THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no: 120/04

In the matter between:

GEORGE FREDERICK HARDAKER **Appellant**

and

ANDREW LIONEL PHILLIPS **Respondent**

Coram : **SCOTT, CAMERON, BRAND, LEWIS *et* PONNAN JJA**

Date of hearing : **4 March 2005**

Date of delivery : **30 March 2005**

Summary: **Defamation - whether words used in judicial proceedings defamatory - whether relevant to an issue in the proceedings – defences of qualified privilege and fair comment. Order in para 24**

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The appellant is a senior investigator in the National Directorate of Public Prosecutions attached to the Asset Forfeiture Unit. The respondent is Mr Andrew Phillips. To avoid confusion I shall refer to him by name. Phillips instituted action against the appellant in the High Court, Johannesburg, arising out of an alleged defamatory statement contained in a replying affidavit deposed to by the appellant in motion proceedings brought by the National Director of Public Prosecutions ('the NDPP') against Phillips and 14 others. Joffe J in the court *a quo* upheld the claim and awarded Phillips damages in the sum of R30 000. The appeal is with the leave of this court.

[2] Before considering the pleadings and the issues raised on appeal it is necessary to refer in some detail to the motion proceedings and the circumstances in which the statement complained of came to be included in the appellant's replying affidavit.

[3] For many years Phillips owned and openly operated a business in Rivonia known as The Ranch. It involved providing a venue and facilities for paying male customers to have sexual relations with female prostitutes. Another business, known as the Titty Twister, was conducted on the same premises by a company

of which Phillips was the sole shareholder. It provided for strip-tease shows and other forms of entertainment by female dancers.

[4] On 22 December 2000 the NDPP sought and obtained in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') a provisional restraint order in the form of a rule nisi against Phillips and 14 other entities being companies or close corporations of which he was either the sole shareholder or sole member. The object of the order was to ensure that in the event of Phillips being convicted on charges preferred against him in the regional court under the Sexual Offences Act 23 of 1957 and the Aliens Control Act 96 of 1991, the assets specified in the order would be available to satisfy any confiscation order that might be made in terms of s 18 of POCA. Phillips opposed the granting of a final order and filed an answering affidavit. The NDPP filed replying affidavits, one of which was the affidavit of the appellant. It is the latter that contained the material giving rise to action in the court *a quo*.

[5] The founding affidavit to the application was deposed to by Mr William Hofmeyr who was then the head of the Asset Forfeiture Unit in the office of the NDPP. He identified the Acts under which Phillips had been charged, ie the Sexual Offences Act and the Aliens Control Act and referred to the supporting affidavit of the

appellant in which, he said, the details of the offences were more fully set out.

[6] In order to succeed the NDPP was obliged in terms of s 25(1) of POCA to place sufficient evidence before the court to satisfy it that there were 'reasonable grounds for believing that a confiscation order may be made'. The appellant in his supporting affidavit stated that from his investigations he had established that Phillips had contravened various provisions of the Acts referred to by Hofmeyr. (I mention in passing that he also said that he was investigating contraventions of the Liquor Act 27 of 1989, but nothing turns on this.) In order to substantiate his conclusions regarding the contraventions of the Sexual Offences Act and the Aliens Control Act he annexed statements taken from eight women who had been employed at The Ranch as prostitutes and dancers. Six of these were foreign woman and two were local. The statement of one of the latter, Ms Sasha Knight, contained not only a description of her terms of employment at The Ranch and the services she and her colleagues rendered there, but also the following paragraph:

'Drug [use] was taking place on the premises as far as I know. I say this because I overheard a conversation by two of the bouncers. They were in the toilet of the girls change rooms and I heard one of them say to one of the

girls as they left the toilet that she had missed out because they had just “cut a line”. The term “cutting a line” means to snort cocaine. I never personally saw drug usage on the premises, although one of the customers once produced a dagga joint and offered to take me outside to smoke it but I declined. On numerous occasions I was offered ecstasy and cocaine by various customers. I always declined these offers. I cannot say for sure that any of the other girls used these drugs, but on occasions some of the girls would be in a state which I would associate more with being high on drugs as opposed to being under the influence of liquor. When they were in such a state they would be withdrawn off stage but would have extreme confidence on the stage or when dancing for customers. Some of them were constantly sniffing and some would check up their nostrils in the mirror, I presume to ensure that traces of cocaine were not visible.’

