

<u>PHILLIPPUS PETRUS JOUBERT</u>	1st Appellant
<u>CAROLINA TREKKERS & IMPLEMENTE (EDMS BPK</u>	2nd Appellant
<u>EMATA MOTORS (PTY) LTD</u>	3rd Appellant
<u>RAOUL KARL RICHARD ZEISS</u>	4th Appellant
<u>JACOBUS JOHANNES UYS</u>	5th Appellant
<u>LIONEL LAUBSCHER</u>	6th Appellant

and

<u>GERT HENDRIK JACOBUS VENTER</u>	Respondent
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

<u>PHILLIPPUS PETRUS JOUBERT</u>	1ST APPELLANT
<u>CAROLINA TREKKERS & IMPLEMENTE (EDMS) BPK</u>	2ND APPELLANT
<u>EMATA MOTORS (PTY) LTD</u>	3RD APPELLANT
<u>RAOUL KARL RICHARD ZEISS</u>	4TH APPELLANT
<u>JACOBUS JOHANNES UYS</u>	5TH APPELLANT
<u>LIONEL LAUBSCHER</u>	6TH APPELLANT

and

<u>GERT HENDRIK JACOBUS VENTER</u>	RESPONDENT
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Coram: KOTZÉ, HOEXTER, BOTHA, HEFER, JJ A et VIVIER, A J A

Heard: 28 August 1984

Delivered: 30 November 1984

J U D G M E N T

KOTZÉ, J A :

This appeal by the six appellants raises the

question...../2

question of the immunity conferred upon witnesses
(who are also parties to an action), advocates and attorneys
with reference to defamatory statements made in the course
of judicial proceedings. In a defamation action tried by
VAN REENEN, J in the Transvaal Provincial Division
a joint and several award of damages in the sum of R5 000,00
with costs was made in favour of the respondent against
the six appellants. I shall, for reasons of convenience,
refer to the respondent as Venter; and to the appellants as Joubert,
Carolina, Emata, Zeiss, Uys and Laubscher respectively.
Collectively I shall refer to the appellants as the defen-
dants.

It is necessary, at the outset, to provide a

chronology...../3

chronology of certain legal proceedings and salient features thereof which form an essential part of the background to the appeal. (All references to such proceedings are, except where otherwise stated, references to proceedings in the Transvaal Provincial Division). On the 17th May 1976 Joubert urgently applied for and obtained (per ESSELEN, A J) provisional winding-up orders against Carolina and Emata of which companies he was a director and majority shareholder. Three days later the Master of the Supreme Court appointed Venter, a director of Maurice Schwartz, Venter and Associates Ltd. and, as at that date, a professional liquidator for a period in excess of twenty years, as provisional liquidator of Carolina and Emata. On the 13th August 1976

CURLEWIS, J set aside the provisional winding-up orders on application by Joubert. In consequence the appointments of Venter lapsed. On the 22nd March 1977 MELAMET, J, on application of Joubert, ordered the calling of meetings in terms of sec. 311(1) of the Companies Act, 1973 of preferent and concurrent creditors of Carolina and Emata by one Kotze to consider offers of compromise proposed by Joubert. ELOFF, J , sanctioned the said offers on the 9th August 1977. The said offers nominated Kotze as "receiver" ("ontvanger") on behalf of the creditors. On the 27th January 1978 HUMAN, J issued rules nisi on application by Kotze (hereinafter called the Kotze applications) calling upon interested persons and upon Carolina, Emata, all creditors and Joubert (the last four being specially referred to in the rule) to show cause why Kotze should not be

released from his offices as receiver and why M J F Potgieter should not be appointed in his stead. A strange and totally unexplained feature of the Kotze applications was a purported offer of compromise annexed thereto which nominated Kotze and Venter as joint receivers. No such offer of compromise nominating Kotze and Venter as joint receivers had in truth ever been made, and in what follows I shall refer to the said document as "the false offer of compromise". The Master of the Supreme Court (upon whom copies of the rules were served) filed a report dated 17th February 1978 in which he objected to Potgieter's appointment and, being under the mistaken impression (induced by the false offer of compromise) that Kotze and Venter had been appointed joint receivers, commented that he could not say whether all the creditors would support Venter as sole receiver and recommended that

"Venter gelas word om 'n byeenkoms van al die betrokke skuldeisers te belê.... vir die verkiesing van 'n vervangende ontvanger en om verslag aan die Agbare Hof te doen sodat die aanstelling bekragtig kan word. Indien nodig verklaar ek my bereid om as voorsitter op te tree."

During March 1978, Venter filed affidavits in the Kotze applications (served only on the Master and Kotze) which included the following paragraphs:

"3.0. I have read all the papers filed in the above matter including, in particular, the Master's Report and insofar as the

above...../7

above Honourable Court sees fit to appoint me as Receiver I willingly accept such appointment subject to such terms and conditions as the Honourable Court may direct."

5.0. I became aware for the first time on the 3rd March, 1978, that I had been appointed as a joint Receiver with certain Gerhardus Dawid Kotze in the above matter pursuant to an Order of this Honourable Court. At no stage whatever was I requested so to act as Receiver nor did I ever consent either to my nomination as Receiver or to my appointment as such.

6.0. My first intimation regarding my involvement in this matter was on the 3rd March, 1978 when I called upon the Master of this Honourable Court at his request, when the papers filed in this matter were exhibited to me.

7.0. I would, however, respectfully point

out...../8

out that I had been appointed Provisional Liquidator of CAROLINA TREKKERS EN IM-
PLEMENTE (EDMS) BEPERK by the Master
of this Honourable Court on the 29th
May, 1976 which appointment terminated
when that Company was discharged from
Provisional Winding-up Order by this
Honourable Court.

7.2. I therefore respectfully submit that I
am familiar to a degree with the
affairs of the Respondent."

Venter, it should be noted, failed to disclose in these
affidavits that Carolina had in the meantime instituted
action against him inter alia for payment of an amount in
excess of R16 400,00 which had allegedly been misappropriated
from the company whilst under provisional winding-up and
that he , therefore, had a direct interest in the matter.
How this action came to be instituted will emerge later.

On the 11th April 1978 McCREATH, J having heard counsel for Kotze and Venter (wrongly referred to in the order as counsel for the creditors) inter alia (a) extended the rules nisi issued pursuant to the Kotze applications to the 23rd May 1978; (b) discharged Potgieters's provisional appointments; (c) ordered Venter to convene meetings of all known creditors of Carolina and Emata for the purpose of electing a substitute receiver ("vervangende ontvanger") and to report the outcome of the meetings on the 23rd May 1978 "sodat die aanstelling bekragtig kan word." McCREATH, J furthermore ordered service of the orders on Carolina, Emata, Kotze, Joubert and Potgieter. The lastmentioned orders led to the intervention of Joubert, Carolina and

Emata...../10

Emata in the Kotze applications. The said intervention took the form of notices of motion served on the 18th May 1978 in which was sought (i) the setting aside of paragraph (c) of the order of McCREATH, J ; (ii) alternatively to (i) that Venter's appointment as receiver be not confirmed (in the event of such an appointment having been made); (iii) that, in the event of Venter having been elected as substitute receiver at the meetings of creditors, such election be declared null and void; (iv) that Abram Jacobus Meintjies be appointed receiver and that Venter be ordered forthwith to hand over all books, records and documents which he may have received to Meintjies. The defamatory passages complained of by Venter are contained in the supporting and replying affidavits

of...../11

of Joubert respectively dated 18th May and 29th June 1978.

These passages will be quoted later.

On the 2nd August 1978 GROSSKOPF, A J (a) confirmed that portion of the rule of 27th January confirming the discharge of Potze as receiver; (b) appointed Meintjies as receiver in the Carolina and Emata compromises and (c) reserved judgment in regard to a prayer for costs against the Master. On the 26th March 1979, GROSSKOPF, A J delivered his reserved judgment and awarded costs against the Master. On the 5th June 1981, this Court in a 3-2 majority judgment (reported in 1981(4) S A 211) reversed the said order of costs. Carolina's action referred to above, was heard by ELOFF, J on 16th April 1980. Counsel

for Carolina abandoned the claim for payment of the sum of R16 400,00 odd. On the 16th April 1980 ELOFF, J decreed absolution from the instance with costs. Carolina appealed successfully to this Court. So much for the chronology of the lawsuits which forms the background to the litigation which has culminated in the present appeal.

