

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the matter of:

SHEIKH MOGAMAT

ABBAS JASSIEM

Plaintiff

versus

SHEIKH NAZIM MOHAMED

Defendant

CASE NUMBER:

1434/86

and

SHEIKH MOGAMAT ABBAS JASSIEM

Plaintiff

versus

THE MUSLIM JUDICIAL COUNCIL

Defendant

CASE NUMBER:

1438/86

JUDGMENT DELIVERED ON THIS 23rd day of FEBRUARY 1990

VAN DEN HEEVER, J: Plaintiff instituted two separate actions for damages.

The first is against Sheikh Nazim Mohamed based on words allegedly uttered by him in public of plaintiff which are alleged to constitute an injuria (Case 1434/86). There was some argument as to whether the pleadings in this matter are limited to a claim for defamation or whether damages may be awarded for wounded pride, even should the claim for wounded reputation fail. I refer loosely to the cause (or possible causes) of action based on the words alleged to have been uttered by Nazim as defamation. (1)

The second is against The Muslim Judicial Council and based on two grounds: That defendant in the first matter had acted as the authorised representative of the defendant in the second in so injuring plaintiff; and that defendant in this second matter had moreover incited the trustees of the (2)

Loop Street Mosque to dismiss plaintiff from their employ as Imam there (Case 1438/86).—

For the sake of convenience and intending no discourtesy to anyone thereby, the individual dramatis personae once identified are henceforth referred to by their names, or abbreviations. Plaintiff is Jassiem, defendant in the first matter Nazim, defendant in the second the MJC and so on.

By agreement the two matters were consolidated. It is part of the agreement between the parties that -

1. The Court is to determine how much additional time is (10 taken up in dealing with the alleged wrongful dismissal of Jassiem.

2. If Nazim succeeds in his defence, a costs award will include costs in respect of time taken up with the issue of wrongful dismissal.

3. If Jassiem is successful against Nazim the latter will,

(i) not be burdened with costs in respect of time occupied with the issue of wrongful dismissal;

(ii) be entitled to recover his costs in respect of (20 time occupied with the issue of wrongful dismissal from either Jassiem or the MJC or both as the Court may determine.

A marathon trial followed, the major portion of which dealt with the issue whether Mirza Ghulam Ahmad who died in India in 1988 was a Muslim or an apostate, and whether one of the two branches of his followers referred to herein as the Ahmedis, to distinguish them from the other branch the Qadianis, consist of Muslims or apostates. What is ostensibly a defamation and dismissal action became - inevitably (30 because Nazim and the MJC pleaded justification in the alternative/...

1.7

native to denial of facts alleged by Jassiem in his particulars of claim - a heated religious dispute with undercurrents suggesting that political power as well as if not rather than theological fervour may be at the root of the quarrel.

A bundle of documents was handed up at the commencement of the trial. In terms of the Rule 37 Minute these are subject to proof save that "all documents discovered will be admissible and receivable in evidence on production thereof without further proof as being what they purport to be in terms of Rule 35(2) and/or (10)". These papers are referred to as "doc" so-and-so, to distinguish each from an exhibit ("Exh") bearing the same number. (1)

This now consolidated action appears to be merely one of the battles in a protracted war which started with small forays in India against Mirza Ghulam Ahmad during his lifetime and grew and was transferred after his death to the following he acquired. He himself had, according to his writings, no doubt that he was a Muslim, moreover a reformer and reviver sent by God: to rejuvenate Muslims' faith in the Quran and adherence to the teachings of the Holy Prophet, to defend Islam and the Holy Prophet against attacks by the protagonists of other religions, and to woo adherence from other faiths, to Islam. (2)

At first he was well regarded and lauded for his propagation of Islam and his defence of that faith and its proponent, the Holy Prophet Muhammed. Not all Muslims accepted his teaching unreservedly. Certain Batalvi after praising Mirza's earlier works later travelled far to obtain signatures to a fatwa - opinion - condemning him. However, at his death Mirza was widely praised as a fighter in the cause of Islam by persons of culture, influence, adherence to the undoubted tenets of the faith. There was no suggestion from (30)

them that he was an apostate despite the fact that those who praised him were aware of his claims to have been the Promised Messiah and to have received revelations from God and of the general content of his teaching and did not necessarily accept some or all of them.

After his death his followers in 1914 split into two groups. The Qadianis accepted that Mirza, who had referred to himself as nabi, and rasul - prophet and messenger - had indeed been that and that those who rejected him as such were unbelievers. That entailed as a necessary consequence (10) segregation from the mass of Muslims for purposes of prayer, marriage, and general social intercourse. The smaller group, the Lahore Ahmedis, laid emphasis on the glossary Mirza had created in his work in terms of which the words nabi and rasul had a special meaning. The Lahores did not or certainly today do not, regard Muslims who do not accept Mirza's claims, to be apostate or unbelievers. Their early leader Muhammed Ali produced the first authoritative translation of the Quran into English and was praised for his scholarship and for this and other service to Islam. There was never any attempt to (20) declare him apostate, which is the equivalent in Muslim society of civil death, capitis diminutio, being sent to Coventry, as the surrogate for the death sentence which was formerly regarded appropriate for apostacy. The evidence that his work was praised in 1945 in the publication which is the mouthpiece of Pakistan's orthodox religious and political party and that "everyone" still reads his books, was not disputed.

In 1947, in the interests of peace among factions at one another's throats because of religion, Pakistan was excised (30) from India to provide a separate homeland for Muslims.

Although government was in the hands of Muslims, there was no

immediate movement against either the Qadianis or Lahores. Indeed, many Ahmedis (a group which had consistently co-operated with the British conqueror) held government office, which caused resentment among others who had been less content with British domination. In 1953 the Prime Minister of Pakistan rejected an ultimatum by religious leaders (ulema) among those others that Qadiani Ahmedis be declared a non-Muslim minority and Ahmedis in key government posts sacked. The rejection led to disturbances, arrest of some leaders, and the Munir report on those. That report stressed (1) the difficulty the commission had encountered in trying to discover exactly what were the indispensable requirements to being entitled to call oneself a Muslim. Among those tried and sentenced on charges of creating hatred and disorder by the movement against the Mirzais was Maududi, who in the '30s had not been prepared to declare the Lahores to be apostate.

When Sir Zafar-Ullah Khan, a Qadiani, died, thousands of Sunni said funeral prayers for him, which, it is common cause, would not have happened had he been regarded to be an apostate.

The Pakistani dispute spilled over from the Indian sub-continent to the Middle East. In 1962 the Rector of the Al-Azhar University at Cairo declared Qadianis to have "deviated from Islam in their beliefs, in their worship and in the rules which govern their social relations". The sketchy report of the research committee of senior professors of the University on which this declaration or fatwa was based, closed with the allegation that "any person who follows either branch, whether it be the branch of Lahore or the branch or Qadian, is rejected from the fold of Islam". (Exh 411). Many of the allegations made in this report as to what Mirza Ghulam Ahmad was supposed to have written and in what books, are (30

incorrect.

The MJC, constituted in 1945 with Jassiem one of the founder members, purports to be authoritative in regard to religious matters in the Muslim community in the Cape. Those with some pretensions to intimate knowledge of the Quran and traditions of the Holy Prophet (the Sunnah) or good secular education are invited to join this body. They are not elected. Since civil rights within the Muslim community are regulated by rules laid down in the Quran and Sunnah, the MJC in exercising the jurisdiction it has arrogated unto itself to advise (1 on, interpret and apply those rules, wields considerable power within the Muslim community in regard to temporal matters since they in large measure depend on religious ones. Those less knowledgeable than the members of the MJC are enjoined to accept its religious guidance as to what Islam requires from Muslims for them to escape not only damnation but wittingly or unwittingly falling into apostacy with its traumatic temporal consequences.

Nazim joined the MJC in 1956, was appointed its supervisor at the abattoir in 1957, has since then held positions of (20 influence within the community, being inter alia a city councillor for Ward 6 in 1963.

Here in South Africa there was at first no schism between Ahmedis and the orthodox Sunni community. Trouble started when Qadiani publications appeared alleging Mirza to have been a prophet. The MJC agitated that Mirzais be excluded from mosques and ostracised. Jassiem regarded that as contrary to the injunctions of the Quran as he understood them, since the Ahmedi he questioned claimed to be a Muslim and recited the

Kalima Shehada. The MJC in 1965 not only regarded itself bound by the 1965 Cairo fatwa, but circularised administrative measures to enforce it, ruling that -

1. All Ahmedis, Kadayanis, Bahais and sympathisers are murtad.
2. They should not be allowed to enter the Masjieds (Mosques) of the Muslims.
3. Their marriage ceremonies should not be allowed to take place in the Muslim Masjieds.
4. No Sheikh, Imam or Muslim should officiate at any of their marriage ceremonies. (10
5. Intermarriage between them and a Muslim should never be allowed.
6. They are not allowed to serve as wakiels or witnesses in any religious matters.
7. They will not be allowed any burials nor can any of them be allowed to perform burial services at any of the Muslim cemeteries.
8. A Muslim should not pray for or on their dead.
9. Anything slaughtered by them can not be eaten nor can you eat from them. (20
10. There should be no association between a Muslim and any of the above sects". (Document 4)

A delegation from the MJC visited Jassiem, including Nazim, because Jassiem permitted Lahores into his Mosque. When he did not toe the line he was in absentia declared murtad. This was reported in the Muslim News. The MJC sent a circular to all the religious leaders in places of worship that "Ahmedis...and sympathisers" are murtad and to be totally ostracised.

A system of burial permits was announced to enable the MJC to prevent the burial of "Kadayanis, Ahmedis, Bahais and sympathisers at any of the Muslim cemeteries". This led to litigation which the MJC, which refused a permit because Jassiem was the Imam of the congregation of which the bereaved father of a baby was a member, lost. NOORDIEN v MOSLEM CEMETERY BOARD, 1965(4) SA 174.

After this skirmish there was no overt battle here between the orthodox Sunni and the Ahmedis for almost two decades. Jassiem, after a few years in the wilderness, was in 1970 persuaded to denounce Ahmedis as murtad which he reluctantly did without being convinced of the truth of the denunciation, and was accepted back into the fold. There was jubilation and press coverage. He himself did not ban Ahmedis from his mosque, they simply stopped attending when they read of his having taken a stand against them. Jassiem did not, however, rejoin the MJC.

In 1973 Jassiem married the sister of Erefaan Rakiep.

According to documents agreed in and attached to the Rule 37 Minute, opposition to Qadianis was increasing overseas and was based in large measure on political considerations. In 1974 a number of Islamic organisations from various countries attended a conference in Mecca. The conference passed a resolution condemning Qadianis as having been "nurtured by British Imperialism. It only emerges and flourishes under the patronage of that imperialism" and sides with imperialists and zionists against Muslims. The conference urged that "this gang" be exposed and that demands be made to Muslim governments to ban all the activities of its followers. In 1978 a similar conference in Karachi also condemned Qadianism as inter alia the "stepdaughter of British Imperialism" and in

the same year the Council of the Academy of Islamic Law declared Qadianism a religious denomination outside the fold of Islam and declared it to be incumbent on "all governments, ulema, writers, thinkers and missionary workers to make struggle against this misguided denomination".

In 1978 the MJC adopted a new constitution, document 9. It claims a good deal of power over the lives of Muslims in the community.

