DEMMERS v WYLLIE AND OTHERS 1980 (1) SA 835 (A)

Citation 1980 (1) SA 835 (A)

Court Appellate Division

Judge Jansen JA, Muller JA, Corbett JA, Diemont JA and Botha AJA

Heard September 18, 1979

Judgment November 29, 1979

Annotations Link to Case Annotations

A

Flynote : Sleutelwoorde

Defamation - What constitutes - Article in a newspaper - Use of words B 'reasonable person' or 'reasonable man' in connection with question whether the ordinary reader would understand the article to have a particular meaning - Who such 'reasonable' person or man is - Article capable of more than one meaning - Approach to be adopted - Plaintiff alleging article defamatory in that it meant that he used his party political affiliations to obtain unduly favourable treatment from a C Government Department - Ordinary and reasonable reader would not have read article as meaning such - Particulars of claim so worded that article was alleged to mean that plaintiff played an active role relative to Department's favours - Plaintiff cannot rely on a meaning alleging a mere D passive role of knowingly receiving undue favours - Appeal against dismissal of plaintiff's claim dismissed.

Headnote : Kopnota

The words 'reasonable person' or 'reasonable man' as used in some decisions of the Courts in connection with the determination, in an action for defamation, whether the ordinary reader would understand an article to E have a particular meaning is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto.

In a civil case the degree of proof is a preponderance of probabilities and that is the approach which should be adopted when an article is capable of more than one meaning and the Court has to decide which meaning F the article would have had to the ordinary reader. Accordingly the test adopted by COLMAN J in *Channing v South African Financial Gazette Ltd and Others* 1966 (3) SA 470 (W) at 473E, namely: 'If, upon a preponderance of probabilities, it is found that to those readers the article bore a defamatory meaning, then (subject to any defences which may be established), the plaintiff succeeds, even though there is room for a non-defamatory interpretation: if not, the plaintiff fails', is the correct test.

G Appellant had instituted action in a Local Division for damages for defamation arising out of an article appearing in the *Sunday Tribune*, a

Sunday newspaper. The article appeared under the headline 'Nat scoops huge land deal' and went on to relate that appellant, who had become well known as a keen and energetic supporter of the National Party, had presented R10 000 to a fund for the Party's forthcoming electioneering campaign. The H article further related that appellant and his wife had sat at the Prime Minister's table 'when Mr Vorster was handed a cheque for R50 000 at a banquet... to mark the launching of the fund'. The article then gave details of 'bargains' the appellant had obtained from the Department of Community Development, including the purchase of land for R36 000 which had a market value of R700 000, another purchase of 15 lots of expropriated land for R28 000 which had a municipal valuation of R83 000, which was alleged to be less than its market value. Appellant alleged in his particulars of claim that the article was intended to mean and was understood to mean by readers of the newspaper that (i) appellant had used, and had in the past used, his party political affiliations to obtain unduly favourable treatment from a

Government Department, and (ii) he donated R10 000 to a National Party Fund in consequence of undue favours received from a Government Department. As to (ii) the Local Division found that, having regard to the A context in which this part of the article appeared, no ordinary or reasonable reader would have read the article as meaning that appellant's gift to the Party had been in consequence of the Department's favours to him. As to (i) the Local Division found that the particulars of claim imputed to appellant not merely a passive role but an active role in relation to the Department's favours, that the articles did not bear that meaning and that, even on the basis of the appellant's said role being a B passive one, the article was not defamatory of appellant. Appellant's claim was accordingly dismissed. In an appeal,

Held, as to (ii) (JANSEN JA and DIEMONT JA dissenting), that no ordinary and reasonable reader would have read the article as meaning that appellant's gift to the Party had been in consequence of the Department's favours to him.

Held, further, as to (i) (JANSEN JA and DIEMONT JA dissenting), that, as the relevant sub-paragraphs of the particulars of claim were worded, a C meaning was given to the selected parts of the article relied upon by appellant which meaning attributed to appellant an active role relative to the Department's favours and not a mere passive role of knowingly receiving undue favours.

Held, further, that it would be unfair to respondents if the appellant was permitted to rely on the second of the aforementioned meanings which was never pleaded and, as the article did not bear any of the meanings pleaded, judgment was correctly entered for respondents.

D The decision in the Durban and Coast Local Division in *Demmers v Wyllie and Others* 1978 (4) SA 619 confirmed.

Case Information

Appeal from a decision in the Durban and Coast Local Division (DIDCOTT J). The facts appear from the judgments of MULLER JA, DIEMONT JA and the report in 1978 (4) SA 619.

E *F H Grosskopf SC* (with him *J van der Berg*) for the appellant: The appellant relies on the primary meaning of the words used in the headline to the article and in the two extracts from it. The appellant will therefore have to satisfy this Court that the said words conveyed to the F ordinary newspaper reader one or more or all of the defamatory imputations attributed to those words in the particulars of claim. The test is objective. *Botha en 'n Ander v Marais* 1974 (1) SA at 48E. The Court must consider how an ordinary newspaper reader would judge the article. *Johnson v Rand Daily Mails* 1928 AD at 204; *SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA at 616G. The reasonable reader is not an astute lawyer or a G critical reader, but an ordinary reader reading the article as articles in a newspaper are usually read, and not proceeding to a detailed analysis of the article. *Johnson v Rand Daily Mails (supra); Basner v Trigger* 1945 AD at 35; *SA Associated Newspapers and Another v Estate Pelser* 1975 (4) SA at 811H. 'The enquiry relates to the manner in which the article would have H been understood by those readers of it whose reactions are relevant to the action, and who are sometimes referred to as the 'ordinary readers'. If, upon a preponderance of probabilities, it is found that to those readers the article bore a defamatory meaning, then (subject to any defences which may be established) the plaintiff succeeds, even though there is room for a non-defamatory interpretation...' *Channing v SA Financial Gazette Ltd and Others* 1966 (3) SA at 473E - F. The ordinary reader of the article in question would be inclined to browse through it once only, gaining an overall impression from it. The ordinary reader of a popular Sunday newspaper is a cursory

