NAUDÉ VERSUS WHITTLE : JUDGMENT ON APPEAL

In the Supreme Court of South Africa (Appellate Division) the case between Willem Johannes Naudé (appellant) and Butler James Whittle (respondent) was heard on 3 December 1957 (*coram* Fagan, C. J., Steyn, Malan JJ. A., Reynolds et Hall, A. JJ. A.) and judgment was delivered on 9 December 1957 as follows:

JUDGMENT

Fagan, C. J.:

This is an appeal from a judgment given by *Sampson, A. J.*, in the Eastern Districts Local Division.* The action was one for damages for alleged defamation.

The appellant, who was the plaintiff in the Court *a quo*, is a medical practitioner and was at all material times the district surgeon for the Franklin and Zwartberg areas of the Mount Currie District.

At the annual general meeting of the Zwartberg Farmers' Association held on 27 October 1955 and attended by about 50 persons, the respondent (so it was alleged in the declaration) said:

> 'When Mr. George Cullen of the New Amalfi area committed suicide on the night of 13 October 1955, the District Surgeon, Franklin (meaning and referring to the plaintiff) was telephoned at 10.30 p.m. and refused to appear at that hour, although the circumstances were explained.'

The declaration alleged, and the plea admitted, that it is common knowledge—

(*a*) that it is the professional duty of a medical practitioner, when called on to do so, to render to any person within the area where he carries on practice such professional services as he is capable of performing and as might be required of him;

(*b*) that it is the professional duty of a district surgeon, when called upon to do so, to render such professional services as he is capable of performing, and as might be required of him in all cases where a crime might have been committed involving *inter alia* injury to or death of a human being.

By his statement—so the declaration continued—the defendant (now the respondent) meant and was understood to mean:

(*a*) That on 13 October 1955 at about 10.30 p.m., the plaintiff was informed by telephone that a certain Mr. George Cullen had committed suicide and that the full circumstances attendant upon this tragedy were explained to him;

(*b*) That the purpose of the said telephone conversation with the plaintiff was to request him to proceed to the scene of the tragedy and there to give such professional services as he could and was obliged to do in his capacity as medical practitioner, and as the district surgeon for the area concerned;

(*c*) That it was the professional duty of the plaintiff in all the circumstances, which had been made known to him, as a medical practitioner and as the district surgeon, to have proceeded to the scene of the tragedy as soon as possible in order to render such professional assistance and services as were required of him and as he was able to give;

(*d*) That the plaintiff refused to respond to the said request to render such professional services on the ground merely that it was late at night, and that his refusal was therefore without good or sufficient reason or excuse;

(*e*) That, therefore, the plaintiff was guilty of a serious dereliction of his professional duties as a medical practitioner and as a district surgeon;

(*f*) That his conduct aforesaid was, in the circumstances, grossly unprofessional and unethical and not in keeping with the high calling of his profession as a medical practitioner;

(*g*) That his conduct was, in the circumstances, both neglectful and in breach of his duty as a district surgeon, and merited censure and condemnation by the community and the authorities concerned;

(*h*) That in all the circumstances the plaintiff had been guilty of serious and despicable misconduct in his profession, which merited the censure of the community and all right-minded people.

The appellant claimed £5,000 as and for damages suffered by him 'to his good name and reputation in his personal and in his professional capacity'.

The respondent admitted that the meeting was held as alleged, but denied that he had spoken the words ascribed to him; alternatively, he denied the innuendo placed on them in the declaration; and as a second alternative he pleaded that, if he had published those words and if they bore the meaning assigned to them in the declaration, 'they were published by him on a privileged occasion in the circumstances hereunder set out;

'(*a*) Defendant has at all relevant times been a farmer in the Zwartberg area of Mount Currie District, and a member of the Zwartberg Farmers' Association.

'(*b*) The said Association is a voluntary association of farmers in the said area, whose objects, *inter alia*, are (i) to serve as a mouthpiece of local farmers and to act on their behalf; (ii) to deal with, further and protect the interests of the farming community; and (iii) to do all things which in the opinion of a meeting of members are in the interests of the members of the farming community.

