REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: **195/03**

In the matter between:

TIMES MEDIA LIMITED First Appellant

MICHAEL WILLIAM ROBERTSON Second Appellant

JAN HENNOP Third Appellant

ROWAN PHILP Fourth Appellant

CRAIG JACOBS Fifth Appellant

and

BARRY NISELOW First Respondent

NISE CATERERS CC Second Respondent

CORAM: **MPATI AP, STREICHER, CONRADIE JJA, ERASMUS and PATEL AJJA**

HEARD: **26 AUGUST 2004**

DELIVERED: **1 DECEMBER 2004**

Summary: Defamation – plaintiff relying on a sting or quasi-innuendo restricted to the defamatory meaning chosen in pleadings and cannot rely on any other meaning that words complained of may be capable of bearing. [Order in para 31.]

JUDGMENT

MPATI AP:

[1] The second respondent is a Johannesburg catering business of which the first respondent is the sole member. The respondents were the successful plaintiffs in an action for damages for defamation which they instituted in the Johannesburg High Court against the appellants. The first appellant is the owner and publisher of the Sunday Times newspaper and the second appellant its editor. The third, fourth and fifth appellants are journalists on the staff of the Sunday Times.

[2] On 10 September 1999 approximately 600 children from around the country and who were members of the Field Band Foundation (the Foundation), an organisation that provides facilities and instruments for young people to play in musical bands, were engaged to perform at the opening ceremony of the All Africa Games at the Johannesburg Stadium. They assembled in the parking area of the stadium at approximately 10h00. The organiser of the Foundation, Ms Retha Cilliers, had made prior arrangements with the second respondent for the latter to serve two meals to the children, lunch between 12 noon and 13h30 and supper. However, lunch, consisting of beef stew and maize meal porridge ('pap'),

was only served at 15h00. A fruit juice in unmarked plastic containers was also supplied. When the second respondent ran out of beef stew, pieces of chicken were served.

[3] It is common cause that a large number of the children took ill within an hour of having consumed the meal. They experienced nausea, stomach cramps and vomiting. Ms Cilliers summoned medical assistance and Dr John Garth Boden, accompanied by para-medics, came to the scene. He and his team had been contracted to provide medical services within the stadium for the Games. Dr Boden testified that he found two large groups of children between the Johannesburg Athletics Stadium and Ellis Park Stadium. Some of them were actively vomiting and others had vomited. Because of the large number of children who needed medical attention his team could not cope. He called for back-up, which arrived in the form of two private emergency services. The Johannesburg Metro dispatched vehicles from their fleet which included their disaster bus and the sick children were removed by ambulance and buses to various hospitals which had been notified that they would be receiving multiple casualties. At these hospitals, one of which was the Johannesburg General Hospital, some of the children were discharged after treatment

while others were kept overnight.

[4] On 12 September 1999 an article appeared in the Sunday Times newspaper under the heading: 'Cook that spoiled Games broth'. On the same day a placard bearing the legend of the Sunday Times, reading: 'POISONED KIDS COOK FOUND' appeared in the streets of Johannesburg. The article read:

'The man who served up the meal that poisoned 600 children at the opening of the All Africa Games on Friday is still catering at the event. Barry Niselow, 38, said he would continue to dish up the beef stew suspected of poisoning the children at the games.

On Friday night, four major Johannesburg hospitals went into crisis alert as busloads of children – aged between eight and 18 – arrived suffering from severe vomiting, diarrhoea and dehydration. Niselow's Company, Nise Caterers, supplied the children with beef stew, pap and fruit juice at a vending stand outside Johannesburg Stadium at 3.30 pm on Friday – 45 minutes before children began complaining of stomach cramps. Niselow refused to take responsibility for the fiasco until the food had been tested, saying the natural acidity of the fruit juice he served – rather than the meat – had triggered mild nausea symptoms among just a few children.

However, Professor Kenneth Boffard, head of disaster planning at Johannesburg Hospital, said he believed the caterer's stew was to blame. "The samples brought in smelt awful and looked appalling. I'd say food poisoning of this type is the result of contamination in the preparation process or food being left out too long."

