LOTHAR PAUL NEETHLING	Appellant
MAX DU PREEZ	1st Respondent
CAXTON LIMITED	2nd Respondent
WENDING PUBLICATIONS	3rd Respondent
JACQUES PAUW	4th Respondent

AND

LOTHAR PAUL NEETHLING	Appellant

and

THE WEEKLY MAIL	1st Respondent
W M PUBLICATIONS (PTY) LIMITED	2nd Respondent
GAVIN EVANS	3rd Respondent

Case Nos 184/91 and 401/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

LOTHAR PAUL NEETHLING	Appellant
and	
MAX DU PREEZ	1st Respondent
CAXTON LIMITED	2nd Respondent
WENDING PUBLICATIONS	3rd Respondent
JACQUES PAUW	4th Respondent

AND

LOTHAR PAUL NEETHLING	Appellant
and	
THE WEEKLY MAIL	1st Respondent
W M PUBLICATIONS (PTY) LIMITED	2nd Respondent
GAVIN EVANS	3rd Respondent

CORAM: CORBETT CJ, HOEXTER, NESTADT, NIENABER JJA
et NICHOLAS, AJA

HEARD: 16, 17, 18, 19, 20 AUGUST 1993

DELIVERED: 2 December 1993

J U D G M E N T

HOEXTER, JA

HOEXTER, JA

(A) INTRODUCTION:

In two separate actions instituted in the Witwatersrand Local Division during December 1989 the plaintiff, now the appellant, claimed damages totalling R1'5 m in respect of certain matter defamatory of him which had been published in two weekly newspapers published and circulating within the Republic of South Africa. The newspapers in question were VRYE WEEKBLAD ("VWB"), which is published in Afrikaans, and THE WEEKLY MAIL ("WM"), which is published in English.

In what follows I shall, in the main, refer to the action against VWB as "the VWB case", and to the action against WM as "the WM case". The VWB case related to articles in two separate editions of the newspaper, the

earlier article ("article VWB (1)") appearing on 17 November 1989 and the later one ("article VWB (2)") on 1 December 1989. The author of both these articles was Mr Jacques Pauw ("Pauw"). The WM case related to an article ("the WM article") which appeared in the edition of WM dated 24 - 30 November 1989, the author of which was Mr Gavin Evans ("Evans").

As the first, second and third defendants in the VWB case there were respectively cited that newspaper's editor, printer and publisher; the fourth defendant being Pauw. In respect of each of articles VWB(1) and VWB(2) the appellant claimed damages in the sum of R500 000. As the first, second and third defendants in the WM case there were respectively cited that newspaper's editor, printer ("Seculo Printers") and publisher; the fourth defendant being Evans. In respect of the WM article the appellant claimed damages in the sum of R500 000.

Both actions were defended. In each action all four defendants filed a single joint plea. In both actions the same team of senior and junior counsel drew the pleadings on behalf of the appellant on the one hand and on behalf of the defendants on the other. In terms of a court order granted on 14 August 1990 the hearings of the two actions were consolidated.

The trial came before Mr Justice Kriegler. In the course thereof a settlement was concluded between the appellant and Seculo Printers, the second defendant in the WM case. Against the remaining defendants the appellant's actions proceeded to their conclusion. At the end of the trial Kriegler J gave judgment with costs, including the costs of two counsel, in favour of the four defendants in the VWB case and the remaining three defendants in the WM case. The aforesaid seven defendants are the respondents in this appeal.

Against the judgment of the trial court the appellant sought leave to appeal. Kriegler J granted the appellant leave to appeal to this Court in the WM case but refused him leave to appeal in the VWB case. In the latter case, however, this court subsequently granted the appellant leave to appeal to it. At the trial leading counsel for the appellant was Mr Oshry, with Mr Witz as his junior. Both in the court below and before us the respondents were represented by Mr Levin and Mr Rautenbach. In this court the case for the appellant was argued by Mr Cilliers, with whom Mr Witz appeared.

(B) THE CHIEF CHARACTERS

There are two chief characters in this unusual case. They were the main witnesses at the trial. The one is the appellant himself. He is a Lieutenant-General in the South African Police ("the SAP"). The other is a

retired SAP officer: Captain Dirk Johannes Coetzee ("Coetzee"). The ultimate resolution of the issues in the appeal involves, inter alia, a careful appraisal of their respective characters, dispositions and proclivities. To provide some background to the case it is convenient at this juncture to mention a few personal details concerning these two men, and to give a thumbnail sketch of their respective careers.

The appellant, who was born in East Prussia in 1935, came from Germany to South Africa as a war orphan in 1948. Having matriculated in this country he enrolled as a science student at the University of Pretoria where in the years 1955 and 1958 he successively gained the degrees of B Sc and M Sc, the latter cum laude. Next the appellant was awarded a bursary by the Atomic Energy Board which enabled him to undertake research in chemistry in the United States of America where he gained a Ph D in 1 962 at the

University of California.

In 1965 the appellant was appointed head of the biological radiation unit at the Onderstepoort Veterinary Research Station. Thereafter part-time study earned him a D Sc in physiological organic chemistry from the University of Pretoria in 1970. In that year the SAP required the services of a scientist equipped to undertake research into hair analysis. There were 26 applicants for the post. The appellant was the successful candidate, and in January 1971 he was appointed to the position with the rank of a full colonel. The task of creating a forensic laboratory for the SAP was entrusted to him. Initially the laboratory was housed in a building in Church Street, Pretoria. During 1971 it moved to premises at 171 Jacob Mare Street. There it remained until February 1987 when it moved to the L P Neethling Building, named after the appellant, in Silverton, Pretoria. From small beginnings the forensic laboratory

rapidly expanded. In its first year of operation it dealt with some 150 analyses. By 1 989 the figure had grown to 26 000. On 1 September 1979 the appellant was made a Major-General in the SAP. Further promotion to his present rank of Lieutenant-General followed on 1 June 1985. When his actions were instituted the appellant was the Chief Deputy Commissioner, Scientific Technical Services, in the SAP. The appellant has been the recipient of various local and foreign police decorations. He is a member of the SA Chemical Institute and of the Akademie vir Wetenskap en Kuns. The appellant is a member of the Society for Forensic Science in England and the International Society of Toxicologists. In 1989 he received the Armscor Award for exceptional contribution to the development of explosives detection techniques. In his official capacity he has attended many conferences in his field of study in the United States of America, in England, Switzerland and

Western Germany. The appellant has frequently testified as an expert forensic witness in criminal trials in this country and in neighbouring states. In short the appellant is an eminent forensic scientist whose skills have gained international recognition.

Coetzee was born in the Northern Cape in 1945. After matriculating he worked for a while in the Post Office before joining the SAP in March 1970. At the end of that year he passed out of the Police College as the best student on the training course. His further advancement in the SAP was rapid. Having become a sergeant he attended a course for dog-handlers. Thereafter, and as a warrant officer, he served for a while north of the country's borders with the Rhodesian security forces. While so seconded he became acquainted with counter-insurgency techniques such as the use of poison against the foe, and the incineration of the slain enemy to prevent subsequent identification of

corpses. Having been stationed for a while at Sibasa, Coetzee became a commissioned officer in the SAP in 1975. As a lieutenant he did a brief stint first at the Police College and then at Volksrust.

In January 1976 Coetzee was appointed commander of the SAP border post at Oshoek on the frontier between South Africa and Swaziland. His duties there involved close co-operation with the Security Branch of the SAP. In addition they afforded Coetzee very ready access to Swaziland, in which kingdom he soon acquired a wide circle of friends and agents. At Oshoek he became involved in certain irregular activities, the nature of which will be detailed later, in consequence whereof Coetzee was transferred to Sunnyside, Pretoria. Through the intervention of senior officers well-disposed to him the transfer was countermanded and instead he was moved to the Security Branch at Middelburg. Shortly thereafter Coetzee was promoted to the rank of

captain.

In August 1980 Coetzee was transferred to the head office of the Security Branch in Pretoria. He was posted to Section C1 under the command of Brigadier Viktor; and he worked from a secret station situate south-west of Voortrekkerhoogte called Vlakplaas. Vlakplaas was used as a base to accommodate a number of men who had defected from the African National Congress ("the ANC") and who assisted the Security Branch in tracking down members of that organisation.

Coetzee remained at Vlakplaas from August 1980 until the end of 1981. From Coetzee's own evidence it appears that this period of his police career was one of sustained participation in wide-ranging illegal acts, including a number of murders. At the end of 1981 Coetzee was transferred to the Security Branch office at Krugersdorp. For personal reasons this move was

unacceptable to him. Once again senior officers interceded on his behalf and in the result he was transferred instead to the Pretoria office of the South African Narcotics Bureau where he remained, until July 1982, as the head of the section dealing with offences involving liquor, immorality and gambling. Next Coetzee served as staff officer to the Divisional Command for the Northern Transvaal. In August 1984 he was moved to radio control.

At about this time Coetzee seems again to have incurred the displeasure of his seniors in the SAP. He did so by meddling with a police inquiry into the affairs of a friend of his, one Whelpton. This and other behaviour on Coetzee's part resulted in a departmental disciplinary inquiry against him, at the instance of the then Commissioner of the SAP, General Johan Coetzee. He faced seven charges of misconduct. At the conclusion of the hearing he was found guilty on five of the charges. Coetzee

is a diabetic. At the hearing, and in mitigation of sentence, medical evidence was adduced on Coetzee's behalf regarding the nature and extent of his diabetic condition. In the final upshot Coetzee's salary was reduced by two notches and he was permitted to retire on pension from the SAP on the grounds of medical unfitness.

In broad outline Coetzee's fluctuating fortunes have now been traced up to the year 1985. When the appellant instituted his actions in December 1989 Coetzee had, shortly before, fled South Africa. His testimony at the trial was taken by a commission de bene esse in London from 8 to 12 October 1990.

It is necessary next to consider what befell Coetzee after his retirement from the SAP; what precipitated his flight from this country; and to see in what circumstances VWB came to publish the articles VWB(1) and VWB(2) on which the action against VWB was founded.

Before taking up the narrative it is convenient at this stage to interpose a synopsis of that portion of Coetzee's evidence in chief at the trial in which he described his involvement in the murder of a Durban attorney, Mr Griffiths Mxenge ("Mxenge"), on 19 November 1981.

While he was stationed at Vlakplaas, so testified Coetzee, he was made the leader of an operational group. Its second-in-command was sergeant Paul van Dyk ("van Dyk"). Other members of the group included Constable Tshikalanga ("Tshikalanga"), Constable Butana Almond Nofomela ("Nofomela") and two men respectively named Joe Mamasela and Brian Nqulunga. By November 1981 Brigadier Viktor had been succeeded as the commander of Vlakplaas by Brigadier Schoon ("Schoon"). In command of the Security Branch for Port Natal at that time was Brigadier van der Hoven ("van der Hoven"). Coetzee's account of his part in the Mxenge

murder, tersely stated, amounts to the following. During November 1981, and at the request of van der Hoven, Schoon had sent Coetzee's operational group to Durban in order there to assist in tracking down ANC members at places like railway stations and shebeens. During this period van der Hoven told Coetzee that Mxenge, who practised and lived in Durban, was suspected of using his bank account as a conduit for channelling ANC funds and that Coetzee should eliminate him otherwise than by shooting, and in such a way as to create the appearance that Mxenge had been the victim of a robbery. As a first step towards the assassination of Mxenge the dogs at his home were poisoned by means of meat which had been treated with strychnine. Coetzee assigned the actual killing to Nofomela, Tshikalanga, Mamasela and Nqulunga. He instructed them to stab Mxenge to death with knives and they agreed to report back to Coetzee at an appointed place after they had carried out their grisly

assignment. When on the night in question the four men rejoined their leader Mamasela was wearing Mxenge's jacket and wristwatch. He was also in possession of Mxenge's wallet and the keys of his Audi motor car. Having on the same night reported the success of his mission to van der Hoven, Coetzee and others on the next day took Mxenge's motor car to the Golel frontier station on the Swaziland border. There the Audi was provisionally concealed in a garage. Coetzee says he then returned to Pretoria and reported to a senior Security Branch officer, Brigadier Jan du Preez ("du Preez"). Coetzee proposed to du Preez that Mxenge's Audi be exchanged for a Koevoet vehicle, but this idea was rejected by du Preez. In the result Coetzee and van Dyk travelled to the Eastern Transvaal in order to get rid of the Audi. In Bronkhorstspruit the demolition party was joined by Captain Koos Vermeulen ("Vermeulen"), a man who according to Coetzee was involved in many of his

criminal exploits. They travelled on to Golel where Mxenge's Audi was removed from its place of concealment, taken to a plantation near the Bothasnoop border post, doused with petrol, and then set alight.

After the above digression in regard to the Mxenge murder the chronicle of events following upon Coetzee's retirement from the SAP must be resumed. This part of the case has been succinctly summarised by the learned trial judge in the course of his very thorough and comprehensive judgment. Here I can do no better than to quote from it at considerable length. The observations by Kriegler J which follow hereunder are based largely, but not exclusively, on Coetzee's own evidence. Kriegler J remarked:-

> "Die dissiplinêre stappe teen hom laat Coetzee met 'n wrok teen die polisiemag, of ten minste teen sekere senior lede daarvan. Voor die uitslag daarvan was daar reeds blyke van onvergenoegdheid en ontrou jeens die mag by hom aanwesig, soveel so dat hy loslippig geraak het oor vertroulike sake, waaronder die werksaamhede van die Vlakplaas-kontingent. Hy kom deur Whelpton in aanraking

met twee joernaliste verbonde aan Rapport, mnre Welz en Pauw, en maak mettertyd talle mededelings aan hulle oor wat hy tydens sy Vlakplaasdae sou gedoen het ....

Coetzee se verbittering word na uitdienstrede gesterk toe hy etlike werksgeleenthede verloor as gevolg van sy ongunstige veiligheidsklaring. Hy bekom naderhand 'n aantal werkies by vriende en familie waardeur hy die pot aan die kook hou. Eers laat in 1989 slaag hy daarin om 'n werksaanbod te kry wat sy ervaring en kwalifikasies waardig is. Voor hy egter daarmee begin, vind daar 'n aantal dramatiese gebeure plaas.

Almond Nofomela, die eertydse lid van Coetzee se Vlakplaas-groep, bring op Donderdag, 19 Oktober 1989, vanuit die dodesel waar sy teregstelling die volgende oggend sou geskied 'n dringende aansoek om stuiting daarvan. In sy vestigende eedsverklaring ....beweer hy onder andere dat hy laat in 1981 tesame met Brian Ngulunga, Tshikalanga en Joe Mamasela, in opdrag van Coetzee en Brig Schoon 'n Durbanse prokureur by name Griffiths Mxenge vermoor het vanweë sy betrokkenheid by ANC aktiwiteite. Luidens Nofomela se verklaring sou Coetzee 'n foto van Mxenge en besonderhede van sy bewegings aan hul verstrek en ook opdrag gegee het dat hy nie geskiet nie maar met 'n mes gedood moes word.

Uiteraard het Nofomela se bewerings groot openbare beroering ontketen en is dit onder andere die Vrydagaand, 20 Oktober 1989, in beide SAUK-TV

nuusuitsendings genoem. Tshikalanga bel uit Venda vir Coetzee by sy huis na die vroeë uitsending en Coetzee kyk na die tweede. Vroeg die volgende oggend le hy besoek af by Brigadier Jan du Preez, 'n afgetrede senior,veiligheidsman, mentor en beskermer van Coetzee tydens hul Veiligheidstakdae. Hy soek raad oor wat hom te doen staan in die storm waaraan die Nofomela-aantygings horn blootgestel net. Die advies wat hy kry is om vas te staan op 'n ontkenning van die bewerings. Dieselfde dag probeer Coetzee in aanraking kom met Paul van Dyk met wie hy in die jare sedert sy uittrede uit die polisie kontak verloor het. Hy word meegedeel dat van Dyk van die grens teruggeroep is en daardie aand op Waterkloof-vliegveld sou aankom. Coetzee reel met van Dyk se eggenote dat van Dyk hom sou bel. Die Sondag en Maandag, 22 en 23 Oktober 1989, hoor Coetzee nie van van Dyk nie. Op laasgenoemde dag tree hy in verbinding met twee persone. Die een is Pauw, die joernalis met wie hy reeds in 1984/85 kennis gemaak het en wat toe vir Vrye Weekblad werk en mettertyd die vierde verweerder in die aksie sou wees. Die twee van hulle was juis enkele weke tevore in gesprek met mekaar oor die moontlike skryf van 'n boek waarin Coetzee se wedervaringe in gefiksionaliseerde vorm verhaal sou word. Die ander persoon was 'n Johannesburgse professionele man wie se naam Coetzee geweier het om te openbaar maar wat hy beskryf as 'n middelman tussen homself en die ANC.

Vroeg dieselfde week word bekend gemaak dat die prokureur-generaal van die Oranje Vrystaat,

advokaat McNally en luitenant-generaal Alwyn Conradie, hoof van die Suid-Afrikaanse Speurdiens, opgedra is om die Nofomela bewerings te ondersoek. Die daaropvolgende Maandag, (30 Oktober 1989), besoek van Dyk vir Coetzee by sy huis waar hulle in die straat voor die huis 'n gesprek voer. Volgens Coetzee (wie se weergawe nie voor my weerspreek of bevraagteken is nie) deel van Dyk horn mee dat hyself, brigadier Schoon, Brian Ngulunga en Joe Masamela reeds voor die McNally-kommissie getuig het en te kenne gegee het dat hulle van Nofomela se bewerings niks weet nie. Van Dyk deel hom ook mee dat die ondersoekbeampte van die McNally-kommissie vir hulle polisiemanne op die hoogte hou van wat by die kommissie gebeur en dat daar rede is om te vertrou dat Nofomela se bewerings in verband met die Mxenge-moord verwerp gaan word as net 'n poging om sy nek te red. Coetzee en van Dyk is toe uitmekaar met die verstandhouding dat laasgenoemde weer kontak sou maak. Teen Vrydag van daardie week het hy nog nie van hom laat hoor nie en Coetzee probeer tevergeefs met hom in aanraking te kom. Intussen is daar, sover Coetzee weet, ook geen stappe van die kant van die Suid-Afrikaanse Polisie of die McNally-kommissie om met hom in verbinding te tree nie. Dit bevreem hom aangesien hy volgens Nofomela 'n sleutel rol gespeel het. Sy kommer groei. Dit lyk vir hom of hy in 'n hoek gedryf word waar hy Nofomela se bewerings sou moes ontken (wat hy nie wou doen om redes wat later onder die loep kom) en bowendien die risiko loop dat hy as potensiële sondebok uitgesonder word.

Saterdag, 4 November 1989 besluit hy finaal om land uit te vlug, sy verhaal in die buiteland aan Pauw te vertel en dan sy lot by die ANC in te werp. So besluit so gedaan. Hy en Pauw vlieg die volgende dag na Mauritius waar hulle tot die Woensdag (8 November 1989) 'n bandopname maak waarvan die oorkonde (bew "P") 198 bladsye beloop. Hulle stel ook 'n formele verklaring op (bew "K")

wat 26 bladsye beslaan. Die wou hulle beëdig maar kon vanweë formaliteitsprobleme nie daarin slaag nie. Die Woensdagmiddag vlieg Coetzee na London waar hy daelank met verteenwoordigers van die ANC konfereer. Sedertdien werk hy vir die ANC. Sy vlug na Londen, sy verblyf aldaar en sy bestaansbehoeftes sedertdien word deur sy nuwe meester gefinansier.

Na die verskyning van die eerste gewraakte berig in die Vrye Weekblad [article VWB(1)] en voor die tweede verskyn, skakel Coetzee vanuit Bulawayo, waarheen hy intussen gereis het, met Pauw en maak 'n aantal verdere mededelings aan hom wat in die tweede berig [article VWB(2)] bygewerk word. Op 4 Januarie 1990 word op aansoek van die prokureur-generaal van Natal 'n lasbrief uitgereik vir Coetzee se inhegtenisname (bew "XX") -

> '....aangesien daar op grond van inligting onder eed redelike gronde vir verdenking teen hom bestaan dat hy....'

op 19 November 1981 vir Griffiths Mxenge vermoor het.

> Van 25 April tot en met 3 Mei 1990 gee hy sewe dae lank in Londen voor die Harms-kommissie getuienis waartydens hy deur 'n battery advokate ondervra word. Die getikte oorkonde van sy getuienis aldaar beloop 690 bladsye. In Oktober 1990 getuig hy weer in Londen en wel voor die kommissaris de bene esse in hierdie verhoor. Tydens die verhoor is 'n video-band in die hof vertoon (en ingedien as bewysstuk "B") van 'n TV-program wat op 4 April 1990 in Brittanje gebeeldsend is, getitel 'Dispatches'. Dit is 'n sensasionele en wydlopende stuk, propagandisties en striemend in sy kritiek op die Suid-Afrikaanse veiligheidsorgane en 'n aantal politieke figure. Coetzee speel 'n prominente rol daarin, word telkemale vertoon en gehoor en doen oenskynlik lustig mee."

(C) THE DEFAMATORY ARTICLES

The way has now been prepared for a scrutiny of the matter published in articles VWB(1) and VWB(2) and in the WM article. For the sake of convenience reproductions of these three articles have been embodied in appendices, respectively numbered "I", "II" and "III", subjoined to the body of this judgment. Further, and in order to facilitate reference to specific parts of the text, there have been introduced by me in the margins of the columns in each

article a series of capital letters to identify particular paragraphs together with a series of numerals in order to pinpoint their sub-paragraphs.

Dealing first with article VWB(1) one finds on the front page a large photograph of Coetzee with the caption "Bloedspoor van die SAP". Flanking the photograph on its right-hand side the following is then stated:-

> "Ontmoet kaptein Dirk Johannes Coetzee bevelvoerder van 'n moordbende van die SA Polisie. Hy vertel eksklusief die volle grusame verhaal van politieke sluipmoorde, gifkelkies, buitelandse bomaanvalle en briefbomme."

The following page features four smaller photographs of Coetzee, underneath which there appear the words:-

> "Moordbende se register van terreur.
> Alle berigte en foto's deur
> JACQUES PAUW"

Below this there are portrayed three miniature photographs of (1) the appellant; (2) Craig Williamson; and (3) Gen Johan Coetzee. It is in the balance of article VWB(1) in

which the statements defamatory of the appellant are to be found. The introductory portion reads thus:-

> "KAPTEIN DIRK COETZEE erken dat hy tot en met 1982 aktief deelgeneem en help beplan het aan verskeie moorde en terreuraanslae wat deur die S A Polisie se spesiale eenheid te Vlakplaas gepleeg is. Daarna het hy steeds noue kontak met verskeie lede van die moordbende behou en is bewus van nog terreur in die jare daarna. Hier is sy doodregister:"

What follows is a catalogue of murders furnished by Coetzee to Pauw. Each section of the register begins with a brief superscription marked by an asterisk, presumably composed by Pauw, followed by Coetzee's narrative between quotation marks.

Paragraph (A) [* Die moord op die anti-apartheidsaktivis en Durbanse prokureur Griffiths Mxenge] is devoted to an account of the Mxenge murder and the alleged roles therein of van der Hoven, Schoon, Coetzee himself, van Dyk, Nofomela, Tshikalanga, Nqulunga, one Joe [Mamasela ?] and others.

Paragraph (B) [* Die moord op twee ANC-lede naby Komatipoort] involves a description of a protracted chapter of events to which hereafter reference will be made as "the Vusi and Peter murder." Here are alleged the roles played in the Vusi and Peter murder by Schoon, Coetzee himself, Vermeulen, Major Archie Flemington ("Flemington") and, very pertinently, the role alleged to have been played by the appellant. In sub-paragraph (B)(2) Coetzee is quoted thus:-

> "Ek en Vermeulen het gif, wat deur die forensiese laboratorium voorberei is, in hul koeldrank en bier gegooi. Almal het gepraat van 'Lothar se gif, (Generaal Lothar Neethling is die hoof van die forensiese laboratorium). Ons is verseker dat sestig gram genoeg sou wees om hul aan 'n 'hartaanval' te laat beswyk. Die gif wou nie werk nie. Ons het die dosis tot 360 gram elk verhoog, maar niks het gebeur nie."

In sub-paragraph (B)(4) Coetzee is quoted thus:-

> "Ons het Vusi en Peter 'n slaapmiddel ingegee wat ook deur die forensiese laboratorium voorberei is. Ons is vooraf gevra om aantekeninge oor die uitwerking daarvan te hou. Toe die twee terries

> goed deurmekaar was, het Vermeulen hul met 'n Makarov-pistool met 'n knaldemper deur die kop geskiet.
>
> Die twee lyke is hierna met hout en buitebande wat ons op 'n ashoop gaan haal het, verbrand. Dit het sewe ure geneem voor die liggaam uitgebrand was. Die as en oorblyfsels is in die Komatirivier geskep."

In sub-paragraph (B)(5) Coetzee is quoted thus:-

> "Tydens die verbranding van die twee terries het die veiligheidsmanne van Komatipoort aan my vertel hoe hulle sterk drank wat met gif gedokter is, onder ANC-lede in Maputo versprei. Die gif word met 'n mikronaald deur die prop in die bottels ingespuit."

In paragraph (C) [* Die verbranding van 'n "tweede Biko"]

there is described in sub-paragraph (C)(1) the theft in the

Eastern Cape by Coetzee and Nofomela of a motor car

belonging to a trade union leader in Port Elizabeth; and in

sub-paragraph (C)(2) Coetzee's subsequent encounter at

Jeffrey's Bay with a lean detainee said to be suffering from

haemmorrhage of the brain. I pause to mention that

according to Coetzee's evidence at the trial the detainee

in question was one Kondile. In what follows reference will be made to Kondile's alleged fate as "the Kondile murder". In sub-paragraph (C)(3) there is described a decision to get rid of this detainee, and to that end a meeting at a Komatipoort farm of various persons including Coetzee and Flemington.

In sub-paragraph (C)(4) Coetzee is quoted thus:-

> "Die skraal man is van Lothar se slaapmiddel ingegee waarna 'n polisieman van Komatipoort horn met 'n Makarov-pistool met 'n knaldemper deur sy kop geskiet het.
>
> Ons het hom op h brandstapel van hout en buitebande verbrand en die as na die tyd gelyk gehark."

Paragraph (D) [* Die moord op die aktivis Patrick Makau] deals with the destruction by explosives in Manzlnl of (i) a house used by the ANC as a transit facility and (ii) the house of an unnamed ANC member. Sub-paragraph (D)(1) mentions that for this purpose Coetzee was in charge of a group consisting of van Dyk and two explosives experts.

Sub-paragraph (D)(2) describes the successful execution of the mission and concludes with a hearsay statement by Coetzee that a child was killed.

Paragraph (E) [* Die bomaanslag op Chris Hani, militêre bevelvoerder van Umkhonto We'Sizwe] deals (in sub-paragraph (1)) with an alleged plan by the Security Branch in Bloemfontein to assassinate Chris Hani in Lesotho by means of a car bomb planted by one Moshesh. Sub-paragraph (E)(2) describes the premature detonation of the bomb, with consequent injury to Moshesh, and the latter's arrest by the Lesotho authorities.

In sub-paragraph (E)(3) Coetzee is quoted thus:-

> "Ons het borg vir hom gaan reel, en nadat hy losgelaat is, het ons hom uit Lesotho gesmokkel en na Vlakplaas geneem."

Paragraph (F) [* Die moord op Ruth First] deals (in sub-paragraph (1) thereof) with an order given to Coetzee to break into the office of the United Nations High

Commissioner for Refugees in Mbabane. Sub-paragraph (F)(2) describes the housebreaking and the articles stolen. Sub-paragraph (F)(3) contains hearsay statements by Coetzee concerning the murder of Ruth First in Maputo by means of a letter-bomb.