* Judgment (1957 : S. Afr. Med. J., 31, 571 (8 June).

'(*c*) In terms of the constitution of the said Association, all matters affecting the said Association and its interests shall be dealt with at the general meeting of the said Association.

'(*d*) On 27 October 1955 the general meeting of the said Association was held at Zwartberg, and was attended by defendant and the persons mentioned in the declaration, all of whom were members of the said Association.

'(*e*) The professional conduct of the district surgeon for the said area was a matter affecting the interests of the farming community of the said area, in particular the members of the said Association.

'(*f*) The said words published by defendant related to the professional conduct of the district surgeon for the said area.

'(*g*) The said words were published by defendant at the said general meeting without malice and in the *bona fide* belief that they were true.

'(*h*) It was the duty of defendant to publish the said words to the members present at the said general meeting, and the said members had a lawful interest in having the said words published to them. Alternatively, the said words were published by defendant in furtherance of his interest as a member of the said Association, and the other members at the said general meeting had a lawful interest in having the said words published to them.'

I shall deal at a later stage with the occurrences that led up to the respondent's report to the farmers' meeting and with the evidence relating to the words in which he made his report. *Sampson, A. J.* did so in the early part of his judgment, and then said:

'It is clear that the statement about plaintiff made to the general meeting of the Association on 27 October 1955 was a highly misleading one which conveyed implications altogether untrue, implications which defendant has said he intended to convey. These implications were of a defamatory nature and there has been no attempt on the part of the defendant to show that they were not defamatory. The only serious defence to the resultant claim for damages is that of qualified privilege; in other words it is contended that the occasion of defendant's statement was a privileged occasion and that defendant made the statement without malice and in the *bona fide* belief that what was said was true.'

The learned Judge, holding on the evidence that the occasion was privileged and that the statement had not been shown to have been made maliciously or without a *bona fide* belief in its truth, found the defence of privilege established and dismissed the plaintiff's claim with costs.

THE ISSUE OF PRIVILEGE

On the question whether the occasion was privileged, I am prepared to assume the correctness of the learned Judge's finding that it was. I shall approach the case on the assumed basis that the evidence established the facts alleged in paragraphs (*a*) to (*e*) which I have quoted above from the portion of the plea setting up the privilege, and that these facts render applicable the principle [of qualified privilege which has been aptly formulated in the following words:

'Where the person publishing the defamatory matter is under a legal, moral or social duty to do so or has a legitimate interest in so doing, and the person to whom it is published has a similar duty or interest to receive it, then the occasion of the publication would be privileged.'

The words are those used by *Innes C. J.* in *Ehmke vs. Grunewald* (1921 A.D. 575 at p. 581); they were quoted by *Watermeyer A. J. A.* in the course of his instructive discussion of this branch of the law of defamation in *De Waal v. Ziervogel* (1938 A.D. 112 at p. 121).

Approaching the matter, then, on the basis that the occasion was privileged, I have to consider whether, on the evidence, the appellant, as plaintiff, succeeded in establishing not only that the respondent uttered words that were defamatory of him, but also that the respondent was in fact actuated by the *animus injuriandi* which would have been presumed from the publication of defamatory words if there had been no privilege. For this purpose I shall shortly outline the facts that are relevant on these issues.

The respondent, a farmer in the Mount Currie District, testified that at about 10.20 on the night of 13 October he received a telephone message as a result of which he went immediately to the farm of a neighbour, a Mr. Cullen. There he and other neighbours, including one Stubbs, found Cullen's dead body in a motor car; he had committed suicide by the inhalation of exhaust gas.

RESPONDENT'S EVIDENCE

I now quote from the respondent's evidence, given while he was being examined in chief by his Counsel, *Mr. O'Hagan*:

'You went to Mr. Cullen's house after seeing the body in the car? . . . Correct.

And you made certain telephone calls from that house? . . . We did.

By about what time did you get back to the house? . . . About quarter to eleven.