The caterer claimed that the children's illness had been "blown out of proportion". "Some of those kids were dancing on the hospital bus – only eight children were really sick, which isn't even a percentage of the 15 000 meals served that day. Under the circumstances, the food preparation was 100 percent. Yet my whole reputation is at stake in this."

But Dr John Boden, a trauma physician who supervised the treatment of 150 children at Johannesburg Hospital, said dozens of his patents were “vomiting, rolling on the floor and crying”, while 18 were treated with drips overnight for dehydration.

“To my mind this is the biggest medical disaster of its sort I’ve ever come across.”

Delia Koopman, 18, who had travelled from Stellenbosch with fellow members of the Penny Players Field Band to perform in a gymnastic display at the opening, said: “Shortly after we ate, I started feeling funny – like my stomach was burning. Some kids fainted and others started throwing up all around me. I felt like I had a fever.”

The chairman of the All Africa Games board of directors, Mthobi Tyamzashe, said the organisers of the games had not terminated their contract with the caterers because “we have not found them guilty up to now”. The All Africa Games is conducting an internal probe.’

[5] The respondents did not plead that the statement or the placard or cartoon was *per se* defamatory of them. They pleaded instead, in their particulars of claim, that the readers of the Sunday Times understood the article to have the following defamatory meanings:

‘9.1 The First Plaintiff was responsible for the dishing up of beef stew which was the cause of the poisoning of 600 children at the opening of the All Africa Games;

9.2 Such poisoning was attributable to the negligence of the First Plaintiff who had not taken proper care to prevent the food being contaminated in the preparation process or had negligently allowed such food to be left out too long.

9.3 Samples of the food prepared by the First Plaintiff “smelt awful and looked appalling”.

9.4 The First Plaintiff callously refused to accept responsibility for such food and continued to supply children with the same food notwithstanding that such was responsible for the said food poisoning of children;

9.5 The First Plaintiff untruthfully denied that beef stew prepared by him was responsible for such poisoning and falsely averred that the acidity of fruit juice had triggered mild nausea symptoms in the children, when he knew or should have known that the poisoning of the children was caused by the beef stew prepared by him.

9.6 The First Plaintiff's denials were to be rejected in as much as Professor Kenneth Boffard, head of disaster planning at Johannesburg Hospital said he believed the caterer's stew was to blame and made the statement attributed to him in the third column of such article.

9.7 The poisoning constituted the biggest medical disaster of its sort which Dr Boden who supervised the treatment of the children at the hospital had ever come across.'

[6] The allegations in paragraphs 9.1, 9.2 and 9.3 of the particulars of claim as quoted above were repeated in respect of the second respondent and it was alleged further that:

'12.1.4 The Second Plaintiff did not use proper skill or care in the preparation of the food and should not have been trusted to continue catering at the All Africa Games.

12.1.5 The Second Plaintiff represented by the First Plaintiff callously denied responsibility for their actions and were unrepentant in regard thereto.'

In addition the respondents relied for their claims on a cartoon which appeared in the next issue of the Sunday Times, on 19 September 1999. The cartoon depicts part of a stadium with images of children lying on the ground with arms outstretched. The caption at the top read: 'ALL AFRICA GAMES, THE CLOSING CEREMONY . . .'. Then there is depicted an

official who is on the telephone with a clipboard in his left hand, saying: 'HELLO; CHOREOGRAPHER? DOES THIS REPRESENT THE END OF THE GAMES, OR ARE WE STILL USING THE SAME CATERER?'

The respondents alleged in the particulars of claim (para 11.3) that the cartoon 'was meant and understood to mean by readers of the Sunday Times that food supplied by the Plaintiffs was calculated to cause the unconsciousness or death of children to whom the Plaintiffs were supplying meals'.

[7] The appellants admitted the publications but denied that the article and cartoon are capable of bearing the meanings attributed to them by the respondents and accordingly denied that they are defamatory of the respondents. In the alternative, the appellants pleaded that the allegations contained in the article were true, alternatively, substantially true and were published in the public interest. Two further defences were pleaded in the alternative, viz (a) that the publications were made in circumstances that made it reasonable to do so and, (b) that the publications contained expressions of opinion.

