IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPèLAFDELING)

In die saak tussen:

SUID-AFRIKAANSE UITSAAIKORPORASIE APPELLANT

V

O'MALLEY RESPONDENT

Parallel citation: 1977 (3) SA 394 (A)

Coram: Rumpff HR, Jansen AR, De Villiers AR, Miller AR en Joubert Wn AR

Heard: March 7, 1977
Judgment: May 5, 1977

UITSPRAAK

Case Information
Appèl teen 'n beslissing in die Witwatersrandse Plaaslike Afdeling (IRVING STEYN, R.). Die feite blyk uit die uitspraak van RUMPFF, H.R.

R. Kruger, S.C. (bygestaan deur F. S. Sutton), namens die appellant: The interpretation of the broadcast must be the interpretation placed thereon as set out by the Judge a quo in his judgment at 1976 (3) SA at p. 127, subject to what is said at p. 127F - G. See also Sutter v Brown, 1926 AD at p. 163; Basner v Trigger, 1945 AD at pp. 35, 36; S.A.A.N. v Schoeman, 1962 (2) SA at p. 616E - H. The term "right thinking member of society" excludes a person who is morbid or of suspicious mind or super critical or abnormally sensitive. See Channing v SA Financial Gazette Ltd.

and Others, 1966 (3) SA at p. 474A - C. Possibly the Judge a quo put the context somewhat too broadly by stating that it was whether a listener "could or should" have formed the impression. The word "would" should have been chosen. Possibly this came about as a result of the decision in Basner v Trigger, supra, where an exception was being argued. Even applying the test of the Judge a quo, he erred in finding that certain omissions from the broadcast caused or should have caused any misunderstanding of the broadcast to the reasonable and right-minded listener. Although the evidence of the listener may have some role in the interpretation, such interpretation is of little or no value. See S.A.A.N. v Schoemann, 1962 (2) SA at p. 616. It is the duty of the Court and not the witness to interpret the message heard. The ordinary listener of reasonable intelligence could only have come to the following conclusions: (a) that the respondent had been arrested in terms of the Riotous Assemblies Act;

1977 (3) SA p397

(b) that his arrest had something to do with the meeting; (c) that other people had been arrested earlier and after the meeting. Such other people did not include respondent. The Judge a quo, at p. 128E - F of the report, placed too high a responsibility on the appellant. Our law does not, as in English law, differentiate between libel and slander, one being the spoken and the other the written defamation. If this statement of the law is correct, a virtually impossible onus is cast on the appellant which as a Broadcasting Corporation like all other broadcasting organisations has a public duty to have the news read to the public. 1n the case of a news broadcast, the reasonable listener will bear in mind that if he has to come to any conclusions, he must listen very carefully with an open mind. He must not search for the sinister interpretation. It appears clearly from the text of the news broadcast that the appellant tersely and in a confined space of time, reports merely factually. This is to be distinguished from news commentary. If the appellant had so high a duty as is envisaged by the Judge a quo, it would mean that the appellant would have to either so lengthen its news broadcasts that they take up an inordinate amount of time or otherwise must be placed under a duty to take such care in the broadcast of facts that it is impossible to misconstrue the meaning of such broadcast. If there is any ambiguity in a statement, then the Court would not and should not lean to that interpretation which makes it defamatory. It is not conceded that there is any ambiguity in the context of any of the news broadcasts but, if there

is, then it would be wrong to attribute a defamatory meaning thereto, where on an equal footing a non-defamatory meaning could be placed thereon. See Conroy v Nicol and Another, 1951 (1) SA at pp. 662G, 663C. Applying the test of a reasonable listener, such listener would not seize upon a defamatory sense in preference to a "good interpretation". Although the respondent led no evidence to rebut the animus injuriandi, this rebuttal can be gleaned and should have been gleaned from the evidence itself. If the newscast was ambiguous, which is not conceded, this in itself negates the presence of animus injuriandi. As the news broadcasts are capable of a non-defamatory meaning, it shows that there was no animus injuriandi. See P. R. MacMillan, South African Law Journal (1975), pp. 160 - 161, and Muller v S.A.A.N. Ltd., 1972 (2) SA at p. 592. There can be no suggestion of dolus directus and, having regard to the lawfulness of what the appellant stated, he is not rendered liable. The finding that appellant acted recklessly in omitting certain words is unjustified because, although the report was read, it did contain visually two separate paragraphs, so that the draftsman obviously had no intention of creating confusion although the paragraphs might not have been audible during the broadcast. It cannot therefore be assumed, after having read the text, that the copywriter and therefore the appellant had the intention of conveying the broadcast in a defamatory manner and thereby injuring the respondent. This also militates against dolus directus or eventualis. In its written form the report was not defamatory and therefore there could be no animus injuriandi. There is also no duty to broadcast in such a manner that nobody could misunderstand a statement.

In regard to damages: Even if the newscasts were defamatory as alleged, this defamation lasted only a few hours at the most because it is common cause that the next day the full story appeared in the press and any

misconception was dispelled immediately. In fact, the omission of the reason for, and the locality where the arrest took place, did the respondent less damage than would have been the case otherwise. Had it been stated that the respondent was arrested on a charge of advertising an unlawful meeting, the impact on his reputation would have been "greater as this would have led to an innuendo that he had done something to further the holding of the meeting which is much less serious than the attendance at such a meeting by a newspaper man.

