Case No 201/1992

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SHEIKH NAZIM MOHAMED First Appellant

THE MUSLIM JUDICIAL COUNCIL Second Appellant

and

SHEIKH MOGAMAT ABBAS JASSIEM Respondent

COURT: HOEXTER, SMALBERGER, STEYN, MARAIS and SCHUTZ JJA

HEARD: 21, 22, 24, 25, 28 AND 29 AUGUST 1995

DELIVERED: 26 SEPTEMBER 1995

JUDGMENT OF THE COURT

During February 1986 the respondent, Sheikh Mogamat Abbas Jassiem ("Jassiem"), initiated separate proceedings against the two appellants in the Cape Provincial Division. In one of the actions he claimed damages from the first appellant, Sheikh Nazim Mohamed ("Nazim"), on account of an alleged defamatory statement made by him of Jassiem on 20 December 1985. The words imputed to Nazim were:

"Hy [i e Jassiem] is 'n sympathiser met die Ahmadis. Hy staan saam met hulle."

Those words were uttered, so it was alleged, in the hearing of a congregation gathered in the Yusufiya mosque, Wynberg, to attend the marriage of one Ramzie Abrahams ("Ramzie") to Fatima Gydien ("Fatima"). (Being a Muslim bride she did not attend her wedding ceremony.)

In the other action Jassiem advanced two claims against the second appellant, the Muslim Judicial Council ("MJC"). The second of

these was based on the same ground as the action against Nazim, with the rider that the defamatory statement had been made by Nazim acting on behalf, and with the authority and approval, of the MJC. The first claim was also one for damages, founded upon the MJC's averred incitement of the trustees of the Coovatool mosque (also known as the Loop Street mosque) to dismiss Jassiem from his position as Imam of that mosque, which dismissal did in fact ensue.

We shall deal with the pleadings and in particular with the defences raised to the defamation claims in more detail later. At this stage it suffices to say that the two actions were consolidated and heard together; that the defamation claims were upheld, resulting in the appellants being ordered, jointly and severally, to pay Jassiem the sum of R25 000 and certain costs, and that the first claim against the MJC (incitement) was dismissed. The present appeal lies against the upholding

of the defamation claims. There is no cross-appeal against the dismissal of the incitement claim.

In order to comprehend the pleadings, the issues raised in the trial Court and on appeal, and the findings of that Court, it is necessary to go back in history. Hazrat Mirza Ghulam Ahmad ("Mirza") was born in what was then British India round about 1840 and died there in 1908. He was born a Muslim and there is no doubt that throughout his life he regarded himself, and, at least until 1891, was widely accepted by his coreligionists, as a devout Muslim. He wrote prolifically in propagation of the Muslim faith and in particular defended it against what were, or were perceived by him to be, scurrilous attacks by some Christian missionaries on the Holy Prophet Muhammad. (We shall refer to the latter as the Holy Prophet.) There were, nevertheless, some severe ecclesiastical rumblings during Mirza's lifetime. He had founded his Ahmadiya

movement in 1889 and for the next two years there was little, if any, opposition to it. In 1891 Mirza wrote that Muslims were in error in believing Jesus Christ to be alive, or in his second coming. He proceeded to claim that he was the "promised Messiah". This caused agitated opposition amongst a large number of Muslims, and especially Islamic religious leaders ("Mullas"). Those Mullas condemned Mirza of apostasy, since according to orthodox Muslim belief of the time there would be a second coming of Jesus Christ from heaven. Some controversy also arose because of Mirza's repeated claims to prophethood. Here we should explain that according to Muslim belief, based on the Holy Quran, (hereinafter "the Quran") the Holy Prophet was the last and final prophet, so that no prophet could arise after him. (Whether Mirza claimed to be a prophet - a Nabi or Rasul - in a literal, a metaphorical, or in some other sense became one of the major factual issues at the trial.)

Despite the opposition to it the Ahmadiya movement grew and in 1906 it claimed some 300 000 members and had spread into inter alia Afghanistan, Egypt and Persia. But in 1914, six years after Mirza's death, the movement split into two. Members of the first branch became known as the Qadiani Ahmadis and those of the second, under the leadership of Muhammed Ali, as the Lahore Ahmadis. We shall refer to them respectively as the Qadianis and the Lahores (or collectively as the Ahmadis).

Before proceeding we should mention that it will be necessary to quote from many documents, from some at length. We quote them verbatim.

Some of the main differences in the tenets of the two groups may be summarised:

(1) The Qadianis, unlike the Lahores, believe that Mirza was

a prophet in the literal sense of the word. In common with orthodox Muslims, Lahores maintain that no prophet can come after the Holy Prophet.

(2) Unlike the Lahores, the Qadianis believe that acceptance of Mirza as a prophet is essential for being a Muslim, and that any one who does not accept that is a non-believer, an apostate, a kafir, murtad (all of which have more or less the same meaning). The Lahores believe that any one who professes faith in the Kalimah Shahada (roughly: "There is only one God, Allah, and Muhammad is his messenger (prophet)") is a Muslim.

(3) Unlike the Qadianis, the Lahores hold that a follower of Mirza may marry an orthodox Muslim.

(4) The Qadianis believe that it is inadmissible to say prayers behind an Imam (roughly, a leader of prayers) who does not accept

Mirza's claims, whilst the Lahores hold that they may pray behind any Muslim Imam who does not condemn other Muslims as kafirs.

It was mainly the Qadiani insistence that Mirza was a real prophet which in later years led to attacks on Mirza and his followers, and to renewed claims by orthodox Muslims that Mirza was indeed an apostate. That was especially the case in Pakistan subsequent to the partition of the Indian sub-continent, resulting in members of both branches of Mirza's followers being declared non-Muslims by legislation in 1981. For present purposes, however, it suffices to refer to the so-called Cairo fatwa (opinion of a mufti or jurisconsult). It was issued in 1962 by the rector of the Al-Azhar University in Cairo and declared that Qadianis "have deviated from Islam in their beliefs, in their worship and in the rules which govern their social relations". This declaration purported to be made on the strength of a report prepared by a research

committee of senior professors of the university under the supervision of the rector. The fatwa does not itself mention Lahores.

The report deals mainly with the Qadianis. It is said, inter alia, that their claim to the advent of a new prophet (Mirza) is contrary to the Quran, and that there is no doubt that Mirza and his followers are apostates because of his

> "claims to prophethood, to messiahood; that he had received revelation; that he is the second Muhammad, that if he had lived during the time of Jesus the latter would not have been able to perform his miracles ..."

It is only the last page of the report that contains references to the Lahores. The compilers there recognise that there exist "some" differences between the two branches of Mirza's followers in their conception of Mirza and his claims; in particular because the Lahores maintain, albeit wrongly, that Mirza did not claim prophethood. Despite these differences both branches are said to qualify as non-believers.

The report concludes as follows:

> "The Ahmedis Lahore claim for example that an Ahmedi can follow a non-Ahmedi in prayer, but on condition that the non-Ahmedi whom they follow in prayer must accept Mirza Ghulam Ahmad as a Muslim. They also claim that he is the Promised Messiah.
>
> Any person, therefore, who follows either branch, whether it be the branch of Lahore or the branch of Qadian, is rejected from the fold of Islam."

We move to the South African scene. During the 1980s there were an estimated 260 000 orthodox (or Sunni) Muslims in the Western Cape and only some 200 Lahores (including women and children). It would appear that the Qadianis were also few in number. In regard to religions matters the MJC claimed authority over members of the orthodox Muslim community in the Western Cape. It came into being in 1945 with Jassiem one of the founder members. Thereafter Muslims (mostly those considered to have a reasonably intimate knowledge of the

Quran) were from time to time invited to join the MJC. It is an unelected and a self-perpetuating body. In exercising its functions it has advised on and applied rules or prescriptions which in its perception are laid down in the Quran and the Sunnah (the traditions of the Holy Prophet). On occasions it has declared a person who regarded himself as a Muslim as murtad, i e, an apostate. As will be seen, such a declaration has dire civil and social consequences.

Nazim became a member of the MJC in 1956 and later its chairman, and still later its president. The evidence led at the trial leaves no doubt but that during the relevant period (1965 to 1985) he played a powerful role in the MIC, in particular in matters related to Islamic belief.

The first agitation in the Cape against followers of Mirza occurred round about 1960. The catalyst was Qadiani publications which

claimed that Mirza had been a prophet. The MJC then took up the stand that all Mirza's followers should be excluded from mosques and treated as pariahs by orthodox Muslims.

By 1965 Jassiem was no longer a member of the MJC. He had left that body in about 1955 when a difference of opinion regarding a ritual - which prayers were to be said on a Friday - had arisen. From 1956 to 1971 he was the Imam of the Imam Yasien mosque, having succeeded his father, who had before his death appointed Jassiem as his successor. For some years before 1965 Lahores had been attending Jassiem's mosque. He allowed them to do so and to say their prayers in the mosque because, when questioned by him, one of the Lahores had claimed to be a Muslim and had recited the Kalimah Shahada. Jassiem acted in this way because in his view the Quran positively enjoins that a professing Muslim is not to be excluded from a mosque.

By 1965 the MJC had received and considered the Cairo fatwa. That body regarded the document as authoritative and decided to send out a circular containing its own fatwa condemning inter alia followers of Mirza as apostates. Before this was done a deputation of the MJC in March 1965 visited Jassiem who was then still allowing Lahores into his mosque. There was a conflict at the trial as to what was discussed on that occasion. Nazim testified that the purpose of the meeting was to inform Jassiem of the true facts concerning Mirza and his followers. To this end the Cairo fatwa was shown to Jassiem and he was requested to join the MJC in its stand against Qadianis and Lahores. Jassiem, however, refused to commit himself.

Jassiem's evidence about the meeting raises certain difficulties to be discussed later. He denied that there was any discussion about Mirza and his followers or that the Cairo fatwa was shown to him. Yet

he fully expected that the subject would be broached by the deputation and was indeed surprised when it was not. He also said that only a fatwa dealing with the death of Jesus (Isa) was shown to him. Apparently this fatwa was not at all concerned with Mirza and the two branches of his followers.

Shortly after this occasion Jassiem forwarded a letter dated 28 March 1965 to the MJC. With reference to the visit of the deputation he wrote:

> "The spokesman [of the deputation] stated that they had come with the unanimous approval of the Council and that I was one of them and they being likewise equal to me, mentioning that the doors of the Council were open for me and that I would be welcomed with open arms.
>
> I take it that I am now accepted as a Muslim.
>
> I will however be pleased if your Council will make it public in the press, because I have been branded and named in the 'Muslim News' and also from the pulpits

by Sheikhs Sharkie and Najaar [presumably as an apostate].

It would also be appreciated if I can have confirmation that the opinions expressed by your deputation are equally held by the last mentioned Sheikhs.

It was requested that I reply as soon as possible, but
I regret that I cannot make a final decision until such time when the said Sheikhs Sharkie and Najaar has made a public statement, both in their respective mosques and in the press, withdrawing all the malicious and defamatory accusations made against me."

According to Nazim the MJC did not consider this letter a proper reply to the Council's invitation that Jassiem should join them in their stand against the Ahmadis. The MJC indeed construed the letter as a refusal by Jassiem to withdraw his support of "the Ahmedi creed", in particular, so it would appear, because he had allowed and continued to allow Lahores into his mosque. The upshot was that the MJC declared Jassiem to be murtad on the Islamic principle that he who approves of

Kufr is also Kufr (roughly, he who approves of apostasy is himself guilty of apostasy). It should be explained that in the vocabulary of the MJC the expressions "approve" and "sympathise with" are applied also to a person who does neither but simply fails to denounce Lahores because he does not know enough about them to form a judgment as to their true faith, and is content to accept their profession of the Muslim faith at face value. An announcement that Jassiem had been declared murtad was made early in May 1965 at a meeting held at a Cape Town mosque.

Immediately after this the MJC sent out their fatwa to Sheikhs, Imams and mosque committees. It is dated 8 May 1965 and reads:

> "Dear Brother in Islam,
>
> I am instructed by the Muslim Judicial Council to report to you the findings and decision of the Council with reference to the Ahmedis, Kadayanis, Bahais and those persons who are sympathetic towards the beliefs of the above-named sects. The decisions of the Council are based entirely on the Quran and Sunnah, and all members and committees of Majieds

[mosques] are earnestly requested to carry out these instructions to the letter. These instructions and decisions should at all times be made known to the congregations especially to those persons who were not fortunate to have heard the lecture which was given on Sunday, 2nd May, 1965, in the Masjied of Sheik Achmat Behardien.

APPENDED ARE THE DECISIONS OF THE COUNCIL:

(5) All Ahmedis, Kadayanis, Bahais and sympathisers,are Murtad.

(6) They should not be allowed to enter the Masjids of the Muslims.

(7) Their marriage ceremonies should not be allowed to take place in the Muslim Masjids.

(8) No Sheik, Imam or Muslim should officiate at any of their marriage ceremonies.

(9) Intermarriage between them and a Muslim should never be allowed.

(10) They are not allowed to serve as wakiels or witnesses in any religious matters.

(11) They will not be allowed any burials nor can any of them be allowed to perform burial services at any of the Muslim

cemeteries.

(12) A Muslim should not pray for or on their dead.

(13) Anything slaughtered by them can not be eaten nor can you eat from them.

(14) There should be no association between a Muslim and any of the above sects...."

One of the many traumatic consequences of this declaration was vividly illustrated in evidence given at the trial If an orthodox Muslim had been in the habit of employing the services of a Lahore tailor he would have to stop doing so and even refrain from meeting him on a social level. On appeal it was contended that among the clear signs that Jassiem was a lost soul are the facts that he employed an Ahmadi attorney (no Muslim attorney might act for him), that in raising funds for the litigation he sold his house to an Ahmadi (no Muslim might buy it), that he called an Ahmadi (Peck) as a witness, and that having been elected to the management committee of a local authority he took his seat

on it despite the fact that one of the other members was an Ahmadi. These are further instances of the rigour of the proscription enjoined by the MJC. However, we were told that banishment is the lot only of an Ahmadi who professes to be a Muslim. Should he, however, profess Ahmadism as a separate religion, he would be shown the same tolerance as would be shown to a Jew or a Christian.

Jassiem spent the next five years in somewhat of a religious and social wilderness. Many members of his former congregation no longer said prayers or attended services in his mosque, whilst generally he was shunned by orthodox Muslims. Even his own sisters refused to visit him. Then, in 1970, he received a letter from the MJC. It contained an invitation to him to attend a meeting at the Azaria mosque with a view to his rejoining the MJC. At this meeting there was considerable discussion about the Lahores and Jassiem's refusal to brand them murtad.

His initial reaction was that he was not there to "make" other people apostates ("ek is nie daar om ander mense kafir ... en murtad te maak nie"). Eventually he accompanied Nazim and Sheikh Mahdi to a separate room where a further discussion took place. The result was that he affirmed the contents of a document drafted by Nazim. The gist of it was that Jassiem announced his return to Allah and his repentance for encouraging the Ahmadis in their beliefs, and that he testified to their heresy. There was a dispute as to whether on their return to the room where the original discussions had taken place Jassiem read out the document to the full meeting, or whether somebody else merely announced Jassiem's acceptance of its contents. However, nothing turns on this.

Jassiem testified that he was pressed into signifying his approval of the document and that in his heart of hearts he still did not believe that

Lahores were apostates. (This may have been the reason why he did not rejoin the MJC.) But his endorsement of the document was received with acclamation by the meeting and orthodox Muslims generally. Needless to say, the Lahores received the news with dismay and their reaction was to stay away from Jassiem's mosque.

We shall return later to these two encounters in 1965 and 1970.

During the next 12 years or so the Ahmadi issue rather subsided. In 1971 Jassiem was appointed as Imam of the Coovatool (Loop Street) mosque by the board of trustees, also known as the committee, of that mosque, and he continued to serve as such until the end of 1985. Some three years earlier, however, there had again been an anti-Ahmadi outcry. This was sparked off by an advertisement placed by the Lahore movement in the Cape Argus in August 1982. This advertisement intimated that the Lahores had applied for a welfare organisation number

to enable them to collect money for the erection of an Islamic centre and the distribution of Islamic literature. The MJC, of which Nazim was then the president, went onto the attack and announced that it would oppose the application. In a circular issued by it the MJC reiterated its 1965 declaration "that the Ahmediah Movement (no matter what branch of it) are non-Muslims and Kafir", and went on to say:

> "The Muslim Judicial Council hereby state categorically that whatever centre the Ahmediahs are going to establish can never be an Islamic centre, neither any type of Islamic institution or Mosque because these establishments or Mosques cannot be established by Kafirs."

