

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO:104/90

In the appeal of:

MEYER ALBERT JOHNSON

APPELLANT

and

DENIS BECKETT

1ST RESPONDENT

SAGA PRESS (PTY) LTD

2ND RESPONDENT

Coram: CORBETT CJ, HEFER, VAN DEN HEEVER JJA, KRIEGLER et

HARMS AJJA.

Date heard: 17 September 1991

Date delivered: 28 November 1991

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## J U D G M E N T

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### HARMS AJA:

The appellant was the unsuccessful plaintiff in a defamation trial heard in the Witwatersrand Local Division by Goldstein J. The court a quo granted leave to appeal. The first respondent is the editor and the second respondent, the publisher of a publication known as "Frontline". In the April/May 1988 edition of Frontline an article was published entitled "The Slippery Search for Moral Outrage". In a sentence in the article, the words "the increasingly depraved Johnny Johnson" appeared. The appellant is known as Johnny Johnson. The issues in the case are whether these words in the context of the article were defamatory of the appellant and, if so, whether the respondents established

the defence of fair comment.

The full title of the article is

"FOREIGN MEDIA  
The Slippery Search for Moral Outrage  
From Our Own Foreign Correspondent"

It was commissioned by first respondent, written by one Robinson, the local correspondent of the Daily Telegraph (an English newspaper) and then edited by the first respondent. It is not possible to summarize the article without doing it an injustice. Its tone and object do, however, appear from the first few paragraphs:

"In one of Johannesburg's choicest northern suburbs there lives an admired and learned foreign correspondent. Local legend has it that he grows the finest mealies this side of the equator. Like all of us his salary is paid in hard currency which when converted into slimline Botha-rands looks like a Houghton telephone number. What could be better than this delightful existence? But a dark cloud hangs over this man's life. In his own words, he has lost his ability to 'inject a bit of moral outrage into the situation'.

He risks falling into the foreign correspondent's

vision of hell - becoming the 'balanced reporter', ridiculed by his colleagues for 'understanding the complexities of the South African situation' to the satisfaction of the crimplene toadies in Pretoria. It's a condition we all dread. The first sign of infection is when the SABC starts reporting one's despatches; the condition is terminal when complimentary mutterings appear in the leader columns of the Citizen.

The first imperative is to remain hostile, to guard against what is classed in South African terms as the balanced view. Thus, we are castigated for negativity, intellectual dishonesty, and whooping it up while the country is burning (or not, as the case may be).

'Go on,' said the saintly editor of this esteemed journal, 'it's time someone lifted the lid on this whole foreign correspondents' circus.' An unbalanced view in itself, one might think, but here we go."

The context in which the offending words appear is the following:

"You revile us, but you need us. You deplore our outpourings as you flatter us by reprinting them in the columns of local newspapers. The 'normally balanced Daily X', and the 'invariably hostile Sunday Y', report this, that, and the other. We send out our thoughts only to see them return, repackaged and sanitised for the South African reader. Witness the local media's second-hand coverage of the Sharpeville Six. Not one local journalist stood up to say: reprieve them, they patently don't deserve to hang.

The Progs whined in the wilderness about diplomatic damage and sanctions. It was left to us to create their ammunition. Certainly some of us went over the top, but something had to be done to shake you out of your lethargy. How much easier to let the foreign media stick their heads above the parapet. Then wait for the Argus man in London to telex our reports back to let you know there's something pongy about hanging six people who didn't do it.

You readily attach labels to us, but - on the rare occasions we find it necessary to quote from the local media - we are restrained. We don't refer to the invariably soporific Harvey Tyson, the increasingly depraved Johnny Johnson, or the nauseatingly smug Hogarth column. Perhaps we should, and then we could recover our lost sense of moral outrage."

(My emphasis. The "you" is a reference to the local media and the "we" one to the foreign media.)

Some background facts are necessary to make the sentence in which the offending words appear, more understandable: Mr Harvey Tyson was the editor-in-chief of The Star newspaper; the present appellant is the editor of The Citizen newspaper; Hogarth was the pseudonym of the late Mr Tertius Myburgh, editor of The Sunday Times. All of them wrote

columns for their respective newspapers, and they were also responsible for the editorial content thereof. The appellant's column is entitled "Johnny Johnson's Height Street Diary".

The article can thus be typified with reference to the following words of Brian St Pierre in The Devil's Advocate; An Ambrose Bierce Reader at p 53:

"Of course, the press always had some ambiguity toward itself. Journalists are alternatively self-congratulatory, defensive, or especially self-righteous when attempting to knock some mud from their shoes as unobtrusively as possible. Occasionally, they are sure of their ends but insecure about means, sometimes the other way round."