The statement of one of the other women, Ms Augustine Grundling, also contained a reference to drugs, but it was innocuous. She said:

‘I do not have insight into any drug usage on the premises but I can say that there are signs displayed prohibiting the use of drugs.’

[7] In his answering affidavit Phillips sought to refute the NDPP’s case that there were reasonable grounds for believing that a confiscation order would be made. He said that the State regarded prostitution as a low priority offence and that prosecutions would follow only in the event of a specific complaint. Moreover, the Asset Forfeiture Unit, he said, had on previous occasions indicated

that in the absence of aggravating circumstances POCA would not be invoked in such prosecutions. The aggravating circumstances that had been identified by the Asset Forfeiture Unit, he said, were drug dealing, international trafficking in women and child prostitution. He denied his involvement in any of these and argued that in the circumstances he had 'a legitimate expectation' that he would be neither prosecuted nor have his property confiscated. He accordingly contended that both the prosecution and the application for a confiscation order in terms of s 18 of the Act would fail.

[8] At a later stage in his affidavit he dealt specifically with the supporting affidavit of the appellant. Responding to the paragraphs quoted above in the statements taken from Knight and Grundling he categorised them as no more than an attempt to paint him 'in the worst possible light' and found it necessary to say the following:

> 'The applicant is well aware of my stated position in respect of drugs. I need do no more in this regard than refer again to "ALP 1" to my answering affidavit in the Chapter 6 proceedings. Hofmeyr is well aware of this stance. So is Hardaker. Yet they persist in their dishonest attempts to mislead this Court into thinking that The Ranch is a place where drugs are permitted or, at least, tolerated. This is untrue. They know it to be such.

By the very nature of things, it is not possible to body-search every person entering The Ranch or The Titty Twister to ensure that they do not have drugs concealed somewhere in their clothes or on their person. Every owner of every club, bar or other place of amusement is in precisely the same position. However, "ALP 1" makes it very clear that drug use of any kind is not permitted and is not tolerated at The Ranch or at The Titty Twister. Any person found using or in possession of drugs will be escorted off the premises and not allowed to return.'

(The reference to the Chapter 6 proceedings is a reference to a previous application of the NDPP for a preservation order in terms of s 38 of the Act. Annexure ALP 1 is a copy of a notice outlawing the use or possession of drugs, of which, according to Phillips, there were about 20 on display on the premises of The Ranch and The Twitty Twister.)

[9] In his replying affidavit Hofmeyr denied that either he or the NDPP had in any way fettered the powers conferred on them to institute prosecutions for offences involving prostitution or to invoke the provisions of the Act in the event of such prosecutions. He admitted that their resources were limited and not all offenders could be prosecuted but explained that not only did The Ranch operate 'on a scale unmatched by any other operator' but there was a suspicion that The Ranch was involved with trafficking in women and that Phillips was linked with drug trafficking. As far as

this suspicion was concerned, he referred to the affidavit of the appellant in which, he said, the allegations were dealt with more fully. I quote from Hofmeyr's replying affidavit:

'Another factor was a suspicion of aggravating circumstances, such as the involvement in the trafficking in women. The affidavit of Hardaker [the appellant] filed herewith refers to some of the circumstances that gave rise to the suspicion that the Ranch was involved in trafficking in women, or, at the very least, provided a ready market for those who engaged in such actions. I had also received a number of reports from other law enforcement officials that there were suspicions that Defendant [Phillips] may be linked to other serious offences, such as trafficking in drugs and corruption of law enforcement officials. These allegations are dealt with more fully by Hardaker in his affidavit.'

[10] The appellant in his replying affidavit dealt with the question of drug trafficking in the context of his response to Phillips's answer to the reference to drugs in the statement of Knight. (The relevant paragraphs of Phillips's answering affidavit are quoted in para 8 above.) It is that response, contained in the following three paragraphs of his replying affidavit, which formed the subject matter of Phillips's action for defamation in the court *a quo*.