The MJC's stand led to litigation between the Lahore congregation and one of its members, Ismail Peck, on the one hand, and the MJC and two other defendants on the other. (For reasons not material to this appeal Peck later became the only plaintiff.) We shall revert to that litigation.

Round about 1973 Jassiem married the sister of Erefaan Rakied ("Erefaan"). In Cape Muslim circles the latter was widely regarded as a Lahore Ahmadi or at least an Ahmadi sympathiser. He did not testify at the trial and one therefore does not have first hand knowledge of his beliefs. His son, Nurredwhan Rakied, ("Nurredwhan"), and Jassiem both testified that when they questioned Erefaan on separate occasions he denied that he was an Ahmadi. On the other hand, Nazim claimed that Erefaan had admitted to him that he was indeed an Ahmadi. Be all that as it may, there appears to have been a reasonably close relationship between Jassiem and Erefaan and this gave rise to suspicion about Jassiem's stance in regard to the Lahore sect.

In 1982 and 1983 Jassiem acted on a part-time basis as Imam of the Parkwood mosque in Grassy Park, Cape Town. He was still the Imam of the Coovatool mosque, but for some undisclosed reason the

regular Imam of the Parkwood mosque could only lead his congregation on Fridays. Jassiem lived in Grassy Park. Towards the end of 1983 he went to Mecca. Before his departure Erefaan and his wife visited Jassiem at his home to bid him farewell. This visit was observed by a member of the Parkwood mosque committee who evidently reported it to the other members of the committee. The consequence was that on Jassiem's return to Cape Town he was asked by the Parkwood mosque committee to attend a meeting. At that meeting his relationship with Erefaan was discussed. Although he assured the committee members that Erefaan was not an Ahmadi they refused to believe him. In the result the secretary of the committee wrote a letter to Jassiem. It is dated 16 March 1984 and the material parts thereof read as follows:

> "Further to our meeting of 17/2/84 where you claimed that Erafaan Rakiep is not an Ahmedi and that until proven otherwise, you cannot reject him or debar him from your home.

A letter was forwarded to the MJC and we were requested to attend a meeting to discuss this matter, which we did on Friday 9 March 1984.

As you are aware Erafaan Rakiep (your brother-in-law) has been declared an Ahmedi by the MJC and we, until proved otherwise, accept their decision. Your association with Erafaan (as confirmed by yourself) is placing us as custodians of the Mosque in a very dubious position. This in turn has caused friction and bitterness not only among the Committee members but also amongst the Community. In this regard to resolve this matter in a most amicable manner, we sincerely appeal to you for your fullest regard with the aforesaid. ...

Until this matter is cleared, we regret to notify you that your services are suspended and that you will not be in the Movement's employ as already stated by our delegation on Monday 5 March. However, this does not debar you from the Mosque but we request you not to hold any lectures after Salaah or at any other time. We sincerely hope that you will adhere to the above request."

After a further discussion, also attended by members of the

MJC, Jassiem arranged a visit to Erefaan. On being questioned by

members of the mosque committee on that occasion Erefaan denied that he was an Ahmadi. Nevertheless the committee did not lift Jassiem's suspension.

In February 1984 a Muslim religious dispute was referred to arbitration. Nazim presided over the tribunal and Jassiem was to be called as an expert witness on behalf of one of the parties. The other side then objected that since Jassiem was an Ahmadi sympathiser he was not a Muslim and therefore incompetent to testify before an Islamic tribunal. Nazim overruled the objection, holding that Jassiem was not such a sympathiser and that he was a Muslim.

In May 1985 Jassiem's daughter died. He conducted the burial service and because she had lived in Lentegeur, Cape Town, he afterwards donated the sum of R100 to the Lentegeur mosque. Some months later he made another donation by way of a cheque for a further

R100. There followed a meeting between him and a delegation of the committee of the Lentegeur mosque at which his cheque was handed back to him. Then, on 29 October 1985, the secretary of the committee wrote to Jassiem as follows:

> "On recommendation from two noted Ulama of the M.J.C. we learned the following:
>
> (15) You allow noted ahmediehs and their sympathisers in attend your congregation in Loop Str. Mosque; a fact that cannot be disputed.
>
> (16) Because you are serving on the Grassy Park management commity of which the chairman is a ahmedieh.
>
> (17) that you are still intimate with your brother-in-law Irefaan Rakiep which is without a shadow of doubt a ahmediey.
>
> (18) when it was stated in court that these people only recognise two Alims, namely Shiek. M.S. Gamieldien and your selves, Shiek. Gamieldien made an affidavit

declaring them apostates, you on the other hand refused to draw up a similar document.

We view with concerne the contents of this letter and will only accept your donation if you publicly denounce the ahmedieya for what they are……

MURTAD."

(The relevance of para (4) of this letter will appear shortly.)

Either shortly before or after the date of this letter Jassiem attended the funeral service of a certain Mrs Albertyn. This was to be conducted by Sheikh Salie at the St Athens Road mosque. When Salie saw Jassiem in the mosque he said that the service could not continue because of the presence of Ahmadis and Ahmadi sympathisers. Jassiem did not react because he considered that that appellation did not apply to him. Salie then mentioned Jassiem and his brother, Abdullah (who was also present) by name. Jassiem's reaction was to refuse to leave the mosque because, so he said, a mosque belongs to Allah and not to man,

hence nobody had the right to expel him from a mosque. After the supervisor ("oorsiener") of the funeral had also vainly requested Jassiem to leave the mosque, the former asked Salie to proceed with the service. This Salie refused to do before "these" murtads had left the mosque. Somewhat of a physical altercation ensued after which Salie left the mosque. Another Imam, who was also a member of the MJC, apparently then took over. He was Sheikh Soeker. At some stage members of the congregation exhorted Soeker to throw Jassiem out of the mosque. Soeker's reaction was:

> "Breeders, stil. Daar is nog nie 'n bestelling nie teenaan die Shaik nie van die Muslim Judicial Council nie."

It is tolerably clear that Soeker intended to convey that the MJC had not yet branded Jassiem as an apostate.

We now revert to the litigation initiated in 1982. There is no

need to set out the issues in that matter in any detail. It suffices to say

that one of the orders sought by Peck was a declaration that Lahores were

Muslims and as such entitled to all the rights and privileges pertaining to

Muslims. There were some initial forensic skirmishes and when the

matter was first heard the Court (Berman J) had to consider certain legal

issues raised in limine by the defendants. One was thus formulated.

> "... whether or not the Court should decline to entertain on its merits the dispute as to whether Ahmadis are Muslims or not."

The argument on behalf of the defendants was that it would be

inappropriate for a secular court to attempt to resolve questions which

were purely of a doctrinal and ecclesiastical nature. The finding of

Berman J thereanent was:

> "... it appears to me that the resolution of the question whether Ahmadis are Muslims or not may well be more fairly and dispassionately decided by a secular Court such as this than by some other tribunal

> composed of theologians. Certainly when regard is had to the considerable number of experts to be called and the considerable volume of testimony to be given by them, this Court may well be the most suitable forum to deal with them and with their evidence."

As will become apparent later in this judgment it is not necessary for the purposes of this appeal for this Court to pronounce upon the acceptability or practicability of the above point of view.

Some time before the issue was raised Jassiem was approached by the defendants' attorney and also by a deputation of orthodox Muslims. Jassiem was asked about these occasions during cross-examination and his evidence in this regard is not entirely clear. It would appear, however, that the deputation asked him to sign some form of document to the effect that no secular court could give judgment on a matter pertaining to Islamic belief. This Jassiem refused to do. During the conversation he was also asked whether he considered the Ahmadis to be Muslims or

apostates. His reply was that in his belief they were indeed Muslims. On another occasion he was telephonically requested by the defendants' attorney, Chohan, to sign an affidavit stating that he (Jassiem) considered Ahmadis as murtad apostates and as such outside the fold of Islam. This, too, Jassiem refused to do. It seems clear that Jassiem was fully aware that both documents were intended to be used at some stage of the litigation in furtherance of the defendants' case.

The hearing of the action commenced before Williamson J on 5 November 1985. On the first day counsel for the defendants announced that they were withdrawing from the proceedings, not because they were conceding the merits of the claims against them, but because as Muslims they felt "that they could not in conscience submit to the jurisdiction of this court, which is an ordinary secular court ..., to decide who is a Muslim".

Evidence was then led for some days. Hafiz Sher Muhammad ("Sher Muhammad"), who testified also in the present matter, gave evidence to the effect that on a proper interpretation of the writings of Mirza he was not an apostate, and that therefore the Lahores are not murtad. (An hafiz is one who knows the whole of the Quran by heart.)

On 20 November 1985 Williamson J gave judgment. He held that Peck, the acknowledged Lahore Ahmadi, had discharged the onus of proving that he was a Muslim (and hence not an apostate) and inter alia

declared him to be such. Accordingly he accepted Berman J's view and, rightly or wrongly, proceeded to decide a question of religious doctrine or dogma.

The outcome was received with dismay, indeed consternation, by the MJC and orthodox Muslims generally. Nazim, on behalf of the MJC, publicly declared that Muslims had no option but to ignore the

rulings of Williamson J on the basis that no kafir could make another kafir a Muslim, or, put differently, that a Muslim was precluded by virtue of his religious beliefs from accepting a determination by a non-Muslim court as to who is a Muslim. He also said that every member of the MJC was prepared to go to jail for the Islamic cause by not giving heed to the judgment. Furthermore, mosque committees were instructed not to allow Ahmadis into mosques.

A few days earlier the MJC's administrator, Sheikh Gabier, had reported to a meeting of the MJC that he had received numerous complaints about Ahmadis and their sympathisers attending the Coovatool mosque. According to the minutes:

> "The meeting also discussed the fact that no notices of
> the masjid's decisions are ever read at the Juna-ah of this masjid. The Council was completely in the dark with regard to the stand and attitude of the Iman viz. Sheikh M.A. Jassiem.

> The Administrator was thereupon instructed to write a letter to the Mosque Board of the Masjid to set up a meeting so that this issue could be discussed."

Pursuant to what was decided at this meeting Sheikh Gabier

wrote a letter to the Coovatool mosque committee. It is dated 26

November 1985 and reads:

> "We wish to draw your attention to the fact that the Council have received numerous complaints regarding:

(19) the attendance of known Ahmadis and known Ahmadi sympathisers at your Mosque;

(20) the attitude of the Imam of the Mosque, Sheikh Abbas Jassiem towards the Ahmadis, Qadianis and Bahai movement and its leaders, its followers as well as their sympathisers. This must be clarified in order to create an atmosphere of trust and harmony between Imam and Mureeds of the Loop Street Mosque.

> I wish to draw your attention that we had many problems with the said Sheikh. Our Main desire is that this matter must be resolved positively in no uncertain terms.

In view of the urgency of this very serious matter we hereby cordially invite your board to a special meeting with the Fatwa Board of the Muslim Judicial Council on Thursday the 28 November 1985 at 8.30 pm at the chambers of the Muslim Judicial Council."

The reply is dated 5 December 1985 and states inter alia:

> "Your letter and allegations made in it was discussed at the Trust Meeting of the abovementioned Mosque. The Trust feels that your letter states that you have received complaints. It should, however be noted that you did not attach any Affidavits or any letters of complaints.
>
> The said Sheik M. Abbas Jassiem has served the Mosque and the community for the last 13 years with dignity and sincerity. As far as we can ascertain, the greatest of trust and harmony prevails between the Imam and his Mureeds.
>
> The said Sheik, being a learned man should be approached by the Muslim Judical Council directly and the Council should not ask us as layman to intervene with the learned Sheik on a religious issue.

> As layman we are in a dilemma, since the M.J.C withdrew from the Supreme Court case against the Ahmadis in such a shocking and appalling manner and allowed the Ahmadis to win the case by default which means that anybody interfering now with the Ahmadis may be committing contempt of court.
>
> This truly was the blackest day in the history of the Cape Muslims and has left many a serious question unanswered as to the ability of the M.J.C to intervene, defend or propogate Islam in a responsible and sincere manner……"

This was how matters stood some 14 days before the wedding ceremony of Ramzie was to take place in the Wynberg mosque. That ceremony was to be led by Nazim who was a co-Imam of the mosque.

Six witnesses testified at the trial of the present matter as to what occurred at the mosque (and some of them also in regard to certain events leading up to that occasion). They were Jassiem, Rashied Abrahams (Ramzie's father), and Jassiem's brother, Imam Abdullah, on the one side, and Nazim, Ramzie, and his father-in-law, Ahmad Gydien on the other.

As adumbrated above, the kernel of Jassiem's version was that on the occasion in question Nazim said that he (Jassiem) was an Ahmadi sympathiser. His version of the events in the mosque was in the main corroborated by Abdullah and Abrahams, but denied by Nazim. According to the latter his only reference to the Ahmadi issue occurred when he asked Jassiem: "Jy moet vir ons sê wat is jou staan met die Ahmadi movement" (You must tell us where you stand with regard to the Ahmadi movement). We shall refer later to the limited corroboration of Nazim's version to be found in the evidence of Ramzie and Gydien.

At this stage it is convenient to say something about the six witnesses and the trial Court's assessment of them and their evidence.

Abrahams was not a learned man and in the view of the Court a quo his vocabulary in Afrikaans - the language in which he testified - was neither large nor sophisticated. He was a Sunni (orthodox) Muslim.

The trial Court (VAN DEN HEEVER J) thought that his evidence was not satisfactory in all respects, that he was somewhat confused as to the precise sequence of events inside the Wynberg mosque, but did not consider him a dishonest witness.

Abdullah, who was some ten years younger than Jassiem, had passed standard 6 in this country. He was, however, somewhat lacking in religious education. He had been taught the Muslim religion by his father and brother, Jassiem, and never attended a religious institution. By December 1985 he had been assistant Imam at the Coovatool mosque for approximately 14 years. He had little, if any, knowledge of the Ahmadi movement. The trial Court doubted whether he had the intelligence to concoct and abide by an untrue version of events merely to support his brother's version. Although his account of the events inside the Wynberg mosque did not match that of his brother in every respect, the impression

gained by the trial Court was that it gave different facets of the same story and that under cross-examination his version remained unshaken. Jassiem attended school in South Africa only up to standard 2. He stemmed from a family of Sunni Muslim religious leaders; his father, grandfather and great-grandfather, as well as his maternal grandfather, all having been Imams. When he was nine years old, in 1924, he was taken on a pilgrimage to Mecca and thereafter attended the Al Azhar institute in Cairo for the purpose of studying the Islamic religion. However, he failed to "graduate" and returned to Cape Town in 1938, having been away from home for some 14 years. During his academically undistinguished career at Al Azhar he gained distinction in another field, being selected to box for Egypt at the Berlin Olympics of 1936. But when it was discovered that he was not an Egyptian his selection was cancelled. During his long subsequent career as an Imam at Cape Town

he was the religious teacher of many later imams, including Nazim, who was some 17 years his junior. In the assessment of the trial Court the paucity of his secular education was reflected in his language of choice: colloquial Afrikaans with a sprinkling of - not always grammatically correct - English words. He had the habit, so the Court also found, of going off on his own tack without listening to the questions put to him. The impression gained by the Court, however, was that this was not due to evasiveness but rather to "the egotism of age and accustomed authority, allied to the fact that he is neither quickwitted" nor linguistically well equipped. Despite "his habit of running about at a tangent, not listening to questions and often rambling without completing sentences", the trial Court did not regard him as a dishonest witness. He was 72 years of age at the time of the trial.

Little need be said of Ramzie at this stage. He was a very poor

witness. He had practically nothing to contribute on the vital occurrences in the Wynberg mosque on 20 December 1985. Concerning preceding events, to which we shall revert, the trial Court found him to be a dishonest witness.

Gydien was the father of Fatima who married Ramzie on 20 December 1985. He passed standard 7 at school in this country and at the time of the trial held a responsible position in a firm of clothing manufacturers. He described himself as "just an ordinary Muslim" and knew very little of the merits or demerits of the Ahmadi movement. As the bride's father he appointed Nazim to perform the wedding ceremony. He corroborated Nazim in a number of respects as to what happened at the Wynberg mosque. He said that he did not hear Nazim referring to Jassiem as an Ahmadi sympathiser, but did not unequivocally deny that Nazim might have done so.