The issues in this case concern the alleged wrongfulness of the statement only. The enquiry whether a plaintiff's right has been infringed -

"is basically objective in the sense that the defendant's state of mind, motives, degree of care taken etc are not taken into account. These factors concern the presence or absence of fault on the part of the defendant. The inquiry is concerned with whether the infringement of the plaintiff's interest was in the particular circumstances objectively

unjustifiable. In order to determine this, account must be taken of the particular conflicting interests of the parties, the parties' relation to each other, the particular circumstances of the case, and any appropriate considerations of social policy."

(Van der Walt 8 Lawsa para 20 sv Delict.) The evidence given in this case is of virtually no relevance to decide this issue and can, for purposes of this judgment, be ignored.

I now turn to consider whether the offending words are, in isolation, defamatory. The verb "to deprave" is derived from the Latin "depravare" and is defined in the Shorter Oxford English Dictionary on Historical Principles (3rd ed) as follows:

"1. To make bad; to pervert; to deteriorate, corrupt. Now rare, exc. as in sense 2. 2. spec. To make morally bad. (The current sense.) 1482. 3. To represent as bad; to vilify, defame, disparage - 1667. Also absol. 4. To become bad or depraved."

There can be little doubt that to say of someone that he is "increasingly depraved", and without taking into account the context in which it is said, is defamatory.

Two questions arise at this juncture: Were the words used in their literal sense, and, did they refer to the appellant personally, to him in his professional capacity, or to his writings? It was alleged (and argued) on behalf of the appellant that the words in their context meant that the appellant:

- (a) is morally corrupt and/or debased and/or perverted;
- (b) in his calling as an editor and journalist is morally corrupt and/or debased and/or perverted;
- (c) is not a fit and proper person to be an editor and a journalist;
- (d) is not an honest person and therefore does not deserve to be recognised as an editor of standing or a person who can be trusted.



It appears to me to be obvious from a contextual point of view that the word "depraved" was not used in a literal sense. The author used figurative language and thereby deviated from the standard significance of words. (M.H. Abrams, "A Glossary of Literary Terms" 4th ed. sv Figurative Language.) An example is a description of the Hogarth column as being "nauseatingly smug": words that do not apply to a column. The reasonable reader would therefore have realised that in using the words "increasingly depraved" the figure of speech employed was hyperbole, i.e. a bold overstatement or extravagant exaggeration of fact, used either for serious or comic effect. (Abrams, op cit sv Hyperbole and Understatement).

Before reaching a conclusion as to the meaning of the words in their context, it is necessary to determine the second question posed, namely, who or what was "increasingly depraved"? It was clearly not a reference to the appellant as a person. The author of the article was dealing with

possible sources in the local media from which to quote. It was in this context that the appellant's name was mentioned. It must, therefore, follow that the reference was one to the appellant's journalistic writings. But what was said about these writings? As I understand the article, the author intended to satirize press coverage on South Africa. On the one hand one has a foreign press that feigns moral outrage and creates moral issues where there may be none. On the other hand, one has a local press that forsakes its journalistic duty by failing to raise moral issues.

"Satire has usually been justified by those who practice it as a corrective of human vice and folly. Pope remarked that 'those who are ashamed of nothing else are so of being ridiculous'. Its claim (not always borne out in the practice) has been to ridicule the failing rather than the individual, and to limit its ridicule to corrigible faults, excluding those for which a man is not responsible."

(Abrams, op cit. p168.) Seen against that background, the author conveyed to the reasonable reader that the appellant's writings were increasingly morally bad

especially since they failed to address moral issues. It is not necessary for the purpose of this judgment to find whether that statement is defamatory. I shall, on the assumption that it is, proceed to deal with the defence of fair comment which was pleaded in justification. The court a quo upheld this defence. The requirements of the defence were stated to be that:

- (i) the statement must be one of comment and not of fact;
- (ii) it must be fair;
- (iii) the facts upon which it is based must be true; and
- (iv) the comment must relate to matters of public interest.

(Marais v Richard en n Ander 1981 (1) SA 1157 (A) 1167.)

A fifth requirement was stated to be that the defence is available only if it is "...based upon facts expressly stated or clearly indicated in the document or speech which contains the defamatory words". See Crawford v Albu 1917 AD 102 at 114; Neethling, Persoonlikheidsreg, p 153.

It was submitted on behalf of the appellant that the defence must fail because the statement was a factual averment and not comment; there is no factual foundation for the comment; there is no reference in the article to the facts upon which the comment was based; and, lastly, the moral standards of the appellant are not of public interest.

