CASE NO 447/92

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE ARGUS PRINTING AND PUBLISHING COMPANY LIMITED .... FIRST APPELLANT

HARVEY TYSON............................... SECOND APPELLANT

BRIAN CURRIN................................. THIRD APPELLANT

and

ESTATE LOUIS LEIPOLDT ESSELEN RESPONDENT

CORAM: Corbett CJ, Botha, Nestadt, Goldstone JJA, et Howie AJA.

DATE OF HEARING: 1 November 1993

DATE OF JUDGMENT: 7 December 1993

J U D G M E N T

/CORBETT CJ..................

CORBETT CJ:

On 27 March 1990 there was published in the Star newspaper an article under the heading "A TALE OF TWO TREE MURDERS". In conjunction with the article there was evidently a picture of the author (the third appellant) and the caption next to this picture read:

> "Was justice colourblind in passing sentences? BRIAN CURRIN (right) of Lawyers for Human Rights writes on the sensitive issue of Equality before the Law".

The body of the article read as follows (for convenience of reference I have numbered the paragraphs):

> "(1) The chairman of the Pretoria Bar Council, Advocate William de Villiers, SC, recently took issue with me for suggesting our courts discriminate on racial grounds when convicting and/or sentencing.
>
> (2) My comments which attracted the wrath of Mr de Villiers were in relation to the so-called "Witbank Tree Murder". I think it would be both interesting and telling to compare this case, which involved black on white violence, with the infamous Louis Trichardt Tree Murder Case which involved

white on black violence.

(3) In the Witbank case, two black men picked up a white woman, had sexual intercourse with her, tied her to a tree and then stole her motor vehicle which they drove to Swaziland. Bar the two thieves who were later arrested and charged with robbery, rape and murder, the woman's domestic employee was the last person to see her alive.

(4) The deceased had bought a bottle of vodka and according to the testimony of the domestic employee, she appeared to be unhappy and drunk. Nine days later, she was found dead and tied to a tree. The probabilities are that she had been ' picked up' by the two accused four days after having disappeared.

(5) The two accused were subsequently arrested and charged with robbery, rape and murder. They were both sentenced to 10 years' imprisonment for robbery. With regard to the alleged rape, the only evidence against them were confessions by each of the accused that they had intercourse with the deceased. According to them, she had consented to the act.

(6) In spite of the circumstances in which she disappeared the trial judge found beyond reasonable doubt that she had been raped. It must also be emphasised that there was no medical evidence to support such a

conclusion. They were both given 15 years' imprisonment for rape.

(7) They were also found guilty of murder and sentenced to death. This sentence was passed in spite of the court's finding that there was no direct intention to kill her. The court found indirect intention, that the accused must have foreseen the deceased may not be found timeously, in which event she would die and in spite of this, left her tied to a tree, regardless of the consequences.

(8) It is relevant to mention that the tree was 50m from a gravel road, about 30m from a plantation used as a dumping ground, 20m from a number of bee hives and a few hundred metres from seven houses.

(9) The accused testified they thought she would be found soon after having been left and they had no intention of killing her.

(10) The fact that they did not kill her also has a bearing on the charge of rape, considering that rape can also attract the death penalty. Fortunately, both the rape and murder convictions were set aside by the Appellate Division in November last year.

(11) It should be noted the Supreme Court judge who initially sentenced the accused refused leave to appeal. Had the accused not been represented by lawyers, which is

the norm, there would have been no petition to the Chief Justice and they would have been executed.

(12) In the Louis Trichardt Tree Murder Case, evidence was led how two white farmers tied a black man to a tree. Unlike the Witbank woman, his destiny was not left to nature or to chance. He was brutally assaulted until he died.

(13) Both accused admitted tying the deceased to a tree and assaulting him. However, they denied they intended to kill him or that they foresaw he would die as a result of the assault.

(14) The first State witness, a medical practitioner, handed in a post-mortem examination report containing a list of the most horrendous injuries found on the body of the deceased.

(15) He described the incident as a 'massive assault'. The doctor testified that these injuries could not have been caused by slaps, but that blunt weapons must have been used.

(16) The second State witness, a co-employee of the deceased, testified that both the accused had kicked the deceased with booted feet. During the course of this evidence-in-chief, the court suddenly adjourned.

(16) On re-convening, prior to any cross-examination of the second State witness, the prosecutor indicated he had reached agreement with the defence concerning the acceptance of pleas tendered by the defence, namely culpable homicide by the first accused and common assault by the second accused.

(17) The next morning, the State and the defence presented to the court an agreed statement of facts described as 'evidence upon which the court must make a finding'.

(18) This set of facts, described as common cause, bears hardly any resemblance to the evidence testified by the second State witness and appears to constitute a complete capitulation by the State. Both accused were given nominal fines.

(19) The question is why did the judge accept this state of affairs when he was not obliged to? I believe he had a duty to query the preposterous statement by counsel for the defence that the facts on which the court was to find were those contained in the agreement and not as the witness had testified.

(20) I venture to speculate that had two black men tied a white man to a tree, inflicted a massive assault causing his death, we may once again have been faced with application of the common purpose doctrine

and death sentences.

(21) Lawyers for Human Rights runs a project which monitors racial discrimination by our judiciary. These are certainly not the only two cases which lead us to believe our courts do sometimes discriminate on the basis of race when convicting and passing sentence.

