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Case No 416/90
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FREDERICK SAULS	First Appellant
JOHN GOMOMO	Second Appellant
ELLIOT MTWA	Third Appellant
LESLEY KETTLEDAS	Fourth Appellant
JURIE HARRIS	Fifth Appellant

and

ALLAN HENDRICKSE	Respondent

CORAM: HOEXTER, SMALBERGER, et VAN DEN HEEVER, JJA

HEARD: 11 MAY 1992

DELIVERED: 19 MAY 1992

J U D G M E N T

SMALBERGER, JA :

At the beginning of 1985 there was unrest at certain so-called "coloured" schools in the Port Elizabeth and Uitenhage areas. The unrest took the

form, inter alia, of students boycotting classes. The unrest was apparently politically motivated and was inspired by certain elements opposed to the recently introduced tricameral system of government in the Republic. Attempts to resolve the unrest situation proved unsuccessful. The unrest eventually escalated to the extent where police intervention was necessary. The respondent at the time was the leader of the Labour Party in the House of Representatives and Chairman of the Ministers' Council. He represented the constituency of Swartkops which included areas from the Port Elizabeth and Uitenhage districts. He was also a member of the Cabinet. On 27 February 1985 the respondent called a press conference at which he made a statement concerning the unrest situation. At the press conference he said, inter alia, (as subsequently reported in the Eastern Province Herald newspaper) that "it had been shown that office bearers of the National

Automobile and Allied Workers Union (NAAWU) were involved behind the scenes in the unrest and that certain teachers had also incited the students" ("the statement"). The above facts are either common cause or not in dispute.

The appellants were all office bearers of NAAWU (a registered trade union) at the relevant time. They claimed that the statement was defamatory of them. They consequently instituted an action for damages against the respondent in the South Eastern Cape Local Division. (They also instituted action against the reporter and the newspaper concerned with the publication of the statement, but their action against them was settled.)

The matter came before JENNETT J. The appellants relied upon the facts admitted in the pleadings and closed their case without leading any evidence. The respondent testified to the

circumstances giving rise to the making of the statement. The learned trial Judge came to the conclusion, on the assumption that the statement was defamatory, that the onus of proof that the statement "relates to the plaintiffs or any of them, and/or would be understood as so doing has not been discharged and for this reason the action fails". He accordingly absolved the respondent from the instance, with costs, but granted the appellants leave to appeal to this Court. Hence the present appeal.

In order to succeed the appellants must prove (the onus being on them) that the statement was defamatory, and that it was published of and concerning them (South Africa Associated Newspapers Ltd and Another v Estate Pelser 1975(4) SA 797 (A) at 810 C). The statement makes no specific reference to the appellants. What it does is to refer to persons belonging to a class or group - office bearers of NAAWU. To succeed in

their action the appellants must establish that the words complained of would lead an ordinary reasonable person acquainted with them to believe, on reading the statement, that such words referred to them personally. The test is therefore an objective one and the actual intention of the respondent is irrelevant. In Knupffer v London Express Newspaper Ltd [1944] 1 ALL ER 495 (HL) at 497 F - G, Viscount Simon, LC propounded a two-fold test for a matter such as the present in the following words:

> "The first question is a question of law - can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him?"

It is common cause that the first question must be answered in favour of the appellants. What is in issue is whether the second question also falls to be

so answered. Whether defamatory words used of or concerning a group will be taken to refer to every member of such group will depend in each case upon the precise words used seen in their proper factual matrix. The mere reference to a group per se will not be sufficient. A plaintiff must still prove that, as a member of such group, he was included in the defamatory statement - often a difficult matter, particularly when one is dealing with a group comprising a large or indeterminate number of persons. In Knupffer's case (supra) at 498 A Lord Atkin remarked:

> "The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was in fact included in the defamatory statement : for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds : or the words are occasionally intended to be a facetious exaggeration."

He went on to add (at 498 C):

> "It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class."

In the South Africa Associated Newspapers case (supra, at 810 D) the above statements were said to reflect the law correctly.

Mr Liebenberg, for the appellants, referred us to a number of reported cases where an individual member of a group was held to have been personally defamed in a reference to the group. Amongst these were Hertzog v Ward 1912 AD 62 (the Medical Council); Young v Kemsley and Others 1940 AD 258 (the Licensing Board); and Bane v Colvin 1959(1) SA 863 (C) (where a reference to a company was held to include all its directors). Further examples are also to be found in Gatley on Libel and Slander, 8 ed, para 288. These cases are all distinguishable. They relate to instances where,

because of the express words used, or by necessary implication, the defamatory imputation was held to apply to every member of the group concerned. For a contrary decision see Visse v Wallachs' Printing and Publishing Co Ltd 1946 TPD 441 where the allegedly defamed class was held to be "unlimited and so large as not to justify the application of any stigma to each member, including plaintiff" (at 449).

This is not a case where reference was made to all the members of a group. The statement refers simply to "office bearers of NAAWU". It does not in express terms refer to all the office bearers. Nor can such a reference necessarily be implied. The position may have been different had it spoken of "the office bearers", for that might have implied all. Seen in their proper context the words "office bearers of NAAWU" only refer to some office bearers - an interpretation which Mr Liebenberg was obliged to

concede. Some in that sense denotes an unspecified yet relatively limited number.

NAAWU is a national trade union. It apparently operates on a national, regional and local level. This may be inferred from the pleadings where the first appellant is described as the "national secretary", the fourth appellant as the "regional secretary" and the remaining appellants simply as "president", "vice-president" and "treasurer" (presumably of a local branch). There is no evidence of how many branches of NAAWU there are on a regional or local level throughout the Republic, nor of how many office bearers there are at each such branch, or on the national executive. For all we know the overall number of office bearers in the Republic may be a very sizeable one. The statement only refers to some of them.

A reasonable person reading the statement would have no grounds for connecting it with the

appellants personally. Nor are there any background facts or surrounding circumstances from which a person acquainted with the appellants could reasonably have inferred that they were the office bearers to whom the statement referred. There is not even admissible evidence that the appellants come from or reside in the Port Elizabeth or Uitenhage areas. If the statement had referred to an office bearer it could clearly not have been taken to refer to the appellants, or any one of them. The position can be no different where the reference is to some of an indeterminate and potentially large number of office bearers.

Mr Liebenberg contended that if the appellants were seen walking down the street together by someone acquainted with them, such person would associate them with the office bearers referred to in the statement. The answer would seem to be that any such acquaintance, in the absence of information with regard to how many

NAAWU office bearers there are and other relevant background facts and circumstances, could not reasonably come to such a conclusion.

In the result the trial Judge correctly held that the appellants had failed to discharge the onus of proving that the statement referred to them personally. It therefore becomes unnecessary to consider any of the other defences raised by the respondent at the trial.

The appeal is dismissed, with costs.

J W SMALBERGER
JUDGE OF APPEAL

HOEXTER, JA) Concur
VAN DEN HEEVER, JA)