The submission that the statement was one of fact and not comment cannot be accepted in the light of the finding of the meaning of the statement. This is a classic case of comment dressed up as fact: it remains an expression of opinion. See Crawford v Albu, supra, at 114. The submission that there was no factual foundation for the comment also has no merit. The respondents relied upon a number of identified columns which appeared in the Citizen under the name of the appellant. It is common cause that those columns were written by the appellant. They therefore form the factual foundation for the comment. The submission that

the moral standards of the appellant are not matters of public interest is based upon the appellant's reading of the article. I have already found that that interpretation is incorrect. It was not suggested that if the criticism was directed at the appellant's work the matter was not one of public interest. To quote from Kemsley v Foot and Others [1952] AC 345 (HL) at 355:

"If an author writes a play or a book or a composer composes a musical work, he is submitting that work to the public and thereby inviting comment."

And, further, at 356:

"... a literary work can be criticised for its treatment of life and morals as freely as it can for bad writing, e.g., it can be criticised as having an immoral tendency."

It appears from the quotations from the offending article set out above that the facts upon which the comment was

based, were not stated in the article. It is therefore necessary to consider the scope of the fifth requirement of the defence of fair comment. Its origin in South African law is to be found in Roos v Stent and Pretoria Printing Works Ltd 1909 TS 988. Innes CJ there stated at 998:

"But it is obvious that to entitle any publication to the benefit of this defence it must be clear to those who read it what the facts are and what comments are made upon them. And for two reasons. Because it is impossible to know whether the comments are fair unless we know what the facts are; and because the public must have an opportunity of judging the value of the comments. If a writer chooses to publish an expression of opinion which has no relation, by way of criticism, to any fact before the reader, then such an expression of opinion depends upon nothing but the writer's own authority, and stands in the same position as an allegation of fact."

The learned Chief Justice proceeded to quote from Hunt v Star Newspaper Co [1908] 2 KB 309, and concluded (at 999 - 1000):

"His words seem to me to apply a fortiori to cases where the facts commented upon are not placed before the reader at all. There must surely be a placing

before the reader of the facts commented upon before the plea of fair comment can operate at all. I do not wish to be misunderstood upon this point: I do not desire to say that in all cases the facts must be set out verbatim and in full; but in my opinion there must be some reference in the article which indicated clearly what facts are being commented upon. If there is no such reference, then the comment rests upon the writer's own authority."

Smith J, in a concurring judgment, expressed similar views in the following terms (at 1010):

"It is not necessary for the decision of this case, and I do not wish to be understood to lay it down as a principle, that every fact on which a comment is based should be set out in the article. I think there may be cases where the facts are so notorious that they may be incorporated by reference. But in the present article no reference was made to any of the sources from which the writer deduced the facts on which he based the assertion complained of. No opportunity was afforded to a reader of the article to know the grounds on which the imputation was based."

The matter was once again raised by Innes CJ in Crawford v Albu, supra, where he stated, as set out above, that the

defence of fair comment is only available if it is "...based upon facts expressly stated or clearly indicated...." This statement was, probably, in its context, obiter, but it nevertheless is of strong persuasive character. If regard is had to the rest of the judgment one notices that the learned Chief Justice had regard to facts which were not stated in the offending speech of the defendant but which were part of the recent history of the country (per Solomon JA at 124) and in the common knowledge of the author and addressee (per de Villiers AJA at 137).

Kemsley v Foot and Others, supra, is for all practical purposes on all fours with the present case. It, in effect, held that a reference to well known or easily ascertainable facts was a sufficient statement of those relied upon (at 360) and that the reference may be by way of implication. Lord Porter concluded (at 360):

"I do not think it necessary to go through the other cases one by one, but reference must be made to the



South African case of Roos v Stent and Pretoria Printing Works Ltd. If I thought that that judgment represented a new and independent view, it would be necessary to analyse its reasoning carefully. But in truth it is founded on Fletcher Moulton L.J.'s opinion in Hunt v Star Newspaper Co. Ltd. and does not contain any fresh point of view."

I am in respectful agreement. Roos's case must be read in its context. It represents good law as far as it goes. Kemsley's case is merely a logical extension thereof and, since both cases rely upon the same authority, should be followed. See also Golding v Torch Printing and Publishing Co (Pty) Ltd and Others 1948 (3) SA 1067 (C). To conclude: Literary criticism may be justified by reference to published works referred to in general or by implication in the alleged defamatory statement. See too Telnikoff v Matusevitch [1990] All ER 865 (CA) 871 and 881.

The last issue of substance to consider is whether the comment was fair. The word "fair" is used in a specialised

sense and means that the opinion must be an opinion which a fair man, however extreme his views may be, might honestly have, even if the views are prejudiced. It must, objectively speaking, qualify as a genuine expression of opinion which does not, "disclose in itself actual malice". McGuire v Western Morning News Co Ltd [1903] KB 100; Crawford v Albu, supra at 115; Marais v Richard en 'n Ander, supra at 1167 - 8. (My emphasis. It was not suggested that the article under discussion "in itself" disclosed actual malice.)