reader who would probably skim a lengthy article crammed with dreary detail. Such a reader would, however, be inclined to attach a significant meaning to the party political affiliations of the person who had managed A to scoop a huge land deal in Queensburgh and who had obtained other bargains in Community Development expropriated land in Queensburgh - particularly where the prominent headline turned the spotlight on the politics of that person. The most obvious conclusions of the ordinary reader would probably have been along the following lines: (i) that the appellant had been the recipient of undue favours from the Department of B Community Development; (ii) that there was no real distinction between a Government Department such as the Department of Community Development and the Party which had the political control; (iii) that, because of the appellant's allegiance to the National Party, the Department of Community Development had done him undue favours; (iv) that there was a causal C connection between the appellant's donation and the undue favours which he had received. In the context in which it appeared, the statement relating to the appellant's donation to the National Party was intended and was understood by ordinary readers

of the newspaper to mean exactly that which is pleaded in para 8 *(d)* of the particulars of claim, namely that the D appellant donated R10 000 to a National Party fund in consequence of undue favours received from a Government Department.
The trial Judge came to the conclusion that, according to the article, the appellant's political sympathies had indeed won him the undue favours of the Department. The Judge pointed out, however, that the appellant's case E went beyond the mere passive receipt of favours. According to the trial Judge the appellant's case, as set forth in paras 8 *(b)* and 8 *(c)* of the particulars of claim, was that an active role in obtaining the Department's favours had been imputed to him in the article; he was accused of having 'used' his party political affiliations to obtain undue F favours from a Government Department. The trial Judge further indicated that the manner in which the appellant had 'used' his connection with the Party to gain the Department's favours, as the article woudl allegedly have been understood, was not specified in the particulars of claim. In the result the trial Judge held that the selected material bore none of the meanings, pleaded in sub-paras 8 *(b)* and 8 *(c)* of the particulars of G claim. The trial judge erred in his findings. To 'use' one's party political affiliations to one's advantage does not necessarily presuppose an active role on one's part. By receiving undue favours knowing that they are extended because of one's party political affiliation can amount to passively 'using' that affiliation to obtain those favours. This passive H way of 'using' such an affiliation is akin to the dictionary meaning 'to avail oneself of', which is given as one of the meanings or as a synonym of the verb 'to use'. *The Shorter Oxford English Dictionary* 1977; Webster *Third New International Dictionary* 1971; *The American Heritage Dictionary of the English Language* 1969. The ordinary reader would have understood that the appellant, in obtaining such undue favours as a result of his party political affiliations, had in fact availed himself of or used his party political affiliations to obtain unduly favourable treatment from a Government Department, as set out

in para 8 *(b)* of the particulars of claim. The use of the word 'scoops' in the headline to the article would probably have suggested to the A ordinary newspaper reader that the appellant had obtained undue favours to the exclusion of other competitors. As to the popular meanings which have been attached to the verb 'to scoop', see *The Shorter Oxford English Dictionary* 1977. The statements relied upon by the appellant were defamatory of the appellant inasmuch as they tended to lower the appellant in the estimation of right-thinking members of society generally.
B In assessing the appellant's damages, regard must be had to the content of the defamatory article; the appellant's standing (*Muller v SA Associated Newspapers Ltd* 1972 (2) SA at 595A); the extent of the publication (*Norton and Others v Ginsberg* 1953 (4) SA at 550F - G; *SA Associated Newspapers* C *Ltd v Yutar* 1969 (2) SA at 455B - D; *Muller v SA Associated Newspapers Ltd (supra));* the subsequent conduct of the respondents and that the defendants have not apologised nor remedied

the defamation in any other way (*Black and Others v Joseph* 1931 AD at 146; *Gelb v Hawkins* 1960 (3) SA at 693D - E; *Buthelezi v Poorter and Others* 1975 (4) SA at 613G, 615H; the recklessness of the publication.

D *K R McCall SC* (with him *M J D Wallis*) for the respondents: As to the meaning of the article, the test is an objective one in which the Court endeavours to ascertain the view of the ordinary, reasonable man in the position of a reader of the *Sunday Tribune. Sutter v Brown* 1926 AD at 166 - 167; *Botha en 'n Ander v Marais* 1974 (1) SA at 48D - F. Although it is correct that the Court must not attribute to the ordinary reader a E tendency towards a critical analysis of the article, it must, nevertheless, assume that the reader read the whole of the article and that he read the words complained of in their context. *Johnson v Rand Daily Mails* 1928 AD at 204; *Young v Kemsley and Others* 1940 AD at 282; *Tweedie v Eksteen* 1942 AD at 231; *Coulson v Rapport Uitgewers (Edms) Bpk* F *1979 (3) SA at 294F - 295A. If the words complained of are capable of more than one meaning, it is not permissible to adopt a defamatory interpretation in preference to non-defamatory interpretation. The test is whether, upon a preponderance of probabilities, the ordinary reader would, not might, have understood the words in a defamatory sense. Conroy v Nicol and Another* 1951 (1) SA at 663C - D; *Channing v South African Financial* G *Gazette Ltd and Others*1966 (3) SA at 473C - F; *Minister of Justice v SA Associated Newspapers Ltd* 1979 (3) SA at 474G - 475A. The Judge in the Court *a quo* erred in finding that the article and, in particular, the words relied upon by the appellant, would probably have suggested to the ordinary reader that, because of the appellant's alleginance to the H National Party, the Department of Community Development had done him undue favours. The word 'undue' is defined in the *Shorter Oxford English Dictionary* 3rd ed at 2296. The heading 'Nat scoops huge land deal' obviously refers to the appellant's purchase of land, and, in particular, the 'plum parcel', which was put up for sale at a public auction. There is no suggestion there of any favouring of the appellant, much less 'undue' favouring. There is nothing in the reference to the appellant having 'obtained other bargains in Community Development expropriated land in Queensburgh' to suggest that those bargains were 'undue favours' from the Department of Community Development