'27. Defendant has gone out of his way to deny that he is involved in drug trafficking. He has held himself out as an ardent opponent of drug trafficking. Although I am not in possession of evidence indicating any direct involvement by the Defendant in drug trafficking, I point out that he has a long standing

relationship with Sailor van Schalkwyk, who was arrested and convicted of dealing in the drugs ecstasy and cocaine in New Zealand. So close is the relationship that the Defendant travelled to New Zealand for Van Schalkwyk's trial after being asked by him for assistance. He was monitored by the New Zealand police officials during his stay at New Zealand. I refer to the confirmatory affidavit of Timothy Leitch, which is annexed hereto and marked "GFH9", and in which these facts are confirmed. The copy of the affidavit has been transmitted by facsimile and the original together with the certificate of the South African consul in Auckland which has been dispatched by courier will be filed upon arrival.

28. Leitch also testifies that he obtained a warrant for and did in fact search the Defendant in New Zealand and found cash in the sum of 10 000-00 ZN dollars (approximately R65 000), which he suspected was to be used for the legal defence of Van Schalkwyk. The Defendant and his female travelling companion each imported the equivalent of about R65 000 into New Zealand. Leitch also interviewed the Defendant who admitted to him that Van Schalkwyk was his good friend. Once more these facts are confirmed in annexure "GFH9". I believe Van Schalkwyk was at court in the company of the Defendant during the previous hearing of this matter.

29. Based on this evidence I submit that the Defendant's supposed condemnation of and protestations against drugs should not be taken too seriously.'

[11] It appears from the affidavit of Detective Timothy Leitch of the New Zealand Police (which was annexed to the appellant's replying affidavit) that following the importation into New Zealand

from South Africa of a large number of tablets of a drug commonly known as ecstasy, four persons were arrested and charged. Two were South Africans, namely John Goldsmith and Albertus (Sailor) van Schalkwyk. It was subsequently established that a similarly large quantity of ecstasy tablets originating in South Africa had previously been imported into New Zealand. As a result of information received from the New Zealand customs Leitch executed a search warrant in respect of a hotel room which turned out to be that of Phillips. The latter told him that he was a good friend of Van Schalkwyk but did not 'really know' Goldsmith. Nonetheless Phillips had arranged and assisted in securing legal representation for both South Africans. It was also not in dispute that Phillips had brought into New Zealand a large sum of money which he had disclosed to the New Zealand customs on his arrival and which, he said, was for Van Schalkwyk's legal expenses. A letter found in Phillips's room, which was established to have been written by Van Schalkwyk to Phillips, strongly suggested that the latter did not approve of the former's conduct. The letter contains the following –

'I don't know what to say but that I am really sorry for disappointing you. Andrew I know your feeling on the shit that I got myself into therefore I will not ask for any help and will take what they give me and hopefully come

out the other side a better person. I got involved because of greed and wanting more. Andrew all I'm asking for is that you can forgive me and that one day when I came out at least you would be there as a friend . . . .'

(The letter was annexed to Leitch's affidavit in the motion proceedings.)

[12] In his plea, the appellant denied that the statements complained of were defamatory. In the alternative, he pleaded that they were relevant and material to the issues raised in the litigation in question and accordingly made on a privileged occasion and were not unlawful. In the further alternative, it was pleaded that by reason of the circumstances in which the statements were made the appellant lacked the necessary intention to injure the plaintiff in his reputation. In yet further defences in the alternative, it was alleged that the statements were true and made for the public benefit, or constituted comment or an opinion which was fair on a matter of public interest or public importance. Finally a defence was raised that by reason of the circumstances in which the statements were made the appellant was indemnified from personal liability in terms of s 78 of the Act. In response, a replication was filed in which it was alleged that in the event of the defences of privilege or fair comment being established, they could not prevail as the statements had been

made with an improper or indirect motive. The court *a quo* found that the statements complained of were defamatory of Phillips and rejected each one of the defences raised.

[13] Were the statements defamatory of Phillips? In the first two paragraphs, ie paras 27 and 28, the appellant fairly summarises the evidence available to him. This much is apparent from Leitch's affidavit. In para 29 he makes a comment in the form of a submission based on what had gone before. It is this that contains the sting. To say that one's '*supposed* condemnation of and protestations against drugs should not be taken *too seriously*' (my emphasis) in response to such a condemnation contained in an affidavit implies untruthfulness. The implication, in my view, would readily be apparent to the ordinary reader of the appellant's affidavit who typically would be the legal representative involved in the litigation. An averment of untruthfulness is per se defamatory (*Penn v Fiddel* 1954 (4) SA 498 (C) at 500F-G). It follows that in my view para 29 is defamatory of Phillips.