The trial Court found that Gydien's version of what sparked off trouble at the Wynberg mosque on the occasion in question was so improbable that it had to be rejected.

Nazim was 55 years of age at the time of the trial. He went to school in South Africa until he was in standard 7. He was then, at the age of 17, sent to Mecca for religious studies and returned to Cape Town towards the end of 1955. He was appointed Imam at the Park Road mosque in 1957 and later, in 1972, became Imam at the Yusufiya mosque, and still later, for reasons not material, co-Imam at that mosque. As stated, between 1966 and 1982 he was from time to time the chairman of the MIC, and was elected president of that body in 1982.

In the assessment of the trial Court Nazim was clearly accustomed to authority in his community and to speaking, in rather grandiose terms, weightily and smoothly, though his language was neither

precise nor that of a truly educated person. He was evasive, so it was found, about many matters and in some respects his version about what occurred at the wedding ceremony was incoherent and inconsequential. We shall, at a later stage, deal more fully with all the relevant events in the Wynberg mosque, and with certain incidents leading up to the wedding ceremony. At this stage no more need be said than that the Court a quo had no doubt that Nazim and Gydien lied about those events, and that the version of Jassiem and his witnesses was to be preferred. The flaws in the apposite evidence presented on behalf of Jassiem were, so it was found, mainly due to age, quality of intellect and memory, and differences of observation of confused events, whilst those in the defendants' evidence were mainly due to deliberate deviation from the truth. Hence it was found that Jassiem discharged the onus of establishing that the alleged defamatory words were indeed published in

the Wynberg mosque on 20 December 1985.

By way of epilogue to the Ahmadi saga, prior to its culmination in this country in the present proceedings, reference should be made to Jassiem's dismissal as Imam of the Coovatool mosque. Presumably at least partially due to what had occurred at the Wynberg mosque, the secretary of the board of trustees of the Coovatool mosque eight days later wrote a letter to Jassiem. It was dated 28 December 1985 and contained the following:

> "As you are aware by now that a lot of controversy is prevailing in the Ahmadia's issue and more specifically the unnecessary rumours and claims that you are a sympathiser of that sect. As this is creating tremendous anamosity between the Trustees of the above mosque whereby several other organisations and Muslim institutions are applying pressure on clearing the issue, we hereby have to bring this serious matter to your urgent attention.
>
> In order to clear the matter and allow the mosque to function and you to continue with the tremendous

amount of good spiritual and religious work you have been doing for the past fourteen years it is necessary for you to submit in writing your denounciation of the Ahmadias.

Upon receipt of such a letter we hereby give you our solemn undertaking that the matter as far as the Board of Trustees of the above mosque is concerned will be closed permanently and you will enjoy the full support of the Board in the future."

Attached to this letter was a draft reply to be signed by Jassiem.

The material part read:

"As Imaam of the above mosque, a duty which I have capably accomplished for the past fourteen years Insha-Allah, it grieves me to experience the amount of injustice that is being leveled at me and the unfair and dishonourable conduct of certain members of the Muslim Judicial Council and the totally unlslamic methods that are being used to persecute me and undermined my position as Imaam of the above mosque.

As most of you are personally aware, I am not of the Ahmadias sect and I denounce them as Muslims out of the folds of Islam and that they are Murtaad Kufir."

The letter and draft reply were handed to Jassiem on 31 December 1985 by the board's secretary, Mr Vinoos. Jassiem refused to sign the draft reply, maintaining that it was not for him "om mense murtad te maak nie". He did, however, on 3 January respond to the board's ultimatum by way of a letter. He wrote that he was not, and never had been, an Ahmadi. But he did not denounce Ahrnadis as murtad, and by clear implication again refused to do so. In the result the board dismissed Jassiem from his position as Imam of the Coovatool mosque. His claim against the MJC for having wrongfully incited the mosque committee to dismiss him failed at the first hurdle, namely proof that the committee acted as a result of MJC pressure. As previously stated there was no-cross appeal against this finding.

We now turn to the further issues which were raised in, or arose from, the pleadings in the consolidated action. We shall refer to the

pleadings under the appropriate headings. At this stage no more than a brief summary of those issues is required. Apart from the question whether Nazim did utter the words attributed to him by Jassiem (and at the trial also by his witnesses), to which reference has already been made, they are as follows.

It was common cause at the trial that to say of a Muslim in the Western Cape that he is an Ahmadi or Ahmadi sympathiser, is highly insulting. In his pleadings Jassiem alleged that he was a Muslim but this was denied by Nazim and the MJC. As matters developed at the trial, four questions arose in regard to the issue whether Jassiem had proved that he was a Muslim. The first was whether evidence that he professed to be a Muslim; had for many years (save for the period 1965 to 1970) been generally regarded as a Muslim in Cape Islamic circles; and had indeed over a considerable period served as Imam of various mosques,

sufficed. If not, the second question was whether he had proved the qualifications which are necessary to belong in the fold of Islam. As a natural corollary to the second question the third question was (or was said to be) whether Mirza was, and his Lahore followers were and are, apostates. The final question arising out of Jassiem's claim to be a Muslim was this: is a professed Muslim who refuses to brand Lahores as apostates, himself an apostate?

Two foreign expert witnesses on Islamic religion gave evidence on those issues. Jassiem called Sher Muhammad (already mentioned) and the defendants Professor Ghazi (who is also an hafiz). Their evidence, and exhibits referred to by them, constitute by far the bulk of the appeal record which comprises 109 volumes and is the upshot of a truly marathon trial. Their evidence related preponderantly to the question whether Mirza had been an apostate. Sher Muhammad maintained that

he was a true Muslim, whilst Ghazi was adamant that Mirza was indeed an apostate. A resolution of this difference was not made easier by the fact that in the Muslim world there is no ecclesia, no central body which finally settles disputes on dogma on this earth.

In respect of the first of these questions the trial Court found that Jassiem had to do no more than to adduce prima facie evidence that he had been accepted as a Muslim by the Cape Islamic community until the occasion of Ramzie's wedding ceremony, and that he had done so. More will be said about this finding at a later stage. As regards the other questions, the trial Court found it unnecessary to determine whether Mirza had been an apostate, but seems to have preferred Sher Muhammad's evidence to that of Ghazi, or to have considered the former's interpretation of Mirza's writings as being as plausible as that of Ghazi.

A further issue was whether the insulting remarks attributed to

Nazim were defamatory of Jassiem since they tended to lower him in the esteem of a segment of the South African community only (viz orthodox Muslims in the Western Cape), as opposed to the public generally. Here the trial Court had little difficulty in answering this important legal question in favour of Jassiem. On appeal Mr Albertus, for the appellants, did not challenge the correctness of this finding despite the fact that it involved a departure from what many had thought to be the law.

The next two issues arose from the defendants' reliance, in the alternative, on a plea of qualified privilege. The kernel of this plea was the proposition that should it be found that Nazim did defame Jassiem, the publication was not unlawful because the words in question "were published and received by the congregation [attending the wedding ceremony] in the discharge of a moral or social duty and/or the furtherance of a legitimate interest"; and because at the time Nazim had

a bona fide belief in the correctness of his utterances. (The second allegation was of course a superfluity.) With respect to this plea, an issue before the trial Court, but not before us, was whether the appellants attracted the onus of proving the facts on which the plea was based. If yes, the other issue was whether they had discharged that onus. The Court a quo correctly held that a full burden of proof rested on the appellants and that they had failed to establish the defence of privilege.

The final issue was whether the MJC had authorised Nazim to publish the defamatory words. On this issue too the Court held for Jassiem. Its reasoning falls within a relatively narrow compass and need not be summarised at this stage.

As stated, the present appeal lies (with the leave of the Cape Provincial Division) against the trial Court's upholding of the defamation claims. As will appear later in this judgment the issues were narrowed

very considerably during the protracted argument in this Court. We shall deal consecutively with the issues remaining under the following headings:

A. What was entailed in proof by Jassiem that he was a Muslim, and did he prove that which had to be proved?

If sots. Did Jassiem prove that the words complained of were uttered?

If so-C. Were the words defamatory of Jassiem despite the fact that they lowered his esteem in the eyes only of a particular community in South Africa, and not in the eyes of the public generally?

If so-

D. Did the appellants discharge the onus of establishing the defence of qualified privilege?

If not-

E. Did Jassiem discharge the onus of proving that the MJC was also liable for the defamation?

A. WHAT WAS ENTAILED IN PROOF BY JASSIEM THAT HE WAS A MUSLIM,AND DID HE PROVE THAT WHICH HAD TO BE PROVED?

It will be recalled that Jassiem pleaded that he had always been a Muslim and that Nazim and the MJC denied that and put him to the proof of the allegation. Two competing arguments as to what was involved in Jassiem proving that he was a Muslim were raised in the trial Court. Counsel for Jassiem contended that it was sufficient for Jassiem to prove that he professed genuinely to be a Muslim, lived the life of a

Muslim, and was generally regarded by the Muslim community in the Western Cape as a Muslim. Counsel for Nazim and the MJC contended that that was not enough and that Jassiem had to go further and prove in addition that he was a Muslim fully entitled to be regarded as such by the Muslim community by reason of his faithful adherence to orthodox Islamic faith and doctrine. That would entail, so it was argued, his having to prove that he was not an Ahmadi or a sympathiser, or that, if he were, that that would not disentitle him to be accepted as a Muslim by other Muslims. Proof of the latter would include his having to satisfy the Court that his and his expert witness's view of what true adherence to the faith and doctrine of Islam entailed was right, and that Nazim's and the MJC's view thereof was wrong. It would also include Jassiem having to satisfy the Court that Mirza and his Lahore followers were not apostates, or, if they were, that a professing Muslim who refuses to

denounce them is not thereby rendered apostate himself. That would also necessitate the Court having to opine on matters of Islamic faith and doctrine: this despite its secular status and the fact that its conclusions would cause neither Jassiem nor Nazim nor the MJC to cease to believe in the correctness of their respective religious beliefs.

The trial judge appears to have rejected the approach urged by counsel for Nazim and the MJC and to have accepted the approach propounded by counsel for Jassiem. However, she balked at the latter's acceptance of the onus of proving on a balance of probability that Jassiem was accepted as a Muslim. She held that Jassiem had only to establish Prima facie that he was accepted as a member of the Muslim community until he was branded as a sympathiser with the Ahmadis, and that he had done so. She held further that if Nazim and the MJC were to succeed in "the plea of justification" they would have to discharge the fully fledged

onus of proving "that Jassiem was no longer entitled to be accepted as a member of the Muslim community". Proof that Jassiem was no longer entitled to be accepted as a member of the Muslim community would no doubt have been relevant to a consideration of a plea of truth and public benefit had such a plea been advanced. In fact, however, the appellants raised no "plea of justification". The sole alternative defence pleaded was that of qualified privilege. To that defence proof that Jassiem was no longer entitled to be accepted as a member of the Muslim community was unnecessary. The nature of the last-mentioned defence is considered fully later in this judgment. The first enquiry was what Jassiem as plaintiff had to show, and by what standard of proof, in order to establish the allegation in his particulars of claim that he was a Muslim. That was in essence an enquiry going solely to the question of whether he was entitled to sue for defamation of himself in the eyes, not of the public at large,

but of only a particular segment of society. The second enquiry arose only after the first enquiry had been answered and if Jassiem had succeeded in establishing whatever it was he had to establish on that score. The second enquiry was what Nazim and the MJC had to show, and by what standard of proof, if their plea of qualified privilege was to be upheld.

Counsel for Jassiem was plainly correct in submitting to the trial Court that Jassiem had to establish upon a balance of probability that he was accepted as a Muslim. It was an integral element of his cause of action. It would not have sufficed (the trial Court appears to have thought it would suffice) for Jassiem to adduce only prima facie proof thereof and then require Nazim and the MJC to positively prove the contrary on a balance of probability. So much is trite.

As we see the position, nothing turns upon the trial Court's

misconception in this limited respect. As counsel on both sides ultimately conceded, there was never any real issue between the parties on this aspect of the case despite the state of the pleadings. In a defamation action in which the statement complained of is one which would damage the plaintiff's reputation in the eyes of society at large, there is no need for a plaintiff to allege anything more than his own existence in that society. It is his mere existence in society at large which gives him a sufficient interest in the protection of his reputation in the eyes of that society to entitle him to come to court for relief if his reputation is unlawfully assailed. Postulating for the moment that an action is maintainable in South African law where a statement is defamatory only in the eyes of a particular segment of society, and not in the eyes of society generally (a question to be considered presently), it is equally obvious that a plaintiff will have to show that he is so placed vis-à-vis

that segment of society, or, in other words, that his relationship with it is such, that the statement is calculated to harm his reputation in the eyes of that particular segment of society. But that is all he will have to show in that particular respect. Here there was no real issue between the parties on that score. It became common cause that Jassiem was so placed. Whether or not he was rightly or wrongly regarded, immediately before the words were uttered, as being outside the fold of Islam and no longer a Muslim, is quite beside the point. It is neither Nazim's nor the MJC's case that Jassiem was not and never had been a Muslim, and that his religious beliefs and associated behaviour were no concern of theirs, and their beliefs and behaviour no concern of his. On the contrary, it was the passionate conviction of Nazim and the MJC that Jassiem's beliefs and behaviour were of critical concern to them and Muslims generally, precisely because he was a Muslim professing adherence to the Islamic

faith and indeed, an Imam. It is inherent in the stance which Nazim and the MJC admittedly adopted towards Jassiem that but for his attitude and behaviour towards Ahmadis, his status as a Muslim could not and would not have been questioned. The words uttered by Nazim amounted to an allegation that Jassiem had forfeited his right to remain in the fold of Islam, and with it his status as a Muslim. To require Jassiem to prove, in order to establish merely that he is entitled to sue for defamation of himself in the eyes, not of the public at large, but of only a particular segment of society, that the very statement and innuendo complained of was not true, would be to impose upon him the entirely inappropriate burden of proving facts which have no logical relevance to that particular aspect of his cause of action. One would then be requiring him to prove wife omnia that the very statement and innuendo of which he complains, namely, that he was an Ahmadi sympathiser and had forfeited any claim

to be regarded as a Muslim and was an apostate, was not true. In the South African law of defamation a plaintiff is not required to prove the untruth of the defamatory allegation. Its truth may of course be a constituent element of a defence which may be open to a defendant but then the onus of proving its truth will burden the defendant. Proof of the untruth of the statements of which Jassiem complains was not germane to the question which arose logically at the threshold of the case, namely, whether he was entitled to sue for defamation of himself in the eyes of only a particular segment of society. The answer to that question has nothing to do with whether or not he had in fact forfeited any claim to be regarded as a Muslim. The answer has to be found by asking the relatively simple question: was his relationship with the particular segment of society which would regard the words uttered as defamatory such that the esteem in which that segment of society held him would be

diminished? In the present case the answer must obviously be in the affirmative.

WERE UTTERED?

There are two wholly opposed versions of what Nazim, and also various other persons, including Jassiem, said during the altercation at the Yusufiya mosque prior to the wedding on 20 December 1985. According to Jassiem's particulars of claim in both cases Nazim said that Jassiem was an Ahmadi or a sympathiser with the Ahmadis. In response to a request for further particulars (again in both cases) as to the precise words used, Jassiem replied "Hy is 'n sympathiser met die Ahmadis. Hy staan saam met hulle." As Nazim and the MJC denied the use of these words the onus of proving that they were spoken rested on Jassiem. But as the defendants were not content with denial, but in the alternative raised an elaborate plea of qualified privilege, the potential for testimonial

embarrassment was created. The potential became real when at the trial the defendants persisted in attempting to maintain both defences simultaneously when adducing evidence.

Before setting out the conflicting versions of what happened at the mosque, something more should be said about the six witnesses (three on each side), their relationships, and how and at which moment they came on the scene.

Jassiem's witness Abrahams was his second cousin, who has known him since his return to Cape Town shortly before the Second World War. Abrahams' father had died and in his place Jassiem "staan amper soos 'n vader". The evidence speaks of a strong family bond. To add Abrahams' own words, "Sheikh Jassiem (is) alles by my." In weighing the credibility and weight of the testimony of Abrahams and Jassiem's other witness, his younger brother Abdullah, the trial court was

fully alive to the strong family bonds in both cases.