Just tell his Lordship what calls you made? . . . We endeavoured first of all to contact our local police camp in Banchory. We had no success, so we asked our exchange, which is then Cedarville at that hour, to please try and contact Zwartberg, which is our next nearest police camp, without success. Zwartberg, we had no success there. In desperation we tried Cedarville, which is further still, and all we could contact there was a Native constable, so he was of no assistance to us. So we got through to Kokstad; it is a matter of 48 miles from the scene of the tragedy.

Now when you got through to Kokstad approximately what time was it? . . . It must have been approximately 11 o'clock.

Who did the speaking? . . . Mr. Stubbs.

Did he speak to the police at Kokstad? . . . He did.

Could you hear the conversation? . . . I could, because this phone had an extra ear-piece.

Now will you tell His Lordship what happened and what the conversation was between Mr. Stubbs and the Kokstad police? . . . My Lord, we reported this matter to the police or whoever was in charge of the charge office at Kokstad. We told him exactly what had happened, what we had found. His immediate words to Mr. Stubbs were, on no account was he to touch the body. We said, we fully realize that, would he please make arrangements for someone to come out to the scene of the tragedy? By someone we meant the police, and at the same time would he kindly contact the District Surgeon and notify him of the tragedy?

Yes, and what was the reply of the police? . . . At the same time he said he would do so and at the same time we asked him and said it is very late, the exchanges are all difficult to get through; after a certain hour we have the privilege of night service and we do not know what happened to the operators. We explained a few outlines of the circumstances and asked him to please do us a favour and keep in operation because we were expecting a return call from the charge office, Kokstad, telling us exactly what they were doing in the matter.

You were expecting the police to ring you back? . . . Definitely.

Had he said he would phone back? . . . He promised he would.

Now, Mr. Whittle, after this telephone call what did you and Mr. Stubbs do? . . . My Lord, we waited until approximately 1 a.m. and there had been no notification, no phone calls from Kokstad or anyone else.

Yes? . . . We then thought it time to put a reverse call back to Kokstad and ask them what they were doing.

Who put that call through? . . . Mr. Stubbs put a call through and I listened in the extra ear-piece.

Continue: . . . Mr. Stubbs asked the same gentleman—it sounded like the same gentleman. I cannot swear, but the voice sounded the same—asked him, what have you fellows done in the matter. He said, we are still attempting to get someone to go out, which rather shocked us. It was from 11 to 1 o'clock, a matter of 48 miles and they were still looking for somebody to come out.

By Sampson, A. J.:

From Kokstad? . . . To come out to the scene of the tragedy.

The police? . . . The police, yes. Mr. Stubbs said I presume the District Surgeon is on his way, and the reply we received was that the District Surgeon would not be out until tomorrow morning.

Mr. Stubbs then said, I presume the District Surgeon is coming? . . . Yes, Mr. Stubbs asked that question twice.

Then the voice said? . . . The District Surgeon will not be coming out until tomorrow morning.

Will not be out until 12 tomorrow morning? . . . Not until tomorrow morning.

What did Mr. Stubbs say? . . . He said, what is that? He repeated, you see the District Surgeon will not be out until tomorrow morning.

Did the voice then say anything? . . . Nothing. I then said to Mr. Stubbs, let us put down and wake the Commandant.

Did he say the District Surgeon refused to come out? . . . He said the District Surgeon will not be out until tomorrow morning. We were both shocked or surprised.

Then you hung up? . . . No, we then got in touch with Captain McGregor.

By Mr. O'Hagan:

And he is? . . . He is the District Commandant at Kokstad. The District Commandant's first words to us were: 'Have you been in touch with the office concerning this matter?' I think he was rather annoyed and we said, yes, we have been in touch with the office. He said, in that case I will see that somebody comes out immediately.

Yes? . . . And at approximately quarter to four a.m., first of all the next of kin arrived and then at 4 o'clock the District Commandant and Sergeant Brand arrived, that is 4 a.m. from 11 to 4 o'clock.