Pakistan politicians apparently yielded to religious pressure. Both branches of Mirza's followers were legislatively declared to be a non-Muslim minority in 1981 which affected their political rights within their country and also effectively prevented them from making the pilgrimage to Mecca as enjoined by the Quran. Statute law compels them to disclose in their passports their adherence to Mirza's teaching. In 1984 an ordinance was passed making it a criminal offence for a Mirzai to call himself a Muslim, his places of worship, Masjids, his call to prayer azan, or even to use the ritual azan those who are recognised as Muslims employ. This Ordinance declares any contrary court order or ruling inoperative. Syria now refuses entry to those known to be Mirza's followers. I refer henceforth to the Lahore branch as Ahmedis, to the Qadianis as such and to both branches, when it is unnecessary to distinguish between them, as Mirzais. (1 (20

Pakistan's constitution now declaring the country to be an Islamic state and that its laws are to be brought into conformity with the Quran and the Sunnah, a Shariat Court was created in 1980 to determine whether any law passed by Parliament does so comply. The inevitable conclusion is that the religious leaders are steadily wresting power from the politicians. In fact statute law has not yet been brought into/... (30

1.17

into complete conformity with what Professor Ghazi assures the Court the Quran requires, though he is one of those working towards that goal. As an associate member of a commission appointed by the President in 1983 to advise him how to bring the constitution of Pakistan into closer conformity with the constitutional traditions of Islam and with the teachings of the Quran and the Sunnah, he has for example recommended that the death sentence be (re-?) introduced for apostacy.

The Shariat Court is manned by orthodox Sunni Muslims. No Ahmedi may appear before it as advocate according to uncontested evidence. Courts are prohibited from handing down any judgment which is contrary to the law of Pakistan. Mirzais having been legislatively declared to be non-Muslims, the lengthy Shariat Court judgment repeating this deeming as a finding (Exh 21) is hardly surprising. (10

In South Africa overt hostilities were resumed when an advertisement appeared in The Argus in 1982 announcing that the Lahores had applied for a welfare organisation number to enable them to collect money to erect an Islamic Centre and distribute Islamic literature. (20

Nazim was President of the MJC by this time.

This advertisement sparked anti-Ahmedi propoganda by the MJC which led to litigation instituted by the local Lahore congregation and one of its members, Mr Ismail Peck (Case 10058/82).

There were many battles in that campaign.

The Lahores and Peck sought an interdict to prevent three Muslim bodies, including the MJC, from treating Lahores as non-Muslims.

a) Those defendants excepted that first plaintiff, the Ahmadiyya Anjuman Ishaati-Islam, had no locus standi. The exception succeeded. (1983(4) SA 856) The Particulars (30

of Claim were set aside in so far as they related to first plaintiff.

b) An application attempting to stifle the suit brought by the remaining plaintiff, Peck, failed. Defendants argued that it is inappropriate for a secular court to attempt to resolve Islamic doctrinal and religious questions. Berman J commented in his judgment (not in those words) that the judgment of a secular court could be more objective than that of a party which had already taken an uncompromising stand against Mirzais.

(1

c) When Peck's action commenced on 5 November 1985, defendants withdrew making it clear that they did so not because they conceded the merits of Peck's claim, but because "they felt that as Muslims they could not in conscience submit to the jurisdiction of...(an) ordinary secular court of this country to decide who is a Muslim".

Evidence was led for a number of days. Hafiz Sher Muhammed explained Mirza Ghulam Ahmed's writings, motives, claims and the sense in which he used certain words such as "nabi" and "rasul" with reference to himself.

(20

On 20 November 1985 Williamson J gave judgment. He summarised Peck's action as one "to enforce his civil right not to be defamed; secondly, to establish his right to attend a mosque from which he says he is wrongfully denied entry, and thirdly, to establish his right to burial in a cemetery established by grant of the Governor of the Cape". It was held that Peck had to establish that he is a Muslim in order to succeed, and had discharged that onus. The order the learned Judge made

1) declared Peck to be a Muslim;

2) interdicted the MJC "from disseminating, publishing or

(30

otherwise propagating false, harmful, malicious and defamatory matter of and concerning members of the Ahmadiyya Anjuman Ashati-Islam Lahore South Africa, including (Peck) to wit, that such members are non-Muslims, disbelievers, kafir, apostates, murtads, that they reject the finality of the Prophethood of Muhammed, that they are non-believers and as such are to be denied admittance to mosques and to Muslim burial grounds, and that marriage with an Ahmedi is prohibited by Muslim Law";

3) declared Peck entitled to have the same right of burial (1) as all Muslims in the Malay portion of the Vygekraal Cemetery;

4) awarded costs on the scale as between attorney and client in his favour. (Document 21).

This judgment caused considerable consternation in the Muslim community of the Cape. Nazim, the President of the MJC, was reported in various newspapers to have said that he had no intention of abiding by the judgment of Williamson J and to have urged all Muslims to ignore the ruling of the Supreme Court since "no unbeliever can make another unbeliever a Muslim". (20)

Presumably to demonstrate that its defiance consisted of more than words, the MJC before the week was out acted to compel a closing of Muslim ranks against the Ahmedi or those it suspected of Ahmedi leanings or even of mere unwillingness to ostracize Ahmedis totally.

Peck is an Ahmedi. Erefaan Rakiep according to Peck, is not. They are, however, friends. Erefaan accepts that the Ahmedis are Muslims on the grounds that the Quran denies any Muslim the right to call another professing to be a Muslim kafir, i.e. unbeliever. Erefaan is a brother of Jassiem's (30) second wife.

Through this relationship by marriage (concluded in 1973 or 1974) to someone who though not an Ahmedi - there was not an iota of evidence that he was - dares be friendly with someone who is, Jassiem has also again come to be regarded with suspicion by the MJC.

Erefaan's son, Nuriduan Rakiep, who was sent to Medina after school to study Arabic and Islamic teaching, painted a picture of pressure and persecution which does not serve to make Islam as interpreted by the MJC an attractive religion.

Nuriduan's knowledge of Arabic, despite his years in Medina, was revealed under cross-examination to be less than perfect. He knows no Urdu. His English is also not that of an Englishman. His evidence was often linguistically strange because of his habit of scattering texts from the Quran or ahadith instead of replying to the actual question put to him. As a child he heard rumours that his father was an Ahmedi. After he had started his overseas study, during a vacation when he came home, he asked his father about this. Rakiep senior denied the allegation. He himself has no relationship with Ahmedis. He was raised as and is a Sunni. After his return from Medina in 1983 he was appointed a teacher at the Square Hill Mosque. He married on 4 December 1983. Plaintiff Jassiem performed the marriage ceremony. The witness's father did not attend. There is some schism between his mother's relatives and those on his father's side. Before the marriage he himself was called on to denounce Mirza and his followers as unbelievers which he said he was prepared to do if they claimed prophethood for Mirza Ghulam Ahmed. Then members of his mother's family, who purported to talk on behalf of a Committee of Ten representing the MJC, urged that he be expelled from the mosque where he had been asked to lead prayers because he refused to denounce his father who was

regarded as an Ahmedi.

The next step was that 30 or 40 people who said that they spoke for the MJC came to the Square Hill Mosque where he was teaching, wanting him to sign a document denouncing his father. They were theological illiterates in the sense that none could read a word of the Arabic written on the black-board. This was during November 1984.

The group came again the following Saturday and ordered him to stop teaching. He referred them to the mosque committee which had appointed him. One tried to eject him physically, but the committee intervened. His students accompanied him to the Lansdowne Street Mosque where he was permitted to teach for a few months but during Ramadan told to stop. During April of 1985 at a wedding where Sheikh Najar officiated, Yusuf Abrahams, one of the group who had harassed Rakiep previously, asked the Sheikh to eject Rakiep from the mosque. He was permitted to stay when he said that he was not an Ahmedi. After the wedding - this was extracted under cross-examination - he was required to say and did say that he believed Mirza Ghulam to be a liar and a non-Muslim. He himself visited the Coovatul Mosque where Jassiem was Imam from time to time for Friday prayers. One day some of the same group challenged Jassiem: "What is he doing here, he is an Ahmedi?" Jassiem refused to eject a man who had come to pray. An argument followed. A veiled threat was uttered to Adam Vinoos of the Mosque Committee, "Ons sal weer ontmoet" which made the latter nervous as a result of which Rakiep went to pacify him.

In 1983 Jassiem went to Mecca. Erefaan Rakiep and his

wife came to Jassiem's house in Grassy Park to bid him bon voyage. On his return he was taxed with associating with Erefaan Rakiep and suspended from service as Imam at Grassy Park. He was never reinstated, despite Erefaan's denial of being an Ahmedi.

In 1984 Nazim expressly ruled Jassiem to be a Muslim. Litigation concerning the Zakaah Fund (of contributions to charity by Muslims) was referred by agreement to an Islamic Tribunal with Nazim presiding. Jassiem was called as an expert witness. Counsel for the fund objected to his competence as a witness on the grounds that Jassiem was an Ahmedi. Nazim overruled the objection holding Jassiem to be a Muslim. The hearing commenced in February and was adjourned from time to time, judgment being given on 24 July 1984. (1)

Then Jassiem's daughter, who lived in Lentegeur, died in May 1985. He buried her himself and donated R100 to the Lentegeur Mosque. Five months later he made a further donation of R100. Two members of the Mosque Committee returned the second cheque and tendered the amount of the first one in cash, which he would not take, asking them to set out their reasons in writing. Document 19 was the result, dated 19 October 1985, which explained that (2)

"On recommendation from two noted Ulema of the MJC we learned the following,

1) You allow noted Ahmadihs and their sympathisers to attend your congregation in Loop Str Mosque; a fact that cannot be disputed;

2) Because you are serving on the Grassy Park Management Commity of which the chairman is an ahmedieh.

3) That you are still intimate with your brother-in- (3)

law Irefaan Rakiép which is without a shadow of a doubt a ahmediey;

4) when it was stated in court that these people only recognise two Alims, namely Sheikh M S Gamildien and your selves, Sheikh Gamildien made an afadauid declaring them apostates, you on the other hand refused to draw up a similar document.

We view with concerne the contents of this letter and will only accept your donation if you publicly denounce the ahmedieya for what they are.... (10

MURTAD.

ENC postal order for R100 being donation received from you in May 1985".

Jassiém had by then already been serving as an elected member of the Grassy Park Management Committee for five years. It is so that Suleiman Abraham, the chairman of that civic body, is an Ahmedi. Jassiém's children who live in Lentegeur, still attend that mosque without let or hindrance.

At the funeral of Mrs Albertyn, Sheikh Salie refused to say prayers since Ahmedi or Ahmedi sympathisers were allegedly present. Jassiém remained silent. Salie mentioned the names of Jassiém and his brother. Jassiém refused to leave and said the mosque belongs to Allah, not to man. Physical violence was on the verge of erupting. Salie walked out. A Mr Soeker intervéned "Broeders, stil. Daar is nog nie 'n bestelling teenaan die Sheikh nie, van die MJC nie". He asked plaintiff to offer a prayer, pro tanto recognising him to be a Muslim. (20

This was the background against which the MJC had its authority - albeit as a result of its own decision to withdraw - to act against Ahmedis denied by the judgment of Williamson J. (30
It did not proceed directly against any Ahmedi or Jassiém, but through the committee of the Loop street Mosque where Jassiém

had served as Imam since 1971. The MJC on 26 November 1985 wrote Document 26 to the Committee, inviting it to a special meeting with the Fatwa Board of the MJC on 28 November 1985, alleging

"That the Council has received numerous complaints regarding

a) the attendance of known Ahmadis and known Ahmadi sympathisers at your mosque;

b) the attitude of the Imam of the Mosque, Sheikh Abbas Jassiem towards the Ahmadis, Quadianis and Bahai Movement and its leaders, its followers as well as their sympathisers. This must be clarified in order to create an atmosphere of trust and harmony between Imam and Mureeds of the Loop Street Mosque. (10

I wish to draw your attention that we had many problems with the said Sheikh".

Vinoos, secretary of the committee of the Loop Street Mosque, brought this letter to Jassiem who assured the committee that no Ahmadies attended the mosque. The nearest to any such thing was Erefaan's son Riduan. The committee reassured Jassiem that they themselves had no complaint against Jassiem. This appears also from the committee's reply to the MJC (Document 30) dated 5.12.1985: (20

"The said Sheikh M Abbas Jassiem has served the Mosque and the community for the last 13 years with dignity and sincerity. As far as we can ascertain, the greatest of trust and harmony prevails between the Imam and his Mureeds.

The said Sheikh, being a learned man, should be approached by the Muslim Judicial Council directly and the Council should not ask us as layman to intervene with the learned Sheikh on a religious issue. (30

As layman we are in a dilemma, since the MJC withdrew from the Supreme Court case against the Ahmadis in such a shocking and appalling manner, and allowed the Ahmadis to win the case by default which means that anybody interfering now with the Ahmadis may be committing contempt of court.