I deal next with article VWB(2). On the front page of the newspaper there is the headline:

"LOTHAR SE DOEPA"

followed by the quotation:

"Hy het die gif aan my gegee"

Under the name "Jacques Pauw" there appear two large photographs of Coetzee (on the left-hand side of the page) and of the appellant (on the right-hand side of the page). Beginning in the column separating the two photographs the following statements are then made on the front page:-

> "GENERAAL Lothar Neethling het persoonlik gif aan kaptein Dirk Coetzee verskaf om twee ANC-verdagtes mee te vergiftig. By 'n ander geleentheid het die generaal 'n slaapmiddel aan Coetsee gegee om 'n ANC-

> lid uit Swaziland mee te ontvoer.
>
> Die en nuwe onthullings oor die vergiftiging van ANC-lede is vandeesweek deur Coetzee gemaak kort nadat Neethling, hoof van die forensiese laboratorium in Pretoria en assistent-kommissaris van polisie, gedreig net om Vrye Weekblad weens beweerde laster vir R500 000 te dagvaar."

On the newspaper's second page paragraph (G)(1) refers to the fact that in article VWB(1) [see subparagraph (B)(2) above]:-

> "....vertel Coetzee dat hulle gif voorberei deur die polisie se forensiese laboratorium, in die koeldrank en bier van twee gewese ANC-lede wat geelimineer moes word, Vusi en Pieter, moes gooi. Coetzee verwys na die gif as 'Lothar se Gif.'"

Thereafter the alleged role of the appellant in the Vusi and Peter murder is considerably amplified and embellished with circumstantial detail. It is stated that in his own office the appellant personally handed to Coetzee a sleeping-draught and poison; that he gave Coetzee instructions as to the dosage of the former to be administered; and that he expatiated on the efficacy of the latter. In paragraphs

(G)(2) to (4) Coetzee is quoted thus:-

> "Voor die operasie om Vusi en Pieter te elimineer, is ek en Koos Vermeulen deur brigadier Willem Schoon opdrag gegee om na Neethling se kantoor by die forensiese laboratorium in Jacob Marestraat te gaan om die gif te gaan haal. In sy kantoor net 'n Oostelikes-rugbyfoto gehang en 'n sertifikaat dat hy in die Concorde of een of ander snaakse vliegtuig gevlieg net.
>
> Hy net eers die slaapdruppels uit sy kluis gehaal en vir ons vier tot agt druppels per volwasse man uitgemeet indien ons dit sou nodig kry. Hy net ons gewaarsku om nie te veel te gebruik nie omdat 'n oordosis fataal mag wees.
>
> Daarna het hy 'n gryserige poeier uitgehaal en vir ons gese as iemand daarvan inkry, gaan hy dood aan 'n hartaanval. Hy het gese hulle het dit op skape getoets en dit is baie effektief."

In sub-paragraaf (G)(5) it is stated that according to Coetzee they followed the appellant's directions closely by adding 60 milligrams of the poison to the drinks of the two intended victims. When this did not work Vermeulen returned to Pretoria where he obtained more of the poison. The second dosage of 120 milligrams likewise failed to

produce the desired result.

Thereafter article VWB(2) proceeds to relate details of an alleged further visit by Coetzee and Vermeulen in guest of an effective poison. Sub-paragraphs (G)(6) to (10) quote Coetzee thus:-

> "Toe die gif steeds nie wou werk nie, is ek saam met Vermeulen weer terug na Pretoria waar ons vir Lothar die Sondagoggend by sy huis gaan sien het.
>
> Hy het in die Hatfield-omgewing naby Tukkies gebly. Ek onthou nog hy het twee verskriklike wreedaardige Dobermanns of Rottweilers gehad.
>
> Hy het uitgekom in sy pajamas en gou 'n kortbroek en slippers aangetrek voor ons saam met hom na die forensiese laboratorium gery het. Neethling kon nie glo dat die gif nie wou werk nie.
>
> Hy het van sy chemiese boeke uit sy boekrak gehaal en daarin rondgeblaai.
>
> Hy het dieselfde gif uitgehaal en die keer 180 milligram afgemeet. Hy het die gif self opgelos en dit in een van my insulienspuite opgetrek en ek het dit met foelie toegedraai....
>
> Neethling het gevra dat ek vir hom aantekeninge moet hou oor die uitwerking van die gif. Ek het die aantekeninge in my ondersoekboek gemaak."

Article VWB(2) goes on to say that according to Coetzee's account the third dosage of 180 milligrams (360 milligrams in all) failed to work, whereupon the sleeping-draught was administered to Vusi and Peter before they were ultimately shot through the head and incinerated.

In sub-paragraph (H)(1) article VWB(2) states:-

> "Coetzee vertel dat die slaapdruppels in verskeie binnelandse en buitelandse operasies gebruik is. Coetzee vertel dat hy persoonlik van die slaapdruppels by Neethling se kantoor gaan haal het."

In sub-paragraph (H)(2) reference is made to an abortive kidnapping raid into Swaziland undertaken by Coetzee and Nofomela with the object of abducting an ANC commander known as "General". The attempt failed because by mistake the sleeping draught was added to the drinks of the General's driver. In connection with the sleeping draught provided for use on this occasion sub-paragraph (H)(2) states:-

> "Hy het vir die operasie agtien druppeltjies van

> Neethling ontvang, onthou Coetzee."

In sub-paragraph (H)(3) mention is again [see sub-paragraph (C) above] made of the Kondile murder, and there is said, inter alia:

> "Hy ['n gevange verdagte ANC-lid] is na Komatipoort geneem en van die slaapdruppels ingegee voordat hy tromp-op deur sy kop geskiet en verbrand is."

In sub-paragraph (H)(4) it is stated that Coetzee was also involved in the poisoning of a COSAS leader in the Eastern Cape in 1981. The article VWB(2) does not link the alleged incident with the appellant.

Lastly I deal with the WM article. It begins with the headline:

> "THE OLD THEORY THAT ASSASSINATIONS WERE THE WORK OF RIGHT-WING GROUPS IS BEING SWEPT ASIDE."

It proceeds (in paragraph (J)) to quote at length from a paper written in 1977 by a military writer who was offering advice to intelligence services as to how "extra legal operations" should be carried out. The WM article then

states that much suggested by the military writer "has come to pass with devastating effect to its victims." By way of example it cites recent instances of "activists" who were victims of hand grenades which had been booby-trapped and which exploded in their own hands.

Paragraph (K) reads as follows:-

> "According to self-confessed death squad leader Captain Dirk Coetzee poison was one of the methods used by the SA Police in dealing with ANC suspects.
>
> He said bottles of whiskey were injected with poison prepared by the police forensic department and sent to Maputo to be given to ANC members and that an ANC suspect in detention in Post Elizabeth was poisoned."

Paragraph (L) reads as follows:-

> "Evidence of hit-squad activity has mounted steadily over the past 18 months in a series of court cases and inquests. What the Dirk Coetzee allegations have done is give shape to the jigsaw. GAVIN EVANS traces the emerging patterns."

Sub-paragraph (M)(1) begins by saying:-

> "SUPPORT for police assassination squads has come

> from the commanding heights of South Africa's security forces"

and adds that this is the implication of the account by,

inter alia, Coetzee.

Sub-paragraph (M)(2) reads as follows:-

> "Coetzee's account names former police commissioner General Johann Coetzee as approving the hit squad murders and both Coetzee and Nofomela name recently retired police Brigadier Schoon as the man behind several of the slayings."

This is followed up immediately by sub-paragraph (M)(3),

which states:-

> "According to Coetzee, another senior police officer involved was Lieutenant-General Lothar Neethling, head of the South African Forensic Bureau, which is said to have prepared the poisoned whiskey allegedly sent to ANC members in Maputo."

It is necessary next to determine the main issues in the case by reference to the pleadings in the two actions, both in their original form and also after an amendment to the pleas following upon an application

therefor made and granted at a very late stage of the trial.

(D) THE PLEADINGS: (1)

In the VWB case:

The appellant's particulars of claim alleged that articles VWB(1) and VWB(2) contained matter which was "false, malicious and defamatory" of him. The plea to the claim based on article VWB(1) denied that the words used were defamatory. The plea to the claim based on article VWB(2) denied merely that the words used were false or malicious. In the case of each claim there was the same first alternative defence, formulated thus:-

> "....the statements contained in the article were true; and
>
> the publication thereof was in the public benefit."

In the case of each claim there was pleaded a second alternative defence, formulated thus:-

"....the publication of the article complained of

> was lawful in that it took place pursuant to a duty on the part of the Defendants to inform the readers of the Vrye Weekblad newspaper as members of the general public of the contents of the article and a corresponding right on the part of the readers of the Vrye Weekblad newspaper as members of the general public to receive the information contained in the said article."

The appellant's replication was a general joinder of issue.

(2) In the WM case:

The appellant's particulars of claim alleged that the words in the WM article were per se defamatory of the appellant. The main defence pleaded was the followlng:-

> "The Defendants admit that the statements were defamatory per se of and concerning the Plaintiff, but plead as follows:
>
> The statements were true, and their publication was in the public benefit."

As an alternative to the above the plea raised a defence which was formulated thus:-

> "....the statements were published as the result of a debate about the existence or otherwise of

> organisations or persons that had allegedly committed unlawful acts on behalf of the State, which debate had been raging in the press for some time, about, inter alia, the following disputed allegations...."

Thereafter the alternative plea in five sub-paragraphs gave particulars of five different disputed allegations, the fifth being that on 17 November 1989 VWB had published article VWB(1) which contained a reference to the appellant. The alternative plea concluded with the following averments:-

> "In the circumstances the Defendants plead that the statements formed part of a series of allegati ons and denials thereof by the State, in an ongoing debate which was reported widely in the press, and as such the publication of the statements was in the public interest."

The appellant's replication was a general joinder of issue.

(3) The effect of the amendment to the Plea in each case:

By notice of amendment dated 29 November 1990 the respondents jointly gave notice of their intention to amend

their respective pleas. The application was resisted on behalf of the appellant. Having heard argument on the application Kriegler J allowed the amendment.

Paragraph A of the notice referred to discursive particulars set forth in paragraph B thereof. The preamble to paragraph B recited that -

> "Details of the facts and circumstances surrounding and leading to the publication of the contents of annexures 'A' and 'B' [articles VWB(1) and VWB(2)] to plaintiff's particulars of claim in case 89/24659 [the VWB case] and of annexure 'A' [the WM article] to plaintiff's particulars of claim in case no 89/24969 [the WM case] are as follows..."

What followed were six foolscap pages containing nineteen paragraphs, respectively lettered (a) to (s), which were rounded off by a further paragraph bearing the letter (t). This last paragraph Kriegler J described as a peroration. The thrust of the amendment appears sufficiently from the following passage from the judgment of the court below:-

"In wese kom die wysiging daarop neer dat 'n reeks

> van 19 openbare en belangwekkende verklarings in verband met onregmatige optrede deur lede van Suid-Afrika se veiligheidsmagte onder beskerming van bo groot openbare belangstelling gaande gemaak het. Daar word dan afgesluit met die perorasie [paragraph (t)]:
>
> > 'In all the premises the publication by the aforesaid defendants of the said articles took place pursuant to a duty to publish vitally important information concerning a matter of wide public interest and concern and readers of the said newspapers as members of the general public had an interest in and a right to receive the said information.'"

The terms of paragraph A of the notice of amendment show at once that the effect thereof was more radical in the WM case than in the VWB case. The particulars set forth in paragraph B of the notice were to be inserted after those paragraphs in the pleas in the VWB case which raised the defence that publication of the matter complained of had taken place pursuant to a duty on the part of the defendants to inform its readers and a corresponding right on the part of the readers to receive

the information. In the WM case, however, the particulars set forth in paragraph B of the notice of amendment were to be inserted, not after the paragraph of the plea in which the alternative defence was raised, but in place thereof. In the original plea in the VWB case the second alternative defence was explicitly formulated so as to indicate that the defendants in that case were relying on the defence of qualified privilege. In the VWB case, therefore, the function of the amendment sought was simply to supplement and augment the alternative defence of privilege. This follows from the unambiguous terms of paragraph (t) in paragraph B already quoted above, which is cast in the typical and traditional mould of a defence of qualified privilege, i.e. by averring the existence of a duty on the part of the defendants to publish and the existence of a reciprocal interest on the part of the readers of the newspapers to have the defamatory matter brought to their

attention. In the WM case the matter stands otherwise. In the original alternative plea in the WM case the defendants pleaded no more than that by virtue of an "ongoing debate", reported widely in the press, the publication of the defamatory matter "was in the public interest." Through the amendment this lastmentioned plea, for whatever it may have been worth, was jettisoned; and in its stead the defendants in the WM case invoked, as their only alternative defence that of qualified privilege.

After the amendment had been granted therefore, and assuming proof of the defamatory nature of the matter published in each case, the court below had to consider both in the VWB case and in the WM case the validity or otherwise of (1) a main defence of justification (that the defamatory matter in respect of the appellant was true and that its publication was in the public interest) and (2) an alternative defence of qualified privilege based on the

existence of a duty on the part of the newspaper to publish the defamatory matter and a reciprocal interest on the part of its readers to have the matter communicated to them.

For the sake of completeness I mention that in both cases Kriegler J correctly found the matter published of the appellant to be defamatory of him.

(E) THE EVIDENCE

The essential issues reflected in the pleadings having been indicated, one turns to the evidence led at the trial.

In regard to the quantum of damages claimed three witnesses were called on behalf of the appellant. These were (1) Dr D J C Geldenhuys, the general secretary of the SA Akademie vir Wetenskap en Runs; (2) Dr M J Pieterse, the deputy executive director of the Water Research Commission and a former fellow-student of the appellant; and

(3) General M C W Geldenhuys, a former Commissioner of the SAP and an old friend of the appellant. Their testimony as to the appellant's unblemished reputation was not challenged by the respondents; and it was accepted by Kriegler J.

On the merits a number of witnesses testified on either side, the main witness for the respondents being Coetzee. Before examining the main features of his testimony it is convenient to get out of the way a whole body of evidence which was led at the trial but which is irrelevant for purposes of the appeal. On Coetzee's evidence the space of time during which the appellant supplied him with poison and soporifics is confined to the period between September and December 1981. On behalf of the respondents evidence was further adduced, however, in order to establish that at a much later date, that is to say, during the period January to March 1987, poison had been supplied by the appellant or his subordinates at the

forensic laboratory; and that such poison had been used by South African security forces against the ANC. In this connection three persons testified for the respondents, the main witness being a Mr C J Lesia. Their allegations were denied by the appellant himself and by four other witnesses on his behalf. This evidence in regard to the alleged supply of poison during 1987 need not be recounted. It was meticulously sifted by the learned trial Judge in the course of his judgment. Kriegler J recorded as his conclusion (which was not challenged in this court):-

> "....dat die getuienis wat die gebeure rondom Lesia in 1987 betref onafdoende is om die lasterlike bewerings in die gewraakte berigte te bewys."

At an early stage of Coetzee's examination in chief, and by way of a prelude to the lengthy recital of the various crimes committed by him in the course of his chequered career in the SAP, counsel for the respondents asked the witness to enlarge upon a concept described as "die veiligheidskultuur." It is necessary to quote at

length from Coetzee's response:-

> "Ek kan miskien dit net meld dat in die veiligheidspolisie het ek en my kollegas, soos alle ander lede van die veiligheidspolisie bale spesiale beskerming geniet, 'n Beskerming wat ons in staat gestel het om onwettige operasies binne en buite die Republiek van Suid-Afrika uit te voer, asook binne en buite werksverband. Nou hierdie spesiale beskerming wat ons in staat gestel het om verhewe bokant die wet en polisiereels en regulasies op te tree, is nie statuter vasgestel nie en is moeilik om te definieer. Dit is vervat in wat ek noem ' 'n kultuur' wat behoort het aan 'n ' kliek' of wat was soos 'n hegte klein familie. Nou die kultuur is 'n droom van arrogante eksklusiwiteit, van verhewe wees bokant die wet, van geheimhouding, van noodsaaklikheid, van lojaliteit, van vertroue en begrip onder mekaar, van 'n baie spesiale verhouding tussen seniors -die hoofde - en juniors wat jy nie in die uniformafdeling byvoorbeeld sal kry nie .... hierdie eksklusiwiteit en noodsaaklikheid van geheimhouding is gerespekteer deur die res van die polisiefamilie, asook deur die bree publiek in die algemeen .... ons het dit aanvaar dat u weet 'all is fair in love and war'. Ons vaardighede, ons tegnleke, ons metodes is konstruktief aangewend om die regering van die dag se doelwitte en doelstellings te bevorder. Hierdie nie alleen ons kultuur nie, maar ook ons ingesteldheid, ons vaardighede en tegnleke, het baie ooreengestem met die van 'n bende boewe. Al verskil tussen ons was dat ons het deel gevorm van die bree

polisiefamilie wat sulke boewery aan die man moes bring .... Ek kan miskien ook meld dat hierdie polisiekultuur is nie iets wat amptelik onderrig is nie. Dit is iets waar jy in gegroei het, jy groei in dit in. Jou vordering word bepaal deur jou bonding teenoor die ANC, jou vaardighede en jou persoonlikheid .... Ons bet dus oortredings of misdaad soos moorde, poging tot moord, ontploffings, diefstal was aan die orde van die dag....Dit het by ons gegaan oor landsveiligheid en met enige middel moontlik die doel te bereik deur die aanslag teen Suid-Afrika van die sogenaamde terroriste af te weer met alle middele tot ons beskikking .... Die 'need to know' is 'n algemene uitdrukking in die veiligheidsmagte dwarsoor die wereld soos ek uitgevind het ook in die ANC. As ek 'n opdrag sou ontvang om iemand te elimineer, sal daar nie vir my gese word: Ons bet vanmôre 'n vergadering gehad met die minister of met Johan Coetzee of met wie ookal en die opdrag bet van hulle gekom en hulle het gesê jy moet daardie man gaan doodmaak, met ander woorde dat ek presies die aanloop tot die ding self nie noodwendig ken nie. Vir my sal daar gesê word: Jy moet ontslae raak van so en so en ek weet dit kom van bo af, dit is nie vir my nodig om te weet van wie af nie en ek sal dit uitvoer en so vir my word daar gese wat hulle nodig ag ek moet weet en so sal ek ook ondertoe werk met die ondergeskiktes ....As 'n man gevang word, dan se hy jy bet die elfde gebod oortree, moenie gevang word nie."

Coetzee's evidence-in-chief roved far and wide.

It involved, inter alia, affirmation of the truth of those statements which had been culled by Pauw from the transcript (exh "P") of the interview recorded at Mauritius and attributed to Coetzee in articles VWB(1) and VWB(2). In his evidence at the commission de bene esse Coetzee expanded upon the matter traversed in the articles by providing further circumstantial detail; and in addition he testified to the commission of further crimes by him not mentioned in articles VWB(1) and VWB(2). It is convenient here to make brief reference to the more important examples of such crimes.

(1) Car thefts in Swaziland:

Coetzee testified that while he was a lieutenant at Oshoek Captain Nick van Rensburg ("van Rensburg") of the Security Branch at Ermelo asked him to steal in Swaziland motor vehicles for relocation to Rhodesia as replacements

for vehicles destroyed in that country in land-mine explosions. In compliance with this request Coetzee stole a number of motor vehicles in Swaziland.

(2) The Rita Botes incident:

While Coetzee was stationed at Oshoek a woman called Rita Lourens was prosecuted for illicit dealing in diamonds. She sought the assistance of Coetzee in the matter of concocting an alibi defence. Coetzee helped her by falsely affixing certain date stamps to the pages of her passport.

(3) Accessory after the murder of a diamond dealer:

During or about November 1981, and while he was based at Vlakplaas, Coetzee lent the sum of R5 000, which he had borrowed from his mother-in-law, to Nofomela, Mamasela, Tshikalanga and a fourth man ("the buyers") to enable them to buy diamonds from a seller in Lesotho. When the buyers returned from Lesotho with the diamonds Coetzee inspected

their purchases and told them that they had been gulled. Coetzee told the buyers to return to Lesotho and to recover what they had paid. Soon afterwards the buyers reappeared in a Datsun motor car ("the Datsun") bearing a Lesotho registration number. The Datsun belonged to the seller of the diamonds. The buyers informed Coetzee that they had lured the seller out of Lesotho and that they had shot him to death near Lindley where they had left his corpse. Coetzee took prompt steps to have removed from the Datsun all marks of identification, whereafter he used his own police vehicle to travel with Nofomela and Tshikalanga to Lindley in order to collect the corpse. Having retrieved

(cont. p 51).....

the corpse Coetzee travelled with it in the boot of his car via Durban to a spot close to the Swaziland border. There, with the assistance of van Rensburg and van Dyk, a pyre was built and the corpse of the seller was incinerated. In order to effect repayment of the loan to Coetzee's mother-in-law the Datsun was sold in Durban to an Indian who had useful trade connections in Maputo and Swaziland.

(4) The Joyce Dipale incident - attempted murder in Botswana:

Coetzee testified that on the evening of 26 November 1981 he sent Mamasela in a police van bearing false registration number plates through the Kopfontein border post to reconnoitre the road to Gaborone. Thereafter, and under cover of darkness, Coetzee, Vermeulen, van Dyk, Tshikalala and Nofomela surreptitiously crossed the border fence. The marauding party was armed

and the object of their exercise was an attack upon the occupants of a house in Botswana well-known to Mamasela who had earlier infiltrated the ranks of the ANC. Having established the absence of road blocks Mamasela linked up with the marauders and guided them to the house of one Joyce Dipale. The party had taken up their position at the back of the house when at midnight a heavy thunderstorm cut off the electricity supply and plunged the house into darkness. The ensuing attack was only a qualified success. In his evidence Coetzee described the critical events thus:-

> "En terwyl ons daar papnat gereën of gestaan en wag het en gedink hoe gaan ons in die huis inkom het twee dames met 'n kers in die hand in die kombuis ingekom, die agterdeur oopgemaak en in Joe [Mamasela] en Almond [Nofomela] vasgeloop. Joe het die een om die nek gegryp haar mond toegedruk en 'n skoot teen haar afgetrek wat vir my gelyk het in die donker soos 'n nek- of kopskoot. Sy het op die grond neergeslaan. Die ander dame het in die huis teruggehardloop, skote is agter haar ingeskiet. Ek het agter haar aangehardloop tot in die gang en nog skote agter

haar aangeskiet waarna ons padgegee het...."

(5) The theft in Johannesburg of a trade union Kombi:

Coetzee testified that in August 1981 he was informed by van Rensburg, then a colonel in the security branch at Port Elizabeth, that a group of trade unionists from that city were travelling by car to Harare in order to attend a trade union congress, and that they would break their journey by spending the night at a Johannesburg hotel. Van Rensburg told Coetzee that this party should be prevented at all costs from reaching Harare in time for the congress.

In response to this instruction a party including Coetzee, Vermeulen, van Dyk and Nofomela went by car to the hotel in question where, in the hotel's parking area, they located the car in which the trade unionists were travelling. It was a new Kombi ("the Kombi") and the ignition keys were in it. Vermeulen drove the Kombi away

followed by the remainder of the party in their own vehicle.

At a later date, and with the approval of Schoon, the Kombi was driven to the Oshoek border post by Coetzee and van Rensburg. The Kombi had meanwhile been provided with false licence and third party insurance discs. On the South African side of the border the Kombi was sold for R7 000 cash to an obliging Portuguese motor dealer from Swaziland with whom Coetzee had earlier had dealings.

(6) Malicious damage to property in the North-Eastern Cape:

According to Coetzee's evidence he set alight a number of motor vehicles in the North-Eastern Cape. These acts of arson were committed at the instance of the major in charge of the Security Branch office at Aliwal North, within whose area of operation there fell also the village

of Rhodes.

In Aliwal North there served in the uniform division of the SAP a black sergeant who was viewed with disfavour for his leftist tendencies and his negative attitude towards the Security Police. He was the owner of a Toyota Cressida motor car. Coetzee and others placed an old tyre containing petrol in this vehicle and set it alight. For reasons unknown to Coetzee the flames failed to engulf the car.

At the same time there lived at Rhodes a colony of so-called "hippies" or artists whose presence was regarded by the major in Aliwal North as a nuisance. Late at night a party including Coetzee, van Dyk, Tshikalanga and Nofomela made an unobtrusive entry into Rhodes by car. While van Dyk and Tshikalange devoted their attentions to certain other parked vehicles Coetzee and Nofomela doused with petrol and then set alight a Volkswagen and a car

described as "'n stompneusvoertuig", before they sped away in their own car.

(7) The Lindley incident - defeating the ends of justice.

According to Coetzee the killing of Vusi and Peter at Komatipoort was the culmination of a complicated sequence of events involving much roaming over large tracts of the country. These travels, in which hundreds of kilometres were covered, were punctuated by a brief incursion into the town of Lindley in the Orange Free State while he was motoring from Lesotho and bound for Middelburg in the Transvaal.In the course of this incursion Coetzee was travelling alone in his car followed by a truck driven by Nofomela in which Mamasela was a passenger, when a car ("the coupe") with five occupants turned into the road ahead of Coetzee. The coupe careered from side

to side in the road and Coetzee noticed that its driver as well as its four passengers were very drunk. Coetzee tried unsuccessfully to force the coupe off the road. Mamasela decided on firmer measures. He opened the door on the passenger's side of the truck, and while leaning out of it, he fired several shots at the coupe with a Makarov pistol.

When the coupé was finally brought to a stop it was discovered that three of the passengers had sustained gunshot wounds. Mamasela was not a member of the SAP and the Makarov pistol used by him in his attack on the coupe was an unregistered weapon. Mindful of possible complications Coetzee decided that a cover-up operation was necessary. He gave his own 9 mm parabellum to Nofomela with which the latter fired a few shots. Coetzee gathered the empty cartridge shells from the shots fired with the parabellum and took them to the police station at Lindley.

From Lindley Coetzee telephoned Schoon. He described the incident to Schoon and suggested that in the official report thereof it would be better if Nofomela should be represented as the man who had fired the shots, using the SAP parabellum, and that Masamela should be kept out of the whole matter. Coetzee testified that Schoon approved this course of action. Accordingly Coetzee drew up statements for the police dossier, for signature by himself and Nofomela respectively, in which the above false version of the shooting was set forth.

Against the above background I proceed to examine those parts of Coetzee's evidence which bear directly cm the actual issues in the case. The sting of the defamation is that as part of a criminal scheme to murder persons the appellant prepared and supplied poison; and that as part of a criminal scheme to kidnap and abduct persons the appellant prepared and supplied soporifics in

the form of "knock-out drops" which would render the victims unconscious. Of particular relevance, therefore, is the testimony of Coetzee in regard to (1) the murder of Vusi and Peter; (2) the murder of Kondile; and (3) the abortive kidnapping raid into Swaziland [see sub-paragraph (H)(2) in article VWB(2)] with the object of abducting an ANC commander, to which reference will hereafter be made as "the 'General' incident".

(1) <u>The murder of Vusi and Peter:</u>

The Vusi and Peter murder involves an account of the peregrinations of Coetzee and Vusi and those of Vermeulen and Peter during the month of October 1981. The saga begins with the date on which Vusi was released at the Brits police station and delivered into the custody of Coetzee; and it ends with the date on which, Vusi and Peter having finally been killed at Komatipoort, Coetzee

returned to base at Vlakplaas.