The respondents relied upon a number of "Height Street Diaries" to justify their comment. Each column occupies a full page. The most conspicuous portion, visually, is a framed insert headed Howlers. These "howlers" consist almost exclusively of quotations of misprints with comment highlighting the misprint. Here is a random example:

**"But the public appearance, said to have been engineered by the Queen Mother..."**

We don't know how she engineered anything."

The column itself deals with matters political, royal, social and sexual in a mocking manner; names are perverted; fictitious events and dialogue are created; fact, fiction and comment are mixed; misspellings abound; rules of grammar are ignored: all under the guise or in the name of humour. It would be inappropriate to comment on the quality of these columns. See McGuire's case, supra. I disagree with the learned trial judge where he held that the alleged defamatory statement was justified by reference to the eccentric, peculiar or outlandish style of these columns and the corruption and distortion of the English language. To my mind, the words "increasingly depraved" related not to style and form but to content. A glance at these columns, which were intended to be humorous, indicates that serious political matter was trivialised and that no moral issues were raised or promoted. There was nothing worthy of quotation for foreign consumption. A serious commentator may honestly hold the view that the column is devoid of any redeeming value. I do not thereby wish to suggest that the

appellant is not entitled to be frivolous about political and social issues or to his own brand of humour; however, he cannot complain if others deem his outpourings as being "increasingly depraved" because they do not enunciate moral precepts.

But the matter goes further. The few articles are replete with crude sexual fictional anecdotes. Persons of stature are, in this way, ridiculed. One example of what can be described as "morally corrupt" writing will suffice and I can do no better than to quote from the Height Street Diary of 4 April 1988:

"Folksy Humour

Folksy (or leery) humour of Professor Chris Barnard appearing on Late Night Live with his new wife, Karen. 'I think the song that I need is, "Will you still need me, will you still need me, when I'm 64." '.

'Karen is going to learn to make sausages, and biltong, and to handle meat (on their Karoo farm). And maybe during that period, we'll do something else. (Wink, wink, nudge, nudge). Next time you get me on this show, there'll be a little one sitting on my lap.'

'I've been through two wives, of course, and through

many women, of course, too.'

'Two things I go by, the Bible, I believe it's the book of wisdom, and nature. Is there anything in the Bible that says you must marry a girl of your age? I couldn't find it.'

'And in nature, an old bull can have a young thing, not so, as long as he can compete with the young bulls. The important thing is performance.'

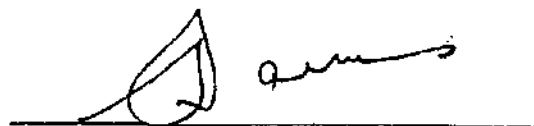
'This age difference business they talk about. Let's be practical now. Say, for example, you were not a married man and this girl comes to you and she says "I love you, will you marry me?" Will you say "No, I'm not going to marry you because I'm too old." Of course not. I would jump at it. I mean to have such a beautiful woman like that as my wife, I consider that an achievement maybe bigger than my transplant.'

'If God wanted us to have clothes on, he would have the babies born with clothes on.'

'I never climb into bed; I jump into bed.'

Wink, wink, nudge, nudge, say no more."

No more need be said. I agree that the appeal must be dismissed with costs.

A handwritten signature in dark ink, appearing to read 'L.T.C. Harms', is written over a horizontal line.

L.T.C.HARMS AJA

IN THE SUPREME COURT OF SOUTH AFRICA  
(APPELLATE DIVISION)

In the matter between:

MEYER ALBERT JOHNSON.....

Appellant

and

DENIS BECKETT.....

First Respondent

SAGA PRESS (PTY) LIMITED.....

Second Respondent

CORAM: CORBETT CJ, HEFER et VAN DEN HEEVER JJA,  
KRIEGLER et HARMS AJJA.

DATE OF HEARING: 17 September 1991

DATE OF JUDGMENT: 28 NOVEMBER 1991

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J U D G M E N T

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CORBETT CJ/.....

CORBETT CJ:

The facts of this matter are set forth in the judgments of Van den Heever JA and Harms AJA, which I have had the benefit of reading. I agree that the appeal should be dismissed with costs.

As to the words complained of by the appellant ("the increasingly depraved Johnny Johnson"), I am of the view (i) that read in their context they should be understood as referring to the writings of the appellant as a journalist; (ii) that they convey that such writings are bad, debased, perverted (see the Oxford English Dictionary, 2ed sv "depraved"); and (iii) that, so understood, the words are prima facie defamatory of the appellant in that they constitute an impairment of his professional reputation.