This truly was the blackest day in the history of the Cape Muslims and has left many a serious question unanswered as to the ability of the MJC to intervene, defend or propagate Islam in a responsible and sincere manner. Needless to say the Coovatul Islam Mosque Trust is as concerned about the Ahmadis (1 issue as any of the other Mosques and ummat".

That the criticism was so sharply voiced accusing the MJC of being wanting in defence of Islam is a factor which cannot be ignored in weighing the probabilities in regard to the different versions of what happened at the Gydien-Abrahams wedding at the Yusufiah Mosque on 20 December at which the defamation which is an ostensible casus belli in this case is alleged to have occurred. According to Jassiem, Nazim tried to evict him from the mosque on that occasion, and called him "an Ahmadi sympathiser".

(20

THE PLEADINGS IN THE PRESENT MATTERS

I paraphrase the Particulars of Claim below. Information obtained in reply to requests for particulars is underlined. The plea to each allegation follows in square brackets, later amplification being similarly underlined. What appears in ordinary brackets is my own commentary.

CASE 1434/86

1. Plaintiff is Sheikh Mogamat Abbas Jassiem, theologian of "Salamah"/...

(30

"Salamah", Grassy Park, whose occupation is that of Imam of a mosque.

[Name and address admitted. No admission that he is a theologian, or of his occupation.]

2. Defendant is Sheikh Nazim Mohamed, theologian, of "Amaan", Wynberg, whose occupation is that of Imam of the Wynberg Mosque.

[Denied that defendant's occupation is that of Imam of the Wynberg Mosque. Rest admitted.]

3. Plaintiff has always been a member of the Sunnite sectarian division of Islam and a Muslim. (This elicited four pages of questions aimed at determining i.a. what, according to plaintiff, the binding beliefs of the Sunni are, including whether the Ahmadis are apostate or not, and what qualifies plaintiff to call himself a Muslim. Plaintiff declined to answer most of these, merely amplifying his particulars by stating that the Sunni are "a particular section of Muslims which is based on certain beliefs" and that he himself is a Muslim by reason of his belief -

(10

(i) that there is only one God, Allah, and that Muhammed is his messenger

(20

(ii) in prayers

(iii) in fasting

(iv) in giving of alms

(v) in pilgrimage to Mecca

[Defendant has no knowledge as to what the Sunnite sectarian/...

tarian division of Islam is nor plaintiff's membership of this, and requires proof on both issues. —

Defendant does not admit that plaintiff is a Muslim.

Defendant admits that beliefs in the matters stated would be necessary to qualify plaintiff as a Muslim, but denies that that is sufficient. Further requisites are

- belief in the finality of the prophethood of Muhammed
- belief in the authenticity and completeness of the message of Muhammed contained in the Quran
- belief in the traditions and practices of the Holy Prophet Muhammed
- respect and reverance for all prophets mentioned in the Quran
- belief that the Quran is the whole, true, undulterated revelation to Muhammed by God
- belief that there have not been nor will be further prophets to whom there will be any further revelation from God
- belief that prophets before Muhammed received revelation
- belief in the virginity of Mary
- belief in the concept of Jihad or holy war including the use of physical force where necessary
- repudiation of all who accept Mirza Ghulam Ahmad as a prophet and/or reformer

(10

(20

These conditions lead to many more, all matters for detailed and complex evidence]

4. On Friday 20.12.1985 during a wedding ceremony conducted by defendant in the Wynberg Mosque at which plaintiff was a guest of the congregation, defendant told the assembled

(30

congregation that plaintiff is an Ahmadi or a sympathiser with the/...

the Ahmadis. The precise words used were "Hy is 'n sym-pathiser met die Ahmadis. Hy staan saam met hulle".

[Defendant admits conducting a marriage ceremony on 20.12.1985 in the Wynberg Mosque. The other allegations are denied. ALTERNATIVELY, if they are proved, defendant denies that publication was unlawful:

1. The occasion was privileged
2. The words were said and heard in the discharge of a moral or social duty and/or the furtherance of a legitimate interest

(Many questions were asked and the reply is very detailed, based throughout on defendant's membership of the MJC which is alleged to be a voluntary association of learned men to whom the Muslim community in the Cape looks for guidance on Islamic matters) Defendant says:

(Further particulars par 3(a)) As a member of the MJC to whose members the Muslim community in the Cape looks for guidance and leadership on Islamic matters, defendant had a duty to inform the congregation as to

- (i) his own views re certain matters, more particularly the proper Islamic response to Ahmadis
- (ii) plaintiff's attitude relating to those
- (iii) the perception of the Cape Town Muslim community as to plaintiff's attitude
- (iv) the attitude of the wider Muslim community to "the said matters"
- (v) the legitimacy of defendant's views and those of Muslims generally
- (vi) the needs, the expectations, the rights and the duties of the congregation
- (vii) the qualities an Imam should have

(viii)/...

- (viii) whether plaintiff should continue as Imam of a mosque
 (ix) whether plaintiff should be permitted to take part in the religious activities and those social activities intertwined with religion such as weddings of the Muslim community in the Cape.

(Further Particulars par 3(b)) Defendant's moral duty arose i.a. from the fact that the Muslim community looks to the MJC for guidance and leadership in Islamic matters and that defendant was an important member of the MJC authorised and expected by it to represent and assist it in leading the community. The members of the congregation required and/or were entitled to leadership and guidance from the MJC and the defendant in Islamic matters. (1

(Further Particulars par 3(d)) The social duties have the same source. Moreover defendant "as a member of the MJC and acting on the authority of and interests of the said council" had a duty to maintain social cohesion among Muslims, the local Muslims looking to MJC members to protect social institutions which are intertwined with religious ones. Those so looking to the MJC and its members include the Trustees and members of the Wynberg Mosque. (2

(Further Particulars par 3(g)) Defendant as a member of the MJC "and acting on behalf and in the interest of the said Council" had a legitimate interest in protecting the Islamic faith and the unity of its adherents.

(During the argument stage Mr Albertus applied for an amendment to his Further Particulars so as to delete all reference to the MJC and any alleged authority conferred by it on defendant. The words "as a member of the MJC to whose members the Muslim community look for guidance" in par 3(a) are replaced (30
 by "As a Muslim and an Imam and more particularly as the one who was to perform a Nikah at which plaintiff was present/...

present, the defendant had a moral duty to inform the members of the congregation". Par 3(b) also replaces the MJC as the alleged source of defendant's alleged moral duty, with defendant's "interpretation and understanding of the Holy Quran, the Sunnah...and the settled opinion of Islamic scholars" allied to his being an Imam expected to guide and lead Muslims on Muslim matters.

Mr De Villiers neither consented nor objected to this amendment.)

3. Defendant believed and still believes that what he said (1) was true. Plaintiff's attitude towards and views about Ahmadi's legitimately entitled defendant to entertain this belief.]

5. Defendant knew that

(a) the congregation was composed of Sunni Muslims

(b) Sunni have at all material times regarded Ahmadi as well as a sympathiser with Ahmadi as non-Muslim, disbelievers, as such to be ostracized by Muslims

[Defendant has no knowledge what constitutes the Sunnite sectarian division of Islam and puts plaintiff to the (20 proof of all allegations]

6. The statement was intended by defendant and understood by the vast majority in the mosque to mean that plaintiff is an Ahmadi alternatively a sympathiser with the Ahmadi's and as such a non-Muslim to be ostracized by Muslims.

[Denies making the statement alleged

ALTERNATIVELY, if proved, denies intention attributed to him, requires proof as to what audience understood it to mean

ALTERNATIVELY, if both statement and intention proved and (30 that the statement was so understood by those

present, defendant denies wrongfulness on the grounds set out/...

out ad par 4]

7. Defendant spoke maliciously with the intent to impair plaintiff's dignity.

[Denies statement, ALTERNATIVELY says

(a) Occasion was privileged

(b) He believed the statement to be true]

8. The statement was moreover insulting, though per se not so insulting.

[Denied]

9. The statement was false. (1

[Denied]

10. As a result of defendant's conduct

(a) plaintiff was injured in his good name, social relationships and office as Imam

(b) plaintiff's dignity was impaired

[Don't know. Prove it]

11. Plaintiff suffered damages in the sum of R25 000

[Don't know. Prove it]

In his replication plaintiff says that he "has no knowledge that defendant is a member of the MJC" and denies (20 the allegations in defendant's plea other than admissions - pro tanto, denies the allegation, that defendant in performing the moral and social duty he alleges, was acting as a member and with the authority of the MJC, which Mr Albertus sought to excise from defendant's plea by an amendment during argument at the conclusion of the trial. The replication is at best careless, in view of the parallel attempt to hold also the MJC vicariously liable in the tandem case for the alleged injuria committed by Sheikh Nazim Mohammed in uttering these words at this wedding.

The pleadings in this tandem case ("the MJC action" No

(30

1438/86) clash in certain respects with allegations or denials in what I shall refer to as the personal defamation action. I propose using the same format in setting out the pleadings in the MJC action as used in respect of the personal defamation claim.

CASE 1438/86

1. Plaintiff is described as before.

[Identity and address admitted, balance to be proved]

2. Defendant is the MJC, a voluntary association of Sheikhs, Imams and other theologians operating under a written constitution, claiming to be the authority on religious matters pertaining to the Sunnite Sectarian division of Islam in the Cape Province. The current president is Sheikh Nazim Mohammed, an Imam of the Wynberg Mosque. (1)

[Defendant does not claim to be the authority on religious matters pertaining to the "Sunnite Sectarian Division of Islam" in the Cape Province. Balance admitted.]

(Comment: In the personal defamation action Nazim denies being Imam of the Wynberg Mosque whereas here the MJC admit that he is) (20)

3. Plaintiff has always been a member of the Sunnite Sectarian Division of Islam - a particular section of Muslims "based on certain beliefs" - and a Muslim since he believes that there is only one God, Allah, and that Muhammed is his messenger; in prayers; in fasting; in giving alms; and in the haj (pilgrimage to Mecca).

[Defendant does not know what the Sunnite Sectarian Division of Islam is and requires proof of this and of plaintiff's alleged membership of this. Defendant requires proof that plaintiff is a Muslim. The grounds on (30 which he claims to be one are insufficient to qualify him

as/...

as such. Further requirements are those set out in the personal defamation action which include repudiation of all who accept Mirza Ghulam Ahmed as a prophet and/or reformer.]

CLAIM A:

4. In 1971 the Trustees of the Loop Street Mosque orally appointed plaintiff as Imam at R100 per month with additional income derived from baptisms, weddings and funerals. The appointment was incorporated in a written agreement but plaintiff does not have it. (1)

[Admitted that he was Imam for some years. No knowledge of the rest.]

5. Pursuant to the appointment plaintiff performed the duties of an Imam until the end of 1985.

[Admitted that he ceased to be the Imam at Loop Street towards the end of 1985. Balance to be proved.]

6.1 Defendant during December 1985 wrongfully and maliciously incited, induced or procured the trustees wrongfully to dismiss plaintiff as Imam and debar him from entering the Mosque. A.G.Gabier and other members of the MJC acted on its behalf in so doing, knowing that the trustees had no justification or ground to dismiss plaintiff as Imam and debar him from entering the Mosque. (2)

[Denied.]

ALTERNATIVELY

(a) The MJC was justified in so acting inasmuch as plaintiff was regarded by local Muslims as an Ahmadi sympathiser and defendant in the discharge of its moral and/or social duties and/or the furtherance of a legitimate interest, was entitled to inform the trustees what its attitude was to (30 the desirability of allowing plaintiff to continue as Imam.

The/...

The MJC had a moral duty to tell the trustees its views on Islamic theology and practice and the proper Islamic response to the pronouncements and practices of the Ahmadi; of plaintiff's attitude to these matters; of the views of the Muslim community in Cape Town on plaintiff's views; whether plaintiff is correct in terms of Islamic law; on the needs of the congregation of the mosque and the qualities its Imam should have; and whether plaintiff should stay on as such. The MJC also has a duty to protect the social cohesion of the congregation of Cape Town Muslims and Muslims internationally.