Documentary evidence established that Vusi was released from the Brits police station on 11 October 1981, and that Coetzee, having thereafter travelled far and wide, returned to Vlakplaas on 29 October 1981. Coetzee did not have an independent recollection of the former date, but he was firm on the point that he had received instructions to collect poison and sleeping-drops from the appellant before he collected Vusi at Brits. In his evidence in chief Coetzee said:-

> "Wel, voor ek Brits toe is het brigadier Schoon vir my gereël by generaal Neethling en ek is na generaal Neethling se laboratorium toe in Jacob Maréstraat waar ek by hom 'n gifpoeier opgetel het en druppels vir die doeleindes van ontvoering."

According to the witness the appellant was then known to him only by name and reputation:-

> "Ek het geweet dat hy 'n bale goeie chemiese ekspert was, spesialis was, 'n dubbele doktorsgraad in chemie gehad het, hy die hoof van die forensiese laboratorium was en baie knap was

> in sy werk ... dat as die veiligheidspolisie gif nodig gehad het, het hy dit altyd voorsien asook drank en wat wie ookal nodig gehad het."

Coetzee was initially emphatic on the point that before this visit to the laboratory in Jacob Mare Street in connection with Vusi and Peter, he had never met the appellant. " In describing this meeting the witness said that he introduced himself to the appellant:

> "....en hom gesê daar is twee manne wat ek van ontslae moet raak, waarna hy my met twee pakkies gifpoeier voorsien het."

This conversation took place in the appellant's office, but according to Coetzee he was given tea in the laboratory. In the office Coetzee noticed an old police safe standing on a base which he described as "houtstellasietjies"; and hanging on the wall he observed a certificate recording the fact that the appellant had been a passenger on a Concorde flight; and a photograph of a rugby fifteen of the Oostelikes Club wherein the appellant could be seen

standing in the middle row. The appellant told Coetzee that he had played rugby for the Oostelikes Club.

Questioned by counsel for the respondents as to what the appellant had given him on this occasion, Coetzee replied as follows:-

> "Twee ....pakkies poeiertjies .... die getal 60 is genoem ....Dit was baie min gewees. So dit moet wees 60 milligram. En ek het ook gevra vir druppels wat ons kan gebruik in drankies van persone tydens ontvoering, waar hy my van 'n deurskynende plastiekhouertjie voorsien het nadat hy druppels uit sy brandkas uit gehaal het, en hy gese het dit is baie duur druppels. Ek dink hy het R30/40 gemeld per druppel. Hy het vir my ek dink dit was agtien druppels afgetel in ook 'n deurskynende houertjie. Wat jy dan in 'n persoon se drank moes gooi. Vier druppels vir 'n medium-bou persoon wat dieselfde uitwerking as choloroform sou gehad het en wat die man dan in slaap sou laat ingaan en jy hom sou kon ontvoer. As jy te veel van dit sou toedien sou die man sterf."

Having left the appellant's office, so Coetzee's evidence-in-chief continued, he obtained in Pretoria the documents necessary for him to procure the release of Vusi

at Brits. He duly secured Vusi's release and took him, via Zeerust, to a farm near the Kopfontein border post on the Botswana border. On the farm there was an old farmhouse which was used by Vermeulen and his men as sleeping quarters whenever they engaged in operations in that area. Vermeulen and Peter were already at the farm. The events at the farm were described thus by Coetzee:-

> "Koos Vermeulen het die twee poeiertjies in 'n drankie leeggemaak. Vusi .... het 'n koeldrank gedrink, Peter het bier gedrink .... en terwyl hy dit voorberei het, het ek Vusi drie hoofkantoorbron-salarisontvangs voor laat teken, blanko, oningevulde salaris-kwitansies met twee verskillende penne .... twee sal in dieselfde kleur ink wees en die ander een dan in die ander kleur .... Dit was om voor te gee ....dat hy vir drie maande salaris sou ontvang het, 'n hoofkantoor informant-toelae, waarna hy weggeraak het .... om enige persoon wat navraag doen te mislei oor die werklike toedrag van sake, naamlik dat ons van horn ontslae geraak het."

As to what took place after Vusi and Peter had consumed their drinks laced with the powder obtained from the appellant, Coetzee remarked:-

> ".... daar het niks gebeur nie. Volgens generaal Neethling as iy die spesifieke poeier in daardie hoeveelheid vir 'n skaap sou ingee was dit tussen vyf en ek dink vyftien minute, die skaap sou net in die lug spring en dood neerslaan en die nadoodse ondersoek sou dan 'n hartaanval aandui."

The powder having had no apparent effect on the intended victims, when night fell meat was grilled and consumed. Vusi was manacled to Peter, the latter having been led to believe that Vusi was in his custody. Coetzee and Vermeulen then gave Vusi a drink containing four drops of the appellant's soporific - later to be dubbed "knockout drops" - whereafter they proceeded to note down what the effects of the drops were on Vusi and how soon they manifested themselves. Coetzee explained that the appellant had told him that the effects depended upon a number of imponderables as, for example, how long before their taking them the victim had last had anything to eat, and the rate of ingestion of the drops; and it was at the specific request of the appellant that he kept a

record of Vusi's reactions. The effects, as observed by Coetzee, were that within twenty or thirty minutes Vusi was bereft of speech. His eyes were:-

> "wild, wild oopgesper, hy het op stadiums in die grond langs hom gegrawe terwyl sy oë oopgesper was. Dan het hy begin rondrol, vreeslik rusteloos gewees. Dwarsdeur die nag en dit het aangehou tot die volgende oggend .... ek dink die volgende môre het hy net van hoofpyn gekla."

On the following day Coetzee remained at the farm while Vermeulen went to see the appellant in Pretoria, whence he returned with a double dose of the poison. The appellant, so Vermeulen informed Coetzee, found it difficult to believe that his powder had not had the desired results. According to Coetzee a further dosage was then administered by them to Vusi and Peter, with equally disappointing results.

From Coetzee's evidence-in-chief it is clear that it was after this second and abortive administration of the appellant's poison that he and Vermeulen travelled to

Pretoria to see the appellant at his home on a Sunday morning. Coetzee's recollection of the sequence of the events intervening before the visit to the appellant's home was somewhat hazy. Having described the second and unsuccessful attempt to poison their victims, Coetzee proceeded to say:-

> "....en toe net daar 'n periode verloop wat ons. onder andere verhuis het Groblersdal toe om in daardie omgewing te gaan werk met die hele span

When counsel for the respondents asked the witness whether he could remember what happened from the time they left Kopfontein and until they reached Groblersdal, Coetzee answered that he had no specific recollection thereof. He added, however, that from certain dates that had been made available to him he knew that at a stage when he was journeying by car from Lesotho to Middelburg in order to give assistance in tracking down certain terrorists who were on the run after they had gunned down people in a

caravan at Ogies ("the Ogies incident"), his journey had been interrupted near the town of Lindley. At this stage of his evidence in chief Coetzee embarked upon a lengthy and detailed account not merely of the Lindley incident (whose essential facts have already been outlined in this judgment) but also of the whole and rather complicated aftermath of the Lindley incident in regard to prosecutions by the office of the Attorney-General of the Orange Free State.

After this diversion involving a description of the Lindley incident the threads of the Vusi and Peter tale were taken up once more by the witness. Having finally completed his journey from Lesotho to Middelburg Coetzee reported to the divisional headquarters of the Security Branch at Middelburg, whereafter he and the entire Vlakplaas contingent were based in an old farmhouse at Groblersdal while the search for the terrorists involved in

the Ogies incident continued. After Coetzee had already moved into the farmhouse Vermeulen arrived there with the two hapless captives still in tow. With reference to Vermeulen's appearance at the Groblersdal farmhouse counsel for the respondents inquired of Coetzee whether this happened "daardie selfde Saterdag aand", to which the witness replied that he could not remember whether it was on that night or the following morning. Thereafter Coetzee's evidence-in-chief proceeds:

> "MNR LEVIN: Ja, en wat het toe gebeur? ----
> KAPTEIN COETZEE: Ons het toe....op 'n Sondagmôre na generaal Neethling se huis toe gery.
> MNR LEVIN: Wie?
> KAPTEIN COETZEE: Ek en Koos Vermeulen.
> MNR LEVIN: Met watter doel?
> KAPTEIN COETZEE: Om weer gif te gaan haal vir die derde keer om Vusi en Peter dood te maak."

Coetzee then proceeded to describe the situation of the appellant's house in Prospect Street in the Eastern

suburbs of Pretoria. He put the time of the visit at between 9 am and 10 am, and said that they had come from Groblersdal. When counsel sought to elicit the date of the visit more precisely, the answer of the witness was:-

> "Ja, ek kan nie onthou of dit spesifiek daardie Sondag was of die Sondag net daarna."

When they knocked at the door, so Coetzee testified, the appellant, still clad in his night-clothes, appeared. Asked whether he and Vermeulen had explained their purpose of the visit, the witness said:-

> "Ja, maar net weer gerapporteer dat daardie gif wat hy vir ons gegee het, nie gewerk het nie."

Thereupon the appellant went into the house to get dressed. He did not invite the visitors to come inside his house; and while the appellant got dressed Coetzee and Vermeulen waited for him on the stoep. After a while he reappeared holding a bunch of keys. Coetzee and Vermeulen then accompanied him to the forensic laboratory.

Of the events at the laboratory on the Sunday morning Coetzee gave the following account:-

> "In die laboratorium het hy op 'n stadium in 'n boek naslaanwerk gedoen waarna hy die poeier, 'n triple (sic) dosis in twee insulienspuitjies van my opgelos het, en in twee insulienspuitjies 100 eenhede insulienspuitjies opgetrek het, dit in blink papier toegedraai het sodat die silinders nie kan afdruk en die vloeistof uitspuit nie, en waarna ons .... hom eers gaan aflaai en toe terug is Groblersdal toe."

Counsel for the respondents invited the witness to say something of the appellant's house. Having described its external appearance Coetzee went on to say:-

> "Die huis het 'n stoep voor met 'n gang na die voordeur toe, en die voordeur in die gang wat in die huis afloop, deel die huis basies in 'n linker- en regterkantse deel. Die vertrekke loop links en regs uit die gang uit. Die huis het plankvloere."

As they were leaving the house, so testified Coetzee, he heard the appellant speaking in German to females in the house -

> "....en op 'n vraag van my net hy my meegedeel dat hulle huistaal Duits is. Hy praat Duits met sy dogters."

The witness further said that he heard two large dogs barking. He noticed on the premises two Rottweilers. There was some sort of discussion between him and the appellant about these two dogs, but Coetzee was unable to recall what had been said.

Having dropped off the appellant at his home, Coetzee and Vermeulen returned to Groblersdal. There, so testified Coetzee, Vermeulen used the triple dosage of the appellant's poison to lace drinks which were given to Vusi and Peter; but again the powder proved to be a complete failure. Thereupon it was decided that the party should move to Komatipoort. At Komatipoort they joined forces with Flemington and two or three of his men. They all foregathered at a spot next to the Komati river which Coetzee proceeded to describe in minute detail. There it

was that the two victims finally met their end. Coetzee gave the following description of their execution:-

> "....daar is ....Vusi en Peter van hierdie druppels ingejaag ... wat die effek van chloroform het, en toe hulle goed bedwelmd was het Kaptein Koos Vermeulen elkeen van die twee agter die oor geskiet nadat hy hulle kop skeef vasgetrap het met 'n skoen."

The victims were shot to death with a Makarov pistol fitted with a silencer provided by Flemington. According to the witness Vermeulen, whom he described as a reactionary with no love for Blacks, insisted upon doing the shooting himself. Thereafter the two corpses were placed on a pyre made of old tyres and leadwood stumps, and set alight. The fire was carefully tended through the night as members of the party refreshed themselves -

> "....digby die vuur, by hierdie brandstapel het ons die hele nag maar gesit en drink en vleis gebraai terwyl ons heelnag natuurlik die grootste hompe van die liggaam wat nog oor was, vars kole onder ingekry het sodat dit kan heeltemal uitbrand tot as - en die volgende more vroeg het ons wat oorgebly het van die brandstapel in die

rivier met grawe ingegooi."

Counsel for the respondents asked whether during the night in question there had been any talk of poison. This question elicited the following reply from Coetzee:-

> "Daar was. Majoor Flemington het ons meegedeel hoe generaal Neethling vir hulle 'n bottel whisky voorberei het deur met 'n mikronaald gif in die whisky in te sit sodat die seel nie gebreek word nie en die gaatjie weer afgeseel word waarna hulle die bottel met 'n informant in Maputo ingesmokkel het na die ANC toe en iedere een wat uit daardie bottel iets sou drink sal doodgaan."

Coetzee's evidence in chief in regard to the Vusi and Peter murder was rounded off by a further reference to the salary receipt forms which Vusi had been made to sign in blank at the farm near Kopfontein. The witness testified that late in 1982 or early in 1983 he was summoned to the Security Branch head office by Schoon. Schoon told him that Vusi's attorneys were becoming a nuisance; and he instructed Coetzee to make a statement to the effect that Vusi had disappeared from Vlakplaas.

Coetzee described how he carried out this instruction:-

> "Ek het toe 'n verklaring ingesit in my handskrif waarin ek meegedeel het dat hy losgelaat is en vrywillig vir ons gewerk het; dat hy 3 maande vir ons gewerk het; dat ek hom nie op die plaas gebring het, maar aan die einde van die maand wanneer die ander Askaris af het, het ek hom by die stasie gaan aflaai sodat hy die naweek sy familie kon besoek en dan het ek weer 'n punt met horn bespreek waar ons hom sou optel. Dit was om te verhoed dat daar van ons ander kollegas op die plaas, Askaris, wat hom kon sien en later kon sê dat hy wel op die plaas was. En nadat ek hom die derde keer afgelaai het aan die einde van die maand, het hy nooit weer teruggekeer nie. Ons weet nie wat het van hom geword nie. En natuurlik as bewys dat hy sy salaris ontvang het en 3 maande vir ons gewerk het, het ons dus daardie 3 getekende informantfooie-kwitansies voorgelê."

2) <u>The Kondile murder:</u>

In sub-paragraph (C)(1) of article VWB(1) there is described the theft in the Eastern Cape by Coetzee and Nofomela of a motor car belonging to a trade union leader in Port Elizabeth. Coetzee testified that the car in question was an Audi. Documents made available by the

SAP established that Coetzee and Nofomela were in the Eastern Cape during September 1981, and that an Audi car was stolen there on 13 September 1981. Coetzee further testified that the stolen Audi was taken to Jeffrey's Bay, and that it was there that he encountered Kondile (cf subparagraphs (C)(2)-(4) of article VWB(1))

In his evidence in chief Coetzee gave the following account of his dealings with Kondile:-

> "Op 'n stadium later nadat ek op Jeffreysbaai was, ek kan nie spesifiek onthou watter datum nie, het ek opdrag ontvang van brig Schoon om druppels van gen Neethling te verkry, wat soos chloroform werk, wat ek gaan optel het vergesel van adjutant-offisier Paul van Dyk van Vlakplaas en dat ek kol van Rensburg saam met maj Archie Flemington op Komatipoort moes ontmoet."

According to Coetzee he and van Dyk saw the appellant in the latter's office, collected the drops, and proceeded to Komatipoort where they met up with Flemington and two of his men. On a particular farm, whose location Coetzee described in some detail, there arrived later in the

afternoon Col van Rensburg, Capt du Plessis and a Sgt Raadt. They were travelling in a Cortina motor car, and they had Kondile with them. What happened thereafter Coetzee described rather tersely in his evidence in chief:

> "....waar hy [Kondile] weer van hierdie druppels in 'n bier ingegee is, baie kort daarna omgeval het en toe is hy met dieselfde Makarov pistool en knaldemper van maj Archie Flemington in die kop geskiet deur 'n sersant of 'n adjutant-offisier - skraal ligte-kop sersant of adjutant-offisier van die personeel van maj Archie Flemington. Weer eens het hulle die hout aangery en bande waarmee 'n brandstapel opgerig is en waar hy, Kondile, deur die nag op gebrand is tot as terwyl ons baie na aan die vuur deur die nag maar vleis gebraai en gedrink het."

The place in question was not near a river. The ash was simply raked flat.

(3) <u>The "General" incident:</u>

In his evidence in chief Coetzee testified that "General" was a relatively senior ANC official living in Mbabane, Swaziland. He was a friend of one Lockwood, a

South African citizen, and a police informer, who spent much time in Swaziland where he had a flat and was often visited by "General". Coetzee was given orders to abduct "General" from Swaziland. It was hoped to obtain from him information concerning the places of residence of other ANC members living in Swaziland.

In execution of the above order, so alleged Coetzee, he and Nofomela:-

> "....het die nodige druppels na oorleg met brigadier Schoon en generaal Neethling van generaal Neethling opgetel van sy kantoor af en is af Swaziland toe waar ons in 'n lee huis by Nerston grenspos ....dit was in Desember 1981 -het ons kamp opgeslaan...."

From Nerston and Oshoek Coetzee telephoned Lockwood and made certain arrangements with him. On the appointed night "General" arrived at the flat of Lockwood at Matenga Craft in a Mazda driven by his driver who was a Swazi. The plan was that Lockwood should ply "General" with wine laced with the knock-out drops. The driver of the Mazda

was soon rendered insensible but, for whatever reason, Lockwood failed to drug "General." When Coetzee and Nofomela had secreted themselves into a darkened bedroom adjacent to the lounge in which "General" was being entertained they could hear from his manner of speech that "General" was far from being benumbed. Immediately -afterwards they obtained confirmation of this state of affairs when, on his way to the toilet, "General" walked through the bedroom in question. Of the resulting encounter between the would-be abductors and their quarry Coetzee gave the following description:-

> "Hy het in die donker kamer in ons vasgeloop. Ons het hom vasgevat en ons is grond toe met hom. General het geskree soos 'n maervark. Almond [Nofomela] het sy mond probeer toedruk - dit is 'n kort, skraal mannetjie, maar hy is so sterk soos 'n leeu. Hy het Almond op die voorarm .... ek dink dit is die linkerarm gebyt . . . .Ek het sy keel probeer toedruk en kon dit nie regkry nie. Almond het my meegedeel dat hy hom byt en ek het gesê:Byt terug, waarna Almond 'n stuk kopvel agter uit sy kop uit gebyt het. Die woonstelligte het toe aangegaan en ek het vir Almond gesê ons

> moet padgee ....ons is toe uiteindelik by die venster uit en weggehardloop en onverrigtersake is ons terug Oshoek toe."

So much for Coetzee's account during his evidence in chief of his direct personal dealings with the appellant in connection with the supplying of poison and soporifics by the latter to the former. As will emerge in due course, the appellant in his evidence not only denied that he had ever supplied poison or soporifics to Coetzee, but he was unable to recall that he had ever had any personal dealings whatever with Coetzee. A documentary piece of evidence relevant to this question is a note-book (exh "B") which Coetzee kept while he was at Vlakplaas. In the note-book Coetzee recorded the telephone numbers of a large number of persons. At page 43 of exh "B" there is inscribed the telephone number of the appellant at the forensic laboratory (in 1981 when it was housed in Jacob Maré

Street). In what follows reference to this entry will be made as "the telephone entry". The telephone entry is made in the hand of Coetzee and in it the surname of the appellant is misspelt. It appears thus:-

"Genl Neetling Tel:
28.2218) 3-2553)
H "

The circumstances in which he made the telephone entry, and the probable date thereof, were explored at length with Coetzee during his evidence. In chief the witness was asked why he would have made the telephone entry. His answer was -

> "Omdat ek met hom kontak gehad het en hy die nommers vir my sou gegee het, dat as ek hom nodig sou kry of enigiets verder van hom verlang het, kon ek met hom skakel."

In cross-examination Coetzee was asked when he had obtained the numbers reflected in the telephone entry. He replied that he had got them at some time during the period of

seventeen months (August 1980 to 31 December 1981) while he was at Vlakplaas. He said that he was unable to indicate a more precise date. When asked how he had obtained the numbers the witness initially answered:-

> ""Dit moes deur gen Neethling persoonlik vir my gegee gewees net."

Further pressed on the point Coetzee said "Dit kon net hy [the appellant] gewees het; and when the suggestion was made to the witness -

> "Now are you sure General Neethling gave you these two numbers?---"

he answered in the affirmative.

Further questioning elicited that the appellant had never telephoned Coetzee; and that the witness had no specific recollection that he himself had ever telephoned the appellant. When later in his cross-examination Coetzee was again asked when he had been given the numbers he responded by saying that it had been in the course of

one of his visits to the appellant. Pressed to say when he had for the first time visited the appellant the reply of the witness was:-

> "Ek vermoed dit was die slag toe ek Peter en Vusi se gif gaan optel het."

Counsel for the appellant explored with Coetzee the sequence of his alleged visits to the appellant. The witness agreed that on his version the first occasion had been shortly before the release of Vusi; the second occasion had been the visit to the appellant's home; and that the third visit had been in connection with Kondile. Asked to fix the date of the third visit, Coetzee replied:

> "Ek kan nie onthou wanneer is hy doodgemaak nie. Ek weet dat ek hom gesien het by Jeffreysbaai polisiestasie op 13 September. Nou weet ek nie hoe lank daarna ons hom toe uiteindelik doodgemaak het nie."

The next visit, so testified Coetzee -

> "....moes gewees het vroeg in Desember net voor ek af is Swaziland grens toe vir General se storie."

Coetzee was unable to say whether Kondile was killed before or after Vusi and Peter were killed.

In cross-examination Coetzee stated that the idea that Vusi and Peter should be killed by poisoning had originated with him; and that he had suggested this means of killing to Schoon. He explained his penchant for poison by saying that it was a better means -

> "....om 'n ou dood te maak as om hom te skiet terwyl hy vir jou staan en kyk."

Counsel for the appellant pointed out to Coetzee that at an early stage of their travels with Vusi and Peter he (Coetzee) and Vermeulen knew that the poison was not working, but that the drops were. He then put the following question to the witness:-

> "Why did you have to go back to Pretoria on two more occasions to get poison when the poison had not worked the first time? You had the drops, you could have administered the drops and shot them, couldn't you? ---"

The witness replied:-

"Ons kon, ons net dit nie gedoen nie." He proceeded to explain the drops cost R40 each, and that they did not want to waste them at that stage.

So much for the evidence of Coetzee. For the purposes of the appeal it is necessary to consider the testimony of two other witnesses called on behalf of the respondents. These were Mrs M S E Coetzee, the mother of Coetzee, and Mr M W Welz. The evidence of Mrs Coetzee may be very shortly stated. She was formerly employed by the Nursing Council in Pretoria. She testified that she stopped working for the Council on 6 March 1981 in order to assist in the care of Coetzee's younger son who is also a diabetic.

On an unspecified date thereafter, but at the time when Coetzee was based at Vlakplaas, she asked her son to take her to town by car. When she had attended to her

own business Coetzee asked her whether she was in a hurry -

> "Toe sê ek nee hoekom, toe se hy want ek wil gou by die Forensiese Laboratorium lets by generaal Lothar Neethling gaan haal."

An objection to the above oral communication was made by counsel for the appellant. How it was ultimately dealt with by Kriegler J may conveniently be considered later. According to Mrs Coetzee her son then drove to Jacob Mare Street and parked his car under a tree in front of the forensic laboratory which he entered. She waited in the car. After a while she saw her son descending the steps in front of the laboratory. He carried something in his hand. She neither saw nor inquired what this object was. As he approached the car Coetzee put the object into the pocket of his safari jacket.

Mr Martin Sylvester Welz ("Welz") is a free-lance journalist. At the end of 1983, when he was following up a story which led to the resignation of the then Minister

of Manpower, he got to know Whelpton who had been the Minister's secretary. Whelpton, in turn, introduced Welz to Coetzee. Welz said that he was unable to put an exact date to the latter meeting "but it must have been early 1984". Over a period of a year, so testified Welz, he and Coetzee often met. The nature of their relationship and the topics of discussion between them were described as follows by Welz during his examination in chief:-

> "And what was the purpose of these meetings? --- At first they were more sort of social encounters when I saw Whelpton, Coetzee would be there or would arrive. Subsequently it was in the course of following up a story on possible illegal telephone tapping by the police and after that it was, I think it was probably a mixture of the two with some interest in the possibility of Dirk Coetzee's other material sort of coming to the stage where one could publish something.
>
> Now did Dirk Coetzee confide in you at all --- Initially not, subsequently yes.
>
> Was that done on a confidential basis or was it done on a basis that .... the information was available for publication? --- It was done on an absolutely confidential basis, in fact Whelpton

> had persuaded him that he could speak openly in my presence and that was when I heard some of the first stories about irregular activities in the police force."

Welz kept no notes of the information given to him by Coetzee. The witness explained:-

> "I soon realised that whatever it was the material was very dangerous material to be handling and certainly not publishable at that time."

When counsel for the respondents asked the witness whether Coetzee had mentioned to him any stories involving soporifics or poisons Kriegler J questioned the relevancy of the evidence proposed to be led. Thereupon Mr Levin submitted that evidence of prior consistent statements by Coetzee to Welz, at a time when Coetzee had no motive to misrepresent, was admissible in order to repel a suggestion implicit in the cross-examination of Coetzee that his implication of the appellant was an imaginative fabrication. The question of admissibility was argued by

both sides.

In the result Kriegler J ruled the evidence so tendered to be admissible "to rebut the suggestion of subsequent fabrication by Coetzee of the procurement by him from the plaintiff of poison." Welz then continued to testify. The kernel of his evidence is to be found in the following passage:-

> "What was the information you were given? ---
>
> I cannot remember any detail of these stories, but I do recall that they had got to discussing how they had got rid of uncomfortable witnesses or cases that were potentially embarrassing and had to be disposed of without sort of attracting public attention and he then told with some hilarity, I would say at the time, of how they had obtained poisons from the police laboratories and he did name General Neethling by name at the time, that I do recall as General Neethling being quite a prominent figure in the police hierarchy at the time. I say that because I don't recall the names of other policemen that were involved ...in this specific incident but he told how they

> had obtained the substance which they had added to drinks that had been given to persons they had in their custody and how they had sat around waiting for something to happen and how nothing had happened and how they had administered more and still nothing had happened and the hilarity I think was prompted by the fact that the newfangled methods didn't work, so they finally just shot them anyway and the old method seemed to work were the more reliable ones."

In cross-examination Welz said that when presented with the whole of Coetzee's story his assessment at the time was that its reference to the appellant was unimportant and "merely a funny aside"; and that at that stage he "regarded .... Neethling as a minor element in the story."

I turn to the testimony of the appellant and to those of his witnesses whose evidence is germane to the appeal. Before dealing with the evidence of the appellant himself it is convenient to deal briefly with two witnesses called in rebuttal. Mention has already been made of the fact that General Geldenhuys testified on the issue of the quantum of damages. While the witness was being led in

this connection, however, the questions put by counsel for the appellant strayed into the field of the merits. The ensuing procedural dilemma for Mr Oshry was removed by an agreement between counsel; and thereafter the witness testified further on the merits. The purport of his evidence was general in nature. It is usefully summarised by Kriegler J in the following passages of his judgment:-

> "Die generaal, wat ten tye van die gewraakte gebeure die Kommissaris van die Suid-Afrikaanse Polisie was, getuig dat hy geen kennis gedra het van enige polisiebedrywighede van die aard wat Coetzee beskryf nie en dat hy daarvan bewus sou gewees het as daar soiets plaasgevind het. Hy dra geen kennis van enige bedekte Suid-Afrikaanse optrede oor landsgrense heen nie. Wat hom betref was die werksaamhede normale misdaadondersoek wat altyd met die goedkeuring, die magtiging, die samewerking van die plaaslike polisie geskied het. Hy het wel verneem van die opblaas van huise, die gebruik van briefbomme en ontvoerings maar dra geen kennis van enige verband daartussen en die Suid-Afrikaanse Polisie nie. Hy herinner hom vaagweg 'n geval soos dié van Pillay maar kan geen besonderhede daarvan onthou nie. Dit is vir hom onbegryplik en onverstaanbaar dat Schoon ooit vir eiser kon versoek het om gif aan Coetzee te verskaf. Dit

> sou ongehoord gewees het en eiser sou horn bejammerenswaardig agter gelaat het .... Eiser was in geen opsig verbonde aan die operasionele sy van die veiligheidspolisie nie...."