[14] It is now firmly established that publication of a defamatory statement (or other defamatory material) gives rise to two presumptions: first, that the publication was unlawful, and second, that the statement was made *animo injuriandi*, ie with a deliberate intention to inflict injury. (See eg *Joubert v Venter* 1985 (1) SA 654

(A) 696A.) While the two presumptions arise from the same event, they are essentially different in character. The presumption of *animus injuriandi* relates to the defendant's subjective state of mind; the presumption of unlawfulness relates to objective matters of fact and law. (*Neethling v Du Preez; Neethling v Weekly Mail* 1994 (1) SA 708 (A) at 768I-769A.) Until comparatively recent times, there was doubt as to the nature of the onus of rebuttal. It is now settled that the onus on the defendant to rebut one or other presumption is a full onus, ie it must be discharged on a preponderance of probabilities. (*Mohamed v Jassiem* 1996 (1) SA 673 (A) at 709H-I.) A bare denial on the part of the defendant will therefore not suffice. Facts must be pleaded by the defendant that will legally justify the denial of unlawfulness. (*National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1202H.)

[15] The element of unlawfulness is more often than not sought to be rebutted by the defendant attempting to establish one or other of the well-established defences which either owe their origin to or bear the influence of English law. These typically include qualified privilege in relation to judicial proceedings and fair comment. But the defences available to rebut unlawfulness do not constitute a *numerus clauses.* (See *Bogoshi*, *supra*, at 1204D.) In the final analysis whether conduct is to be adjudged lawful or not depends

on a balancing of the constitutionally enshrined right of dignity, including as it does the right to reputation on the one hand, and the right to freedom of speech, on the other. (See *Khumalo v Holomisa* 2002 (5) SA 401 (CC) paras 25 and 27.) This may involve, as proposed by Hefer JA in *Bogoshi*, *supra* at 1204D-E –

'the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community'.

(See further the remarks of Ackermann and Goldstone JJ in *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001 (4) 938 (CC) para 56.) But, the above notwithstanding, the well-established defences and the rules relating to each are both useful and convenient and in addition have the advantage of affording litigants a degree of certainty. Nonetheless, in their application and development, sight should not be lost of the constitutional values underlying their true object which is the rebuttal of unlawfulness. It is also worthy of note that because they all have the same object, depending on the circumstances, a certain degree of overlapping is inevitable.

[16] In the present case the statement in question was made in the course of judicial proceedings. But as previously observed, it took the form of a submission or comment. To bring it within the

ambit of the defence of qualified privilege the appellant bore the onus of proving that it was relevant to an issue in the proceedings. Similarly, unless in some way relevant to an issue in those proceedings, there would seem little prospect of the defence of fair comment succeeding as it is unlikely that the comment would then be regarded as being in the public interest. In either event, the question of relevance is determinative.

[17] The problem, of course, lies in fixing the boundaries. On the one hand, it is necessary in the interests of the proper administration of justice not to restrict unduly the protection afforded to a litigant or witness. On the other, it has always been accepted that the protection should not be afforded where the defamatory statement has no connection whatsoever to an issue in the case. To hold otherwise would be to undermine the defamed person's right to have his or her dignity protected by the law. In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) para 22 Smalberger JA pointed out that the concept of relevance in the context of qualified privilege was not capable of precise definition and listed some of the phrases used in the past to describe the concept, such as 'in some measure relevant to the purpose of the occasion', 'germane to the matter dealt with' and

'relevant tot die onderwerp onder bespreking'. The learned judge summed up the position as follows (at para 26):

'[26] Ultimately, the concept of relevance under discussion is, in my view, essentially a matter of reason and common sense, having its foundation in the facts, circumstances and principles governing each particular case. The words of Schreiner JA in *R v Matthews and Others* 1960 (1) SA 752 (A) at 758A that "(r)elevancy is based upon a blend of logic and experience lying outside the law" have particular application in a matter such as the present, even though they were said in the context of evidential relevance (cf Hoffmann and Zeffertt *The South African Law of Evidence* 4th ed at 21*).* The assessment of whether a defamatory statement was relevant to the occasion to which it relates is therefore essentially a value judgment in respect of which there are guiding principles but which is not governed by hard and fast rules. And in arriving at that judgment due weight must be given to all matters which can properly be regarded as bearing upon it.'