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and, in the context of the article as a whole, the ordinary reader would probably have inferred that these bargains were obtained by the appellant in the same way as he obtained the 'plum parcel', ie in competition with A other prospective purchasers, not as a result of any favouritism, but as a result of the Department of Community Development's system of selling land. The ordinary, reasonable reader would have regarded the article as being an attack upon the Department of Community Development's policy of expropriating land and re-selling it at low prices with the effect that it had 'not just flooded, but completely drowned a weak market' and would B have regarded the reference to the appellant's

association with the National Party as being intended to point to the fact that amongst others, he, an enthusiastic supporter of the governing party responsible for the activities of the Department of Community Development, was able to reap the benefits of the Department's policy. In any event, even if the C ordinary reader would have seen a causal connection between the appellant's enthusiasm for the Party and his transactions with the Department, that connection does not lead to the necessary inference that the appellant's transactions with the Department were 'bargains' which had been allowed on political grounds, or that they involved 'undue favours'. There is nothing in the article which suggests that the appellant had D 'used' his party political affiliations in his dealings with the Department of Community Development. It was not open to the appellant to advance the contention that he had been defamed because he had been portrayed as the mere recipient of undue political favours, since it was not alleged that the article was defamatory in that particular respect. *Sachs v Werkerspers Uitgewersmaatskappy (Edms) Bpk* 1952 (2) SA at 272H - E 273B; *Gayre v SA Associated Newspapers Ltd* 1963 (3) SA at 378H - 379A; *Marais v Steyn en 'n Ander* 1975 (3) SA at 486B - C; *HRH King Zwelithini of KwaZulu v Mervis and Another* 1978 (2) SA at 524E - H. Even if it was open to the appellant to advance this contention, there is no substance in it. There is nothing in the words complained of, read in their context, to F suggest that the appellant had received any favours whatsoever from the Department of Community Development; or that the bargain prices paid by the appellant were paid as a result of anything other than the Department of Community Development's policy in regard to the sale of expropriated land; or that the bargains received by the appellant were in any way G 'undue', particularly as it appears from the article that people other than the appellant had purchased land at bargain prices from the Department of Community Development. In any event, a mere charge that the H appellant had received undue favours from the Department because of political bias towards him would not have been defamatory of the appellant.

Grosskopf SC in reply.

Cur adv vult.

Postea (November 29).

Judgment

JANSEN JA: I respectfully agree with my Brother DIEMONT that the appeal should succeed.

MULLER JA

In interpreting a newspaper article, and determining its implications, the standard to be applied, I suggest, is that of the average ordinary reader A of that newspaper: how, on the probabilities, would he have understood the article? In my view abstract and ideal qualities of being balanced ('ewewigtig'), right-thinking ("regdenkend") and reasonable ("redelik") - if 'reasonable' be understood in the sense of 'sound of judgment' - should only be ascribed to the reader and should only come into play (if at all) B when the subsequent question is to be answered, viz

whether the meaning attached to the article by the average ordinary reader (including the implications seen by him) is to be considered to be defamatory and therefore actionable. (Cf the views expressed by me in agreeing with the minority judgment of my Brother VILJOEN in *SA Associated Newspapers Ltd en 'n Ander v Samuels* 1979 AD, 29 September.)*

C I agree that the ordinary reader would understand the article in question as found by my Brother DIEMONT. I also agree that so understood the article is defamatory. D

Judgment

MULLER JA: The appellant, a director of companies of Westville, Natal (hereinafter referred to as the plaintiff), sued the respondents, who are, respectively, the editor, the printers and the publishers of a weekly newspaper, the *Sunday Tribune* (hereinafter referred to as the defendants), in the Durban and Coast Local Division for payment of a sum of R10 000 as damages for alleged defamation. The said action arose as a E result of an article which appeared in the *Sunday Tribune* of 19 December 1976 in which article reference was made, *inter alia*, to certain purchases of land by plaintiff or by companies in which plaintiff had a financial interest from the Department of Community Development.

DIDCOTT J, at the end of the case, granted judgment for the defendants F with costs. His written judgment is reported under the heading *Demmers v Wyllie and Others* in 1978 (4) SA 619.

The plaintiff is now before this Court on appeal.

Because the trial Court's reported judgment contains a complete statement of the facts of the case and the reasoning of the Court in coming to the conclusion to which it did come, it is necessary, for the purposes of this G judgment, to restate only certain facts and the findings of the trial Judge on certain aspects of the case. Unless otherwise stated all references in this judgment are to the trial Court's reported judgment.

The portions of the article in question on which the plaintiff based his case were the following:

H *(a)* The headline on the first page of the newspaper reading 'Nat scoops huge land deal' and

(b) the following statements in the article:

'(i) After gaining his South African citizenship, Mr Demmers became well known as a keen and energetic supporter of the National Party. Last month he presented R10 000 to the John Vorster Fund for the national Party's forthcoming electioneering campaign.

Mr and Mrs Demmers sat at the Prime Minister's table when Mr Vorster was handed a cheque for R50000 at a banquet in Durban to mark the launching of the fund.

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(ii) Mr Demmers, through Ilco Homes and Demmal Properties, has obtained other bargains in the Community Development expropriated land in Queensburgh. In 1972 Ilco bought 15 lots for R28000. The current municipal valuation of R83 000 is regarded by a A number of real estate

agencies (to be) less than the land's market value. In 1973, Demmal Properties bought two industrial lots for R35 700. The present price for equivalent land in the area is about R100 000.'