Flemington was also called in rebuttal. This witness joined the SAP in 1959 and was transferred to the Security Branch some seven or eight years later. In 1971 he was posted to the Lebombo border post at Komatipoort where he remained until the end of 1981 when he was transferred to Durban. He went to Komatipoort as a lieutenant and left it as a major. In 1983, and for financial reasons, he retired from the SAP.

According to Flemington his dealings with Coetzee were few and somewhat trivial. During Coetzee's spell of duty at Oshoek he and the witness saw each other on a number of occasions at Middelburg at conferences of branch commanders.

Flemington told the trial court that their last meeting occurred somewhere between March 1981 and, at

latest, mid-1981, when Coetzee arrived at his office at Komatipoort with a party of men which included two Askaris. Coetzee informed him that they were on the trail of ANC terrorists who were crossing the border into South Africa, and he sought accommodation for his party at one of Flemington's border guardposts. This Flemington arranged for them.

According to Flemington the persons Koos Vermeulen and Paul van Dyk were unknown to him. When Coetzee's allegations regarding what had happened at Komatipoort in connection with the Vusi and Peter murder were put to the witness he denied that there was any truth in them. Flemington similarly denied any participation by him in the events surrounding the murder of Kondile at Komatipoort or in the disposal of his remains.

Asked whether there was any truth in Coetzee's

allegation that Flemington had told him of poisoned whisky being sent to the ANC in Maputo, the witness said the following in his examination in chief:-

> "No, I never told him any such thing.
> Did any such thing ever take place? ---
> Not ever, I don't even know General Neethling, I met him for the first time on Monday in your chambers .... The very first time I ever set eyes on him in my life."

In cross-examination Flemington said that he had never even heard of poisoned liquor prepared in the manner mentioned by Coetzee.

Flemington testified that while he had been stationed at Komatipoort his border-post men were never deployed in operations across the border. When tested during cross-examination as to his knowledge of the "need to know" rule Flemington responded by saying that he could imagine what the expression meant, but that he himself had never encountered it. Nor, according to the witness, had

he ever heard of what was known in the security police as "the eleventh commandment."

Turning finally to the appellant himself, it is necessary to begin by mentioning a few domestic details. He married in 1959 a woman born in Pretoria of a German mother. While the appellant himself is fluent in German, his unchallenged testimony is that Afrikaans is his home language. He says that his wife's understanding of German is reasonably good and that her spoken German is adequate. He adds, however, that he speaks German to her only when they are in the company of Germans. They have two sons and two daughters. According to the appellant he has never spoken German to any of their children. Indeed, he says that none of the children is able to speak German.

The appellant told the trial court that his house in fact has wooden floors, but that since 1973 or 1974 the floors have been covered in carpeting extending from wall

to wall. In 1981 the family owned a Rottweiler bitch. They have never had a Dobermann.

In the course of his evidence the appellant described with some particularity the lay-out of the forensic laboratory and his office at Jacob Mare Street. He stressed that, whether by day or by night, his office had never been locked and that to gain access to it would not have been a matter of difficulty. The appellant also described the furniture and fittings in his then office. He admitted the presence both of the certificate recording his flight in the Concorde and the photograph of the Oostellkes Club rugby fifteen of which he had been a member.

The witness agreed that there had been (and still was) a safe in his office; but when his counsel invited him to say whether there was any resemblance between it and the safe which Coetzee had described in his cross-

examination he replied that there was none.

When asked whether he was an authority on poisons the appellant claimed a wider knowledge than most of his colleagues in this particular field for the reason that over the years he had become engrossed in it. He acknowledged that he would know, if bent on homicide by poisoning, what poison would be quick and lethal.

The appellant flatly denied that he had ever supplied poison or soporifics to anybody. In regard to the so-called "knock-out drops" he said that there was no such thing in his laboratory. He denied that he had ever received a telephone call from Schoon requesting him to supply poison to Coetzee. Asked what his probable reaction would have been had Coetzee come to him in quest of poison he replied:-

> ".... ek sou hom waarskynlik weggejaag het en ek sou die telefoon opgetel het en of die speurhoof òf die Kommissaris gebel het...."

When his counsel asked the appellant whether he knew Coetzee he answered -

> "Ek kan hom nie onthou nie al sou 'n mens my gepynig het."

The appellant's possible knowledge of Coetzee was explored with him in cross-examination:-

> "Soos ek u getuienis in hoof verstaan het, ken u horn glad nie, u het hom nooit ontmoet nie, u kan horn nie onthou nie, u het niks met horn te doen gehad nie op enige geleentheid tydens u polisie-loopbaan, is dit die korrekte weergawe wat ek van u getuienis-in-hoof verstaan?- - -
>
> Ek dink dit is in hoof trekke korrek met die veronderstelling dat ek gesê het dat as hy in een van die klasse gesit het waar hy dalk 'n lesing van my kon gekry het of as hy dalk by die laboratorium sou aangedoen het vir watter doel ookal en ek hom daar sou raakgeloop het sonder dat ek eers geweet het wie hy is. Met ander woorde, sy gesig op hierdie oomblik is onuitwisbaar in my geheue maar ek het hom nie geken voordat hierdie fotos van hom nie gepubliseer is en .... ek het hom nie geken, ek sou nie geweet waar hy geopereer het nie."

During his evidence in chief the appellant denied

that he had ever given any telephone numbers to Coetzee. He also gave details of his absences from South Africa during the months of September and October 1981. He was out of the country from 25 September to 6 October; and he was in West Germany from 17 October for a visit lasting one week. He returned to South Africa after the last-mentioned visit on Saturday 24 October 1981.

Against the background of the above general outline of the appellant's evidence there must now be brought into closer focus certain excerpts from the appellant's testimony not only at the trial but also before the Commission of Inquiry presided over by Mr Justice L T C Harms ("the HCI"). Such closer examination is necessary for a proper understanding of the nature, scope and significance of a number of adverse credibility findings made against the appellant by the learned trial judge which will be considered later in this judgment.

By way of introduction it may be mentioned that the video-tape of the particular edition of the British Television programme "Dispatches" which was televised in the United Kingdom on 4 April 1990 was handed in at the trial as exh 3. Exh 3 portrays, inter alia, camera shots of the front of the appellant's house. During the trial exh 3 was viewed by the court below. During the hearing of the appeal it was also viewed by this court. Before he testified at the HCI the appellant obtained a copy of exh 3.

(1) At the HCI Mr McNally put the following question to the appellant:-

> "Waar meen u kon kaptein Coetzee die besonderhede van u huis gekry het as hy nie, soos u nou getuig het, u nooit besoek het?---"

In answering this question the appellant referred to exh 3 and said that he had seen that Coetzee -

> "....daardie beskrywing kon hy gekry het deur net na die televisieopname te kyk maar dat hy dan as hy kom by die detail heeltemal verkeerd is."

As an example of Coetzee's faulty detail the appellant then mentioned to the HCI that the front door of his house (as portrayed in exh 3) was open and -

> "....as 'n mens met die televisiekamera daar [the open door] ingaan dan gaan jy tot by die agterste kamers ingaan en jy sien duidelik dat dit is 'n lang gang maar verder eintlik niks."

(2) After exh 3 had been viewed in the court below and during the appellant's evidence in chief counsel put the following question to the witness:-

> "As far as you are able to make out, you have seen this picture, I know, more than once, at the time when this video was taken was the front door open or closed?---"

This simple question elicited from the witness an effusion of words which in the transcript of the record occupies some forty lines but which nowhere contains any sort of

answer to the inquiry. The above unsatisfactory response to a plain question was taken up at length with the witness in cross-examination. Again the reaction of the witness was unsatisfactory. After a plethora of equivocations one finds the following question and answer:-

> "Ja maar die vraag wat ek u nou vra is spesifiek of 'n mens kan sien of daardie deur oop is of nie?---
> Vir my lyk dit so."

(3) At the HCI Coetzee in describing the appellant's house said that "there is a verandah in the middle of the house in front". When the appellant testified before the HCI he was cross-examined by Mr Kuny. When Mr Kuny put this portion of Coetzee's evidence to the appellant the latter resisted the notion that his house had a verandah:-

> "Dit is die probleem wat jy net. As jy kyk na die video jy kry alleen 'n twee-dimensionele beeld en nie drie-dimensionele beeld nie en daarom is ek oortuig dat wat hy hier beskryf is wat hy

> gesien het op die video. Dit is hoegenaamd nie 'n verandah nie." (Emphasis supplied)

When at the trial Mr Levin was debating with the appellant what, - upon a viewing of exh 3, could and could not be observed of the appellant's house, the witness purported to quote to Kriegler J from the HCI record in order to demonstrate what his reply to Mr Kuny had been. In quoting his reply to Mr Kuny the witness used the following words:-

> "As jy kyk na die video kry jy alleen 'n twee-dlmensionele beeld, nie 'n drie-dimensionele beeld nie daarom is ek oortuig dat wat hy hier beskryf het hy op 'n video dalk gesien." (Emphasis supplied)

The appellant proceeded to comment thereon to Kriegler J as follows:-

> "Ek sê nie watter video, ek sê êrens 'n video, dalk nie hierdie een nie want van hierdie een kan daar 'n tien ure lang video wees wat u en ek nog nie gesien het nie." (Emphasis supplied.)

4) During his cross-examination at the trial the appellant reaffirmed his evidence at the HCI that his house had no verandah:-

"En 'n verandah is in my opinie 'n stoep waar mens op sit en koffie drink en oor jou beeste stories vertel volgens mense maar ek het nie so 'n plek nog ooit in my lewe gehad nie. So dit gaan miskien oor semantiek maar ek wil dadelik vir u toegee om weereens die hof se tyd te spaar dat daar 'n gedeelte is wat 'n plaveisel is ...." A little later, in answer to a question by Kriegler J as to whether Coetzee had been correct in saying that there was a verandah in the middle of the front of the house, the appellant replied as follows:-

> "Ja, as ons aanvaar dat die term verandah vir my iets anders beteken as vir hom en ek het dit uitgeklaar met my kollegas wat argitekte is, vir hulle is dit ook nie 'n verandah nie, dit is 'n ingangsportaal maar dit maak nie saak nie. Ek is heeltemal tevrede om te se dat hierdie besondere konstruksie kon dalk deur 'n onkundige wat miskien 'n beter kenner is van honde 'n verandah verkeerdelik genoem gewees het, maar ek kan nie toegee dat dit 'n verandah is nie maar dat dit 'n toegangsportaal is of iets van dié aard maar as hy dit 'n verandah wil noem gee ek regtig nie om

nie."

So much for the essential features of the evidence adduced at the trial. The merits of the appeal may now be considered. On appeal it was common cause that in each action the matter published of the appellant was grossly defamatory of him. The main defence raised in each action, as already pointed out, was one of truth in the public benefit; the alternative defence in each action was one of qualified privilege. I shall deal with each defence in turn.

(F) THE DEFENCE OF TRUTH AND PUBLIC BENEFIT IN THE WM CASE:

Kriegler J concluded that on the evidence before him there was insufficient proof of the truth of the matter defamatory of the appellant in the WM article. As the following observations from the judgment will show the

learned judge gave this defence short shrift:-

> "Coetzee dra nie persoonlike kennis van die versending van vergiftigde drank na Maputo nie. Hy het by Flemington daarvan gehoor en het dit oorgedra vir wat dit werd is. Gesien my bevindinge aangaande Flemington se geloofwaardigheid se dit nie veel nie. Gesien die sentrale belang van die betrokke stukkie hoorse getuienis, die onbetroubaarheid van die bron daarvan, die potensiële benadeling vir die eiser as dit toegelaat sou word en, les bes; Flemington se ontkenning van beide die bewering self en dat hy dit aan Coetzee sou vertel het, meen ek nie dat dit behoorlike uitoefening sou wees van die diskresie wat by artikel 3(1)(c) van Wet 45 van 1988 verleen word nie. Die enigste moontlike ander skakel tussen eiser en die vergiftigde drank was die getuienis van Lesia en dit het ek reeds ontoereikend gevind om die waarheid van die beweringe te bewys ...."

(G) THE DEFENCE OF TRUTH AND PUBLIC BENEFIT IN THE VWB CASE:

In the court below it was initially argued on behalf of the respondents that inasmuch as in his particulars of claim the appellant had asserted the falsity

of the matter complained of he bore the onus of demonstrating its untruth. This argument was summarily rejected by Kriegler J who correctly observed:-

> "Valsheid is geen noodsaaklike komponent van lasterlikheid nie. Omgekeerd is waarheid op sigselfstaande geen verskoning vir die publikasie van lasterlike aantygings nie."

In this court it was common cause that an onus rests with the respondents. What was in issue at the trial, however, and what remains an important issue in this appeal,is the question whether the respondents are saddled with a primary onus of proof (the risk of non-persuasion) or simply with an evidentiary burden (a "weerleggingslas"). The rival contentions, and their respective implications, were stated thus by the trial judge in his judgment:-

> "Namens eiser word aangevoer dat daar 'n volledige bewyslas op die verweerders rus om die waarheid te bewys van die lasterlike bewerings wat hulle aangaande die eiser gepubliseer het. Daarmee word bedoel dat indien die getuienis uiteindelik 'n wesenlike ewewig van oortuiging agterlaat, dit wil se as daar nie bevind kan word dat die

> waarheid van die betrokke bewerings op oorwig van waarskynlikhede bewys is nie, die eiser moet slaag."

and

> "Wat die aard van die las betref, is daar namens die verweerders aangevoer dat dit nie 'n volle bewyslas in die bovermelde sin is nie maar slegs 'n weerleggingslas. Daarmee word bedoel dat indien die feite uiteindelik in wesenlike ewewig bevind word, die saak teen die eiser uitgewys moet word. Vir bedoelde betoog is daar 'n indrukwekkende falanks steun, te wete vier eenparige beslissings van die appelhof en verskeie akademici. Daar is egter in 'n verdere appelhofuitspraak en deur 'n gesaghebbende akademikus twyfel daaroor uitgespreek."

This issue Kriegler J resolved in favour of the respondents. He concluded:-

> "Die gevolgtrekking is dan dat .... die geldende reg in die onderhawige saak 'n weerleggingslas op die verweerders laat rus. By die ondersoek van die feite sal dit dan die maatstaf wees wat ek toepas."

Having decided as a matter of law that the respondents bore no more than an evidentiary burden, the learned judge, after an exhaustive review of the evidence

and upon his appraisal of the probabilities, recorded two separate findings of fact. He concluded not merely (1) that the respondents had discharged a "weerleggingslas"; but further (2) that the respondents had indeed succeeded in establishing the truth of the defamatory allegations on a balance of probabilities.

On appeal Mr Cilliers contended on behalf of the appellant that upon a proper evaluation of the evidence the respondents had failed to clear even the lesser hurdle represented by a mere evidentiary burden; and, a fortiori, that they had got nowhere near proving the truth of the defamatory allegations on a balance of probabilities.

For reasons to be indicated later in this judgment I find myself unable to assent to the argument urged on behalf of the respondents that in regard to the defence of truth in the public benefit they bore no more than an evidentiary onus. In my view the respondents,

having pleaded truth in the public benefit, were firmly saddled with a primary onus in regard thereto: the success of that defence depended on proof of the truth of the defamatory allegations on a balance of probabilities. I consider, with respect, that in ruling otherwise the court below erred in law.

In the light of the above I propose at this stage to examine the correctness or otherwise of the trial court's finding that the respondents succeeded in proving on a balance of probabilities that the defamatory allegations in the VWB case were all true. As a starting point to this inquiry there has to be noticed in what manner the court below approached the case; to see in what manner it assessed the broad probabilities; and to consider its main findings of credibility and the grounds on which these are based.

The record of the proceedings is a voluminous

one. Despite the mass of evidence which was led at the trial the compass of the essential factual inquiry on which the fate of the appeal hinges is a narrow one. The issue is not whether or not there existed within the Security Branch of the SAP the climate of thought and philosophy which in his evidence Coetzee described as "die veiligheidskultuur". The issue is not whether within the Security Branch there roamed assassination squads or what role Coetzee played in them. The issue is not whether Vusi or Peter or Kondile were murdered, and if so, by what means. The issue is not whether Coetzee obtained, otherwise than from the appellant himself, poison from the SAP forensic laboratory. The sole issue of fact is whether or not, as part of a criminal scheme of murder and abduction, the appellant personally supplied Coetzee with poison and soporifics.

The trial court appreciated the circumscribed

nature of the central inquiry. In this connection Kriegler J observed in the course of his judgment:-

> "In die eerste en finale instansie val die kerngeskilpunt in hierdie saak uitgemaak te word op die beoordeling van die regstreekse getuienis van twee getuies, te wete Coetzee en die eiser."

and again:

> "Slegs 'n klein breukdeel van die 754 bladsye wat Coetzee se getuienis beslaan en van die meegaande bewysstukke, het regstreeks betrekking op die eiser en die hoofgeskilpunt. Vir die res gaan dit meerendeels om 'n wye verskeidenheid onkonvensionele en/of misdadige optredes waarby Coetzee na sy bewering betrokke was of waarvan hy kennis dra. Vraag is tot welke mate, indien hoegenaamd, sodanige ander getuienis oorweeg moet word."

In the following five sections of this judgment there will be successively examined and discussed: (a) the trial court's assessment of the appellant's witnesses (i) General Geldenhuys and (ii) Flemington; (b) the trial court's assessment of the respondents' witnesses (i) Welz and (ii) Mrs Coetzee; (c) the trial court's assessment of

the evidence of Coetzee; (d) the trial court's assessment of the evidence of the appellant; and, in the light of the aforegoing, (e) the correctness or otherwise of the trial court's finding of fact that the respondents have proved, on a balance of probabilities, the truth of the defamatory allegations in the VWB case.

(a) General Geldenhuys and Flemington:

(i) General Geldenhuys

Of this witness the trial judge observed, inter alia -

> "General Geldenhuys het, soos dit 'n goeie gesagvoerder betaam, te kenne gegee dat hy van optredes soos die wat Coetzee beskryf bewus sou gewees het as hul wel plaasgevind het. Dat dit die strewe van iedere gesagvoerder is, val nie te betwyfel nie. Ewe seker is egter dat dit in 'n groot, wydverspreide en divers aktiewe organisasie soos die Suid-Afrikaanse Polisie by h strewe bly. Dit is eenvoudig onmoontlik, selfs waar alles reelmatig daaraan toe

> gaan, vir die Kommissaris .... om kennis te dra van alles wat orals deur al diegene onder sy bevel gedoen word. Waar gepostuleer word, soos wel hier die geval is, dat 'n klein groepie of groepies met klandestiene bedrywighede besig is, is die moontlikheid dat die Kommissaris daarvan te hore sal kom des te kleiner."

These remarks appear to me to reflect a realistic approach to the matter. In addition the court a quo was sharply, but in my opinion not unfairly, critical of the hazy recollection which the witness was able to muster of the Pillay incident, an event whose impact upon the upper echelons of the SAP must have been considerable. In my view the testimony of General Geldenhuys is insufficient to cast serious doubt on so much of Coetzee's evidence as does not directly implicate the appellant. At the same time it is unhelpful in regard to the central factual issue of Coetzee's alleged involvement with the appellant.

(ii) Flemington

The trial court found Flemington to be a slippery and unimpressive witness. It rejected as dishonest his refusal in cross-examination to budge from 30 June 1981 as the latest possible date of Coetzee's visit to him at Komatipoort. Kriegler J found it difficult to believe Flemington's professed ignorance of the "need to know" rule and the so-called eleventh commandment. The trial court recorded its overall impression of the witness in the following words:-

> "By wyse van samevatting kan gestel word dat majoor Flemington se getuienis wat inhoud en aanbieding betref, ongeloofwaardig is met betrekking tot die belangrike fasette daarvan, naamlik sy kontak met Coetzee. Laasgenoemde se weergawe van die einde van Vusi en Peter is alleen deur Flemington weerspreek."

(b) Welz and Mrs Coetzee:

(i) Welz

In giving his reasons for the ruling made during

the trial that the evidence of Welz was admissible, the learned trial judge in his judgment stated, inter alia:-

> "Die kruisondervraging van Coetzee in Londen het telkemale uitdruklik en implisiet gesuggereer dat die byhaal van gif en die daaruitvoortspruitende bybring van eiser 'n tierlantyntjie is wat hy onlangs by sy storie bygevoeg het om pikantheid daaraan te verleen. Die suggestie was ook dat hy dit opgetower het om sensasie te verleen aan die weergawe wat hy op Mauritius via Pauw die wêreld wou instuur. Dat hy vier of vyf jaar vantevore op 'n vertroulike basis teenoor Welz geopenbaar het dat gif van eiser verkry en in amptelike moordpogings gebruik is, was gevolglik regstreeks tersake." (Emphasis supplied)

In regard to the evidence of Welz the main argument advanced by Mr Cilliers was that it was inadmissible. Counsel for the appellant contended, first, that the obvious explanation for what he described as the loose-mouthed disclosures made by Coetzee to Welz was the

following. In speaking to Welz in this vein Coetzee, on his own showing, was breaching a duty of secrecy owed by him to the SAP and his colleagues. This renegade act was born of resentment against the SAP. Accordingly, so the argument proceeded, a motive on the part of the speaker to misrepresent already existed at the time when Coetzee made his disclosures to Welz. Counsel's further contention in regard to admissibility was based on uncertainty as to dates. It was pointed out that Welz's evidence in relation to the date of the disclosures, namely, that "it must have been early in 1984", lacked any clear chronological point of reference; added to which there was the fact that Coetzee' s rancour towards the SAP had been aroused before the end of 1984. In these circumstances, so urged counsel, the respondents had not discharged the onus of establishing lack of motive to misrepresent on the part of Coetzee at the time when he spoke to Welz.

There is considerable force in these objections. I prefer to express no firm opinion in regard to their validity because it seems to me that in any case the alternative argument on which Mr Cilliers relies is sound. Counsel's alternative submission was that upon proper scrutiny the evidence of Welz was, in relation to the critical issue, too vague and unspecific to carry any significant probative weight. Counsel contended that Welz had been able to say nothing more than that "they" had. obtained poisons "from the police laboratories" and that the name of the appellant had been "mentioned." Upon a careful reading of Welz's evidence it seems to me, with respect, that the passage "dat gif van eiser verkry ... is" in the paragraph from the judgment of the court a quo which I have quoted above, represents an overstatement of the effect of what Welz in fact said. Looking dispassionately at the words used by Welz it seems to me to be not

improbable that the name of the appellant might have been mentioned quite adventitiously as the person heading the forensic laboratory. The evidence of Welz is not to the effect that Coetzee explicitly stated to him that the appellant himself had supplied Coetzee with poison. It seems unlikely, furthermore, that such was the impression subjectively gained by Welz from what Coetzee conveyed to him; at the time, so Welz testified, he regarded the appellant as "a minor element in the story."

(ii) Mrs Coetzee

The learned trial judge approached the evidence of Mrs Coetzee with due caution. Having alluded to her advanced years Kriegler J went on to say:-

> "....sy getuig van 'n kortstondige en betreklik alledaagse gebeurtenis wat byna tien jaar gelede plaasgevind het. Daar is geen eksterne hulpmiddel vir haar geheue nie. Dit het haar betreklik onlangs eers bygeval en daar is nog meer onlangs eers met haar gekonsulteer met die

> oog op getuienislewering. Wat sy te vertel het, ondersteun die weergawe van haar seun teenoor wie sy 'n moeder se liefde, toegeneentheid en trou koester. Aan die anderkant van die balansstaat moet verskeie plusfaktore aangeteken word...."

Having examined her testimony with characteristic thoroughness the trial judge recorded his impressions of this witness in the following terms:-

> "Ek bevind haar 'n eerlike en hoofsaaklik betroubare rapporteur van 'n gebeurtenis wat sy meegemaak het."

What the court a quo made of the testimony of Mrs Coetzee appears from the passage of the judgment hereunder quoted:-

> "Die waarskynlikheid is dus dat mevrou Coetzee wel haar seun tussen 6 Maart 1981 en die einde van daardie jaar na die forensiese laboratorium vergesel het; dat hy 'n ruk lank daar binne besig was en toe met 'n klein vodrwerp uitgekom het en dit in sy safaribaadjiesak gesit het. Sodanige insident rym met Coetzee se relaas en kan nie met eiser se weergawe versoen word nie. Dit dien dus as stawing van Coetzee se weergawe ten aansien van 'n belangrike geskilpunt, naamlik of hy destyds 'n verbintenis met die forensiese laboratorium gehad het.

> Die voorgaande bevinding word gemaak sonder enige steun op mevrou Coetzee se getuienis van wat haar seun destyds aan haar sou gesê het. Die inhoud van die mededeling sou wel steun aan Coetzee se weergawe verleen maar ek ag dit onnodig om te tob of dit ingevolge die uitsonderingsgrondslag by artikel 3(1)(c) van Wet 45 van 1988 toegelaat moet word ondanks die hoorsê-aard daarvan. Word dit toegelaat is dit maar 'n druppel in die emmer aangesien die waarskynlikheid in elk geval is dat Coetzee vir eiser gaan spreek het. Hy het immers geen besigheid met enigiemand anders by die laboratorium gehad en sou by niemand anders 'n klein voorwerp gekry het nie."

The hearsay constituent having been thus excised from her testimony the residue of Mrs Coetzee's evidence, by itself, does not point to any dealing on the day in question between Coetzee and the appellant. Counsel for the appellant submitted, correctly in my opinion, that what the trial court reckoned as a probability (that it was Coetzee's purpose to see the appellant and to procure something from him) must remain a matter of inference to be drawn aliunde from the evidence in the case as a whole.

That body of evidence, so Mr Cilliers forcibly contended, did not sustain such an inference. To this point I shall in due course return.

(c) Coetzee

This was a case in which the court below laboured under a manifest handicap in regard to one of the two key witnesses in the matter: it neither saw nor heard Coetzee when he testified in the witness stand. Mindful of this disability and bearing in mind the heinousness of the catalogue of crimes to which on his own version Coetzee had been a party Kriegler J rightly treated the evidence of Coetzee with circumspection. In his judgment the learned judge observed that although the cause before him was a civil one his approach to the testimony of Coetzee was akin to that adopted by a criminal court in weighing the evidence of an accomplice witness. Kriegler J reminded

himself, moreover, that in regard to the central issue the case for the respondents depended on the evidence of Coetzee as a single witness.

Mindful of the pitfalls involved in an assessment of credibility by reference to the cold printed word Kriegler J resorted to the expedient of comparing Coetzee's version given before the commission de bene esse in the instant trial with the content of six other versions proved to have been given by Coetzee on other occasions.

The admissibility . for this purpose of these extra-curial statements by the witness was vigorously challenged by counsel for the appellant. I find it unnecessary to decide this particular issue, and I shall assume in favour of the respondents that the statements in question were admissible for this purpose.