(10)

These duties arose because the MJC is comprised of learned men to whom the Muslim community, including the trustees of the Mosque, look(s) for guidance.

(b) The trustees were in any event in law entitled to terminate plaintiff's employment and services when they did.

(c) Pursuant to such duty and interest the MJC told the trustees in December 1985 it thought that plaintiff should not "in certain circumstances" continue or be permitted into the mosque having regard to plaintiff's attitude to the supporters and followers of Mirza Ghulam Ahmad. The advice was given orally and in writing. Defendant does not have a copy of the written advice. Certain members of the executive acted on behalf of the MJC in giving the said advice which was received by all the trustees of the said mosque.

(20)

(d) The conduct of the MJC did not constitute incitement, nor did it act maliciously.]

6.2 On or about 31.12.1985 the trustees influenced during November to December 1985 thereto by the MJC through Gabier and others wrongfully dismissed plaintiff with immediate effect/...

(30)

effect and debarred him from entering the mosque. They were not entitled to dismiss him since no justification or lawful grounds for his dismissal existed, alternatively, would not have done so but for the conduct of defendant. The dismissal was by means of a letter, copy annexed.

(This, from Mr Vinoos as the Secretary of the Board of Trustees of the Coovatul Mosque, is dated 28.12.1985 and requires plaintiff to denounce "the Ahmadias" in writing within 7 days, failing which his services are to be terminated forthwith) (10)

[Don't know, prove it.]

6.3 In consequence of the wrongful dismissal plaintiff has lost income and so suffered damage, for which defendant is liable, in the sum of R52 500 as set out in the annexed actuarial report.

[Don't know. Prove it.]

CLAIM B:

7. On 20.12.1985 at a wedding conducted by Sheikh Nazim Mohamed in the Wynberg Mosque where plaintiff was a guest of the congregation, its president on behalf of the MJC and with (20 its authority and approval said to the congregation that plaintiff is an Ahmadi or a sympathiser with the Ahmadi. The precise words were "Hy is 'n sympathiser met die Ahmadi. Hy staan saam met hulle".

[Admits Nazim Mohamed conducted a wedding at the Wynberg Mosque on that day. No knowledge of the rest - prove it. ALTERNATIVELY should the words and authority to represent the MJC be proved -

(1) the occasion was privileged: on behalf of the MJC Nazim spoke in the discharge of a moral or social duty and/or the furtherance of a legitimate interest of the (30

MJC/...

MJC.

(2) the words were published and received in the discharge of a moral or social duty and/or the furtherance of a legitimate interest.

(3) and Nazim believed and believes them to be true, on the strength of the attitude and views expressed by plaintiff on the position adopted by the Ahmadis.]

(Another example of the clash between the cases, since here the MJC denies the authority which Nazim Mohammed claimed to have existed in the personal defamation action, although the MJC admits that authority in the Further Particulars to the alternative defence of privilege) (1

8. To the knowledge of Mohammed and the MJC -

(a) The congregation was composed of members of the Sunnite Sectarian Division of Islam

(b) Many members of this group, including many of those attending the wedding, regard Ahmadis as well as sympathisers with Ahmadis as non-Muslim pariahs.

[Defendant does not know what constitutes the "Sunnite Sectarian Division of Islam". Plaintiff required to prove (2' all allegations].

9. The statement meant, and was intended and understood by the vast majority of those present in the mosque to mean that plaintiff is an Ahmadi, alternatively a sympathiser with the Ahmadis, and as such a non-Muslim to be treated as a pariah by Muslims.

[Plaintiff is put to the proof that the statement was made
ALTERNATIVELY

Mohammed was not acting for the MJC

FURTHER ALTERNATIVELY

Having no idea what the "Sunnite Sectarian Division of
Islam/...

Islam" is or what it believes, the MJC has no idea how the audience as alleged members of this group understood the statement and puts plaintiff to the proof of his allegations.]

10. The MJC and Nazim Mohamed acted maliciously and intended to impair plaintiff's dignity.

[Denial of knowledge of the statement repeated; authorization denied; in the alternative, the occasion was a privileged one, and malice and the intent alleged denied.]

(10

11. The statement was in the circumstances moreover of an insulting, injurious and contumelious character towards plaintiff. It is not per se insulting to be referred to as an Ahmadi or an Ahmadi sympathiser.

[Plea to previous par. repeated]

12. The statement is false. Plaintiff has never been an Ahmadi or a sympathiser with Ahmadis.

[No knowledge. Not admitted.]

13. It has injured plaintiff in his good name, social relationships and in his occupation and office of Imam.

(20

[No knowledge. Not admitted.]

14. He suffered damages in the sum of R25 000.

He has been injured in his good name and social relationships.

His dignity was impaired.

[No knowledge. Not admitted.]

Pausing here for a moment, Rule 21(7) deals with the seeking of Further Particulars both for purposes of pleading and for purposes of trial, and enjoins:

(30

"The Court shall at the conclusion of the trial mero motu consider/...

consider whether the Further Particulars were strictly necessary and shall disallow all costs of and flowing from any unnecessary request or reply, or both, and may order either party to pay the costs thereby wasted, on an attorney and client basis or otherwise".

This injunction is honoured in the breach rather than the observance. I realize full well that the costs of the MJC's request for particulars is a drop in the ocean in a case of this magnitude, but it appears prima facie to have been an abuse of the process of the Court where it consisted of (1) something like a hundred questions to which something like 16 replies were given, and where one of its requests was to be afforded a copy of its own constitution. There were slightly fewer questions - and also fewer answers - in the personal defamation action. It was agreed that costs would be argued after judgment, when the Court's findings were known. This is one of the aspects that should be addressed by Counsel, even if it is a drop in a large ocean, because of the obligation imposed on the Court by the Rule.

(20

In his Replication plaintiff merely denied the allegations in defendant's Plea save for admissions made.

There was an exceedingly lengthy request for particulars for purposes of trial. In the reply given by plaintiff to some of the questions asked, plaintiff set out what he meant by the expression "Sunnite Sectarian Division of Islam", namely,

"That division of Islam comprising the vast majority of Muslims worldwide (known as Sunnis) as distinct from the (minority) Shi-ite Division. The Sunnite Division is generally regarded as being orthodox although it is in itself a genuine division, subdivided into many groups between/...

(30

between whom differences of perception and practices exist".

Further:

1. Many Sunni, but not all, criticise or oppose the Ahmadi, although the Ahmadi school of thought arose within the Sunni Division.
2. Plaintiff himself believes the Quran and Ahadith
 - (a) require him to be tolerant towards others
 - (b) do not entitle him to reject people who profess to be Muslims, including Ahmedis, despite his differing from⁽¹⁾ their interpretation and perceptions in certain respects.
3. He has refused to express criticism of or opposition to Ahmadis despite being called upon to do so.
4. He has since birth been and testified to being a Muslim and was recognised as such by the South African Muslim Community.
5. Accepting and bearing witness to the Kalimah Shahada is sufficient to constitute one a Muslim, alternatively, sustaining belief in the five pillars on which Islam is founded: the Kalimah, prayers, fasting, the giving of alms, and⁽²⁾ pilgrimage to Mecca.
6. On other matters there are differences among Muslims. It is not incumbent on a Muslim to repudiate all who accept Mirza Ghulam Ahmad as a prophet and/or reformer
7. All or almost all Muslims (including plaintiff) accept the following doctrines as constituting part of the principles and faith of a Muslim -

- (i) Belief in the finality of the prophethood of the Prophet Muhammed

- (ii) Belief in the authenticity and completeness of the message of the Prophet Muhammed, as contained in the Quran
- (iii) Belief in the concept of Jihad including the use of physical force where necessary
- (iv) Belief in the traditions and practices of the Holy Prophet Muhammed
- (v) Respect and reverence for all prophets mentioned in the Quran.

8. Some Muslims accept, others reject, the doctrine of the virginity of Mary. Others, including plaintiff, are neutral about this. (1

9. Rejection of the Ahmadis does not form part of the principles and faith of a Muslim.

10. (The question was asked, ad par 10 of the Particulars of Claim relating to the alleged defamation, "On what grounds is it alleged that the said statement was made maliciously with intent to impair the plaintiff's dignity?". I detail the reply, because of argument addressed based on this by Mr de Villiers). "The malice and injurious intent are evident from (2) the facts already pleaded. Aggravating features included the following:

(a) The said Mohamed spoke in a loud, hostile, aggressive and derisive manner for all persons present to hear

(b) the defamatory words were accompanied by repeated demands that plaintiff should leave the mosque, refusals to perform the ceremony until plaintiff did so, repeated exhortations to others present to support the demands and an explicit attitude that the demands were made not with a view to allowing the wedding ceremony to proceed but by (3)

way/...

way of rejecting plaintiff on religious grounds".

11. As a result of the defamation plaintiff has been ostracized by large numbers of the Sunnite Muslim community by whom he is regarded as a disbeliever.

During the course of argument after both parties had closed their cases, many issues were raised some of which the Court could and should perhaps have been invited to deal with before any evidence was led at all. For example, there is a dispute as to the incidence and nature of the onus on the issue whether plaintiff is a Muslim - relevant to both claims; (1) and another as to whether being called an Ahmadi sympathiser can found a claim for defamation at all in a country where the Muslim community is a small minority and "right-thinking people generally" i.e. the non-Muslim community majority would think no less of a person so described.

These questions only require to be decided should it have been established

(a) that Nazim uttered the words attributed to him at the Gydien-Abrahams wedding, which is denied by the defendant in both cases (2)

(b) in regard to the claims against the MJC

- (i) not only that Nazim uttered the words alleged but did so as a duly authorised representative of the MJC
- (ii) that the MJC induced or procured the trustees of the Coovatul Mosque to dismiss plaintiff as their Imam.

The sensible place to start therefore seems to be with these primary factual issues.

Despite the fact that Nazim and the MJC in their pleadings profess not to know what a member of "the Sunnite Sectarian Division of Islam" is, in what follows I refer to the local Muslims who are in the majority as Sunni - since they are not Shi-ites. (3)

FACTS: Were the words complained of spoken?

I do not repeat any of the background already sketched.

Peck testified in Afrikaans. He appeared sincere and kindly. He is not highly educated or versed in subtleties of theology or dogma. His interest in religious matters is not strong. He was not a zealous attender at the mosque. One suspects that he finds himself within the Lahore group because it is more tolerant, less narrowly fanatic than the Sunni group into which he was born rather than as a result of profound doctrinal differences. (10

He regards himself as still a Muslim despite having joined the Ahmedis in 1958. One does so by signing a pledge which contains nothing but the five basic pillars of Islam and then one receives a certificate of membership.

Having sketched the background to the litigation culminating in the judgment by Williamson J, Peck said he had not tried to exercise the rights conferred on him by that. He feared that his future rights of burial would be prematurely exercisable on his behalf should he try to exercise his present right to attend Muslim mosques. (20

Neither of the Rakieps, father or son, are members of the movement.

Nuriduan Rakiep is a sales representative for Hamrad Electronics. Despite his studies in Medina, it is clear that his knowledge of Islamic theology is limited. He has never read any works of Mirza, knows no Urdu.

Rashid Abrahams testified in Afrikaans. He is not a learned man and his vocabulary even in that language is neither large nor sophisticated. Under cross-examination his evidence gives an inkling of the existence of a system of trial by gossip and conviction by reason of association, but his testimony relates primarily to the events at his son's (30

wedding in 1985 when the alleged defamation occurred. He himself is a Sunni Muslim and has never been anything else. He has known Jassiem since the latter returned from El Azhar something like half a century ago as, like himself, a Sunni Muslim. He respects Jassiem as a surrogate father, his own having died long ago.