Referring, in his particulars of claim, to the said headline and statements, the plaintiff averred (in para 8):'The said words, in the context of the aforesaid article, were wrongful, malicious and defamatory of the plaintiff, in that they were intended and were understood by readers of the aforesaid newspaper to mean that the plaintiff's conduct in and/or surrounding the acquisition of land from the Department of Community Development was dishonest and/or improper in one or more or all of the following respects:

(a) he obtained, for R36 000, land with a market value of about R700 000; and/or

(b) he used, and had in the past used, his party political affiliations to obtain unduly favourable treatment from a Government Department; and/or

(c) he used his party political affiliations to obtain favourable treatment from a Government Department, to the exclusion of other competitors; and/or

(d) he donated R10 000 to a National Party fund in consequence of undue favour received from a Government Department.'

It should be mentioned here that, at a conference in terms of Rule 37, the plaintiff admitted that the

'facts set out in part 8 *(a)* of the particulars of claim are not, by themselves, defamatory'.

The learned trial Judge dealt with this admission (at 622A - B of his reported judgment) and remarked that 'para 8 *(a)* has fallen away for all practical purposes...'. On appeal counsel for the plaintiff said that the learned Judge's remark was not entirely correct. Counsel explained that what had been admitted at the pre-trial conference was that the facts mentioned in para 8 *(a)* of the particulars of claim did not in themselves constitute a defamatory statement. Those facts, however, still stood and had to be considered when dealing with the allegations in sub-paras *(b)*, *(c)* and *(d)* of para 8 of the particulars of claim. In any event, as the learned trial Judge saw the matter, the issues to be decided at the trial were the following:

'(1) Did the headline to the article and the extracts from it which I have reproduced (also quoted above) bear the meanings attributed to them in paras 8 *(b)*, 8 *(c)* and 8 *(d)* of the particulars of claim, or any of them?
(2) If so, did such meanings or meaning defame the plaintiff?
(3) If so, what damages would fairly compensate the plaintiff for the harm thereby done to him?'

(Reported judgment at 623H.) Before I come to deal with the findings of the Court *a quo* relative to the above issues and the grounds upon which the said findings were attacked on appeal, it is, I think, advisable to deal first with a few questions of law on which argument was addressed to

us on appeal. These questions concerned the correct approach to be adopted in determining whether the words in question conveyed to the ordinary newspaper reader one or more or all of the defamatory imputations attributed to those words in paras 8 *(b)*, 8 *(c)* and 8 *(d)* of the particulars of claim.

In the first place counsel for the plaintiff contended on appeal that the test is an objective one. There can, I think, be no doubt on this point. In *Botha en 'n Ander v Marais*1974 (1) SA 44 (A) OGILVIE THOMPSON CJ B stated specifically, at 48E, 'Die toets is objektief...'. That view is, in my opinion, correct and was not in any way questioned before us.

Another matter which arose in discussion before us was the use, in some decisions, of the words 'reasonable person' or 'reasonable man' in connection with the determination whether the ordinary reader would understand an article to have a particular meaning. In his judgment the C learned trial Judge dealt with this matter at 624F - 625A. He said, *inter alia:*

'The standard is that of the ordinary reader instead, who has no legal training or other special discipline. He is taken to be a reasonable person of average intelligence and education.'

D For other decisions in which the words 'reasonable person' or 'reasonable man' are referred to see *Young v Kemsley and Others* 1940 AD 258 at 282; *SA Associated Newspapers Ltd v Schoeman*1962 (2) SA 613 (A) at 616G; *South African Associated Newspapers Ltd and Another v Estate Pelser*1975 (4) SA 797 (A)at 811A; *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*1977 (3) SA 394 (A) at 408D; *Coulson v Rapport Uitgewers (Edms) Bpk*1979 (3) SA 286 (A) at 294F.

E The question which arises is who is the 'reasonable person' or 'reasonable man' which these decisions had in mind. In *Young v Kemsley and Others (supra* at 282) TINDALL JA said:

'A member of the audience cannot be said to be a reasonable person of ordinary intelligence if he seizes on certain words and ignores others.'

F And in *SA Associated Newspapers Ltd v Schoeman (supra*) STEYN CJ said, at 616G:

"Die maatstaf vir die aanwesigheid van laster is naamlik die oordeel van die redelike leser met normale verstand en ontwikkeling."

In the case *Suid-Afrikaanse Uitsaaikorporasie v O'Malley (supra*) the present CHIEF JUSTICE said, at 408D:

G "By die vraag of wat die aanhoorder van die nuusberigte sou kon gedink het, is die maatstaf die fiktiewe, normale, ewewigtige, regsinnige en redelike mens."

The word "regsinnige" in the passage just quoted should read "regdenkende" (see *Coulson v Rapport Uitgewers (Edms) Bpk (supra* at 295A)).

H From the above it is clear, I think, that the words 'reasonable person' or 'reasonable man' referred to in the decisions cited is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto.

Then there was some discussion before us as to the approach which should be adopted where an article is capable of more than one meaning. In this regard our attention was drawn to the following passage in the judgment of COLMAN J in *Channing v South African Financial Gazette Ltd and Others*1966 (3) SA 470 (W) at 473E:

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'The enquiry relates to the manner in which the article would have been understood by those readers of it whose reactions are relevant to the action and who are sometimes referred to as the 'ordinary readers'. If, upon a preponderance of probabilities, it is found that to those readers the article bore a defamatory meaning,

then (subject to any defences which A may be established), the plaintiff succeeds, even though there is room for a non-defamatory interpretation: if not, the plaintiff fails (see *Gluckman v Holford* 1940 TPD 336).'

Our attention was also drawn to a recent decision *Minister of Justice v SA Associated Newspapers Ltd and Another* 1979 (3) SA 466 (C) in which VAN ZIJL JP stated at 474G - 475A:

B 'In the first place the words complained of do not directly charge or accuse the Minister of a crime or fault, nor do they directly involve him with any accusation or charge. If the words do any of these things they must do it by implication. For the words to be defamatory in such circumstances the implication must be one that must inevitably be drawn by an ordinary reasonable reader. The Minister says this is exactly what has happened, the words involve him 'with the so-called Information scandal' C and the ordinary reasonable reader may reasonably come to such a conclusion. It is not sufficient that the words *may* cause the ordinary reasonable reader to come to such a conclusion. They *must* cause the ordinary reasonable reader to come to such a conclusion. The words in fact are such that they cause an ordinary reasonable reader to come to other conclusions that are not defamatory, eg that the words the Minister wished to have cleared were a statement that dealt with some matter unconnected 'with the so-called Information scandal' but were politically embarrassing D to him and which, if published, would mean the end of his political career for instance as a member of his party. The words are therefore not *per se* defamatory.'