The defamatory passage in Joubert's supporting affidavit reads as follows:

"(a) Applikante maak ten sterkste beswaar teen die aanstelling van GERT HENDRIK JACOBUS VENTER (die tweede respondent) as ontvanger in die bestaande kompromie, omrede applikante beweer dat gemelde Venter terwyl hy provisionele likwidateur van die tweede applikant was, gelde en bates van die tweede applikant verduister en ontvreem het, en voorts die bepalinge van atikel 394(1)(a) van die gemelde Maatskappywet oortree het, deurdat hy 'n

totale bedrag van R16 430,48 wat deur hom tydens sy provisionele likwidateurskap ten behoeve van die tweede applikant geïen is, versuim het om dit in 'n bankrekening te deponeer of enigsins rekening te lewer vir vermelde bedrag, en inderdaad vermelde bedrag gehou het.

- (b) Vermelde eise vir betaling van die bedrag van R16 430,48 spruit voort uit die feit dat tweede respondent sekere gelde wat op die vermelde bedrag te staan kom, uit die besit van Stoffberg Motors - synde 'n besigheid van tweede applikant - ontfreem het en dit gehou het, sonder om dit volgens die bepalinge van artikel 394(1)(a) van die vermelde Maatskappywet, in 'n bankrekening in te betaal nie. Gemelde ontfreemding het geskied deur middel van ene SWERSKY, wat ten alle tersaaklike tye tweede respondent se behoorlike gemagtigde verteenwoordiger was, en volledige besonderhede van sodanige ontfreemding verskyn in die beëdigde verklaring van ANNA CATHARINA PITOUT, hierby aangeheg, gemerk 'C 10'.

Tweede respondent se versuim om die .
vermelde bedrag van R16 430,48 of enige
deel daarvan, in 'n bankrekening wat hy
vir tweede applikant terwyl dit in
voorlopige likwidasië was, geopen het,
te deponeer, blyk uit die tersaaklike
bankstaat, 'n afskrif waarvan hierby
aangeheg word gemerk 'C 11'. Uit 'n
ontleding van gemelde bankstaat is dit
duidelik dat geeneen van die bedrae
soos vermeld deur Mev. Pitout in haar
eedsverklaring - aanhangsel 'C 10' hiertoe -
in die vermelde bankrekening gedeponeer
is nie, en tot die beste van my wete is
die vermelde bankrekening die enigste
bankrekening wat deur tweede respondent
terwyl tweede applikant in voorlopige
likwidasië was, geopen is. Tweede
respondent het derhalwe tenminste 'n
ernstige oortreding van artikel 394(1)(a)
van die vermelde Maatskappywet begaan,
maar ek doen met eerbied aan die hand
dat die aangeleentheid verder gaan en
dat tweede respondent deur middel van
vermelde SWERSKY, inderdaad 'n Fraudulosa

Contrectatio van die gemelde bedrag van R16 430, 48 gepleeg het.

- (c) Uit hierdie paragrawe blyk dit dat tweede respondent nog in staat is om te ontken dat hy die bedrae soos uiteengesit in die beëdigde verklaring van Mev. Pitout - aanhangsel 'C 10' hiertoe - ontvang het, nog in staat is om te verduidelik wat met gemelde bedrae gebeur het, wat in my respekvolle submitisie 'n skandelijke toestand is."

The following is the relevant passage from the replying affidavit:

"Toe die aansoek vir 'CAROLINA' se likwidasie geloods is, het ek geen gegewens hoegenaamd by my gehad nie, en moes ek skat wat 'CAROLINA' se bates was. Die klem van die aansoek het gelê op kommersiële insolvensie, welke kommersiële insolvensie inderdaad bestaan het. In die verband verwys ek u na die beëdigde verklaring van prokureur UYS, aanhangsel 'C 19' hiertoe, en vereenselwig my met die bewerings daarin bevat. Op bladsy ... erken tweede respondent dat hy reeds in Oktober 1977

daarvan bewus was dat daar ernstige (bewerings) van wangedrag teen hom gemaak word. Voorts is die dagvaarding in Saak Nommer I. 1725/78 op 9 Maart 1978 op tweede respondent persoonlik bestel, soos sal blyk uit die relaas van bestelling uitgereik deur die Assistent Adjunk-Balju van Johannesburg, hierby aangeheg gemerk 'C 35'. Uit hierdie dagvaarding blyk duidelik dat die bewering gemaak word dat tweede respondent of tenminste sy behoorlike gemagtigde agent SWERSKY, vir wie se dade tweede respondent aanspreeklik is, 'n bedrag van ongeveer R16 000,00 uit die besigheid van STOFF-BERG MOTORS ontfreem het, wat maar net 'n meer hoflike woord vir 'gesteel' is. 'n Man wat vir meer as 20 jaar vertrouensposisies aanneem, moet weet dat op die oomblik toe so 'n bewering teen hom gemaak word, hetsy met hetsy sonder regverdiging, dit vir hom uiters onbehoorlik sou wees om die aanstelling as ontvanger in die twee kompromieë te soek, maar nieteenstaande hierdie feit het tweede

respondent...../17

respondent aktief hierdie aanstelling gesoek, soos hierintevore meer volledig uiteengesit, en meer besonderlik in sy tersaaklike beëdigde verklaring, geteken en beëdig op 16 Maart 1978, dit wil sê nadat die vermelde dagvaardiging wat die voormelde bewerings bevat, op hom persoonlik bestel is. Ek wil met eerbied aan die hand doen dat hierdie optrede van tweede respondent terwyl hy bewus was van die ernstige aantygings teen hom, hetsy reg, hetsy verkeerd, op sigself onbehoorlik is, maar besonderlik omrede hy die feit dat daar bewerings teen hom gemaak is, vir die Agbare Hof verberg het, terwyl hy die aanstelling gesoek het, dat dit op sigself 'n kostebevel op prokureur-en kliënt skaal teen hom regverdig."

(References in the aforesaid passages to (a) "applikante", (b) "tweede applikant", (c) "tweede respondent" and (d) to "bankstaat" and "bankrekening" are to (a) Joubert, Carolina

and Emata, (b) Carolina, (c) Venter and (d) to a bank-

statement or bank account of Carolina (in liquidation)

at the Standard Bank, Carolina respectively). The

defamatory passages were drafted by Zeiss, an advocate

briefed by Laubscher who was the attorney for Joubert,

Carolina and Emata at the seat of the Court and who, in turn,

acted for Uys, their country attorney.

I do not propose to reproduce the copious plead-

ings filed in the Court a quo. Suffice it to say that it

was common cause between all the parties that the passages

in the affidavits complained of are per se defamatory of and

concerning...../19

concerning Venter. It was also common cause between Venter and Joubert, Carolina, Emata, Uys and Laubscher that publication took place as alleged by Venter viz to Venter's attorneys of record, officials of the staff of the Registrar, the Master of the Supreme Court, Kotze, officials of the Commercial Insurance Co. Ltd. and "newspaper reporters of the principal newspapers circulating within the Republic of South Africa,

with...../20

with the result that those newspapers made further widespread publication of the matter complained of as aforementioned, which further publication was, or alternatively should have been, foreseen by the Defendants as a probable consequence of their conduct aforesaid." The main issue raised by the various pleas is the question whether the defamatory statements were published on a privileged occasion in that they were made in the course of civil judicial proceedings. It should be noted that Venter delivered no replication to the plea of privilege; it follows that it must be taken that there is a denial that the bounds of privilege were not exceeded. A subsidiary issue between Venter and Zeiss is the question whether there was publication to the insurance company and

the...../21

the newspapers and, if so, whether Zeiss was a party thereto and responsible for or accountable in respect thereof.

As pointed out above the defamatory nature of the matter complained of is not in issue. Accordingly two presumptions arise upon its publication: (a) that the publication was unlawful and (b) that the statements were made animo injuriandi. See Suid-Afrikaanse Uitsaaikorporasie v O'Malley, 1977(3) S A 394 (A) at 401H- 402A and May v Udwin, 1981(1) S A 1 (A) at 10 C-E. It will be convenient, for the present, to assume proof of publication as against Zeiss. Pleas of privilege having been raised, the essence of the enquiry upon which this Court accordingly has to embark at the outset is whether the defendants have

established...../22

established these defences and thus the lawfulness of the publication. (May v Udwin, supra, at 10 F-G).

If so, a further question arises: whether the provisional protection afforded by the defence is defeated by affirmative proof (see Young v Kemsley and others, 1940 A D 258 at 277) by Venter of "malice" in the sense explained by SCHREINER J A in Basner v Trigger, 1946 A D 83 at 95 i e the existence of an improper or indirect motive. (See also May v Udwin, supra, at 19 A-B).