Ramzie, the bridegroom, sided with Gydien, his father-in-law as he had become, in giving fumbling support to Nazim, and so took the side opposite to his own father, Abrahams. One of the consequences of the wedding has been the cleaving asunder of the Abrahams family ("my hele familie is ge'split'", as Abrahams put it).

Of the six witnesses Jassiem was the first to enter the mosque accompanied by his nephew Mogadien Price. After he had prayed, he took his seat on the right hand side, where he remained quietly seated. In the meantime Nazim, who was to officiate, was waiting in his office next to the mosque. According to him and Gydien, who represented and appeared for his daughter Fatima, Gydien and Fredericks came in to pay their respects. After a brief conversation, also involving Fredericks, Gydien stalked into the mosque in quest of Jassiem. The discussion in

the office will be revisited. Some time later Nazim entered the mosque. There then commenced the events which are so much in dispute. There were some 200 to 300 persons present, all of whom, it was common cause, were Muslims.

The bridegroom's party consisting of Ramzie, his father Abrahams, Abdullah, and two groomsmen, arrived some 15 minutes late. Accordingly none of them witnessed the start of the altercation. What awaited them was described by Abrahams, "Wat ons uit die kar klim, toe hoor ons 'n lawaai."

Jassiem's version may now be set out in greater detail. No hostility was evinced by guests when he arrived at and entered the mosque. Indeed the atmosphere was a wedding atmosphere and friendly greetings were exchanged. After praying he sat down and nothing unusual happened before Nazim entered. In particular Jassiem denied

that Gydien, with whom he was not well acquainted, or anyone else came up to him where he was seated to speak to him about his presence or the need for his departure.

After Nazim's entry there was trouble for about half an hour, with many persons participating and some things re-iterated or taken up by others, so that an accurate minute by minute account by any witness cannot be expected.

In sum Jassiem's version is this. Speaking fiercely in a loud voice, so that the whole congregation could hear, and addressing him, Nazim proclaimed that he was to leave the mosque and that the wedding would not proceed for so long as he remained. The reason for his having to go was that he was an Ahmadi sympathiser. This last was said at least three times at various stages. Jassiem declined to leave saying that he was an invited guest. During the course of his tirade Nazim said, "Ons

wil hê hy moet saam met ons staan, maar hy wil nie saam met ons staan nie. Hy staan saam met die Ahmadis. Hy is 'n Ahmadi sympathiser." He then invited the congregation to show their "solidarity" with the "council" (this can only be the MJC) by rising. Some rose, others sat, and yet others walked out visibly upset by what was happening. Some members of the congregation took up the call for Jassiem to leave. At this stage Ramzie and his party had not yet entered.

When Abdullah and his companions did enter Nazim rounded on him and said, "Jy moet ook uit, jy 'encourage' dit." A struggle ensued. There was an attempt to eject Abdullah. At this point another of Jassiem's nephews, one Adiel Waggie, spoke up, expostulating to Nazim, "Watter reg het jy om my 'uncle' te wil uitgooi uit die Moskee uit?" To which Nazim responded aggressively, "Ek gooi vir jou ook uit." Attempts were made to seize Adiel, but he escaped from the mosque. In

the meantime, whilst the altercation between Nazim and Abdullah proceeded, Nazim's supporters wrestled with Abdullah and knocked him down. One was heard to say "Jou 'bastard'" - language that clearly shocked Jassiem.

A group then appealed to Abrahams to ask Jassiem to leave. Fatima Gydien's brother came up to Jassiem and asked him to leave, so that the wedding could proceed. Jassiem declined saying that he had been invited to attend. Abrahams then addressed him in similar terms, at which Nazim interjected, "Nie dat die troue kan aangaan nie: vir die 'sake' van die Deen (meaning for the sake of the faith or religion)". Jassiem remained seated and did not answer Abrahams.

This was all proving too much for the bridegroom Ramzie, who went outside and burst into tears. Jassiem followed him to calm him down, and found him with his tie off expressing doubt about going on

with the wedding. Jassiem re-entered the mosque. Ramzie's companions succeeded in calming him, and after a time he followed, approached Jassiem, and asked him please to leave. Jassiem did not answer him either. He was angry and deeply insulted by the acts of Nazim, but he walked forward and offered two prayers in order to compose his troubled spirit.

That done, he concluded that for the sake of Ramzie's wedding he should leave, and he told him that he would. He and Abdullah then walked out, slowly. They were not present for the wedding.

Jassiem explained that if he had been quietly and decently requested by a member of one of the families or even Nazim not to remain in order to forestall trouble, his reaction would have been different. What got his back up was Nazim's unprovoked and insulting attack. That is Jassiem's account.

Abdullah had been invited to the wedding by Ramzie. Nothing was sought to be made of his saying this when he was later cross-examined. The significance of this will appear when the attack on Jassiem relating to Air invitation is considered. Abdullah did not dispute Ramzie's version that it was to him rather than Jassiem that Ramzie had come to learn the Arabic formulae to be spoken by him at the wedding. He could not remember which of them had performed this service.

When he entered the mosque with the bridegroom's party there was commotion, and Nazim was pointing at Jassiem and saying in a loud voice that the wedding would not proceed until he left, that he should leave because he would not take a stand "met ons", and because he was an Ahmadi sympathiser. During the course of his outburst he said that if he had been of Jassiem's age he would have taken him by the scruff of his neck and thrown him out. But Jassiem's age was against him

(Nazim). Abdullah could not remember if Jassiem had first challenged Nazim to throw him out. Ramzie walked forward to take his seat. Abdullah prayed and then followed him. On seeing him Nazim pointed his finger and said to him in a loud voice, "En jy moet ook uit, want jy 'encourage' dit." Abdullah responded to Nazim that he should get on with the wedding and forget about them. There is a conflict in Abdullah's evidence as to whether this statement provoked Nazim's attack on him, or followed it. Abdullah then proclaimed "Allah-Hu-Akbar." ("Oh Allah the Almighty") to which some retorted, forget it, they did not wish to hear this from him, he should get out. Someone shouted, "Ons wil die 'front page' van die Sunday Times he." Jassiem came up to him to persuade him not to respond, and then went forward, knelt down and prayed. Some shouted at him, "Wat gaan hy bid voor? Hy gaan niks kry vir daardie nie. Dit is sommer nonsens." He saw Ramzie go out. Three

persons then took hold of him, Abdullah, as if to throw him out. One shouted, "Jon 'bastard' (Abdullah also apologised for having to repeat this word) jy maak moeilikheid hier. Jy moet uit." During the scuffle his chest was hurt and his turban fell off. His assailants having failed to eject him, he walked out after Jassiem, who had asked him to follow. As he was leaving he called out to Nazim in Arabic, "Ek dank vir Allah op al hier te doen staan en ek vra bewaring deur Allah van die te doen staan van die vier se mense." Nazim responded, "Na die wat jy nou gesê het kan ek beter sê as jy en harder." Three times Abdullah challenged him to do so, saying "Sê!", without result. On the fourth occasion he added, "Jy kan nie. Jy lieg. Jou hart is vuil."

Abdullah confirmed that at a stage after he had prayed Adiel Waggie had cried out, "Wat maak julle met my 'uncle.' Julie kan hom nie uitgooi nie. Dit is 'n moskee." That is Abdullah's account.

Abrahams, the groom's father, described a state of commotion in the mosque, with people screaming and shouting. When he entered Nazim was pointing at Jassiem and saying in a loud voice that he must get out, that the wedding could not proceed with him present, and that the reason why he had to go was that he was an Ahmadi sympathiser and would not stand "with us". Further, that when Nazim saw Abdullah he ordered him out too, saying that he encouraged Jassiem, that when he, Abrahams, was persuaded to ask Jassiem to leave for the sake of the wedding, Nazim shouted, not for the sake of the wedding but of the faith, that Adiel protested at the treatment being meted out to his uncle in a mosque, that Abdullah was insulted and assaulted and his turban knocked off, that Ramzie went out, and in a state of tears said that he did not wish to marry, and that he after a time succeeded in his entreaties to Jassiem to leave, taking Abdullah with him, the latter enkindling the final

exchange with Nazim, already described, as he left.

We come to Nazim's version. The fundamental differences between his and Jassiem's version are that he denies any initiative in having Jassiem expelled, attributing that to Gydien, and also denies having uttered any of the allegedly defamatory words, or indeed any of the other verbal aggressions directed at Jassiem or members of his family, such as are described by Jassiem or his witnesses.

He was sitting waiting in his office when someone came in to tell him that Jassiem was in the mosque. He had not been expecting him. Shortly afterwards Gydien and Fredericks came in to greet him. He told Fredericks, who was a member of the mosque committee, that Jassiem was inside. At this Gydien, looking very annoyed, and without a word, strode through the door leading from the office to the mosque and, together with Fredericks, disappeared from view. A few minutes later he

followed (presumably to officiate at the wedding ceremony, although he did not say as much) and went towards the front. There Gydien came up to him saying that the wedding was not to proceed until Jassiem left. From this he inferred that Gydien had spoken to Jassiem without result. He saw Jassiem sitting down and then addressed the congregation, saying that he could not proceed with the ceremony as the father of the bride had told him not to proceed until Jassiem should leave. The latter at once responded, "Gooi jy vir my uit?" To this he answered, "Jy wil hê ek moet vir jou uitgooi dat jy my kan 'court' toe vat," adding, "Jy moet vir ons sê wat is jou staan met die Ahmadi 'movement'" He was then asked by his counsel, "Yes, why did you say that?' and he answered:

> "Because a letter was sent to the Court of Islam and it was reported by our administrator in our meeting." (This is a reference to Sheikh Gabier's report concerning the Loop Street mosque contained in the MJC minutes of 13 November 1985).

The record proceeds

> "Yes ... And eventually the Council decided that a letter be sent to Court of Islam Mosques." (This is a reference to the MJC letter of 26 November 1985 to the Loop Street committee.)
> "Yes ... Because of him allowing Ahmadis and sympathizers in his Mosque. And then there was rumour outside also."

Nazim himself considered Jassiem to be an Ahmadi sympathiser who allowed Ahmadis and their sympathisers into his mosque. That was why he had asked Jassiem to clarify his position. Jassiem's answer was, "Ek kan nie mense Kafirs maak nie." This had been a theme of Jassiem's for many years, and as such has a certain plausibility, but a suspicion that it was falsely obtruded into the exchange by Nazim is created by the fact that this critical response was not put to Jassiem or any of his witnesses.

By now some of those sitting down were shouting at Jassiem to get out. "As an Imam of the Mosque," said Nazim, "we really cannot

allow things to go completely out of hand." So, turning to the people, he indicated that those who wished Jassiem to leave because of what he had just said should stand up. Upon this, as he had expected, "everybody stood up." But his plan did not work. Jassiem did not go. His reason for not approaching Jassiem quietly with a request to leave, he gave as being that where Gydien had failed (as he inferred he had) he had no real chance of persuading Jassiem. Jassiem's attitude towards him was one of restraint, he would not allow Nazim "really to communicate with him." Nor did he try. Things continued to be disorderly and he tried to calm the people down. Jassiem then went to pray. At a later stage he noticed Abdullah, but he did not speak to him at all. Jassiem then left.

The likelihood that he would have ignored Jassiem's co-Imam at the offending Coovatool mosque will be addressed later. Asked in cross-examination why, if he had not ordered Abdullah out, people had

grabbed hold of him, he answered: "... Grab who?" The record proceeds:

> "Abdullah - Abdullah?
> Yes - I saw only a shuffle, but I was not very near to
> that, I was not near to that area.
> You do not know why it happened? — No. The
> mosque was full, there was quite a number of people.
> I was not there."

He denied having called Jassiem an Ahmadi symphathiser or having said anything about standing in solidarity with the Council, indeed having mentioned the Council at all. (However, in cross-examination he agreed that he had asked the people so to show their solidarity.)

Concerning Adiel Waggie's alleged protest at his uncle's treatment he said, when asked about it in cross-examination:

> "A lot of people were then speaking. I do not know, some people came to tell us things, some people shouted at us.
>
> Court: Did somebody ever suggest that it would be improper to throw a man out of the house of God, the house of Allah? No, not to me, Your Ladyship."

Gydien substantially confirmed Nazim's version of what had happened in the office. Inside the mosque he approached Jassiem who was sitting alone. He sat down next to him and said:

> "Sheikh, ek is die wakiel van my dogter. En Sheikh maak nie reg nie, want Sheikh het belowe vir my dat daar gaan nie moeilikheid wees nie. Ek het die landers belowe dat daar gaan nie moeilikheid wees in die mosque nie en nou sit Sheikh hier in die mosque en ek wil hê Sheikh moet die mosque verlaat asseblief."

Jassiem replied. "Vir wat? Ek was genooi."

It should be noticed that there is no hint in Gydien's prior evidence in chief that anyone in the mosque was reacting to the presence of Jassiem, although a good number of people were already present. Indeed in cross-examination he agreed that everything in the mosque was quiet. Jassiem was just sitting there, and nobody was interfering with him.

He went up to Nazim, who was by now in the mosque, and told him he

was not prepared to proceed with Jassiem present. Nazim went to the front, repeated this message to the congregation and asked those in favour of Jassiem's leaving to stand up. Almost all did.

It will be seen that Gydien does not confirm the critical part of Nazim's version, because according to Gydien, Nazim's announcement that the wedding was not to proceed was immediately followed by Nazim's call upon those present to indicate their wish by standing up. But according to Nazim these two events were separated by Jassiem's "gooi jy vir my uit?", Nazim's "Jy wil hê ek vir jou uitgooi dat jy vir my 'court' toe vat", then the essence of Nazim's version "Jy moet vir ons sê wat is jou staan met die Ahmadi 'movement'", followed by Jassiem's failure to denounce by saying "Ek kan nie mense kafirs maak nie". This then, according to Nazim, led him to ask the people "that they must stand to show if they want him in the mosque, because they have heard what

he said now". Thus the essence of Nazim's version, that he challenged Jassiem to say where he stood on the Ahmadi issue, is lacking in that of Gydien, despite the expectation that he would have listened to these exchanges with close attention. Nor is the matter made easier for Nazim by the failure of counsel for the appellants to put in cross-examination what Jassiem had allegedly said about not making people kafirs (as already stated), or that Nazim had called on the people to show their reaction to this statement. Further, the important phrase "because they have heard what he said now" was mentioned by him for the first time during his cross-examination.

To continue with Gydien's version, Nazim said nothing about the Council or solidarity with the Council. Then to quote Gydien, "Well actually chaos broke out." People were milling around and talking loudly. He was upset and did not wish to see his daughter's wedding

spoiled. At his instance his uncle Salie spoke to Jassiem, without result. He then approached Abrahams, suggesting a joint approach to Jassiem. Failing results he would rather go home. The two of them went to Jassiem. Abrahams asked him please to leave the mosque, "vir die 'sake' van die kinders. Moenie hulle dag 'spoil' nie." Jassiem's response was, "Gooi jy ook dan nou vir my uit, ons is dan ramilie." Abrahams denied that he was throwing him out, and again entreated him on behalf of the children. Gydien then said to him, "Sheikh, jy hoor mos nou wat die man vir jou sê, staan op kanala (please) en gaan uit." Upon that Jassiem left. Gydien claimed that he had not heard Nazim say that Jassiem was an Ahmadi sympathiser, or that he stood with the Ahmadis and not with the Council, or that Jassiem should leave not for the sake of the wedding but for the sake of the faith. When asked in cross-examination why he had not heard what Jassiem and his witnesses had said they had

heard, particularly when he agreed that Nazim had spoken loudly, he said "It is a big mosque." Nor did he hear anything to the effect that but for the difference in their ages Nazim would have thrown out Jassiem with his own hands. His answers as to whether Nazim ordered Jassiem out went like this:

> "'Hy moet uit'. Did you ever hear that? I can't recall that one, Sir.
>
> You can't recall that? No, Sir.
>
> Now are you telling the court you cannot recall it or don't you want to say it? Say what, Sir?
>
> That he did say to him in a loud voice, in almost shouting voice, 'You must out, you must go out'? - A lot of people was talking in a loud voice at that time, Sir. I do know for a fact Sheikh Nazim did speak but what he said I was very upset at that time, I didn't know what to do and I didn't hear.
>
> Didn't you see him pointing with his finger? - No, Sir"

Being very upset was also the reason he gave for not seeing and hearing a young man (Adiel) saying you cannot put out my uncle because

this is a mosque. But he did see a scuffle. The record proceeds:

> "Did you see Sheikh Nazim taking, moving towards him and saying,
>
> 'Ek smyt jou nou self uit'? —
>
> Who Sir?
>
> Sheikh Nazim? -- Said to who? To this young boy?
>
> — No, Sir You never saw that? — No."