In my opinion the test applied by COLMAN J is the correct test. In a civil case the degree of proof is a preponderance of probabilities and that, I E think, is the approach which should be adopted when an article is capable of more than one meaning and the Court has to decide which meaning the article would have had to the ordinary reader.

I come now to the finding of the trial Court relative to the allegations in sub-paras *(b), (c)* and *(d)* of para 8 of the particulars of claim. It will be convenient to deal first with sub-para *(d)* in which it was F averred that the article in question was intended to mean and was understood by readers thereof to mean that plaintiff donated a sum of R10 000 to a National Party Fund in consequence of undue favours received by him from the Department of Community Development.

At 626H - 627D of his reported judgment, DIDCOTT J dealt with the fact G that the National Party and the Department of Community Development are two separate entities and with the attitude of defendant's counsel at the trial with regard to that matter.

The learned Judge said that a concession made by counsel for the defendant on this aspect of the case

'removed the most effective obstacle to the conclusion that, according to H the article, the plaintiff's political sympathies had indeed won him the undue favours of the Department'.

This conclusion is in effect a restatement of a finding made earlier in the judgment, at 625B, namely:

'Although the matter is by no means free from doubt, I consider that the article, construed thus, would probably have suggested to the ordinary reader that, because of the plaintiff's allegiance to the National Party, the Department of Community Development had done him undue favours.'

The learned Judge continued to say, at 627E:

'The plaintiff's case, however, went beyond that limited conclusion. An active role in relation to the Department's favours, and not merely a passive one, was said to have been imputed to him. He was accused, so he has complained, of having 'used' his association with the Party to obtain A the favours, and of having rewarded the Party in turn for them. In my opinion neither complaint has any merit.'

The learned Judge then dealt first with the second of the matters just stated, namely the alleged reward to the Party, and came to the following conclusion, at 627H - 628A:

B 'When all is said and done, I can find nothing at all in the article which would have suggested to the ordinary reader that the plaintiff's gift to the Party had been in consequence of the Department's favours to him.'

On appeal before us counsel for the plaintiff attacked the learned Judge's finding on this aspect of the case and he addressed various arguments

to C us in that regard. He said, *inter alia*, that there would have been no real sense in mentioning the plaintiff's donation to the Party if it had no connection with any of the other issues. The reason why the donation was mentioned in the article, as found by the Court *a quo*, was clearly to demonstrate that the plaintiff was a keen and energetic supporter of the Party. I am in entire agreement with that finding. It was also for that D very reason that mention was made in the article of the fact that the plaintiff and his wife sat at the Prime Minister's table when a donation was made to the Party.

I do not think that any purpose will be served by dealing in detail with counsel's arguments addressed to us on this aspect of the case. It is only E necessary, I think, to say that, having regard to the manner in which mention was made of the donation, and the very context in which it appears (see in this regard that part of the article quoted above concerning the plaintiff's Party affiliations) no ordinary and reasonable reader would have read the article as meaning that the plaintiff's gift to the party had been in consequence of the Department's favours to him.

F I come to deal next with the averments in sub-paras *(b)* and *(c)* of para 8 of the particulars of claim which were to the effect that the plaintiff had used his party political affiliations to obtain unduly favourable treatment from the Department of Community Development.

I have earlier in this judgment indicated that it was the view of the G trial Court that, according to the article in question, the plaintiff's political sympathies had indeed won him the undue favours of the Department. I have also indicated, by quoting from the judgment of the trial Court, that it was the view of the said Court that what was said in the particulars of claim to have been imputed to the plaintiff was not merely a passive role but indeed an active role in relation to the H Department's favours. The trial Judge dealt with this matter at 628 of his reported judgment where he stated, with reference to the word 'used' in sub-paras *(b)* and *(c)* of para 8 of the particulars of claim:

'The manner in which the plaintiff had 'used' his connections with the Party to gain the Department's favours, as the article would allegedly have been understood, was not specified in the particulars of claim. Such 'use' must, however, have consisted of his procurement, solicitation or encouragement of the favours in some or other way which had exploited his link with the Party.'

He then dealt with the headline and the passages in the article relied upon by plaintiff and came to the conclusion that the said selected material

bore none of the meanings pleaded in sub-paras *(b)* and *(c)* of para 8. There then follows a passage in the judgment reading,

'Mr *Grosskopf* submitted that... the plaintiff had nevertheless been A defamed by his portrayal as the mere recipient of undue political favours. Indeed, this became the point around which the argument in the case revolved most intensely.

I am not altogether sure that it was open to Mr *Grosskopf* to advance the contention. Para 8 did not allege that the article was defamatory in that particular respect. Perhaps, however, this was not an independent charge, but a component of the others which was therefore covered by the pleadings. That, at any rate, is what I shall assume. The point will therefore be considered.'

B The Court *a quo* came to the conclusion that, even in the limited respect alleged, the article was not defamatory of the plaintiff and judgment was entered for the defendants.

Very much the same argument was addressed to us on appeal. Counsel for the plaintiff contended that the learned trial Judge erred in his findings relative to the meaning of sub-paras *(b)* and *(c)* of para 8 of the C particulars of claim. Crisply stated counsel's submission was (I quote from his heads of argument):

'To 'use' one's party political affiliations to one's advantage does not necessarily presuppose an active role on one's part. By receiving undue favours knowing that they are extended because of one's party political affiliation can amount to passively 'using' that affiliation to obtain those favours.'

D And, in support of that submission counsel argued that this passive way of 'using' such affiliation is akin to the dictionary meaning 'to avail oneself of'. He referred to certain dictionaries.