Recent decisions of this Court describe the nature of the onus to establish privilege as a "weerleggingslas" ("the burden of adducing evidence in rebuttal"). Cf O'Malley's case, supra, at 403 B; Borgin v De Villiers and another, 1980(3) S A 556 at 571 E-F; May v Udwin, supra,

at 10 D-E; Marais v Richard, 1981(1) S A 1157 at 1166 H.

Earlier decisions of this Court, however, dealt with the

defence of privilege on the footing that the onus to be

discharged is a full onus of proof on a preponderance of

probability: Tromp v McDonald, 1920 A D 1 at 2 i f ("the

question ... is whether that defence has been made out");

McLean v Murray, 1923 A D 406 at 414 ("the onus is ... upon

the defendant to prove that they are privileged"); De Waal

v Ziervogel, 1938 A D 112 at 120 ("proving"); Young v

Kemsley and others, supra, at 277 ("if it is shown that

the words were spoken on a privileged occasion"); Basner v

Trigger, supra, at 97 ("prove"); Nydoo en andere v Vengtas,

1965(1) S A 1 (A) at 13 E-F (per RUMPF, J A , "Slaag die

verweerder...../24

verweerder daarin om te bewys dat"), at 23 B-C (per WESSELS, J A , "The defendants having failed to discharge the onus of proving ..."), and particularly the judgment of HOLMES, J A at 20D-22A (see e g at 20 i f - 21A, "the onus of proving the facts and establishing such defence is on him"); Benson v Robinson & Co. (Pty) Ltd and another, 1967(1) S A 420 at 432 E-G ("proof ... on a balance of probabilities"). Apparently mindful of the incompatibility between the approaches above-mentioned, Professor J M BURCHELL comments as follows (footnote 38 at p 178) in one of the memorial essays to the late Mr Justice SCHREINER in Fiat Iustitia (1983):

"JOUBERT J A "(in May v Udwin)" specifically mentions the evidentiary burden

or...../25

or 'weerleggingslas', but unfortunately also refers to 'proving' a defence and 'establishing' lawfulness ...

The Appellate Division in Mabaso v Felix 1981(3) S A 865 has recently held that, in a situation of alleged self-defence, the defendant must normally prove facts substantiating such defence on a balance of probabilities. The recent Appellate Division decisions on defamation ... indicate that the defendant need only adduce evidence of lack of unlawfulness or animus injuriandi ... This is not the appropriate place to consider whether the attitude of the Appellate Division to self-defence can be reconciled, in logic or on grounds of public policy, with the defamation cases. A consideration of this problem deserves comprehensive attention ..."

I agree that the problem of reconciliation referred to by

Professor Burchell "deserves comprehensive attention".

I am of the view, furthermore, that on the facts of the present case it is not necessary to attempt to resolve the problem, nor even to enter upon a discussion of it. It may not be out of place, however, to point to some aspects of the problem that will require attention when the need to resolve it arises. When the notion of a "weerleggingslas", as opposed to a full onus, was first raised by RUMPF, J A in O'Malley's case supra, in relation to a defence of privilege, it was done obiter, without reference to the earlier decisions of this Court, and without any discussion of the considerations relevant to the policy of the law in regard to a choice between burdening the defendant with a full onus or merely a "weerleggingslas". The subsequent cases merely repeated what had been said in O'Malley's case, again obiter and

without discussion of policy considerations. By contrast, the decision in Mabaso v Felix, supra, relating to a plea of self-defence, was founded after full argument upon a full review of considerations of policy, practice and fairness inter partes. In regard to a plea of justification (i.e. absence of unlawfulness) it is difficult to see why a defendant who has injured a plaintiff's fama should be in a better position than a defendant who has injured a plaintiff's body. There are authors who have criticised the decision in Mabaso v Felix (see e.g. Schmidt, Bewysreg, 2nd ed at 44-5) and the notion that a defendant who relies on a defence of privilege is burdened with a full onus (see e.g. Hoffman and Zeffert, South African Law of Evidence, 3rd ed at 389).

However...../28

However, in the pursuit of justice practical considerations may sometimes require the policy of the law to override considerations based on an academically orientated view of jurisprudence. If the latter kind of considerations are to be applied consistently they can lead to unacceptable results. Take, for example, the case of a defence, in a defamation action, of truth in the public interest. If the defendant adduces evidence of the truth of the defamatory words which falls short of proving it on a balance of probabilities, but is sufficient to leave the issue in balance, and the criterion of a "weerleggingslas" is applied, the plaintiff must be non-suited. I cannot believe that that is the law.

In my opinion, therefore, the question of "weerleggingslas"

versus full onus in relation to a plea of qualified privilege should be regarded as being still an open question in our law. For the purpose of the decision in the present case it can and should be left open, and it can be assumed, for the purposes of this appeal, that the defendants bear the burden of a full onus.

The present case relates directly to witnesses (including litigants testifying in their own cause), counsel and attorneys. In May v Udwin, supra, JOUBERT, J A refers to the privilege which extends to such persons but, since the learned Judge of Appeal was dealing with the position of a magistrate, his remarks are obiter in relation to other participants in legal proceedings. It is accordingly

necessary now to embark upon a brief analysis of the relevant principles which emerge from the pre-May v Udwin authorities in this regard.

Our law, as will appear, confers a qualified albeit a very real privilege upon counsel, attorneys, witnesses and litigants in respect of defamatory statements during the course of legal proceedings and differs in this respect from the law of England which extends an absolute privilege. (Halsbury, fourth edition, vol. 28 pars. 96 and 98). It will be convenient, before turning to the facts, briefly to discuss the authorities relating to witnesses and counsel and thereafter, during the analysis of the facts, to consider the position of the attorneys in this case from whom the instructions to counsel emanated.

At the outset it should be observed that there are a number of questions relating to various aspects of the privilege of witnesses and counsel that have not been settled by any decision of this Court. Many such questions need not be answered finally for the purposes of deciding the present appeal. However, lest there be any misunderstanding as to the effect of this judgment, it will be necessary to refer to some of these questions, in order to delineate precisely the basis upon which this appeal can be decided and to identify the questions that are left open for future decision when the need for it should arise.

No distinction should, in my view, be drawn between a witness testifying verbally who is not a party to an action and one

who is. The latter is as much a witness as the former
and is

"as such ... entitled to the privileges
and rights of a witness"

(per BRISTOWE, J in Goldseller v Kuranda, 1906 T H 185
at 189).

Voet 47.10.20 is the source of our common law
and the decision in Norden v Oppenheim 3 Menzies 42
the "foundation of our case law" (cf Rubel v Katzenellen-
bogen, 1915 C P D 627 at 632) on the subject of defamatory
utterances by witnesses in the course of judicial proceedings.
The relevant portion of the passage from Voet is to the

effect...../33

effect that if a litigant makes a derogatory imputation against a witness of the other side in the course of judicial proceedings he ought not to be regarded as having done so animo injuriandi but rather with the object of having acted in self-defence. Commenting on Voet 47.10.20, Melius de Villiers (The Roman and Roman-Dutch Law of Injuries) at p 223 stresses the legal obligation of a witness to answer questions and elaborates that if he "answers truthfully to the best of his knowledge and belief, no action of injury will lie against him, even if it should turn out that his statements were incorrect and tended to prejudice the character of another." He continues by pointing out, however, that a witness who wilfully introduces irrelevant and imper-

inent...../34

inent defamatory matter, or knowingly and falsely defames another, forfeits the protection which he would otherwise enjoy; and concludes by declaring that a plaintiff bears the burden of establishing the falsity of the evidence and that the witness swore "to that which he knew to be false".

Norden v Oppenheim , supra applied Voet 47.10.20. The case of Preston v Luyt, 1911 E D L 298, contains a wide-ranging review by KOTZÉ, J P of the early authorities relative to the privilege of advocates, litigants, judicial officers and witnesses and proceeds to summarise the legal principles laid down in Norden's case in respect of a witness as follows:

"... if a witness, in the course of a

judicial...../35

judicial inquiry, makes statements injurious to the character and reputation of others, he will be presumed to have done so innocently, in the discharge of his duty, for he is under legal compulsion to give evidence, and to reply to questions put to him. The onus will be on the plaintiff, complaining of what has been said by the witness, to allege and prove that the answer or statement by the witness was false and malicious, not pertinent to the question put to him, and made without reasonable and probable cause." (At p 310)

Two years earlier, in MacGregor v Sayles, 1909 T S

553, INNES C J , also approved of Norden's case, and expressed very much the same view at p 556:

"According to the authorities, it was necessary under such circumstances to the success of the plaintiff that he shall satisfy the court of three

things: First, that the witness was actuated by express malice; second, that the words spoken were false; and third, that the witness who uttered them had no reasonable grounds for believing them to be true' ... I am satisfied it is the principle we should follow in the present case."