Turning to the defence of fair comment, I agree with both my colleagues for the reasons given by them that the words in question constitute comment, not a statement of

fact; and that the facts upon which the comment is based, viz appellant's writings in the newspaper column known as "Johnny Johnson's Height Street Diary", need not have been stated in the Frontline article. In this connection I agree that the principles laid down in the English case of Kemsley v Foot and Others [1952] AC 345 should be followed. It is not disputed that the comment in question relates to a matter of public interest. In substantiation of the defence of fair comment respondents have placed on record eight samples of the Height Street Diary which appeared in issues of the newspaper during November 1987 and February 1988. There is no suggestion that these are not representative of the appellant's writings as a newspaper columnist. Moreover, the samples are genuine; i e the facts are true. The only remaining question is whether the comment is fair.

The Height Street Diary samples have been analysed



and some illustrative extracts quoted in the judgments of my colleagues. To sum up my overall view of these writings, I would say that they are bad, both in style and content; they trivialize important matters in a manner no doubt intended to be humorous but seldom achieving this; the language used is often ungrammatical and is replete with slang, much of it derived from Afrikaans; certain of the writing is in extremely poor taste and here I refer in particular to certain lengthy references to members of the British royal family and to the extract quoted at the end of the judgment of my Brother Harms; and there is throughout the writings a recurring theme of sexual suggestiveness of the crude variety.

I say this about the writings not to moralize but in order to answer the question whether the comment published in the Frontline article was fair, in the sense that objectively speaking it qualified as an honest,

genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice. In my view, it was.

I concur in the order made by Van den Heever JA.

  
\_\_\_\_\_  
M M CORBETT

HEFER JA)  
KRIEGLER AJA) CONCUR

CG

17/6/91  
CASE NUMBER: 104/90

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In the matter between:

MEYER ALBERT JOHNSON

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DENIS BECKETT

First Respondent

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Second Respondent

CORAM: CORBETT CJ, HEFER et VAN DEN HEEVER JJA,  
KRIEGLER et HARMS AJJA

HEARD: 17 SEPTEMBER 1991

DELIVERED: 28 NOVEMBER 1991

J U D G M E N T

VAN DEN HEEVER JA

GRIFFIER, HOOGGEREGSHOF VAN SUID-AFRIKA	
02 -12-1991	
REGISTRAR, SUPREME COURT OF SOUTH AFRICA	

Denis Beckett is the editor of Frontline Magazine which is published by Saga Press (Pty) Ltd. It deals in serious and sometimes controversial fashion mainly with political issues. It has a circulation of about 10 000 readers of various political persuasions, and is aimed at the reasonably well-educated, sophisticated English-speaker.

Mr M A ("Johnny") Johnson, editor of The Citizen daily newspaper, sought damages for defamation from the editor and publisher of Frontline. The action was dismissed with costs but leave to appeal granted.

For the sake of brevity and clarity I refer to the plaintiff (appellant) and first defendant (first respondent) by their names, intending no discourtesy by omission of their courtesy titles, and generally omitting reference to the publishing company, which took no active part in the trial itself.

Johnson annexed a copy of an article containing

the alleged defamation to his particulars of claim, which state:

"6. A statement in the article refers to the plaintiff as 'increasingly depraved' (the statement).

7. The statement:

7.1 is *per se* defamatory of the plaintiff;

7.2 was caused to be published by the first and second defendants unlawfully and *animo iniuriandi*;

7.3 Alternatively to sub-paragraph 7.1 above

The statement, in the context of the article, meant, was intended to mean and was understood to mean one or more or all of the following, which are defamatory of the plaintiff:

7.3.1 The plaintiff is morally corrupt and/or debased and/or perverted.

7.3.2 The plaintiff in his calling as an editor and journalist is morally corrupt and/or debased and/or perverted.

7.3.3 The plaintiff is not a fit and proper person to be an editor and a journalist.

7.3.4 The plaintiff is not an honest person and therefore does not deserve to be recognized as an editor of standing or a person who can be trusted."

I deal with the article in more detail below.

To understand the allegations in the plea it is necessary to quote here the immediate paragraph in which the statement appears:

"You readily attach labels to us, but - on the rare occasions we find it necessary to quote from the local media - we are restrained. We don't refer to the invariably soporific Harvey Tyson, the increasingly depraved Johnny Johnson, or the nauseatingly smug Hogarth column. Perhaps we should, and then we could recover our lost sense of moral outrage."

The plea admitted the identity of the parties and publication of the article, but denied that the statement constituted defamation, and elaborated:

"2.3 The following facts were public knowledge:

2.3.1 Harvey Tyson was the editor-in-chief of The Star newspaper and a regular contributor to its editorial content.

2.3.2 The plaintiff was the editor of The Citizen newspaper and a regular contributor to its editorial content.

2.3.3 Hogarth was the pseudonym under

which a regular column appeared in the Sunday Times newspaper.