The six versions to which the court below thus had recourse were respectively: (1) exh "P" (the transcript of

Coetzee's conversation with Pauw in Mauritius); (2) exh "K" (the formal but unsworn statement of Coetzee drawn up in Mauritius); (3) article VWB(2); (4) exh 3 (Coetzee's statements recorded in the video-tape of the television broadcast); (5) those passages in the evidence of Coetzee at the HCI (the Harms Commission of Inquiry) which were explored with Coetzee in the course of his evidence at the trial; and (6) Coetzee's statement to Welz to which Welz deposed at the trial.

It appears from the judgment of the court below that as a result of the comparative survey undertaken by him Kriegler J formed a favourable impression of the consistency between the versions given by Coetzee at different times:-

> "In die algemeen gesproke, is sy getuienis voor die Harmskommissie wat in hierdie verhoor met hom in debat geneem is asook sy getuienis alhier onderling konsekwent en redelik in ooreenstemming met Bewysstukke P en K."

and again later -

> "Coetzee is einde Desember 1981 uit die veiligheidspolisie en einde Desember 1985 uit die Mag as sodanig. Daarna verloop bykans vier jaar voordat hy sy mededelings vir publikasie beskikbaar stel. Op daardie stadium, dit wil se op Mauritius, net hy geen notas voorberei of selfs sy dagboekie byderhand nie .... Die weergawe wat hy uiteindelik in die verhoor voorlê, toon egter geen wesenlike afwyking van dit wat hy op Mauritius aan Pauw vertel het nie. Wat meer is, dit toon 'n merkwaardige konsekwentheid met wat Welz getuig in 1984/85 aan hom meegedeel is."

In weighing his evidence the trial court bore in mind that in regard to the SAP Coetzee had revealed "'n geestesgesteldheid .... wat 'n vraagteken oor sy motiewe laat hang." Referring to Coetzee's criminal past Kriegler J made mention of "talle blyke van oneerlikheid", and cited, inter alia, the following examples:-

> "Reeds in sy Oshoekdae verskaf hy 'n valse alibi vir mevrou Botes. Dan is hy party tot 'n bekookte verklaring wat die gevolge van sy optrede help afweer. Terwyl hy op Vlakplaas is pleeg hy regsverydeling met betrekking tot die skietery by Lindley deur middel van valse

> verklarings aan adjutant-offisier Heath of dan later aan die prokureur-generaal .... Toe hy met die oog op strafversagting by die dissiplinêre verhoor mediese getuienis van sy gesondheidstoestand nodig net, mislei hy sy eie geneesheer daaroor en gevolglik word misleidende getuienis aan die dissiplinêre raad gelewer."

As exemplifying "meer manifestasies van oneerbaarheid" on the part of the witness the trial court mentioned:-

> "Nie alleen was daar die moorde in Suld-Afrika en Swaziland nie maar etlike pogings tot moord, huisbraak, motordiefstal en meineed. Wat laasgenoemde betref, getuig Coetzee dat sy eedsverklaring oor Vusi se lot vals was . ..."

At the same time, so the learned judge remarked, it was necessary to judge Coetzee's past misdeeds in a proper context:-

> "Die alibi-misstap het in verband gestaan met 'n informant van horn, die ontwyking was nie sy eie maaksel nie maar is met die advies en medewerking van meerderes bewerkstellig ....Die Lindley-insident was weereens met die aktiewe samewerking van meerderes besweer en Coetzee is nie daaroor voor stok gekry nie."

The trial court was sensible of the fact that in so far as it sought to inculpate the appellant Coetzee's tale was a very remarkable one. It conceded that there was force in many of the submissions bearing on the probabilities in the case which had been advanced by the appellant's counsel, which it summarised thus:-

> "Ten eerste is dit hoogs onwaarskynlik dat 'n man van eiser se agtergrond en inbors hom sal leen tot die vergiftiging van gevangenes soos Peter, Vusi en Kondile. Dat hy sy reputasie en loopbaan sal plaas in die hande van 'n junior offisier soos Coetzee is ewe onwaarskynlik. Wat volgens die advokaat eenvoudig belaglik is, is dat ' man van eiser se kundighede so sou ploeter wat die gifdosisse betref dat daar honderde der honderde kilometer gery sal word om nog gif te kry en om die slagoffers dwarsoor die Transvaal te karwei net om hulle tog maar uiteindelik dood te skiet en dan nog boonop te veras. Hoekom, so word gevra, hoegenaamd met gif of druppels sukkel as die lyke tog veras gaan word? Hoekom druppels toedien en nie somar maar doodskiet?....
>
> Met heelwat van advokaat Oshry se submissies is daar geen fout te vind nie. Dit is .... 'n bale eienaardige storie van 'n bale eienaardige man.

> Die bysleep van 'n algehele vreemdeling wat met die veiligheidstak niks te make net nie en dit by wyse van 'n gif en bedwelmingsverhaal is nog eienaardiger..."

Notwithstanding these implausible features in the story told by Coetzee, the trial court felt impelled to take the following view of its accuracy:- .

> "Dit lyk vir my eerder na een van daardie gevalle waar die waarmerk van die verhaal juis in die onwaarskynlikheid daarvan geleë is. Vergelyk

(cont on p 127)

Viviers v Kilian 1927 AD 449 op 454."

The court below considered that there were to be found also other indications to support its impression that Coetzee's version implicating the appellant bore the stamp of truth. In reviewing Coetzee's account of how Vusi had been captured and kept in custody, and how he had finally disappeared, Kriegler J regarded as significant the correlation between the narrative of the witness and objective data to be gleaned from official documents which had been discovered by the SAP. In this connection the learned judge remarked:-

> "In die afwesigheid van enige ander houdbare verduideliking dui dit sterk daarop dat Coetzee se bewering dat hy verantwoordelik was vir die moord op Vusi die waarheid is."

The trial court further reasoned that the objective facts revealed in official SAP documents pointed even more strongly to the truth of Coetzee's description of the treatment accorded to Kondile and of the circumstances

in which ultimately he met his fate. Such documents established, for example, that at the relevant time an Audi had been reported stolen in Uitenhage during the very period when Coetzee, Nofomela and Tshikalanga were engaged in operations in the Eastern Cape; and that Col van Rensburg, Captain du Plessis and Sgt Raath (the trio who on Coetzee's version brought Kondile by car to the farm near Komatipoort) were in the Eastern Transvaal at the relevant time. The evidence in regard to the Kondile incident left the trial judge with an indelible impression -

> "....dat Coetzee se relaas daaroor, hoe skokkend verregaande dit ookal mag wees, tog die waarheid is. Kondile het bestaan, hy het verdwyn en Coetzee noem drie persons wat wel 'n verbintenis met horn gehad het as teenwoordig by sy uitwissing."

(d) <u>The appellant</u>

Otherwise than in the case of Coetzee the court below had ample opportunity of seeing and listening to the

appellant. The learned judge gives the following pen-picture of the man who testified before him:-

> "Hy het homself bewys as wetenskaplike, 'n polisieman en 'n mens van uitmuntende stoffasie. Hy staan bekend as 'n strenge tugmeester, en het in die getuiebank hier getoon hoekom hy ontsag en soms moontlik bewing by sy kollegas afdwing. Hy is fors, indien nie oordonderend nie. Haastig en selfs ongeduldig. Hy vorm vaste opinies wat hy welsprekend verwoord en heftig verdedig. Ondanks 'n hooghartigheid wat plek-plek deurslaan, openbaar hy soms ook 'n fyn aanvoeling vir interpersoonlike nuanses en diplomasie. Hy het byvoorbeeld dwarsdeur die verhoor....fyn begrip en selfs voorgevoel gemanifesteer vir die rigting waarin die debat beweeg. Nietemin is sy styl eerder die van die kapswaard as die rapier.
>
> Hy is 'n formidabele persoon wat tereg groot aansien verwerf het."

Having concluded on the one hand that the extraordinary quality of Coetzee's version bore the hall-mark of veracity the court a quo on the other hand recorded its finding that the appellant was a deliberately untruthful witness. The grounds on which the court below based its adverse credibility finding are considered in the paragraphs

0 numbered (i) to (v) which follow hereunder.

(i) That portion of the appellant's evidence suggested how Coetzee could have gained his knowledge of the appellant's house and how much of the house's interior is revealed by the television camera in exh 3 has already [see paragraphs (1) and (2) at pages 99-101 above] been described. In this regard Kriegler J commented as follows:-

> "Daardie antwoorde van die eiser was in verskeie opsigte onwaar. Die eiser, 'n Hoof Adjunk-Kommissaris van die Suid-Afrikaanse Polisie, het die Harms-kommissie mislei:
>
> (a) Coetzee kon nie 'deur net na die televisieopname te kyk' sy beskrywing van eiser se huis gekry het nie;
>
> (b) die voordeur van die huis was nie oop nie;
>
> (c) jy kan nie tot by die agterste kamers ingaan met die kamera nie;
>
> (d) jy kan nie duidelik of hoegenaamd sien dat dit 'n lang gang is nie."

The trial judge was further critical, and

correctly so, of the rambling and inconclusive response by the appellant to his counsel's question whether the front door of the house was open when the video exh 3 was shot.

(ii) Reference has already been made to the appellant's evidence at the HCI concerning the existence or otherwise of a verandah at the front of his house, and the misquotation by the appellant of that evidence when he testified at the trial [see paragraph (3) at pages 101-4 above]. The misquotation (which in fact contains several errors) passed unnoticed at the trial. It was the subject neither of cross-examination by counsel or of query by the trial judge. In the judgment, however, the misquotation became the basis for a finding of critical importance. In the eyes of the trial judge this misquotation was at once destructive of the appellant's credibility and determinative of the truth of Coetzee's implication of the

appellant. In this connection the learned judge remarked:-

> "Wat ek destyds .... nie besef net nie .... is dat hy sy toevlug neem tot 'n wanaanhaling. Dit was eers toe ek by die bestudering van die stukke vir die voorbereiding van hierdie uitspraak die twee sinne woordeliks met mekaar vergelyk dat dit my tref - en ek moet erken soos 'n donderslag omdat dit haas ongelooflik is dat 'n man van eiser se aansien tot so 'n gemene kunsgreep sou daal .... Die jammerlike konklusie waartoe ek gedwing is, was dat daar geen ander moontlike uitleg is nie.
>
> Waar sy geloofwaardigheid 'n onmisbare komponent is van 'n oortuigende weerlegging van die web getuienis om hom, skryf die voorgaande bevinding eintlik Ikabod oor sy vooruitsigte van sukses."

The trial judge went on to say that this was a deceitful ruse on the part of the appellant inspired by his appreciation -

> "....dat Coetzee se kennis van sy huis ten alle koste weggepraat moet word."

(iii) As reflected in photographs handed in at the trial there projects from the front main wall of the

appellant's house an exterior structure forming a covered approach to the front door. It is described thus in the judgment:-

> "....'n uitstek van die hoofdak met 'n plafon, 'n geut met afvoerpype, twee stutpilare en twee lae muurtjies wat weerskante die pilare met die voormuur van die huis verbind."

The structure concerned appears not to be large enough to accommodate furniture. Speaking for myself, I should hesitate to describe it as a verandah. The court below discerned in the prolonged debate about the "verandah" a sly attempt on the part of the appellant to gloss over what was regarded as a deception by him both of the HCI and the trial court:-

> "Ondanks sy taalvaardigheid en retoriese vernuf, by voorbeeld die optowering van die beeld van 'n boer op sy breë plaasstoep en die gevatte klap na Coetzee, gaan die poging nie op nie. Nie alleen misluk die poging nie maar dit moet aangemerk word as 'n doelbewuste stap om sy wanvoorligting van die Harmskommissie en van hierdie hof te verbloem."

(iv) Under cross-examination, and in response to a question by the trial judge, the appellant admitted that the safe in his office was in fact a standard police safe of a sort to be found in charge offices and in the offices of SAP station commanders. The court below regarded as deliberately misleading the statement by the appellant in his evidence in chief that there was no resemblance between his safe and the description given by Coetzee of the safe that he had noticed in the appellant's office.

(v) In the course of his evidence the appellant testified at some length on the efficacy of certain cyanide compounds when administered as a means of homicide. In the course thereof the appellant had elaborated on the fact that these substances were tasteless, colourless and almost odourless. The witness omitted to deal with the question

whether in the case of human consumption these substances left detectible traces. Since on Coetzee's version it was important for him to procure poison which was not merely tasteless, colourless and odourless, but which in addition was incapable of detection, the trial court considered that the appellant's evidence on cyanide compounds was a red herring designed to divert attention from the true issue. The learned judge said:-

> "Eiser het voor en tydens die verhoor geweet wat die schwerpunkt van Coetzee se getuienis met betrekking tot die verskaffing van gif was. As polisieman van die naashoogste rang en gifdeskundige van die hoogste, die veteraan van 'n menigte forensiese veldslae, wat hom maandelank instudeer het in die saak, kon hy nie anders nie. Tog is die hoftyd verbeusel met die tangensiële getuienis. Die afleiding wat ek daaruit maak is dat dit daarop bereken was om die aandag van die kern te deflekteer."

(e) The correctness or otherwise of the trial court's finding of fact

I turn to the crucial question whether the respondents succeeded in proving, on a balance of probabilities, the truth of the defamatory allegations made of the appellant in the VWB case.

In order to put into perspective the chief criticisms which Mr-Cilliers levelled at the conclusions reached by the court a quo on this part of the case it is useful to trace the broad line of reasoning underlying the findings of the learned judge.

Having pointed out that Coetzee's evidence of his alleged personal dealings with the appellant lay at the very core of the issue in the case Kriegler J remarked:-

> "Hy [Coetzee] beweer naamlik dat hy by een geleentheid vir eiser by sy huis gespreek het en verskeie kere op kantoor terwyl eiser ontken dat hy Coetzee ken of hoegenaamd lets met horn persoonlik te doen gehad het.

> Die beweerde besoeke lê dus aan die episentrum van die feitekompleks. Dié bestaan op sy beurt uit aantal sentrale momente, te wete Coetzee se kennis van eiser se huis, sy kennis van eiser se kantoor en Coetzee se sakboekie. Daarop is dit die sinvolle beginpunt van die kritiese ontleding van die getuienis en die waarskynlikhede."

Having analysed in depth the evidence bearing on the three "sentrale momente" the learned judge observed:-

> "Dit blyk dan dat iedereen van die drie sentrale momente op sigself beskou, daarop dui dat daar waarskynlik wel teen die einde van 1981 meermale persoonlike kontak tussen eiser en Coetzee was. Die oortuigingskrag van die drie momente gesamentlik is natuurlik groter as die som van die drie afsonderlik."

Thereafter the trial court embarked upon an appraisal of the probabilities "rondom die sentrale momente". It began by stressing that the case involved a weird tale told by a single witness with a depressing past record of dishonest dealing and a possible motive to misrepresent; a witness, moreover, whose performance on the witness stand had not been observed by the trial judge. Having recited (in a

passage of the judgment already quoted by me) the more obvious improbabilities inherent in Coetzee's version as detailed in Mr Oshry's argument to it the trial court next discussed a number of features which in its opinion tended to fortify Coetzee's trustworthiness as a witness. These included such factors as the apparent consistency in the various statements made by Coetzee on earlier occasions; the developments which precipitated his departure as demonstrating the truth of Nofomela's death-cell revelations; the unlikelihood that Coetzee would needlessly implicate himself in a string of crimes (some of which were already buried in the distant past) unless he wished to unburden his soul by telling the whole truth; the corroboration, to be gleaned from data in official SAP records, for many features of Coetzee's version dealing with the histories of people like Vusi, Kondile and Joyce Dipale; and the untruthfulness of Flemington's denials of

Coetzee's version.

Next the trial court dealt with the fact that there were three men, Schoon, Vermeulen and van Dyk, who were able to give evidence of critical importance but who had not been called as witnesses by either side. For reasons mentioned in his judgment the learned judge concluded that no inference against either side should be drawn from the failure to call them as witnesses. Those reasons need not be here reviewed. For purposes of argument I shall deal with the appeal on the basis that the said conclusion was correct. In the end result, so pointed out the court a quo, as the matter stood:-

> "....is daar Coetzee se getuienis oor talle gebeure, of beweerde gebeure, wat nie op die man af ontken of weerspreek is nie. Dit, afgesien van enige ongunstige afleiding, is 'n gewigtige oorweging by die beoordeling van die feitemassa as geheel."

Having reasoned as indicated above the trial court reverted to the attack which Mr Oshry had launched upon Coetzee's general credibility, but found it unacceptable:-

> "Sy submissie dat Coetzee 'n gewoonteleuenaar is aan wie se woord geen waarde geheg kan word nie, kan ek nie mee saamgaan nie. Ten eerste is die voorbeelde van sy leuenagtigheid in die verlede nie so talryk nie. Ten tweede reflekteer sodanige voorbeelde, kontekstueel gesien, nie so ernstig op sy geloofwaardigheid in die algemeen nie. Op die beste vir die eiser toon dit dat Coetzee die 'elfde gebod' eerbiedig. Hier gaan dit egter nie om nie uitgevang te word nie maar juis die teenoorgestelde. Hy is nie nou die benoude kat wat by sy tugverhoor benoude spronge maak om uit die net te bly nie. As hy besig is om hier te lieg, dan lieg hy hom al hoe vaster in die net in."

A little later in its judgment the trial court reflected once more upon Coetzee's strange tale involving repeated but fruitless attempts at poisoning. The learned judge remarked:-

> "Die verhaal van hoe Vusi en Peter van bakboord na stuurboord geneem is, van die eksperimentering met die druppels en die vernietiging van Coetzee se notas van sy waarneming daarvan is nou eenmaal moeilik om te glo."

However, citing the dictum of Megarry J in John v Rees [1970] 1 Ch 345 that "the path of the law is strewn with

examples of ....inexplicable conduct which was fully explained...." Kriegler J iterated that "die blote eienaardigheid van die verhaal 'n aanduider van die waarheid daarvan is."

Next the trial court weighed the evidence of Mrs Coetzee. As already mentioned earlier in this judgment it concluded that her testimony served to corroborate Coetzee - on the important issue "of hy destyds h verbintenis met die forensiese laboratorium gehad het." Kriegler J then rounded off this part of his judgment with the following summation:-

> "Die eiser se ontkenning van enige verbintenis met Coetzee moet beoordeel word in die wete dat daar 'n formidabele web getuienis om hom saamgetrek is. Nietemin kan hy met oortuigende weerlegging daarin slaag om die web te deurbreek. En voorvereiste nommer een vir 'n oortuigende weerlegging is dat dit geloofwaardig is."

Thereupon the learned judge embarked upon an inquiry into the appellant's credibility, and, as has been shown earlier

in this judgment, decided that the appellant was a witness unworthy of credence.

In the course on an able argument on behalf of the appellant Mr Cilliers submitted that the reasoning of the court below was marred by a fundamental logical flaw. From its acceptance (whether rightly or wrongly) that the evidence by Coetzee of grave malpractices by the security police and his own active participation therein was the truth, so it was said, the trial court had wrongly inferred that Coetzee's evidence implicating the appellant in the supply of poison was also true. As a matter of logic, so the argument proceeded, the validity of that inference depended wholly upon an entirely different finding: that in relation to the critical issue itself (the alleged supply of poison by the appellant to Coetzee) the evidence of Coetzee was to be accepted in preference to that of the appellant. While evidence to show that the Special

Branch had not engaged in the sort of malpractices alleged by Coetzee would doubtless have served to impair Coetzee's general credibility, positive evidence pointing to such malpractices, so counsel stressed, could reinforce Coetzee's credibility only in regard to the existence of such malpractices. Such evidence in no way heightened the probability that the appellant had been implicated in the supply of poison to the appellant.

I think that counsel's stricture is well-founded. Those features, already enumerated, upon which the trial court sought to rely in order to buttress Coetzee's credibility are all factors tending merely to prove the criminal activity in which Coetzee participated other than his alleged procuring of poison from the appellant. None of the factors is verificatory of Coetzee's claims that the appellant supplied him with poison. Moreover, although there is in the passage quoted hereunder no specific

mention of the appellant himself, it is of some significance to note the broad approach to the probabilities reflected in the following statement in the trial court's judgment:-

> "As bevind word dat Coetzee en sy groep inderdaad ampshalwe die verskeie ander dade gepleeg het waarvan hy getuig, sal dit die bestaan van die 'kultuur' en die waarskynlikheid van die half-amptelike klandestiene verskaffing van gif of slaapdruppels aan hom en ander veiligheidsmanne versterk."

Counsel for the appellant further challenged the validity of the trial court's finding that each of the three "sentrale momente" yielded a probability that towards the end of 1981 there had been, on several occasions -

> "....persoonlike kontak tussen eiser en Coetzee."

In this connection it was submitted that the knowledge of Coetzee of the matters concerned supported nothing more than an inference that Coetzee: had on some single occasion visited the appellant's house; had on some single

occasion visited the appellant's office; and that Coetzee had somehow obtained the appellant's telephone number at the forensic laboratory. A finding that there had existed a "verbintenis" between Coetzee and the appellant depended, so the argument ran, not upon the "sentrale momente" but upon an acceptance of Coetzee's evidence in regard to his alleged personal communication with the appellant.

1 agree with the above submission, and with the further contention developed by Mr Cilliers that Coetzee's evidence in regard to his alleged visits to the appellant is unsatisfactory in several respects. In regard to the latter it seems to me that the following criticisms may fairly be levelled at Coetzee's version:

(1) According to Coetzee he communicated personally with the appellant on four or five occasions. Two of these visits had as an object the fetching of poison to be used in the murder of Vusi and Peter. The remaining two

or three visits must therefore have been in connection with the procuring of the so-called "knock-out drops". It is noteworthy that Coetzee, whose narrative is in general characterised by vivid attention to minute detail, is here unable to provide any circumstantial framework for the remaining visits. In particular he is unable to say when these visits took place.

(2) Whereas Coetzee's initial evidence was to the effect that his first meeting with the appellant had been in connection with poison for Vusi and Peter, this recollection evaporated in cross-examination when he confessed his inability to say in what connection he had first visited the appellant. One would have imagined, having regard to the respective positions and functions of the two main characters involved, that Coetzee's first visit to the appellant would have left him with an indelible recollection of both the occasion and the

surrounding circumstances.

(3) Coetzee was constrained to admit that he was quite unable to determine the sequence of (i) the Vusi and Peter murder; (ii) the Kondile murder; and (iii) the "General" incident.

(4) It is an arresting feature of Coetzee's description of his visits to the appellant's house and his office that it involves what is essentially eye-testimony. His account is curiously barren of personal details concerning the appellant which could have emanated only from the appellant himself. Had Coetzee visited the appellant on 25 October 1981 it would have been very natural for the latter to have made mention of the fact that he had returned from Germany only on the previous day. Coetzee's account is silent as to any such communication by the appellant. On the other hand when Coetzee does venture to provide some detail of the appellant's domestic

regime based on what the appellant said to him, his attempt fails. According to Coetzee during his visit to the appellant's house on 25 October 1981 the appellant claimed that his home language was German and that he spoke German to his daughters. On the appellant's unchallenged testimony his home language is Afrikaans and his daughters are unable to speak German.

(5) On Coetzee's own version of his movements immediately before the morning of Sunday 25 October 1981 it is difficult to understand precisely when and how Coetzee managed to accommodate within his very busy schedule a journey to Pretoria and a visit to the appellant's home. He says that he arrived there at between 9 am and 10 am in the morning. However, on the evening of Saturday 24 October Coetzee was still in Lindley. From Lindley he had to travel to Middelburg, whence he was sent to the old farm-house at Groblersdal where the entire Vlakplaas

contingent was involved in tracking down the terrorists involved in the Ogles incident. What prompted a sudden interruption of his duties at Groblersdal and when he left Groblersdal for Pretoria are left unexplained.

(6) Coetzee had attended a course for dog-trainers and he had a knowledge of dogs. Coetzee told Pauw [see sub-paragraph (G)(7) of article VWB(2)] that from his visit to the appellant's house he recollected that the appellant had:-

> "....twee verskriklike wreedaardige Dobermanns of Rottweilers."

When he testified at the HCI Coetzee described the two dogs in question as being Dobermanns. The video-tape exh 3 portrays a Rottweiler sign at the house of the appellant. When Coetzee testified at the trial he identified the two dogs as Rottweilers. The uncontradicted evidence of the appellant was that in 1981 he had been the owner of a single Rottweiler.

The third "sentrale moment" is the telephone entry. When an individual keeps a note-book for the purpose of recording telephone numbers the presence of a particular number therein will in general be indicative of some or other personal communication between the owner of the note-book and the person whose telephone number it is. In all the circumstances of the present case, however, there seems to me to be force in the submission of Mr Cilliers that the telephone entry is readily to be explained on the hypothesis that Coetzee may simply have wished to communicate with the appellant; or that he anticipated the need to do so on some future occasion. The fact that the telephone entry embraces only the appellant's number at work while the space specially provided by Coetzee himself for the home number remained blank is a pointer to the conclusion that the appellant himself was not the source of the information. It is

significant, moreover, that initially in his evidence Coetzee, a witness whose memory in general displayed quite remarkable powers of retention, was unable to say from whom, or when or in what circumstances he had obtained the information which enabled him to make the telephone entry. Equally noteworthy is the fact that on Coetzee's version he never telephoned the appellant.

Reference has already been made to the trial court's rejection of the submission made on behalf of the appellant at the trial that Coetzee was an habitual liar. A perusal of Coetzee's own evidence sufficiently demonstrates, I consider, not only that Coetzee is an entirely amoral person but also that in the past he lied as often as a lie served his convenience. I agree, furthermore, with the submission by counsel for the appellant that in weighing the evidence bearing on the crucial issue in the case there should be steadily borne in

mind not only Coetzee's proclivity for perverting the truth but in addition his cunning and ingenuity in fabricating evidence in order to lay a false trail.

The learned judge was disposed to believe Coetzee for the reason, inter alia, that -

> "As hy besig is om hier te lieg, dan lieg hy hom al hoe vaster in die net in."

In this connection there seems to me to be considerable force in the argument of counsel for the appellant that, having thrown in his lot with an organisation which was critical of the operations of the SAP, it suited Coetzee's book falsely to weave into his narrative of events a senior police officer. As to the selection of a probable victim, so counsel urged upon us, the appellant was an obvious choice. Already at the time when Coetzee served with the Rhodesian security forces he had become familiar with the use of poison. Thereafter he appears to show a preoccupation with the notion of poison as a means of

killing. On his own version he was the author of the idea that Vusi and Peter should be murdered by administering poison to them. Coetzee himself testified that he knew that the appellant was a specialist in the field of chemistry.

In regard to what was the crucial issue in the case Coetzee was a single witness with a grudge against the SAP and a motive to misrepresent. He was a criminal whose many misdeeds included crimes of dishonesty. His evidence at the trial was recorded by a commission de bene esse sitting in London. How well or indifferently he deported himself when he testified, how convincingly or unconvincingly he told his story to the commissioner, were matters upon which the trial judge was left to speculate. In that part of his evidence which inculpated the appellant there was grave improbability. The trial court was alive to this improbability but it was disposed to regard it as

the hall-mark of the truth of Coetzee's story.

In Coetzee's whole narrative involving the supply of poison to him by the appellant there is a double incongruity. First, it attributes to two seasoned police officers, neither of whom appears to have suffered from undue squeamishness, over a period of some fourteen days a dithering course of conduct entirely incomprehensible and bordering on the ludicrous. Second, it casts a scientist of note, described by the trial court as a toxicologist of the first rank, in the comic role of an obstinate and bungling apprentice. One does not overlook the adage that truth is stranger than fiction. However, when faced with extravagances evocative of the Baron von Münchhausen a court will incline to healthy scepticism. In the instant case the improbability is so manifest that, in my respectful view, it cannot be seen to wear the badge of truth. Instead it must tip the scales against an

acceptance of the tale.