The above-quoted statement as to what a plaintiff is required to prove in order to defeat the privilege is couched in cumulative terms. In my view that is not a sound approach in relation to the first requirement mentioned in MacGregor's case, viz that the defendant was actuated by "express malice". No doubt proof of the other requirements will give rise to an inference of "malice", in the sense explained in Basner v Trigger, supra, but in principle it

would...../37

would seem to be possible for a plaintiff to prove malice in that sense by means of extrinsic evidence without necessarily proving all or even any of the other requirements mentioned in the cases. In my view, therefore, the door should be left open to recognise the possibility that the plaintiff may succeed in holding the defendant liable on proof of malice in the sense stated, without the necessity of proving all or any of the other requirements laid down in the cases. The first requirement should accordingly be read disjunctively in relation to the others mentioned.

The second requirement mentioned in MacGregor's case, viz proof that the words spoken were false, is an exceptional one in the law of defamation, but it follows

naturally and logically from the very special position
in which a witness testifying in a court of law finds himself,
as explained in the cases. In my opinion considerations
of policy dictate that proof of the falsity of the statement
complained of should be recognised as one of the minimum
requirements to establish liability on the part of a witness.
It is not, however, necessary to express a final view upon
the point and for present purposes it may be left open.

In regard to the third requirement mentioned in
MacGregor's case, viz proof that the witness had no reasonable
grounds for believing his words to be true, I have no doubt
that this is indeed a minimum requirement in order to es-
tablish liability (i e apart from the possibility of proving

malice as above stated), and that this Court should hold accordingly. (The adoption of this principle will eventually provide a sufficient basis for deciding the appeal in respect of Joubert, Carolina and Emata, on the facts of this case.)

In connection with this requirement a further question can be posed: should it not be required of a plaintiff, in order to defeat the witness's privilege, to go even further and to satisfy the Court that the witness in fact did not believe in the truth of what he said?

In my view there is much to be said in favour of a positive answer to this question. It would be in accordance with the passage in the work of Melius de Villiers supra, where the learned author states that the plaintiff bears the burden

of establishing, inter alia, that the witness swore "to that which he knew to be false"; and, as a matter of policy, it would give due recognition to the importance of the fact (dealt with in the cases) that the witness's statement is made under oath. A requirement of this nature would not place too heavy a burden on a plaintiff, I consider, because if he proves that the statement is false and that the witness had no reasonable grounds for believing it to be true (which latter is the least that he must prove in any event), this would call for an answer by the defendant, failing which the inference would be justified that the defendant did not believe in the truth of the statement. If an absence of belief in the truth of the statement is the true criterion,

it...../41

it would follow that proof of absence of reasonable grounds for believing it would not per se be enough to impose liability upon the defendant. For present purposes, however, these questions may also be left open.

In MacGregor's case no reference is made to the matter of pertinency or germaneness, while in Preston's case supra it was said that the onus is on the plaintiff to prove, inter alia, that the statement of the witness was "not pertinent to the question put to him". However, this cannot be regarded as an independent requirement for establishing liability, for if a plaintiff were to prove, for instance, that the statement was false and that the defendant knew it to be false, the privilege would be forfeited

whether or not the statement was a pertinent answer to the question put. On the other hand, an answer which is wholly irrelevant to the question asked may attract liability even if the statement is true, as is demonstrated by the example given by COCKBURN, C J in Seaman v Netherclift 2 CPD 53 cited in Preston's case, supra at 310-311.

In so far as any question of onus in relation to relevance can arise in the case of a witness who testifies orally it will be convenient now to mention that as will be shown presently a litigant who deposes to an affidavit in legal proceedings carries the burden of proving that a defamatory statement made therein was relevant to an issue in the proceedings. In regard to a witness who testifies orally

two possible approaches concerning the onus in respect of relevance suggest themselves: (a) that the extent of the privilege ought not to vary in accordance with the procedure followed or the manner in which testimony is adduced; (b) it may be contrary to the interests of the due administration of justice to whittle away the wide protection afforded in the cases to a witness giving evidence viva voce by requiring him to prove that his answer was relevant to the question asked; provisional protection ought to be extended to such a witness solely on the ground that he was testifying under oath when he made the statement in issue. Since it is not necessary to decide the point, however, it also may be left open.

The view of the law expressed in the cases mentioned above has been consistently followed in various former colonies and the latter provincial and local divisions. (Vide, e g Lumley v Owen, 1882 NLR 185; Dippenaar v Hauman, 1878 Buch 135; Goldseller v Kuranda, supra; MacGregor v Sayles, supra at 556; Rubel v Katzenellenbogen, supra, Van Rensburg v Snyman, 1927 O P D 123; Rutland v Jordan, 1953(3) S A 806 (C) at 814-5).

The above cases with the exception of Lumley v Owen, Rubel v Katzenellenbogen and Rutland v Jordan all deal with or discuss the case of viva voce evidence. The three excepted cases, like the instant case, are concerned with witnesses who swore affidavits for use in legal proceedings. In Rubel v Katzenellenbogen...../45

ellenbogen, supra, KOTZÉ, J pointed out at p 633 that a difference may exist between the case of a witness, "who appears under a subpoena and is compelled to answer questions put to him" and that of "a party who swears an affidavit containing defamatory matter". The possible difference arises by reason of the fact that in the latter case there can be no question of compulsion. The learned Judge, having raised the question, passed it over and did not decide whether the law affords a stronger shield of protection to the witness who testifies in court in answer to questions put to him than to the one who has an opportunity to reflect before submitting an affidavit in less tense circumstances. The learned Judge nevertheless concluded (at p 633) that:

"Whatever difference there may be between

the two cases supposed, in both the qualified privilege exists. A person who gives oral testimony on oath as a witness, and one who gives written testimony by means of an affidavit, both enjoy a qualified or conditional privilege."

The privilege of a witness, as KOTZÉ, J P points out in Preston v Luyt, supra, at p 310, is a fairly wide one necessary for the due and proper administration of justice. It was pointed out in Norden's case, supra, at p 57 that statements by a witness are given

"as pertinent answers to questions which the Court put, or suffered to be put, to him, and which he was compelled to answer both by the obligation of his oath and by the fear of being punished for contempt if he refused to answer them"

In regard to a litigant who deposes to an affidavit to be used in legal proceedings the question must now be considered where the onus lies in respect of relevance.

As has been pointed out, the evidence contained in such an affidavit is not given under compulsion and by way of answers to questions where there is little opportunity for reflection. Moreover, such an affidavit is not only evidence as such but also partakes of the nature of a pleading in which the litigant's case is formulated. If a defamatory statement is made therein I do not think that provisional protection should be afforded to a defendant on the ground merely that the affidavit was sworn to in the course of and for the purposes of legal proceedings. It would not hamper

the administration of justice to require proof from a defendant that the defamatory statement was relevant and germane to the issues, or an issue, in the case, and it would be sound policy to require such proof in order to establish provisional protection, in accordance with the rule stated in general terms in this connection in Basner v Trigger, supra, and followed in Penn v Fiddel, 1954(4) S A 498(C). It is accordingly laid down that such proof is required from a defendant in such a case in order to establish a plea of privilege.

Apart from the question of onus in respect of relevance

I am of the view that the due and proper administration of justice requires that to the extent that KOTZÉ, J left

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the question unresolved in Rubel's case supra, it should now be resolved by holding that no difference should be drawn between the extent of the privilege enjoyed by the two classes of witness. Such difference as there may be, might manifest itself at the stage which is reached after a defendant establishes the existence of the qualified privilege and the plaintiff undertakes the onus of endeavouring to overcome the provisional protection which the defendant has achieved. In most cases it will probably be less burdensome to prove malice in the sense of an improper or indirect motive in the case of a witness who had time to reflect on the contents of his affidavit than in the case of the witness who is confronted with an oral question

which...../50

which he has to answer on the spur of the moment.

To summarise, with regard to Joubert, Carolina and Emata: they must prove that the statements complained of were relevant and germane to an issue in the case; in order to defeat the provisional protection of the qualified privilege thus established, it would be open to Venter to prove that Joubert, when he made the statements, was actuated by malice in the sense of an improper or indirect motive, as explained in Basner v Trigger supra; failing such proof Venter could succeed in his claim only if he proved, at the very least, that Joubert had no reasonable grounds for believing in the truth of the statements. Whether it should be required that Venter must go further and prove

that...../51

that the statements were false and that Joubert did not as a matter of fact believe in their truth, before he could succeed in his claim, need not here be decided.

