion, however, the third proposition raises, albeit in a somewhat different form, the very same issue raised in the second proposition. To say that the reasonable reader would read and understand the article in a certain way, is merely another way of saying that it is not reasonably capable of bearing any other meaning.

At the outset, it is necessary to make some reference to the legal nature and functions of the Executive. The reference in the article in question to "the Government" is clearly intended to be a reference to the Executive. Part IV of the Republic of South Africa Constitution Act (Act No. 32 of 1961) -

- hereinafter.....11/

- hereinafter referred to as the Constitution - provides, in section 16(1) thereof, that

> "The executive government of the Republic in regard to any aspect of its domestic or foreign affairs is vested in the State President, acting on the advice of the Executive Council."

In terms of section 17 of the Constitution the Executive Council

> "shall consist of the Ministers appointed under section twenty for the time being holding office."

The State President may, in terms of section 20,

> "appoint persons not exceeding eighteen in number to administer such departments of State of the Republic as the State President may establish."

Section 20(5) of the Constitution provides, inter alia, that, before assuming his duties as a member of the Executive Council, a Minister shall make and subscribe an oath in the following form, namely,

"I, A.B.....12/

"I, A.B., do hereby swear to be faithful to the Republic of South Africa and undertake before God to honour this oath; to hold my office as Minister and as a member of the Executive Council with honour and dignity; to respect and uphold the Constitution and all other Law of the Republic; to be a true and faithful counsellor; not to divulge directly or indirectly any matters brought before the Executive Council which are entrusted to me under secrecy; and to perform the duties of my office conscientiously and to the best of my ability.

So help me God."

The power of the State President to reprieve offenders derives from section 7(3)(f) of the Constitution, which reads as follows:

"He shall, subject to the provisions of this Act, have power -

(f) to pardon or reprieve offenders, either unconditionally or subject to such conditions as he may deem fit....."

In terms of section 16(2) the reference in section 7(3)(f) to the State President is

"deemed to be a reference to the State President acting on the advice of the Executive Council."

It follows.....13/

It follows that where the State President exercises his statutory power of reprieve, he gives effect to the advice tendered to him by the Executive Council. Such advice must obviously be related to a prior decision taken by the Executive Council as to the nature and content thereof. In this regard, it was common cause that the convention of Cabinet responsibility is accepted in the Republic, and that, in relation to its decisions and actions, the Cabinet is not divisible into its constituent members. As members of the Executive Council, the Ministers are jointly responsible for its decisions; so much so, that even if a Minister is strongly opposed to any proposal being debated at a meeting of the Council, he is nevertheless bound to accept the decision taken at the meeting and to support it in public. He may not even disclose that he was opposed to it. If he is so strongly opposed to the decision that he cannot accept it, then he must resign. See, Verloren Van Themaat: Staatsreg (2de Uitgawe) p. 275.

It was.....14/

It was submitted on defendants' behalf that the Government in its executive branch, as represented by the State President acting on the advice of the Executive Council, is a body sui generis. In its executive functions, the Government (and thus the Executive Council) represents the State, and is wholly identified with it. The correctness of this submission was not challenged on plaintiff's behalf. It is supported by the judgments in the cases referred to by defendants' counsel, namely, R. v. Leibbrandt and Others, 1944 A.D. 253 at 281, R. v. Neumann, 1949(3) S.A. 1238 (Sp. Crim. Crt) at 1260 - 1261, and Die Regering van die Republiek van Suid-Afrika v. S.A.N.T.A.M. Versekeringsmaatskappy Bpk., 1964(1) S.A. 546 (W) at p. 547/548. Following on this, it was submitted that the sui generis nature of the Executive Council served to distinguish that body from other bodies in respect of which it has been held in numerous decided cases over the years that, in appropriate circumstances, defamation of such bodies could give

rise.....15/

rise to an action for damages at the instance of a member thereof. See, e.g., Hertzog v. Ward, 1912 A.D. 62 (medical council), Le Roux v. Cape Times, Ltd., 1931 C.P.D. 316 (a jury), Bane v. Colvin, 1959(1) S.A. 863 (C) (board of directors of a company) and De Klerk v. Union Government, 1958(4) S.A. 496 (T) (executive committee of a trade union). I shall revert later in this judgment to the issues which arise for determination in cases of so-called class or group defamation.