So much for Coetzee. Next there must be considered the appellant's qualities as a witness. His evidence was marred by certain obvious blemishes. The record demonstrates that he was a voluble witness much given to discursive answers which often did not deal properly - or indeed at all - with the crux of the question. The appellant often betrayed signs of impatience, and he was prone to exaggeration. Paying due regard to the various imperfections in his testimony, however, I am, with respect unable to agree with the adverse credibility finding which the trial judge made against the appellant. Still less am I satisfied that the testimony of Coetzee should be preferred to that of the appellant.

Turning to the grounds on which the court below based its rejection of the appellant's testimony, it is

convenient to deal at once with the two ancillary reasons summarised in paragraphs (iv) and (v) above. As to (iv) it is clear that in suggesting that Coetzee's description of the safe in the office was quite inaccurate the appellant was guilty of gross exaggeration. In truth it was only in respect of the base on which the safe stood that Coetzee was mistaken. A photograph of the safe was, however, an exhibit before the trial court, and I am not satisfied that the hyperbole on the part of the appellant was intended to mislead the court. In any case the complaint - as the learned judge rightly pointed out to counsel when he cross-examined the appellant in regard thereto - is a very trivial one. The court's criticism of the appellant based on the ground indicated in paragraph (v) is, in my respectful opinion, unmerited. If, as Coetzee himself maintained throughout, the ultimate intention was to incinerate the bodies of their victims when

they had succumbed to the poison, the fact that the poison might leave traces in their corpses was perhaps not of first importance.

Dealing next with the grounds of criticism mentioned in paragraphs (i), (ii) and (iii) above, a number of considerations must be borne in mind. In the first place it must be remembered that at the HCI exh 3 was available to the chairman and to counsel there appearing. The trial judge had before him a transcript of the appellant's evidence at the HCI, and by the time the appellant came to testify at the trial the court below had already viewed exh 3. Had the appellant been tempted to mislead the trial court in relation either to what he had said at the HCI or to what would be seen by an observer of exh 3, it must have been apparent to a person of his intelligence that the prospects of a successful deception were slim indeed.

Second, it is a striking feature of the main

grounds on which the trial court's adverse credibility finding rests that they involve matters entirely unrelated to the essential facts surrounding the critical issue itself. Those grounds relate to purely collateral matters which, in my respectful opinion, are of peripheral significance and minor importance. The grounds there detailed all derive from the question: what is objectively observable on a viewing of exh 3, and what were the subjective perceptions of the witness. In addition paragraph (3) largely reduces itself to a matter of mere semantics.

Assuming for the moment that the appellant was in truth innocent of Coetzee's very serious charges against him, his position was an awkward one in the sense that it would be difficult if not impossible for him to explain when, where and how Coetzee had acquired the knowledge which the trial court identified as the three "sentrale

momenta." Any attempt to provide an answer would necessarily involve a process of pure speculation on the

part of the witness. Such a witness is, in a real sense, simply beating the air; and in this situation even an innocent witness will easily succumb to the temptation of grasping at straws or of venturing theories and possible explanations which may not bear serious scrutiny. Cf in this connection the remarks of Davis AJA in Rex v Du Plessis 1944 AD 314 at 323.

In respect of the adverse finding of credibility the whole judgment of the court below hangs on the misquotation. Looking at the evidence of the appellant as a whole I find it difficult to conclude that his misquotation was deliberate. It seems to me to be far more probable that this misquotation was the product of impatience and slipshod reading in the course of a rather blustering attempt by the witness to vindicate his earlier

(and untenable) proposition in regard to the likely source of Coetzee's knowledge of his house.

It is well known that an appellate tribunal will not lightly assume the responsibility of differing from a trial court's finding of fact on the strength of its own comparisons of the witnesses and its own assessment of the probabilities in the case. In my respectful judgment that responsibility must be shouldered in this appeal. The burden of the responsibility is appreciably lessened, of course, by the fact that the learned trial judge did not have the advantage of seeing and hearing Coetzee, and of so judging what manner of man he was. Not influenced at all in the case of Coetzee by considerations of demeanour, the trial court proceeded on inferences which this court is in as favourable a position to draw as was the trial judge. In regard to Coetzee one of the governing facts in the case is the glaring improbability involved in his inculpation of

the appellant. In my judgment the court below misdirected itself by glossing over that cardinal factor. In regard to the trial court's estimation of the appellant I find myself unable, with respect, to accept the reasoning, based on what appear to me to be grounds far too narrow and insubstantial, which impelled the trial court to find that the appellant was an untruthful witness.

For all the aforegoing reasons (and on the assumption aforementioned that the trial court correctly held that no inference should be drawn against the respondents from their failure to call Schoon, Vermeulen and van Dyk as witnesses), I am driven to the conclusion that the trial court erred in its finding that the respondents had succeeded in proving on a balance of probabilities the truth of the defamatory allegations made of the appellant in the VWB case.

(H) THE BURDEN OF PROOF:

The survey earlier undertaken in this judgment as to the effect of the pleas (as amended) respectively filed in the two actions shows that in both actions there were raised (1) a defence of truth in the public benefit and (2) a defence of qualified privilege. In regard to these defences it will be recalled, the trial court ruled that the respondents did not bear a primary onus of proof (the risk of non-persuasion); and that they were encumbered by no more than an evidentiary burden in the sense that if, at the end of the case, the court were to be left in a state of uncertainty as to whether or not the defences pleaded had been established, the appellant's actions should fail. The correctness or otherwise of this ruling must now be examined.

Over a long period of time and in the many decisions of this court flowing from actions for defamation, statements as to the burden of proof in relation to both defences here in question are frequently to be encountered. Before noticing in what directions the currents of judicial opinion in regard thereto have flowed reference may usefully be made to certain principles which may be regarded as having been firmly established in our law.

The broad position obtaining in the Civil law as to the incidence of the burden of proof was summarised thus by Kotzé JA in Kunz v Swart and Others 1924 AD 618 at 662-3:-

> "The rule of the Civil law was actori incumbit suae intentionis probatio, so that if the plaintiff failed to establish his claim the defendant was absolved. The defendant (reus), however, if he sets up an exception or defence, was, in respect of it, considered to be in the position of a plaintiff and had to prove his exception. It was also a rule that, per naturam

> rei a negative is not capable of proof, but this refers to a negative in substance and not in expression or mere form of words. All matters of fact had to be established by the party alleging and relying on such fact or facts, for facts are not presumed but have to be proved. Where, however, a legal presumption exists in favour of one of the parties, such presumption will prevail donee probetur in contrarium."

For an exposition of the fundamental rules which govern the incidence of onus the locus classicus in our law is Pillay v Krishna and Another 1946 AD 946. The statements by Davis AJA in that judgment were concurred in by Watermeyer CJ, Tindall JA, Greenberg JA, and Schreiner JA. Of the onus probandi Davis AJA took care immediately to note (at 951):-

> "....that this is a matter of substantive law and not a question of evidence; Tregea and Another v Godart and Another (1939, A.D. 16, at p.32)."

Thereafter the learned judge of appeal made the following observations (at 951-952):-

> "The first principle in regard to the burden of proof is thus stated in the Corpus Juris:

> 'Semper necessitas probandi incumbit illi qui agit' (D.22.3.21). If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: 'Agere etiam is videtur, qui exceptione utitur : nam reus in exceptione actor est (D. 44.1.1). (Exceptio does not mean, of course, an exception in the sense in which the term is now used in our practice). Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it. (I am not here going into questions as to how far either party may be assisted by presumptions: nothing of the kind arises here, so far as I know, and I am only stating the general rules which, as I see them, are applicable to the present case.)"

Davis AJA proceeded (at 952) to deal with the rule stated by Voet in (22.3.10), and likewise to be found in a number of places in the Corpus Juris, to the effect that the onus is on the person who alleges something and not on his opponent who merely denies it. Thereafter (at 952-953) the learned judge enunciated three further propositions

which are germane to the debate in the instant case:-

> "The first is that, in my opinion, the only correct use of the word 'onus' is that which I believe to be its true and original sense (cf. D.31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence as to the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all, not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto; but the onus which then rests upon his opponent is not one which has been transferred to him : it is an entirely different onus, namely the onus of establishing any special defence which he may have. Any confusion that there may be has arisen, as I think, because the word onus has often been used in one and the same judgment in different senses, as meaning (1) the

> full onus which lies initially on one of the parties to prove his case, (2) the quite different full onus which lies on the other party to prove his case on a quite different issue, and (3) the duty on both parties in turn to combat by evidence any prima facie case so far made by his opponent: this duty alone unlike a true onus, shifts or is transferred."

An instructive practical illustration of an "onus" in the secondary and loose sense of a duty on the part of a litigant to combat a prima facie case presented by his opponent is afforded by the facts of South (Cape) Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA 534 (A). In delivering the judgment of the court Corbett JA referred (at 548A) to the distinction drawn by Davis AJA in the passage from Pillay v Krishna (supra) at 952-3 quoted above, and went on to say (at 548A-G):-

> "Only the first of these concepts represents onus in its true and original sense. In Brand v Minister of Justice and Another, 1959(4) SA 712 (AD) at p 715, Ogilvie Thompson JA called it 'the overall onus'. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in

order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also Tregea and Another v Godart and Another, 1939 A.D. 16 at p 28; Marine and Trade Insurance Co Ltd v Van der Schyff, 1972(1) SA 26 (AD) at pp 37-9). Applying these concepts to an application for leave to execute a judgment pending an appeal, the onus proper (or overall onus) rests, as I have already indicated, upon the applicant. This is so, in my view, irrespective of whether the judgment in question is one sounding in money only or is one granting other forms of relief. Where the judgment is for money only, then, in an appropriate case, the inference may be drawn, prima facie, that the furnishing of security de restituendo would protect the appellant against irreparable harm or prejudice. This would go a long way towards establishing, prima facie, the applicant's claim for relief, and, in the absence of any rebutting evidence from the other party (the appellant), might be conclusive .... It is only in this sense, in my view, that an 'onus' can be said to rest on the other party. This not being an onus proper but merely a burden of adducing evidence to rebut a prima facie case, the other party would not be obliged to establish a case on a preponderance of probability; and, if upon a consideration of all the evidence the Court were left in doubt as to whether irreparable harm would be suffered or not, then the applicant upon

> whom the true onus rested, would fail on this issue."

See further : Vasco Dry Cleaners v Twycross 1979(1) SA 603(A) at 615G-616A; 620E-621B.

Long before this court's decision in Pillay v Krishna (supra) South African courts had consistently accepted that defended defamation actions tended to yield different issues each of which attracted its own and independent burden of proof. As a typical statement (albeit made in a case dealing with the expression res ipsa loquitur) there may be taken the following passage from the judgment of Schreiner J in Klaassen v Benjamin 1941 TPD 80 at 86:-

> ".... the plaintiff has to prove the publication of a defamatory statement concerning him, the defendant has to prove that it was published on a privileged occasion, and the plaintiff has to prove that the occasion was abused."

Moreover, over a period of some sixty years, this court in a long line of decisions dealt with the defence of

qualified privilege explicitly on the footing that the defendant bore an overall onus to be discharged on a balance of probabilities. The authorities, and brief excerpts from them, are conveniently collected in the judgment of Kotzé JA in Joubert and Others v Venter 1985(1) SA 654(A) at 696D-G, and need not here be repeated. However, what came to be interpreted as a sharp change of direction was thereafter heralded by certain remarks made by Rumpff CJ in Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977(3) SA 394 (A) ("O'Malley's case"), which remarks were echoed in a number of later decisions of this court. It is necessary now to examine the various dicta concerned and the various settings in which they occurred.

The facts in the O'Malley case were the following. O'Malley was the editor of a daily newspaper in

which there had appeared an advertisement of an illegal gathering. While O'Malley was attending a social function at an hotel he was arrested on a charge relating to the offending advertisement. In a news report by the SABC the latter mentioned the fact of O'Malley's arrest under the Riotous Assemblies Act; but the report was couched in language which suggested that O'Malley had been arrested while he was actually attending the illegal meeting. In the court below O'Malley successfully sued the SABC for damages for defamation. At the trial no evidence was tendered on behalf of the SABC. On appeal it was contended on behalf of the SABC, inter alia, that the news report had not been broadcast animo injuriandi. The appeal was dismissed. This court held that in the absence of any evidence the presumption arising from the publication of the defamatory matter had not been rebutted.

Having referred to the pleadings and the evidence on

behalf of O'Malley Rumpff CJ said (at 401 in fin - 402A):-

> "Dit moet aanvaar word dat in ons reg die publikasie van lasterlike woorde 'n vermoede laat ontstaan dat die woorde opsetlik gepubliseer is en dat die publikasie onregmatig is. Weens die oorname van Engelse terminologie in ons lasterreg het die twee noodsaaklike elemente van laster as delik, nl. onregmatigheid en skuld, nie altyd duidelik na vore gekom nie en het daar heelwat vertroebeling ontstaan....".

Later in his judgment (at 402 in fin - 403C) the learned

Chief Justice made the following observations:-

> "Die vermoede van onregmatigheid kan in ons reg weerlê word deur getuienis wat aantoon dat die lasterlike woorde gebesig is in omstandighede wat onregmatigheid uitsluit en wanneer die vraag ontstaan of die publikasie van die lasterlike woorde regmatig of onregmatig was, is dit die taak van die Hof om vas te stel, vir sover dit die gemene reg betref, of publieke beleid verg dat die publikasie geregverdig is en dus as regmatig bevind moet word. Die geykte Engelse 'privileges' word juis as 'privileges' geag, omdat die publikasie van die lasterlike woorde in

> die betrokke omstandighede 'in the interest of public policy' geag word. Vgl. Eraser, On Libel and Slander. 7de uitg., bl 116. Die omstandighede wat aanleiding gee tot die sgn. ' privileges' in die Engelse reg geld ook in ons reg as voorbeelde van omstandighede wat onregmatigheid uitsluit. Die vermoede van die opset om te belaster, wat weens die publikasie van die lasterlike woorde ontstaan, plaas 'n weerleggingslas op die verweerder, wat die vermoede kan weerlê deur getuienis voor te lêdat hy nie so 'n opset gehad het nie. 'n Blote ontkenning van die opset om te belaster sou onvoldoende wees om 'n eiser in staat te stel om te weet watter feite die verweerder aan die Hof gaan voorlê, en daarom sal die verweerder, in sy pleit of nadere besonderhede, die feite moet stel op grond waarvan hy beweer dat hy nie die opset gehad het om te belaster nie."

In what follows it will be convenient to refer to the words which in the above quotation I have rendered in bold print as "the O'Malley dictum."

Since the defendant broadcasting corporation had at the trial adduced no evidence whatever towards rebutting the presumption in question it was, I consider, quite immaterial to the decision of this court in O'Malley's

case whether such a rebuttal would in law saddle the defendant with a full onus, to be discharged on a balance of probabilities, or with a mere evidentiary burden. In either eventuality the appeal was doomed to failure.

In Borgin v De Villiers and Another 1980(3) SA 556 (A) the first respondent (defendant) had written to a Professor Liese in Hamburg a letter containing information about the appellant (plaintiff). In an action by the appellant for damages for defamation the trial court held that the letter was defamatory of the appellant, but it upheld a defence of qualified privilege raised by the respondent. The appellant appealed. In delivering the judgment of this court Corbett JA observed (at 571E-G):-

> "It is not disputed that the letter .... bears at least some of these meanings and it is consequently prima facie defamatory. It follows that the publication to Prof Liese of exh 'C' raised a presumption that the publication was unlawful and was made animo injuriandi. This placed on respondents an onus (in the form of a 'weerleggingslas') to rebut these presumptions.

> One of the ways in which the presumption of unlawfulness may be rebutted is by showing that
>
> the publication was made on a so-called privileged occasion. In such a case the publication of the defamatory words is regarded as being in the interest of public policy and, therefore, as being lawful (See generally Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977(3) SA 394 (A) at 402-3). In this case respondents' main defence was that exh 'C was published on a privileged occasion. The onus (in the sense of a 'weerleggingslas') was, therefore, upon them to establish this proposition."

On appeal it was not disputed on behalf of the appellant that the occasion had been privileged. As appears from the following passage from the judgment (at 572A-C) the issue concerned the ambit of the privileged occasion:-

> "It is conceded that Prof Liese's enquiry established a privileged occasion, but it is contended that the enquiry was not as wide a one as that alleged by respondents and that this limited the ambit of the privileged occasion...."

Having embarked upon a detailed examination of the facts

this court concluded (at 577C-D) that it seemed probable that the scope of the enquiry made by Professor Liese related to the wider issue for which the respondents contended. Corbett JA proceeded to consider and reject a further contention advanced on behalf of the plaintiff that portions of the letter indicated that the defendant had acted unreasonably or abused the occasion.

It was common cause that the occasion was privileged. In addition this court was satisfied on the probabilities that the ambit of the privilege was as wide as alleged by the respondents. Consequently the question whether in order to repel the presumption of unlawfulness the respondents bore a full onus of proof upon a balance of probabilities or a "weerleggingslas" was not in Borgin v De Villiers an issue which fell to be decided in the appeal.

Borgin v De Villiers was decided in May 1980. In September of the same year there was handed down in this court the judgment in May v Udwin 1981(1) SA 1 (A). In that case the plaintiff (Udwin) was an attorney and had appeared as such in certain litigation before the defendant (May) who was a magistrate. In the ensuing judgment May made unflattering remarks about Udwin which prompted the latter to sue May for damages for defamation. At the trial the issues on the pleadings were narrowed by agreement between the parties. They agreed not merely that the remarks of which Udwin complained were defamatory but also that they had been published by May on an occasion of qualified privilege. The parties further agreed that the onus was on the plaintiff to prove that the defendant had abused the privilege or that he had exceeded its ambit.

The trial court decided this issue in favour of the plaintiff and against the defendant; and it ordered the latter to pay damages. The defendant appealed. The narrow issue on appeal to this court was stated by Joubert JA (at 12A-B) in the following words:-

> "The question before this Court is whether the Court a quo was correct in holding that May had abused or exceeded the ambit of the qualified privilege and in consequence thereof forfeited the protection of the qualified privilege."

This court came to the conclusion (at 21E-F) that the trial court was wrong in holding that the plaintiff had discharged the onus of proving that the defendant had forfeited the protection of the qualified privilege. Accordingly the appeal by the defendant succeeded.

Having at an early stage of his judgment (at 10C-D) referred to O'Malley's case in connection with the two rebuttable presumptions of fact which arise upon proof of the publication of defamatory matter, the learned judge of

appeal proceeded to say (at 10D-E):-

> "Once the presumptions of animus injuriandi and unlawfulness have arisen from the publication of the defamatory matter an onus (in the form of a 'weerleggingslas') rests on the defendant to rebut them."

Since it was common cause that the defamatory matter had been published on a privileged occasion this court was not required in May v Udwin to ponder whether, in the absence of such agreement between the parties, the defendant in seeking to establish his defence of qualified privilege would have born a primary onus or a mere evidentiary burden.

In December 1980, and close on the heels of May v Udwin (supra), came the judgment of this court in Marais v Richard en 'n Ander 1981(1) SA 1157 (A). The defendant was a newspaper editor whose newspaper published a leader concerning the plaintiff. The plaintiff sued for damages for defamation. The trial court found that the matter in

the leader was defamatory of the plaintiff in certain respects, but it sustained a defence of fair comment on a matter of public interest. The plaintiff appealed. This court held (at 1170E) that the attack upon the judgment of the court below could not succeed and it dismissed the appeal.

The plaintiff's grounds of attack upon the trial court's judgment are comprehensively set forth by Jansen JA at 1165G-1166D of this court's judgment. Their validity was examined at 1167A-1170E. A consideration of these portions of the judgment will indicate, so I consider, that the judgment on appeal in no way turned upon the question whether any of the three defences of (1) qualified privilege (2) fair comment (3) truth in the public benefit requires proof on a balance of probabilities or whether it suffices for the defendant to adduce evidence adverse to the presumption sufficient to leave the court in doubt on

the issue.

However, Jansen JA remarked (at 1166E) that before he proceeded to consider the plaintiff's grounds of complaint a few general observations on the defence of fair comment were necessary. These general remarks involved, inter alia, reference to the O'Malley case. At 1166F-1167A of the reported judgment the learned judge of appeal remarked:-

> "Dit word nou deur hierdie Hof aanvaar dat in ons reg skuld en onregmatigheid afsonderlike elemente van die onregmatige daad is (Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977(3) SA 394 (A)). By laster bestaan die onregmatigheid in die krenking van die goeie naam en publikasie van 'n lasterlike bewering oor 'n ander sal prima facie as onregmatig beskou word. Trouens, publikasie daarvan skep die 'vermoede' dat dit onregmatig en met opset geskied het en dit plaas 'n weerleggingslas op die verweerder (Suid-frikaanse Uitsaaikorporasie v O'Malley (supra te 401-402A); Borgin v De Villiers and Another 1980(3) SA 556 (A) te 571F). Die vraag of dit nou aanvaar word dat in die geval van die pers aanspreeklikheid 'skuldloos' is - vgl O'Malley-saak supra te 404H - kom nie nou te berde nie. Soos later sal blyk, word die onderhawige saak op

> grond van die onregmatigheidselement van laster beslis, in welke geval die aanwesigheid van animus injuriandi irrelevant is.
>
> Daar kan weinig twyfel bestaan dat, soos in die geval van die sg 'privilegies' (O'Malley-saak supra te 403A-B; May v Udwin [1981(1) SA 1 (A)], die verweer van 'billike kommentaar' (asook die verweer van 'waarheid in die openbare belang') slaan op die onregmatigheidselement van die injuria en as regverdigingsgrond beskou moet word. In hierdie stadium van ons regsontwikkeling sou dit dus onjuis wees, en lei tot onnodige verwarring, om nog te sê dat hierdie verweer 'die vermoede van animus injuriandi weerlê'".

Some three months after the decision in Marais v Richard (supra) a question-mark as to the correctness of certain of the dicta contained in the O'Malley case was raised, albeit obliquely, by the judgment of this court in the case of Mabaso v Felix 1981(3) SA 865 (A). It was there held, in a joint judgment of Wessels and Diemont JJA and Trollip AJA, that in actions for damages for delicts affecting the plaintiff's personality and bodily integrity, such as assault, it is fair and accords with

experience and common sense that the defendant should ordinarily bear the onus of proving the excuse or justification, such as self-defence. That approach, so it was held, is ordinarily correct, and should be followed in such cases, unless the form of the pleadings in a particular case places the onus on the plaintiff to negative the excuse or justification.

The question whether this court's stance on the burden of proof in relation to self-defence in a civil action for assault was reconcilable with the O'Malley case was raised by Professor J M Burchell in an article to which reference is made by Kotzé JA in Joubert and Others v Venter (supra) at 696 G-I. In the article the learned author suggested that this problem required attention. This last sentiment was endorsed by Kotze JA in Joubert v Venter. The learned judge of appeal stressed (at 697A) that on the facts of the case before him it was

unnecessary to resolve the problem; but he remarked that it might not be out of place to point out some of the aspects of the problem worthy of attention. Kotzé JA then proceeded (at 697 B-H) to make the following observations:-

> "When the notion of a 'weerleggingslas', as opposed to a full onus was first raised by Rumpff CJ 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 eg Schmidt Bewysreg 2nd ed at 44-45) and the notion that a

> defendant who relies on a defence of privilege is burdened with a full onus (see eg Hoffmann and Zeffert South African Law of Evidence 3rd ed at 389). 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...."

The conclusion at which Kriegler J arrived in the court below, namely that -

> "....die geldende reg in die onderhawige saak 'n weerleggingslas op die verweerders laat rus...."

stemmed from his reliance upon the quartet of defamation

cases (O'Malley's case; Borgin v De Villiers; May v Udwin; and Marais v Richard) which have already been analysed above.

For the reasons stated earlier in this judgment the O'Malley dictum was, in my opinion, no more than the statement of a parenthetic opinion unnecessary for the decision of the appeal. In dealing with the onus of proof necessary to repel the presumption of animus injuriandi the learned Chief Justice stated that the defendant was burdened with a "weerleggingslas". The important question which crisply arises in this appeal is whether in his judgment in the O'Malley case Rumpff CJ went further, and indicated in addition that a defendant seeking to refute the presumption of unlawfulness arising from the publication of defamatory matter was likewise burdened with no more than a "weerleggingslas."

It would seem that since the O'Malley case the

view has been widely held and expressed, both by the courts and by academic writers, that the dicta in that judgment involved an assertion that a defendant in a defamation action who wishes to repel the presumption of unlawfulness, e g by raising a defence of qualified privilege, bears no more than a "weerleggingslas" or evidentiary burden. As an example I cite the judgment in Joubert and Others v Venter (supra) to which I was also a party. It will be recalled that there Kotzé JA remarked (at 697A-B):-

> "When the notion of a 'weerleggingslas', as opposed to a full onus, was first raised by Rumpff CJ in O'Malley's case supra in relation to a defence of privilege..."

This view of the matter, in my respectful opinion, rests upon a misapprehension as to what was in fact said by Rumpff CJ in the O'Malley case. A careful examination of that judgment, so I consider, points rather

to the conclusion that in truth the learned Chief Justice proceeded upon the assumption that a defendant invoking privilege is burdened with a full onus and is required to refute the presumption or unlawfulness by proof on a balance of probabilities.

At the outset it is to be noticed that Rumpff CJ expressly mentioned a weerleggingslas" (at 403A-B) only in relation to the presumption "van die opset om te belaster". When earlier in his judgment (at 402 in fin-403A) the learned Chief Justice discussed the presumption of unlawfulness, and described in what manner it might be repelled, no reference whatever to a "weerleggingslas" was made. In that part of the judgment, moreover, the language in fact employed -

> "...deur getuienis wat aantoon dat die lasterlike woorde gebesig is in omstandighede wat onregmatigheid uitsluit..."
>
> (at 402in fin - emphasis supplied)

and again

> "...is dit die taak van die Hof om vas te stel, vir sover dit die gemene reg betref, of publieke beleid verg dat die publikasie geregverdig is en dus as regmatig bevind moet word."
>
> (at 403A - emphasis supplied)

is indicative, so I consider, of a full onus to be discharged on a balance of probabilities. What tends in the same direction is the reference (at 403A) to the "privileges" in the English law of defamation, since in England the defence of qualified privilege requires proof on a balance of probabilities. Of further significance, in my view, is the following reference by the learned Chief Justice (at 405F-G) to his own judgment in the earlier defamation case of Craig v Voortrekkerpers Bpk 1963(1) SA 149 (A):-

> "Al wat wesenlik in die uitspraak van die Craig-saak behandel word, is die vraag of 'n bevoorregte geleentheid deur verweerder bewys is of nie..." (Emphasis supplied.)

Next it must be remembered that the

O'Malley case there is in this court a long line of decisions affirming and reaffirming that in a defamation action a defence of privilege has to be established on a balance of probabilities. Had Rumpff CJ intended to state that a defendant raising the defence of privilege attracts no more than an evidentiary burden in order to succeed thereon, it appears to me to be distinctly improbable that he would have done so without so much as a passing reference to the many decisions of this court holding otherwise which had remained unimpeached for more than half a century.

Finally it should be borne in mind, I think, that although both the presumption of animus injuriandi and the presumption of unlawfulness arise from the happening of the same event (the publication of matter defamatory of the plaintiff) these two presumptions are essentially different in character. The presumption of animus injuriandi

relates to the defendant's subjective state of mind (a deliberate intention to inflict injury) whereas the presumption of unlawfulness relates to objective matters of fact and law.