(22) Fortunately, there are many judges who do not allow the colour of either the accused or the complainant or deceased in murder charges to influence their decisions.

(23) However, as long as there is even one judge who shows tendencies of racial discrimination and he is tolerated by fellow judges and the Minister of Justice, the entire judiciary will be tarnished."

As a result of the publication of this article the late Mr Justice L L Esselen, of the Transvaal Provincial Division, instituted in that Division an action for damages for defamation, citing as defendants the printer and publisher of the Star newspaper (first appellant), the editor of the newspaper (second appellant) and the author of the article (third

appellant). In the plaintiff's particulars of claim it was alleged that the plaintiff was the Judge who presided in the case referred to in the article as the "Witbank Tree Murder" and that he had been identified as such by the Star to its readers in prior editions of the newspaper and also by other newspapers circulating in the Transvaal. It was further alleged that portions of the article were defamatory of the plaintiff and damages in the sum of R120 000,00 were claimed.

The defendants noted an exception to the plaintiff's particulars of claim as disclosing no cause of action upon the following grounds:

> "1. The passages relied on by the Plaintiff in paragraph 10 of the Particulars of Claim read in the context of the article as a whole are not reasonably capable of conveying a defamatory meaning.
>
> ALTERNATIVELY
>
> 2. 2.1 The article read as a whole concerned

the conduct of the Plaintiff only in his official capacity as a Judge of the Supreme Court.

(24) Any scandalous, improper or defamatory imputation on a Judge arising out of the exercise of his judicial function is an imputation on the administration of justice and is punishable by the law of contempt.

(25) It is contrary to public policy to permit a Judge of the Supreme Court to recover damages in an action for defamation based upon criticism of a judgment delivered by him in his official capacity in judicial proceedings."

The exception was argued before Hattingh J in the "Transvaal Provincial Division on 24 September 1991 and on 28 February 1992 he delivered judgment, dismissing the exception with costs. Unhappily Mr Justice Esselen had in the meanwhile passed away on 3 February 1992.

Subsequently his estate was substituted as plaintiff and it is, of course, the respondent on appeal. With leave from this Court, the appellants appeal against the order of the Court a quo. For convenience I shall continue to refer to the late Judge as "the plaintiff".

The judgment of the Court a quo has been reported (sub. nom. Esselen v Argus Printing and Publishing Co Ltd and Others 1992 (3) SA 764 (?)). From this it appears that Hattingh J adopted, as the basic criterion for adjudicating the merits of the first ground of exception, the test as to whether a reasonable person of ordinary intelligence might reasonably understand the words of the article to convey a meaning defamatory of the plaintiff (see p 767 E-F) . This is unquestionably the correct approach and, as this formulation indicates, the test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words

alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply. As it was put by Lord Reid in Lewis and Another v Daily Telegraph, Ltd; Same v Associated Newspapers, Ltd [1963] 2 All ER 151 (HL), at 154 E-F -

> "What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning."

And in Jones v Skelton [1963] 3 All ER 952 (PC) Lord Morris of Borth-y-Gest, citing Lewis's case, stated (at 958 F-G):

> "The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words..."

(See also Gatley on Libel and Slander, 8 ed, paras 86, 93, 97; Duncan & Neill on Defamation 2 ed, paras 4.05 and 4.06; Burchell, The Law of Defamation in South Africa, p 85; cf Sauls and Others v Hendrickse 1992 (3) SA 912 (A) , at 919 E.) And I must emphasize that such an implied meaning has nothing to do with innuendo, which relates to a secondary or unusual defamatory meaning which can be attributed to the words used only by the

hearer having knowledge of special circumstances. (See National Union of Distributive Workers v Cleghorn and Harris, Ltd 1946 AD 984, at 993-4, 997.)

In his particulars of claim the plaintiff relied specifically upon paras 1 to 11 and 22 to 24 of the article as being defamatory of himself, but did not plead any specific imputation. The Court a quo held, as I understand the judgment, that a reasonable person of ordinary intelligence who read the article might reasonably understand it as conveying that the plaintiff, as presiding Judge in the Witbank Tree Murder case, convicted the accused of rape, not because the convictions were justified by the evidence, but because the plaintiff is racially prejudiced; that the plaintiff sentenced the accused to 15 years imprisonment for the crime of rape and to death for the crime of murder not because these sentences were appropriate in the circumstances, but because the plaintiff is racially

prejudiced; and that plaintiff is also racially prejudiced and does discriminate on racial grounds when convicting and sentencing. (See the reported judgment at 768 I - 769 A.)

On appeal appellants' counsel argued (as he did before the Court a quo) that the article compares and contrasts "the infamous Louis Trichardt tree murder case" with the Witbank case in which the plaintiff presided; that the main thrust of the article is that the decision and sentences in the former case were the product of racial discrimination on the part of the Court; and that the article should not be read as casting a similar aspersion on what was decided in the Witbank case. In support of this argument counsel pointed out that nowhere in the article is there any direct allegation made that plaintiff was actuated by an ulterior or improper motive and submitted that this was particularly important since no secondary meaning or innuendo had been pleaded.