[18] What are sometimes referred to as the 'true or real' issues in litigation are those which it is necessary to determine one way or the other in order to decide the outcome of the dispute between the parties. They may relate to an element of the appellant's (or plaintiff's) case or that of the respondent (or defendant). These must be contrasted with the countless side or subsidiary issues which frequently arise, particularly in motion proceedings, and which often are only tenuously linked, if at all, to what I have called the true or real issues. They may, for example, relate solely to a

question of credibility. In many instances they will be unnecessary to decide or even consider in the resolution of the litigation. From what has been said above it is apparent that the protection afforded to a litigant or witness is not limited to those defamatory statements relevant to an issue in the 'true or real' sense. If that were the case the protection would be extremely limited and litigation would be a lot more perilous than it already is.

[19] In the present case the defamatory statement was not only a response to what Phillips had said in his answering affidavit about his attitude to drugs but was undoubtedly relevant to that professed attitude. The complaint therefore is not that the appellant's statement was irrelevant to the allegations he was answering but that the whole question of drug abuse and Phillips's attitude was irrelevant and had arisen only because of the reference in Knight's affidavit to drugs. If the contention were correct, it would mean that the appellant would have been precluded from responding to allegations that Phillips himself had made and which included, I might add, the obviously defamatory statement of the appellant and Hofmeyr that they were persisting 'in their dishonest attempts to mislead the court'. This strikes me as a most extraordinary result. Had Phillips regarded the reference to drugs in Knight's affidavit as irrelevant he could either have

ignored it or applied to have it struck out. But he did neither. He responded at length and in so doing raised the issue of his attitude to drug abuse. Once having done so, and even assuming that it was a subsidiary and not a 'true or real issue' in the sense described above, he cannot, I think, be heard to contend that the appellant's response, although relevant to a subsidiary issue, is to be denied the benefit of the privilege by reason of its irrelevancy.

[20] But the issue of drugs and Phillips's attitude towards them was more than a side or subsidiary issue. It is true that the NDPP relied solely on offences under the Sexual Offences Act and the Aliens Control Act in his attempt to procure an order in terms of s 26 of POCA. But a defence raised by Phillips was that in the absence of aggravating circumstances, such as dealing in drugs, he had a 'legitimate expectation' that he would not be prosecuted under the Sexual Offences Act or have the provisions of POCA invoked against him. As indicated above, Hofmeyr in his replying affidavit denied the existence of any basis for the alleged expectation and added that there was in any event a suspicion that Phillips was indeed linked to other serious offences, including trafficking in drugs. In support of the suspicion, he referred to the replying affidavit of the appellant in which, he said, some of the circumstances giving rise to the suspicion were set out. The

appellant, in turn, responded to what Phillips had said in his answering affidavit concerning his professed attitude to drugs but in so doing sought in addition to substantiate the suspicion referred to by Hofmeyr with the object of rebutting the alleged absence of aggravating circumstances.

[21] In the course of his judgment in the court *a quo* Joffe J said:

'As set out above dealing in drugs or possession of drugs forms no part of the NDPP's application against the plaintiff. Despite this, inadmissible evidence relating thereto was contained in the affidavit by Knight which formed part of the founding papers. Admittedly plaintiff answered these allegations. His answer did not make that which was irrelevant relevant. Defendant's reply thereto which contains the offending paragraphs was equally irrelevant.'

The approach of the learned judge appears therefore to have been that because dealing in drugs or possessing them formed no part of the NDPP's case against Phillips, therefore the appellant's statement concerning Phillips's attitude to drugs was irrelevant and not covered by the privilege. But quite apart from the fact that the statement was in any event a relevant response to what Phillips himself had said, this approach overlooks that an issue relevant to a defence involving a confession and avoidance is no less relevant than an issue relevant to the establishment of the claim itself. From what had been said above, it is clear that the issue of drugs and Phillips's attitude towards them was undoubtedly relevant to

the defence raised by Phillips. It follows that in my view the statement complained of falls within the scope of the qualified privilege afforded to witnesses in judicial proceedings.

[22] Counsel for the respondent argued that in the event of its being found that the defamatory statement was relevant to an issue in the proceedings, the privilege, being a qualified one, was defeated by reason of the appellant having acted with an improper or indirect motive (*cf Basner v Trigger* 1946 AD 83 at 95). He based his submission principally on what he described as the sarcastic tone of the language used and its lack of objectivity. In my view there is no substance in the submission. The defamatory words are contained in a submission. The expression 'not to be taken too seriously' is no more than a euphemism. It does not give rise to an inference of an improper motive. Moreover, the appellant fairly and quite properly placed before the court all the evidence available to him on which his submission was based. That included Van Schalkwyk's letter to Phillips which cast the latter in a more favourable light.