For the aforegoing reasons I respectfully conclude that nothing stated in the O'Malley case represents authority for the proposition that in our law of defamation a defence raised in order to repel the presumption of unlawfulness attracts no more than an evidentiary burden or "weerleggingslas."

In supporting the decision of the court a quo that in respect of the defences raised by them the respondents bore no more than an evidentiary burden Mr Levin rested his argument upon the authority of the same four decisions invoked by Kriegler J. Counsel did not suggest that in Joubert v Venter the effect of the earlier decisions of this court dealing with the onus to be

discharged by a defendant raising a defence of qualified privilege had been misstated by Kotzé JA. While fully recognising what the earlier cases had decided on this issue counsel contended that, on the strength of O'Malley's case and the three subsequent decisions in which the O'Malley dictum had been invoked, this court had deliberately overturned the earlier decisions. 'However, counsel did not, in the alternative, contend that the earlier cases manifested such clear and palpable error that, in any case, we were at liberty to reconsider them.

Apart from the fact that we are bound to follow the earlier decisions, I would add that I am unable to see any good grounds for doubting their soundness as judicial precedents. That there is a full onus on a defendant raising a defence of qualified privilege seems to me to follow from an application of those principles enunciated in Pillay v Krishna (supra) to which attention has already

been called. The defence of privilege involves entirely new factual allegations unrelated to the plaintiff's cause of action. It is a true case of confession and avoidance (cf Mabaso v Felix (supra) at 674G-675H).

In my view the substantive law governing defamation prescribes not only what facts the plaintiff must prove but also what facts must be established by a defendant whose defence involves confession and avoidance. If the defendant raises the defence of qualified privilege then he must prove his duty or right to communicate the defamatory matter to another; and the latter's reciprocal interest to receive the communication. These are matters which need to be established on a balance of probabilities. The requirements of the substantive law cannot here be satisfied by a mere equiponderance of

evidence which leaves the court unable to say whether or not either element of the defence has been established. To hold otherwise would be subversive of principles governing the law of defamation deeply entrenched in our legal system.

The earlier cases cited by Kotzé JA in Joubert v Venter (supra) at 696D-G all dealt with qualified privilege. But also in regard to the defence of truth in the public benefit there is venerable authority in this court for the proposition that the defendant likewise bears a full onus. In Johnson v Rand Daily Mails 1928 AD 190 Stratford JA (at 196) remarked of the publication there in issue:-

> "As to the whole statement, the words were undoubtedly defamatory, and it was for the defendant to prove their truth."

For a more recent but no less outright affirmation by this court that in regard to the defence in question truth of

the defamatory matter has to be established by the defendant "on a balance of probability" see the remarks of Steyn CJ in South African Associated Newspapers Ltd and Another v Yutar 1969(2) SA 442(A) at 451G-452A. Moreover, as pointed out by Jansen JA in Marais v Richard (supra) at 1166 in fin - 1167A, the defence of qualified privilege, fair comment and truth in the public benefit all relate to "die onregmatigheidselement" of the delict of defamation.

Apart from the fact that in principle all three defences should be governed by the same onus, there are in the case of the defence of truth in the public benefit cogent policy considerations for burdening the defendant with the full onus of proof. In the case of qualified privilege the defendant who transmits the defamatory matter is generally thus impelled by considerations of duty or of protection of an interest. The matter stands rather

differently in regard to the defence of truth in the public benefit. Here no form of compulsion operates on the mind of the defendant whose decision to put the character of the plaintiff in jeopardy proceeds entirely from his own volition. The rationale of the defence seems to be that the law will not allow a person to recover damages in respect of an injury to a reputation which he does not, or at any rate should not, possess; coupled with the fact that society has an interest in correctly estimating the true character of its members. The general policy appears from the response of the jurist Paulus, (D.47.10.18) who tells us "that it is not right or just that anyone who has defamed a guilty person should on that account be condemned; for it is both proper and expedient that the transgressions of delinquents should be known." Since it is entirely of his own accord that the defendant elects to vilify the plaintiff, justice demands that he should do so

at his peril; and that in an action for defamation he should have to establish what he should have troubled to verify before he maligned the plaintiff. I recoil from the suggestion that it is enough for a defendant who invokes the defence of truth in the public benefit to plead, and to prove, no more than: (1) that it is just as likely as not that his defamatory allegations concerning the plaintiff are true; and (2) that it is not improbable that they might be in the public benefit.

For all the aforegoing reasons I conclude that in our law a defendant in a defamation action is encumbered with a full onus in regard to the defences of truth in the public benefit and of qualified privilege. Such defences can be sustained by nothing less than proof on a balance of probabilities. In passing it may be mentioned that proof on a balance of probabilities is required also in England and those Commonwealth countries in which the common law of

defamation allocates to the defendant the burden of proof in regard to the defence of truth and the defence of qualified privilege. In my respectful view the court a quo erred in holding that the respondents were burdened with no more than an evidentiary burden.

(I) CONCLUSION : IN THE VWB CASE THE COURT BELOW ERRED IN UPHOLDING THE DEFENCE OF TRUTH IN THE PUBLIC BENEFIT

The court below held, rightly in, my opinion, that in the WM case the defence of truth in the public benefit could not succeed. Earlier in this judgment I have indicated my conclusion that in the VWB case the truth of the defamatory matter was not established on a balance of probabilities. In the light of my further conclusion that the defence in question demands proof on a balance of probabilities, it follows that in my view the said defence

should have failed also in the VWB case; and that the court a quo was wrong in upholding it.

(J) THE ALTERNATIVE DEFENCES OF QUALIFIED PRIVILEGE:

Since it sustained the plea of truth in the public benefit in the VWB case the court below found it unnecessary to consider in that case the validity of the plea of qualified privilege pleaded in the alternative.. That necessity now arises in the VWB case. Bearing in mind my conclusion that also in regard to the defence of qualified privilege a defendant bears a primary onus requiring proof on a balance of probabilities, I proceed to consider in turn whether on the evidence adduced the said defence was established (1) in the WM case or (2) in the VWB case. For the reasons which follow it is my view that in each case the question is to be answered in the negative.

(1) The defence of qualified privilege in the WM case:

Earlier in this judgment I examined in some detail the pleadings in both actions and the effect of the belated amendment which was allowed in respect of the alternative defences raised in the respective pleas. I concluded that through the amendment in question the defendants in the WM case had discarded their original alternative plea (publication in the public interest by virtue of an ongoing debate) and had pinned their colours to the mast of qualified privilege as their only alternative defence. Here it is appropriate to mention that during argument in this court, and in response to a direct question from the bench, counsel for the respondents affirmed that the defence raised in the alternative plea as amended in the WM case was the defence of qualified

privilege.

It seems to me, however, that in effect the defence upheld by the court below in the WM case may well have been the original alternative defence (publication in the public interest by virtue of an ongoing debate) rather than a defence of qualified privilege. That this may be the position is indicated by the heavy reliance which the trial court placed on the reasoning of Coetzee J in the case of Zillie v Johnson and Another 1984(2) SA 186 (W). In regard to the alternative defence the learned judge defined the issue by saying:-

> "Die vraag is of daar in bepaalde omstandighede 'n houdbare beroep op regverdiging kan wees al is die geopenbaarde laster nie waar nie. (Met regverdiging word hier natuurlik bedoel 'n verweer van nie-onregmatigheid)."

A clear answer to this question, so Kriegler J held, was to be found in Zillie v Johnson (supra), to which decision reference will hereafter be made as "the Zillie case".

Before looking more closely at the Zillie case and considering how the court below relied upon it, it is convenient to make reference to an article written in 1976 by Professor J C van der Walt which appeared in Gedenkbundel H L Swanepoel and to which reference is made in this court's judgment in Pakendorf en Andere v De Flamingh 1982(3) SA 146 (A), in Zillie's case, and in the judgment of the court below. For the sake of easy reference I shall number separately the three paragraphs from the article hereunder quoted. The paragraphs numbered (1) and (2) run consecutively in the article. At page 68 of the article the learned author writes:-

(1) "Die pers se funksie is om die openbare belang te dien. Wat behels die openbare belang? Die openbare belang word gedien deur die beskikbaarstelling van gemeenskapsrelevante inligting en kritiek oor alle aspekte van openbare politieke en sosiaal-ekonomiese aktiwiteite en meewerking tot vorming van die openbare mening. Hierdie funksie waarborg die vryheid van die pers en plaas meteen ook die grense daarvan. Dit verleen prinsipieel 'n besondere wye vryheidsfeer aan die pers. Lasterlike bewerings wat binne die grense van hierdie sfeer val, is in beginsel nie onregmatig nie. Die individuele belang moet in so 'n geval wyk voor die openbare belang."

(2) "Die wye funksie van die pers om die openbare belang te dien, regverdig in beginsel persoonlikheidskrenkende publikasies. Dit skep 'n wye vryheids- en invloedsfeer waaraan die belange van die individu ondergeskik gestel word. Die bevordering van die openbare belang

as regverdigende omstandigheid in die geval van lasterlike beriggewing vind neerslag in die bekende regverdigingsgronde by die lasterreg, naamlik privilegie, waarheid en openbare belang, en billike kommentaar. Hierdie regverdigingsgronde pas die pers met sy besonder funksie soos 'n handskoen.

Hulle laat in beginsel ruimskootse bewegingsvryheid aan die pers. Privilegie berus wesenlik op belangebevordering. Mits die pers, gesien sy funksie, die openbare belange dien, kan hy hom te enige tyd op hierdie regverdigingsgrond beroep. Die objektiewe bestaan al dan nie van 'n belang behoort, waar die aanspreeklikheid van die pers ter sprake kom, onder andere aan die hand van die besondere funksie en aard van die personderneming bepaal te word. Ook die regverdigingsgrond van waarheid en openbare belang is besonder geskik om die pers se openbare funksie te waarborg. Die regverdigingsgrond van billike kommentaar is meetpas om die kritiese funksie van die pers te beskerm.

Indien 'n lasterlike persberig dus ter bevordering van die openbare belang geskied, en wel soos dit neerslag gevind het in die drie genoemde

> regverdigingsgronde, is die perspublikasie regmatig. Die persoonlikheidsbelang van die belasterde word oorwoeker deur die betrokke openbare belang. Die persbelang in vryheid van spraak word beskerm ten koste van die individuele belang."

At page 76 of the same article Professor van der Walt says the following:-

> (3) "Die beheerders van die personderneming skep myns insiens normaalweg 'n genoegsame tipiese en hoe risiko van benadeling van die persoonlikheidsbe-lange van die individu om die risiko-beginsel tot aanspreeklikheidsgrondslag te verhef. Die pers skep ongetwyfeld, deur die verspreiding van sy produkte, een van die potensieel grootste bronne van persoonlikheidskrenking van die individu."

In Pakendorf v De Flamingh (supra) the basis of the liability of the mass media for defamation was authoritatively laid down. In delivering the judgment of this court Rumpff CJ adopted a stance foreshadowed some years previously in the O'Malley case, that the liability

of owners, editors, printers and publishers of a newspaper which publishes a defamatory statement is a strict one, independent of fault. The learned Chief Justice held, on the grounds both of authority and the requirements of public policy, that the press, radio and television are strictly liable for the publication of defamatory statements. In the course of his judgment (at 157G-H) Rumpff CJ referred to an article by Professor J M Burchell entitled "The Fault Element in the Law of Delict" (1978 SAW 170) in which at 179 there had been quoted in a footnote the paragraph (which I have numbered (3)) in the article by Professor van der Walt quoted above by me. Of the footnote Rumpff CJ, proceeded to say (at 158A in the Pakendorf case):-

> "Dit is natuurlik aanloklik om die risiko-aanspreeklikheid ten opsigte van produkte toe te pas omdat 'n koerant as 'n 'produk' beskou sou kon word. Radio en televisie wat op dieselfde basis as die pers behandel behoort te word, kan egter kwalik as bron van 'produkte' beskou word."

With that prelude I turn to the facts of the Zillie case. The plaintiff was the political correspondent of the Rand Daily Mail ("the RDM"). At the time of the 1981 general election the then Minister of Health ("the Minister") made a statement to the effect that pensioners were able to subsist on a diet costing no more than R20 a month. The plaintiff reported this story in the RDM and this triggered off a series of public statements and disclaimers. Reacting to criticism of himself in the press the Minister sent a telegram to the chairman of the Steyn Press Commission in which he stated that certain newspapers had said that it was expected of pensioners to exist on R20 a month. This, so complained the Minister in the telegram, was a "flagrant and total distortion of the facts and a malicious misrepresentation of my intentions...." This ministerial statement was published by all the daily newspapers in the country,

including the RDM and The Citizen. On the strength of the publication in The Citizen the plaintiff claimed damages for defamation against that newspaper's editor and publisher. By way of defence the defendants pleaded, inter alia, (see 188D) that:-

> "....the said article was published pursuant to a duty on the part of the defendants to inform the readers of The Citizen newspaper as members of the general public of the contents of the said telegram and a corresponding right on the part of the readers of The Citizen as members of the general public to receive the information contained in the said telegram."

On behalf of the plaintiff in Zillie's case it was contended that this alone did not constitute a defence to her claim, and that the plea of public interest had to be coupled to an affirmation of bona fide belief in the truth of the matter published. The court held that lawfulness of the publication had been established and it dismissed the plaintiff's claim.

In the course of the judgment reference was made

to O'Malley's case, Borgin v Richard (supra), May v Udwin (supra), and Marais v Richard (supra). The learned judge said (at 195B) that he would summarise the effect of the dicta in these four cases as follows:-

> "1.....
>
> 3. Well-known defences such as privilege, fair comment and justification are mere instances of lawful publication and do not constitute a numerus clausus.
> 4. The general principle is whether public policy justifies the publication and requires that it be found to be a lawful one. As the test is an objective one it involves. an application of the 'general standard of reasonableness' but it relates to the sense of justice prevailing in South Africa as opposed to that in other countries and systems."

Coetzee J stressed what he conceived to be the role of the press. In this connection he remarked (at 195F-G):-

> "Plaintiff's counsel submitted that the press and other public media are in no better position than other members of the public; and the law recognises no such peculiar rights, privileges or claims to indulgence of the press. Whilst I

> cannot find any fault with this contention, one must not lose sight of the special position of the press in our modern society when deciding whether as a matter of policy an action should lie in circumstances like the present. This special position has been frequently recognised -cf Pakendorf's case supra at 154. A concise statement of the position of the press and its importance is well expressed by Prof J C van der Walt in an article referred to by Rumpff CJ at 158 of Pakendorf's case as follows (at 68):....."

Coetzee J then proceeded to quote from Professor van der Walt's article the paragraph which I have numbered (1) and the content whereof I have already indicated. The learned judge went on (at 196 A-C) to say:-

> "It seems to me that the present case is an excellent example of the right of the press, nay its duty, to have published the Minister's telegram to the Steyn Commission which he released to SAPA on the Sunday night. That the Government's policy with regard to pensions had become the burning public issue of the moment is beyond question. Equally important to the public was the question what the Minister had said at his press conference and what his attitude was to the widely published comment thereon .... I have no doubt that the public at large had a right to know what his reaction was at that stage. The average right thinking

> person would have felt justifiably annoyed if the public media had suppressed the existence of this telegram or its contents only became public knowledge subsequently. He would have felt deprived of knowledge to which he was entitled."

In weighing the application for amendment Kriegler J in his judgment quoted at length from the remarks of Coetzee J in the Zillie case. Before granting the amendments sought Kriegler J remarked of the judgment in the Zillie case:-

> "Die geleerde regter se ontleding van die tersaaklike reg en uitleg van die rigtinggewende gewysdes is so kennelik suiwer dat ek my eerbiedig daarby aansluit sonder enige toevoeging."

Earlier in this judgment reference was made to the nineteen paragraphs (respectively lettered (a) to (s)) introduced into the plea as a result of the amendment granted. Before considering the reasons which prompted Kriegler J to uphold the alternative plea in the WM case it is convenient here to quote paragraphs (k), (n), (o) and (r) therefrom. They

read thus:-

"(k) In the said article [article VWB(1)] extremely important and far reaching information was furnished in regard to various illegal activities of Coetzee and other members of the South African security forces and of the involvement of highly placed officers in the security police in such activities.

(n) The publication of the said article [the WM article] by the Weekly Mail as aforesaid, likewise related to a matter of great public interest and concern which had been widely covered in the press and' furnished further relevant information in regard thereto.

(o) The matter was widely debated in the press and further calls were made for the appointment of a judicial commission of enquiry into the matter.

(r) In the circumstances set out herein it was in the public interest that the readers of the Vrye Weekblad and Weekly Mail and the South African public at large should be informed of Coetzee's said allegations to ensure as wide a public debate thereon as possible and a full and proper public investigation of

the said allegations."

In the concluding part of his judgment Kriegler J applied what he had said earlier in regard to the Zillie case to the facts in the WM case. Before doing so, remarked the learned judge -

> ".... wil ek een verdere beginselstelling aanhaal. In die Zillie-saak (supra) verwys Coetzee R met instemming na die volgende passasie in 'n artikel deur prof J C van der Walt:...."

Kriegler J thereupon quoted the paragraph from the article in question which I have numbered as (1). Having done so the trial judge said:-

> "Die tweede stel verweerders het, myns insiens, ieder wesenlike bewering in paragraaf 2.3.2 van hul gewysigde verweerskrif bewys. In die besonder het hulle die bewerings in sub-paragrawe (k), (n), (o), (r) en die reeds aangehaalde slotsubparagraaf [paragraph (t) already quoted by me] daarvan bewys. In substansie kom dit daarop neer dat die aard en strekking van Coetzee se bewerings, gesien teen die agtergrond van die wydlopende en voortslepende openbare debat rondom bewerings van magmisbruik tot op hoe vlak deur lede van die veiligheidsmagte, sodanig was dat die Suid-Afrikaanse publiek geregtig was om

> daaroor ingelig te word. Die inligting was so belangrik dat dit die reg en belang van die pers om dit te publisher en van die lesende publiek om dit te verneem die individu se reg om nie te na gekom te word nie moet verdring....
>
> Ondanks die feit dat die betrokke bewering nie as waar bevind kan word nie was die besondere wyse en omstandighede van die publikasie daarvan sodanig dat dit nie onregmatig was nie. Met
> .... sodanige konklusie skep ek geen gevaarlike
> presedent nie. Die onderhawige omstandighede was ongeewenaard en sal hopelik nooit weer geewenaar word nie."

In my respectful judgment the trial court's finding represented not only a marked departure from precedent and principle but also an unsound one. Into what juristic niche it is designed to fit is, I think, a matter of some difficulty. That its links with the defence of qualified privilege which was pleaded are tenuous is suggested by the following comments in Burchell's Principles of Delict (1993). The learned author, while approving the result achieved by the trial court's finding, makes the following observations thereon at 174-5:-

"It has always been accepted in the law of defamation that the statements published need not be true in every minute detail - the material allegations or sting of the charge must be true. Or to put it another way, substantial but not absolute accuracy is required.

But, Kriegler J's judgment in the Neethling case appears to go further than this concession to freedom of speech. The judge accepts that the protection of the defendant's (sic) reputation in that case must also yield to the publication of matter, which is of a more significantly harmful nature, and for which there is insufficient evidence of truth..

This approach of Kriegler J to the public benefit element of the defence of truth for the public benefit could equally apply to the public interest element of the defence of fair comment and could be included in the judicial approach to the defence of qualified privileged occasion which relies upon a duty or legitimate interest in making a disclosure to someone who has a corresponding right or interest in receiving the information. The right of the public to be informed adequately will thereby receive appropriate attention within the general defences to a defamation action.

Another possible perspective on Kriegler J's judgment .... is to interpret his conclusion on

> the defence available to the Weekly Mail as creating a new ground of justification. It has been accepted by our courts that .... there is, in fact, no closed list of defences excluding unlawfulness .... His own conclusion that the facts of the .... case were unequalled and hopefully will not occur again and that he was thus not establishing a dangerous precedent, might point in the direction of his developing a 'new' defence. One of the difficulties of developing a new defence is the obvious one of delimitation and definition. How would one formulate the defence? Would 'duty to inform the public on a matter of major public concern' suffice for these purposes?
>
> It is perhaps better to regard the approach of Kriegler J as a logical and desirable policy-based extension of the fundamental defence of publication of the truth for the public benefit."

Such jurisprudential conjecturing apart, one has the situation that the trial court's judgment in regard to the Weekly Mail was based entirely on the reasoning of Coetzee J in the Zillie case. For present purposes the propriety of the final result in that case- a matter to which brief attention will be given later in this judgment - is not directly in issue. In my respectful opinion,

however, the reasoning adopted in the Zillie case is faulty inasmuch as it accords to the press a licence recognised neither by South African law nor (with the exception of the United States of America) by the legal systems of most other countries in the English-speaking world.

Before briefly stating the effect of the many decided cases bearing on this issue which were mentioned to us in argument, a few general observations on Zillie's case are necessary. Coetzee J attached significance to what (at 195F-G) he described as "the special position of the press in our modern society." Inasmuch as in this connection the learned judge relied both upon the Pakendorf case and the article by Professor van der Walt to which Rumpff CJ made reference in his judgment in that case, it is as well to bear in mind, first, that the special position assigned to the media in the Pakendorf case was an

unpropitious one. The effect of the decision is that where a person has been defamed by a newspaper it is no defence for the newspaper to plead that a mistake has been made which negatives the existence of animus injuriandi. Second, it might be pointed out that Rumpff CJ made reference to Professor van der Walt's article not in amelioration of the position of the press, but in order to fortify his conclusion that its liability should be a strict one. That portion of the article cited by Coetzee J in the Zillie case was not referred to at all by Rumpff CJ in the Pakendorf case. Finally it appears to me that the answer to the question posed in the passage of the article quoted by Coetzee J, namely, "Wat behels die openbare belang?" is to be sought not in that passage alone, but no less by what is said in the following passage (paragraph (2)); and more particularly by reference to the following words thereof:-

> "Die bevordering van die openbare belang as regverdigende omstandigheid in geval van lasterlike beriggewing vind neerslag in die bekende regverdigingsgronde by die lasterreg, naamlik privilegie, waarheid en openbare belang, en billike kommentaar. Hierdie reverdigings-gronde pas die pers met sy besondere funksie soos 'n handskoen."

It will be recalled that in the Zillie case, after making reference to four decisions of this court, Coetzee J sought to distil therefrom as a proposition in our law of defamation (at 195B-C) that -

> "4. The general principle is whether public policy justifies the publication and requires that it be found to be a lawful one ...."

In my respectful opinion the above proposition is untenable. It is trite that underlying the three traditional and specialised defences (privilege; truth in the public benefit; and fair comment) are the requirements of public policy. Since these three categories of justification do not represent a numerus clausus it may

also be accepted that in the further development of our law of defamation, if and when the courts decide to define and delimit any further categories of justification, the governing factor will likewise be the dictates of public policy. The fact that the traditional defences do not constitute a closed list of categories of justification, however, does not mean that in the present state of the law a court is free to consider the issue of liability for the publication of a defamatory statement by a newspaper independently of the substantive requirements of. the traditional defences, and simply by abstract reference to a "general principle .... whether public policy justifies the publication and requires that it be found to be a lawful one". In my opinion our law recognises no such defence to an action for defamation, whether the matter complained of be published by a newspaper or by anybody else.

At common law there is no general "newspaper

privilege". Contrary to the view expressed by Coetzee J (at 195G) any notion that for the purposes of claiming justification in respect of defamation the press occupies "a special position", so far from being recognised by our law, is entirely alien to it. Some eighty years ago Lord Shaw in delivering the judgment of the Privy Council in Arnold v The King Emperor 30 TLR 462, remarked (at 468):-

> "The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other, and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position."

The above-quoted remarks, so I consider, accurately reflect the position in our modern South African law. In regard to the immunity which the defence of qualified privilege

accords to statements published in discharge of a duty or the exercise of a right, the matter is summarised thus in LAWSA vol 7 par 249 at p 209:-

> "The duty or right may be legal, moral or social. The test of whether such a duty or right exists in a particular case is objective: did the circumstances in the eyes of a reasonable man create a duty or a right which entitled the defendant to speak. Thus there is a legal duty to furnish information in connection with the investigation of a crime; and statements about the creditors of a company may be made in a report on its claim for insurance. One public official may be obliged to make a defamatory statement to another in the course of his official duty. Members of public bodies may have a social duty or right to make defamatory statements to other members at meetings of these bodies. A former employee has a right to inform a prospective employer about the character of an employee, and inquiries as to creditworthiness may in appropriate circumstances be answered. A member of a church may have a moral duty to speak about the morality of a minister of the church to the elders of the church, and a close relative may make a statement to a young woman about the character of a suitor. The statement must be published in the discharge of the duty or exercise of the right in the sense that the statement must be relevant or germane and reasonably appropriate to the discharge of the

> duty or exercise of the right.
>
> The statement will not be published in the discharge of the duty or the exercise of the right if it is published to a person who has no similar duty or interest in receiving it...."

As already indicated it is unnecessary for purposes of the present appeal to express a firm opinion as to the correctness of the ultimate result in the Zillie case. That result followed Coetzee J's conclusion (at 196A) that it was the duty of the press to publish the Minister's telegram to the Steyn Commission. However, it seems to me, with respect, that without the arrogation of any special position to the press and without the invocation of the unwarranted "general principle" formulated by the learned judge in the Zillie case, his conclusion that the press had a duty to publish the said telegram might nevertheless readily have been reached upon the application to the facts in that case of the ordinary principles of qualified privilege.

Publication in the press involves dissemination to the world at large. Although courts are in general disinclined to recognise between a newspaper and its readers a community of interest sufficient to sustain the defence of qualified privilege, there are a few well-recognised exceptions to the general rule. One exception involves a public answer by a defendant in refutation of a public charge. It will be recalled that in the Zillie case the Minister was reacting to public criticism of himself in the press. A useful illustration of the exception under discussion is afforded by the facts of the oft-cited case of Adam v Ward [1917] AC 309. The plaintiff, a member of Parliament, was a former officer in a regiment within a brigade commanded by a certain General. In a speech in the House of Commons the plaintiff charged the General in question with having sent to headquarters reports on his officers containing deliberate

misstatements. The defendant was the Secretary of the Army Council. Having written a letter to the General vindicating him and containing statements defamatory of the plaintiff, the defendant sent his letter to the press. The letter was widely published in the British and Colonial press. In an action for libel by the plaintiff against the defendant it was held that the letter had been published on a privileged occasion; and that the defamatory statements were strictly relevant to the vindication of the General. For a discussion of the position where the medium of both the attack and its repulse is the press, reference may be made to Loveday v Sun Newspapers Ltd [1937-8] 59 CLR 503. A newspaper published an article containing extracts from a letter addressed to it by the secretary of a relief council attacking the local municipal council by reason of its refusal of relief to the plaintiff. The same article contained a statement in reply to the attack, prepared for

publication by the town clerk, which contained matters defamatory of the plaintiff. The plaintiff sued the newspaper for defamation. In the course of his judgment Latham CJ said (at 512):-

> "The plaintiff himself had chosen the public press for the purpose of giving publicity to his complaint and he cannot complain if the defendant uses the same medium for reply."

Starke J remarked (at 515):-

> "A person attacked has both a right and an interest in repelling or refuting the attack, and the appeal to the public gives it a corresponding interest in the reply. Occasions of this kind are privileged and communications made in pursuance of a right or duty incident to them are privileged by the occasion."

(See, per contra, the remarks of Dixon J at 520).