Abdullah he did see involved in a scuffle with "somebody", but he did not see Nazim address him or shake his finger at him nor threaten him.

These passages strongly suggest that Gydien is selective about what he is prepared to admit to having heard and seen. His brand of truthfulness seems to avoid expressio falsi whilst allowing suppressio veri.

The last of the six witnesses, Gydien's son-in-law Ramzie Abrahams, took suppressio veri to its outer limits. One is almost led to doubt whether even the bridegroom attended the wedding. According to

him, after he entered with his father and Abdullah he saw people standing around in the middle of the mosque, talking loudly. Jassiem was sitting down. A couple of minutes after going to the front, Ramzie walked out of the mosque, because he became very emotional. Outside he cried. He was there for some 15 minutes whilst his friends consoled him. He then went in again. That practically sums up his evidence in chief. When the defendants' counsel brought him to the point, the following occurred:

> "Did you in the mosque hear Shaikh Nazim, did you hear him say anything to Sheikh Jassiem? ... (After a long pause) ... That would be difficult to say because everybody was talking.
>
> So you say that you did not hear him say anything specifically to anything specific to Sheikh (Jassiem)? ... Not specifically, no"

Attempts to get him to expand in cross-examination fared no better, "All I can remember was just people standing around talking

loudly." He could not describe anything that anybody had said to anybody else. This from a man who said he actually wanted to testify, had volunteered to do so, and who holds a BA degree. But he did agree that Jassiem was quietly seated and that he saw no fighting or quarrelling involving him.

An outline of the Court a quo's impressions of the six witnesses and its finding on credibility has been given earlier in this judgment. In summary that Court believed the plaintiff's three witnesses (whatever their shortcomings) and rejected the evidence of those called by the defendants as untruthful. We have to consider whether any misdirection on the part of the Court below has been demonstrated. If there be none the appellants will have to satisfy us that the Court a quo was wrong notwithstanding. If there be, then we are entitled to disregard the findings below, in whole or in part, depending upon the circumstances. We are to be alive to the

advantages presented to the trial judge which we do not enjoy. See R v Dhlumayo and Another 1948(2) SA 677(A) at 705-6: S v Kelly 1980(3) SA 301(A) at 307-8.

We shall commence our review of the witnesses with Nazim. The finding of the Court a quo was unequivocal. "I have no doubt that Nazim lied about the events at the wedding and his part in those." In the forefront of the reasons for disbelieving him was the total change in character which his version entailed, from the leader valiant in the faith, bellicose in enjoinder, to the passive, the meek, not even suggesting a course of action, which according to his lights it was his clear duty to demand, the president of the MJC who at the critical moment was content to leave matters to the uncertain handling of a layman. In order to understand this point fully it is necessary to recall the historical background.

Nazim had been a party to the MJC fatwa of 8 May 1965.

Thereafter he embraced it wholeheartedly. Because of the political situation in South Africa its terms could not be enforced by punishment of decapitation as might happen in an Islamic state. However, subject to local restraints, the fatwa is implacable. It envisages, inter alia, civil death as a Muslim. One of the first of its explicit commandments is that Ahmadi sympathisers are not to be allowed to enter a mosque. That was what, according to Nazim's acknowledged belief, had happened at the Yusifiya mosque, his mosque, on 20 December 1985 before he entered it. But the imposition of the MJC's will upon the Western Cape Muslims had not been without a hitch. This must have been galling to its president. After the Lahores had applied for a welfare organisation number, Nazim delivered an address at the Masjied-us-Salaam mosque on 11 June 1982 during the course of which he reaffirmed:

> "In a non-Islamic country it is encumbrant upon every Muslim to disassociate himself in all respects from a murtad (which included a follower of Mirza) and to have nothing whatsoever to do with him. It follows that such a person cannot be admitted to any Islamic holy place or even to the home of a Muslim and that no contact whatsoever between Muslims and murtads is permitted."

On 20 November 1985 Williamson J gave judgment against the MJC declaring Peck (an admitted Lahore) to be a Muslim, with all the rights and privileges attendant thereon, including entry into mosques and posthumous entry upon burial grounds. After this Nazim, speaking for the MJC, publicly stated that a court ruling by a non-Muslim could not be binding on a Muslim community: that notwithstanding the Court's order Ahmadis would not be allowed into mosques, and would continue to be branded non-Muslim: that the MJC would not back-pedal on these matters even if members made themselves guilty of contempt of court, and that they would go to jail if necessary.

On 26 November 1985 the MJC had written to the Loop Street committee concerning Jassiem's attitude to Ahmadis. The terms of the letter have been set out above. The response was dated 5 December 1985 and has also been quoted. It included the stinging accusations that the MJC, "withdrew from the Supreme Court case in such a shocking and appalling manner and allowed the Ahmadis to win the case by default...": further, "This truly was the blackest day in the history of the Cape Muslims and has left many a serious question unanswered as to the ability of the MJC to intervene, defend or propogate Islam in a responsible and sincere manner." Nazim sought to dispute that he had become aware of the contents of this letter before the wedding but his attempts to do so were most unimpressive.

On two recent occasions mentioned in the record the MJC had succeeded in furthering its campaign against Jassiem's brother-in-law

Erefaan Rakied by exerting pressure on mosque committees: on that of Grassy Park in the incident already described, and on that of Lonedown Street in connection with the employment of Erefaan's son Nurredwhan as a teacher. Now the MJC was confronted by a mosque committee, that of Coovatool, which answered back. Apart from berating the MJC it handed the issue of Jassiem's theological standing straight back, saying that they as laymen found no fault with him.

By the time of the wedding Nazim must have been smarting. Jassiem, who had been an irritant for many years, was an obvious target, not only for retorsion. Even more important, Jassiem's presence provided an opportunity to re-assert the MJC's authority. Indeed to fail to do so would have been quite inconsistent with the defiance expressed by the MJC through the mouth of Nazim less than a month before. Given the history it would have been an extraordinary thing if Nazim had not taken

a decisive stand on this occasion. Nor did time mellow his stand. In chairing a meeting more than seven months after the wedding, on 3 August 1986, he adopted or expressed statements such as,"... fight these alien forces to the bitter end," "... they must immediately deal with these people immediately ('these people' being Ahmadis who entered a mosque)" and "Ons moet almal in die 'front line' wees of in die "firing line'." This is the talk of the battlefield not of the appeaser nor of the mild catechizer.

Nazim would have the trial Court believe that against this background he did nothing other than report Jassiem's presence. Whilst in the office he did not state what must be done, he did not ask Fredericks, who was an office-bearer, to do anything, (although when pressed he "thought" Fredericks would ask Jassiem to leave); he did not ask Gydien what he was off to do; he entered the mosque without finding

out what, if anything, Gydien had done; he did not claim in evidence that his intention was to eject Jassiem if Gydien had not succeeded in doing so (this would have been too near the bone); and he did not obey the MJC's binding injunction that Ahmadi sympathisers were not to be tolerated in a mosque. Instead he called for a vote as to what was to happen. We agree with the trial judge's comment that the suggestion that Gydien and not Nazim took the lead in trying to eject Jassiem "is so improbable that one may describe it as romancing."

The trial judge relied on another improbability also, the reverse of Nazim's inaction, that Gydien would have taken the initiative, without any direction from Nazim, to create a scene at his own daughter's wedding at a stage when all was peaceful. He happened to be in the presence of the president of the MJC, the man above all in the Western Cape to say what to do and who was to do it. All the evidence is to the

effect that there were no outward signs of hostility to Jassiem before Nazim spoke (whichever version he uttered). Gydien conceded that if Jassiem had simply been left alone it was quite possible that there would have been no trouble, but then "I would not have felt good about it afterwards". He acted because of concern for his own feelings and those of the community. He was not concerned at all with what Nazim might think. It had not occurred to him that Nazim might consider it his duty himself to take action. All of this is surpassing strange, especially as up to that moment Gydien had simply assumed that Jassiem would not be present, assumed after what had at best been an ambiguous exchange, to which reference will be made later. The trial judge was right in our view to regard as highly unlikely Gydien's "theological fervour", he being "just an ordinary Muslim", who on the defendants' version was supposed to have started the disruption of his daughter's wedding.

There is a further jarring note in the evidence of Nazim, Gydien and Ramzie. It relates to their attitude to Abdullah. Over many years he had been Jassiem's assistant Imam at Coovatool, where so many iniquities were supposed to have been perpetrated, and he was his younger brother. Given the weight attached by the MJC and its adherents to guilt by association, it is difficult to see why Abdullah should not have been regarded as seriously suspect, and at least worthy of interrogation. Yet Ramzie went to him for ceremonial instruction prior to the wedding. He knew that he had been invited to the wedding by his father, Abrahams, and the three of them went to the wedding as a family group. Gydien had raised no question about his attendance. The vague foreboding of impending trouble to which he deposed did not extend to Abdullah's presence, as he had no knowledge of any trouble between him and the community. Gydien's view was otherwise. He would have objected to

Abdullah's coming, but he took no special steps to warn him off, as he took it for granted that because of the message that he was supposed to have sent Jassiem, "I presumed his brother would also take that as he himself as well." He was unaware that his future son-in-law had gone to Abdullah for instruction, or that he would or did arrive at the mosque in the same car. But when he saw Abdullah in the mosque he did not ask him to leave, because, "... at that moment like I said, there was chaos in the mosque, Sir." As far as Nazim is concerned, he did see Abdullah in the mosque but, as already stated, denied having addressed him. Questions were put to him as to why Abdullah also was not put to the test and the vote:

> "How did you view his position on the Ahmadi issue? ... We have not gone into his position as such yet.
>
> You had not gone into his position? ... We only dealt with the plaintiff.
>
> But surely you knew that he was the plaintiffs

assistant...

His brother, yes.

Beg your pardon? ... His brother.

Ja, but you. know that in the Koovatool Mosque as well as in the Imam Jassiem, he was assistant to the Shaikh. He performed Imam services at both of those mosques. Correct? ... Correct.

Correct. And that if Ahmadis and Ahmadi sympathisers had been allowed into the mosque he must have been well aware of it? ... The brother?

The brother, yes? ... Yes."

This passage together with that following, already quoted in connection with why persons should have grabbed Abdullah if Nazim had not addressed him as claimed, is a vintage piece of Nazim evasion. If the MJC had not earlier adopted an attitude towards Abdullah (and Nazim said it had not), and if Nazim had said nothing to or about him in the mosque, it is difficult to understand why Abdullah should have been so vigorously set upon, without Nazim being able to make out why it was happening. It should also be remarked that Nazim's conduct at the

Abrahams/Gydien wedding is in sharp contrast with Sheikh Salie's conduct at the Albertyn funeral a few weeks before. There Sake, also a member of the MJC had singled out both Jassiem and Abdullah. He seemed to have no difficulty with the fact that the MJC had not "gone into the position" of Abdullah.

Nazim is also very unconvincing about another event that occurred five days after the wedding. On 25 December 1985 a meeting attended by no less than 50 mosque committees was held at the offices of the MJC, which led to a letter dated 30 December 1985 recording an unanimous resolution to send a delegation to ascertain the "Islamic stand" of the Loop Street mosque committee on the subject of Jassiem's "links" to the Ahmadis, and his failure to denounce them. This was the very subject that the MJC was trying to pursue with the same committee. Yet, although he was president, Nazim claimed to know nothing of this

meeting. His professed ignorance carries no persuasion, and is no doubt to be accounted for by the fact that at the time Jassiem's other claim, based on the MJC's having incited the committee to dismiss him, was still alive.

The Court a quo recorded that Nazim had been evasive about many matters. The transcript of his evidence is indeed replete with evasion.

With regard to Gydien the trial Court's views were expressed thus, "... his version of what sparked trouble at the mosque ... is so improbable that it must have been largely concocted. ..."

Concerning Ramzie, the trial judge said, "He not only cries easily, he lies easily. I have no doubt that he too was not honest with the Court. There are contradictions and improbabilities inherent in his evidence."

These findings were fully and convincingly motivated by the Court a quo.

Turning to the evidence given on Jassiem's side, the trial judge's general comment was that such flaws as marred it were mainly due to age, quality of intellect and memory, and differences of observation of confused events.

Concerning Abrahams, she held that his evidence was not satisfactory in all respects. One respect in particular was that he was aware, contrary to what he tried to suggest, that Jassiem's presence at the wedding might cause friction.

There was much evidence concerning the invitation given to Jassiem, and it has to be explored in order to understand this point. According to Ramzie, at his father's insistence he took a wedding invitation to Jassiem. Later his father asked him to approach Gydien

enquiring whether Jassiem could attend. Although reluctant to bear this message Ramzie did so, delivering it in Gydien's kitchen in the presence of Fatima. Gydien's response was that if there was going to be trouble Jassiem should rather stay away. Upon being told this Abrahams' reaction was that if that was so he would himself not attend at the mosque. Ramzie went to his mother and requested her to cancel the arrangements for the reception. When his father heard of this he took to his bed. Ramzie then went to Jassiem's home. When he entered he began to cry. He told Jassiem of the trouble with his father and requested him to confine his attendance to the reception. After some remarks about mixing with Christians and Jews not altering one's allegiance, Jassiem said that Ramzie was not to worry, everything would be alright. Ramzie understood from his words that Jassiem would not come to the mosque. He left it to Fatima to convey the answer to her father. Later, when he

was receiving instruction from Abdullah the latter said that his father should not have asked permission for Jassiem to attend at the mosque, and asked Ramzie if he did not have some young friends who could prevent the two brothers being forcibly removed from the mosque. (Abdullah denied this conversation). Further, according to Ramzie, he feared that there might be trouble at his wedding because of the rumours about Jassiem's Ahmadi convictions, the attitude of the MJC and the close-knit nature of the local Muslim community.

Gydien largely confirmed this evidence. He said that his reason for requesting that Jassiem not attend was that he did not want trouble at his daughter's wedding. When the message came back that Jassiem had said that he was not to worry, everything would be alright, he assumed that this meant that he would not attend. He did not seek any confirmation that this was in fact what Jassiem intended. Asked why he

did not, he gave the answer, "I can't stop him from coming to the mosque, Sir." This is to be contrasted with what he claimed he did when he did come to the mosque.

Abrahams said that he had personally invited Jassiem to the wedding about a month before the time. Thereafter Ramzie had taken the written invitation. He also asked him to enquire of Gydien whether Jassiem might attend. There was no immediate reaction, but Fatima then came to him saying that Gydien had nothing against Jassiem. She herself had no objection either. There was no suggestion that Jassiem should stay away. In cross-examination he agreed that, starting about a year before, Jassiem's position had become difficult again as many people said that he was an Ahmadi sympathiser. "Die hele Kaap het gepraat daarvan." That was why he had sent Ramzie to Gydien, but his concern was set at rest when Fatima had come to him. Ramzie himself had

brought no answer. In the upshot he did not expect trouble. He denied that the invitation to Jassiem was intended as a challenge to Nazim. But he also said, when asked whether he did not think that Jassiem's presence might create a problem, that he had not thought about it. At this stage it appeared for the first time that after Fatima had brought the message from her father and as she was leaving she was in tears. Why that was he could not say. According to him he was concerned with the message she had brought. Her crying was not his concern and he did not ask her about it. Initially he denied that there was trouble between him and Ramzie about the impending wedding. The explanation for Ramzie's moving out of his house was that he was busy setting up his new home. He was alarmed when he found that Ramzie had left without telling him, but attributed this to Ramzie's talking to his mother rather than himself. This explanation reflects tension between father and son. Abrahams

conceded that he had said to Ramzie that if his family was not to be at the wedding Ramzie was not to count him a father. After some hedging he conceded that "family" meant, or included Jassiem. Unconvincingly he tried to play down the extent of the friction. He denied that it was a communication of Gydien's desire that Jassiem should not attend that had led to his saying that Ramzie was not to count him a father. In our opinion the trial court was correct to comment adversely on this part of Abrahams' evidence. What it all amounts to is that Abrahams placed his loyalty to his surrogate father above any possible embarrassment to his son (as Ramzie complained in his evidence), and was not prepared to be frank about it. That does not entail, necessarily, that the rest of his evidence has to be rejected without more.