A further submission on defendants' behalf was that by reason of its sui generis nature the Government or Executive Council cannot be defamed in any actionable sense. That this is so, and the reason therefor, appears from a passage in the judgment of Watermeyer, C.J. in Die Spoorbond and Another v. South African Railways, 1946 A.D. 999 at p. 1009. The passage in question reads as follows:

"But, independently.....16/

But, independently of considerations of fairness and convenience, it seems to me that the position of the Crown in relation to any reputation enjoyed by it in connection with its trading or business activities is very different from that of a business or trading corporation. A business or trading corporation exists solely for the purpose of carrying on its trade or business and the reputation which has been attributed to it in decided cases is connected with or attached to the carrying on of that trade or business. On the other hand the Crown's main function is that of Government and its reputation or good name is not a frail thing connected with or attached to the actions of the individuals who temporarily direct or manage some particular one of the many activities in which the Government engages, such as the railways or the Post Office; it is not something which can suffer injury by reason of the publication in the Union of defamatory statements as to the manner in which one of its activities is carried on. Its reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature. No one who reads the alleged defamatory statements would regard the reputation or good name of the Crown (regarded as a perennially existing legal persona whose function is that of carrying on all the multifarious activities of Government in the Union) as having been lowered or injured by these publications. He knows that, though the railways are vested in the Crown, the Crown is only a legal conception and takes no part in the management of the railways. He might regard the noxious words as

reflecting.....17/

> reflecting upon the individuals or group of individuals temporarily responsible for the direction or management of the railways on behalf of the Crown but he would not regard them as reflecting upon the good name of the Crown itself."

In my opinion, however, the fact that the Government cannot be defamed, does not assist the defendants in this case. The plaintiff's case, as set out in the particulars of claim, is that the article in question is defamatory of him personally, and not that it is defamatory of the Government and that he, therefore, as a member thereof, has an action for damages. In the above-quoted passage from the judgment of Watermeyer, C.J., reference is made to the possibility that a reader of the defamatory statements

> "might regard the noxious words as reflecting upon the individuals or group of individuals temporarily responsible for the direction or management of the railways on behalf of the Crown....."

In a concurring judgment in the Spoorbond case, Schreiner, J.A., at p. 1012 - 3, states the following:

"The normal.....18/

> "The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the State's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the State actions for defamation will lie at their suit."

In my opinion, the reference to the right of "individual servants of the State" to sue for defamation in the circumstances postulated, was not intended to formulate a rule reserving a right of action in favour of a particular class of persons only (servants of the State) to the exclusion of all other classes of persons, e.g., Ministers of State. Schreiner, J.A., was intent upon contrasting the position of the Government with that of its servants in regard to instituting a claim for damages on account of alleged defamatory utterances in connection with the management of the railways.

It was.....19/

It was submitted on defendants' behalf that if individual Ministers could sue for damages for defamation consequent upon a criticism of the Government, or the Executive, the effect of Die Spoorbond case would be undone, and the evils adverted to by Schreiner, J.A., in his judgment in that case would follow. It is to be noted, however, that in the relevant passage in his judgment (at p. 1013) Schreiner, J.A., was dealing with "evils" that would follow if "the Crown's right" to sue for defamation were to be recognised (my underlining). In this case, however, the Court is only concerned with the personal right of a member of the Executive Council to sue for defamation in circumstances where it is alleged that defamatory matter was published with the intention of injuring him personally. In my opinion, counsel's submission is devoid of any real substance. To recognise the right of a Minister to sue for defamation where he has personally been defamed in connection with the management of

State affairs.....20/

State affairs cannot, in my opinion, have the effect contended for by defendants' counsel. The subject's undoubted right to express his opinion, freely, and without fear of legal consequences, upon the Government's management of the country's affairs would, in my opinion, remain unimpaired.

I might add that, in my opinion, it cannot be said that the reputation of an individual Minister has those "robust and universal" characteristics which, in the case of the Government (as a separate entity), render it invulnerable to criticism of a defamatory nature. His reputation is, indeed, a "frail thing", capable of suffering injury by the publication of defamatory matter regarding his conduct in the management of State affairs.