Counsel for the defendant, on the other hand, submitted, *inter alia*, that it was not open to the plaintiff to advance the contention that he had E been defamed because he had been portrayed as a mere recipient of undue political favours, since it was not alleged in the pleadings that the article was defamatory in that particular sense. In this regard counsel for the defendant referred to the decided cases mentioned by the trial Judge in his judgment at 622G - H. The last of these cases is *HRH King* F *Zwelithini of KwaZulu v Mervis and Another*1978 (2) SA 521 (W). In the said case McEwan J, at 524G, said, with reference to the said decisions relied upon by counsel:

'Those cases indicate that, once a plaintiff has selected the meanings of the offending words upon which he relies, he is bound by that selection and, if he should fail to establish that the words bore or bear such meaning or meanings, he cannot then fall back on any other defamatory meaning or meanings which he contends that the words bear *per se*, unless Ghe has pleaded the selected meanings as an alternative to a general allegation that the words are defamatory *per se.'*

This proposition was not challenged before us.

I agree with the trial Court that as sub-paras *(b)* and *(c)* of para 8 of the particulars of claim are worded a meaning was given to the selected H parts of the article relied upon by the plaintiff which meaning attributed to the plaintiff an active role relative to the Department's favours and not a mere passive role of knowingly receiving undue favours. I am also of the view that it would be unfair to the defendant if the plaintiff were permitted to rely on the second of the aforementioned meanings which was never pleaded. In this regard counsel for the defendant drew attention to the fact that special defences of justification and fair comment were pleaded in the alternative but that both these defences were withdrawn, the one before trial and the other at its start. And, said counsel, if the

plaintiff had made it clear that his case was that he had been defamed because the article alleged a mere passive role of knowingly receiving A undue favours from the Department, the special defences might not have been withdrawn. I think that there is substance in this argument.

For the same reasons as stated by the trial Court it is my conclusion that the article in question does not bear any of the meanings pleaded in sub-paras *(b)* and*(c)* of the particulars of claim. It follows that, in my opinion, judgment was correctly entered for the defendants.

B I may add that I am inclined to agree with the trial Court that the article in question would probably have suggested to the ordinary reader that, because of the plaintiff's allegiance to the National Party, the Department of Community Development had done him undue favours. But there is, in the circumstances aforestated, no need to express a definite view on this point.

C The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

CORBETT JA and BOTHA AJA concurred in the judgment of MULLER JA. D

Judgment

DIEMONT JA: I have read my Brother MULLER's reasons for dismissing the appeal in this case but I do not agree with the conclusion to which he has come. I think there is merit in the appeal and that it should succeed for the reasons which follow.

The article which led to this dispute related to the sales of expropriated E land by the Department of Community Development. The fact that the sales were said to have been conducted inefficiently hardly rendered the story of sufficient interest to find a place on the front page of a national Sunday newspaper, the*Sunday Tribune*. However, the appellant was linked with these land transactions in such a manner as to convey to the reader F that the news was sensational. Banner headlines in heavy type proclaimed that 'Nat scoops huge land deal'. The reader who perused the column on the front page and the four columns on the third page of the newspaper would find items of information presented in a disorderly sequence but which nevertheless did not dispel the impression of sensationalism which the headline created. He would learn that the 'Nat' who had 'scooped (the) G huge land deal' was the appellant, that he was a man famous in the building industry (a fact emphasised in a sub-heading) and that he controlled a number of construction companies. It was stated further that after gaining South African citizenship he had become 'well known as a keen and energetic supporter of the National Party', that he had presented H R10 000 to the party's electioneering campaign and had recently sat at the Prime Minister's table at a banquet to mark the launching of a political fund. Only after the reader had been conditioned by all this information was he told of the appellant's success in purchasing land from a government department - the Department of Community Development. It was alleged that he had bid R15 000 for a 'plum parcel' of land comprising five lots at an auction. This bid was refused but a subsequent offer of R36 000 was accepted. The reader was told further that real estate experts estimated that the market value of the site could be R700 000 'as raw land' and about R3 million if developed.

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The article went on to excite further suspicion by describing to the reader how the regional representative of the Department refused to give the press the names of the successful bidders at the auction and the A prices they paid and to say that a provincial councillor and real estate executive proposed pressing for a commission of inquiry into the competence of the Department. Reference was made to 'the give away prices' which had been obtained and then followed more information about 'other bargains' that the appellant had made in 1972 and 1973 in the purchase of expropriated Community Development Land, including a purchase of B industrial land for R35 700 which was now worth R100 000. Sandwiched between the paragraphs relating to these earlier bargains was the subheading 'Inquiry'.

After referring to the pleadings the Judge *a quo* found that when the trial got under way he was called upon to answer three questions:

C *(a)* What meaning or meanings must be given to the words complained of - that is to the headline to the article and two extracts from the article quoted in full in the pleadings (and set out at 620 and 621 of the reported judgment, 1978 (4) SA 619).

(b) Did such meaning or meanings defame the plaintiff?

D *(c)* What damages would fairly compensate the plaintiff for the injury he had suffered?

The only witness to testify was the plaintiff and, as his evidence related only to the measure of damages, it was of no assistance to the Court in seeking an answer to the first two questions. Clearly no evidence was admissible to prove how any individual had understood the words complained E of in their primary sense since the test in such a case is objective and not subjective.

'It does not matter'

said the trial Judge

F 'what effect or different effects the statement happened to have on some or other assortment of its readers or hearers'.