S. Kentridge, S. C. (bygestaan deur R. J. Goldstone), namens die respondent: The question which arises in this appeal is whether the broadcasts meant and were understood to have the meaning alleged by respondent. The test to be applied in answering this question has been variously described by the Courts (in relation to the written word) in: Johnson v Rand Daily Mail, 1928 AD at p. 204; Basner v Trigger, 1945 AD at p. 35; Gatley, Libel and Slander, 4th ed., p. 127; Borkum v Cline, 1959 (2) SA at p. 676A; S.A. Associated Newspapers Ltd. v Schoeman, 1962 (2) SA at p. 616C; Dorfman v Afrikaans Pers Publikasies (Edms.) Bpk., 1966 (1) P.H. J9. The above tests apply no less to the spoken word: Botha v Marais, 1974 (1) SA at p. 48E. With regard to the spoken word, in distinction to the written word, it must be taken into account that the hearer does not have the report before him and he is consequently unable to re-read or analyse it. The broadcast in question had the alleged defamatory meaning. The appellant has submitted that a reasonable listener would not seize upon a defamatory sense in preference to a "good interpretation". It is true that if a statement in its ordinary sense has a number of "good interpretations", it is unreasonable to seize upon "the only bad one" to give a defamatory sense to it. Neville v Fine Arts and General Insurance Co., 1897 A.C. at pp. 72 - 73; Conroy v Nicol and Another, 1951 (1) SA at p. 663. But this argument has no relevance here. Even if the broadcast is regarded as capable of an innocent meaning, that would not avail the appellant. The fact that a statement might be read in a non-defamatory sense does not prevail against the probability that it would be understood in the defamatory meaning alleged. See Gluckmann v Holford 1940 T.P.D. at p. 339; Channing v SA Financial Gazette Ltd. and Others, 1966 (3) SA at p. 473E - F; Association of Rhodesian Industries and Others v. Brooks and Another, 1972 (4) SA at p. 110C - D. The Judge a quo was correct in stating that the interpretation of the broadcast was a matter for him and not for the witnesses. As no secondary meaning is relied upon by the respondent, the meaning of the broadcast is a matter to be determined by the Court. Evidence as to what any particular witness understood it to mean is not relevant or admissible. Sutter v Brown, 1926 AD at pp. 163 - 167; Kleyn v Snyman, 1936 OPD at p. 100; Pienaar v Argus Printing and Publishing Co. Ltd., 1956 (4) SA at p. 317E - F; S.A.A.N. v Schoeman, 1962 (2) SA at p. 616E - G; Hassen v Post Newspapers (Pty.) Ltd., 1965 (3) SA at pp. 566 - 567; Botha en 'n Ander v Marais, 1974 (1) SA at p. 48E - F. The evidence of the witnesses called by the respondent was led in chief solely on the question of

damages. Counsel for the appellant chose to cross-examine these witnesses on the meaning which they ascribed to the broadcast. To the extent to which this evidence may be rendered admissible by the cross-examintion, see R. v.
1977 (3) SA p399
Perkins, 1920 AD at p. 310; De Klerk v Zagorie, 1943 E.D.L. at p. 47; R. v Bosch, 1949 (1) SA at p. 554: it bears out the learned Judge's finding as to the meaning which the ordinary listener would in all probability have attached to the broadcast. If the broadcasts were correctly held to have had the meaning contended for by the respondent then it was defamatory of him: Hassen v Post Newspapers (Pty.) Ltd., supra at p. 565B - H. If this Court upholds the judgment of the Court a quo that the broadcasts had the meaning contended for by the respondent, then not only is there no evidence to rebut animus injuriandi but the evidence establishes that, at best for the appellant, it was reckless or negligent in omitting facts which would have conveyed the true reason for the arrest of the respondent. Although the appellant led no evidence to rebut the presumption of animus injuriandi arising from the publication of defamatory matter, the appellant now argues "that this rebuttal can be gleaned and should have been gleaned from the evidence itself". If the broadcast was defamatory, the presumption of animus injuriandi cannot be rebutted by a mere denial, but only by proof that the broadcaster did not intend to insult the plaintiff, and had another object which in the circumstances is one sanctioned by law. Nydoo en Andere v Vengtas, 1965 (1) SA at p. 13A - C; Benson v Robinson and Co. (Pty.) Ltd. and Another, 1967 (1) SA at p. 426C - E; Wentzel v SA Yster en Staalbedryfsvereniging en Andere, 1967 (3) SA at pp. 98H - 99B. It is only in exceptional circumstances (none of which have been proved to be present here) that the defence of absence of animus injuriandi will succeed where defamatory statements have been generally published by a newspaper or a broadcasting corporation. The appellant complains that the judgment of the learned Judge in effect lays too onerous a duty on it. No more is demanded of the appellant than reasonabl accuracy. The appellant's unique position gives it no privilege to be less careful than a newspaper must be.
The award of R2 000 as damages was by no means excessive and was, if anything, on the low side. On the factors relevant to the award of damages in defamation actions, see Buthelezi v. Poorter, 1975 (4) SA at pp. 614 - 616. The fact that the truth was published in newspapers a short time after the broadcasts does not justify the

submission on behalf of the appellant that "any misconception was dispelled immediately". Not every listener of the SABC would have read the newspapers in question or even if they read them realized that they contradicted the incorrect broadcasts. Further, this Court would be slow to interfere with the award of the trial Court which did not misdirect itself in regard to material facts or in its approach to the question of the assessment of damages: Sandler v Wholesale Coal Supplies Ltd., 1941 AD at pp. 199 - 200; Norton v Ginsberg, 1953 (4) SA at pp. 551F - 552D; Simpson v Williams, 1975 (4) SA at p. 314A - F.

Kruger, S.C., in repliek.

Cur. adv. vult.

Postea (Mei 5).

Judgment

RUMPFF, H.R.: In hierdie saak kom appellant in hoër beroep teen 'n

bevel van 'n Hof in die Witwatersrandse Plaaslike Afdeling waarvolgens appellant 'n bedrag van R2 000 aan respondent as skadevergoeding weens laster moet betaal. 'n Deel van die uitspraak van die Hof a quo verskyn in O'Malley v South African Broadcasting Corporation, 1976 (3) SA 125 (W). Respondent is die redakteur van The Daily News, 'n dagblad wat in Natal gedruk en uitgegee word. Appellant is geskep deur Wet 22 van 1936 en sy adres word aangegee as Broadcast House, Johannesburg. In sy besonderhede van eis het respondent (eiser) in para. 4 (a) beweer dat appellant (verweerder) op 26 September 1976 op verskillende tye van die oggend nuusberigte uitgesaai het, o.a. oor die Engelse diens, wat oor die hele Republiek en elders gehoor is. In die nuusberigte is o.a. die volgende berig:

> "The Minister of Justice, Mr. Kruger, has announced in Cape Town that the editor of the Durban afternoon newspaper, The Daily News, Mr. John O'Malley, has been arrested in terms of the Riotous Assemblies Act. Our Durban news office reports that 13 other people were arrested earlier yesterday evening after several hundred non-whites, and a number of white students, attended an illegal meeting organised by the South African Students' Organisation and the Black Peoples' Convention. The Chief of the Security Police, Brigadier Geldenhuys, revealed last night that six alleged

leaders of the two movements were in an office in Durban. One of the six - he said - was a banned person. The Chief of the Security Police in the Port Natal Division, Colonel Steenkamp, said investigations were still being made and further arrests were possible."