I cannot agree. With regard to this latter argument, it is true that no innuendo has been pleaded, but it does not follow from this that the plaintiff can only succeed if the article contains an express allegation of racial bias or discrimination in his handling of criminal cases. As I have pointed out above, in determining the natural and ordinary meaning of the words in issue the Court must take account not only of what is expressly said, but also of what is implied.

Turning to the article itself, I note that its general theme, as indicated by the headings and by the content of the article itself, is the suggestion that certain judges discriminate on racial grounds when convicting and/or sentencing accused persons. To substantiate this suggestion the author has selected two cases, similar in that in each case the victim of the crime was tied to a tree, dissimilar in that (a) the victim in one case (the Witbank case) was white, whereas

the other (the Louis Trichardt case) he was black, (b) the perpetrators of the crimes were in the Witbank case black, whereas in the Louis Trichardt case they were white and (c) the convictions and sentences were, in the view of the author, in the one case (the Witbank case) excessively harsh and in the other case (the Louis Trichardt case) excessively lenient.

The author discusses each case in detail. His discussion of the Witbank case is prefaced by reference (in paras 1 and 2) to a previous criticism of his of the Witbank case which had attracted "the wrath" of the chairman of the Pretoria Bar Council. It is clearly to be inferred from these paragraphs that this previous criticism was to the effect that the Witbank case was an instance where the Court discriminated on racial grounds in convicting and sentencing.

The article proceeds (in par 2):

"I think it would be both interesting and

> telling to compare this case [the Witbank case], which involved black on white violence, with the infamous Louis Trichardt Tree Murder Case which involved white on black violence."

The author then (in paras 3 to 5) refers briefly to some of the facts of the Witbank case and to the verdicts reached and sentences imposed by the Court (paras 6 and 7). The latter two paragraphs, together with paras 8, 9 and 10, contain statements which can clearly be construed as being critical of the rape conviction and of the conviction and sentence of death for murder. Discussion of the case concludes with reference to the appeal to this Court, which took place despite the trial Judge's refusal of leave and which resulted in the rape and murder convictions being set aside. (The judgment of this Court in the case has, incidentally, been reported: see S v Mamba en 'n Ander 1990 (1) SACR 227 (A).)

The article then turns to the Louis Trichardt case and discussion of it and criticism of the verdicts

and sentences occupies paras 12 to 21. The general thrust of the criticism is that it was a very serious case in which the victim was tied to a tree and brutally assaulted until he died; that after certain damning evidence had been led, the State and the defence got together and presented to the Court an agreed statement of facts upon which the Court was asked to make a finding; that this statement bore hardly any resemblance to the State evidence hitherto led and appeared to constitute a "complete capitulation" by the State; that both accused were given "nominal fines"; and that in accepting this state of affairs the Judge failed in his duty. The author concludes (in par 21) -

> "I venture to speculate that had two black men tied a white man to a tree, inflicted a massive assault causing his death, we may once again have been faced with application of the common purpose doctrine and death sentences."

The final three paragraphs (22 to 24) contain

general observations about "racial discrimination by our judiciary" and includes the following:

> "These are certainly not the only two cases which lead us to believe our courts do sometimes discriminate on the basis of race when convicting and passing sentence."

This statement, read in the context of the article as a whole, plainly charges the Judges in <u>both</u> the Witbank and Louis Trichardt cases with racial bias, in favour of whites and to the detriment of blacks, in convicting and sentencing the accused who appeared respectively before them. I think there is also to be read into the article the imputation that the Judges concerned were improperly influenced not only by the race of the accused, but also by the race of the victims involved.

It is conceded by counsel for the appellants that such imputations are defamatory (cf <u>Le Roux v Cape Times Ltd</u> 1931 CPD 316). The first ground of exception

must accordingly fail. I turn now to the second ground of exception.

In support of this ground appellants' counsel submitted that by reason of public policy and certain other factors a Judge should not be permitted to sue for damages for defamation in respect of criticism of a judgment delivered by him in his official capacity in judicial proceedings. Counsel made it clear that he was not arguing in favour of a blanket prohibition against Judges suing for defamation, but only that there should be a disability in the sphere thus indicated. (For the sake of brevity I shall call this "the disability sphere".) This formulation follows that contained in par 2.3 of the exception.

This is a bold and, in our law certainly, a novel contention. The firmly entrenched principle of Roman-Dutch law is that every person is entitled, as a primordial right, to be protected against unlawful

attacks upon his reputation and to legal relief when such an attack has taken place. The classic statement of the law on this topic appears in Melius de Villiers's The Roman and Roman-Dutch Law of Injuries (1899), at 24, and reads as follows:

> "The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. By a person's reputation is here meant that character for moral or social worth to which he is entitled amongst his fellow-men; by dignity that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.
>
> The rights here referred to are absolute or primordial rights; they are

not created by, nor dependent for their being upon, any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion. Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right. The law recognises the absolute character of this right, so far as it is well founded and has not been lost or forfeited in the eye of the law itself, and it takes this right under its protection against aggression by others."

This statement, or relevant portions of it, have down the years been referred to with approval by the Courts (see

Rex v Umfaan 1908 TS 62, at 66; O'Keeffe v Argus Printing and Publishing Co Ltd and Another 1954 (3) SA 244 (C), at 247 G - 248 A; Minister of Police v Mbilini 1983 (3) SA 705 (A) , at 715 G - 716 A; Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A), at 542 C-E; Argus Printing and Publishing Co Ltd v Inkatha Freedom Party 1992 (3) SA 579 (A), at 585 E-G; also Fayd'herbe v Zammit 1977 (3) SA 711 (D), at 719 F-H).