Who are the general body of readers of the *Sunday Tribune?* The circulation figures show that the newspaper is widely read - according to the minutes of the pre-trial conference 153 106 copies were sold on 19 December 1976. There is, however, no other information before the Court and recourse must therefore be had to the hypothetical reader who so frequently features in G this type of litigation. He has been described as: 'a reasonable reader of average intelligence and education' (*per* TINDALL JA in *Basner v Trigger* 1945 AD 22 at 35); 'a reasonable reader with normal intelligence and development' (*per* STEYN CJ in *SA Associated Newspapers Ltd v Schoeman*1962 (2) SA 613 (A) at 616); 'a reasonable reader having average intelligence H and knowledge' (*per* WESSELS JA in *South African Associated Newspapers Ltd and Another v Estate Pelser*1975 (4) SA 797 (A) at 811); and more recently as 'die fiktiewe, normale, ewewigtige, regsinnige en redelike mens' (*per* RUMPFF CJ in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*1977 (3) SA 394 (A) at 408).

On the other hand the Courts have on occasions described the newspaper reader in more modest terms as simply 'the ordinary reader' (*per* WESSELS JA in *Johnson v Rand Daily Mails* 1928 AD 190 at 204) or

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"die leser van normale verstand" (per VAN DER HEEVER JA in Conroy v Nicol and Another 1951 (1) SA 653 (A) at 659).

A This hypothetical figure is an immigrant; he has been imported from the English law where he has stood high in judicial favour particularly when juries are instructed to resolve problems in the sphere of negligence. But whether the case be one of negligence or defamation, this 'complex creature', as he has been called, does not always provide a ready solution B to the question before the Court, as was pointed out by Lord COLERIDGE over a century ago:

'I have used language which, or the equivalent of which, is to be found, I believe, in cases of undoubted authority - cases which have been described as giving rules for the guidance of Judges in the performance of their difficult duty. To me, the entire uselessness of such rules as practical guides lies in the inherent vagueness of the word 'reasonable', the absolute impossibility of finding a definite standard, to be expressed C in language, for the fairness and the reason of mankind, even of Judges. The reason and fairness of one man is manifestly no rule for the reason and fairness of another, and it is an awkward, but as far as I see, an inevitable consequence of the rule, that in every case where the decision of a Judge is overruled, who does or does not stop a case on the ground that there is, or is not, reasonable evidence for reasonable men, those D who overrule him say, by implication, that in the case before them the Judge who is overruled is out of the pale of reasonable men.'

(*Dublin, Wicklow and Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 at 1197.)

Many years later Lord GODDARD put forward the same idea with characteristic bluntness:

E 'Of course, different minds have different ideas as to what is moderate, and seeking for a mean, a normal or an average where there is really no guide is very like Lord BOWEN's illustration of a blind man looking for a black hat in a dark room.'

(*Mills v Stanway Coaches Ltd* (1940) 2 KB 334 at 349.)

In the same year, 1940, MACKINNON LJ, in determining whether words were F defamatory, accepted 'the reasonable man' as the criterion with marked reluctance:

'What type of mind or intelligence ought the Judge to impute to the audience? Not, I think, that they are of the class who accept and act on the wickedest proverb that was ever invented: 'There is no smoke without fire.' On the other hand, perhaps he should not impute to them the charitable decency of gentlemen. I can only suppose that one must have Grecourse again to that elusive being 'the reasonable man', and assume that the audience consists of 'reasonable people'.'

(*Newstead v London Express Newspaper Ltd* (1940) 1 KB 377 at 390.)

Whether that paragon, the reasonable man, is the same individual as the ordinary man or the average reader, may be a matter for debate; whatever the answer to that question may be, it seems to me, that it is wrong to H overlook the shortcomings of the average reader - the fact that he does not concentrate but skims through his newspaper, the fact that he has a capacity for implication and is prone to draw derogatory inferences, the fact that he is guilty of loose thinking and will jump to a conclusion more readily than a man trained in the caution of the law. I find Lord DEVLIN's words apposite as reported in *Lewis v Daily Telegraph Ltd* (1963) 2 All ER 151 at 169:

'My Lords, the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as

popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication A must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.'

More recently the attributes of the ordinary reader were referred to in B Morgan v Odhams Press Ltd and Another (1971)2 All ER 1156. At 1162 Lord REID is reported as stating:

'If we are to follow *Lewis'* case and take the ordinary man as our guide then we must accept a certain amount of loose thinking. The ordinary reader does not formulate reasons in his own mind: he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought. The publishers of newspapers must know the habits of mind of C their readers and I see no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach. If one were to adopt a stricter standard it would be too easy for purveyors of gossip to disguise their defamatory matter so that the Judge would have to say that there is insufficient to entitle the plaintiff to go to trial on the question whether that matter refers to him but the ordinary reader with perhaps more worldly wisdom would see the D connection and identify the plaintiff with consequent damage to his reputation for which the law would have to refuse him reparation... What has to be decided is whether it would have been unreasonable for a hypothetical sensible reader who knew the special facts proved to infer that this article referred to the plaintiff. I shall not set out those facts because it appears to me that in the end it all depends on the way in which one is required to assume that a sensible reader will react on Ereading this kind of article in a daily newspaper. If one must assume that he thinks and acts cautiously as a lawyer would do in his professional capacity then I have no doubt that he would say that that inference is not justified in this case. But if one is entitled to be more realistic and take account of the way in which ordinary sensible people do in fact read their newspapers and draw inference then equally I have no doubt such people would quite probably draw this inference.'

F In the same report attention was drawn to the manner in which the ordinary reader reads a sensational article in the press. Lord MORRIS said (at 1170):

'Further, it was said that what must be contemplated is that a person would read an article with care. With respect I do not agree. What must be contemplated is a reading of a newspaper in what a jury would consider to be the ordinary way in which a newspaper article would be read. The G average reader does not read a sensational article with cautious and critical analytical care.'

At 1181 of the report, Lord PEARSON described the article in words which might well be applied to the article in the *Sunday Tribune:*

'The article was written so as to be sensational rather than informative and allusive rather than specific. The sequence of events and the H connections between events are far from clear, especially on a first reading, which is the only reading which an article of this character is likely to receive.'