Hierdie berig is in die agtuurnuus oor die Engelse diens gevolg deur die volgende:

"A message just received says that Mr. O'Malley, who was released on R50 bail, will appear in court this morning."

Die besonderhede van eis beweer in para. 4 (c) die volgende:

"By the aforesaid reports the defendant meant and was understood to mean that the plaintiff had attended an unlawful gathering and had been arrested on a charge of having done so."

En in para. 5:

"The aforesaid news reports were defamatory of the plaintiff and were published by the defendant with the intent to injure him and by reason thereof the plaintiff has sustained damages in the sum of R10 000."

In appellant se pleit is erken dat die nuusberig wat in die besonderhede van eis verskyn oor die radio gelees is, maar dan word die volgende verwere opgewerp:

"3 (b) Die verwerder ontken dat die nuusberigte kon beteken of verstaan kon word om te beteken dat die eiser 'n onwettige vergadering bygewoon het, of dat hy op grond daarvan in hegtenis geneem is.

(c) Die verweerder sê dat die voormelde nuusberig in elke opsig waar en korrek is en gebaseer is op inligting wat ontvang is van die bronne gemeld in die voormelde nuusberigte.

(d) Sodanige bronne is uiters betroubaar en het die verweerder voormelde nussberigte sonder enige animus injuriandi teenoor die eiser, en in die belang van die algemene publiek van die Republiek van Suid-Afrika sodanige nuusberigte die eter ingestuur."

Uit getuienis wat namens respondent voorgelê is, blyk dit dat toe die betrokke nuusberig gelees is, appellant se personeel in besit was van o,a. 'n verslag van die South African Press Association (kortweg SAPA

genoem) wat om 22.51 op 25 September aan appellant in Johannesburg gestuur is. Hierdie verslag lui soos volg:

"MR. J. M. W. +PAT+ O'MALLEY, EDITOR OF THE DAILY NEWS IN DURBAN, WS ARRESTED BY POLICE AT HIS CURRIE ROAD HOME TONIGHT.

HIS ARREST WS CONFIRMED IN CAPE TOWN LATER BY THE MINISTER OF JUSTICE, MR JIMMY KRUGER, WHO SD THAT +THE OTHER ARGUS GROUP EDITORS CASES+ WOULD BE CONSIDERED TOMORROW.

IT IS UNDERSTOOD THAT MR. O'MALLEY'S WS DETAINED UNDER THE PROVISIONS OF THE RIOTOUS ASSEMBLIES ACT WHICH STATES, INTER ALIA, THAT IT IS AN OFFENCE TO +ADVERTISE+ A MEETING BANNED UNDER THE ACT."

Ook het 'n ander verslag van SAPA, wat op 1.13 op 26 September deur appellant in Johannesburg ontvang is, die volgende omtrent respondent bevat:

"MR. J. M. W. O'MALLEY, EDITOR OF THE DAILY NEWS IN DURBAN, WS ARRESTED WHILE ATTENDING A WINE-TASTING CONTEST ORGANISED BY HIS NEWSPAPER IN A BEACHFRONT HOTEL TONIGHT.

HE WAS ARRESTED BY COLONEL MARCUS VAN DER MERWE, ACTING CID OFFICER FOR THE PORT NATAL POLICE DIVISION, UNDER THE PROVISIONS OF THE RIOTOUS ASSEMBLIES ACT WHICH STATES, INTER ALIA, THAT IT IS AN OFFENCE TO +ADVERTISE+ A MEETING BANNED UNDER THE ACT.

THE MINISTER OF JUSTICE, MR. JIMMY KRUGER, CONFIRMING THE ARREST TONIGHT, SD THAT IT AROSE OUT OF A REPORT ON THE FRONT PAGE TO TODAYS DAILY NEWS WHICH STATED THAT THE BANNING ORDER ON A PRO-FRELIMO RALLY ORGANISED BY SASO AND BPC IN DURBAN WAS +TO BE DEFIED+ TONIGHT.

MR. KRUGER ADDED: +THIS APPEARED TO AMOUNT TO A TRANSGRESSION OF THE RIOTOUS ASSEMBLIES ACT+."

Drie persone het namens respondent getuienis afgelê en gesê dat hulle die betrokke berig gehoor het. Een was Dawid Edward James, nuusredakteur van die Daily News. Hy het gesê dat respondent een van die senior koerantredakteurs in die land is en in die koerantwêreld 'n hoë reputasie geniet. Hy het 'n Afrikaanse weergawe van die nuusberig gehoor oor Radio Port Natal, wat om 6.30 'n berig uitgesaai het wat wesenlik dieselfde as dié hierbo genoem, behalwe dat daarin spesifiek genoem is dat die onwettige vergadering by Curries Fountain in Durban gehou is.

James het gesê dat hy dadelik gedink het dat respondent by Curries Fountain was. 'n Sekere Milne van Johannesburg, buitelandse redakteur van die Argusgroepkoerante, waartoe die Daily News behoort, en 'n argitek, Reeves, van Durban, het verklaar dat hulle na aanhoor van die berig gemeen het dat respondent by die verbode vergadering was. Uit die getuienis wat namens respondent gelei is, kan afgelei word dat koerante wat later op 26 September verskyn het die juiste weergawe bevat het omtrent respondent se arrestasie.