Abrahams's evidence was not satisfactory in all respects. The probabilities are that he was aware that Jassiem's presence at his son's wedding might cause friction, though he denies this. For something like a year, gossip in the community had had it that Jassiem was an Ahmadi sympathiser. (1) Abrahams knew about the judgment in favour of Peck in the matter from which the MJC had withdrawn, and that Nazim and others were unhappy with that. He knew also that Nazim had been appointed by the bride's father, Gydien, to officiate at her wedding. There is no evidence that he knew that Nazim, then Chairman, now President of the MJC, had publicly declared his refusal to be bound by that judgment of the Court (Document 21).

Abrahams explained that in Muslim society the bride does (2) not attend her own wedding. She is represented by her father at the mosque. He appoints the Imam who is to officiate, and may also cancel such appointment or instruction. The bridegroom's father is at liberty to invite guests to the wedding. They do not necessarily have to be Muslims to be acceptable, may be both non-Muslim and even female. He had himself towards the end of November orally invited Jassiem to attend the wedding. He had not himself contacted Gydien personally but because of the gossip that Jassiem was a "sympathiser" instructed his son to ask Gydien whether Jassiem (30) could attend the mosque, making it clear that if Jassiem were

not/...

not welcome "dan moet hy" - that is his son Ramzie - "nie vir my reken as 'n vader nie". Ramzie himself brought no reply. Abrahams's future daughter-in-law, Fatima Gydien, came and reported her father as having said "Hy het niks teen Sheikh Mogamat nie...Sy het nie ge-mention bywoon van die troue nie". When she left Abrahams tears were coursing down her cheeks.

Suggestions by Mr Albertus of a quarrel between father and son before the wedding about Jassiem's being invited to the mosque were not supported by Ramzie when he in (10) due course testified on behalf of the defendants.

Abrahams was somewhat confused in his testimony as to the precise sequence of events inside the mosque, not surprising since what is clear is that after Nazim entered confusion reigned. Abrahams was not confused as to the content of those events as he observed them. I give the gist. The wedding was set for 3 o'clock in the afternoon. Abrahams arrived late, along with his son Ramzie the groom, Jassiem's brother Abdullah, and two groomsmen. There was already noise and confusion inside the mosque. Jassiem was sitting up front (20) near the migrab. Nazim was near the door when Abrahams entered. Many of the congregation, about 250 to 300 strong, were on their feet conversing loudly in groups or shouting at Jassiem to leave. Nazim was pointing at Jassiem and said, "Hy moet uit, hy is 'n Ahmadi sympathiser en hy wil nie saam met ons staan nie". Nazim made it clear that the wedding could not proceed until Jassiem left, nor could it be held elsewhere than in the mosque, that is, not outside, nor in a house. Abrahams asked Jassiem to leave, for the sake of the wedding. Nazim interjected, "Nie vir die sake van die troue (30) nie, vir die sake van die din" (religion). Abdullah was also/...

also ordered out by Nazim "want jy encourage dit". Jassiem's nephew, Adiel, protested at people's being ejected from the house of Allah when Abdullah was manhandled and sworn at. Nazim threatened to eject Abdullah himself. The bridegroom walked out saying he was not going through with the ceremony. He was crying. His father followed and tried to calm him.

After a while Abrahams and Ramzie were called and Abrahams was urged to tell Jassiem to leave so that the wedding could continue. Nazim again said, and was not alone in this, that it was for the sake of the faith that Jassiem should leave. (1) Jassiem and his brother left slowly, loudly declaiming in Arabic, which caused Nazim to challenge that he could declaim more loudly and better than they.

Abrahams testified that since the wedding the entire family has been split. When anyone is labelled an Ahmadi sympathiser "dan is jy afgekap". One is ostracized and regarded as an apostate. People now avoid him also. Indeed, having been in court on the first morning of the trial, when he left the building during the lunch adjournment in the company of Jassiem and his attorney, he himself was assaulted (2) along with Jassiem and his brother Abdullah, the two latter being actually knocked down. This lent force to the testimony of Peck and his own that intolerance is almost total in at least a section of the local Muslim community towards anyone suspected of not himself being totally intolerant of Ahmedis. "Hulle dink dat enigeen wat met eiser praat is ongelowig". "As hulle praat van sympathiser dan breek hulle die familie van onder toe na bo. Geeneen mag na jou huis kom nie. Hulle moenie praat met jou nie, hulle moenie eet van jou nie. Jy word niks nie".

Mr Albertus put what would be Nazim's version of events to

Abrahams/...

Abrahams

that it was the bride's father who would not permit the wedding to continue while Jassiem was present that when Jassiem refused to leave Nazim asked the congregation to express its wishes: those who wanted Jassiem out were to stand that Nazim at no stage labelled Jassiem as an Ahmedi sympathiser nor said "Jy wil nie saam met ons staan nie" nor ordered him out.

Abrahams said he had no knowledge of the first two of these propositions, but was adamant that should Nazim deny having used the words alleged he would be lying. (10

Sheikh ^{Jassiem} ~~Nazim~~, the plaintiff, is 72 years old. His evidence supplements that of Peck as regards the years of ever increasing opposition to the Admedis by the MJC. ^{Jassiem's} ~~Nazim's~~ age shows more in his habits than his physique. Stocky, and with a rather wispy little goatee, in his Muslim apparel of turban and robe he looked like an Arab. The moment he started talking he proved that he belongs in the Western Cape. His home language is Afrikaans. His "professional" language as Imam or former Imam is Arabic. I obviously cannot judge his fluency in the latter. His Afrikaans corroborated what his evidence told me: He attended school in South Africa only to standard 2. At the age of 9 he was taken on pilgrimage to Mecca. He and a cousin were left behind in Cairo to follow the family tradition. His father, paternal grandfather, and great-grandfather had all been Imams as well as his maternal grandfather. He returned 14 years later. (20

The paucity of his secular education is reflected in the language he speaks: colloquial Afrikaans with a fair sprinkling of English words; in his admission that he was assisted/... (30

assisted when he composed certain letters which feature as exhibits; and in the further acknowledgement that spelling is not his strong suit.

He has a habit of going off on his own tack without listening to the questions put to him. I did not get the impression that this was due to evasiveness, but rather to the egotism of age and accustomed authority, allied to the fact that he is neither quick-witted nor linguistically better off than Abrahams. He was not averse to employing histrionics and on occasion used the witness box as a pulpit. All the witnesses with firm religious beliefs - Hafiz Sher Mohammed and Prof Ghazi also - were clearly addressing the audience as much as the Bench when they testified. Professor Ghazi admitted that an invitation had been extended to the congregation at a Mosque he attended one Friday to come to court to listen to his testimony - one infers, which would demolish Ahmedi pretensions to Muslimhood. I probably did Sher Mohammed a disservice and prevented him from preaching as extensively as Ghazi did, by encouraging him to permit me to read after court hours the evidence which he submitted in the form of written synopses. My undertaking to do so was given in an attempt to save time. In this I was not particularly successful, but did succeed in partially depriving him of an opportunity to speak to the local Muslims present in court who would hear from no one as well as from this witness what Ahmedism is all about.

Jassiem in Cairo attended school from 1924 and from 1931 the Al Azar Institute "om geloof te leer". Despite five years there he did not pass. Indeed, he does not impress as having been either particularly studious or having an irresistible theological vocation, though I do not doubt his religious sincerity/...

cerity. His cousin, also left behind in Cairo to study, carried reports home of Jassiem's distractive interest in cerity. His cousin, also left behind in Cairo to study, carried reports home of Jassiem's distractive interest in boxing which would have led to his taking part, for Egypt, in the Olympic Games had it not come to light that he did not have the requisite citizenship. He returned home in 1938 and became Imam virtually by inheritance. The mosque in Pentz Street belonged to his family. It was "ge-slum" - one infers, expropriated and demolished. With the proceeds Jassiem's father built a house with a hall which he named The Imam Yasiem Mosque. There Jassiem and his cousin assisted Jassiem's father. The latter died in 1956 after having appointed his son as his successor. The cousin broke away at some stage, taking the wealthier congregants with him. Jassiem was appointed Imam at the Coovatul Mosque in 1971 but also assisted in Grassy Park, where he lives. His brother Abdullah shared his duties at the Imam Yasiem and Coovatul Mosques. (10

In Egypt he studied subjects like jurisprudence, interpretation of the Quran, and hadith. I did not get the impression that he read widely, if at all, beyond the primary sources. His studies did not touch on the life and writings of Mirza Ghulam Ahmed or the Ahmadiyya Movement at all. (20

Sheikh Jassiem was one of the founder members of the Muslim Judicial Council which was constituted in 1945. He parted company with this body ten years later on a question of ritual. Four members adopted the view that the special Friday prayers, Jumah, replaced the daily Zuhr. The rest said that Jumah was additional to Zuhr. Jassiem voted with the four. He absented himself from MJC meetings after that "maar hulle gee te kenne hulle het my uitgeskop". (30

The Muslim Progressive Society had launched the Muslim

Judicial Council, but later they came into conflict. Most of the members of the MJC are not highly educated. Some inherit their office of Imam from their fathers, some know no Arabic, some have not attended any Islamic educational institution at all. The MJC is not representative of all the Muslims in the Western Cape. There are other bodies like the Islamic Council of South Africa ("ICSA") and Ashura - the latter also having splintered from the MJC. Moreover, no one elects or appoints the members of the MJC. People decide themselves whether they do or do not wish to belong to this body. (10

In support of his allegation that the MJC does not represent the unanimous view of Muslims in this area, Jassiem testified that at one stage Gamildien's followers broke away from the MJC. There had been litigation between ICOSA of which Sheikh Najaar was president (he also being Sheikh Nazim's predecessor on the MJC) and the Muslim Butchers' Association.

Jassiem sketched the events which led to his being in the '60s declared, untried and in absentia, an apostate for allegedly refusing to "withdraw his support to the Ahmedi creed". A deputation from the MJC had visited him before they made (20 that announcement. His evidence about the topic of conversation at that meeting is garbled, but it appears that some fatwa was shown him. There is no suggestion, save a fleeting one from Nazim which I do not accept, that anyone ever, then or now, gave Jassiem a fair account of the content of Mirza's writings and tried to persuade him objectively that they contained undoubted heresy. He says he was invited to rejoin the MJC, not reasoned with on the topic of Ahmedism. He says too that he never "supported" Ahmedis. They told him they were Muslims, worshipped the same God, recited the same (30 testimony. His understanding of the Quran and Sunnah was that

he/...

he had no right to call such a person kafir, even if he doubted the correctness or genuineness of that person's faith. He surrendered and did denounce Ahmedis when approached in 1970, against his better judgment. He was appointed Imam at Coovatul in 1971 but by the time he was invited by Abrahams to attend his son's wedding there had been a number of incidents where Sunni displayed suspicion about Jassiem, based not on any known flaw in his beliefs, but his refusal to denounce someone whom he did not regard as an Ahmedi, as such.

About the wedding Jassiem testified as follows. He went (10 to the Mosque in the company of his cousin Mogadien Price. No one objected to his presence either outside the Mosque where he greeted people and they him, or inside where he prayed (which involves a prescribed ritual of physical motion) and then sat down to one side. Then Sheikh Nazim came in alone. Jassiem denied that the bride's father was the first to have come to him, denied also that Gydien had asked him to leave the mosque before Nazim started the trouble. Nazim walked past Jassiem and then ordered him out speaking wildly, loudly, "Ons wil hê hy moet saam met ons staan, maar hy wil nie saam (20 met ons staan nie. Hy staan saam met die Ahmedis. Hy is 'n Ahmedi sympathiser". Nazim then invited the congregation to show their solidarity with the MJC by standing up. Some did, others remained seated, some walked out. After Abrahams and Abdullah arrived, Nazim said Abrahams should go out and Abdullah too. "Jy moet ook uit, hoekom jy encourage dit". Plaintiff's nephew Adiel objected. "Watter reg het jy om my uncle uit te gooi?" To which Nazim reacted "Ek gooi jou ook uit". Someone asked the groom's father to ask Jassiem to leave. Abrahams did. "Gaan maar uit dat die troue kan

aangaan" to which Nazim again reacted "Nie vir die troue nie, vir die din".