[8] At the commencement of the trial the court *a quo* (Foulkes-Jones AJ) ordered, by agreement, that the issues of liability and quantum be separated. The trial accordingly proceeded on the issue of liability only, at the end of which the trial judge held that 'the article . . . and the poster were defamatory of the plaintiffs' and found 'in favour of the plaintiffs, with costs,

including the costs of two counsel'. It is against that order that the appellants now appeal with leave of the trial court.

[9] The first question to be considered is whether the article and cartoon conveyed to the ordinary reader of the Sunday Times one or more or all of the defamatory imputations attributed to them in the particulars of claim. Such ordinary reader would be 'a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto'. (*Demmers v Wyllie and Others* 1980 (1) SA 835 (A) at 842H.) Very recently this court (per Lewis JA), in *Mthembi-Mahanyele v Mail and Guardian Ltd and Another* [2004] 3 All SA 511 (SCA) at 520 para [26], endorsed the following statement by Colman J in *Channing v South African Financial Gazette Ltd* 1966 (3) SA 470 (W) at 474A-C:

'. . . the ordinary reader is a "reasonable", "right-thinking" person, of average education and normal intelligence; he is not a man of "morbid and suspicious mind", nor is he "super-critical" or abnormally sensitive; and he must be assumed to have read the article as articles in newspapers are usually read. For that assumption authority is to be found in *Basner v Trigger* 1945 AD 22 at pp 35-6. It is no doubt fair to impute to the ordinary reader of the *South African Financial Gazette* a somewhat higher standard of education and intelligence and a greater interest in and understanding of financial matters than newspaper readers in general have. But this, I think, is clear: one may not impute to him, for the purposes of this enquiry, the training or the habits of mind of a lawyer.'

As to the attributes of a 'right-thinking' person Marais JA said the following in *Independent Newspapers Holdings Ltd and Others v Suliman* [2004] 3 All SA 137 (SCA) at 153 para [29]:

'For myself, I have no doubt that sound legal policy should not require a court hearing a defamation suit to ascertain the meaning and effect of words by reference to the meaning and effect that would be attributed to them by anyone

other than the well-known notional reasonable person in the particular circumstances. Anything less would be unfair to the publisher of the statement who is sought to be held liable; anything more would be unfair to a plaintiff who bears the onus of establishing both the meaning of the words used and the defamatory nature of that meaning. In the former case it would subject the publisher to liability for less than reasonable interpretations of published matter; in the latter case it would require a plaintiff to establish more than that reasonable readers would attribute a particular meaning of a defamatory nature to the matter. The same considerations apply, so it seems to me, to the suggestion (Jansen JA in *SA Associated Newspapers Ltd en 'n ander v Samuels* 1980 (1) SA 24 (A) at 30 and *Demmers v Wyllie* 1980 (1) SA 835 (A) at 840) that one test should be applied when ascertaining the meaning of the words used and another more intellectually and ethically rigorous test when deciding whether the ascertained meaning is indeed defamatory. In my view, neither logic nor sound legal policy requires the application of two different criteria to these questions.'

[10] In her judgment Foulkes-Jones AJ said that 'what is contended for by the Plaintiffs in paragraph 9 of their particulars of claim as regards the meaning of the article, appears from the evidence to have been established'. Not unexpectedly, counsel for the appellants criticised this finding, submitting that the test in establishing whether or not the plaintiffs had proved their quasi-innuendos or stings is objective; no evidence is admissible to assist them in this regard. He relied for his submission on the decision of *Johnson v Beckett and Another* 1992 (1) SA 762 (A) at 773A-D, and *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) at 20E-G.

[11] Counsel's submission as to the test to be applied is obviously correct. The criticism, however, is not entirely justified. It was alleged in the particulars of claim (para 9.5) that Professor Kenneth Boffard, head of disaster planning at Johannesburg Hospital, had said that 'he believed the caterers' stew was to blame' and 'the samples (of the food) brought in smelt

awful and looked appalling'. In his testimony, which was accepted by the trial court, Professor Boffard denied that he had uttered these words. The trial court's finding that the meaning of the article as contended for in paragraph 9 of the particulars of claim 'appears from the evidence to have been established' follows upon the evaluation of the evidence and a finding that Professor Boffard had not uttered the words attributed to him in the article. My comment on counsel's criticism must, of course, not be construed as an acceptance or confirmation of the trial court's approach that because Professor Boffard had not uttered the words attributed to him the statement is for that reason defamatory of the respondent. This issue will receive attention later in this judgment.