[23] The appeal must therefore succeed. It is necessary to add that subsequent to preparing this judgment I have had the privilege of reading the judgment in draft of my brother Cameron. I concur in that judgment.

[24] The appeal is upheld with costs, including the costs occasioned by the employment of two counsel. The order of the court *a quo* is set aside and the following is substituted in its place:

> 'The action is dismissed with costs, including the costs occasioned by the employment of two counsel.'

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

BRAND JA
LEWIS JA
PONNAN JA

CAMERON JA:

[25] I concur in the judgment of my brother Scott JA and wish to add a further ground on which the defence was good. The impugned statement took the form of a submission the defendant Hardaker made in an affidavit in proceedings the National Director of Public Prosecutions had brought against Phillips. As Scott JA points out (para 16), the determination whether the statement was 'relevant' to the issues that arose in those proceedings, for purposes of qualified privilege, relates also to the defence of fair comment. In my view, in addition to enjoying a qualified privilege, the comment was protected as free speech because it constituted fair comment.

[26] Defendants in this country first sought to invoke the defence as early as the 19th century;[1] and it was authoritatively imported into our law from the English law of libel nearly ninety years ago in *Crawford v Albu*.[2] Innes CJ explained that the defence 'rests upon the right of every person to express his real judgment or opinion upon matters of public interest'. Drawing on that exposition, this court in *Marais v Richard*[3] summarised the requirements as follows: (i) The statement must constitute comment or opinion; (ii) it must be 'fair'; (iii) the factual

[1] See *Davis & Sons v Shepstone* (1886) 11 LR App Cas 187 (Privy Council, on appeal from the Supreme Court of Natal) 190 and *Ribbink v Marais and Roos* (1892) 4 SAR 236 at 245 (Kotze CJ, Ameshoff and De Korte JJ concurring).
[2] 1917 AD 102 at 114.
[3] 1981 (1) SA 1157 (A) 1167F, per Jansen JA, applied in *Delta Motor Corporation (Pty) Ltd v van der Merwe* 2004 (6) SA 185 (SCA) 13-15.

allegations being commented upon must be true; and (iv) the comment must relate to a matter of public interest.

[27] Here, Hardaker cast doubt on the authenticity of Phillips's claim that he was opposed to drugs ('Based on this evidence I submit that the Defendant's supposed condemnation of and protestations against drugs should not be taken too seriously'). His statement was cast explicitly as a comment. The mere fact that it was advanced as a legal 'submission' does not of course automatically qualify it as a 'comment'. The test is whether the reasonable reader of Hardaker's affidavit would understand his statement as a comment.[4] One of the hallmarks of a comment is that it is connected to and derives from discernible fact. This is a textbook instance of a comment plainly presented as such. Hardaker expressly related it to the facts on which he based it ('based on this evidence'). That he sought to obtain the court's endorsement for his conclusion – the purpose of a 'submission' – does not detract from its status as a comment. Requirement (i) was therefore fulfilled.

[28] The facts on which the comment was based – Phillips's mission to New Zealand to fund the drug-prosecution defence of his embattled friend 'Sailor' van Schalkwyk – were not disputed (requirement (iii)).

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[4] Compare *South African Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) 453E-454H (statement in question must appear and be recognisable to the ordinary reasonable person as comment and not as a statement of fact).

[29] The question of relevance arises in relation to requirement (iv). In this particular setting (an exchange of affidavits in contested proceedings) the comment could relate to 'a matter of public interest' only if it was germane to the issues in those proceedings. This is because there is no discernible value in protecting litigants who make irrelevant comments that injure the reputation of others in court proceedings. For the reasons Scott JA gives, it is clear that Hardaker's comment was relevant to the issues.

[30] That leaves the question whether the comment was 'fair'. What Hardaker did was to employ the classic 'noscitur a sociis' jibe against Phillips: 'a man is known by his associates'; or, updated and expanded, 'your character can be inferred from those with whom you associate'. His 'submission' suggested to the court that because Phillips went to the aid of a friend standing trial on drug charges, his own professed opposition to drugs or drug-dealing should be treated with suspicion.