Geen getuienis is namens appellant voorgelê nie. In die besonderhede van eis beweer respondent uitdruklik dat appellant

> "meant and was understood to mean that the plaintiff had attended an unlawful meeting and had been arrested on a charge of having done so"

en in sy pleit beweer appellant uitdruklik dat hy die nuusberigte

> "sonder enige animus injuriandi teenoor die respondent en in die belang van die algemene publiek van die Republiek van Suid-Afrika"

uitgesaai het. Dit moet aanvaar word dat in ons reg die publikasie van

lasterlike woorde 'n vermoede laat ontstaan dat die woorde opsetlik gepubliseer is en dat die publikasie onregmatig is. Weens die oorname van Engelse terminologie in ons lasterreg het die twee noodsaaklike elemente van laster as delik, nl. onregmatigheid en skuld, nie altyd duidelik na vore gekom nie en het daar heelwat vertroebeling ontstaan. Voordat die woord "privilege" sy verskyning in die Engelse reg gemaak het, is in daardie reg regmatigheid skynbaar as verweer aanvaar. In sy werk, On Actionable Defamation, 2de uitg., verduidelik Spencer Bower op bl. 318 dat die woord "privilege", met enkele uitsonderings, in die eerste helfte van die 19de eeu sy verskyning in die lasterreg gemaak het en ter stawing van sy opvatting dat die woord "privilege" vervang behoort te word deur "immunity" verklaar hy op bl. 312 - 313 die volgende:

> "The common element in the various conditions under which a party defaming becomes entitled to assert the legal right or excuse above referred to cannot be better stated than in the language of BLACKBURN, J., at p. 780 of Campbell v. Spottiswoode, (1863) 3 B. & S. 769:

'the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else'

(to which, it is submitted, there ought to be added, in order to make the definition completely sound - 'or in himself, but for his standing in such relation'). In other words, any member of the public, given the existence of the facts and his 'relation' thereto, is entitled to speak and write freely, that which, in the absence of those facts and that relation, no member of the public would be allowed to speak or write, - 'not Lancelot, nor another.' When the occasion arises, the right arises; when the occasion is past, - when the facts or 'relation' cease to exist, - the right disappears.

Nothing less resembling, or more directly opposed to, what is connoted by the word 'privilege', could well be imagined. If the dictionary were searched through, one could scarcely select an expression more inapt to indicate the root-idea (as stated in the above passage) of that to which it is usually applied, or more calculated to suggest the very contrary."

Op bl. 325 verwys hy na 'n aantal beslissings vanaf 1796 tot 1868 as voorbeelde waarin die term "lawful" gebruik word wanneer daar geen aanspreeklikheid weens regmatigheid sou wees nie en hy verwys ook na 'n aantal beslissings vanaf 1796 tot 1873 waarin die woord 'justified" of "justification" gebruik is om vorms van verweer gebaseer op regmatigheid aan te dui, en nie slegs die beperkte vorm van "justification" nie.

Ook het die invoer van die woorde "malice" en "express malice" uit die Engelse reg wat skuld betref, dikwels die juiste beginsel aangaande opset in ons reg versluier. In Whittaker and Morant v Roos and Bateman, 1912 AD 92, waarin 'n opsetlike onregmatige daad ter sprake was en na die daad verwys is as "a wrongful and intentional interference with those absolute natural rights relating to personality", het INNES, A.R., op bl. 131 die beginsel wat behoort te geld duidelik gestel:

"It is not necessary in order to find that there was an animus injuriandi to prove any ill-will or spite on the part of the defendants towards the plaintiffs; and it is quite immaterial what the motive was or that the object which the defendants had in view was a laudable one. It is sufficient that the injuries suffered by the plaintiffs were inflicted by the defendants, not accidentally or negligently, hut with deliberate intention."

Dit moet aanvaar word dat opset in hierdie sin in ons reg dolus directus sowel as dolus eventualis behels. Die vermoede van onregmatigheid kan in ons reg weerlê word deur getuienis wat aantoon dat die lasterlike woorde gebesig is in omstandighede wat onregmatigheid uitsluit en wanneer die vraag ontstaan of die publikasie van die lasterlike woorde regmatig of

onregmatig was, is dit die taak van die Hof om vas te stel, vir sover dit die gemene reg betref, of publieke beleid verg dat die publikasie geregverdig is en dus as regmatig bevind moet word. Die geykte Engelse "privileges" word juis as "privileges" geag, omdat die publikasie van die lasterlike woorde in die betrokke omstandighede "in the interest of public policy" geag word. Vgl. Fraser, On Libel and Slander, 7de uitg., bl. 116. Die omstandighede wat aanleiding gee tot die sgn. "privileges" in die Engelse reg geld ook in ons reg as voorbeelde van omstandighede wat onregmatigheid uitsluit. Die vermoede van die opset om te belaster, wat weens die publikasie van die lasterlike woorde ontstaan, plaas 'n weerleggingslas op die verweerder, wat die vermoede kan weerlê deur getuienis voor te lê dat hy nie so 'n opset gehad het nie. 'n Blote ontkenning van die opset om te belaster sou onvoldoende wees om 'n eiser in staat te stel om te weet watter feite die verweerder aan die Hof gaan voorlê, en daarom sal die verweerder, in sy pleit of nadere besonderhede, die feite moet stel op grond waarvan hy beweer dat hy nie die opset gehad het om te belaster nie. In hierdie stadium kan aanvaar word dat die opset om te belaster die geestesgesteldheid is om die bepaalde gevolg, in die sin reeds genoem, te wil, met die wete dat die gewilde gevolg onregmatig sal wees. Vgl. Maisel v Van Naeren, 1960 (4) SA 836 (K); Nydoo en Andere v Vengtas, 1965 (1) SA 1 (AA); Wentzel v SA Yster en Staalbedryfsvereniging en Andere; Wentzel v Blanke Motorwerkersvereniging en 'n Ander, 1967 (3) SA 91 (T).

In die onderhawige saak gaan dit oor die Suid-Afrikaanse Uitsaaikorporasie wat kragtens Wet 22 van 1936 tot stand gekom het en wat vir doeleindes van die reg ten opsigte van laster mutatis mutandis op dieselfde voet geplaas kan word as die eienaar of uitgewer van 'n koerant. Reeds in die eerste helfte van die vorige eeu is in ons reg die standpunt gehuldig dat wanneer 'n koerantredakteur weens laster aangespreek word, die afwesigheid van animus injuriandi nie as verweer kan geld nie, kyk bv. Hill v Curlewis and Brand, (1844) 3 Menz. 520. In Hartley v Palmer;

Hartley v Central News Agency, (1907) 24 S.C. 228, was die tweede verweerder die eienaar van 'n weekblad. Die pleit van die verweerder word op bl. 23 soos volg opgesom:

> "The second named defendants admit that they published and circulated the issue of the newspaper containing the words complained of but say they did so without being aware of the contents of the paper and without any malice or intention to injure the plaintiff."

'n Bedraggie skadevergoeding word ook aangebied, met koste. Wat hierdie verweer betref, word die opvatting van die Hof soos volg op bl. 236 opgesom:

> "As the publishers of what they themselves admit to be defamatory matter, they are liable in damages to the plaintiff."