[12] Foulkes-Jones AJ held that the 'sting of the charge or the gist of the defamation is that the stew prepared by the Plaintiffs caused the poisoning of the children' and that an additional sting was that 'Professor Boffard said he believed the caterer's stew was to blame'. With regard to the additional sting the learned trial judge said: 'I have already indicated above that I do not find that such a statement was made by [Professor Boffard]' and that the appellants 'thus need to prove that the latter statement attributed to him in the article was in fact made by him'.

[13] Counsel for the respondents did not contend in this court, nor in their heads of argument, that the court *a quo* ought to have found that other stings in addition to those mentioned in para [12] above had been established. On the other hand counsel for the appellants submitted that the trial court erred in finding that the stings mentioned in para [12] above had indeed been established. With regard to the additional sting he argued that the respondents did not plead as a sting merely that Professor Boffard said that he believed the plaintiffs' stew was to blame and that therefore it was not open to the trial court to find that the additional sting had been established.

[14] It was alleged in paragraph 9.6 of the particulars of claim that the article and placard meant that the first respondent's denials (that the beef stew caused the poisoning of 600 children) were to be rejected 'inasmuch as Professor Kenneth Boffard . . . said he believed the caterer's stew was to blame and made the statement attributed to him in the third column of such article'. What is alleged to have been said by Professor Boffard was clearly not pleaded as a sting but rather to strengthen or confirm the alleged meaning of the article, viz that it was the beef stew that caused the poisoning of the children. The paragraph merely says that the first

respondent's denials were to be rejected because of what Professor Boffard said, i.e. that he believed the caterer's stew was to blame. Counsel for the appellants is therefore correct, in my view, in his argument that the trial court was not entitled to find the additional sting to have been established. That really disposes of the question whether or not the trial court was correct in requiring the appellants to justify the additional sting by proving that Professor Boffard in fact had made the statement attributed to him.

[15] As to the main sting found by the trial court to have been established, counsel for the appellants submitted that the sting of the article is that the meal (as opposed to the beef stew) served by the respondents was the cause of the poisoning of the children. He argued further that the statements regarding the beef stew meant no more than that it (the beef stew) was 'suspected' of being, or 'believed' to be, the cause of the food poisoning, and that at best for the respondents the article conveyed the meaning that there were grounds for investigating whether or not the stew and/or fruit juice were responsible, alternatively, that there were reasonable grounds for suspecting that the stew and/or fruit juice caused the food poisoning.

[16] I agree with counsel for the respondents that in determining what meaning would be attributed to the article by the ordinary reader one should have regard to the heading of the article: 'Cook that spoiled Games broth' as well as the caption against the photograph of the first respondent which appeared in the article, reading: 'DEFIANT: Caterer Barry Niselow is still serving up stew at the games'. Regard should also be had to the poster that read: 'POISONED KIDS COOK FOUND'. In other words the context of the article as a whole must be considered. *Stewart Printing Co (Pty) Ltd v Conroy* 1948 (2) SA 707 (A) at 714; *Johnson v Rand Daily Mails* 1928 AD 190 at 204; *HRH Zwelithini of Kwa Zulu v Mervis and Another* 1978 (2) SA 521 (W) at 526H.

[17] It is true that the article commences with the assertion that it was the meal served up by the first respondent that poisoned the children and that he is still catering at the All Africa Games. The allegation that the first respondent 'is still catering' at the event was obviously based on the last paragraph of the article, which states that the chairman of the board of directors of the All Africa Games had said that the organisers of the games had not terminated the respondents' contract because 'we have not found them guilty up to now'. The second paragraph then becomes more

specific as to what part of the meal might have been the culprit. It states that the first respondent had said he would continue to 'dish up the beef stew suspected of poisoning the children'. (My underlining.) The caption is also specific, alleging that the first respondent 'is still serving up the stew', which is then referred to in the article as that component of the meal suspected of having poisoned the children. (My underlining.)