In the meantime had the body of Mr. Cullen been touched or moved? . . . We were instructed not to touch anything. We left it in the car on the banks of the river with a Native boy in charge.

When the District Commandant arrived what did he do? . . . We discussed the matter—it is some considerable way from the house—and then proceeded to the scene of the tragedy.

And ultimately you and Mr. Stubbs were given authority to take the body to Kokstad? . . . Yes, by the District Commandant.

And I think you took the body in early the next morning? . . . We took the body to the District Surgeon, Kokstad. We got in approximately 6 o'clock in our pyjamas and overcoats.

Now after this action you reported the matter to the Annual General Meeting of the Association? . . . I did.'

MESSAGE RECEIVED BY RESPONDENT AT CHARGE OFFICE

The appellant's evidence—which on this point was not contradicted—nor was it questioned by the defence—was that, although he had been at home during the evening and the night of 13 October, he had received no message that night, and Cullen's suicide, with the intimation that he should do a *post mortem*, had only been reported to him at about half past eight on the morning of the 14th.

The wording of the message which the respondent and Stubbs received from the Kokstad charge office in the night of 13 October is given nowhere else in the record than in the respondent's evidence. No police witness was called at the trial. Stubbs was called by the defence, but he did not give the words of the message.

The respondent was afforded several opportunities to state what the message was, and he repeated it in the same words every time: Mr. Stubbs said, I presume the District Surgeon is on his way, and the reply we received was that the District Surgeon would not be out until tomorrow morning.

What the respondent is alleged in the declaration to have said at the meeting is that 'the District Surgeon was telephoned at 10.30 p.m. and refused to appear at that hour, although the circumstances were explained'.

It is clear from the respondent's evidence that the only information on which he based his report to the meeting was the message received from the man on duty at the Kokstad police station at 1 o'clock in the night of the 13th.

That message did not say that a telephonic communication had reached the appellant at 10.30 p.m. or at all. For all the message said, the appellant might not have been at home and the police might not have been able to get into direct contact with him or might for some other reason in fact not have done so. His home, indeed, was not at Kokstad, but at Franklin. The appellant's evidence, not disputed, was to the effect that his practice serves an area with a radius of 40 miles, containing about six or seven hundred Europeans and about seventeen thousand Natives, and that he pays regular visits, on certain days of the week, to various clinics situate in different directions at considerable distances from his Franklin headquarters. There certainly was nothing in the police message to suggest that the appellant had *refused* to come. Even if he had received the message, he might have been unable to come immediately. He might well have been held up by a difficult confinement or some other critical case.

It was in this allegation of the *refusal* to come, which was not justified by the police message, that the sting of the alleged defamatory statement lay.

WORDS USED BY RESPONDENT AT THE MEETING

It is therefore necessary to consider whether the evidence proves that the words used by the respondent at the meeting were those complained of in the declaration or words to a like effect.

The words in the declaration are taken *verbatim* from a letter dated 31 October 1955, sent to the appellant by the magistrate of Kokstad, who had copied them from a letter dated 29 October written by the secretary of the Zwartberg Farmers' Association to the magistrate. The secretary had written this letter in compliance with a resolution adopted at the Association's meeting of 27 October as a direct result of the report made to it by the respondent. Clearly, therefore, it represented the secretary's impression of what the respondent had said. In the minutes of the meeting he had recorded the relevant portion of the respondent's report in the words:

'They were informed that they (the Kokstad police) were unable to contact any policeman to send out and the medical officer at Franklin had refused to go out.' The Secretary, one Barnes, was called as a witness for the respondent. He said that the respondent had said at the meeting that 'the District Surgeon refused to go out that night or words to that effect'. Nowhere in his evidence did he suggest that his written version, in the minutes and in his letter, was based on any information other than the respondent's report to the meeting or did not truly reflect the tenor of that report. The only other witness, apart from the respondent, who testified about the words used at the meeting was a witness for the appellant, one Mortlock. According to him, the respondent had said that when they had got the police at Kokstad the first time they had reported the matter (of the suicide) requesting them to get through to Franklin:

'Mr. Whittle, the defendant, instructed him' (the policeman) 'to get into touch with the District Surgeon acquainting him with the facts. They wanted the District Surgeon out. This poor man was dead in the car. Several hours went by; once more he was able to get in touch with Kokstad; the policeman said he had already been through to Dr. Naudé, explained the circumstances to him, but Dr. Naudé refused to come out.'