In African Life Assurance Society Ltd. v Phelan and Others, (1908) 25 S.C. 743, het die Hof 'n verweer van billike kommentaar behandel, dit verwerp en daarna op bl. 759 gesê:

> "In the view that I take of the article it is not necessary to come to any express finding on the point which has been raised as to whether its writer was actuated by actual malice or improper motives."

Die skuldelement word dus nie oorweeg nie, maar wel die onregmatigheid van die publikasie. In Wilson v Halle and Others, 1903 T.H. 178, was die verweerders die eienaar, die uitgewer en die redakteur van 'n koerant.

1977 (3) SA p404

RUMPFF HR

Op b1. 200 en 201 het die Hof o.a. die volgende gesê:

> "The next point to consider is whether I ought to draw any distinction between the writer and the owner and the publishers of the paper. The News Agency is not a mere vendor of the Critic. It is the registered publisher, and, therefore, the actual utterer of the libel. It can, therefore, not plead that it is in the position of a newsboy who sells his papers in the streets. Any person can replace the newsboy: whether newsboy A or newsboy B sells, it makes no difference; but it does make a very great difference whether the paper is issued by a person who calls himself a publisher or not. If he puts the paper into the world, he puts it into circulation, and if he puts it into circulation he is liable for all the consequences equally with the editor and with the proprietors."

En verder:

> "It has been decided in these Courts over and over again, and I believe also in the English Courts, that a company which makes it its business to publish newspapers, and which employs individuals to publish those papers, is responsible for any libel which may appear therein."

In Dunning v Cape Times Ltd., 1905 T.H. 231, het die Hof ten opsigte van die drukker van die koerant waarin laster verskyn het, en ten opsigte van 'n verweer dat die drukker nie aanspreeklik sou wees omdat hulle nie van die laster geweet het nie op bl. 233 gesê:

> "In my opinion there can be no doubt whatever as to their legal responsibility."

In Dunning v Thomson & Co. Ltd., 1905 T.H. 313, word bevestig dat 'n drukker en 'n uitgewer aanspreeklik is. Ten opsigte van 'n "newsvendor" word daar 'n opinie uitgespreek dat daar in sekere gevalle miskien alleen aanspreeklikheid kan wees weens nalatigheid. Hierdie beginsel word aanvaar in o.a. Trimble v Central News Agency Ltd., 1934 AD 43. In Robinson v Kingswell; Argus Printing and Publishing Co. Ltd. v Kingswell, 1913 AD 513, het hierdie Hof na aanleiding van 'n sekere strafregtelike bepaling aangaande laster in Ord. 49 van 1902 (T) op b1. 526 die volgende gesê:

> "Now under sec. 7 of Ord. 49 of 1902 the plaintiff, as managing director of the company (which the learned Judge in the Court below finds is merely another term for manager of the company), may, if he be the person registered as such, be criminally liable, in spite of the fact that he did not publish the article in question, unless he proves that the libel complained of was published without his knowledge, consent or connivance, and without negligence on his part. But nothing is said in the Act about civil liability, and in the absence of some clear indication of intention a person's civil liability is unaffected by the section. To hold otherwise would be to absolve the proprietor, e.g., from civil liability in cases where he is in a position to prove that the libel was published without his knowledge, consent or connivance and without negligence on his part. While such a provision is eminently desirable in a criminal case, it is certainly not in accord with the principles of civil liability. To introduce what would be an entirely novel principle into the law of civil liability would require clear language."

Die beslissings in ons reg, waarna hierbo verwys is, is klaarblyklik in ooreenstemming met die Engelse gemene reg waarvolgens aanspreeklikheid weens laster gegrond is op die publikasie daarvan, en nie op 'n bepaalde opset nie, en waarvolgens die eienaar, drukker, uitgewer en redakteur van 'n koerant aanspreeklik gehou word weens laster, al het dié persone nie van die laster geweet nie. Die aanvaarding in ons reg van hierdie beginsel skep 'n toestand waarby skuldlose aanspreeklikheid ten opsigte van sodanige persone erken word, en kritiek dat hierdie beginsel van skuldlose aanspreeklikheid in stryd sou wees met ons tans aanvaarde begrip van animus injuriandi in die lasterreg, sou wel geregverdig wees. Na my mening sou daar egter goeie redes bestaan waarom hierdie klas van persone skuldloos aanspreeklik behoort te wees, by wyse van uitsondering. Die uitsondering sou wesenlik gegrond kon wees op beskerming van die

gewone burger teen 'n klas van persone wat by 'n medium betrokke is, wat van so 'n aard is, dat in geval van laster gepleeg in die medium, dit moeilik is om die opset by 'n bepaalde persoon tuis te bring. Dat in die Romeinse reg en ons eie reg skuldlose aanspreeklikheid in sekere gevalle van deliktuele skade erken word, blyk o.a. uit die actio de effusis vel deiectis wat toegeken word aan 'n verbyganger was beseer word deur goed wat uit 'n gebou gegooi of gestort word. Die okkupeerder van die gebou word aanspreeklik gehou vir die besondere daad wat 'n bewoner doen en, na my mening, is dit 'n heilsame beskerming van onskuldige verbygangers wat dit uiters moeilik mag vind om te bewys watter bepaalde bewoner die daad begaan het.
In Craig v Voortrekkerpers Bpk., 1963 (1) SA 149 (AA), was die verweerder in die Verhoorhof die eienaar en uitgewer van 'n dagblad. In die pleit teen 'n eis weens laster is beweer dat die gewraakte publikasie op 'n bona fide manier gedoen is sonder die bedoeling om te krenk en in die normale loop van verweerder se besigheid. Afgesien van 'n ontkenning dat die publikasie lasterlik was, is ook beweer dat die bewerings in die berig waar en in die publieke belang was. Die Verhoorhof het bevind dat 'n billike verslag van die verrigtinge van 'n verantwoordelike liggaam onder meer beskerm is indien dit o.a. van openbare belang is. By appèl in hierdie Hof, het hierdie Hof aanvaar dat die bevinding van die Verhoorhof neergekom het op 'n bevinding dat daar 'n sgn. bevoorregte geleentheid was. Klaarblyklik is in die Verhoorhof die vraag omtrent skuldlose aanspreeklikheid van die verweerder nie

geopper nie, nieteenstaande die bewoording van die pleit, en in hierdie Hof is daar ook geen betoog gerig gebaseer op so n aanspreeklikheid nie. Inteendeel, volgens die betooghoofde is daar aangevoer dat:

> "Die posisie van die pers in ons lasterreg is niks sterker of swakker as die posisie van enige ander individu of liggaam nie; vgl. Marks v Conservative Newspaper Co. Ltd., (1886) 3 T.L.R. 244."