A further.....20A/

A further submission on defendants' behalf was based on what counsel described as "special rules of evidence" which apply to the Executive Council. He referred, inter alia, to the fact that minutes of meetings of the Council are secret and may not be disclosed. The oath of office taken by a Minister binds him "not to divulge directly or indirectly any matters brought before the Executive Council" which are entrusted to him under secrecy. This, so it was argued, served to underline the distinction between the Executive Council and other bodies, such as, e.g., boards of directors, liquor licensing boards, etc. Counsel pointed

to the.....21/

to the difficulties which face a defendant where it would not be open to him to subpoena a member of the Executive Council and to require him to testify as to the proceedings of the Executive Council or its decisions or, for example, as to how the plaintiff voted. In my opinion, however, this submission is not of any real assistance in deciding upon the issues which arise for determination in this case. Firstly, these "special rules" (and others of a similar nature based on considerations of public policy which serve to exclude relevant evidential material from being placed before a court) would appear to apply in all cases in which the State or a Minister is a litigant. Secondly, I refer to a concession made by defendants' counsel (rightly so, in my opinion) that in appropriate circumstances an individual Minister might have a right to sue for defamation even though he is not personally identified in the defamatory matter complained of. I quote from counsel's heads of argument:

"An example.....22/

> "An example of criticism which might give rise to an action by individual Cabinet Ministers would be an allegation that the Executive Council had accepted a bribe or that it had deliberated when the members were drunk. Such imputations would obviously be pointed at the members individually : indeed, they could only apply to individuals, and not to the body as such."

If, in the circumstances postulated, a Minister were to institute a defamation action, the defendant would inevitably be faced with the same difficulties brought about by the application of the "special rules of evidence" which have been referred to above. I might add that I did not understand counsel to contend that the two examples referred to by him constitute a full and complete catalogue of imputations which might give rise to an action by an individual Minister in circumstances where the criticism is directed to "the Government" or "the Executive Council".

In his argument, defendants' counsel submitted that there is no precedent in this country for an action by a

Minister.....23/

Minister arising from an attack on the Government. The concession of counsel, which was discussed in the preceding paragraph, appears to detract from the significance of the lack of precedent. In this connection, I must, however, refer to Conroy v. Nicol and Another, 1951(1) S.A. 653 (A.D.). The appellant (plaintiff) instituted a defamation action in the Transvaal Provincial Division in which he averred in his declaration that an article written by first respondent, which was published in a church journal and also in a newspaper printed and published by second respondent, contained matter defamatory of him. In May 1948, as a result of a general election, there was a change of Government. Prior to the general election, plaintiff was a Cabinet Minister. At the time he instituted the action, plaintiff was a senator and leader of the opposition in the Senate. The defamatory matter is set out on p. 655 E - G of the judgment of Van Den Heever, J.A. In so far as plaintiff was concerned, the sting of the defamation was contained in the following sentence in the article in question:

"Die aanval.....24/

> "Die aanval op die Kerk, so aanhoudend en onredelik deur Senator Conroy gevoer, het ons magteloosheid teen 'n onbillike owerheid laat voel."

The defendants launched exception proceedings on the ground that the words complained of were per se incapable of bearing a defamatory meaning and, moreover, incapable of bearing the meaning set out in the innuendo. A full bench of the Transvaal Provincial Division (Murray, A.J.P., Claydon, J., and De Wet, A.J.) dismissed the exception, holding that the matter complained of was reasonably capable of bearing a defamatory meaning. See, Conroy v. Nicol and Die Voortrekker Pers Bpk., 1949(3) S.A. 1134 (T). The trial took place before De Villiers, J., who held that the matter complained of was defamatory of the plaintiff, but that the defendants were justified in publishing it. The plaintiff's claim was, accordingly, dismissed. On appeal before this Court, it was assumed for the purposes of the judgment, that

matter.....25/

matter which was defamatory of the Government would also be defamatory of the individual members thereof. (See, Conroy, 1951(1) S.A. at p. 660A). The Court concluded (at p. 660C) that the unreasonable conduct complained of was addressed to the Government and not to plaintiff personally and, further (at p. 662 - 3) that no reasonable reader could have assigned to the alleged words the meaning given to them by the plaintiff. In my opinion, therefore, Conroy's case can be regarded as a precedent because, although the plaintiff was unsuccessful, he did found his action on criticism of the Government of which he was a member. However that may be, there are sound reasons why a Minister, whose conduct is called into question in regard to the management of the country's affairs, would normally regard it as expedient and in the public interest to vindicate himself by taking political rather than legal action. Firstly, a person who accepts appointment as a Minister must know that his part in the management of the country's affairs will be under constant

public.....26/

public scrutiny and he must expect to be subjected to criticism which may often be not well-founded; it may indeed on occasion be of a defamatory nature. The criticism will almost invariably relate to a matter of topical public importance, and would, therefore, in the public interest, call for immediate refutation or explanation, which can more readily be achieved by political rather than legal action. (In this case, the alleged defamatory matter was published as long ago as 15 April 1973). It has also been said on occasion that ordinarily a person who has reached the high rank of Minister will not be so thin-skinned as to regard it necessary to have resort to litigation whenever some member of the public has used rather ill-chosen language in exercising his right to criticise him. This may, in part at least, explain the dearth of precedent referred to by defendants' counsel.