2.3.4 The aforementioned newspapers were 'local media' in the sense that they were published in South Africa.

2.4 Given those facts, the statement meant and would have been understood to mean that the plaintiff was increasingly depraved in his writing.

2.5 The statement constituted fair comment in that it was a genuine expression of comment or opinion on the plaintiff's writing which was a matter of public knowledge and interest.

2.6 In the premises, the defendants deny

2.6.1 that the statement was defamatory of the plaintiff; or

2.6.2 that the statement was published unlawfully or *animo iniuriandi*."

In a request for particulars for purposes of trial, Johnson asked for identification of every instance of his writing relied on in paragraph 2.5 of the plea, and why in the opinion of the writer of the statement such writing was depraved or increasingly depraved. The reply (amended, to retract reference to editorial columns) referred to Johnson's column in The Citizen

known as the "Height Street Diary", eight issues of which were annexed as examples of the general content and style of Johnson's writing in that column. These had appeared on the Thursdays of November of 1987 and February of 1988. The statement, so it was alleged, constituted a genuine expression of comment or opinion on Johnson's writing generally in these articles.

At the trial Mr Mostert appeared for Johnson. In opening he contended with reference to a variety of dictionaries listing synonyms for "depraved", that the statement is *per se* defamatory; and that the onus whether of proof or rebuttal accordingly burdened Beckett. Mr Mostert closed his case in respect of the issues on which the onus burdened Johnson.

The only witness at the trial was Beckett. He put in as an exhibit the front page of the issue of Frontline magazine in which the article appeared and the article itself, and told how it came to be written. He



was of the opinion, and thought moreover that he was not alone in that, that foreign correspondents in writing about South Africa reported for overseas publication what their private conversations here belied. He approached Mr Robinson, local correspondent of the Daily Telegraph, a conservative newspaper in the United Kingdom, and commissioned an article on the topic. Robinson wrote it. Beckett read and edited it and provided the title. The cover page of the April/May 1988 edition of Frontline records what are presumably the major subjects dealt with in that issue: These include

**"THE TROUBLE WITH THE FOREIGN PRESS  
LIFTING THE LID ON THE MEDIA CIRCUS"**

The title of the article is

**"FOREIGN MEDIA  
The slippery search for moral outrage."**

The article is satirical in tone but serious in content, and spares none who come within firing distance over a wide range: an individual foreign correspondent,

foreign correspondents en masse, clerics playing at politics, Mr Sonny Ramphal, overseas editors with an eye on circulation figures, and so on. It deals with the accusations of hypocrisy and bias levelled against foreign correspondents as regards their reporting on events in South Africa - where they live in luxury, being paid in foreign currency - by admission and counter-attack. The gist of the article as regards reporters, is to admit that individual foreign correspondents and foreign correspondents as a group sometimes behave badly and write what they do not personally believe, or with deliberate sensationalism, for an overseas readership many of whom are also hypocritical about events here. However, South Africa is not regarded as a news story but a moral issue, and approval of and by Pretoria is the kiss of death for a foreign correspondent. It is difficult to muster sufficient genuine moral outrage (to ensure remaining posted here in luxury), about local

political figures none of whom merits being taken seriously. The writer then turns to the local press, and has this to say:

"You revile us, but you need us. You deplore our outpourings as you flatter us by reprinting them in the columns of local newspapers. The 'normally balanced Daily X', and the 'invariably hostile Sunday Y', report this, that, and the other. We send out our thoughts only to see them return, repackaged and sanitised for the South African reader. Witness the local media's second-hand coverage of the Sharpeville Six. Not one local journalist stood up to say: reprieve them, they patently don't deserve to hang. The Progs whined in the wilderness about diplomatic damage and sanctions. It was left to us to create their ammunition. Certainly some of us went over the top, but something had to be done to shake you out of your lethargy. How much easier to let the foreign media stick their heads above the parapet. Then wait for the Argus man in London to telex our reports back to let you know there's something pongy about hanging six people who didn't do it."

Then follows the paragraph already quoted, thereafter a salvo at South Africans generally, another at racist UK readers in "ethnically interesting Labour-controlled

local authorities", and the concluding paragraph, returning to foreign correspondents, cocks a snook at their critics:

"We in the foreign press are not actually horrible people. We merely drive horribly expensive cars and live in horribly large houses. That is why we are disliked, indeed why the present article was commissioned at all - it is Am-Ex envy. But we must not whinge. We are a small band of men at the southernmost tip of Africa, doing the best we can. Like you, we can live with our pariah status. Besides, we must preserve our sense of moral outrage for the really important issues of this world.

Sonny Ramphal would expect nothing less of us."