Daardie Engelse saak het gegaan oor die verweer van die eienaar van 'n koerant wat hom beroep het op 'n bona fide en billike weergawe van 'n ex parte regsgeding. Die berig was onakkuraat en vals, en die verweer het nie geslaag nie. Al wat wesenlik in die uitspraak van die Craig -saak behandel word, is die vraag of 'n bevoorregte geleentheid deur verweerder bewys is of nie en die uitspraak in die Craig -saak raak dus geensins die uitspraak van hierdie Hof in die Kingswell -saak van 1913 nie.

Dit moet na my mening ook aanvaar word dat waar daar in die Craig -saak verwys word na die animus injuriandi as opset wat bestaan uit die wil en wete, tesame met die oogmerk om te krenk, die begrip so vertolk moet word dat opset beteken die wil om te belaster met die wete van wederregtelikheid, en dat in hierdie verband motief iets anders is as opset.

In 'n latere saak, Kassen v Post Newspapers (Pty.) Ltd. and Others, 1965 (3) SA 562 (W), het dit wesenlik gegaan oor 'n oënskynlik tweeledige verweer. In 'n weekblad het 'n foto verskyn van iemand wat aangekla was van 'n sekere misdryf en die opskrif bo die foto het verkeerdelik aangedui, dat die foto dié van eiser was. Hoewel die eienaar, die drukker en die uitgewer en verspreider van 'n weekblad die verweerders was, en hoewel daar 'n verwysing in die uitspraak is na die swaar verantwoordelikheid wat op iemand rus wat 'n koerant publiseer, is daar geen verwysing nie na

die skuldlose aanspreeklikheid van die pers soos in die hierbogenoemde uitsprake van ons Howe aanvaar is. Dit het gebeur oënskynlik weens wat in die pleit aangevoer is en wat o.a. beweer dat die opskrif bo die foto gepubliseer is

> "under the bona fide mistaken belief without recklessness or negligence on their part..."

dat die

"intention... was lawful in that it was to publish in the ordinary course of the business a fair and accurate report on a matter of public interest"

en

"that in the circumstances the defendants wrote, printed, published and distributed the matter complained of without any intention of defaming the plaintiff".

In die uitspraak word dan uitgewei oor die subjektiewe aard van die animus injuriandi, met verwysing na sekere beslissings van hierdie Hof o.a. Nasionale Pers Bpk. v Long, 1930 AD 87, en ook die Craig -saak. In die Long -saak het 'n redakteur van 'n koerant, Long, beweer dat hy deur 'n artikel van 'n ander koerant Die Burger beledig is. Die verweerder was die eienaar van Die Burger. Die vraag het hoofsaaklik gegaan of in die besondere omstandighede die eiser, of persoonlik of as redakteur, getref is weens die bewering dat 'n valse berig in sy koerant verskyn het. Op bl. 98 word die volgende vraag in die uitspraak van hierdie Hof gestel:

"Assuming, however, that the libel does apply to Mr. Long and that he can bring this action in his personal capacity, can he succeed unless he can show that the writer had him in mind and that he intended to libel Long?"

Na 'n kort verwysing na sekere Engelse beslissings gaan die uitspraak op bl. 99 soos volg voort:

"Our law of defamation is based upon the Civil law, and its general principles are to be found in the title de injuriis et famosis libellis (D. 47.10). Injuria is a wide term and includes any wrong, but when we use the term injuria in connection with defamation it has the special meaning of contumelia in its legal sense. Mackeldey has a very concise definition of injuria in the sense of contumelia as understood by the Civil law: Sensu autem strictiore et quidem speciali respectu existimationis hominis cujusdam, intellitur quodlibet factum, quo bona existimatio, quae alteri debetur animo injuriandi laeditur (sec. 487). In its narrow sense and in its special relation to a person's honour, it signifies every act whereby the honour and good reputation of a man is intentionally injured.' (Dropsie's translation.) Before a person can be held liable for any injuria in its widest sense of wrong, as well as in its narrower sense of contumelia, there must exist an intention to commit a wrong or, as it is usually expressed, there must be an animus injuriandi."

En verder:

"The use of defamatory language about a person or persons is prima facie evidence of an animus injuriandi. The onus is then upon the defendant to establish some lawful justification or excuse for the defamatory language used. But it is not enough for him to show that he did not intend to do wrong, for it is a principle of our law which applies as well to libel and slander as to other wrongs that if a man acts recklessly, not heeding whether he will or will not injure another, he cannot be heard to say that he did not intend to hurt. If, therefore, a writer couches his libel recklessly in such terms that it may hit others as well as the person whom he intends to libel, the Court will hold him liable for the consequences of his act. But should the surrounding circumstances show that the writer never intended to injure the plaintiff, that he was in no way reckless and could not have known that what he wrote might per infortunium apply to the plaintiff, then according to our law he has a good defence."

In die Hassen -saak word daar dan op bl. 575 en 576 die volgende afleiding gedoen:

"In any event, if I am right in thinking that Long's case, supra, has not been overruled, it binds me, and I must follow it in this judgment. From that case I deduce the following rule: A defamation is not actionable if it was published in the honest, though mistaken, belief in the e istence of circumstances which would have justified or excused its

publication; but that is so only if the mistake is not attributable to the recklessness or negligence of the defendant, or of those for whose acts or omissions he is responsible."

Hoewel die Long -saak gehandel het oor die aanspreeklikheid van 'n eienaar van 'n koerant en in die uitspraak die aanwesigheid van 'n animus injuriandi bespreek en skynbaar aanvaar is, het die Hof nie spesifiek die moontlikheid van skuldlose aanspreeklikheid van die pers as uitsondering oorweeg nie. Die feite van die Long -saak, en wat omtrent ons reg daarin gesê is, is na my mening geen regverdiging vir die afleiding omtrent nalatigheid wat in die uitspraak in die Hassen -saak, hierbo genoem, verskyn nie. Die beslissing in die Long -saak stel dit baie duidelik, as uitgangspunt, dat daar 'n "intention to commit a wrong" by laster moet wees. Wat die feite betref, het Die Burger beweer dat 'n valse verslag van 'n toespraak van

Generaal Hertzog in die Cape Times verskyn het en dat dit nie aan te neem was nie dat

> "rapporteur wat maar 'n ietsie van sy werk begryp, sy woorde so verkeerd kon verstaan het."