Turning now to the qualified privilege accorded counsel in the conduct of legal proceedings the rule of our

law...../52

law has been authoritatively stated in crisp terms by this Court as follows:

"(T)he statement

(a) must be pertinent or germane to the issue, and

(b) have some foundation in the evidence or circumstances surrounding the trial."

(Per BEYERS, J A in Pogrund v Yutar, 1967(2) S A 564 at

570 E). The rule, as KOTZÉ, J P pointed out in his ency-

clopaedic judgment in Preston v Luyt, supra, derives from

the Code (2,6,6 sec 1) which enjoins advocates to serve

litigants without resorting to slander and abuse beyond

what the interests of the case require and from Voet

47.10.20 referred to above. Prior to Pogrund v Yutar

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the rule was formulated in somewhat different language

viz. that counsel is protected

"when he makes a defamatory statement
in the interests of his client, pertinent
to the matter in issue, even though
it be false, provided that he can produce
some probable (or credible) foundation
for the defamatory allegation which he
has made."

(Preston v Luyt, supra, at 320; Findlay v Knight, 1935 AD

58 at 75). In the last-mentioned decision, WESSELS, C J

pointed out at p 71 that counsel's protection is not confined

to the opening address, the examination of witnesses, cross-

examination and addresses to the Court but also extends to

pleadings drafted by him and "other documents necessary

to...../54

to place his client's case before the Court". The category last referred to is clearly wide enough to include affidavits settled or prepared for the purpose of motion proceedings. Counsel who drafts a pleading or affidavit on the instructions of an attorney is in a stronger position than an attorney who draws up a pleading on the information given to him by a client since there

"is an inherent difference between an advocate who draws up a plea on the instructions of an attorney and an attorney who draws up a plea on the information given to him by his client. The advocate does not get his information from his client. He gets his instructions from the attorney and presumes that the latter has sifted the matter and that the proof will be forthcoming.

The attorney draws his plea from the instructions of the client." (Per WESSELS, C J in Findlay v Knight, supra, at 73).

In my view, however, the position of counsel who accepts a brief to consult with witnesses and thereafter to draft pleadings or prepare affidavits pursuant thereto can, in principle, not differ from that of an attorney who acts on the instructions of his client. But that the privilege embraces all the stated functions cannot be doubted.

In regard to the two matters referred to in Pogrund's case supra I consider that some further discussion is called for. In the first place attention must be given to the incidence of the onus, which was not discussed in

Pogrund's case.

As to the first requirement mentioned in Pogrund's case, viz that the statement must be pertinent or germane to the issue (I would prefer to say: to an issue in the case), I am satisfied that the defendant must establish this in order to be provisionally protected, in accordance with the general rule stated in Basner's case supra (and as applied to the case of a litigant who deposes to an affidavit).

As to the second requirement mentioned in Pogrund's case, viz that the statement must have some foundation in the evidence or the surrounding circumstances, expressions

in...../57

in some of the authorities tend to suggest that the onus

in this respect is on the defendant (e g Voet 47.10.20,

Preston's case supra at 320, Findlay v Knight supra per

WESSELS C J at 71 i f - 72 top). It is also true that in

particular circumstances it may be required of a defendant

pleading privilege to prove that he had reasonable grounds

for making the defamatory statement (see Jordaan v Van Biljon

1962(1) S A 286 (A) at 296-299 and the cases discussed there),

but this is certainly not a rule of universal application

(cf McLean v Murray 1923 AD 406 at 417 i f - 418 top).

The incidence of the onus in the present context falls

to be determined by considerations of policy, and in this

connection I consider that what is of paramount and decisive

importance...../58

importance is the first principle of public policy stated

by WESSELS C J in Findlay v Knight supra at 71:

"That the welfare of society demands that an advocate or attorney who pleads the cause of his client should have a large degree of freedom in laying his client's case before the Court, even though in so doing he defames the other party or even a third party. The decided cases show that he has this privilege when opening a case in open Court, when examining and cross-examining witnesses, and when addressing the Court. For the same reasons the pleader must enjoy this qualified privilege when he files formal pleadings and other documents necessary to place his client's case before the Court. To hamper his freedom in this respect would be to hamper the administration of justice; this would be contrary to public policy, and therefore our

courts...../59

courts accord to attorneys and advocates a large measure of freedom in drawing pleadings and in pleading causes."

To give due effect to these considerations it is necessary, in my opinion, to lay down firmly that the privilege which counsel enjoys (and thus the provisional protection afforded thereby) is established on proof that the statement in question was relevant or germane to an issue in the legal proceedings in the course of which it was made, and that it is then for the plaintiff to prove that the defendant abused the occasion (and thus forfeited the protection of the privilege). One of the ways in which the plaintiff can do this is by proving that the defendant did not have "some foundation" in the evidence or the surrounding circumstances for making

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the statement in issue. It is clearly inadvisable to attempt any circumscription of the concept of "some foundation": each case must be decided upon its own facts. I would, however, sound a word of caution: in my opinion the Court should not be astute to find a lack of "some foundation" (or "reasonable cause") for counsel's statements, for to do so might unduly inhibit counsel in presenting his client's case and thus hamper the search for the truth in the administration of justice. In saying this I am not unmindful of the caveat expressed by BEYERS J A in Pogrund's case supra against the remarks of SCHREINER J A in Basner's case supra.

I have said that proof of the absence of "some foundation" is one of the ways in which a plaintiff can

defeat...../61

defeat counsel's plea of privilege. Of course there are other ways of doing it; the statement of BEYERS J A in Pogrund's case could hardly have been intended to be an exhaustive statement of the law. It is always open to the plaintiff to prove that the defendant was actuated by malice in the sense of an improper or indirect motive, as explained in Basner's case, and this he can do, for example, by proving that the defendant knew that his statement was false or that there was no evidence to substantiate it (cf Findlay v Knight supra at 69, 72, 73-4; Gluckman v Schneider supra at 165-6, read with Basner v Trigger supra at 105-6), or that the defendant made the statement on his own initiative, without instructions, and on the strength of untrustworthy information (cf Preston

v Luyt...../62

v Luyt supra at 324-7; Richards v Kuranda supra at 48-50),

or that the defendant's real motive was personal spite or

ill-will (cf Findlay v Knight supra at 69; Briscoe v Benson

1914 T P D 598 at 600-3).

A further matter requiring particular attention

(with a view to the argument of Venter's counsel to be referred

to presently) is the relevance or otherwise of counsel's

belief in the truth of the statement made by him. (I am

not now referring to the situation where he knows the statement

to be false; that has been referred to above). Expressions

can be found in some of the cases which, when read in isolation

and without reference to their own facts, might suggest

that an absence of (reasonable) grounds for believing in

the...../63

the truth of the statement is sufficient to attract liability
(see e g Preston v Luyt at 326-7); Geere v Gladwin & Nicolatos
1945 WLD 65 at 80; Gluckman v Schneider supra at 161-2 per
STRATFORD J A, but contrast per BEYERS J A at 165-6 and see
in this connection Basner's case at 106). This is not a
correct reflection of the law. In order to be afforded
protection counsel need not believe in the truth of the
statement and accordingly the absence of grounds
for such belief is, per se, inconclusive (see e g Briscoe v
Benson supra at 600; Solomon v Van Leggelo 1938 TPD 75 at 80;
Basner v Trigger supra at 105-107). With regard to Zeiss
the argument of Venter's counsel was to a great extent
centred upon a submission that Zeiss did not know that

the...../64

the statements in question were true and that he made them recklessly, not caring whether they were true or not. In my judgment, when once it is accepted, as it must be, that the absence of a subjective belief on the part of counsel in the truth of the statement does not defeat the privilege, there is no room for giving validity to the submission mentioned. I am aware that support for the submission can be found in the judgment of WESSELS C J in Findlay v Knight supra at 69, 72-3, but on that particular score his judgment did not form part of the ratio decidendi of the majority of the Court - see per CURLEWIS J A at 73, per BEYERS J A at 73-4, and especially per DE VILLIERS J A at 75-6, where the question was expressly left open. In my opinion it

should...../65

should now be decided that the submission I have mentioned
is unsound in principle and must be rejected.

It is against the foregoing background
that the facts must now be considered.