I revert..... 27/

I revert to the question of so-called class or group libel. I have considered the various authorities referred to by counsel. In the result, as I understand those authorities, there are no special rules of law which apply to cases of class or group libel where an individual member of the class or group institutes a defamation action grounded on defamatory matter which in terms refers to the class or group in question. In every defamation action the plaintiff must allege, and prove, that the defamatory words were published of and concerning him. So too, in a case of so-called class or group libel the plaintiff can only succeed if it is proved at the trial that the matter complained of, though expressed to be in respect of the class or group of which he is a member, is in fact a publication thereof of and concerning him personally. In my opinion, the law was correctly stated by Lord Atkin in his judgment in the case of Knupffer v. London Express Newspaper, Ltd. [1944] 1 All E.R. 495 at p. 497 H - 498 C. The passage in question reads as follows:

"I venture.....28/

"I venture to think that it is a mistake to lay down a rule as to libel on a class, and then qualify it with exceptions. The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. It is irrelevant that the words are published of two or more persons if they are proved to be published of him : and it is irrelevant that the two or more persons are called by some generic or class name. There can be no law that a defamatory statement made of a firm, or trustees, or the tenants of a particular building is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was in fact included in the defamatory statement : for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds : or the words are occasionally intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or at any rate of himself. Too much attention has been paid, I venture to think, in the textbooks and elsewhere to the decision of WILLES, J., in 1858, in Eastwood v. Holmes (2). It is a nisi prius decision in which the judge non-suited the plaintiff both because he thought there was

no evidence.....29/

> no evidence that the words were published of the plaintiff and for other reasons, and so far as the first ground is concerned, it appears to me on the facts to be of doubtful correctness. His words, 'It only reflects on a class of persons,' are irrelevant unless they mean it does not reflect on the plaintiff : and his instance 'All lawyers are thieves' is an excellent instance of the vulgar generalisations to which I referred. It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class."

In this regard, see also Gatley on Libel and Slander (6th Ed.) par. 285 p. 284.

In the light of what has been set out above, I proceed to consider the first of the two legal issues which arise for determination by this Court, namely : Can the article reasonably be read as referring to any member of the Executive Council in his individual capacity? It was common cause between counsel that on exception the test is whether the words are reasonably capable of conveying to the reasonable reader,

having.....30/

having average intelligence and knowledge (which in this case would include knowledge of the facts set out in paragraph 26 of plaintiff's particulars of claim), that the criticism in the article in question refers to individual members of the Government (or Executive Council). See, e.g., Basner v. Trigger, 1945 A.D. 22, per Tindall, J.A., at p. 32.

The reasonable reader would note from the heading above the article, and the first sentence thereof, that the "Government" is being severely criticised in regard to the decision to reprieve a White man but not to do so in the case of his Black "partner in crime". After referring to certain background facts in the second and third paragraphs thereof, the article continues: "Professor Van Niekerk.....told me:

'The execution.....31/

'The execution of Makinitha must fill all South Africans with shame.' * This, in essence, is a criticism solely directed to the decision itself in respect of its effect on the general public without any reference whatsoever to its motivation. So far, I am of the opinion that no reasonable reader could understand the words as referring to conduct on the part of individual members of the Government. After referring, in the fifth paragraph, to the fact that, though the court had imposed the same punishment on the two persons, "yet they are treated differently by the executive on a plea of mercy", the article proceeds to quote the second defendant as having stated :

> * One would have expected the Government to save the life of Makinitha, to avoid the obvious inference of discrimination; that they did not do so speaks volumes for their lack of concern for justice and the reputation of our law."

In this passage, second defendant no longer confines himself to a criticism of the decision itself. He points to inferences to be drawn therefrom. The words in question are, in my

opinion.....32/

opinion, at least reasonably capable of conveying to the reasonable reader, not that the decision to reprieve the White man has resulted in discrimination but that intentional discrimination resulted in the taking of the decision to reprieve the White man but not his Black partner in crime. It is suggested, too, that the failure to save the life of Makinitha demonstrates the Government's lack of concern for justice and the reputation of our law. The article concludes with a statement that if extenuating circumstances meriting reprieve were present in the case of the White man, they were also present in the case of the Black man. In my opinion, the words are at least reasonably capable of conveying to the reasonable reader that the Government discriminated against Makinitha because he was a Black man, and that the Government did so because of a lack of concern for justice and the reputation of our law.