The trial court's favourable assessment of Abdullah's truthfulness, notwithstanding his shortcomings as a witness, have been set

out earlier in this judgment and there does not seem to us to be any basis for not accepting that assessment.

On appeal the attack on Jassiem's credibility largely revolved around the incidents in 1965 and 1970, when he was entreated to "return to the fold." It was contended that his dealings with the MJC were characterised by a singular lack of honesty and candour. The counter view is that the MJC, for all its professions of desire for reconciliation and unity among Cape Muslims, was really more concerned with maintaining its sway over them, and that Jassiem, a man who detested witch-hunts, was treading that difficult path between his conscience and his yearning to be accepted by the only community which he regarded as his own. An approach to this subject cannot but be affected by Nazim's utter falsity as a witness, be it, from time to time, the result of mendacity, or religious fervour so intense as to blind him to all opinions but his own, as it is his

account which is to be compared with that of Jassiem where there is a conflict in the oral evidence.

The 1965 episode has been summarized earlier in this judgment. For the defendants it was contended that Jassiem treated the delegation from the MJC deceitfully. The thrust of Jassiem's version was that the delegation had come to make peace, that he should accept them as brothers and return to the Council. That stands in the forefront of his letter of 28 March 1965, which was never expressly answered. Further, he saw this as an opportunity to extract a public retraction of statements by Sheikhs Sharkie and Najaar presumably to the effect that he was not a Muslim. His letter proceeds to record that he assumes that the MJC has accepted him as a Muslim and to state that he awaits a similar acceptance by the two Sheikhs. Nazim claimed in evidence that their names were not even mentioned at the meeting. It would seem pointless and therefore

unlikely for Jassiem to have introduced their names if this were so. On the other hand it also seems unlikely that the delegation would not have raised the subject of the Ahmadis with Jassiem, something that clearly occupied their minds at the time. But he was giving evidence 22 years after the event, and it is of the nature of human memory to retain what one thought was important on a distant occasion and to discard or submerge what one thought was not, and also to build recollection around such written record as remains. However, the main charge against Jassiem is that in his letter he gave the impression that he might denounce the Ahmadis after reflection, when in fact he had no such intention. In cross-examination he conceded that there was substance in this charge. Also, it is contended that his belated concession that Ahmadis might have been mentioned shows that he was being untruthful It is not easy after all this time to reconstruct quite what went on in Jassiem's mind, but in

so far as he did dissemble, then the justification for it, as he viewed

matters, may be found in these clumsy words:

> "Dink u dit is eerlik wat u gedoen het? ... Wel, as hulle eerlik is met my dan ek is dit hulle plig om eers vir die Ahmadis te gaan vra en dit is ook hoe hulle glo. Het hulle ooit vir die Ahmadis gevra hoekom hulle vir my vra. Dit is hulle plig om na die Ahmedis te gaan, nie na my toe nie. Ek is nie 'n Ahmadi nie."

In other words it is the old refrain: please stop troubling me to denounce persons about whom I do not know enough to form a view, and in the meantime please stop calling me a non-Muslim. Overall, by no means a model of truthfulness, nonetheless to be understood if not excused as the behaviour of a man subjected, as he saw it, to unfair and oppressive pressure.

The incident in 1970 has also been summarized earlier in this judgment. The particular thrust of the criticism relates to his failure to

repudiate his publicly reported denunciation of the Ahmadis, and his acceptance of the Imamship at Coovatool, which was then offered to him. Jassiem attempted to explain his attitude in cross-examination thus, "En hulle het geeët en gedrink (a reference to the convivialities at the Azaria Mosque after the announcement of his changed attitude had been made), maar ek het maar gevoel dat ek maar net kan huis toe gaan." In re-examination he further explained his failure to repeat his true belief by saying that if he had, his congregation would have been scattered again, that the MJC frightened people so much that he would never again be able to bury the departed decently, or perform marriages for those who remained, and he would have lost the esteem which he had earned among his congregation over so many years.

All this is supposed to demonstrate Jassiem's self-interest and lack of principle. Rather it reminds us of the words which posterity

attributed to Galileo, after his famous recantation, seventy and afraid, before another earthly tribunal, "Eppur is muove." We do not consider that these events demonstrate Jassiem to be an untruthful witness either.

That said, it must be added that he displayed distinct weaknesses as a witness. Even the passing of the years has not wholly effaced the pugnacity and quick reaction of the one-time pugilist, leading him into unconsidered and possibly inaccurate answers which he was sometimes slow to retract. The other critical observations of the trial Court already mentioned are borne out by the record. Various further criticisms of Jassiem were raised in argument but, making allowance for his personality and age, we do not consider that any of them have a weight deserving of further discussion. Overall we do not find fault with the trial Court's finding that Jassiem was not dishonest.

Several times during his evidence Jassiem claimed that he had

it was also common cause that the congregation present in the Wynberg mosque when Nazim used the words complained of were members of the Western Cape Muslim community, and that they viewed matters differently. By way of an innuendo Jassiem alleged in his particulars of claim that Nazim's statement was intended to mean, and was understood by the congregation to mean that Jassiem:

> "is an Ahmadi as well as a sympathiser with Ahmadis and as such a non-Muslim, a disbeliever, a kafir, an apostate and murtad, who rejects the finality of the prophethood of Muhammed, who, as such, is to be denied admittance to mosques and Muslim burial grounds, to whom marriage is prohibited by Muslim law, and with whom Muslims should not associate."

In our judgment the evidence proves the innuendo. Counsel for the appellants did not contend otherwise.

Mention has already been made of the fact that at the time relevant to Jassiem's action there were some 260 000 orthodox Muslims in the Western Cape. Accordingly the trial Court had to consider whether

> "The fact that something like 98% of the South African population would not care a fig whether Jassiem is a traitor to Islam or not..."

deprived Jassiem of a cause of action based on defamation. That inquiry,

as the learned judge correctly pointed out, raised the issue -

> "whether it is correct to accept literally the allegation often made that for defamation to occur it is insufficient that the esteem of the object of the defamatory appellation be lowered in the eyes of a section of the community: the imputation in question must tend to lower him in the estimation of 'ordinary right-thinking persons generally'. (Burchell, page 95.)"

In considering this issue VAN DEN HEEVER J pointed out in

the course of her judgment that a man's reputation is not something which

"exists in a void". She proceeded to make the following perceptive

observations -

> "It consists of the esteem in which he is held by 'society' or within 'the community'. How the

community, society, is to be defined must in my view depend upon the facts and the pleadings in each particular case. Sometimes geographical borders of a country may define what society or community is relevant in a particular case; for example, where a member of Parliament of a government within those boundaries claims to be defamed as such. If a man's reputation within the scientific community of which he is a member, or within the financial community within which he operates, or within the black community within which he lives, is tarnished by an imputation within that community of conduct disapproved on the whole by that community, the Court will use its muscle to recompense him for the loss... And by his pleadings a plaintiff makes it clear whether the loss for which he claims reparation is of reputation countrywide, or in a more limited particular society ... I do not understand anything in the Appellate Division decisions as barring such an approach, which is accepted in many other countries and urged here as a matter of common sense and fairness. Prosser, TORTS, page 743, Burchell, DEFAMATION, page 99, Street, TORTS. 5th Edition, page 288, Salmon & Heuston, TORTS. 18th Edition, 134, Amerasinghe, DEFAMATION, pages 21-23, Ranchod, DEFAMATION, page 156, Hahlo and Kahn, THE UNION OF SOUTH AFRICA. THE DEVELOPMENT OF ITS LAW AND CONSTITUTION, page 546. The only qualification,

> it seems to me, is that the particular society should not be one whose reasonably uniform norms are contra bonos mores or anti-social."

Turning to the pleadings in the matter before her the trial judge remarked:

> "The innuendo pleaded here of necessity affects Jassiem's reputation within the only community of relevance to the action in which Jassiem sued as a Muslim claiming to have been defamed as such within the Muslim community of the Cape. Nazim himself testified that that community keeps to itself to keep itself pure and for that very reason rejects anything it regards as foreign to its allegedly well-defined norms."

Finally VAN DEN HEEVER J expressed the opinion that there was no sound reason for concluding that "in a non-Islamic overall South African context" the Court should regard the relevant norms of Muslim society as anti-social or as contra bonos mores. Accordingly she resolved the issue now under consideration in favour of Jassiem. She ruled that, despite the fact that the Cape Muslim community represents but a tiny fraction of our total national population, the words uttered by Nazim were defamatory of

Jassiem.

It appears to us, with respect, that the general approach reflected in the reasoning of the Court below upon this legal issue in the case is both logically compelling and sound in principle. Despite the fact that our courts have frequently reiterated the test of "ordinary right-thinking persons generally", we consider that the precise problem crisply raised by the peculiar facts of the instant case has not so far claimed the attention of this Court; and that there is no decision of this Court which represents authority directly contrary to the view expressed by the learned trial judge. The correctness of that view was strenuously challenged by counsel for the appellants in the Court below. However, during the argument on appeal Mr Albertus candidly informed us that, without making any explicit concessions in regard thereto, he proposed not to argue in this Court that on the issue in question VAN DEN HEEVER J had wrongly stated the law.

For the reasons hereunder we consider that the conclusion at which the Court a quo arrived in deciding this issue in favour of Jassiem was correct in law.

In pondering whether the words complained of by the plaintiff in the well-known case of Sim v Stretch [1936] 2 All ER 1237 (HL) were in their ordinary meaning capable of being defamatory, Lord Atkin proposed in that case (at 1240) the test:

> "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

The words quoted above were, however, immediately prefaced by the following cautionary remarks -

> "The question is complicated by having to consider the person or class of persons whose reaction is the (test of the wrongful character of the words used." (Emphasis supplied.)

It need hardly be said that what does or does not represent "the

estimation of right-thinking members of society generally" is something

difficult enough to gauge even in a society which is more or less homogeneous. Such homogeneity might perhaps have existed in the United Kingdom for a long time before the large-scale immigration which that country began to experience shortly after the end of the Second World War. However, where one has a heterogeneous society such as is to be found in South Africa, and the statement complained of is alleged to be defamatory only in the eyes of a particular segment of society, Lord Atkins test cannot sensibly be applied unless his cautionary remarks should be construed as meaning that, when dealing with a particular segment of society, it is the reaction of "right-thinking" members of that segment of society which becomes the yardstick rather than that of "right-thinking" members of society generally. While constitutionally the Republic is a single sovereign State, the composition of its peoples reflects a rich mosaic made up of a variety of races,

cultures, languages and religions. The consequences of such a diversity, in the context of the present discussion, have been vividly described by Didcott J in Demmmers v Wyllie and Others 1978 (4) SA 619 (D) at 629B-D:

> "No single group has a monopoly of such a society's 'right-thinking' members, and the 'mythical consensus' [of opinion] must encompass them all. Subjectivity inevitably intrudes whenever this is sought. A Judge would doubtless hesitate to see himself as the epitome of all 'right-thinking' persons, or to say so at any rate. He is seldom likely, on the other hand, to attribute to the 'right-thinking' a viewpoint sharply in conflict with his own. More often he decides what he personally thinks is right, and then imputes it to the paragons. To others, however, the tenets thus decreed may seem merely the innate prejudices of the group or class from which he has sprung. That they indeed are is the danger against which he must guard."

It is hardly a matter for surprise that the complex population structure of our country has been mirrored in a number of South African defamation cases in which the court has appeared to disregard the view

of "society in general" in favour of a narrower provincial, ethnic or religious view. In Naidu v Naidu (1915) 36 NLR 43, the plaintiff was an Indian, and a member of the Naidu caste, who had arranged the marriage of his daughter to the son of Raja Naidu. The words used by the defendant were:

> "After all Raja Naidu got a Woda's daughter in marriage to his son."

At the trial in the magistrate's court evidence was led that in India the Woda caste was several degrees lower than that of a Naidu; and that an allegation that a Naidu's son had married a Woda's daughter would degrade the Naidu. Against the magistrate's award of nominal damages to the plaintiff the defendant appealed. The Natal Provincial Division (Dove-Wilson JP and Broome J) dismissed the appeal with costs. In the course of a brief judgment Dove-Wilson JP remarked (at 44):

> "There is evidence that the words were calculated to do some damage to the plaintiff, and although it

> suggests that the damage in Natal might not be so great as it would have been if the parties were living in India, still any defence on that ground is met by the very moderate amount which has been allowed."

In Naidu's case the plaintiff and the defendant were Indian; and publication was made to an Indian. That situation may be contrasted with the state of affairs which confronted the court in Pillay v Ivins (1919) 40 NLR 137. The defendant, a white man, owed money to the plaintiff, an Indian market agent in Pietermaritzburg. In settlement of his debt the defendant forwarded a cheque to the plaintiffs attorney, a white person, under cover of a letter which read -

> "I was at your office on the 31st, but found same closed, so enclose the amount, by cheque, for full payment of that coolie claim."

In an action for damages in the magistrate's court the plaintiff alleged that he was a member of a caste many degrees above that of a coolie, and that the words "coolie claim" had been used maliciously, and with intent to

degrade. The defendant pleaded that he had written the letter without any intention of injuring the plaintiff; and he testified that he was quite unaware of caste distinctions. The plaintiffs action failed and he appealed. The full court of the Provincial Division (Dove-Wilson JP, Hathorn and Tatham JJ) dismissed the plaintiff's appeal with costs. In the course of his judgment Dove-Wilson JP (at 139-140) made the following observations:

> "Now in the immigration laws down to 25 of 1891 the term used by the legislature to designate the people who came here from India under those laws was the word 'coolie', and that was the universal appellation throughout Natal for Indians. It became known to the legislature that there were certain classes of Indians, to whom in their own country it would be inapplicable, who objected to the word as derogatory, and in subsequent legislation the words 'Indian immigrants' were substituted. But it had become the habit among Europeans, and these habits die slowly, to designate Indians as 'coolies' without any idea or knowledge whatever that any insult could thereby be conveyed, and it is not surprising that there are many who in the same way do'so still; and indeed, there is a number of

> Indians in Natal to whom the term would be properly applicable in their own country, who cannot consequently object to it here. But there are others who, according to Indian ideas, would naturally resent the term being applied to them, and the case might have been very different had the defendant been one of themselves and conversant with their customs and ideas. I do not defend the use of the term. It is just as easy to say Indian as coolie, which is descriptive of only one, and that, the lowest class of Indian, and, consequently, as it is offensive to the other classes, it should be avoided. But it is perfectly clear from the evidence of the plaintiff and of his witnesses that it may, and is, still used by many Europeans as a general term for Indians without any idea whatever that it may, if addressed to an Indian to whom it is not applicable, give offence, and indeed, without any knowledge that there are Indians to whom it is not applicable, and consequently with no intention to insult."

Having noticed the approach of the Natal courts in a couple of defamation actions involving members of that province's Indian community, with its adherence to or at any rate recognition of differences within India's social caste system, we turn to the approach adopted in a

defamation action in the then province of Transvaal. The case is Brill v Madeley 1937 TPD 106. The defendant was the Nationalist Party candidate at a Provincial Council election where the Labour Party had also put up a candidate. The plaintiff was a member of Parliament and the leader of the South African Labour Party. The defendant distributed among the voters of Fordsburg an electioneering circular. A judge in chambers held that the critical sentence in the circular would convey to the ordinary reasonable reader that a speech made in Parliament by the plaintiff justified the inference that he advocated marriage between white girls and coloured men; that it was actionable falsely to say of a public man in the Transvaal that he was an avowed advocate of miscegenation; and that an order restraining the defendant from distributing the circular should be granted.