After some time Jassiem decided to leave, first going forward "om weer te bid om vir my af te koel". His brother Abdullah accompanied him out. Many of those standing outside criticised Nazim's conduct. They are unwilling to give Jassiem overt support by testifying, just as his nephew Adiel is unwilling to testify. "Hulle is bang. As jy met my is dan is dit gif". His own sisters refuse to visit or receive him (although they still telephone him) for fear of adverse reaction, although the community is not even-handed in its treatment. "Daar is party van Muslims wat Murtads het in hulle familie en hulle maak niks daaraan nie".

Jassiem said under cross-examination that the bride's father had asked him to leave, "maar na die moeilikheid al ge-start het", and that "as iemand in manierlikheid my gevra het, sou ek gegaan het". Gydien may perhaps have spoken to him, but definitely did not do so before Nazim had ordered him out. And he was adamant that the version, that Nazim had asked those in the congregation who wished Jassiem to leave to stand as an expression of that wish, was false. Nazim had said "Staan op en wys julle solidarity dat julle staan saam met die Council", after labelling Jassiem an "Ahmedi sympathiser, hy moet uitgaan". He denied that he had been evicted, has no recollection of anyone asking him please to go. So too he denied that Gydien came and sat next to him and spoke to him, but admitted that the groom's father had asked him to leave. He refused, not verbally, but merely by silence and inaction.

To be called an Ahmedi sympathiser before a Muslim congregation would result in his being regarded as not being a Muslim and becoming an outcast.

He became quite emotional in describing his feelings during this episode. "As ek nou vertel my gevoelentheid, het ek gewens dat die aarde kan ope gaan dat hy vir my kan insluk. Ek het nog nooit in my lewe so iets oorgekom nie, nooit in my lewe nie. En nooit in my lewe het ek gesien 'n Moslem-leier gedra vir hom op so 'n manier nie om my te beskreeu". Adv.Hoberman urged this as symptomatic of dishonesty in view of Jassiem's having been declared murtad in 1965 already and in view of the events at Mrs Albertyn's funeral. Jassiem's evidence may not be literally quite correct, but he was dealing with an episode which was the culmination of a long train of events which built up until on Jassiem's version Nazim's conduct caused the majority of the congregation present in the mosque to turn on Jassiem to his face. That had certainly never happened before. (1

Jassiem corroborated Riduan Rakiep as to an episode where there was an attempt to eject Riduan from the Coovatul Mosque. He places the date as 27 December 1985. He intervened. Someone asked "Wat soek hy (that is Riduan Rakiep) hier?" to which plaintiff replied "Wat soek jy hier? As jy jumah kom maak het, hy ook". Someone commented "Hy soek nie hier want hy is Ahmedi" at which Jassiem protested "Hoe kan jy so sê?". Adam Vinoos, Secretary of the mosque committee, also argued with the group offering to "fix" trouble-makers. (20

Jassiem testified that the moving spirit behind the harassment of Reduan Rakiep was Sheikh Shakier Gamildien, Imam of the Aspeling Street Mosque, or rather "die manne wat aan hom behoort". He mentions Salie at Concert Boulevard in Retreat. Other pupils of Gamildien are Salie of Chiappini Street, and the Imam at the Heideveld Mosque. (30

On 31 December Mr Vinoos brought Jassiem a

letter dated the 28th from the Coovatul Mosque Committee (Document 31). This recites that rumours abound that Jassiem is a sympathiser of the Ahmedi sect which "is creating tremendous animosity between the Trustees of the above mosque whereby several other organisations and Muslim institutions are applying pressure on clearing the issue". To clear the matter "and allow the mosque to function and you to continue with the tremendous amount of good spiritual and religious work you have been doing for the last fourteen years it is necessary for you to submit in writing your denunciation of the Ahmadias". Annexed to this was a draft reply (dated 2/01/86) awaiting only his signature: (1)

"As Imam of the above mosque, a duty which I have capably accomplished for the last 14 years in Insha-Allah, it grieves me to experience the amount of injustice that is being levelled at me and the unfair and dishonourable conduct of certain members of the Muslim Judicial Council and the totally un-Islamic methods that are being used to persecute me and undermined my position as Imaam at the above mosque. As most of you are personally aware I am not of the Ahmadias sect and I denounce them as Muslims out of the fold of Islam and that they are Murtaad Kufir. I pray that the above will clear my position". (20)

When Vinoos handed over these two letters, Jassiem refused to sign the draft reply. His attitude was and remains that it is not for him "om mense murtad te maak nie".

He assisted at the wedding of Suleiman Ebrahim's daughter, does not know whether she is an Ahmedi. He may well have taught Ahmedi children, but unwittingly. "Dit maak (egter) by my geen verskil nie. As iemand in Allah en Muhammad glo en hy maak my salaah en hy face my kibla aanvaar ek hom as 'n (30

Muslim volgens die hadith".

He had in Document 31 been given 7 days to react. Before the 7 days were up Adam Vinoos telephoned and said that if he did not sign the annexure "sal ek nie meer Imam wees in daar-die moskee nie. Hulle is gepress, hy sal my self uitsit".

Vinoos handed documents 32 and 33 to plaintiff saying that they might be of assistance to him. The former purports to be from E Holt to the Loop Street Mosque Committee, is dated 30 December 1985 and refers to a meeting held on the 25th at the MJC offices attended by 50 mosque committees at which plain- (10
tiff was discussed and a delegation appointed to speak to the committee of the Loop Street Mosque "in order that we may ascertain your Islamic stand on this matter which I can assure you is extremely chagrining". Document 33 is Vinoos's reply to this, dated 31.12.1985, criticising "the totally ruthless and dishonourable methods and conduct being used in the form of threats of execution, boycotts and spreading of false rumours of persons declaring them to be Murtaad, Kufir or Ahmedias sympathisers without a proper course of Islamic justice" and referring to the letter which is now Document 31. (20

Jassiem did respond to the ultimatum in Document 31, by means of Document 34 dated 3 January 1986. A friend helped him with this. In this he stresses that he is not and never was an Ahmedi, but that his view is that it is contrary to the Quran and Sunnah to prevent people who wish to do so from praying in the house of Allah, and contrary also to the Quran and Sunnah to condemn any man unheard. He quotes from the Quran and Ahadith to support a somewhat incoherent but impassioned protest against gossip mongering and in-fighting amongst Muslims, a protest he repeated in court. The Mosque Committee (30
never/...

never put charges to him nor gave him an opportunity of putting let alone explaining, his own point of view. And the MJC, he says, appoints spies to see who is visiting whom. "My huis word baie dopgehou".

Despite his habit of running along at a tangent, not listening to questions asked, often rambling without completing sentences, there can be no doubt that

- a) he himself was accustomed to being regarded in local Muslim society as an alim, because of his knowledge of Arabic and the Quran; (1)
- b) according to his understanding of the Quran he would be acting contrary to the injunction of the Shariah if he usurped Allah's function and labelled anyone who professed to be a Muslim and who gave him no concrete proof of undoubted apostacy as an outcast to be refused entry to the mosque;
- c) he resented bitterly the methods allegedly adopted by the MJC and its members and delegations since he was not afforded an opportunity of defending his view as set out in b) and was dealt with by indirect and devious or autocratic and unfair methods; (2)
- d) he is devoid of fanaticism and has an unsophisticated religious philosophy. "Ek moet sorg dat ek reg lewe...Die BoodsAPPER sê as jy iets verkeerd sien maak hom reg met jou hand. As jy nie kan nie, met jou tong. Dit meen keer, en bring hom reg. As jy nie kan nie, met jou hart (vra Allah daardie man leiding te gee dat hy kan reg dink). Maar ek is nie gewoon om 'n man te sê 'glo so en so' nie".

It was argued for defendants that Jassiem knew what the Lahore Ahmedis believe because he had had this explained to him/... (3)

him at length and that Jassiem was dishonest in not admitting this. I disagree. Had any non-Ahmedi in South Africa - and probably the bulk of the ostensible Ahmedis - had any real knowledge of Mirza Ghulam Ahmad's writings at first-hand, it would surely have been unnecessary to import overseas witnesses to educate us all about them. Nazim himself is innocent of such dangerous studies. The local Muslims received the Al Azar fatwa and followed that, feeling obliged to follow it, leaving no room for any crisis of conscience such as I accept Jassiem genuinely suffered. He seems to have been (10) swayed by natural family loyalty and friendship on the one hand and the dictates of others as to what he was allegedly obliged to say he believed, to the detriment of those he liked and respected, on the other. Put another way, though he never crystallised his attitude in those terms, Jassiem claims the right, a) to have an open mind about Lahores; b) to associate with them, without being labelled a sympathiser and ex hypothesi himself an apostate.

Advocate Hoberman suggested that the fault lay with plaintiff himself and that Nazim had treated Jassiem fairly with (20) reference to the 1984 civil action relating to Zakat which had by agreement been referred to the Islamic tribunal, where Nazim had ruled in favour of Jassiem's Muslimhood. Jassiem countered the suggestion of Nazim's alleged impartiality, not illogically, as follows "As die advokaat (that is at that hearing) miskien vir my beskuldig het, hoekom het Sheikh Nazim nie gevra nie hy moet my om verskoning vra nie?" He remained adamant that he is not an Ahmedi, that he knows very little about the Ahmedis, though aware that there are two groups one of which believes Mirza Ghulam Ahmad to be a (30) prophet. He himself does not believe this. He believes Jesus was/...

was a prophet, and died. He does not know whether Jesus had a physical father. He himself has no right to cross-examine a man as to his belief, because that is a matter between the man and God.

Imam Abdullah Tarrief Jassiem, plaintiff's brother, is ten years younger than Jassiem with a slightly better secular education (he passed standard 6). However, he has a disadvantage as regards theological studies. He was taught by his father and the plaintiff, did not attend any institution for this purpose. I refer to him as is already apparent as Abdullah, (10 reserving the surname for his brother the plaintiff.

I doubt Abdullah has the intelligence to concoct and abide by an untrue version of events merely to support plaintiff's evidence, and he has no knowledge of or interest in the Ahmedi Movement or any Ahmedis. He testified that Erefaan Rakiep attended the Coovatul Mosque. No one in the mosque complained. He clearly does not regard Erefaan as an apostate. Abdullah did in certain respects support Jassiem's story and contradict Sheikh Nazim's.

His evidence relates to two events: the attempt to eject (20 Riduan Rakiep shortly before the Wynberg wedding, and the events at the wedding itself.

He was not challenged about the former at all. Two people asked what Riduan was doing at the Coovatul Mosque to which Jassiem in effect replied "praying like you". Vinoos was not prepared to take any nonsense from them, and was threatened.

On 20 December 1985 he accompanied the bridegroom, the groom's father and the groomsmen to the Wynberg Mosque. They arrived a bit late. There was a noise. Some people were on their feet. Plaintiff was sitting alone in the mosque. (30 Sheikh Nazim said the wedding would not continue until plaintiff/...

tiff left. "Hy moet uitgaan want hy wil nie saam met ons staan nie en hy is 'n Ahmedi sympathiser". Sheikh Nazim said to this witness "en jy moet ook uit" pointing to him "want jy encourage dit".

His version does not match Jassiem's in every respect, but gives different facets of the same story, one in the nature of things confused because "die gewoel was te veel". He himself said the wedding should continue and called on Allah in prayer; at which people protested, as they did when Jassiem moved forward to pray "om vir hom af te gaan koel". (10) At some stage the bridegroom left the mosque. Three people tackled the witness who lost his turban in the scuffle. He left, reciting a prayer in Arabic. Sheikh Nazim jeered, "Ek kan beter sê as jy en harder". The witness challenged him to do so. The challenge was not accepted. He left. His brother preceded him.

Cross-examined, his version remained unshaken. He denied a) that he had taken a tape recorder to the wedding; b) that Nazim said it was the bride's father who wished Jassiem to leave; c) that he had earlier asked the bridegroom (20) to bring young supporters to the wedding because he was expecting to be ejected. He did not hear Nazim call on those in the congregation who wished plaintiff to leave, to stand up. But he did hear his nephew Adiel protest "wat maak julle met my uncle? Julle kan hom nie uitgooi nie. Dit is 'n moskee".