[18] So far the article would raise a mere suspicion in the mind of the reasonable reader because it would be saying no more than that the beef stew served by the respondents is the component of the meal that might have been responsible for the poisoning of the children. An imputation of mere suspicion, without more, is not capable of carrying a defamatory meaning. Compare the concurring judgment of Nugent JA in *Independent Newspaper Holdings Ltd and Others v Suliman* (*supra*) at 166 para [77]; *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL). See too *Singleton v Hudson* [1999] 20 WAR 191 (SCWA). But the article goes further and contrasts the first respondent's refusal to take responsibility until the food had been tested with the views of a highly qualified medical officer, Professor Boffard, that 'he believed the caterer's stew was to blame'. (In refusing to take responsibility for the food poisoning the first respondent is

reported as having said that the natural acidity of the fruit juice he served – rather than the meat – had triggered mild nausea among just a few children.) In contrasting the first respondent's response with Professor Boffard's conclusion the reporters commence the next paragraph with the word 'however', which is used in the article in the same sense as the word 'but' when used as an adversative conjunction. The word 'however', as it is used in the article, clearly shows that although the first respondent raised the possibility that the fruit juice was responsible for the food poisoning, the writer does not believe that the fruit juice was the culprit. Cf *Black and Others v Jospeh* 1931 AD 132 at 143. The article continues and quotes Professor Boffard as having said: 'The samples (of the food) brought in smelt awful and looked appalling'. Clearly the words describing the condition of the food alleged to have been uttered by Professor Boffard are meant to serve as a factual basis for the view held by him.

[19] In my view, the article plainly points the reader to the beef stew (and the 'pap'). It says although it might be possible that the fruit juice was responsible, here are the facts and the views of a highly qualified medical officer; the readers are allowed to judge for themselves. I therefore disagree with the submission of counsel for the appellants that the article

would convey to the reasonable reader that there were reasonable grounds for suspecting that the beef stew and/or the fruit juice were responsible, or that there were grounds for investigation as to whether or not the beef stew and/or the fruit juice were responsible. (My underlining.) But I also disagree with the trial court's finding that the 'sting of the charge or gist of the defamation is that the stew prepared by the [respondents] caused the poisoning of the children'. I do not believe that the ordinary reader would 'gloss over' the word 'suspected' in the second sentence of the article as suggested by counsel for the respondents. The reasonable reader would have realised from the first respondent's refusal to take responsibility '*until the food had been tested*' and from the statement by the chairman of the All Africa Games Board that the caterers' contract had not been terminated because they had not been found guilty 'up to now', that it was not stated as a fact that the beef stew had caused the poisoning. (My emphasis.)

[20] That does not mean, of course, that the article is not capable of bearing a defamatory meaning. Where the words complained of are capable of bearing the imputation that there are reasonable grounds to suspect that a person has committed the impugned act they are defamatory. See *Singleton v Hudson*, (*supra*); *Chase v News Group*

Newspapers Ltd (2003) EMLR 218 (CA) 230 paras 45-48. In my view, in the present matter the reasonable reader would understand the article to mean that the beef stew prepared by the respondents was suspected on reasonable grounds of having been responsible for the poisoning of the children. It is therefore defamatory of the respondents. This finding disposes of the 'bane and antidote' argument raised in this court by counsel for the appellants, which is that the words complained of, taken in the context of the article as a whole, are not defamatory of the respondents because the article contains other allegations that neutralize the defamatory part.

[21] In *Chase v News Group Newspapers,* (*supra*) at 230 para 48, it was stated that in order to justify a publication to the effect that there were reasonable grounds to suspect that a claimant was guilty of the impugned act, a defendant had to establish that there were objectively reasonable grounds for such suspicion. However, the respondents did not plead, in the present matter, that this was the meaning to be attributed to the article. Having pleaded stings or quasi-innuendos the respondents are restricted by the pleadings and cannot rely on any other meaning that the article may be capable of bearing. *HRH King Zwelithini of Kwa Zulu v Mervis* (*supra*)

at 524D-H; *Demmers v Wyllie* (*supra*) at 845E-H. The appellants were thus not required to justify this sting. As was said in *Demmers v Wyllie* (at 845H), it would be unfair to the appellants if the respondents were permitted to rely on a meaning that was never pleaded.