He admitted that he could not remember the precise words. When *Mr. O'Hagan* came to cross-examine him, however, the only point on which he questioned the accuracy of the witness's recollection of what the respondent had said was whether he had not said that it was Stubbs who had spoken over the telephone while it was the respondent who had listened on the extra earpiece; the witness had put it the other way about. It was not suggested to the witness that he had been wrong in saying that the respondent had reported the policeman as having said that Dr. Naudé 'refused to come out'.

At an earlier stage, while the appellant—who was the first to give evidence in the case—was in the witness-box, *Mr. O'Hagan*, in the course of his cross-examination of the appellant said:

'You see Mr. Whittle's case is going to be this. I must put it to you that Mr. Whittle and Mr. Stubbs, who were together when Mr. Cullen's body was found, who together phoned the police and asked for the police and for the District Surgeon, they received this report from the police that the District Surgeon would not come out and Mr. Whittle conceived it to be his duty to report this report of the police to the Association; and Mr. Whittle will say he has nothing at all against you but he felt it his duty to put it to the Association so that they could take whatever action was required in the matter, whatever investigation was necessary.'

RESPONDENT'S EVIDENCE (CONTIN.)

I now quote from the examination-in-chief of the respondent:

'*By Mr. O'Hagan:*

Mr. Whittle . . . when you overheard the Kokstad police make this remark to Mr. Stubbs that the District Surgeon would not be out until tomorrow what did that convey to you, what did you understand? . . . I understood possibly by the remark that he refused to go out.

Is that what you understood? . . . What could I conclude? He may have been ill. They said the District Surgeon would not be out.

When you made that statement to the meeting what meaning did the persons present at the meeting assign to that statement? . . . My Lord I am not a thought-reader but all I can suggest is that possibly they may have had different opinions but they possibly

all concluded that the District Surgeon refused to go out, but I did not take part in any further discussion over this matter.'

The learned judge then wished to know from Mr. O'Hagan whether he was correct in his impression that the respondent had said to the meeting that he was told by the Kokstad police that the District Surgeon had refused to go out. *Mr. O'Hagan* replied in the affirmative, and added:

'In case there is any misunderstanding I want to make it perfectly clear that I am not suggesting in this case that there was a non-defamatory remark made. We are not setting up the case that we made a perfectly innocent remark which was misinterpreted by the meeting. We conveyed a report, whatever particular words we used, that the District Surgeon refused to go. That is, I am not making any other sort of suggestion in the case.'

The respondent, who was in the witness-box at the time, continued his evidence without making any comment on his counsel's statement to the Court.

In cross-examination the respondent said: 'I said that the police had informed me that the Doctor had refused to come out.'

I have already quoted the portion of his evidence in which he related what the police had told him. It was merely: 'The District Surgeon will not be out until tomorrow morning.'

I have referred at some length to the evidence of these two aspects of the case—what the policeman had actually said and what the respondent had reported to the meeting as having been said by the police—because at several stages in his evidence the respondent took up the attitude that he had merely repeated to the meeting what the police had said.

I quote again from his examination-in-chief:

'*By Mr. O'Hagan:*

Yes? . . . I then explained to the Association that I had gleaned my information from the police concerning the District Surgeon, that we have requested that this officer, whoever he may be, in the office to notify the District Surgeon and tell him of this tragedy and that the District Surgeon would be of value. We got the reply that the District Surgeon would not be out until the following morning. I then sat down and it was for my Association to discuss the matter, which they did.

When you heard the police say over the telephone that the District Surgeon would not be out until tomorrow, when you heard that statement made, did you people believe that the District Surgeon had refused to come out?