Jassiem and his witnesses were far from perfect. The story told by Nazim was far less probable than plaintiff's version. Moreover, the witnesses were also even less perfect than Jassiem and his supporters.

Ahmad Gydien, the father of Fatima who married Ramzie (30) Abrahams on 20 December 1985, is the (or a) divisional factory manager at Rex Trueform clothing factory. I accept that/...

that it is a position of responsibility which would require a modicum of common sense and knowledge of human nature. He has a standard 7 education and no pretensions whatever to Islamic learning. He labelled himself as "just an ordinary Muslim". As such he had my sympathy since it was clear that his version of what sparked trouble at the mosque on that occasion is so improbable that it must have been largely concocted. The fact that it was concocted and he prepared to accept responsibility for doing what he says he was keen to avoid, namely, spoil his daughter's wedding day, gives some insight into the hold that (10 the majority of those regarded (not always on strong grounds) as possessed of Islamic learning have on "just ordinary Muslims".

Mr Gydien is physically far more imposing than Sheikh Jassiem or Mr Abrahams but was clearly uncomfortable in the witness box. He never relaxed and was almost as terse as Jassiem and Sheikh Nazim, indeed all the theologians, were verbose.

I do not propose to set out his evidence in great detail, but summarise it, the summary revealing self contradictions or improbabilities. (20

1. He asked Sheikh Nazim to perform the ceremony at his daughter's wedding since he himself belongs to the Yusufia Mosque. He was aware that Sheikh Nazim was a leading member of the MJC. He knew about Peck's case in which judgment was given in November declaring that Peck was entitled to admission to mosques. There were notices at the Yusufia Mosque that neither Ahmedis nor Ahmedi sympathisers were allowed to enter.

2. He regarded Sheikh Jassiem as a trouble-maker, but could give no valid grounds for this view, except that he had heard (30

without himself seeing anything which could be construed as evidence of this, that he was an Ahmedi sympathiser.

Originally Gydien tried to justify the opinion he had allegedly then already held with reference to reports that had come to his ears of Jassiem having been "thrown out" of inter alia the Coovatul Mosque but chronology contradicted him.

What was left was a vague and dangerous generalisation: he must be an Ahmedi sympathiser otherwise he would be a leading figure in the community.

3. He himself had strong feelings about Ahmedi sympathisers being present at his daughter's nikah but (10

a) admitted that he did not express them when given the opportunity of doing so before the wedding;

b) says that he merely sent a message, when asked, that he would prefer Jassiem not to attend; and was told by Ramzie later that Jassiem had told the young couple not to worry - "everything will be all right";

c) gives as reason for this insipid attitude that "I can't stop him from coming to the mosque, sir";

d) despite which he says that he tried to eject him once he found him there by halting the ceremony until he should have gone. (20

4. He says he did not want Jassiem to come to the mosque because he feared that the community might make trouble and so spoil his daughter's wedding day. Pressed, the only name that came to mind after some delay as someone who might wish to eject Jassiem was that of his uncle Mr Salie. Yet when Gydien arrived Nazim, the Imam of the mosque and leader in that congregation, in his office and aware of Jassiem's presence, had taken no steps to get rid of Jassiem who was already inside and sitting quietly, nor did Nazim indicate any (30

intention/...

intention of doing so although Nazim had reported Jassiem's presence to Fredericks as a member of the Mosque Committee. He himself started the ball rolling by announcing to Nazim that the wedding would be cancelled did Jassiem not leave, and by himself attempting to persuade Jassiem to go.

5. He is vague as to the sequence of events, but says he was very upset. No explanation was offered as to why he should have been so upset at a train of events he himself was supposed to have set in motion. He did not hear what Nazim said although Nazim was speaking loudly. (10

6. His aversion to having an Ahmedi sympathiser at his daughter's wedding is scarcely based on doctrinal differences since he knows nothing whatever of Ahmedi beliefs. He has merely been taught that he is obliged to reject Mirza Ghulam Ahmad (this crystallized after initial uncertainty) because he is held up as "somebody who had made claims which are contrary to my Islamic belief". There was no attempt to justify his alleged objection to Jassiem while himself taking no steps against Abdullah nor voicing any objection to Abdullah's presence at the wedding. (20

Because Gydien is more intelligent, educated and coherent than Jassiem, Abdullah and Abrahams are, discrepancies and improbabilities in his evidence show up far more starkly since they are not lost in or masked by a jumble of words.

Ramzie Abrahams is the bridegroom whose wedding was disrupted on 20 December 1985. He is 28 years old, and head of the geography department at the senior school where he is in charge of a standard 7 class, despite his majors for his BA degree at the University of the Western Cape having been anthropology and history. (30

He looks younger than his 28 years, is slight in build and not/...

not a forceful character. He had to be reminded often to speak up. He seems to be much closer to his mother than his father, indeed regards his father as having made a deliberate choice between himself and his second cousin Sheikh Jassiem, and was resentful at having been dragged into his father's stand on principle that - no-one put it in these words - the MJC had no right to dictate whether his relatives should be entitled to attend his son's wedding or not. Ramzie confessed to being emotional and crying easily. He not only cries easily, he lies easily. I have no doubt that he too was not honest with the Court. There are contradictions and improbabilities inherent in his evidence. Under cross-examination he was adamant that he had volunteered to testify, not being asked to do so, but could give no logical reason why he had so volunteered. It was not to contradict any untruths or errors in the testimony given on behalf of Jassiem. It was because "my marriage was used for a specific purpose - not necessarily a purpose concerned with a religious dispute..." to create trouble between Sheikhs Jassiem and Nazim or between the community and Jassiem. He could give no more detailed explanation. (10)

Before the wedding he was already under the impression, received from his father, that there was going to be trouble at the mosque. Despite his shying away from the admission, it was clear that he expected that an attempt would be made to eject Sheikh Jassiem from the mosque. His allegation that he expected it to come from his father-in-law is patently false. It was the MJC which had taken a stand against Ahmedis being permitted into the mosque. Though he himself never regarded Jassiem as an Ahmedi, Jassiem was reputed to be an Ahmedi sympathiser. Nevertheless, Ramzie did not envisage trouble ensuing/... (20)

(30)

ensuing should Jassiem attend the reception, only should he attend the mosque. He conceded ultimately as one possible source of trouble what is indeed the most probable source of trouble: the Imam presiding over the ceremony, moreover the President of the MJC, which body we know had been severely criticised shortly before in scathing terms for retiring from the battlefield when Islam should have been defended against Ahmedism had Ahmedism indeed been apostacy.

The run-up to the wedding was this, according to Ramzie: (10
 His father asked him to ask his prospective father-in-law whether plaintiff could attend the wedding ceremony at the mosque. He was reluctant to pass on the request because he did not regard it as his duty to deliver such a message. His father insisted. He personally took a wedding invitation to Sheikh Jassiem, also at his father's insistence. He approached his father-in-law Mr Gydien who said "if there is going to be trouble Sheikh Jassiem should rather stay away". Under cross-examination he admitted that the possible trouble at the wedding would be about religion because "the way I have heard was that Jassiem associates himself with Ahmedis - (20
 probably mixing with them" although Ramzie did not understand that Jassiem was an Ahmedi sympathiser and never thought him to be an Ahmedi. When Ramzie conveyed this message to his father, Abrahams said that he himself would then not attend. Ramzie was upset and told his mother to cancel the arrangements for the reception. When, on the strength of this decision, which Ramzie accepted she had conveyed to her husband, his father, the father took to his bed, Ramzie went to Jassiem. As he entered the house he started to cry. Through his tears he told Sheikh Jassiem that there was trouble bet- (30
 ween Ramzie and his father because of him ("because I could see/...

see whose side my father was taking") and that he must rather stay away from the mosque. Sheikh Jassiem told him that mixing with Christians does not make one a Christian nor mixing with Jews a Jew and enjoined him, "do not worry, everything will be okay". From this Ramzie says he inferred that Sheikh Jassiem would not come to the mosque, probably just come to the reception. Ramzie, however, cannot possibly have been honest in saying that he drew this conclusion on this ground. He cannot explain the conclusion, which far from being reasonable, is still less a necessary one, and moreover (1 says that he was "too upset to still continue the conversation." That he should have been so upset though genuinely thinking the anticipated problem solved is illogical. And he explains why he did not back up his alleged inference by asking either his father or his father-in-law to ensure that Jassiem would not attend the mosque, by side-stepping the question instead of answering it: "Like I said when my father asked me to deliver the message I did not consider it as my duty because it had nothing to do with me. It was between them. They should solve it".

At the wedding ceremony the bridegroom has to recite a formula known as niyah. Ramzie went to Jassiem's brother, Imam Abdullah, for the necessary instruction. During this, Imam Abdullah according to Ramzie

- a) voiced the opinion that Abrahams senior should not have asked "if Sheikh Jassiem can come to the mosque"; and
- b) "also mentioned something if I do not have young friends that would stand by them to prevent them from being forcibly removed from the mosque - I assume himself and Sheikh Jassiem".

(30

As regards the wedding itself Ramzie says the following:

He/...

He arrived at the mosque somewhat late in the company of his father, one best man, and the driver of the car. His mother had commented that there was going to be trouble and asked her sister "why is Ramzie's father taking Imam Abdullah with? He knows that there is going to be trouble at the mosque".

Ramzie did not know in advance that Imam Abdullah would be accompanying them to the wedding, but did not anticipate any problems flowing from this despite his mother's alleged comment. "I did not think there was any trouble between him and the community". He had no problems about going to Imam Abdullah to be taught his niyah, would not have done so had he considered him to be an Ahmedi. Abdullah had been Ramzie's Muslim teacher for about five years and used to visit the Abrahams quite regularly. His father and Imam Abdullah entered the mosque ahead of him. People were standing around, talking loudly. He went to the front of the mosque and sat down. Sheikh Jassiem was sitting to his right, alone, quietly. He himself did not pray as was customary and stayed for only a minute or two, then got up and walked out and cried outside "because I am a very emotional person". He has no logical explanation at all of what happened to make him emotional and decided to leave. Friends consoled him and after a while he returned, went to his future father-in-law Gydien "to tell him how sorry I am that what is happening. He said I must not worry about it". Why he should have expressed regret merely about people's standing around is unexplained. His father-in-law's alleged comment hardly accords with Gydien having himself tried to eject Sheikh Jassiem. Asked whether he heard Sheikh Nazim say anything to Sheikh Jassiem inside the mosque he replied "that would be difficult to say because everybody was talking...and I did not focus on what someone was saying specifically/...

specifically...because I was just standing with my friends...and then they were just sort of telling me all the time do not worry, everything will be okay etc".

This neutral comment under cross-examination alters to "I do not remember. One does not try to recall unpleasant experiences". He did remember his father's telling him subsequently that Sheikh Nazim had shouted while pointing at Sheikh Jassiem "jy moet uit, jy is 'n Ahmedi sympathiser".

The only aspect of his evidence that was revealing, apart from the fact that he testified at all, having purportedly so poor a recollection of what happened inside the mosque, relates to his attitude to the religious dispute. Having said that he never regarded Sheikh Jassiem as either an Ahmedi or an Ahmedi sympathiser, he nevertheless expected that he might be ejected from the mosque because he "associated with Ahmedis - probably mixing with them" and he expected this sort of trouble because "the Sheikhs and Imams teach the community whether something is to be considered even vaguely different from Islam". It follows that he did not (dare?) question the right of those he expected would deprive Jassiem of his right, namely, to enter the mosque, despite his expectation of the imminent ejection of someone known to him as a non-Ahmedi but perhaps regarded as sympathetic to Ahmedis on the strength merely of hearsay past history. (10)

Ramzie's alleged aversion to Ahmedis is not based on any doctrinal conviction. He knows little about their beliefs. What is being taught everywhere is that those beliefs are un-Islamic and that an Ahmedi "might try to spread some beliefs which is not acceptable" though none has ever attempted to talk Ahmedism to him, let alone convert him to this creed whatever it may be. It is something which must be "exposed"/... (20)

"exposed". Since Islam is international what is happening overseas - such as Pakistani legislation putting Ahmedis who call themselves Muslim in gaol - is "relevant to the situation in South Africa as well when Islam is concerned".