[22] In his heads of argument and in this court counsel for the appellants submitted that the respondents have established only the following stings:

(a) samples of the food smelled 'awful and looked appalling'; and
(b) the food-poisoning incident was the biggest medical disaster that Dr Boden had ever seen.

He argued, however, that these allegations or stings were true and that their publication was to the benefit of the public.

[23] The requirement for the justification of defamatory matter alleged to be true is substantial and not absolute truth. *Johnson v Rand Daily Mails* (*supra*) at 204. I deal first with the second allegation, ie that the food-poisoning was the biggest medical disaster that Dr Boden had ever seen.

[24] It will be recalled that Dr Boden attended to the children at the stadium after Ms Cilliers had summoned medical assistance following the food-poisoning. He also went to the Johannesburg Hospital where he spoke to Professor Boffard. In his testimony he stated that he thought this

was ‘one of the biggest medical disasters we faced in the number of patients affected by a medical condition’. He was never challenged on this assertion. It must therefore be accepted as being true.

[25] As to the sting that the food ‘smelled awful and looked appalling’ it must be accepted, as was found by the trial court, that Professor Boffard, to whom the words were attributed, never uttered them. But the respondents were not required to justify this sting by proving, as suggested by the trial court, that Professor Boffard indeed uttered the words complained of. What the respondents were required to prove was the truth of the allegation that the food smelled awful and looked appalling, for that is what was defamatory and not whether a particular person said it. *Hassen v Post Newspapers (Pty) Ltd and Others* 1965 (3) SA 562 (W) at 564H-565A; see also *Mark v Associated Newspapers Ltd* (2002) EMLR 839 (CA) at paras 27-35.

[26] Ms Cilliers testified that when the caterers ultimately brought the food she ‘took one look’ at it and thought ‘something is not right’. She then called the regional directors and asked one of them, Lilian Setusha, to taste it. Lilian Setusha then said the food tasted ‘absolutely awful’. Ms Cilliers testified further that the first respondent got very upset, asking whether the

insinuation was that his food was not acceptable. But because she had 600 hungry children Ms Cilliers said she allowed the caterers to serve the food although she herself would not eat it. In cross-examination, however, she was confronted with a report she had sent to her superiors, in which the following appears:

'After the first few children were served one of the mothers came to me and said that she thought the food smelled funny. I asked Lillian and Marcellens to taste the food and they thought that it tasted bad but was not off. I approached Barry Niselow of Nise Caterers and asked whether he was sure this food was fit to eat at which point he reacted rudely at the suggestion that his food may be unpalatable.'

Ms Cilliers then conceded that possibly she was not the one who thought the food smelt off or bad or funny, but rather one of the mothers. She said, however, that she actually did remember smelling the food and that that was probably what struck in her mind. In my view, no reliance can be placed on the evidence of Ms Cilliers, standing on its own, regarding the condition of the food.

[27] Dr Boden testified that in the course of looking for the cause of the children's illness he was given a cardboard plate which contained what appeared to be 'pap'. He described the food as 'a pretty glutinous mess and a brown mixture associated with that'. He did not taste it but to him the food did not look 'wholesome'. He said it did not look appetising and 'it certainly smelt sour'.

[28] Two of the children who ate the food and fell sick also testified. Nomvula Makgedi was 15 years old at the time of the incident. She said the food did not taste well but that they (the children) had no choice; they

had to eat it because some of them had left their homes without having had breakfast. The food, she said, did not smell as if it was rotten, but 'it smelt like it was burnt'. Mpho Rakate, who was 12 years old at the time, testified that there were some hair specimens in the meat and wood particles in the 'pap'.

[29] It seems clear from the evidence that the food (excluding the chicken) served by the respondents to the children on the day in question was not free from criticism. According to the unchallenged testimony of Dr Boden, the food did not look wholesome and 'certainly smelt sour'. To Makgedi 'it smelt burnt'. It is not out of place, in my view, to describe the smell of the food in these circumstances as 'awful'. Nor would it be so to describe its appearance as 'appalling', regard being had to the evidence of Dr Boden and the children Nomvula Makgedi and Mpho Rakate. The words used may be said to be an exaggeration but on the facts of this case that does not deprive the plea of justification of its effect. *Johnson v Rand Daily Mails* (*supra*) at 206.