Beckett was led by counsel as to the facts set out in the plea. He stated, i.a., that Tyson writes a column often criticised as boring (indeed, in his Height Street Diary Johnson himself refers to him as "Harvey Tiresome"), that Hogarth is the pseudonym under which the late Mr Tertius Myburgh then wrote a column in the Sunday Times; and that most of the readers of Frontline would be familiar with The Citizen, and would know that Johnson

is the editor and writes a column therein entitled "Johnny Johnson's Height Street Diary". This evidence stands uncontradicted.

The court a quo held that the words "increasingly depraved" used in the alleged defamation meant, in their context, that Johnson's work was "exceptionally bad" or "poor" but that it was unnecessary to decide whether it was *per se* defamatory since the defence of fair comment was well-founded.

When leave to appeal was granted the trial judge said

"Given the fact that the ordinary dictionary meaning of the word 'depraved' may be more serious than the innocuous one I ascribe to it, I think there is a reasonable prospect of another court differing from my interpretation of these words".

Beckett stressed in his evidence that, in adopting as his own the article he had commissioned, what he had intended to criticize, criticize even harshly, was

Johnson's style of writing rather than the content of his work, certainly not Johnson personally. His evidence was not admissible for purposes of determining the meaning of the statement since that is for the court to determine. It construes the words in their context, and considers what meaning they would convey to ordinary reasonable persons, having regard to the sort of people to whom the words were or were likely to be published (CHANNING v SOUTH AFRICAN FINANCIAL GAZETTE LTD AND OTHERS 1966 (3) SA 470 (W) at 474 A-C; Jansen JA in DEMMEERS v WYLLIE AND OTHERS 1980 (1) SA 835 at 840: "the average ordinary reader of that newspaper"; DUNCAN AND NEILL ON DEFAMATION 2nd ed, p 13, para 4.10). The kind and quality of the readership is relevant, since it is as much part of the context in which the alleged defamation occurs, as the other words contained in the article are.

Mr Mostert argued that it matters not whether Johnson's personal integrity is impugned or that of his

writing since the latter reflects the former.

In all cases, the nature of the allegation made must determine whether the reputation of the person about whom it is made, is tarnished as a result. Flemming J puts it thus in KRITZINGER v PERSKORPORASIE VAN SA 1981 (2) SA 373 (O) at 384H:

"Die uitgangspunt by laster is dat dit gaan om 'n skending van die benadeelde se fama; sy aansien of agting in die oë van andere. Soos 'n geslypte diamant het die fama vele fasette wat saam die beeld na buite bepaal. Beskadiging van enige faset het die potensiaal om 'n verminderde agting van die aanskouer vir die beeld na buite te veroorsaak en 'n lasteraksie regverdig."

Our courts have long recognized that a man's reputation includes a general estimation of his professional competence. An aspersion on his competence in his calling may be sufficient to constitute defamatory matter, "calculated to bring (him) into contempt, even though it may not reflect on his moral character" (PITOUT v ROSENSTEIN 1930 OPD 112 at p 117), which is

what the inquiry is ultimately all about. Relevant cases are referred to in BURCHELL, THE LAW OF DEFAMATION IN SOUTH AFRICA at pp 124-5.

Since the Frontline article contrasts the sins of foreign correspondents as such with the sins of their local counterparts, and since Johnson is mentioned in the company of two other columnists well known in the ranks of "the local media", the ordinary reader of Frontline could not view the statement as an attack on Johnson in any other capacity than the only relevant one: as a journalist. In dealing with journalists as a breed, the Frontline article confessed on behalf of foreign correspondents to sins of style, content and ethics: they are often too shrill in stating matters they themselves have no faith in. The reasonable Frontline reader would have no reason to assume that in comparing the performance of foreign correspondents with that of the local media, Frontline was comparing apples and



pears. The labels given the three chosen representatives of the local media must therefore relate to the style and/or content of their writing.

In calling Johnson the journalist "depraved" the statement was defamatory whether referring to his journalistic mores or the content of his writing or even his style, or more properly the first of these as reflected in the other two. Strunk and White (THE ELEMENTS OF STYLE, p 84) say:

"Style takes its final shape more from attitudes of mind than from principles of composition, for, as an elderly practitioner once remarked, 'Writing is an act of faith, not a trick of grammar'. This moral observation would have no place in a rule book were it not that style is the writer, and therefore what a man is, rather than what he knows, will at last determine his style."

Since "depraved" ordinarily means bad, corrupt, perverse, and the adjective was moreover used albeit satirically in the context of trying to regain a sense of "moral outrage" the statement was one calculated to bring

Johnson into contempt (PITOUT'S case, *supra*).

Mr Mostert argued that the defence of fair comment must fail at the first hurdle: the statement complained of was a statement of fact, he contended, not a comment upon other facts. Should that hurdle be cleared, nothing in the Frontline article, he submitted, directed the reader's attention to the Height Street Diary as being the matter commented upon; and in any event the comment was not fair since whatever other rude adjectives might be appropriate in describing the column, "depraved" was not among them.