Mr. Cloete: He has not said anything about refusal.

Sampson, A. J.: What did you say, Mr. Cloete?

Mr. Cloete: There is no question being said about the District Surgeon having refused to go out and I do not think my learned friend . . .

Sampson, A. J.: What the witness said is that he told the meeting that he was informed by the police that the District Surgeon would not be out until the following morning.

Mr. Cloete: Yes, My Lord.

Mr. O'Hagan:

Well, I will put it this way, what did you understand by the statement of the police? . . . I understood that the District Surgeon naturally had refused; what other construction could I construe from the statement?

What I want to ask you is this, did you believe in your own mind that that was in fact the case when you heard the police say this? . . . If we cannot believe the police.

By Sampson A. J.: Just a minute. From your evidence I understand, put it that way, that you told the meeting what the police had actually said to you? . . . That the District Surgeon would not be out until the morning.

Are you quite sure that you did not say he refused to go? . . . The way I put it, but that he would not be out until the morning.

But you heard a number of witnesses, at least two witnesses, who gave the statement that you said the District Surgeon had refused to go, that was the report you got? . . . If they wish to interpret it that way I cannot help it.

Now is it possible that after this statement of yours other people in speaking about what happened had drawn the conclusion that you drew, which I think was the natural conclusion, that they did? . . . Yes.

That others made that remark? . . . My Lord, this matter was open for discussion, I did not say anything further, I sat down. It was for the meeting and my Association to take the necessary steps.'

The tenour of this part of the respondent's evidence was clearly that all he had reported to the meeting was that the police had said that the District Surgeon would not be out until the morning, and that if others understood from this that the doctor had refused to come, that was their own interpretation.

I need hardly point out that this is in conflict not only with the evidence of Mortlock and Barnes, which was not questioned by the respondent's counsel, but also with other quotations which I have already given from the respondent's own evidence and with the statements made on his behalf by his counsel.

In cross-examination he took another line. He made the direct admission I have already quoted: 'I said that the police had informed me that the Doctor had refused to come out', but when it was put to him that this was a serious thing for a District Surgeon to do, he gave answers which implied that it was what the police had told him: 'I received this message from an authentic source . . . I did not concoct it, they told me so.'

The learned Judge found 'that the terms of the report in the minute reflect the effect of the actual words as this effect was voiced in the discussion that followed'.

According to the minute the respondent had reported: 'They were informed that . . . the medical officer at Franklin had refused to go out.'

ALLEGED REFUSAL TO ATTEND NOT VERIFIED

In view of the evidence I have quoted and discussed, I do not see how this finding can be queried, and, indeed, *Mr. O'Hagan*, in his argument before us, conceded its substantial correctness.

Nor does the evidence leave any doubt in my mind that the allegation of a *refusal* on the appellant's part to come was not contained in the police message, but was the respondent's own gloss on it. And, as I have said before, the entire sting of the imputation lies in this allegation.

In making this addition to the police message the respondent, to my mind, showed a reckless indifference both to the question whether the imputation contained in it was true or false and to the harm it might do the doctor.

There is no suggestion in the respondent's evidence that he had misunderstood the policeman and had mistakenly formed in his own mind the impression that the policeman had said that the doctor had *refused* to come. When the case was heard in February 1957, 16 months after the occurrence, he could still repeat the words the policeman had used. Those words, as he repeated them, did not contain the imputation that the doctor had refused. On his own evidence that imputation was a construction he himself had put on the policeman's words.

It was a construction he could very easily have verified. A fortnight elapsed between the telephone conversation and the meeting to which he reported. In that interval he could have telephoned the police to get further particulars from them as to why the doctor had not come out, or he could have telephoned the appellant himself to get an explanation from him. The respondent himself mentioned in his evidence the possibility that the doctor might have been ill. Yet, while there might have been many innocent reasons why the doctor was not coming till the next day, the respondent chose one that cast a serious slur on the doctor's professional conduct and put that to the meeting as the only reason, and, what is more, as the reason that had been given by the police.