The true ratio decidendi of the Court a quo
in the judgment appealed against centres on the question
of pertinency as appears from the undermentioned passages
in the judgment of VAN REENEN, J :-

"Dit...../66

"Dit is dus duidelik dat op die keerdag van die bevel nisi daar geen moontlikheid kon bestaan dat mnr. Venter of enigemand anders as ontvanger aangestel kon word nie. Die bewerings teen mnr. Venter, wat bloot gemaak is om te verhoed dat hy as ontvanger aangestel word, was dus nie ter sake nie."

"Ek kom dus tot die besluit dat die bewerings teen mnr. Venter gemaak in die beëdigde verklaring van mnr. Joubert nie ter sake was nie. Die uitdruklike rede waarom die bewerings gemaak is, was om te verhoed dat mnr. Venter as ontvanger aangestel sou word, en so 'n aanstelling was nie eers ter sprake nie. Dit volg dus dat objektief beskou daar geen bevoorregte geleentheid was nie, en aldus beskou, was daar geen regverdigingsgrond nie."

The conclusion that the statements in question

were...../67

were not relevant can, however, not be supported. There is no room for doubt that Venter's intervention in the Kotze applications, his declared willingness to act as receiver, his avowed familiarity to a degree with the affairs of Carolina and Emata; and the ensuing orders of McCREATH, J inter alia directing Venter to convene meetings for the election of a substitute receiver precipitated the further intervention of Joubert, Carolina and Emata and unleashed the defamatory utterances which lie at the heart of these proceedings.

By relevance is meant "in some measure relevant to the purpose of the occasion" (at p 97 of Basner v Trigger supra).

The...../68

The release of Kotze from office was, as at the date of

the Joubert, Carolina and Emata intervention, in all proba-

bility imminent. The matter of the election of a substitute

receiver, by virtue of the orders of 11th April 1978, fell

to be determined under the lead and direction of Venter -

a man who in his affidavit of the 22nd March, to put it at

the very lowest, foresaw the possibility of being appointed,

directed the mind of the Court to such possibility; and

openly expressed his readiness to accept appointment.

Moreover he exhibited no diffidence in advancing his qualification

for...../69

for appointment by stressing his familiarity "to a degree"

with the affairs of Carolina and Emata. In the meantime

the Master labouring under the delusion, caused by the

false offer of compromise, that Venter already held office

as co-receiver, had alluded in his report to the possibility

that the creditors might desire to retain him as the sole

receiver. Venter, who had read the Master's report, knew

this and yet failed to remove the delusion. On the contrary,

by declaring that he became aware on the 3rd March 1978

that he "had been appointed", Venter disingenuously fortified

the impression that such was indeed the case. Regard being

had to his extensive experience in matters of this kind,

it is difficult to avoid the conclusion that Venter appreciated

full well that both the Master and the Court had been led astray. It is difficult to resist the conclusion that Venter wished the wrong impression to persist and enhance his chances of appointment. In the light of these circumstances there must, at the time of the service of the order on Joubert, Carolina and Emata, have existed a very real fear in Joubert's mind that Venter might be appointed receiver. To hold, as VAN REENEN, J appears to have done, that the holding of a meeting of creditors is a necessary pre-requisite to the appointment of a receiver, appears to me (although it is unnecessary to make a finding) to be legally unsound. But be that as it may, the stage was set for the appointment of a receiver, and the possibility that such an appointment

might...../71

might be bad in law does not establish an absence of relevance.

(Cf Blumenthal v Shore, 1948(3) S A 671 (A) at 685 top).

But for the intervention of Joubert, Carolina and Emata -

the propriety of which cannot be questioned in view of the

Court's direction that service of the order be affected

on them and, therefore, that they were entitled to be heard -

it is highly probable that Venter's preparedness to fall

in with the idea of being appointed and the likelihood that

the stray course would be persisted in, would de facto

have led to his appointment or his recognition as sole

receiver. Particularly noteworthy in this regard is the

evidence adduced at the trial that in precisely the same

situation which had arisen in two other kindred applications

(Paula's...../72

(Paula's Cake Shop (Edms) Bpk and Barteve Investments (Edms)

Bpk) Venter was appointed by the Court in each case as the substitute receiver without his prior election as such at any meeting of creditors. It follows that the intervention by Joubert, Carolina and Emata was not only appropriate but timely and well-considered. Joubert, moreover, had every reason - especially in the light of Venter's non-disclosure of the pending action - to be strongly opposed to the appointment of Venter. His attempt to fend off Venter's appointment accordingly rendered the attack on his character germane to the issue. The validity of this view is borne out by the success of the claim for the substantial relief prayed for in the intervening application of the 18th May 1978 viz

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the appointment of Meintjies. In advancing and substantiating that claim it was entirely relevant to stress the demerits of Venter vis-à-vis Meintjies. The following remarks by RAMSBOTTOM J in Geere v Gladwin and Nicolatos, supra, at 75 - a case concerning an application for a liquor licence by rival claimants - seems to be apposite:

"Mr. Rathouse contended that the occasion was not privileged because the defendant

had...../74

had no interest to enquire into the truth of Geere's affidavit. The argument was that each application was separate from all the others, and had to be dealt with on its own merits, and that one applicant or his representative had no interest or duty to deny the merits of another applicant. Since all that was pertinent to the occasion was an address in favour of Nicolatos, words derogatory of Geere were not pertinent and the occasion was not privileged for publication of such words. I do not agree with this argument. The circumstances were that there was only one licence to be granted, and although the several applicants were not in the position of parties to litigation they were rival claimants for the licence that was to be granted. In the circumstances each applicant, if appearing in person must, I think, have been entitled when presenting his own claims, to make comparison between his premises and those of his rivals, and between his personal qualifications and those of other applicants.

In comparing his premises with those of his rivals, he must be able to criticise the latter, and draw attention to their defects. Similarly, in advocating his own place, he must be allowed to argue that he is a more suitable licensee than the other applicants, and in doing so, to draw attention to features of unsuitability in his rival."

It is self-evident therefore, that the defamatory statements complained of by Venter were made in the course of judicial proceedings and were germane to the matter in issue.

Unless defeated by Venter, therefore, the defence of privilege raised by the defendants must prevail.

A convenient starting point in considering whether forfeiture of the privilege has been established on the

part of the defendants is to look first at the position of Zeiss - the author of the defamatory material. Zeiss did not testify at the trial but Joubert, Uys and Laubscher did. VAN REENEN, J regarded Joubert as an unsatisfactory witness who resorted to half truths in regard to portions of his evidence which did not appear to be relevant ("nie geblyk ter sake te wees nie"). Uys impressed him as a person who posed as a passive spectator but who did not deliberately give unreliable evidence. Laubscher he also regarded as passive and negative and as a witness who failed to make a good impression in portions of his evidence "(wat) nie juis ter sake (is) nie". The above uncomplimentary observations notwithstanding, the learned Judge concluded his remarks

relative...../77

relative to the three persons mentioned as follows:

"Dit blyk egter uit die bevindings wat ek gemaak het dat ek my nie juis verlaat het op die geloofwaardigheid al dan nie van die persone nie, en hierdie opmerkings word slegs gemaak indien 'n indruk van die getuies later nodig blyk te wees."

Inasmuch as the conclusion of the Court below in no way hinges upon its assessment of the aforementioned three witnesses, it is unnecessary to embark upon any close examination of the quality of their evidence in this judgment. Considerations of fairness nevertheless impel me to say that I do not share all the views expressed by the learned Judge in regard to these three witnesses; and I am constrained

to...../78

to observe that in my opinion the testimony of these witnesses in regard to the essential issues in the case is not open to any substantial criticism. Since the evidence of these three witnesses stands uncontradicted it is necessary and proper to have regard thereto in order to adjudicate upon the merits of this appeal.

It is hardly feasible to refer in detail to the voluminous evidence led at the trial, and in what follows I shall examine only those portions which appear to me to be of decisive importance. The cumulative effect of the evidence of the abovementioned three witnesses inter alia establishes

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the undermentioned facts:

1. After his appointment as provisional liquidator Venter, on the 25th May 1976, appointed Swersky (who died on the 27th April 1978 i e prior to the trial) in writing "to act on my behalf in conducting the administration" of Carolina and Emata. Both Uys and Laubscher were under the impression that Swersky was associated with Venter as co-director, partner or co-shareholder.
2. After Swersky assumed control of Carolina and Emata (and in particular of the two garages "Phillips Toyota" at Carolina and "Stoffberg Motors" at Stoffberg, owned by Carolina) he took possession of all the books of account (including debtors' cards) and retained the services of Mrs Pitout, as clerk and

bookkeeper,/80

bookkeeper, at Stoffberg Motors.