And at 1184:

'Regard should be had to the character of the article: it is vague, sensational and allusive; it is evidently designed for entertainment rather than instruction or accurate information. The ordinary, sensible man, if he read the article at all, would be likely to skim through it casually and not to give it concentrated attention or a second reading. It is no part of his work to read this article, nor does he have to base any practical decision on what he reads there. The relevant impression is that which would be conveyed to an ordinary sensible man (in this case

having knowledge of the relevant circumstances) reading the article casually and not expecting a high degree of accuracy.'

A In the judgment of the Court *a quo* the standard of the ordinary reader 'who has no legal training or other special discipline' was applied and the conclusion come to was that the article would probably have suggested to the reader that

'... because of the plaintiff's allegiance to the National Party, the Department of Community Development had done him undue favours'.

B The trial Judge drew attention to the 'pointless digression into the plaintiff's politics' and the emphasis given to this factor. He pointed out that

'although the theme of the article was the Department's bungles, neither the headline on the front page nor the heading on the third had a word to say about the Department itself or its activities. Each turned the spotlight on the 'Nat' instead.'.

C The learned Judge asked, with justification, what the relevance was of the fact that the plaintiff had sat at the Prime Minister's table at a political banquet

'unless the newspaper's purpose was to hint at a causal connection between the plaintiff's enthusiasm for the Party and his transactions with the Department...'

D After considering various arguments to the contrary, the Judge *a quo* decided that these arguments would not readily have occurred to the ordinary reader since they were 'by and large... lawyers' points', and any such points which did occur to him

'... would have struck him with much less force than the single and simple E fact of the plaintiff's support for the Party. That, exposed so conspicuously and underlined so heavily, must surely have predominated in influencing his reaction to the article'.

Accordingly, the conclusion to which the ordinary reader would come was that

'the plaintiff's political sympathies had indeed won him the undue favour of the Department'.

F I agree that this is the very probable conclusion to which the reader would come and that there is no substance in the arguments to the contrary which were addressed to us on appeal.

But I do not agree with the further conclusion reached by the trial Judge, namely that the plaintiff was not disparaged by the mere charge that he G had received undue favours from the Department because of political bias towards him, and that the article was therefore not defamatory of the plaintiff.

The Judge *a quo* reasoned that the plaintiff's case as pleaded imputed an active role in relation to the Department's favours and not merely a H passive one. The accusation was that he had 'used' his party political association either to obtain favours or, having obtained favours, to reward the Party for those favours. He held that neither of these complaints had any merit. So far as the one complaint went it was not unusual for 'a keen and energetic supporter' of a Party to make large donations and the ordinary reader would not infer that such a gift was made in consequence of the Department's favours to him. I have some hesitation in accepting that the ordinary reader would place so innocent a construction on the nature and design of these substantial monetary gifts in the context of this article.

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So far as the other complaint was concerned the trial Judge stated that the manner in which the plaintiff had 'used' his connections with the Party to gain the Department's favours was not specified in the particulars of claim. 'Such 'use' must', he said,

A 'have consisted of his procurement, solicitation or encouragement of the favours in some other way which exploited his link with the Party'.

Having found that the article contained no hint of any such conduct he went on to consider an alternative argument which had been advanced, namely whether in any event the plaintiff was not defamed by his portrayal B as the mere recipient of undue political favours. He held that

no 'right thinking' members of society would think that the plaintiff had been disparaged and that the article was not defamatory in any respect.
In my view, the learned Judge erred in making the finding that para 8 *(b)* and *(c)* of the pleadings must impute an active role to the plaintiff. In C everyday parlance the verb 'use' does not necessarily always connote active conduct; it can also refer to a passive act as where a person 'avails himself of something'. (See the *American Heritage Dictionary of the English Language* 1970.) As I see it, plaintiff's case is based on the passive receipt of favours knowing they are being extended because of his D politics and it is in this sense that the particulars of claim should be read, and should so have been understood by the defendant. The plaintiff can accordingly not be held responsible for the fact that the defences of justification and fair comment were withdrawn.
In determining whether the ordinary reader would read the article in this sense care must be taken not to fall into that trap which, as was E specifically stated earlier in the judgment of the trial Court, must be guarded against - approaching the task 'like a lawyer poring over a contract, a will or a statute'. It may well be that a lawyer would hesitate to infer that the plaintiff had 'used' his link with the Party to gain favour in the absence of some allegation that he had actively taken F steps to solicit or encourage the bestowing of such favour, but in the case of the layman, the ordinary reader untrained in the law and the demands of logic, we must accept, as was emphasised in the authorities to which I referred, a certain amount of loose thinking and not only loose thinking, but implication read more freely, 'especially - when it is derogatory'. As was pointed out by Lord DEVLIN 'The layman's capacity for G implication is much greater than the lawyer's'. In this case we are concerned only with the layman.
I must picture the Sunday afternoon reader of this newspaper who relaxes with his feet up and a glass by his side. He is in no mood to subject the article to close scrutiny and analysis. He is reading for his pleasure; H sensational matter is provided for his entertainment. He will browse through the article, probably once only and, having done so, is likely to come to the conclusion that plaintiff's politics have brought him financial favours. It is improbable that he will caution himself and say that there has been no impropriety because it is nowhere stated in the article that plaintiff has actively used his political influence to canvass for favours. Indeed, if he does pause to think about the matter, he may well say to himself - this man has used his political connections to enrich himself because he has accepted undue favours knowing that such

favours were extended to him because of his party political affiliation. In short he has 'used' his politics by availing himself of the opportunities offered.

A Having come to this conclusion the ordinary reader will, in my view, regard the plaintiff with diminished respect. The article will, in the well worn phraseology of the law,

'tend to lower the plaintiff in the estimation of right-thinking members of society generally'.

B In a word, the plaintiff has been defamed. The appeal should succeed.

Appellant's Attorneys: *De Villiers & Strauss*, Durban; *McIntyre & Van der Post*, Bloemfontein. Respondents' Attorneys: *Shepstone & Wylie*, Durban; *Webber & Newdigate*, Bloemfontein.

* 1980 (1) SA 24 (A) - Eds.