In a footnote (no 20, on p 24) De Villiers makes it clear that by "person" in the passage quoted above he means a human being or natural person, but he does not exclude the extension of these principles to legal or juridical persons. In fact our law has, in the sphere of defamation, allowed such extension. This process is fully narrated and described in the judgments of E M Grosskopf JA in the Inkatha case, supra, at 583 B - 584 J and of Rabie ACJ in Dhlomo NO v Natal Newspapers (Pty) Ltd and Another 1989 (1) SA 945 (A), at 948 F -

953 D. (See also Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another 1993 (2) SA 451 (A), at 460 G - 462 B.)

In Die Spoorbond and Another v South African Railways; Van Heerden and Others v South African Railways 1946 AD 999, this Court, however, held that the South African Railways and Harbours (which was identified as the Crown or the Government of the Union of South Africa, a legal persona) was not entitled to sue for damages in respect of defamatory statements alleged to have injured its reputation as the authority controlling, managing and superintending the railways. The main judgment in this case was delivered by Watermeyer CJ; and in addition Schreiner JA gave a concurring judgment of his own. The case, and the two judgments, were closely analysed by E M Grosskopf JA in the Inkatha case, at 595 J - 598 J. Appellants' counsel cited the Spoorbond case in support of the proposition that public

policy can constitute a ground for denying a party the right to sue for defamation. I shall return to this case later.

The argument of appellant's counsel to the effect that a Judge is not entitled to sue in the disability sphere may be summed up under the following heads:

(26) There are a number of considerations of public policy which constitute good ground for denying a Judge the right to sue for defamation in the disability sphere.

(27) There are available to a Judge alternative remedies which negative, or at any rate materially reduce, the need for a right to sue for defamation.

(3) There is a significant absence of precedent for Judges suing for damages for defamation.

(These heads do not necessarily represent the order in

which the various arguments were presented.) I shall deal with each of these heads in turn.

Public Policy

At the forefront of his argument based on public policy counsel placed freedom of expression and of the press and he argued that these freedoms were not only integral components of democracy but also facets of public policy. Moreover, he said, in the context of the administration of justice freedom of expression should be allowed the greatest possible latitude, particularly in regard to comment critical of a Judge in his official capacity. He submitted that allowing Judges the right to sue for defamation in the disability sphere would have a "chilling effect" and would remove one of the few elements of public accountability of Judges in our system. In this connection he emphasized that because of its position as an organ of State, because judicial

decisions affect citizens in every aspect of their lives (in some instances they involve the very deprivation of life) and because of the powerful public position of Judges which allows them to assume "the role of public oracles", the judiciary is inclined to attract criticism. In much the same vein counsel further argued that the healthy growth of the law is dependent upon "the highest degree of latitude" in the criticism of judicial decisions by academic lawyers; and that to allow Judges to sue in matters falling within the disability sphere would have a potentially inhibiting effect upon such criticism.

With much of this I have little fault to find; but the critical question to be asked and answered is: does it follow from this that, in the disability sphere, the Judge should be denied the right enjoyed by all his or her fellow citizens to sue when he or she has been defamed?

I agree, and I firmly believe, that freedom of

expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasize the word "unlawfully", for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (i e truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie defamatory. (See generally the Inkatha case, supra, at 588 G - 590 F.) The resultant balance gives due

recognition and protection, in my view, to freedom of expression.

I also agree that Judges, because of their position in society and because of the work which they do, inevitably on occasion attract public criticism and that it is right and proper that they should be publicly accountable in this way. And in this connection I can do no better than quote the following well-known remarks of Lord Atkin in the Judicial Committee of the Privy Council in the case of Andre Paul Terence Ambard v The Attorney-General of Trinidad and Tobago [1936] 1 All ER 704 (PC), which dealt with a conviction for contempt of court (at 709):

> "But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of

> justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men." (My emphasis.)

(See also Kotzé J in In re Phelan (1877) Kotzé 5, 9-10;

R v Torch Printing and Publishing Co (Pty) Ltd and Others 1956 (1) SA 815 (C), 819 F - 820 F, 821 F - 822H; S v Van Niekerk 1972 (3) SA 711 (A), 719 H - 721 A.)

There seems little doubt that in the nearly sixty years which have passed since Lord Atkin made these remarks attitudes towards the judiciary and towards the

legitimate bounds of criticism of the judiciary have changed somewhat. Comment in this sphere is today far less inhibited. Criticism of judgments, particularly by academic commentators, is at times acerbic, personally oriented and hurtful. I doubt whether some of this criticism would have been regarded as falling within the limits of what was regarded as "respectful even though outspoken" in Lord Atkin' s day. (See, for example, the academic criticism alluded to, in R v Shivpuri [1986] 2 All ER 334 (HL), at 345 f-g and the relevant article in [1986] Cambridge Law Journal at 33, the language of which was described by Lord Bridge as being "not conspicuous for its moderation".) But we are all to a degree captive to the age in which we live. And modern norms relating to freedom of expression and the discussion of matters that were formerly tabooed must be recognized and taken into account in setting limits in this sphere. To some extent what in former times may have been regarded as

intolerable must today be tolerated. (Cf the remarks made, in regard to contempt of court, in Borrie and Lowe's Law of Contempt, 2 ed, 231, 235, 236.) This, too, will help to maintain a balance between the need for public accountability and the need to protect the judiciary and to shield it from wanton attack. As to the "chilling effect" referred to by counsel, in the not inconsiderable period of my experience I have certainly not become aware of any such restraint, nor noticed its influence, despite the fact that hitherto it has always been generally assumed, as far as I know, that Judges enjoy the rights of the ordinary citizen vis-a-vis those who defame them.