Dit is myns insiens duidelik dat in die Long -saak die wesenlike benadering was dat die skrywer van die laster bewus daarvan was dat sekere persone, waaronder die eiser, deur die laster getref kon word, en dat die skrywer roekeloos teenoor die gevolg gestaan het. Dit moet bevestig word dat nalatigheid in ons reg geen aksie weens laster kan fundeer nie. Dat die uitslag van die Hassen -saak wel as korrek beskou kan word, sou wel moontlik wees indien die besondere geskil benader sou gewees het op die basis van skuldlose aanspreeklikheid van die pers.

'n Voorbeeld van 'n uitdruklike uitsondering in die lasterreg waar die afwesigheid van nalatigheid as verweer erken word (in navolging van die Engelse reg), word gevind in die posisie van die nuusverspreider. In sy geval het hierdie Hof in die Trimble -saak, supra, verwys na 'n Engelse beslissing wat deur 'n Regter in die Transvaalse Provinsiale Afdeling aangehaal is en hierdie Hof het met goedkeuring gesê:

> "He also referred to the statement of ROMER, L.J., in the same case, who said 'that a newspaper vendor is protected if he proves (1) that he did not know that the newspaper at the time it was sold contained libels on the plaintiff; (2) that it was not by negligence on the vendor's part that he did not know that there was any libel in the newspaper; and (3) that the newsvendor did not know that the paper was of such a character that it was likely to contain libellous matter, nor ought he to have known'."

Kyk ook, in die algemeen, die artikel van R. McMillan in die South African Law Journal (1975) getitel: "Animus Injuriandi and Privilege", bl. 144. 'n Insiggewende artikel oor die probleem van laster en die pers is dié van prof. J. C. van der Walt op bl. 41 van die Gedenkbundel H. L. Swanepoel, getitel: "Die Aanspreeklikheid van die Pers op Grond van Laster." Dat weens die besondere posisie van die pers en die radio, wat magtige media is, 'n weerlose burger in 'n moeilike posisie geplaas kan word, is nie te betwyfel nie, en die opvatting dat skuldlose aanspreeklikheid van die pers in ons reg bestaan, sou myns insiens aanvaarbaar wees. In elk geval is die onderwerp nie voor ons beredeneer nie en is dit onnodig om, vir doeleindes van hierdie saak, die onmyns insiens aanvaarbaar wees. In elk geval is die onderwerp

nie voor ons beredeneer nie en is dit onnodig om, vir doeleindes van hierdie saak, die onderwerp verder te bespreek.
Teen hierdie agtergrond moet die pleitstukke en die feite in die onderhawige saak beoordeel word. In die eerste plek word ontken dat die nuusberig so vertolk kan word dat dit laster bevat. Hoewel die appellant in die tweede plek beweer dat die betrokke nuusberig in

"elke opsig waar en korrek is en gebaseer is op inligting wat ontvang is

van die bronne gemeld in die voormelde nuusberigte",

en ook beweer dat sodanige bronne "uiters betroubaar" is en die nuusberigte sonder enige animus injuriandi teenoor die respondent gepubliseer is in die belang van die algemene publiek, is daar geen poging in die verweerskrif aangewend om 'n vermoede van animus injuriandi andersins te weerlê nie. Daar is namens appellant toegegee dat, wat die pleit betref, afwesigheid van die animus injuriandi gekoppel word aan die feit dat betroubare bronne gebruik is by die opstel van die nuusberigte en dat die Hof a quo onder die indruk gebring is dat die appellant nie die afwesigheid van animus injuriandi gaan probeer bewys nie. Daar was dus wesenlik 'n ontkenning dat die berig lasterlik was, en, onderhewig aan wat later gesê word, 'n alternatiewe pleit wat die regmatigheid van die publikasie aanvoer, gebaseer op waarheid en publieke belang, en waarop appellant hom wel kan beroep. Hierdie verweer staan in verband met die verweer dat die nuusberigte nie laster bevat nie, want indien die nuusberigte vertolk sou word dat dit laster bevat, sou dit in die onderhawige geval meteen 'n vertolking wees wat die verweer van waarheid uitskakel.
By die vraag of wat die aanhoorder van die nuusberigte sou kon gedink het, is die maatstaf die fiktiewe, normale, ewewigtige, regsinnige en redelike mens. So 'n persoon is vanselfsprekend nie hiperkrities of oorsensitief nie. Daar is egter 'n verskil tussen die leser van 'n geskrif en die aanhoorder van 'n berig oor die radio. By iets wat onseker skyn, kan 'n leser sy oog vir 'n tweede keer werp op wat hy gelees het of dink wat hy gelees het, maar by die aanhoor van 'n nuusberig kan hy nie die aankondiger vra om nog 'n keer die nuus te lees nie. Die gevolg is dat 'n eerste indruk ook vir baie die laaste indruk sal wees, hoewel die indruk later vir sommige op een of ander manier verander mag word. Die Verhoorhof het wesenlik die maatstaf van die fiktiewe aanhoorder soos hierbo beskryf toegepas, die verskil tussen die

leser van 'n geskrif en 'n aanhoorder van 'n radioberig in aanmerking geneem, en tot die volgende slotsom gekom:

> "It seems to me that when the failure of the defendant to announce in its broadcasts the reason for the plaintiff's arrest and, to a lesser degree, the place where he was arrested, is coupled with what was announced in those broadcasts in regard to the arrest of 13 other people, it must result in the conclusion that the immediate impression which would have been formed by the average reasonable listener of normal intelligence was that the plaintiff had attended an unlawful gathering and had been arrested on a charge of having done so. If I am correct in this conclusion, it follows that the plaintiff is entitled to succeed and the only remaining issue is the question of the quantum of damages to which the plaintiff is entitled."