Before leaving Zillie's case, and for the sake of completeness, mention should be made of a brief reference to that decision which was made in Argus Printing and Publishing Co Ltd v Inkatha Freedom Party 1992(3) SA 579(A). In delivering this court's judgment in the last-

mentioned case E M Grosskopf JA said the following (at 590C-E):-

> "In principle, therefore, the Court is not limited to the accepted grounds of qualified privilege. Where public policy so demands, it would be entitled to recognise new situations in which a defendant's conduct in publishing defamatory matter is lawful. So, in Zillie v Johnson and Another...Coetzee J weighed up the interests of the public against those of the persons defamed, and held that the defendants (the editor and publisher of a newspaper) were entitled to publish defamatory matter where the public had, in the circumstances, a right to be informed of the facts."

The passage just quoted, so I consider, cannot be taken as signifying this court's approval either of the view expressed by Coetzee J in the Zillie case that the press occupied a special position or the "general principle" enunciated by the learned judge.

Before I turn to the many foreign authorities which were cited to us in the course of a lengthy argument, reference may usefully made at this stage to the

observations to be found (albeit in a different context) in regard to the concept of "the public interest" in the recent judgment of this court in Financial Mail (Pty) Ltd v Sage Holdings Ltd 1993(2) SA 451 (A). In delivering the majority judgment Corbett CJ said at 464C-D):-

> "(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known ....
>
> (2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest...."

In the United States of America media liability for defamation appears to have been shaped by constitutional guarantees of free speech and a free press; and the law stands in rather sharp contrast to that of most other countries in the English-speaking world. It was

therefore on the decisions of the courts and the writings of learned authors of England and the Commonwealth countries that counsel on both sides concentrated. We were referred to a long list of authorities.

I have considered all the authorities cited by counsel, but I find it unnecessary, for purposes of the present appeal, to embark upon any detailed discussion of them. They appear to me to reflect a fairly consistent pattern of judicial thought, and one unfavourable to the alternative defences pleaded in this case. I shall do no more than refer, in passing, to those dicta which appear to me to be pertinent to the issues under discussion. Before I do so it may be convenient to set forth briefly a number of broad propositions which in my opinion may be extracted from the relevant authorities. These appear to me to be the following:

(a) At common law there is no general "media privilege"; and there is no defence of "fair information on a matter of public interest." A journalist who obtains information reflecting on a public figure has no greater right than any other private citizen to publish his assertions to the world.

(b) The common law does not recognise a duty-interest relationship between a newspaper and its readers sufficient to support qualified privilege. Publication in the media is publication to the world; not everyone can be regarded as having a sufficient interest in the subject-matter. To

this rule there are limited exceptions, such as replies to public attacks, and publication in "crisis" cases, where speedy national warnings are necessary to avert possible disaster. (c) Although all privilege is based on the publication in question being "in the public interest", there is a palpable difference between that which is interesting to the public and what is in the public interest to be known. (d) A newspaper publication is not the subject of qualified privilege merely because it gives the public information concerning a matter in which the public is interested. Qualified privilege requires publication pursuant to a duty, whether legal, moral or social, and the existence on the part of its readers of a corresponding interest or right to receive the defamatory communication.

> This reciprocity is essential. It connotes a common legitimate interest which is more than idle curiosity in the affairs of others.

(e) The test of the existence of a duty to publish is an objective one, based on the standards of the community concerned: Would the great mass of right-minded persons in the position of the defamer have considered, in all the circumstances, that it was their duty to make the communication? The test is the common convenience and welfare of society.

(f) One function of a newspaper is to provide its readers with fair and accurate reports of proceedings, parliamentary, judicial and otherwise. Another function of a newspaper is to provide its readers with news of current events and gossip.

(g) The commercial incentive to increase circulation figures renders newspapers prone to the error of confusing what is in the public interest with the newspaper's private economic interest.

(h) In deciding whether a defamatory publication attracts qualified privilege the status of the matter communicated (i e its source and intrinsic quality) is of critical importance. In this connection obvious questions which suggest themselves (the examples given are not intended to be exhaustive) are: Does the matter emanate from an official and identified source or does it spring from a source which is informal and anonymous? Does the matter involve a formal finding based on reasoned conclusions, after the weighing and sifting of evidence, or is it no more than an ex parte statement or mere hearsay?

I proceed to consider some of the dicta from the various decisions upon which the propositions stated in (a) to (h) above are based. Blackshaw v Lord and another (supra) deals with the question whether the public at large has a legitimate interest in the publication of what is mere inference by a journalist. The judgment of Stephenson W contains (at 327 a-j) the following succinct statements of the circumstances in which a newspaper report in England is entitled to protection at common law:-

> "The question here is, assuming Mr Lord recorded Mr Smith's conversation with him fairly and accurately, did Mr Lord (and his newspaper) publish his report of that conversation in pursuance of a duty, legal, social or moral, to persons who had a corresponding duty or interest to receive it? That, in my respectful opinion, correct summary of the relevant authorities is taken from the Report of the Faulks Committee, p 47, para 184(a), repeated in Duncan and Neill p 98, para 14.01. I cannot extract from any of those authorities any relaxation of the requirements incorporated in that question. No privilege attaches yet to a statement on a matter of public interest believed by the publisher to be true in relation to which he has exercised

reasonable care. That needed statutory enactment which the Faulks Committee refused to recommend (See pp 53-55 paras 211-215). 'Fair information on a matter of public interest' is not enough without a duty to publish it ....Public interest and public benefit are necessary (cf s 7(3) of the 1952 Act), but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough.

The subject matter must be of public interest; its publication must be in the public interest. That nature of the matter published and its source and the position or status of the publisher distributing the information must be such as to create the duty to publish the information to the intended recipients, in this case the readers of the Daily Telegraph. Where damaging facts have been ascertained to be true, or been made the subject of a report, there may be a duty to report them (see eg Cox v Feeney (1863) 4 F & F 13, 176 ER 445, Perera v Peiris [1949] AC 1 and Dunford Publicity Studios Ltd v News Media Ownership Ltd [1971] NZLR 961), provided the public interest is wide enough (Chapman v Lord Ellesmere [1932] 2 KB 431, [1932] All ER 221). But where damaging allegations or charges have been made and are still under investigation (Purcell v Sowler (18V7) 2 CPD 215), or have been authoritatively refuted (Adam v Ward (1915) 31 TT,R 299; affd [1917] AC 308, [1916-17 J All ER Rep 157), there can be no duty

to report them to the public.

In this case, as counsel for the plaintiff points out, there is, when Mr Lord types his article, no allegation against the plaintiff which has been made good.... He may have been under a duty to inform the public of the £52m loss, but not to attribute blame to the plaintiff or to communicate information about his resignation, even if it was of public interest. The general topic of the waste of taxpayers' money was, counsel for the plaintiff concedes, a matter in which the public, including the readers of the Daily Telegraph's first edition, had a legitimate interest and which the press were under a duty to publish; but they had no legitimate interest in Mr Lord's particular inferences and guesses, or even in Mr Smith's and the defendants had' certainly no duty to publish what counsel for the plaintiff unkindly called 'half-baked' rumours about the plaintiff at that stage of Mr Lord's investigations.

There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information is so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs; but there is nothing of that sort here. So Mr Lord took the risk of the defamatory matter, which he derived from what he said were Mr Smith's statements and assumptions turning out untrue."

The matter of qualified privilege in relation to the liability of a broadcaster as a publisher of defamatory matter was one of the issues considered by the Federal Court of Australia (Smitners, Weaves and Pincus JJ) in Australian Broadcasting Corporation v Comalco Ltd 68 ALR (1986) 259. In rejecting a "public debate" argument raised on behalf of the appellant Neaves J in the course of his judgment endorsed the approach adopted by Stephenson LJ in Blackshaw v Lord and Another (supra). At 328 Neaves J said:-

> "The appellant's submissions involve the proposition that it is sufficient to constitute an occasion one of qualified privilege if it be shown that what is published can properly be characterised as the public discussion of matters germane to a general subject matter which can itself be classified as one of great public interest or concern.
>
> In my opinion, the authorities do not support the proposition for which the appellant contends. I respectfully adopt what was said by Stephenson LJ in Blackshaw v Lord, supra ...."

Pincus J made the following observations at 340:-

> "....a thorough review of the authorities .... suggests that only in unusual circumstances will defamation emanating from neither an official nor quasi-official source come under the cloak of privilege on the broad ground being discussed. Most of the cases in which the defendant's claim has succeeded have involved publications of material from a person or body connected with government, or with some institution having responsibility for the administration of an aspect of community affairs. Perhaps the most important examples are the decision of the Privy Council in Perera v Peiris, supra, and that of the House of Lords in Adam v Ward [1917] AC 309 ....The nature of the source is the best practical guide to the likely result, at least where the material is published at large...."

At 342 the same learned judge remarked:-

> "Despite a number of judicial denials that the categories are closed, it seems clear that the law has proceeded in this area with great caution and in such a way that the balance of authority is clearly against the existence of the privilege claimed by the appellant. Courts have evinced a strong reluctance to hold that the broad principle above supports the existence of a duty to publish any material not coming from or associated with an 'authoritative' source, particularly where the defamatory material is

> disclosed to the public at large. We were referred to no case in England or Australia in which there was held to be such a duty to publish such material to the public at large, in the public interest: it was not suggested that any of the established specific categories of common law privilege applied."

In Smith's Newspapers Ltd v Becker [1932-3] 47 CLR the plaintiff practised medicine in South Australia where he was riot registered so to practise. A newspaper article attacked the plaintiff, describing him as a person with a discreditable past who treated his patients in an incompetent manner, and whose treatment had in some cases resulted in the death of the patient. The newspaper sought unsuccessfully to rely on qualified privilege. In the course of his judgment (at 304) Evatt J said:-

> "There was no community of interest between the defendants and the general body of their readers which gave rise to any occasion for the communication to them of the imputations against the plaintiff. Communications of genuinely entertained opinions and suspicions to the proper State or professional authorities, by the defendants or any other person, might have given

rise to an entirely different situation....."

In Doyle v Economist Newspaper [1980] NILR 171 the defendant published an article concerning the appointment of the plaintiff as a county court judge implying that the appointment had not been made on merit. The freelance journalist, Miss Holland, who wrote the article, testified that it was based on interviews with senior members of the Bar and other eminent persons, but she declined to name her sources. It was held that although the quality of the county court bench was a matter in which the public had an interest there was no duty on the defendant to pass on to the general public views expressed in private discussions by unnamed persons which views were untested for reliability or motive. In ruling against the defendant Murray J (at 179E-180A) tested the matter in the following way:-

> "Put the matter the other way round. If Miss Holland had decided not to publish those views

> since they were, in effect, anonymous and untested for reliability or motive, who could possibly have said (with reason) that she was guilty of a breach of some recognisable duty? Moreover, if I approach the matter in the terms used by Pearson J in Webb's case, I unhesitatingly come to the conclusion that while the subject-matter of the words complained of, viz. the integrity and quality of the county court bench, was undoubtedly a matter in which the public had an interest, the status of the material received by Miss Holland and passed on to the public was certainly not such as to attract privilege to its publication. As regards some of the other matters dealt with in the words complained of, Miss Holland said her unidentified source was a judge at the highest level. In my view this makes not the slightest difference: the material in question was still in effect from an anonymous source and was not tested or probed in any way by any independent authority."

In the case before us the arguments on behalf of the respondents have laid heavy (and no doubt proper) emphasis on the public benefit and the right of the citizen to be informed by the press cm issues of burning importance. There are, of course, two sides to the coin. Before turning to the facts on which the alternative

defences rest, it is not inappropriate, I think, to quote briefly from the judgments of two eminent English judges.

In Campell v Spottiswoode (1863) 3 B & S 769 at 777 Cockburn CJ had the following to say on the topic:-

> "It is said that it is for the interests of society that the public conduct of men should be criticized without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men, and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation."

Much in the same vein is the following rhetorical question posed by Lord Macnaghten in Macintosh v Dun [1908] AC 390 at 400:-

> "Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters

of other people?"

So much for the law. It remains to apply the legal principles above discussed to the facts of the WM case in order to see whether the alternative defence has been established.

Although the WM article is a lengthy one the matter therein defamatory of the appellant represents a very small portion of the whole article. For the sake of convenience there will be repeated hereunder those paragraphs from the WM article which I have lettered (K) and (M)(3). They read as follows:-

(K) "According to self-confessed death squad leader Captain Dirk Coetzee poison was one of the methods used by the SA Police in dealing with ANC suspects.

He said bottles of whiskey were injected with poison prepared by the police forensic department and sent to Maputo to be given to ANC members and that an ANC suspect in detention in Port Elizabeth was poisoned."

(M)(3) "According to Coetzee, another senior police

> officer involved was Lieutenant-General Lothar Neethling, head of the South African Forensic Bureau, which is said to have prepared the poisoned whiskey allegedly sent to ANC members in Maputo.""

The first point to be noticed about the WM article's inculpation of the appellant is this. When Evans wrote the WM article he knew what Pauw had written in article VWB(1). In the latter (see the paragraph earlier lettered (B)(5)) Pauw had quoted Coetzee thus:-

(B)(5) "Tydens die verbranding van die twee terries het die veiligheidsmanne van Komatipoort aan my vertel hoe hulle sterk drank wat met gif gedokter is, onder ANC-lede in Maputo versprei. Die gif word met 'n mikronaald deur die prop in die bottels ingespult." (Emphasis supplied).

It is clear that in what he said to Pauw, Coetzee did not himself claim first-hand knowledge that poisoned liquor had been distributed among ANC members in Maputo. He related to Pauw no more than what he had been told by others at Komatipoort. What was no more than a hearsay statement

was nevertheless paraded in the WM article as a first-hand account by Coetzee himself. That the allegation in question in fact emanated from an anonymous source was not disclosed. A second point which may fairly be made is this. That portion of the WM article defamatory of the appellant might well have been expunged altogether, so I consider, wihout appreciably whittling down the purpose for which the article had been written.

These initial observations apart, it is clear, in my opinion, that the respondents in the WM case failed to establish that the defamation in question had been published on a privileged occasion. Concerning the WM article the learned trial judge remarked:-

> "Die besadigde en saaklike trant van die Weekly Mail-berig getuig van 'n bedoeling aan die kant van die skrywer (en 'n waarskynlike begrip by die leser daarvan) om 'n bydrae tot genoemde debat ['die wydlopend en voortslepende openbare debat rondom bewerings van magmisbruik tot op hoe vlak deur lede van die veiligheidsmagte'] te lewer. Die verwysing na die gif en die forensiese

> laboratorium (in die berig die buro genoem) was nie as 'n brok sensasie aangebied nie maar vervul 'n wesenlike rol in die saamgestelde artikel wat weer op sy beurt 'n rol wil speel in die debat. Die feit dat die eiser in die artikel rakelings getref is, is die prys wat betaal moet word ter bevordering van die openbare belang. Sy reg op die onskendbaarheid van sy reputasie moet wyk voor die groter reg van die gemeenskap om ingelig te word oor aangeleenthede wat die voortbestaan van die regsorde mag bedreig. Ondanks die feit dat die betrokke bewering nie as waar bevind kan word nie...."

I must confess, with deference, to uncertainty of mind as to the true import of the trial court's finding in the WM case. If the finding is intended to signify that the publication was not unlawful on the grounds that through its participation in a public debate in relation to a matter of great public concern the newspaper was providing information to which the public was entitled, then in my respectful opinion it is legally insupportable because the facts mentioned, without more, do not in our law afford immunity in respect of a defamatory newspaper

article.

If, on the other hand, the trial court's conclusion is more properly to be construed as a finding that the requirements of the traditional defence of qualified privilege were satisfied, then I must respectfully dissent therefrom. Having regard to the authorities examined earlier in this judgment I am driven to the conclusion that the matter defamatory of the appellant contained in the WM article was in no sense for the public benefit; and that it was not published in the discharge of any journalistic duty such as would be recognised by the mass of right-thinking people in the community. There was, in my view, no such community of interest between the respondents in the WM case and the readers of the WM newspaper as could attract the protection of qualified privilege. The status of the subject-matter communicated was nothing short of deplorable. Its sole

source was a disaffected and retired police officer who was a self-confessed murderer and thief. The sting of the defamation in the WM case derived not from what the source claimed as his own first-hand knowledge but from hearsay. There was not a tittle of evidence to suggest that before publication the slightest steps had been taken to test or verify Coetzee's allegations concerning the appellant. Neither the journalist concerned nor the editor of the WM found it either necessary or wise to testify to a belief in the truth of the allegations. In my opinion the readers of the WM had no possible legitimate interest in having communicated to them these untested, and largely hearsay, allegations by an informant whose credibility and motive alike were suspect. Applying the logical test indicated by Murray J in Doyle v Economist Newspaper (supra) one asks whether, had the respondents in the WM case upon due reflection decided not to publish as part of the article

that portion defamatory of the appellant, a suggestion might reasonably have been advanced that they had been guilty of a dereliction of journalistic duty. Any such suggestion, so I consider, must be dismissed as grotesque.

In my judgment both the defences raised by the respondents in the WM case failed; and the learned trial judge erred in granting judgment with costs in their favour.

(2) The defence of qualified privilege in the VWB case:

The same considerations which have already been mentioned in regard to the WM case apply largely also to the facts of the VWB case, and need not be here repeated. While it is true that in the VWB case what Coetzee told Pauw purported to be based on Coetzee's first-hand knowledge of the relevant events, it seems to me that the

status of the subject-matter in the VWB case is even less impressive than the subject-matter in the WM case. In the VWB case the sole informant was not only a self-confessed murderer and thief, but it was manifest to Pauw that Coetzee had often been untruthful in the past. In addition, and for the reasons detailed earlier in this judgment, insofar as Coetzee inculpated the appellant, his . story was riddled with inherent improbabilities.

On behalf of the respondents it was urged that so vast and widespread were the irregularities revealed by Coetzee's version, and so commanding was the position occupied by the appellant in the hierarchy of the SAP, that in consequence no proper State authorities remained to whom Coetzee's grave charges might effectively be addressed. Accordingly, so the argument proceeded, publication to the world at large remained the only realistic channel for obtaining redress. In my view there is no merit in this

argument. The appellant admittedly held a very senior and important position in the SAP, but there were officers in the SAP superior in rank to him. Having regard to the gravity of Coetzee's charges appropriate complaints could have been addressed either to the Commissioner of Police, or to the Minister of Law and Order; and, failing satisfaction in those quarters, the matter might suitably have been referred to the Cabinet itself.

In my judgment both the defences raised by the respondents in the VWB case failed; and the learned judge erred in granting judgment with costs in their favour.

(K) FINAL CONCLUSION:

In the result the appeal in each case must succeed.

I turn to the matter of the assessment of damages. In regard to the quantum of damages the evidence of the three witnesses called on behalf of the appellant to testify to his reputation went unchallenged and was accepted by the trial court. In these circumstances it would have been open to counsel, by agreement, to invite this court itself to determine the awards of damages in case the appeal should succeed. That might have been an expeditious course. It would have avoided' the further delay and the additional costs involved in referring the matter back to the trial court for the determination of damages. Such a course would furthermore eliminate the unfortunate possibility of a second appeal to this court following upon a determination of damages by the trial court.

The arguments addressed to us in the appeal were limited to the merits. The question of quantum was not dealt with; and counsel did not ask us to determine the damages in the appeal shoulu succeed. This statement involves no criticism of counsel. It is trite that the assessment ot damages lies peculiarly within the province of the trial judge. It follows that the suggestion, made by counsel on both sides, that if the appeal succeeded the matter should be sent back for damages to be fixed by the trial court was entirely proper.

In the ordinary course of events this court might well have been disposed to adopt the procedure so suggested. In the present case, however, in all the circumstances remittal to the trial court could prove inconvenient for all concerned. Subject to further argument thereon our prima facie view is that it would be more fitting that this court itself should assess the

damages to be awarded.

In the light of the above the undermentioned orders are made:-

(A) (1) The appeals succeed with costs to date hereof, such costs to include the costs consequent upon the employment of two counsel.

(2) The order of the trial court dismissing the plaintiff's claims with costs is set aside, and there is substituted for it the following declaration: "Die eiser is op genoegdoening geregtig."

(B) (1) Leave is granted to both parties to file further heads of argument. The heads of argument of the appellant must be filed by noon on 15 February 1994, and the heads of argument on behalf of

the respondents by noon on 15 March 1994. (2) In the further heads of argument counsel will be free, if so instructed, to advance reasons why the quantum of damages should be determined by the trial court rather than by this court, The further heads must in any case deal fully (i) with the quantum of damages against the eventuality that this court may decide itself to determine the damages; and (ii) deal fully with the matter of the costs occasioned by the proceedings subsequent to today's order and any other remaining issue of costs which may require determination.

(C) Failing a settlement between the parties in regard to each and every remaining issue not covered by the order in (A) above (including the issue of the costs of the trial), further argument in regard to the matters set forth in (B)(2) above will be heard by this court on a date to be advised by the registrar of this court.

G G HOEXTER, JA

Nesradt JA)
Nienaoer JA) Concur
Nicholas AJA)

J U D G M E N T

CORBETT CJ:

I have had the privilege of reading the judgment of my Brother Hoexter. I am in broad agreement with it and I concur in the order proposed by him.

I wish to make it clear that, in my view, this is one of those relatively rare cases where the probabilities are evenly balanced and, therefore, the case must be decided according to the incidence of the onus of proof. My Brother's judgment deals very fully with the credibility of the vital witnesses and the inherent probabilities. I intend merely to highlight the factors which particularly impel me to the view that in the end a probative equilibrium came about: that it is not possible to say with any degree of confidence who was telling the truth.

The case turns essentially on the mutually destructive stories of Coetzee and the appellant. Consequently their relative merits as witnesses are

matters of cardinal importance. The other evidence tends to be peripheral. And here the important point to be made is that the trial Judge had to adjudge the merits of Coetzee as a witness on the bare record of the evidence given by him on commission in London; and that in this respect this Court is in exactly the same position as the trial Judge. This aspect of the case makes it, in my experience, very unusual.

As regards the appellant's merits as a witness, I am in agreement with the criticisms thereof expressed by Hoexter JA, save that I take a more serious view than he apparently does of the appellant's misquotation of the record of the evidence given by him before the Harms Commission of Inquiry. I have carefully read and reread the relevant evidence and, subject to one qualification, I find it difficult to accept that the misquotation was anything but deliberate: an attempt by appellant to extricate himself from the difficulties created by his

initial insistence that Coetzee's ability to describe the appellant's home was derived from the video shots contained in the "Dispatches" television programme. The qualification is that the appellant was never confronted with this misquotation while in the witness-box and thus did not have the opportunity to explain it. In fact the misquotation passed unnoticed by everyone until the trial Judge picked it up while studying the record for the purpose of writing his judgment. It is thus not possible to make a decisive finding on this issue. I would, however, point out that there is a similar, though less extensive, misquotation later on in appellant's evidence. Purporting to quote from what he told the Harms Commission appellant stated:

> '"Ek het gesien dat hy daardie beskrywing kon gekry het deur net na televisie opname te kyk maar dat hy dan as dit kom by die detail heeltemal verkeerd is.'"

The quoted passage actually reads:

> "Ek het gesien dat hy daardie beskrywing kon gekry het deur net na die televisie-opname te kyk, maar dat hy dan as dit kom by die detail heeltemal verkeerd is." (My emphasis.)

Again this small, but significant, discrepancy passed unnoticed.

In weighing the two witnesses against one another one must place in the scales in favour of appellant and against Coetzee:

(1) Coetzee's character and previous record; his proven involvement in a series of heinous crimes; his utterly unscrupulous approach to what he did; his evident lack of any measure of contrition or regret; and his capacity for deception, mendacity and the fabrication of false evidence and his ingenuity in this

regard. (2) Other characteristics of Coetzee which emerge clearly from the record are an inquisitive interest in the affairs of others, particularly fellow members of the South African Police, an apparent knowledge of their affairs, an enjoyment derived from revealing discreditable facts about them and a penchant for embellishing his evidence with circumstantial detail.

(3) Coetzee's grudge against the police.

(4) The circumstances under which Coetzee decided to flee the country and his sudden espousal of the African National Congress. His previous disclosures to Welz tend, however, to negative this factor.

(5) The improbabilities of his story about the abortive poisoning of Peter and Vusi, which are

fully elaborated in my Brother's judgment and in my view, derive mainly from the unlikelihood (i) of a man in appellant's position lending himself to this scheme involving criminal conduct, (ii) of appellant's apparent ineptitude (in spite of his expertise in this field) in providing a "poison" which despite increased dosages had no effect whatever, (iii) of Coetzee requiring a poison at all when in the end the victims were shot, and (iv) of Coetzee requiring a poison which left no traces when the plan all along was to incinerate the corpses. (6) The real difficulty in fitting the visit by Coetzee and Vermeulen to appellant's home on Sunday, 25 October 1981 into the reconstruction of Coetzee's movements and duties over that weekend.

(7) The discrepancies in Coetzee's description of appellant's home and family circumstances and the absence of evidence concerning information emanating from the appellant which would have corroborated Coetzee's allegation that he was there on 25 October 1981.

On the other hand, in the scales in favour of Coetzee and against appellant are:

(8) What the trial Judge referred to as "die drie sentrale momente" i e Coetzee's ability to describe appellant's home, his ability to describe the forensic laboratory complex and the appellant's office, and the entry relating to appellant's telephone numbers in his pocket-book. These factors, taken together, are not conclusive, but they nevertheless constitute a probability in favour of Coetzee's version,

given the appellant's contention that, so far as he could recall, he had no contact with Coetzee at all relevant times. Of course, Coetzee could have visited the forensic laboratory and seen the inside of appellant's office on some occasion without appellant's knowledge; and he could similarly have seen appellant's home. And there are various arguments for and against the significance of these two "sentrale momenta" which I need not detail. Nevertheless, these two factors do trouble me when it comes to an acceptance of appellant's denial of any relevant contact between Coetzee and himself. This is further compounded by the late discovery of the entry in Coetzee's pocket-book (the third "sentrale moment") which at the very least suggests that at this time Coetzee had a reason to record for

 his own convenience appellant's office telephone numbers. One asks oneself "Why"? (9) The consideration that if Coetzee had wished falsely to implicate the appellant in poisoning episodes he could readily have devised a story less replete with inconsistency and improbability, and therefore more persuasive, than the one he told. The very bizarreness of his tale thus tends to give it the ring of truth. (10) The evidence of Mrs Coetzee (Coetzee's mother) concerning the visit to the forensic laboratory, which, though again not conclusive, raises a probability in Coetzee's favour. But in the end, as I have indicated, I am unable to find a preponderance of probability one way or the other and the case must, therefore, be approached on the basis that the allegations defamatory of the

appellant may or may not be true. The correct approach to onus is, therefore, of critical importance to my decision on the case.

I agree with my Brother Hoexter's judgment on the question of the onus of proof in regard to the defence of justification, i e truth and public benefit. I was the author of the judgment in the case of Borgin v De Villiers and Another 1980 (3) SA 556 (A). As my Brother points out, in that case the exact nature of the onus cast upon a defendant who raises the defence of qualified privilege did not arise for decision. The observations about onus in regard to privilege appearing on p 571 F-G were merely of an introductory nature and repeated what was said in O'Malley's case with reference to animus injuriandi (at 403 B-D) . Upon consideration I agree with what my Brother Hoexter has stated in regard to the dicta in O'Malley's case and the intended scope of Rumpff CJ's remarks about a "weerleggingslas". I, too,

satisfied that the true position in our law is that a defendant who relies upon the defence of truth and public benefit bears the full onus of proving that the defamatory statements are substantially correct. Were this not so, it would be a defence to say and prove that it was as likely as not that the defamatory imputation was true.

I also express my concurrence with the section in my Brother's judgment dealing with the further defence of newspaper privilege.

M M CORBETT
CHIEF JUSTICE