With regard to the argument based upon the inhibition of academic criticism, I would make three short points. Firstly, I do not believe that there is any valid reason for such inhibition. Secondly, I have again not noticed any such inhibition in the past,

despite the assumed sanction of legal action for defamation lurking in the background. Thirdly, I fail to see why in criticising the judgment of a Court it is in general necessary to resort to the language of defamation. In the exceptional case where the criticism itself is of so serious a nature as to be prima facie defamatory, the critic must choose whether to voice it and rely upon one of the defences which render it lawful or to remain silent. After all, the defamatory statement may, despite what the critic thinks, turn out to be totally unfounded. As I understand counsel's argument, in those circumstances, however serious the defamation, the Judge must simply grin and bear it. I do not believe that that is the law.

Appellant's counsel further developed the argument based on public policy by referring to what he termed "the negative impact on the administration of justice". In elaboration of this he submitted that the

prospect of a Judge litigating in the Supreme Court in his personal capacity concerning a matter in which his competence and integrity as a Judge was in issue would inevitably have the effect of bringing the administration of justice into disrepute; and that, therefore, it was contrary to public policy to allow this. In support of this argument counsel referred to the Australian decision of Trouqhton v Mcintosh (1896) 17 NSWR 334. I shall deal with this case more fully at a later stage. At this point it is sufficient to note that in the majority judgments of Stephen J and Cohen J (there was a minority dissent by Simpson J) there are expressions of opinion which support counsel's general submission.

I agree that a Judge litigating in the Supreme Court about his competence or integrity is not a happy or desirable state of affairs. The reasons are obvious and it is not necessary to elaborate upon them. Because of this I believe that a Judge should be chary about

resorting to litigation even where what has been said about him can be categorized as defamation. But this is a far cry from denying him the right to sue in regard to all matters falling within the disability sphere. In this connection the following remarks of Bristowe J in Attorney-General v Crockett 1911 TPD 893, at 931, made with reference to an application for committal for contempt, are, in my view, apposite:

> "There is much to be said for the view expressed by BUCHANAN, J.P., in Rex vs Blanch and Richardson (supra, p. 89), that 'it is more conducive to the dignity of a court of justice not to pass from its more serious work to take notice of every petty malicious attack.' If a court steadily and consistently does its duty, it can often afford to disregard spiteful and malicious comments. On the other hand, as was said by WILMOT, C.J., in his undelivered judgment in Almon's case, it is not only necessary that a court should be impartial, but it is also necessary

> that it should 'be universally thought so'. And as was pointed out in McLeod and St. Aubyn (1899, A.C. p 561), circumstances may arise in which it may be very necessary to protect the Courts of Law from aspersions on their honour and integrity."

To deny a Judge the right to sue in the disability sphere would be both illogical and inequitable. It would be illogical because it is conceded that he has a general right to litigate and indeed may sue in respect of a defamation falling outside the disability sphere; yet such litigation would give rise to most, if not all, the undesirable features which have been alluded to by counsel. Here let me give an illustration which was put as a hypothetical case to appellants' counsel in the course of argument. Suppose that it were stated publicly of a Judge that his behaviour off the Bench (instances given) deviated so

grossly from social norms that he was not fit to sit on the Bench. Such a defamation would, so I understood counsel to concede, fall outside the disability sphere and the Judge would be entitled to take action. On the other hand, if it were said of a Judge that he was a racist and that his judgments were perverted by racial bias, then, I gather, litigation would be taboo. I cannot see any merit or logic in such a distinction.

Another illogicality, or anomaly, arises from the consideration that a Judge who has been seriously defamed, even in the disability sphere, can initiate (by laying a charge) a prosecution of the defamer for criminal defamation (see generally Hunt South African Criminal Law and Procedure, Vol II, revised 2 ed, 552 ff). This in fact happened in the case of S v Revill 1974 (1) SA 743 (A). In such a case, particularly where the accused pleads truth, the Judge and his conduct come under scrutiny in Court just as much as they would in a

civil action for defamation.

Furthermore, as I have indicated, the disability in judicio contended for by appellants' counsel could give rise to great inequity. This is obvious if one considers the case of a gross defamation, such as a statement that Judge X's judgment in a particular case bore no relation to the merits of the matter but was motivated by a bribe given to him by or on behalf of one of the parties. Postulate that this allegation is devoid of truth and was widely and prominently published in the press. Why should the Judge be denied the satisfaction of clearing his name in court and recovering damages to compensate him for wounded feelings and injury to his reputation? The reason escapes me.