[31] That was hard hitting. As a matter of objective appreciation it cannot be said that one who gives aid to a friend standing trial on criminal charges is necessarily 'soft' on the conduct charged. Nor does that follow as a matter of logic. Yet the jibe that associating oneself with a disreputable, delinquent or criminal person taints one with the opprobrium the associate deserves is as old, surely, as human

relationships themselves: it may even be one of the burdens of loyal friendship.

[32] More importantly, whether the jibe is 'fair' does not in law depend solely or even principally on reason or logic. In *Crawford v Albu*, Innes CJ suggested that the use of the word 'fair' in connection with the defence 'is not very fortunate'.[5] This is because it is not what the court thinks is fair (a critical comment or opinion, Innes CJ said, need not 'necessarily commend itself to the judgment of the Court'). Nor does the comment have to 'be impartial or well-balanced'.[6] Indeed, 'fair' in this context means only that the opinion expressed must be one that 'a fair man, however extreme his views may be, might honestly have, even if the views are prejudiced'.[7] Hence Innes CJ's observation that the defendant 'must justify the facts; but he need not justify the comment'.[8]

[33] And in the nearly 90 years since *Crawford v Albu*, our courts have firmly established that once the other three requirements are established, a generous leeway is permitted in determining 'fairness'.[9] In *Crawford*, Innes CJ recommended the adoption of an exceptionally wide test: 'any genuine expression of opinion is fair if it is relevant, and if

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[5] 1917 AD 102 at 114.
[6] 1917 AD 102 at 114.
[7] *Johnson v Beckett* 1992 (1) SA 762 (A) 780-781 (Harms AJA).
[8] 1917 AD 102 at 117.
[9] See for instance *Johnson v Beckett* 1992 (1) SA 762 (A) 775C-H (van den Heever JA); 778-781 (Harms AJA); 782-783 (Corbett CJ).

it is not such as to disclose in itself actual malice'.[10] In *Johnson v Beckett*,[11] Corbett CJ asked whether, objectively speaking, the comment 'qualified as an honest, genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts on which it was based, and not disclosing malice'. The Constitution has certainly not occluded this latitude.

[34] The 'noscitur a sociis' jibe is by its nature vague and imprecise. While it invariably implies that the association somehow taints the subject of the comment, it does not necessarily suggest that the opprobrium is equal. The facts here illustrate. Why should Phillips's 'supposed condemnation of and protestations against drugs' 'not be taken too seriously'? Hardaker's comment invites speculation as to a range of possible reasons, without itself giving the answer. One could be that Phillips is himself a drug dealer; another that though not a drug dealer, he colludes in their activities. A third is that though Phillips does not support drug dealing himself, the mere fact of giving comfort and succour by bank-rolling an alleged drug dealer's defence is in itself discreditable and incompatible with genuine opposition to drug-dealing.

[35] This was the most obvious meaning of Hardaker's comment. He disclaimed evidence showing 'any direct involvement' by Phillips in drug

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[10] 1917 AD 102 at 115.
[11] 1992 (1) SA 762 (A) 783B, Hefer JA and Kriegler AJA concurring.

trafficking. The sole basis for his jibe, offered as such, was Phillips's 'long standing relationship' with 'Sailor' and his mission to New Zealand to support him.[12]

[36] In these circumstances there can be little doubt that the comment that Phillips's 'condemnation of and protestations against drugs' should be treated with scepticism qualified as 'fair'. Hardaker's opinion was no doubt shaped by the tough-minded moralism of a law enforcement officer with nearly 25 years' experience. It may have been 'prejudiced' in the sense that he was literally 'on Phillips's case'. Perhaps it showed little deference to what in others' opinion would be the sentimental claims of loyal friendship. But the law does not require Hardaker to justify his opinion. His submission that giving succour to suspected drug dealers is discreditable and wrong and puts in question professed opposition to drug dealing was fairly tenable, stated in relation to facts fully stated, and not tainted by malice. In my view the appeal must succeed also on this ground.

E CAMERON
JUDGE OF APPEAL

CONCUR:

BRAND JA
LEWIS JA
PONNAN JA

[12] The 'evidence' for the comment, attached to Hardaker's affidavit, included a letter from 'Sailor' to Phillips that made it clear that 'Sailor', at least, thought that Phillips would deplore what he had done.