In an appeal to the full court its judgment was delivered by Tindall J with the concurrence of Solomon and De Wet JJ. In the

course of his judgment Tindall J (at 110) said the following:

> "I am of the opinion that, having regard to the feeling which has prevailed among the public of the Transvaal ever since it was first occupied by whites many years ago, a man is exposed to hatred and contempt if it is said of him that he advocates marriage between European women and coloured men in South Africa... In the passage in Matthaeus, de Crim, (47.4.1.2) quoted by DE VILLIERS A.J.A., in G.A. Fichardt, Ltd v. The Friend Newspapers,Ltd (1916, A.D. at p. 13) that writer says that words are defamatory when something is imputed which is disgraceful according to the usages of the country, provided that in order to ascertain whether this is so, the opinion of the better classes and of the saner members of the community must be taken. If this test is applied, in my judgment, the imputation complained of in this case is defamatory. The Court is not concerned with the question whether the general opinion today on such marriage is right or wrong. We must take public opinion as it exists in the Transvaal, according to our knowledge of it gained after a long residence in this Province... In my view, a European who advocated such marriages would, in the prevailing state of opinion, be regarded by most Europeans in the Transvaal as trying to destroy a safeguard which a large section of the population regards as fundamental for the preservation of the white race in this country,

> and he would lose caste himself and would incur the hatred and contempt of most white citizens."

The thrust of the full court's judgment in the case of Brill v Madeley entailed a purely regional conspectus of the facts. The emphasis throughout, as the above quotation amply demonstrates, was exclusively upon the state of white public opinion (whites alone then having the vote in the Transvaal) within the confines of a single province. Whether the deep-seated predisposition of the majority of white persons in the Transvaal would have been shared by the majority of "the better classes" and of "the saner members" of the white communities living elsewhere in South Africa, was an inquiry upon which the full court found it unnecessary to embark.

Lord Atkin's test has been widely applied in South African courts - see, for example: Smith v Elmore 1938 TPD 18 at 21; Conroy v Stewart Printing Co Ltd 1946 AD 1015 at 1018; Hassen v Post

Newspapers (Pty)Ltd 1965(3) SA 562 (W) at 564; Botha v Marias 1974 (1) SA 44 (A) at 49; HRH King Zwelithini of Kwa-Zulu v Mervis and Another 1978 (2) SA 521 (W) at 529. In the context of a criterion of

defamation our courts have tended to equate "right-thinking" with "reasonable" or "ordinary" or "average". We would agree, with respect, with the suggestion made by J M Burchell, "The Criteria of Defamation" (1974) 91 SAW 178 at 180, that -

> "In this sense the term 'right-thinking' does not add anything to the test of the ordinary reader."

If the requirement of "society generally" of Lord Atkin's test were to be applied in every conceivable case of defamation it would have the consequence that, in the case of a plaintiff belonging to a particular community representing only a fraction of the entire population of the country, the views of such community would be disregarded in circumstances in which the views of that community were all that

mattered. That, so we consider, is not the position in our law of

defamation.

Earlier in this judgment the view has been expressed that upon the issue now under consideration the reasoning of the learned judge in the Court below was sound in principle. It is true that there are certain dicta in the judgments of our courts which may seem to suggest that what we would call "community views" are irrelevant as a criterion of what constitutes defamation; and, in consequence, that our law does not recognise what may conveniently be termed "segmental defamation". It appears to us, however, that too much has been read into them, and that upon careful scrutiny these dicta do not represent real authority for such propositions.

Most frequently cited in this connection are the following remarks of Solomon JA in G A Fichardt Ltd v The Friend Newspapers Ltd 1916 AD 1 at 9-10:

> "The argument raises the question whether words that in themselves are perfectly innocent can be regarded as defamatory by reason of the special circumstances prevailing at the time and in the locality where they were published.... For example it may very well be that, though in certain parts of South Africa it would injure a man in his business to say that he was a German, this might not be so in other parts. Would the words then be libellous in one district and not in another? Moreover if words innocent in themselves can be treated as defamatory in certain places and at certain times where is the line to be drawn? For example it might very well be that in one part of the country, where political feeling is running high, it might be injurious to a man in his business to say that he is a Nationalist, or again in another part that he is a Unionist. Is it to be held that in the one district it would be defamatory to say of a man that he is a Nationalist or a Unionist but that it would not be defamatory to make the same statement of him in another district?"

However, we are of the opinion that the question with which we are concerned neither arose nor was considered in Fichardt's case. The issue before this Court was a very narrow one: Could the accusation that the plaintiff was a German company, standing alone and without any

special innuendo, be defamatory. The question was answered in the negative. That, and nothing more, was what was decided. This Court was not required to consider whether words, innocent on their face, spoken of a plaintiff belonging to a community localised in one corner of South Africa might not sustain a defamatory innuendo when uttered there, despite the fact that the same words would be quite incapable of any such innuendo elsewhere in South Africa.

The case of Wallachs Ltd v Marsh 1928 TPD 531 decided that an imputation against a school-teacher that he had made a political speech at a political meeting was not defamatory per se. In the course of his judgment Krause J said (at 536):

> "It is not what one particular section of the community, which might have very narrow ideas with regard to what is proper or improper for certain persons in society to do; the Court has to regard the estimation in which a man is held in society generally; and, therefore, although we have a vast difference of opinion as to the correct conduct of school-teachers,

> especially whether they ought or ought not to meddle in politics, that is merely a sectional view and not one which is generally accepted." (Emphasis supplied.)

What the learned judge in the above passage described as a "sectional view" was not the view of a defined community (such as the Cape Muslim community within a broader South African context), but rather a section of the general public whose narrow views departed from the norm.

A further reference to "sectional views" is to be found in this Court's judgment in Conroy v Nicol 1951 (1) SA 653 (A). Dealing with the effect of words alleged to be defamatory Van den Heever JA said at 660H:

> "So 'n bewering kan die kabinet wel in onmin by 'n sekere seksie van die bevolking laat geraak, maar nie die hoogagting van regdenkende persone in die algemeen laat verbeur nie." (Emphasis supplied.)

Here loo, so it seems to us, the learned judge had in mind simply a

number of individuals in the populace whose notions were considered

unreasonable. Again the court was not required to consider the views of a defined community in order to gauge whether its views, seen in isolation, might fittingly serve as a criterion for defamation.

Against the general terms in which the above dicta (and many more like them) are couched, there must go into the scales the rationes of the Natal cases, already considered, dealing with the views of the Indian community in that province; and the approach reflected in the criteria applied in Brill v Madeley (supra).

Writers have pointed out that a rigid application of the "society generally" principle is in our country an unrealistic one. Thirty-five years ago Hahlo and Kahn, The Union of South Africa - The Development of its Laws and Constitution delivered the following plea (at 546) -

> "The South African population is composed of comparatively large groups of persons having widely divergent cultural, educational, social and economic

> backgrounds. In many cases persons belonging to different racial groups hold different views. Under these circumstances it is submitted that it would be preferable to adopt the American approach, according to which it is recognised 'that the plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it be a minority one, with ideas that are not necessarily reasonable [provided that] ... if the group who will think the worse of the plaintiff is so small as to be negligible, or one whose standards are so clearly anti-social that the court may not properly consider them, no defamation will be found'."

Ranchod, Foundations of the South African Law of Defamation, rejects

as artificial the "right-thinking" test (at 156) and proceeds to say:

> "In a country like South Africa, with its varied social and economic structure, it would seem to be more appropriate to test the meaning the words are capable of bearing in a particular group or community to which the parties belong. The reasonable hearer or reader in the circumstances may be a better standard than that of a reasonable, right-thinking member of society."

In his work on defamation Burchell, The Law of Defamation in South

Africa, remarks (at 99):

> "Reputation is a 'relational interest' - it is the opinion which others hold of a person. Even if this opinion is not diminished among persons generally but only among a portion of society, it seems right that the plaintiff should have his remedy... Melius de Villiers defines reputation as 'that character for moral or social worth to which [a person] is entitled among his fellow men'. In South Africa, with its diverse population with different ideologies and cultures, in many instances the concept of a person's fellow men inevitably assumes a sectional meaning and there is a distinct need for the recognition of the views of different groups."

Whether in a given situation a distinctive community group

which forms part of the total South-African population is such that when

a plaintiff is lowered in its esteem he must be adjudged to have suffered

damage, is a question of fact to be decided on the circumstances of each

case. It goes without saying that such jurisdiction is to be exercised

cautiously, and that appropriate line-drawing may prove difficult. It may

also require the concomitant evolution of defences peculiarly appropriate

to it and which would not necessarily be recognised as defences where the words complained of are defamatory in the eyes of society at large.

In the present case, however, the claim for community recognition is, in our view, a strong one. In the total fabric of South African society the Western Cape Muslim community is a long-established, well-defined and closely-knit social, cultural and religious unit. Despite the fact that its numbers are relatively small the evidence in this case satisfies us, inasmuch as it is a substantial and respectable segment of our society, that when a member of the Western Cape Muslim community is lowered in its esteem he suffers damage; and that he is in law entitled to seek reparation by way of an action for damages for defamation.

D. DID THE APPELLANTS DISCHARGE THE ONUS Of ESTABLISHING THE DEFENCE OF QUALIFIED PRIVILEGE?

Having established that the words imputed to Nazim were uttered by him, and were defamatory of Jassiem, the appellants' alternative plea of qualified privilege falls to be considered next. As pointed out previously, this plea is founded on the proposition that the publication of the defamation was not unlawful because the offending words "were published and received by the congregation in the discharge of a moral or social duty and/or the furtherance of a legitimate interest". Coupled with this was an allegation that at the time Nazim had a bona fide belief in the correctness of his utterances.

It is common cause that the appellants were encumbered with a full onus in regard to their defence of qualified privilege (Neethling v Du Preez and Others 1994(1) SA 708(A) at 770H-I).

The learned trial judge appears to have decided the issue of qualified privilege on the basis of what was referred to in argument as the

"substantive approach". This approach was predicated on the need for the appellants to prove, on the requisite balance of probabilities, that in terms of applicable Islamic law an Ahmadi sympathiser (of the kind Jassiem was claimed to be) is not a Muslim and is not accepted in a Muslim community nor permitted in a mosque. This, it was held, they had failed to prove. It has already been pointed out that as an alternative to their main plea denying use of the words complained of the appellants did not plead that the words were true and uttered for the public benefit. The only alternative defence relied upon was that of qualified privilege. Truth and public benefit on the one hand, and qualified privilege on the other, are disparate defences. The validity or otherwise of the defence of qualified privilege hinged solely upon the answer to the inquiry whether Nazim's defamatory communication to the wedding guests in the Wynberg mosque was made in the discharge of a moral or social duty

and/or in the furtherance of a legitimate interest; and whether the congregation had a reciprocal duty or interest to receive it. To this inquiry the "substantive approach" was irrelevant.

Accordingly it is necessary for this Court to consider afresh, in the light of the proven facts, whether or not the elements of the defence of qualified privilege were established.

The defence of qualified privilege rebuts the inference of unlawfulness that arises from the publication of defamatory matter.

Public policy is the foundation of the defence (Borgin v De Villiers and Another 1980(3) SA 556(A) at 571F-G). As pointed out by Burchell: The Law of Defamation in South Africa, at 237/8:

> "It is in the public interest that the communication of certain defamatory statements, uttered on specific occasions, should not be prevented or inhibited by the threat of defamation proceedings."

Privilege attaches to the occasion on which the communication

was made (Adams v Ward [1917] AC 309 (HL) at 348.) The appellants contend that the defamatory words were uttered by Nazim in the discharge of a duty or the furtherance of a legitimate interest to the members of the congregation present at the Wynberg mosque who had a corresponding duty or interest to receive them; hence the occasion, and consequently the communication, was privileged. Our law recognises that such an occasion may enjoy qualified privilege provided certain prerequisites are satisfied. One such requirement is that the communication must not be lacking in relevancy. As pointed out by Watermeyer AJA in De Waal v Ziervogel 1938 AD 112 at 122:

> "[A]n occasion which is privileged for a communication upon one subject is not privileged for a communication upon another subject not germane to the occasion"

Moreover, the truth or otherwise of a defamatory statement has no bearing on whether it was germane to the occasion or not (Borgin v De

Villiers and Another (supra) at 579A).

Watermeyer AJA went on to hold in De Waal v Ziervogel (at 122/3):

> "Whether or not the occasion is privileged must be decided from the circumstances of the case independently of the motives which moved the defendant to speak. In other words the question which the Court has to decide at this stage is not was the defendant in fact speaking from a sense of duty but did the circumstances in the eyes of a reasonable man create a duty or an interest which entitles the defendant to speak. This does not mean that the state of mind or actuating motive of the defendant is immaterial in the ultimate result of the case because it becomes very relevant in the next stage of the enquiry when the question arises whether a privileged occasion has been abused."

On page 124 of the judgment he reiterated that a defendant's state of mind "was irrelevant on the question whether the occasion was privileged".

The objective test propounded in De Waal v Ziervogel has been consistently followed in this Court - see e.g. Benson v Robinson & Co

(Pty) Ltd and Another 1967(1) SA 420(A) at 426 D-F and Borgin v De

Villiers and Another (supra) at 577E-G where Corbett JA stated:

> "The test is an objective one. The Court must judge the situation by the standard of the ordinary reasonable man, having regard to the relationship of the parties and the surrounding circumstances. The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did?"

The principles outlined above are those which must guide us in

arriving at a decision. The essential enquiry is whether a reasonable man

would have considered, ex post facto and in the light of all the relevant

circumstances, of which he must be taken to have been aware, that there

existed a duty on the part of Nazim which entitled him to speak as he

did. We accordingly turn to a consideration of the facts that bear on this

enquiry. To the extent that this involves a repetition of facts already

recounted, this is necessary to facilitate a proper understanding of the

judgment.

In May 1965 the MJC declared Jassiem to be an apostate. This was followed almost immediately by the 1965 fatwa in which the MJC proclaimed, inter alia, that all Ahmadis were murtad and that no Ahmadis or Ahmadi sympathisers should be allowed to enter Muslim mosques. The fatwa has been of application ever since. It could only have been intended to apply to acknowledged Ahmadis and their sympathisers, or persons who had properly been identified and declared as such. The consequences of a declaration of apostasy are so severe that the MJC could not have countenanced the indiscriminate labelling of persons as Ahmadis or sympathisers. In 1970 Jassiem was absolved of apostasy and returned to the fold of Islam. In 1971 he became the Imam of the Coovatool mosque, an office he continued to hold until late December 1985. During 1982 and 1983 he acted as part-time Imam of the Parkwood mosque. Whatever discontent or rumours there may have

been concerning Jassiem's alleged sympathetic attitude towards Ahmadis, nothing came out into the open until the beginning of 1984. Until then Jassiem appears (outwardly at any rate) to have been fully integrated into, and accepted by, the Muslim community.

On his return, in January 1984, from a visit to Mecca Jassiem was confronted by the Parkwood mosque committee with regard to his association with Erefaan. This eventually led to the letter from the secretary of the committee dated 16 March 1984, the material parts of which have been quoted earlier in this judgment. Of significance is the fact that while Jassiem's services as a part-time Imam were suspended "until this matter is cleared", he was not debarred from attending the mosque. The letter indicates uncertainty in regard to Jassiem's precise stance in relation to Ahmadis, and recognises the need for investigation of the situation. In the meantime, in February 1984, Nazim had

overruled an objection to Jassiem being called as an expert witness in a Muslim religious dispute, declaring him to be a Muslim.

The next event of any significance was the letter from the committee of the Lentegeur mosque in October 1985 in which Jassiem was accused of associating with Ahmadis and allowing them and their sympathisers to attend his mosque. The latter, it was claimed, was "a fact that cannot be disputed". However, no names, dates or specific instances were cited. At about this time Jassiem attended the funeral of Mrs Albertyn at the St Athens Road mosque where a concerted effort was made by a section of those present to eject him from the mosque. This was the occasion on which the agitators were silenced by Sheikh Soeker with the words "Daar is nog nie 'n bestelling nie teenoor die Sheik nie van die Muslim Judicial Council nie". In the result Jassiem was permitted to remain in the mosque for the service and Soeker even asked

him to say a prayer, which he did. What occurred suggests that at the time there was no general consensus amongst Muslims about Jassiem's status, and that the mourners at the funeral were prepared, after being admonished by Sheikh Soeker, to adopt a wait-and-see attitude pending an investigation by the MJC - an attitude seemingly in keeping with both Islamic principle and practice.