3. Joubert thereafter arranged with Mrs Pitout to keep a secret duplicate cash book.
4. After the provisional winding-up orders were set aside, Swersky removed the takings of the previous week from Stoffberg Motors.
5. The books of account and debtors' cards were missing after termination of the winding-up and a registered demand, dated 6th October 1977, addressed by Uys, on behalf of Joubert, to Venter calling for delivery of the books of account, records and liquidation and distribution accounts met with no response.
6. The failure of Venter to respond to the aforesaid demand led to Uys receiving instructions from Joubert, Carolina and Emata to

obtain/81

obtain legal advice with a view to litigation.

Uys in turn instructed his Pretoria correspon-

dent, Laubscher, who briefed Zeiss - a man

"onderleg in syfers ... met rekenkundige kennis".

7. Laubscher and Zeiss proceeded to the towns of

Carolina and Stoffberg on the 7th December 1977

where the secret cash book was examined by

Zeiss and consultations were held with various

witnesses.

At Carolina Joubert, his brother Jannie and

one Nel instructed Zeiss that Swersky often

received payments due to Carolina by post

and issued receipts in respect thereof

from/82

from an unofficial receipt book; that subsequent to the winding-up a receipt book was found at Stoffberg Motors from which pages referring to Swersky's regime had been removed; that certain motor vehicles and other assets could not be traced after the winding-up; that the turnover of Phillips Toyota and Stoffberg Motors was considerably greater than was reflected in the Standard Bank statement, the only one available and known to them relative to the trading operations of Carolina during the winding-up period; and that cash and assets valued at approximately R200 000,00 had during the same period disappeared from Carolina and Emata. Zeiss requested and later

obtained written details of this loss which, he was told, was confirmed by stocktaking figures. (Auditors present on this occasion confirmed, according to Laubscher, that there was a massive deficit). Later on the same day Mrs Pitout was interviewed at Stoffberg by Laubscher and Zeiss. She imparted the following information which was later incorporated into an affidavit:

"4. Gedurende die bestaan van die voorlopige Likwidasië het ek gelde ge-in en uitbetalings gemaak en het ek persoonlik 'n totale bedrag van R16 431,49 aan gemelde Zwiersky persoonlik oorhandig, synde gelde wat beskikbaar was nadat uitbetalings uit die bedrae wat ge-in is gemaak is. Hierdie totale bedrag van R16 431,49 wat ek aan Zwiersky oorhandig het, het gedeeltelik uit tjeks wat ge-in is en gedeeltelik uit kontantgelde wat ge-in is bestaan, en besonderhede van die datums en bedrae wat oorhandig is,

is soos volg:

<u>Datum</u>	<u>Bedrag</u>
3 Junie 1976	R 1 000,00
11 Junie 1976	1 977,73
28 Junie 1976	520,86
30 Junie 1976	1 100,00
30 Junie 1976	213,06
8 Julie 1976	3 055,88
16 Julie 1976	4 055,31
29 Julie 1976	1 143,50
31 Julie 1976	3 365,15
	R16 431,49

5. Gemelde Zwersky het nooit aan my gemeld
wat hy met die gemelde bedrae gedoen
het nie en het ek geen idee wat hy
inderdaad daarmee gedoen het nie."

8. Pursuant/85

8. Pursuant to the consultations referred to in the preceding paragraphs and certain calculations made by Zeiss, two summonses were issued and served, No I 1725/78 in which Carolina and No I 1726/78 in which Emata figured as plaintiffs. The original idea was to proceed against Venter by way of motion but Zeiss changed his mind and decided upon the institution of illiquid actions which were commenced by the said summonses. He notified his change of mind in a memorandum dated 6th February 1978 and also intimated that Carolina's action would incorporate a claim for repayment of the monies which, according to Mrs Pitout, were appropriated by Swersky. Zeiss, however, included the following warning in the memorandum:

"Dit/86

"Dit moet daarop gelet word dat die bewering dat die Verweerder hierdie bedrae gevat het, nie in die bankrekening gestort het en nog hou, prima facie uiters lasterlik is. Ek het dit oorweeg om hierdie bede weg te laat omrede dit in elk geval deur die algemene bede vir rekeninglewering gedek sal wees maar ek het daarteen besluit omdat hierdie pertinente bewerings die Verweerder onmiddellik in 'n groot verleentheid stel. Aangesien hierdie bewerings egter prima facie lasterlik is, moet daar voordat hierdie dagvaarding uitgereik word, eers ondersoek ingestel word om seker te maak dat Venter of Swersky nie die gelde miskien gebruik het om skulde van die maatskappy in likwidasië uit die hand uit te betaal en dat die rekening by die Standard Bank wat geopen is ook die enigste rekening is wat vir hierdie maatskappy in voorlopige likwidasië geopen is. Dit wil sê in alle omringende dorpe van Stoffberg moet alle banke wat daar takke het, by navraag gedoen word of Verweerder dan miskien nie nog 'n bankrekening vir die maatskappy in likwidasië geopen het nie."

9. The required enquiries were duly made

and the fears shown to have been unfounded.

Uys put it thus in his evidence

"ek was heeltemal tevrede dat hierdie
moontlike kwelpunte geopper in die
memorandum weggeval het."

Laubscher and Zeiss were informed accordingly.

10. Joubert was distressed at the orders made on the

11th April 1978 by McCREATH, J and believed

that this development foreshadowed the

re-emergence of Venter in the affairs of

Carolina and Emata. In order to prevent

the possible appointment of Venter as

receiver, further extensive consultations were

held/88

held during May 1978 in the conference rooms of the Agricultural Union in the town of Carolina. These consultations extended over several days during which Zeiss and Joubert's auditors analysed figures. Thereafter Zeiss, in the presence of Uys, Laubscher and Joubert, dictated to Laubscher's typist the supporting affidavits attached to the notices of motion of the 18th May 1978. Uys and Laubscher were satisfied that the affidavits were in accordance with the information which Zeiss and the auditors had gathered.

11. When Zeiss dictated one of the defamatory

passages/89

passages, Joubert remarked that the language was rather robust. Zeiss countered by saying that

"hy praktiseer vreesloos en as hy nie kan vreesloos praktiseer nie dan stel hy nie belang om te praktiseer nie."

12. Somewhat later Uys raised the matter

referred to in the preceding paragraph anew

with Zeiss and received the assurance that he

(Zeiss) was satisfied, on the available

information and evidence, that the allegations

against Venter were justified and well-founded;

and that the affidavits were properly worded.

13. Both/90

13. Both Laubscher and Uys considered that the legal and accounting knowledge of Zeiss surpassed theirs and they were satisfied by his assurance. Indeed they both testified that it was mainly left to Zeiss (assisted by Carolina's auditors) to determine whether amounts which accrued during the winding-up could be traced in the statements of the winding-up accounts at the Standard Bank, Carolina.

After entry of appearance in case I 1725/78,

Carolina applied for summary judgment in respect of the

claim for payment of the sum of R16 430,48 plus interest,

a tempore morae. Venter opposed the application by filing

an/91

an affidavit dated 26th April 1978 in which he averred that he had a bona fide defence to the action. It is necessary to refer to portions thereof and to certain events arising out of it. Venter admitted in the said affidavit that after discharge of the provisional winding-up order, he had received a request to make available all the books and records of Carolina - a request to which he did not object. He stated further that Joseph Tshabalala of Kotze Trust thereafter called at his office to collect the books but that he removed the wrong set of books. After the error was discovered Tshabalala returned the wrong books and collected from him (Venter)

"each and every book, record and document

which...../92

which I had removed" from the plaintiff upon my appointment as its provisional liquidator."

He stated further that he merely retained certain vouchers in respect of his trading as provisional liquidator.

Tshabalala, having earlier furnished his version to the defendants, dealt with the abovementioned allegations by Venter in an affidavit, dated 29th June 1978, being an annexure to Joubert's replying affidavit in the Kotze applications.. In the said affidavit Tshabalala, the holder of a B A degree, affirms that during August, 1976 he fetched certain books from Venter's offices but that they were the wrong books and were thereafter returned by another employee of Kotze Trust - one Prinsloo. On the 2nd March 1978 one Van Rooyen, also

a former employee of Kotze Trust, handed him a draft affidavit (which he annexed to his affidavit) with a request that he should sign it. He refused to do so as the draft incorrectly stated that he (Tshabalala) had returned the wrong books to Venter's offices and exchanged them for books belonging to Carolina and Emata. On the 6th March 1978 Venter and Van Rooyen repeatedly telephoned Tshabalala, urged him to sign the false affidavit and assured him that he could do so with impunity. Tshabalala however, refused to do so.