The reasonable reader would, of course, not proceed to a detailed analysis of the article and peer excessively at

every.....33/

every word and phrase used therein. The impact of the contents of the article on the mind of the reasonable reader would be immediate. Having read the article, he would direct his attention to whatever else in the newspaper is of interest to him. The question now is whether, in the context of the article as a whole, the words used are reasonably capable of conveying to the reasonable reader that the criticism is aimed not only or solely at the Government as a statutory entity apart from its constituent members, but also at the individual members thereof?

It was submitted on defendants' behalf that the criticism of the Executive Council related to the carrying out of one of its constitutional functions, namely, its function of advising on the exercise of the statutory power of granting a reprieve. In this context, so it was argued, the criticism was an attack on the decision itself, and thus an attack on the policy of the Executive and not any individual member thereof.

I cannot.....34/

I cannot agree that the criticism in question constitutes an "attack" on the policy of the Executive. The article refers in terms to a decision taken by the Executive in relation to a specific case being considered by it. As I understand the article, it is in no way related to any policy of the Executive regarding the exercise of the power to grant a reprieve. In so far as the article in terms criticises the decision itself, as being one which "must fill all South Africans with shame", the argument of counsel is, in my opinion, correct. Criticism limited to Government policy or Executive Council decisions could rarely, without more, be understood as being aimed at individual members thereof. But, in my opinion, it is one thing to say that a policy or a decision of the Executive Council results in shameful discrimination or gross injustice; it may be a completely different thing to say that a policy or decision was determined upon as a result of a desire or intention to discriminate or a disregard

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of the requirements of justice. In the sixth paragraph of the article in question, second defendant sought to suggest an explanation for the decision which he regarded as shameful. In that context he refers to the "obvious" inference of discrimination" and the "lack of concern for justice and the reputation of our law". The reasonable reader may no doubt appreciate that the Executive Council is a legal entity apart from its members. On the other hand, he may also appreciate that as such an entity it has no will or conscience apart from its members. If, therefore, criticism is not confined to the demerits of any particular policy or decision of the Executive, but is extended to the motivation which underlies that policy or decision, the reasonable reader could, in my opinion, reasonably infer that the criticism reflects not only upon the Executive Council as a legal entity apart from its members, but also on the individual members thereof. If immoral or unlawful conduct is imputed to a class or group

(such as.....36/

(such as the Executive Council), such conduct could ordinarily be more properly attributed to the individual members thereof. See in this regard, Young v. Kemsley and Others, 1940 A.D. 258, per Tindall, J.A., at p. 273. The use of the pronouns "they" and "their" with reference to "the Government", could conceivably be understood by the reasonable reader as a reference to the individual members thereof. In my opinion, therefore, the article in question can reasonably be read as referring to individual members of the Executive Council.

The next.....36A/

The next issue, also one of law, relates to the question whether the words complained of are reasonably capable of conveying to the reasonable reader a meaning defamatory of the plaintiff. It was argued on defendants' behalf that it is not defamatory to allege that the Executive is motivated by racial bias. That begs the question whether it is defamatory to say that a member of the Executive was motivated by racial bias. I do not, however, propose to consider this question in general terms. I will confine myself to the question in relation to the facts of this case. In the field of criminal law the State, in the public interest, exercises

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awesome powers in relation to the liberty and life of its subjects. The powers are in the main exercised by instituting judicial proceedings in courts of law. Where a person has been sentenced to death, the Executive Council has power to reprieve the offender. Every right-thinking person would expect that the members of the Executive Council would give earnest and anxious consideration to the question whether or not the power is to be exercised in favour of the condemned person. It is, after all, a matter of life or death. It would surely cause a sense of extreme shock if it were to become known that members of the Executive Council were motivated by racial bias in deciding to advise the State President not to exercise the power of reprieve in the case of a Black man. In deciding upon the advice to be tendered to the State President, it is required of the members of the Executive Council to exhibit the utmost concern for justice and the reputation of our law. To act otherwise would most surely constitute a gross violation of the oath of office. In any event,

the words.....38/

the words complained of are, in my opinion, at least reasonably capable of being defamatory in the sense set out in the innuendo pleaded in paragraph 27 of the particulars of claim. The plaintiff was the Minister of Justice at the time of the publication of the article in question. The reasonable reader could understand the criticism to reflect more particularly on him, as the Minister in charge of the administration of Justice.

In the result, the appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

P.J. Rose-Innes, C.J.

Van Blerk, A.C.J.)
Jansen, J.A.) concur
Rabie, J.A.)
Hofmeyr, J.A.)