Finally, under the general head of public policy, appellants' counsel invoked the well-known precept of justice being "seen to be done" and argued

that it would be difficult to achieve this ideal where a Judge appears as a litigant in his "own" Court. Viewed from the point of view of the lay litigant, so it was argued, there would, or might be, a reasonable suspicion that there would not be an impartial adjudication. I do not believe that there is substance in this argument. One of the precautions invariably taken in cases involving Judges is that a Judge from another provincial division is asked to hear the case. This is what happened in the present case; and it is also what happened in Revill's case, supra, which involved two court hearings at first instance. But even if there is substance in these considerations, it seems to me that they apply equally to litigation outside the disability sphere and do not provide a reason for denying a Judge the right to litigate within the disability sphere. The only logical response to these considerations, if valid and sufficiently cogent, would be a total denial of the

right to sue.

Finally, appellants' counsel pointed out that there were a number of special protections enjoyed by Judges not available to ordinary litigants and argued that some of these would have the effect of "unfairly strengthening" the position of a Judge in litigation against an ordinary citizen. In this regard he listed, as such protections, the qualified privilege of a Judge for defamatory imputations, the fact that a Judge may be sued only with the leave of the Supreme Court, a Judge's immunity from compulsion to testify and the security of tenure of office which a Judge enjoys. With all due respect to counsel, I am unable to see how these so-called "protections" in any way strengthen a Judge's position as a plaintiff in litigation generally; and, in any event, I fail to understand why these "protections" should deny the Judge the right to sue for defamation in the disability sphere, but otherwise allow him free rein

litigate.

I might add that in general Judges are rather more vulnerable than their fellows. They are public figures and, as I have indicated, they are accountable to the public for the proper discharge of their duties in regard to the administration of justice. The public have the right to criticize them and the manner in which they discharge their duties. But they suffer under the disability (not pertaining to other public figures) of not normally being in a position to defend themselves publicly, to answer back. As Lord Denning put it, in R v Metropolitan Police Commissioner, Ex parte Blackburn (No 2) [1968] 2 All ER 319, at 320 G -

> "All we would ask is that those who criticise us will remember that from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own

vindication."

In the Inkatha case, supra, E M Grosskopf JA summed up the effect of the judgments in the Spoorbond case, supra, as follows (at 598 I-J):

> "Taking the judgments in the Spoorbond case as a whole, the central theme is that the State as a persona is unique - its nature and functions are different from those of all other corporations and its reputation is not only invulnerable to attack but can, in any event, be defended by political action unavailable in its nature or scope to others; moreover, the State should not be allowed to use its wealth derived from its subjects, to launch against those subjects an action for defamation."

These considerations obviously do not apply to Judges, who, as I have just shown, are peculiarly ill-equipped to defend themselves. There is no basis for extending the general principle applied in the Spoorbond case to the

present case. For these reasons appellants' counsel has failed to persuade me that there is any valid reason on grounds of public policy to restrict a Judge's right to sue for defamation to the extent contended for.

Alternative Remedies

The only alternative remedy advanced by appellants' counsel was that species of contempt of court known as "scandalizing the court", which he described as a unique criminal sanction having exclusive application to Judges and the administration of justice and as being fashioned to deal with insults to and defamation of the judicial office and the administration of justice.

The law relating to contempt by scandalizing the court is dealt with fully in the textbooks (see Hunt South African Criminal Law and Procedure, Vol II, revised 2 ed, 178 ff; 6 LAWSA. par 201; Snyman, Strafreg, 3 ed,

358). It is defined in LAWSA in the following terms (par 201):

> "Contempt is here committed by the publication either in writing or verbally of allegations calculated to bring judges, magistrates or the administration of justice through the courts generally, into contempt, or unjustly to cast suspicion upon the administration of justice."

The purpose which the law seeks to achieve by making contempt a criminal offence is to protect "the fount of justice" by preventing unlawful attacks upon individual judicial officers or the administration of justice in general which are calculated to undermine public confidence in the courts. The criminal remedy of contempt of court is not intended for the benefit of the judicial officer concerned or to enable him to vindicate his reputation or to assuage his wounded feelings (see Attorney-General v Crockett, supra, 925-6; S v Tromp

1966 (1) SA 646 (N), 652 G - 653 F; S v Van Niekerk, supra, 720 H - 721 A) . As Lord Morris put it in McLeod v St Aubyn [1899] AC 549 (PC), at 561 -

> "The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information."

(See also Borrie and Lowe's Law of Contempt, 2 ed, 229 -30.) Nor does a prosecution for contempt do more than

punish the offender. It may, incidentally, vindicate the good name of the judicial officer, but it does not provide him with any personal relief by way of damages. There are many differences of substance and procedure between a prosecution for contempt and an action for defamation. It is true that in certain cases the two may overlap in the sense that the facts may give rise to the

possibility of either being instituted, but this is no reason to regard the one as displacing the other.

I know of no authority in our law which even suggests that, because a statement concerning a Judge which scandalizes him in his official capacity could give rise to a prosecution for contempt, the Judge is precluded from suing civilly the maker of the statement for damages for defamation. (I shall deal later with Troughton v Mcintosh, supra, which appellants' counsel cited in support of this proposition.) In my opinion, the existence of this so-called "alternative remedy" is no reason to deny the civil remedy for defamation.