I now revert to Venter's affidavit of 26th April 1978. He stated that he endeavoured, but failed, to reconcile the amounts which make up the claim of R16 400,00 odd as only the bank statements and not the cash book were in his possession. But, said Venter, each and every

amount received by Carolina during the period of winding-up was either deposited to its banking account or used for the conduct of the business. He re-iterated what he had already stated in his intervening affidavit about a month earlier viz

"Without either my knowledge or my consent I had been appointed Receiver for creditors and only became aware of such appointment on the 3rd March, 1978 when I was so advised by the Master of this Honourable Court."

On the day before his death (i.e. 26th April 1978) Swersky filed a very brief affidavit in support of Venter's affidavit in which he stated that he had read Carolina's particulars of claim in action I 1725/78.

In his said affidavit, and save for the sentence quoted hereunder, Swersky made no attempt to account for the amounts of money which, according to Mrs Pitout, were handed over to him:

"I state affirmatively that all monies handled by me received by the Plaintiff whilst under Provisional Winding-up Order were either deposited to the banking account opened for such purpose, or alternatively legitimately expended on necessary stocks and expenses of the Plaintiff."

At the pre-trial conference, it might be noted, Zeiss enquired whether Venter was prepared to admit that Swersky took possession of the amounts referred to in Mrs Pitout's affidavit. On Venter's behalf it was recorded that he was unable to make any such admission

"as Swersky is now deceased."

At the commencement of the trial, however, Venter's counsel made the desired concession by stating

"... on consideration, because ... this trial really turns on that issue, on these figures, I can say at this stage that the plaintiff received the amounts in question and ... accounted for it."

Venter did not testify at the trial. Accordingly no evidence was tendered to account for the amounts received by Swersky.

It will be seen from the foregoing summary of the salient facts that Uys and Laubscher relied heavily on the advice of Zeiss who, to a large extent, performed the functions which they would ordinarily have performed viz. of gathering the relevant information, sifting it, examining and analysing the books of account and the relevant transactions. They were guided by Zeiss and unquestionably

accepted his advice and assurances in good faith. If, therefore, the plea of privilege succeeds in the case of Zeiss, then a fortiori it will succeed in their cases.

In essence the charges levelled against Venter in the affidavits complained of were that he had stolen the property of Carolina and Emata and that his conduct rendered him unfit to be appointed receiver in terms of the proposed compromises which appointment he was improperly soliciting. When Zeiss dictated the affidavits dated the 18th May and 29th June 1978 he knew that Swersky acted on behalf of Venter in conducting the administration of Carolina and Emata and that Venter maintained close contact with Swersky. He was given this information by Joubert and that such information was correct appears from Venter's affidavit (dated 13th June 1978) in the Kotze applications:

"I ... left the day to day administration

of...../98

of the businesses to Swersky, leaving it to him to make inventories of the assets of the two companies as I was entitled to do, and he went to live in Carolina to carry out his duties.. During the time that he ran the businesses and from the 4th June, 1976, when he went down to take up his duties, he maintained regular telephonic communication with me and gave me brief reports that all was under control in regard to the operation of the businesses."

Zeiss knew also that Swersky took possession of all relevant books of account and records, that they were missing after termination of the winding-up, that a demand for their return by Uys brought forth no response, that Venter alleged on oath in the summary judgment proceedings that Tshabalala had removed the books and records from him, and this Tshabalala disputed

on oath and alleged further that Venter tried to persuade him to swear falsely that he had indeed removed them.. Zeiss received instructions on the 7th December 1977 that the turnover of the businesses of Carolina during winding-up far exceeded the amount of business reflected in the bank statements revealed and that auditorial confirmation existed of a theft of the order of R200,000,00. In a face to face discussion with Mrs Pitout on the same date Zeiss learnt that she claimed to have handed Swersky nine separate amounts, the property of Carolina and totalling a sum in excess of R16 000,00 and Zeiss established that the nine amounts in question did not figure in the bank deposits. Zeiss furthermore knew that, in the summary judgment proceedings, Venter declared himself

unable to "reconcile" the amounts referred to by Mrs Pitout

and that Swersky, in a supporting affidavit, made no endea-

vour at all to deal with any one of the nine amounts or

even to admit or deny that he received the said amounts

or any of them. Very much later, i e at the trial before

VAN REENEN, J, it was established that the third, seventh

and eighth items listed by Mrs Pitout coincide respectively

with the totals of three, two and four deposits made at

the Standard Bank, Carolina on or about the dates mentioned

by Mrs Pitout. Thus, at best, about a third of the total

amount could possibly be accounted for by a searching

analysis of deposit slips. Zeiss did not detect this

prior to dictating the affidavits and did not consider the

possibility...../101

possibility that any of the items mentioned by Mrs Pitout might have been divided into separate deposits. Nor did this possibility occur to the auditors. And neither Venter nor Swersky could suggest a possible reconciliation during April 1978. I consider that Zeiss cannot be faulted on this account and that the undermentioned submission in the written heads submitted to this Court on his behalf, is fairly made:

" ... an examination of the said Bank accounts carried out with ordinary diligence ... would not necessarily reveal the aforesaid arithmetical coincidences."

Other alleged misconduct by Swersky which was conveyed to Zeiss included the following: the removal of the proceeds

of...../102

of the last week of the winding-up period; the issue of receipts from an unofficial receipt book in respect of monies forwarded to Phillips Toyota by post; that pages were cut out of an official receipt book; that assets were missing. Zeiss foresaw the possibility that portion of the monies allegedly stolen by Swersky might have been used to pay some of Carolina's debts or that deposits might have been made to banks other than the Standard Bank at Carolina. In his memorandum of 6th February 1978 he called for and received an assurance (before the issue of summons I 1725/78) that this was not the case. The circumstances set out above fully justify the conclusion that a distinct factual foundation existed for the inference

that...../103

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that...../103

that Swersky had stolen an amount in excess of R16 000,00 from Carolina. The question remains: was there also some foundation in the evidence or circumstances surrounding the trial to attribute responsibility to Venter for the defalcations of Swersky and to link him thereto? The answer, in my view, is in the affirmative for the reasons that follow. Swersky was Venter's fully authorised representative at the scene of Carolina's trading operations, maintained regular telephonic communication with him and submitted reports to him. Venter failed to dissociate himself from any part of Swersky's conduct and indeed relied on the statement of Swersky that

"all monies handled by me ... were either

deposited...../104

deposited to the banking account ... or
alternatively legitimately expended
on necessary stocks and expenses"

to resist the grant of summary judgment. On the strength
of Tshabalala's affidavit, Zeiss had every reason to conclude
that Venter dishonestly attempted to induce Tshabalala to
swear falsely that he had received Carolina's books of account
intact. Such conduct coupled with the disappearance
of the books provided some foundation for the notion that
Venter endeavoured to conceal Swersky's wrongdoing and
thus condoned it. Taken in conjunction with all the
other abovementioned circumstances and the fact that Venter
failed to disclose to the Court in the course of the Kotze
applications that a claim for payment of R16 400,00 odd

in respect of monies allegedly misappropriated from Stoffberg Motors was pending against him, the foundation for the belief that Venter was indeed linked with Swersky's misconduct is further fortified. The circumstances abovementioned represent only part of the vast body of evidence relevant to this issue in the record on appeal but suffice, in my view, to justify the conclusion that forfeiture of the privilege enjoyed by Zeiss has not been established by proof that there was any lack of "some foundation" for the statements complained of. Nor is there any basis for finding that malice in the special sense envisaged at p 95 in Basner v Trigger, supra, has been established against Zeiss. In view of this conclusion I need not deal with the subsidiary issue relating

to...../106

proceedings apply equally to them. The assurances which their legal advisers and auditors gave them effectively dispel any suggestion that the defamatory matter contained in Joubert's affidavits was published with an improper or indirect motive. Certainly there can be no question that Joubert swore "to that which he knew to be false". On the contrary he had received from Zeiss the assurance that the allegations against Venter were justified and well-founded. In all the circumstances it is impossible to find that Joubert made the statements complained of without having reasonable grounds for believing them to be true. It follows that the appeals of Joubert, Carolina and Emata should also be upheld.

The appeals are allowed with costs, including in the case of the first, second, third, fifth and sixth appellants, the costs of two counsel. The judgment of the trial Court is altered to one of judgment for the defendants with costs, including in the case of first, second, third, fifth and sixth defendants, the costs of two counsel.

JUDGE OF APPEAL

HOEXTER, J A)

BOTHA, J A)

HEFER, J A)

VIVIER, A J A)

concur