[30] It was not suggested by counsel for the respondents that the publication was not in the public interest. In my view, it was. It follows that the appellants have succeeded in justifying the two stings conceded by

counsel for the appellants to have been established.

[31] The following order is made:

(a) The appeal succeeds with costs.
(b) The order of the court *a quo* is set aside and replaced with the following:

'Plaintiffs' claims are dismissed with costs.'

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L MPATI AP

CONCUR:

ERASMUS AJA
PATEL AJA

CONRADIE JA:

[32] I respectfully find myself constrained to disagree with the conclusion of my brother Mpati. I agree that the article published in the Sunday Times about Mr Barry Niselow and his catering business Nise Caterers CC is defamatory. For the purpose of this judgment it is not necessary to distinguish between the two respondents and I do not do so. The Sunday Times report is defamatory for the reason given by Mpati AP but also, I consider, for conveying to the readers of that publication that the beef stew

was indeed noxious.

[33] I agree that the publication of the article was in the public interest so that substantial truth would have been adequate justification for its publication. However, as I shall proceed to demonstrate, there was no substantial truth to the allegations about the beef stew or about Niselow's conduct in regard to it.

[34] The attention of a reader of the Sunday Times would first have been attracted by a poster announcing 'Poisoned Kids' Cook Found'. Once inside the newspaper, the reader would find a report captioned 'Cook that Spoiled Games Broth' about a man who served up a meal that poisoned 600 children at the opening of the All Africa Games. The first thing about him that the reader is made acquainted with is his disregard for the health of his customers and the wider public. He is portrayed as being ready to keep dishing up his beef stew despite its being suspect. In fact he is 'defiant' about it. That is what the caption next to his photograph says. To be defiant is to wilfully persist in something that is wrong. A person who adheres to a correct standpoint cannot properly be described as defiant. In the context of the article this means that the writer considers him to have been wrong about the toxicity of the stew.

[35] Niselow's defiance is particularized: it concerns 'still serving up stew at the Games'. The implication is that he has learnt nothing; he is still doing what he did before. What stew is this that he is 'still' (that is to say despite everything that it has done to hundreds of children) serving up, the curious reader may ask himself. The answer given in the report is that it is the suspect stew, stew that might be deleterious to health.

[36] To say of a caterer that he displays such a reckless disregard for food safety is defamatory, but if it were true it ought to be brought to the notice of the general public. The difficulty with the appellants' reliance on justification of this defamatory remark is that it is not substantially true. Niselow did not say that he would continue to serve up suspect beef stew. He said that there was nothing wrong with the stew and that is why he would continue to serve it.

[37] Niselow's refusal to accept responsibility for the 'fiasco' until the food had been tested, as well as his statement that the fruit juice he had served (and not the meat) had triggered the nausea symptoms, are portrayed as feeble excuses. For, however much Niselow might protest, Professor Kenneth Boffard, the head of disaster planning at the Johannesburg

Hospital (an eminent man who, the ordinary reader would understand, can speak with authority on medical topics) said that *he* believed the caterer's stew was to blame. And, the report goes on to inform its readers, he was not speaking merely as an expert expressing an opinion, he was speaking as an eye-witness: He had actually seen and smelt the stew and declared that it smelt awful and looked appalling.

[38] This eye-witness account by an apparently independent, reliable and responsible expert concerning the smell and appearance of the stew is then, in the account, immediately linked to its toxicity when reference is made to the Professor's opinion that the children's symptoms were probably caused by food poisoning.

[39] As described in the article, the stew had all the traditional hallmarks of rotten food. Contaminated food might not necessarily smell bad, but more than one sample of the stew that had been brought in (presumably to the hospital) 'smelt awful'. Now, when food smells awful it is a sure sign that it will make you ill. Every newspaper reader knows this. No one among them would not throw away evil smelling food. The only person who evidently does not discard such food, who in fact serves it up to his customers, is the caterer Niselow. That, a reasonable reader would think,

is unforgivable conduct for a caterer.

[40] Here, again, if it were true that Niselow served stew that smelt awful, it is something that the public should know about. The difficulty in the appellants' way is that it is not true.