The respondent's counsel is recorded as having said:

'He felt it his duty to put it to the Association so that they could take whatever action was required in the matter, whatever investigation was necessary.'

It would have been a very simple matter for him to make the investigation himself before putting the worst construction on the message; and, at most, the duty, if he felt any, would have been to repeat the message as it had been given to him, not to add a defamatory imputation which it had not contained.

He was under no illusion as to the gravity of the imputation; indeed, his whole object in putting it to the meeting was to have a complaint against the doctor made to the magistrate, and he admits that the resolution to do so—which was acted upon—was unanimously passed by the meeting while he was present as a member.

QUESTION OF ANIMUS

Can it be said, on these facts, that he acted without *animus injuriandi* and was therefore protected by the privilege of the occasion?

In *Findlay v. Knight*, 1935 A.D. 58, the Appeal Court had to consider a case in which matter defamatory of one party to a lawsuit had been contained in a plea drawn and filed by the attorney of the other party. *Wessels C. J.*, after referring to decisions of our Courts, at pp. 71 and 72, quoted passages from *Voet* and *Van Leeuwen* which are illustrative of the limits of qualified privilege. He mentioned *Voet* 47.10.20, where the writer says that if charges are made by a litigant to impugn the credibility of a witness who testifies against him, he should not be considered to be doing so *injuriandi animo 'si modo verisimiles aliquas opprobrii facti causas producere possit'*—provided he can produce a reasonable foundation for the defamatory charges. Having considered the authorities, the learned *Chief Justice* said:

'The pleader who does not care whether his libellous charge is true or false, and who knows or ought to know that no evidence will be produced to support his charge is in no better position' (than one who knows the charge to be false). 'He is manifestly abusing the process of the Court and using the freedom of a pleader for some ulterior or improper motive which it is unnecessary for the Court to formulate, because if he then publishes a libel recklessly without caring whether it is true or false he must be presumed to act *animo injuriandi*.'

Curlewis J. A. (at p. 73) and *de Villiers J. A.* (at p. 76), while concurring in the result, made it clear that they wished to leave open the question—on which they felt some doubt—whether an attorney would be liable 'in cases where he is instructed, or knows, or believes, or assumes, that there will be some evidence to support the defamatory allegation, but at the same time he makes the allegation recklessly, in the sense that he does not care whether it is true or false'.

In the case before them the attorney had known, when he filed the plea, that there would be no evidence to support the defamatory allegation.

In the present case the respondent, when he reported the police as having said that the appellant had refused to come, knew that the message from the police had not contained that allegation. I therefore need not consider the effect of the reservation made by *Curlewis J. A.* and *de Villiers J. A.*

In *Monckton v. British South Africa Co.*, 1920 A.D. 324, *Innes C. J.* said at p. 332:

'In the majority of cases a defendant who exceeds his privilege is actuated by what in English law is called express malice; but *animus injuriandi* may be established not only by proving actual ill-will towards the plaintiff, but by showing that the defendant was actuated by an indirect or improper motive or that he stated what he did not know to be true, reckless whether it was true or false.'

The decision in *Findlay v. Knight* was considered and followed in *Gluckman v. Schneider*, 1936 A.D. 151, in which a reference was also made to *Monckton's* case—*vide* judgment of *Stratford J. A.* at pp. 158, 160, 162. There (in *Gluckman's* case) the alleged defamation had occurred in the course of the cross-examination of a Crown witness by the attorney defending the accused in a criminal case. The attorney had some information about alleged thefts having been committed by the witness, and he emphatically charged him with them. The witness sued the attorney for defamation, and the judgment given against the attorney was upheld by the Appeal Court, which considered that the information he had received was of so unreliable a nature that he should not have acted upon it, in the definite way he did, without verifying it (see pp. 162-164). The head-note says:

'*Held*, on appeal, that the defendant had made the accusations recklessly without caring whether they were true or false and without reasonable grounds for believing them to be true and that although the occasion was privileged *animus injuriandi* had correctly been inferred by the court below.'