Then followed the meeting of the MJC on 13 November 1985 at which Sheikh Gabier reported that he had received complaints about Ahmadis and their sympathisers attending the Coovatool mosque. We have already quoted the relevant portion of the minutes of that meeting. What needs to be emphasized is the recital that "The Council was completely in the dark with regard to the stand and attitude of the Imam viz. Sheikh M.A. Jassiem". Sheikh Gabier was instructed to write a letter to the mosque committee "to set up a meeting so that this issue

could be discussed", presumably to obtain clarification on the matter. The nature of the MJC's response points to the conclusion that the MJC, despite possible concerns it might have had, did not intend to label Jassiem an Ahmadi sympathiser without a proper investigation. The letter was the first step to that end. It is worthy of note that no suggestion was made that Jassiem should be suspended as Imam pending an enquiry.

One would have expected the committee members of the Coovatool mosque to have been fully aware of events taking place at their mosque. If there were undoubted substance in the complaints against Jassiem, confirmation of this fact should have been readily forthcoming. The committee's sharply-worded response lent no support to the complaints, this notwithstanding its attitude, reflected in the last sentence (not previously quoted) of its reply, that "Needless to say the Coovatool

Islam Mosque Trust is as concerned about the Ahmadis issue as any of the other Mosques and ummat". Its letter, which suggested that the MJC should deal with Jassiem directly in relation to what was a religious issue, amounted to a referral of Jassiem's position to the MJC for consideration and decision. It is common cause that the MJC construed it in that light. Despite his evasive evidence in this regard, the probabilities suggest that Nazim was aware of the committee's response and its implications. This then was the position that pertained on 20 December 1985 when the events at the Wynberg mosque took place.

Clause 7(a) of the MJC's constitution provides:

> "All religious matters affecting the Muslim Community shall be referred to the Supreme Council for consideration and decision."

In terms of clause 10 of the constitution the Fatwa Committee (of which Nazim was the chairman), and which comprised the members of the Supreme Council, was called upon, inter alia, to handle all matters

relating to Ahmadis.

The uncertainty (for such it was) and concern regarding Jassiem's alleged Ahmadi sympathies was clearly a religious matter affecting the Muslim Community, and as such a matter on which the Supreme Council was called upon to adjudicate. Alternatively, it raised an Ahmadi issue and therefore fell within the purview of the Fatwa Committee. As at 20 December no proper consideration had been given by either body to Jassiem's position, and no decision taken or finality reached in regard thereto. The matter was the subject of a pending enquiry. There can be little doubt that Nazim was fully alive to the situation that existed as at that date, and that he knew that there was an investigation under way that would ultimately determine Jassiem's fate. Islamic faith, according to Ghazi, requires certain steps to be taken before a Muslim can be declared an apostate. That this should be

so is hardly surprising in view of the dire consequences that flow from

such a declaration. He explained the procedure to be followed in these

words:

> "In order to excommunicate a person in order to declare that such person has ceased to be a Muslim, it is necessary that his doubts are to be removed, his misunderstanding is to be removed and the true position, true Islamic point of view is to be properly explained to him. If after receiving explanation, if after the removal of doubts, if after listening to the arguments and authorities he still insists that he holds the same view, then he will be considered to be a kafir, a non-Muslim. In spite of their being explained to him and in spite of his association with the Muslims, a person is living in a Muslim society, a person is co-existing with fellow Muslims, day and night he is with them and he hears them, he sees them, he witnesses them but there they are performing in a certain manner. They are offering five time prayer. They are having such and such beliefs and in spite of that the true position is explained to him and even then he says that he does not believe, then he is unanimously considered to be kafir."

It appears from Nazim's evidence that the accepted method of

dealing with suspected Ahmadis in the Western Cape at the relevant time

was somewhat more forthright and robust. This appears from the

following passage in his evidence when questioned by the trial judge:

> "I am putting to you a hypothetical situation that there is the rumour, the man comes to your mosque and you confront him and you say, 'I believe that you are an Ahmadi, the rumours are floating around that you are an Ahmadi' and he answers you, as I have suggested, what would you do with him? — I will ask him if he is an Ahmadi. If he says no, then I will tell him that denounce such a belief because it is not accepted in Islam, it is the belief of kafir and if he says that he does not and he regards that belief as being Islamic, then I declare him as a sympathiser of the Ahamdi.
> In other words you would test him by requiring him to denounce Ahmadis? — Yes.
> Saying that you would not let him pray in your mosque? — That is correct."

Whichever procedure is followed there would appear to be two essential

preconditions before a declaration of apostasy is justified - some form of

enquiry and ultimately (the acid test) a refusal to denounce.

If, as was contended on behalf of the appellants, these

procedures are indeed integral to Islamic faith - as to which we express

no opinion - it would not be for us to comment on their reasonableness

or fairness. Significant in this connection are the following observations

of Lord Davey in General Assembly of Free Church of Scotland and

Others v Lord Overtoun and Others [1904] AC 515 (HL Sc) at 644-5):

> "My Lords, I disclaim altogether any right in this or any other Civil Court of this realm to discuss the truth or reasonableness of any of the doctrines of this or any other religious association, or to say whether any of them are or are not based on a just interpretation of the language of Scripture, or whether the contradictions or antinomies between different statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed only from an imperfect and finite conception of a perfect and infinite Being, or any similar question."

See too Lord Halsbury LC at 613.

One cannot deny the right to those who are legitimately charged with the protection of the Muslim

faith to seek to safeguard what they consider to be the fundamental and critical tenets of their faith, and to

excommunicate someone whose convictions and beliefs are in opposition

to, or not in conformity with, those principles. It would therefore be inappropriate for us to measure by conventional juridical standards the fairness or justifiability of declaring murtad a person who persists in adopting a neutral attitude towards Ahmadis, either because of his lack of knowledge as to what their beliefs are, or because he believes that the Quran enjoins that a person who is to all outward appearances a professing Muslim may not be debarred from attendance at a mosque, and that the sincerity of such a person's professed faith is a matter between him and Allah. Turning more particularly to Jassiem's own attitude, his neutrality was partly due to lack of knowledge but predominantly due to his belief in the last-mentioned proposition. Whether or not a failure or refusal by Jassiem, for those reasons, to denounce Ahmadis would have justified branding him a "sympathiser" is a question which we are not called upon to decide in the light of our conclusions on other aspects of

the case, and in the absence of any invocation by the appellants of the defence of truth and public benefit. However, we may say that it is far from clear to us that it would have justified so branding him.

Suffice it to say that it is common cause that the procedural requirements of Islamic faith in dealing with a person suspected of being an Ahmadi or an Ahmadi sympathiser had not been followed in respect of Jassiem prior to 20 December 1985. Jassiem had not yet been requested by either Nazim or the MJC to clarify his stand and attitude in relation to the rumours circulating and the complaints made against him. Nor had he been asked to denounce Ahmadis. Nazim's false evidence was no doubt designed to deal with this failure - by untruthfully putting forward the case that he had in effect "tested" Jassiem and been met by a refusal to denounce Ahmadis. In this respect we disregard the events that occurred before Jassiem was declared an apostate in 1965, as they

were purged by Jassiem's return to Islam in 1970 and subsequent events. They are therefore not relevant to the issue of privilege.

While rumours may have abounded that Jassiem was an Ahmadi sympathiser (as appears, inter alia, from the evidence of Peck, Abrahams and Abdullah), his status as such had not been positively established at the time of the wedding. Given Jassiem's essentially neutral stance, the matter was one on which opinions could conceivably have differed. There was an enquiry pending into Jassiem's position. The recognised procedures that needed to be followed before a Muslim can be declared an apostate had not yet taken place. Amongst a responsible section of the Muslim community there seems to have been the perception that no action could or should be taken against Jassiem until the MJC had finally pronounced upon the matter. Those taking up that attitude recognised Jassiem's right to attend a mosque until then. In this respect it is worthy

of note that, on the proved facts, the members of the congregation present at the Wynberg mosque had displayed no hostility towards Jassiem, nor raised any objection to his presence there, prior to the entrance of Nazim and the events that followed.

All this being so, a reasonable man, properly apprised of the

antecedent history and the relevant surrounding circumstances, in particular the fact of an impending, unresolved enquiry and noncompliance with the essential prerequisites for a declaration of apostasy, would not have considered it his duty to speak as Nazim did. The time was wholly inappropriate for an ex parte statement of the kind made by Nazim. His accusation was premature and improper, and not germane to the occasion. Speaking colloquially, Nazim jumped the gun.

In terms of the principles enunciated above it is irrelevant that Nazim bona fide believed Jassiem to be an Ahmadi sympathiser, or that

he may subjectively have considered that there was a duty upon him to speak when he did. The communication was therefore not privileged.

Mr Albertus conceded in argument that Nazim would not have been entitled to brand Jassiem an apostate at a similar gathering immediately after receipt by the MJC of the letter from the Coovatool mosque committee. If such occasion would not have been privileged, neither would the later one in the Wynberg mosque have been, for nothing of any consequence had occurred in the interim to bring about any change between the one situation and the other.

The position may well have been different (we express no definite view in regard thereto) had finality been reached by the MJC on Jassiem's position after an enquiry and Nazim had used the occasion of the wedding to announce the result of its findings; or if the defamatory statement had been made by Nazim not to the wedding guests but to the

Supreme Council or Fatwa Committee of the MJC in the course of investigatory proceedings; or possibly even if Nazim had converted the occasion at the Wynberg mosque into an enquiry into Jassiem's convictions and beliefs concerning Ahmadis, and given him an opportunity to denounce them, as he falsely suggested in evidence had been the case.

Nazim's false evidence at the trial in an apparent attempt to bring his conduct in line with Islamic procedures strongly suggests that he appreciated ex post facto the wrongfulness of his behaviour, and that he resorted to such lengths in the hope of avoiding liability for his actions. That he was alive to the need for a proper enquiry is evident from his attitude towards Abdullah, against whom he claimed he could not level an accusation as "we have not gone into his position as such yet". The implication that Jassiem's position, by contrast, had already

been gone into, was clearly untrue. An enquiry had been embarked upon but no decision had yet been reached. In the circumstances, if the occasion was inappropriate to label Abdullah a sympathiser, it was equally inappropriate to brand Jassiem one.

Mr Albertus contended that if, objectively viewed, there was no duty upon Nazim to speak, he had spoken pursuant to a legitimate interest. Nazim's alleged interest derives from precisely the same factual matrix as his professed duty. In the present instance, if one is excluded, so is the other.

In the result the appellants failed to discharge the onus resting on them of proving that the defamatory words were uttered on a privileged occasion.

THE MJC WAS ALSO LIABLE FOR THE DEFEMATON?

The basis of Jassiem's second claim against the MJC is his allegation that in uttering the aforesaid defamatory words at the wedding on 20 December 1985, Nazim was "acting on behalf of Defendant and with its authority and approval". This was denied by the MJC in its plea and the matter was not dealt with specifically in the replication.

Particulars for purposes of trial relating to the alleged authority and approval were requested by the MJC but were refused in these terms:

> "The particulars requested are peculiarly within the knowledge of Defendant and constitute matters for evidence and/or are not strictly necessary for the purposes referred to in Rule 21(4)."

The onus was on Jassiem to prove such authorisation and approval on a balance of probabilities. In our estimation he failed to discharge that onus for the reasons set out hereunder.

In his evidence in chief Nazim said:

(21) that he did not know beforehand that Jassiem had been invited or that he would attend the wedding ceremony;

(22) that the MJC was unaware of the fact that he was going to officiate at the wedding;

(23) that the wedding had never been discussed at any meeting of the MJC; and

(24) that the MJC neither authorised him to say anything at the wedding nor approved of anything said by him on that occasion. His evidence hereon was as follows:

> "Did the Muslim Judicial Council authorise you to say anything at the wedding? — No, not at all.
>
> Did the Muslim Judicial Council approve of anything that you said at

> that wedding? Did they ever ... did the Muslim Judicial Council ever get together and authorise you to do something or approve of anything that you had done in relation [to] that wedding? ... No."

None of this was challenged or even dealt with in cross-examination and no evidence was given by or on behalf of Jassiem that there had ever been such authorisation or approval by the MJC as alleged.

In finding that the MJC was liable to Jassiem for the defamatory words uttered by Nazim at the wedding, the learned trial judge said the following:

> "Two further factual questions have to be answered. Having found that Nazim said the words alleged at the Gydien-Abrahams wedding, was he doing so acting as authorised agent for or representative of the MJC? Did the MJC incite the trustees of the Coovatool Mosque to dismiss

Jassiem?...

All the probabilities indicate that when Nazim attacked Jassiem at the wedding he did so not only in his personal capacity, but in pursuance of his duty as laid down in the constitution of the MJC to give guidance. That the MJC did not dictate to him exactly what form that guidance or 'dealing with' a person he regarded as requiring to be dealt with was to take is, in my view, immaterial.

When challenging Jassiem as an Ahmadi sympathiser at the wedding Nazim did so in pursuance of the policy decided upon by the MJC as expected of him by that body and not merely as an individual, just as he in his capacity as a leader within the self-appointed leader body, had acted in other instances on its behalf without any formal authorisation being minuted as far as we know from discovered documents.

That Nazim testified that he was not authorised to say anything at the wedding is probably correct. That it was not challenged in cross-examination is therefore in my view irrelevant in the circumstances of this case. It was as, INTER ALIA, President of the MJC, indeed part of his function to deal with Ahmadis. The method of dealing was left to him because according to him (and Advocate Albertus's argument) a simple expedient is adopted

> in such cases which avoids the trauma of religious trials. The MJC did not authorise him to insult or defame Jassiem. That, too, was unnecessary. Nazim merely adopted the course approved by the MJC as appropriate in similar matters: of labelling as an Ahmadi sympathiser and ejecting from the mosque a person not himself willing when called upon to do so, to take a similar stand against either the Ahmadis or anyone suspected of being one."

With respect to the learned trial judge we do not agree with her reasoning.

Nazim could not have uttered the said words "in pursuance of his duty as laid down in the constitution of the MJC to give guidance". His duty clearly was to abide by the decision of the MJC, to which he was a party, reached at the meeting on 13 November 1985, to conduct an investigation into Jassiem's attitude in relation to the Ahmadis. On 20 December 1985 that investigation was still pending. Neither was the method of dealing with that question left to him. The method of dealing

therewith by way of a formal investigation had already been determined at the MJC's meeting aforesaid. The investigation had been set in motion on 26 November 1985 by the writing of the letter to the Coovatool mosque committee, and was still incomplete at the time of the wedding. Nazim did not attend the wedding in his capacity as president of the MJC or as an authorised representative of that Council, but in his capacity as the Imam who was to officiate there at the invitation of the bride's father. It was clearly Nazim's own decision (probably made on the spur of the moment) to act as he did.

A careful appraisal of all the evidence leads us to the conclusion that there was no room for a finding that in acting as he did Nazim had the authority or approval, express or implied, of the MJC.

The MJC's investigation was never completed. It was

overtaken by events. It was only after the wedding and during the annual recess of the MJC, that Jassiem was subjected to the "acid test" by the Coovatool committee. When the MJC met again after its recess the need for any further investigation had already fallen away.

By reason of the aforesaid onus of proof imposed upon Jassiem by the pleadings the learned judge's correct finding that the MJC did not authorise Nazim to do what he did (and by clear implication also did not approve what he had done) should have been, and in fact is, fatal to Jassiem's second claim against the MJC. OUTCOME

For the aforegoing reasons the appeal of Nazim fails, and the appeal of the MJC succeeds.

COSTS

The parties have reached agreement on what an appropriate order as to costs should be.

The terms of such agreement are embodied in this Court's order.

The following orders are made:

(25) The appeal of the first appellant (Nazim) is dismissed with costs, such costs to include the costs of two counsel.

(26) The appeal of the second appellant (the Muslim Judicial Council) is upheld with costs, such costs to include the costs of two counsel.

(27) The order of the Court a quo of 23 February 1990 is altered to read as follows:

(28) Jassiem's claims against the Muslim Judicial Council based on wrongful dismissal and defamation are dismissed.

(29) The defamation action against Nazim succeeds

and he is ordered to pay R25 000 to Jassiem as damages.

(d) The costs order of the Court a quo of 3 June 1991 is amended in the following respects:

(30) Nazim will pay 85% of Jassiem's costs of which eight days shall be on the attorney and client scale, all such costs to include the costs of two counsel.

(31) Jassiem will pay the Muslim Judicial Council's costs, such costs to include the costs of two counsel.

(e) Save as aforesaid the costs order of 3 June 1991 is confirmed.

HOEXTER JA

SMALBERGER JA

STEYN JA

MARAIS JA

SCHUTZ JA