The writer of the Frontline article was clearly expressing his opinion of Johnson's writing. Though his opinion appears in the guise of a statement of fact, in the context of the article the reasonable reader could have been under no misapprehension that the author, who throughout the article was voicing his unflattering opinion on a wide range of topics, suddenly purported to

state an objective fact. That is even less likely where the statement is made in the same breath as what can indubitably be only opinion: that Tyson's work is "soporific", i.e. dull, and Myburgh's "smug".

Generally it is necessary that the facts on which the comment is made be incorporated in the article containing the comment, at the very least by reference.

ROOS v STENT AND PRETORIA PRINTING WORKS LTD 1909 TS 988

at 999, 1000; CRAWFORD v ALBU 1917 AD 102 at 114;

GOLDING v TORCH PRINTING AND PUBLISHING CO (PTY) LTD AND

OTHERS 1948 (3) SA 1067 (C) 1078-1081. In GOLDING'S

case, however, Ogilvie Thompson AJ held that a matter of public interest may by its very notoriety be regarded as having been incorporated by reference in a statement even though such matter is not specifically mentioned in the statement in question (pp 1082-3). The Height Street Diary in The Citizen proclaims itself the product of Johnny Johnson. Any reader of Frontline not aware of the

content and tenor of his work would be able to discover that without difficulty. In any event Beckett's uncontradicted evidence was that most people who would have read the article, would have known that Johnson wrote a column in The Citizen.

In a similar situation in England the House of Lords held:

"If an author writes a play or a book ... he is submitting that work to the public and thereby inviting comment. Not all the public will see or read ... it but the work is public in the same sense as a case in the Law Courts is said to be heard in public ... (T)he subject-matter upon which comment can be made is indicated to the world at large.

The same observation is true of a newspaper. Whether the criticism is confined to a particular issue or deals with the way in which it is in general conducted, the subject matter upon which criticism is made has been submitted to the public, though by no means all those to whom the alleged libel has been published will have seen or are likely to see the various issues. Accordingly its contents and conduct are open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter

upon which the comment is founded." (KEMSLEY v FOOT AND OTHERS 1952 AC 345 pp 355-6)

(See too TELNIKOFF v MATUSEVITCH 1990 (3) AER 865 (CA) at 871 f-j, 881 g-j.) Unlike the situation where a fact may be objectively ascertainable: "he stole"; or "he lied"; there is no absolute and objective norm against which written work can be judged. In such a case, the requirements for the defence of fair comment to succeed can only be that the opinion voiced about the writing should be objectively fair in the sense that it is one which, in the judgment of the court based on the material placed before it, a fair man might honestly hold about the particular author's work, whether the defamer was aware of the particular examples of that offered in evidence when he spoke or not. CRAWFORD v ALBU 1917 AD 102, 130. KEMSLEY'S case, *supra*, at p 358 pointed out that where the factual substratum on which comment is based is so wide - "your work" - the defence of fair

comment will succeed where any fact sufficient to justify the criticism voiced<sup>.</sup> is proved. And in testing whether comment in a given case is fair or not, the court ruled that:

"... a literary work can be criticized for its treatment of life and morals as freely as it can for bad writing, e.g. it can be criticized as having an immoral tendency. The fairness of the criticism does not depend upon the fact that it is confined to form or literary content". (KEMSLEY'S case, supra, at p 356.)

In the absence of pertinent local authority, reference to the English law whence we derive the defence of fair comment is appropriate; and KEMSLEY'S case has stood the test of time. Cf BRENT WALKER GROUP PLC AND ANOTHER v TIME OUT LTD AND ANOTHER 1991 (2) AER 753.

The problem facing a writer suing for damages for defamation based on criticism of his work is usually that the inference that an expressed opinion could not honestly have been held by a literary critic may be a difficult one to draw. Quot homines, tot sententiae.

For that reason it is unnecessary to analyse the Height Street Diary in great detail. Only because in my view Johnson's style is part of the "factual substratum" on which to assess the fairness of the statement, do I add to the succinct description by Harms AJA of the general tenor of the Height Street Diary. A reasonable reader, without conscious awareness of what Strunk and White say in the passage quoted earlier, would be entitled to regard the style of the column as appropriate to its content. Slang words abound, languages are mixed, ("'acerbity' is just a way of donnering up ous like me verbally"), attempts to mock foreigners' English are crude ("Mith Thluzman velly nice thlady for Plesident. Thentral Clomittee, Thlinese Thlommunist Plarty"). The passages in brackets are merely quoted as representative examples.

In the circumstances the defence of fair comment succeeds.

The appeal is dismissed with costs.

L. van den Heever

L VAN DEN HEEVER JA