Namens appellant is betoog dat alles wat in die berigte staan wesenlik waar is, dat daar eintlik twee afsonderlike berigte was vanuit Kaapstad en vanuit Durban, en dat dit uit die berigte blyk dat die ander persone wat gearresteer is, vroeër gearresteer is as die respondent en dat sy arrestasie later die aand plaasgevind het. Ook blyk dit, so is betoog, dat respondent nie 'n nie-blanke of 'n student is nie en dat dit daarom sou blyk dat respondent nie by die arrestasie van daardie mense betrokke was nie. Namens appellant is betoog dat volgens die berigte 'n aanhoorder slegs tot die volgende konklusie kon gekom het, nl. dat die respondent gearresteer is luidens die bepalings van die Wet op Oproerige Byeenkomste, dat sy arrestasie iets te doen gehad het met die vergadering dat hierdie benadering

miskien geregverdig sou wees indien dit gebaseer is op 'n fyn analise van die geskrewe berig, maar dit gaan hier juis oor die indruk wat die aanhoorder eenmalig ontvang het. Daarby kom 'n faktor in die onderhawige geval, wat na my mening bygereken moet word, en dit is die evokatiewe trefkrag van die titel van die Wet, nl. die Wet op Oproerige Byeenkomste, waarna in die berigte verwys is. Op sigself suggereer dit dat 'n byeenkoms geïmpliseer word en, as die berigte dan ook nog na 'n spesifieke byeenkoms verwys, skyn dit my dat 'n aanhoorder, soos hierbo beskryf, wel die indruk sou kry, na aanhoor van die berig in sy geheel, dat respondent 'n verbode byeenkoms bygewoon het en dat die bevinding van die Verhoorhof nie as verkeerd beskou kan word nie.

Namens appellant is aangevoer dat hoewel geen getuienis voorgelê is omtrent die afwesigheid van animus injuriandi nie, die dubbelsinnigheid van die berigte (wat nie erken word nie) op sigself bewys is van die afwesigheid van die animus injuriandi. Verder is betoog dat die berigte soos hulle op skrif verskyn, uit twee afsonderlike paragrawe bestaan het, en dat daaruit sou blyk dat die opsteller nie die opset gehad het om verwarring te veroorsaak nie hoewel die afsonderlike paragrawe nie hoorbaar sou gewees het nie. Hiervan sou ook geen dolus eventualis afgelei kan word nie, so is betoog. Die berigte in die onderhawige geval word as lasterlik beskou omdat die aanhoorder die indruk sou gekry het dat die respondent 'n verbode vergadering bygewoon het. Om die vermoede van animus injuriandi in hierdie geval te weerlê, help dit nie om 'n beroep te doen bloot op 'n dubbelsinnige bewoording van die berig of die bestaan van twee paragrawe sonder meer nie. Indien bevind is dat die berigte wel deur die aanhoorder as lasterlik beskou sou word, moet daar getuienis wees om aanwesigheid van animus injuriandi te weerlê. Waarom die opsteller die berig só opgestel het dat die werklike plek van en rede vir die arrestasie nie gemeld word nie, is bv. onbekend. Die vermoede van animus injuriandi is dus nie weerlê nie.
In die loop van sy uitspraak het die Verhoorregter verwys na 'n betoog dat die appellant met roekeloosheid (recklessness) opgetree het deur die berigte uit te saai in die vorm waarin hulle was, aangesien die werklike omstandighede, nl. die plek van arrestasie en die rede vir arrestasie aan appellant bekend was. Hierdie betoog het die Verhoorregter as geldig beskou en hy het dieselfde argument by die berekening van die skade oorweeg. Dit wil my voorkom dat die betoog omtrent roekeloosheid in die eerste stadium 'n betoog is wat in verband staan met die vraag of daar wel animus injuriandi was en dat na roekeloosheid verwys is om animus injuriandi te bevestig. Dat beweerde roekeloosheid wel oorweeg sou kon word, is duidelik indien die vraag o.a. ontstaan of daar dolus eventualis was of nie. By die vasstelling van skadevergoeding sou roekelose publikasie van laster wel in aanmerking geneem kan word, maar dan is laster (weens opset) reeds bewys en word die roekeloosheid in 'n ander verband gebruik. In die onderhawige geval is dit ironies dat indien die berig die werklike rede vir respondent se arrestasie sou bevat het, nl. die publikasie op die voorblad van die koerant dat 'n verbod op 'n vergadering wat luidens die bepalings van die Wet op Oproerige Byeenkomste gelê is, getrotseer sou word, daar wel regmatige publikasie sou gewees het. Die verbod op die vergadering word luidens

die Wet opgelê wanneer 'n landdros rede het om te vrees dat die openbare rus ernstig in gevaar gebring sal word in sekere

genoemde omstandighede. Art. 2 (6) (a) lui soos volg:

> "(6) (a) Iemand wat, nadat 'n byeenkoms kragtens hierdie artikel verbied is -
>
> (i) dit belê of die bywoning daarvan aanmoedig, bevorder of deur middel van dreigemente teweegbring of daarby voorsit of dit toespreek; of
>
> (ii) 'n kennisgewing waardeur dit belê word, druk, publiseer, versprei of op enige wyse in omloop bring of dit adverteer of op enige ander wyse bekend maak; of
>
> (iii) dit bywoon
>
> is aan 'n misdryf skuldig, tensy hy, indien die verbod nie in die Staatskoerant afgekondig was nie, die hof oortuig dat hy geen kennis van die verbod gedra het nie..."

'n Nuusberig dat respondent onder die betrokke Wet gearresteer is omdat na bewering hy in sy koerant bekend gemaak het dat 'n verbode byeenkoms getrotseer sou word, sou respondent miskien in 'n meer ongunstige lig kon geplaas het as wanneer dit beweer word dat hy gearresteer is omdat hy die vergadering bygcwoon het. Hoewel die Verhoorhof oënskynlik nie hierdie feit by die oorweging van skadevergoeding oorweeg het nie is dit onnodig om hierop verder in te gaan omdat in elk geval appellant in hierdie Hof nie ernstig betoog het nie dat die toegekende bedrag van skadevergoeding te hoog is.

Die appèl word afgewys met koste, insluitende dié van twee advokate.

JANSEN, A.R., DE VILLIERS, A.R., MILLER, A.R., en JOUBERT, WN. A.R., het saamgestem.

Appellant se Prokureurs: Hofmeyr, van der Merwe & Botha, Johannesburg; Naudé & Naudé, Bloemfontein. Respondent se Prokureurs: Van Hulsteyn, Duthie & Saner, Johannesburg; Webber & Newdigate, Bloemfontein.