The words are those of the writer of the head-note, but I think they correctly summarize the effect of the judgment.

There may be cases in which a man makes a defamatory statement without reasonable grounds for belief in its truth, but does so under circumstances which negative the inference of *animus injuriandi* or—to use the term which *Schreiner J. A.* in *Basner v. Trigger*, 1946 A.D. 83, at pp. 95-96, considered more apt in this connection—what English law calls 'malice' in the sense of any improper or indirect motive. Such a case was the one I have just mentioned. There the defamatory statement occurred in the course of an argument addressed by the defendant—appellant in the Appeal Court—to a tribunal before which he was appearing in the interest of certain groups of people whose case he was presenting. The statement was one of several deductions he purported to draw from a written report which the plaintiff had made. The tribunal had the report itself before it. I quote from the judgment of the Court delivered by *Schreiner J. A.* at p. 107:

'It is, unfortunately, true that arguments are sometimes, from lack of experience, presented in the form of expressions of the arguer's belief or opinion but essentially he is throughout putting forward submissions as to the weight of the evidence and the inferences to be drawn therefrom. Considerable latitude must be allowed to the party or his representative who is thus presenting his case and trying to persuade the tribunal to his view. Malice is not to be attributed to him merely because he does not think his submissions well founded or because they are pitched too high for reasonable acceptance.'

The distinction between *Basner's* case and the one before us is obvious. The present respondent was not arguing a case and submitting his interpretation of or deductions from facts known to his hearers, who could therefore judge for themselves whether his statements were justified or not; he was purporting to state a fact, i.e. what the police had told him; he was conveying to them information of which they had only his version to go by.

The impression I get is that the respondent worked himself up into such a state of annoyance when he and Stubbs failed to get the immediate responses he apparently expected from the telephone service, the police and the District Surgeon that he did not even try to form a calm and dispassionate judgment but decided to have them all taught a lesson. It seems to me to have been that frame of mind, and not a sense of duty, which led him to put on the message he had received a sinister construction not warranted by its actual content, and then to pass his construction on to the farmers' meeting as if it was the actual wording of the message. That was an abuse of whatever privilege the occasion might have afforded him.

APPEAL SUCCEEDS

It follows that the appeal should succeed, and the only remaining question is the amount of damages that should be awarded. On this point the trial Judge said:

'If, however, I am wrong in finding that the occasion of its publication was privileged, I would after consideration of all the circumstances: the absence of apology in public, the failure of plaintiff to respond to the offer contained in the letter of 15 December 1955, the fact that Mr. Dorning says that when he stated to the meeting of the Association that the report was false, practically everyone was aware of the fact, and the consideration that the publication did not have a very wide ambit of interest and was probably quickly corrected so far as the Franklin and Zwartberg area was concerned, allow in damages the sum of £800.'

I have dealt with the case on the basis that the learned Judge was right in holding the occasion to have been privileged but was wrong in not finding that the privilege had been abused. For the purpose of determining the *quantum* of damages, however, I see no reason for drawing a distinction in this case between a liability arising from absence of privilege and one arising from abuse of privilege.

The letter of 15 December 1955 referred to by the learned Judge was one in which the Association, through its attorneys, offered to send out a circular to its members correcting the report that the District Surgeon was ever telephoned or knew of the late Mr. Cullen's death on the night in question. The amount assessed by the learned Judge which was 'in the nature of things necessarily a matter of estimate', should not be disturbed unless we consider that, as an estimate, it is wrong (*vide S.A. Railways v. New Silverton Estates Ltd.*, 1946 A.D. 830 at p. 838). I cannot say that, taking all factors into account, it is not a fair estimate, and I therefore accept it.

In the result the appeal is allowed with costs and the judgment of the Court *a quo* is altered to read: Judgment for the Plaintiff in the sum of £800 with costs.

Steyn J. A.
Malan J. A.
Reynolds A. J. A.
Hall A. J. A.
} concur