[41] Mpati AP relates in his judgment that Boffard's denial that he had seen any stew samples was accepted by the court *a quo.* I agree that acceptance of his denial was entirely justified. I also agree that the other evidence concerning the quality of the food does not indicate that it was so bad that it gave off a foul smell. There is some evidence that the food looked unappetizing but it is going much further (and in my opinion much too far) to say about it (in the context of its foul smell) that it 'looked appalling.'

[42] The truth is that many children who were to perform at the All Africa Games were made ill by food poisoning as a result of a meal served to them by the appellants. The appellants did not attempt to prove that the offending component of the meal was the stew and conducted its case on the basis that the culprit had been a consignment of fruit juice that Niselow had procured from an outside contractor. It may have been, and probably

was, negligent of him not to have satisfied himself that the fruit juice was wholesome (particularly since he did not buy it from a reputable supplier but bought it – or was made to buy it – from an informal home business) but that is not nearly as spectacular a transgression as serving foul smelling stew to the public. The first is merely carelessness in checking the work of someone else, the second is a gross dereliction of a caterer's duties in serving stew that he should have realized was off because it smelt awful.

[43] As bad as serving foul smelling stew, the readers of the report are led to infer, was Niselow's refusal to 'take responsibility for the fiasco until the food had been tested'. What, a reasonable reader would ask herself, is there to test if one is dealing with rotten stew? No reader would for a moment think that rotten food might not be toxic but here, the reader realizes to his astonishment, is a caterer who does. Refusing to take responsibility for stew that smells awful and looks appalling, is a serious indictment of the integrity of a caterer. It is really just adding insult to injury for a caterer to then have the temerity to deny responsibility. And as for Niselow's denial that the stew was to blame, a reasonable reader would undoubtedly think that a man who denies that foul smelling stew is toxic is

not being truthful.

[44] The appellants also relied on the defence of reasonable publication developed in *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA). The basis of this defence is that even though a defamatory report is not substantially true it may nevertheless be justified, and the defamation excused, if the court finds that publication of the untrue defamatory report was reasonable.

[45] In my view publication of the offending report was unreasonable. At the time when the Sunday Times journalists went after their story (which in the words of one of them was intended as a story on the perpetrator rather than on the incident) it was already known that the beef stew was probably not to blame for the food poisoning. Mr J P C Hennop, one of the reporters, recorded in his notebook that Niselow told them the juice was under suspicion, that he believed that (only) one of the groups at the Games had received the batch of juice and that they should wait for the microbiological report to come out. But since deadlines do not wait for reports, no effort was made to investigate this aspect of the matter. Niselow's statement about the juice was published but then immediately made to look ridiculous by the eye-witness evidence falsely attributed to

professor Boffard, evidence so powerful that it could have left no doubt with the reader that the evil smelling and visually appalling stew was to blame for the children's illness.

[46] According to the notebook of Mr Rowan Philp, one of the other Sunday Times reporters sent to cover the story, Niselow told him that he had been telephoned by Dr Boden who advised him that the pathologists had phoned him, Boden, 'to say it was the juice'. It is clear, therefore, that even before expiry of the deadline, the Sunday Times reporters were made aware of the existence of evidence that the juice had probably been to blame. To then suggest that it was the stew that had caused the children's illness, or even to state only that the stew was 'suspected' of having caused their illness, is in the circumstances untrue and unreasonable. Furthermore, untruthfully attributing a crucial assessment of the stew to Boffard is not the sort of reasonable conduct that the courts have said should under certain circumstances serve as a shield for newspapers against defamation.

[47] A copy of the cartoon to which my brother Mpati refers in his judgment is annexed to the respondents' particulars of claim but no allegations are made about it. It does not matter. I agree that the cartoon is humorous and satirical and that no one is likely to think worse of either

respondent for the joke made at their expense.

[48] It is my view that the article is defamatory of the respondents, that it is not substantially true so as to allow the appellants to justify publication thereof and that the failure of the Sunday Times reporters to investigate crucial information that they knew was available, is unreasonable and so affords the appellants no protection under this rubric either.

[49] I would have dismissed the appeal.

J H CONRADIE

JUDGE OF APPEAL
CONCUR:

STREICHER JA