Absence of Precedent

Appellants' counsel contended that the absence of South African precedent indicated that a Judge did not have a right of action in the disability sphere and he referred in this connection to what was said by

Watermeyer CJ in the Spoorbond case, supra, at 1008:

> "No case was quoted to us in which such an action has ever been brought, and the nonexistence of such cases would be surprising if the Crown had a legal right to sue for damages for injury to its reputation. It would be surprising because many business activities are, and have been in the past, carried on by the Crown, not only in South Africa but elsewhere in the Commonwealth, and the management and conduct of such activities are peculiarly liable to hostile criticism and attack by adverse interests. Had such a right existed one would have expected to find reports of cases in which it had been claimed."

I do not think that it is correct to say that there is a complete absence of precedent. In Meurant v Raubenheimer (1882) 1 Buch App. Cas. 87 a magistrate and civil commissioner in a country district was charged at a

public meeting with introducing private feeling into public prosecutions. He sued one of the persons responsible for this charge and recovered damages. It is clear that the defamatory statement related to the plaintiff's discharge of his duties as magistrate. In Philpott v Whittal, Elston and Crosby & Co 1907 EDC 193 a resolution of a farmers' association which was published in the press imputed to the plaintiff, the local magistrate, bias in giving decisions in regard to cases arising from prosecutions under certain legislation and that his reason for so doing was pecuniary profit to himself. The magistrate sued and recovered damages for defamation. In the early case of Mackay v Philip 1 Menz 455 the plaintiff, the magistrate ("landdrost") of Somerset, sued the defendant, the well-known Dr John Philip of the London Missionary Society, for damages for defamation. The case arose from certain allegations in a book entitled "Researches in South Africa", written and

published by the defendant. In the book a description was given of the cruel and oppressive treatment alleged to have been meted out by the plaintiff to "a Hottentot" who had stolen some of the plaintiff's brandy. The acts imputed to the plaintiff were acts "committed by him while in the execution of [his] public office", but it is not clear whether they were of a judicial as opposed to an administrative, nature. At all events, plaintiff's action succeeded and the defendant was ordered to pay damages in the sum of £200 and costs.

Appellants' counsel sought to distinguish these cases on the grounds that magistrates are in a different position from Judges and that the policy considerations which preclude Judges from recovering damages for defamation in the disability sphere do not all apply to magistrates. In support of this he referred to the facts that (i) magistrates do not enjoy security of tenure of office; (ii) that, being civil servants, they

 are promoted

on their conduct and performance and thus ' their promotional prospects can be impeded by injury to reputation; (iii) that no special procedure exists for obtaining leave when suing a magistrate; and (iv) that the alternative remedy of contempt is limited by the powers conferred by sec 108 of the Magistrate's Court Act 32 of 1944, whereas Judges have an inherent jurisdiction to punish for contempt.

Point (iii) above does not appear to me to have any relevance whatever. Points (i) and (ii) are factually correct, but do not provide any reason for allowing a magistrate to sue for defamation, but not a Judge. Point (iv) is also without substance. Sec 108 deals only with contempts committed in facie curiae. A magistrate's court has, in addition, jurisdiction to try a contempt of court committed ex facie curiae brought before it by way of an ordinary criminal summons (see R v Van Rooyen 1958 (2) SA 558 (T)). The only difference

between the magistrate's court and the Supreme Court in this sphere is that the latter can also deal with a contempt ex facie curiae by the summary procedure (see Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa, 8 ed, 376). I fail to see the relevance or the cogency of this distinction to the question as to whether a Judge, as distinct from a magistrate, should be denied the right to sue for defamation in the disability sphere. Moreover, it seems to me that most, if not all, of the so-called public policy considerations advanced by appellants' counsel as reasons why a Judge should not be permitted to sue in this sphere, apply also to a magistrate.

It is true that there are no reported cases in South Africa of a Judge suing for a defamation relating to the discharge by him of his judicial functions. The Court is, nevertheless, aware of at least two instances (one of them very recent) where a South African Judge did

institute such action, but in each case the case was settled by an out-of-court payment of damages by the defendant. There are also admittedly no recent examples in England of such litigation. (Cf Doctor Caesar v Curseny 78 ER 556, and remarks in Birchley's case 76 ER 894.) In fact the only relatively modern reported case on the subject which counsel's researches could bring to light was Troughton v Mcintosh, supra.

In this case the defendant appeared as an appellant before the plaintiff, described as a "police magistrate", in a number of appeals against municipal assessments for rates imposed on his properties. The court dismissed all but one of his appeals. Immediately after the conclusion of the last appeal and when still in the courtroom the defendant made certain remarks which were alleged to mean that the plaintiff, while acting in his judicial office, was influenced by corrupt, improper and malicious motives and that he gave his decision in

the defendant's appeals by reason of malice and not on the merits of the cases. Stephen J posed the issue thus(at 337):

> "The question, therefore, for determination resolves itself into the all-important one whether a Magistrate, exercising judicial functions, can sustain an action for words uttered (as these were) sedente curiâ, implying that a decision was attributable to corrupt motives."

At a later stage of his judgment Stephen J emphasized (at 341):

> "I am dealing, it must be distinctly understood, solely with occurrences in open Court - sedente curiâ. It may be admitted that many of the reasons against the policy of bringing actions by Judges apply to slanders outside, to libels by newspapers, pamphlets and the like, e.g., the reported cases of the Sydney Morning Herald, the Evening News and the Echo. I

confine my judgment to the very case before me."

Points made in the judgments of Stephen J and Cohen J for denying the plaintiff the right to sue for defamation included the following:

(28) The absence in textbooks which refer to contempt of Court of any hint of another proceeding, where the contempt takes the shape of an aspersion upon the integrity of a Judge (at 337); and generally the lack of authority favouring a civil action in such circumstances (358-9).

(29) An aspersion of this kind should be regarded by the Judge as a libel on the administration of justice; that the personal wrong is absorbed in this offence; and that there is no libel upon the Judge personally and no personal remedy open to him (at 338, 341, 354-6).

(3) The difficulties and embarrassment which could arise if a Judge, having exercised his summary jurisdiction for contempt, should appear as a suitor in court and ask another Judge to come

to a decision on the same facts; or even if he sues without any antecedent proceedings for contempt (at 339).

(4) A duel of words in Court between the incensed Judge, who is protected by absolute privilege, and a disappointed suitor, who is not, would not be consistent with justice (at 341).

(5) The same considerations should apply to a judicial officer in an inferior court (341-21, 359-60).

(6) The defendant in a civil action might plead truth and justification, either as a defence or in mitigation of damages. This would be "anomalous and a scandal upon the administra-

tion of justice". Rather that it be incompetent for the judicial officer to bring such an action (at 343).

In his dissenting judgment Simpson J indicated his disagreement with most of the points raised by the majority. He stated, inter alia (at 350-1) -

> "It was not contended, and I do not think it could be contended, that if the words complained of in the case now under consideration were spoken of the plaintiff out of Court, an action could not be maintained, see Fuller v Weston (2), and yet in such an action there might arise the same state of things to which Mr Justice Stephen refers when he speaks of the defendant pleading truth and publication for the public benefit, or setting up the truth of the charge merely in mitigation of damages. Whether an action be brought for words spoken in or out of Court, the defendant can equally plead, by way of defence, that the allegations were true, and that it was for

> the public benefit that they should be published, and, in either case, he can set up the truth - without any special plea -in mitigation of damages."

While he admitted to being impressed by the arguments based on public policy raised by Stephen J, Simpson J stressed the need to ride this restive horse carefully (at 351). He further took the view that such authority as there was favoured the view that a magistrate against whom a gross charge of corruption had been made in open court was not deprived of the right "possessed by the humblest person in the community" to proceed civilly against his defamer (at 351).

I have dealt with the Trouqhton case at some length because it really formed the keystone of the argument of appellants' counsel. But it must be borne in mind that at best it is merely persuasive authority, weakened by the sharp differences of opinion on the Court

on matters of principle and by the fact that it is distinguishable from the present case on the facts. Moreover, a curious feature of the case as authority is that it is apparently not referred to in any textbook on defamation or tort (delict), save for Gatley on Libel and Slander, 8 ed, par 400, note 78, where it is cited in a footnote to a section dealing with the privilege of parties to an action. No textbook that I have consulted suggests that a Judge cannot sue in the disability sphere. Indeed such indications as there are, seem to be to the contrary (see e g Gatley, op cit, par 173, note 37; Borrie and Lowe, op cit, p 245). The significant points made in the majority judgments have been considered and dealt with earlier in this judgment. And finally, as to the "scandal upon the administration of justice" said to arise where in a civil action for defamation by a Judge were truth and justification to be pleaded, I would point out that in Meurant v

Raubenheimer, supra, and Mackay v Philip, supra, justification was pleaded and in Philpott's case fair comment; and these defences were considered by the court in the ordinary way.

An obstacle - in my opinion an insuperable one - standing in the way of acceptance of the general contention advanced by appellants' counsel is the fact that it is very difficult to define the boundaries of such a disability sphere and to justify such a rule. I have already alluded to problems in this regard. Let me give a further instance. During the course of his argument appellants' counsel was asked by a member of this Court what the position would be in case where it could be shown that a person made a defamatory allegation concerning a Judge which fell within the disability sphere, knowing that the allegation was false or with reckless disregard as to whether it was true or false: whether in such a case the Judge could sue for

defamation. Counsel's answer, as I understood it, was in the affirmative; and he invited this Court to adopt the well-known Sullivan principle which pertains to actions for defamation by public officials in the United States of America (see New York Times Co v Sullivan 376 US 254, 279-80). In terms of the Sullivan principle, the onus is on the plaintiff (being a public official) to establish the defendant's knowledge of the falsity of his statement or his reckless disregard of whether it was false or not. I am not sure whether counsel wished us to import not only the basic principle but the rule as to onus as well. At all events, I cannot conceive of any valid basis upon which this court could engraft upon our common law of defamation, in respect of Judges only, the Sullivan principle or something similar to it. To do so would amount to a usurpation of the powers of the Legislature.

Finally, I would point out that all that is

being decided in this case is that a Judge who has been defamed by way of criticism of a judgment delivered by him in his official capacity in judicial proceedings is entitled to sue his defamer. The success of his action will depend, inter alia, upon whether the defendant can effectively invoke one of the various defences to which I have alluded, including fair comment and truth and for the public benefit.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

BOTHA JA)
NESTADT JA)
GOLDSTONE JA)
HOWIE AJA)