Sheikh Nazim Mohamed is younger, taller, less trim than Jassiem, who for a short spell in Nazim's childhood was his mentor. Nazim sports a trimmed salt and pepper beard and gold-rimmed spectacles and appeared only in robes and always with his kufia, matching his robes of which he has an elegant assortment, on the back of his head; the total effect being to give him an air of innocent dignity.

He is accustomed to authority in his community and to speaking weightily and smoothly (and in grandiose terms); though his use of language is neither precise nor that of an educated person, rather that of one using polysyllabic English to impress.

When I refer to his use of language that obviously excludes Arabic about which I cannot judge. His secular schooling stopped short in mid-standard 7 after which he was sent to Mecca for religious studies. He was nudging 17 years of age when he left and returned at the end of 1955 aged 23½, therefore having studied for 6½ years. Whether the full period was spent at formal institutions or merely four years (three at Nadrasat-ul-fatah and one at the Islamic Institute) and the balance in the afternoons with various ulema at the Sacred Mosque is not clear but also not material. His theological learning, like Rakiep's, is impressive compared with that of "the ordinary Muslim" like Mr Gydien, but shallow in comparison with that of Professor Ghazi or Sher Mohammed. There is no suggestion (save a shaky and questionable one in re-examination) that as a student he came into contact with the/...

(20

(30

the writings or beliefs of Mirza Ghulam Ahmad, even on as limited a scale as Riduan Rakiep who had been subjected to one adverse chapter had done. After his return to South Africa he lectured on religion, joined the Muslim Judicial Council in 1956 and was appointed Imam at the Park Road Mosque in 1957. After 11 years he resigned to join Sheikh Tofie as assistant Imam at the Yusufia Mosque stepping into his shoes after Tofie's death in 1972. He has always been and still is involved in what one may term public office, beyond that of being an Imam; in the MJC for 7 years he held office as supervisor of the ritual slaughtering at the abattoir. He served for a three year term as city councillor representing Ward 6 from 1963. Between 1966 and 1982 from time to time he was chairman of the MJC, being elected President in 1982. In 1979 he intended studying further but nothing came of this save that he resigned as Imam at Yusufia and on his return a few months later had to rest content with sharing his former post with the Imam since appointed, Mr Heuwel, formally the holder of the office. (1)

His evidence suffered, inter alia, from a flaw that had its origin in the pleadings: they denied the defamation alleged but pleaded privilege in the alternative, and neither alternative was abandoned at the trial. Permissible pleading may embarrass in the witness box. Sheikh Nazim tried to follow conflicting courses simultaneously. On the one hand he used generalities to impress how widely the MJC is accepted as being the authoritarian voice of the people on religious matters in the Cape, as such also echoing the voice of "the entire Muslim world" - a phrase to which he was particularly wedded. On the other hand, he was meticulous in undermining any suggestion that the MJC had in the present issue displayed (20)

any/...

any of the qualities of the leadership he claimed for this body. Though it consistently claimed to be the authority local Muslims should consult and be guided by, and indeed called on Muslims in doubt to seek its advice, Sheikh Nazim denied that it had indeed advised any person as to how to react to what had long been perceived as a thorn in its flesh.

He was evasive about many matters as will be illustrated in due course. What is relevant, as regards the events at the wedding, is that when the Lahores advertised their application for a welfare organisation number, the MJC authorised Nazim to "deal with the matter", to "act in the matter". He asked that a committee be formed and became the chairman of that. "The matter" was far larger than merely opposing the welfare organisation application. He caused a notice to be issued and read out at all mosques (Document 15a) to give effect to MJC policy and consistently reported on what other bodies, with which there was close cooperation, were doing. (10

Of relevance too is the Peck judgment delivered a month before the wedding and what flowed from that, and that Nazim had been since 1982 the President of the MJC and as such also the head of the Fatwa Committee which has the duty of handling all matters relating to Ahmedi in terms of the constitution of the MJC. That position is one of power since Fatwas are issued on behalf of the MJC in the expectation of obedience. (20

The MJC had advised the Muslim community which it purported to lead that Mirzais were a foe dangerous in the extreme. The MJC, by walking off the battlefield, had conceded the foe a victory. The MJC, through Nazim, reacted by verbal boldness in defying the court order. At a meeting of the MJC where Nazim presided, the administrator reported on Jassiem's/...

Jassiem's "collaboration" with the foe. When the body through which the MJC intended putting a stop to that - the Committee of the Coovatul Mosque - openly flouted the MJC's authority and criticised its lack of leadership in the Peck matter, the inference is inescapable that neither Nazim nor the MJC had any choice. If they were not to back down, they had to act against the nearest perceived target or most recent cause of the flouting of the authority of the MJC, namely, Jassiem.

Against that background Nazim's evidence that at the wedding when somebody told him that Sheikh Jassiem had entered the mosque, he did nothing except to pass this information to Fredericks when he, Gamildien and Gydien came to greet Nazim; and that not even Fredericks who was a member of the Mosque Committee, but Gydien took the lead in trying to eject Jassiem, is so improbable that one may describe it as romancing. Apart from such a course of events showing up the MJC as a rudderless boat adrift once more despite all the verbal vigour displayed by Nazim shortly before, it would, as I have already commented, endow Gydien with a highly unlikely theological fervour. He is an "ordinary Muslim" who did not want his daughter's wedding day marred by controversy, yet allegedly himself started the disruption of the ceremony. (10

The reasons Nazim advances as to why he did not himself try to eject Jassiem are incoherent and inconsequential, except that one again gets a glimpse of the reliance on rumours not put to the subject of the gossip. "I thought Sheikh Jassiem...will not allow me really to communicate with him...because of the information we already had in the Judicial Council. Because of the rumour and he knows my stand. I felt that it was not possible to communicate with

this/...

this man".

His version of the events at the wedding is this: He went to the mosque to officiate at the wedding and entered his office off the main entrance. He sat there not doing anything in particular. Someone told him Jassiem was in the mosque. He already considered Jassiem to be an Ahmedi sympathiser. Cross-examined as to what he thought was the proper thing for him to do, he was evasive. Although he admits that it was his duty to ask Jassiem to leave - one accepts primarily his duty since he claims as President of the MJC to be the leader of the Muslim community in the Western Cape - he did nothing. Then Gydien, Fredericks and Gamildien came into the office to greet Nazim. He told Fredericks that Jassiem was in the mosque, so that Fredericks could ask Jassiem to leave. (Under cross-examination he protests "I never shield behind other people on this".) Gydien and Fredericks went into the mosque itself. A few minutes later he himself followed and saw Jassiem still there. Gydien at once approached him and told him not to proceed with the wedding until Jassiem had left. Nazim went to the front of the mosque. He told those present that he could not proceed with the ceremony because of Gydien's instruction. Jassiem immediately challenged him "Gooi jy vir my uit?" Nazim replied "Jy wil hê ek moet vir jou uitgooi dat jy my court toe vat. Jy moet vir ons sê wat is jou staan met die Ahmedi Movement". The reason he gives for this counter-challenge is not clear: "Because a letter was sent to the Court of Islam and it was reported by our administrator in our meeting...and eventually the Council decided that a letter be sent to Court of Islam Mosques... because of him allowing Ahmedis and sympathisers in his mosque". (I quote this because of the reference to the Council/...

Council which can only be the MJC.) "And then there was rumour outside also". Nazim regarded Jassiem as an Ahmedi sympathiser. It had been reported that Jassiem allowed Ahmedis and Ahmedi sympathisers to attend his mosque. So challenged Jassiem replied "Ek kan nie mense kafirs maak nie". Some people were telling Jassiem to go, so Nazim, because "as an Imam of the mosque we really cannot allow things to go completely out of hand" turned to the people and said "Those of you who want Sheikh Jassiem to go out of the mosque please stand up". Everybody stood up. Under cross-examination he conceded (10 that he asked people to stand up to show their solidarity with the Council. It did not cross his mind himself to ask Jassiem to leave. He accepted that Gydien had already done so without success and that Jassiem would "not allow me really to communicate with him", whatever that may mean. Things were not orderly in the mosque. He tried to tell people to calm down. He had done so already before he asked them to stand. Some were standing, some sat down again. He saw Jassiem go forward to pray. He denies having called Jassiem an Ahmedi sympathiser or having told Abdullah to leave the mosque or (in (20 chief) having said something about standing in solidarity with the Council. He admits in cross-examination having said when Jassiem was asked to go out for the sake of the wedding "nie vir die sake van die troue nie, vir die sake van die din". Jassiem ultimately left.

I have no doubt that Nazim lied about the events at the wedding and his part in those and that the version of Jassiem and his witnesses is to be preferred. It would have required a total change of character for a leader accustomed to exercising authority, no doubt smarting from the Ahmedi victory in (30 Peck's case, and from the criticism voiced about the MJC's handling/...

handling of that - a leader moreover holding the view that it would be disastrous were an Imam to side with the Ahmedis - to be so passive and unleaderlike here and so aggressive and militant as Nazim comes across in both Exhibit 3 before the wedding and Document 37 later. That later document may also explain why Nazim, despite being a religious leader (with also great secular influence as a result) would be prepared to lie under oath in what he conceives to be a good cause. At the meeting the proceedings of which were recorded, and of which Document 37 is a transcript, the attitude was that "we are now (1) protecting our religion against the courts of South Africa and we must all be united when we take a stand like that". The intention of the MJC is to eliminate a threat, to crush a kafir sect, and to "stand up solidly" against anyone who permits Jassiem into his mosque and therefore undoubtedly to "stand up solidly" against Jassiem himself, especially when he is seeking relief in that court. After all, the hearing by that court of issues brought before it affecting the Muslim community, was tagged as "gross interference in the religious matters of the Muslims of South Africa". (20

In short, the flaws in the evidence presented by plaintiff as to what happened at the wedding are mainly flaws due to age, quality of intellect and memory, and differences of observation of confused events. The flaws in the defendant's evidence are mainly due to deliberate deviation from truth.

Jassiem has therefore discharged the onus of establishing that the words on which he relies for the defamation action were uttered.

(30

Two further factual questions have to be answered. Having found that Nazim said the words alleged at the Gydien-Abrahams wedding, was he doing so acting as authorised agent for or representative of the MJC? Did the MJC incite the trustees of the Coovatul Mosque to dismiss Jassiem?

Sheikh Nazim says the MJC is regarded as the body in Cape Town that represents the Muslim community. It deals with Muslim divorces and a tribunal presided over by the President decides disputes of a religious nature. It is, according to him, the accepted authority amongst all Muslims in the area of (10 its jurisdiction on Islamic religious and judicial matters, respected by all Muslims, the "sole and binding authority on matters pertaining to Islamic religion and the religious law related thereto".

This claim appeared under cross-examination to be overstated though the MJC is certainly striving to achieve that status.

There are as yet other bodies within the area, like the Islamic Council, that appear to be in competition with the MJC in the sense of fulfilling similar functions (20 though not working under the aegis of the MJC as the Council of masajids with a 90 percent membership overlap with the MJC appears to do.

As already pointed out the MJC is neither appointed nor elected but like Little Topsy just grows. Those already within decide which further applicants they will admit so that it cannot be regarded as representative along democratic lines. Its constitution (Document 9) shows that the Supreme Council of the MJC does wield great power within the Muslim community. It decides religious matters and informs other members of the (30 MJC after the decision has been made. It gives or refuses permission/...

permission to its members to testify on any question of Islamic Law. It can veto decisions of the General Council. It acts as a fatwa body, a court, an appeal court. Its decisions are said to be final and binding.

The MJC is not merely a passive body waiting for disputes to be submitted to it. It issued the 1965 fatwa against "Ahmedis, Kadayanis, Bahais and those persons who are sympathetic towards the beliefs of the abovenamed sects", declared that "all Ahmedis, Kadayanis, Bahais and sympathisers are Murtad" and gave instructions as to how such should be treated. Those instructions amount to total ostracism. (10

(Document 4)

It attempted, according to Jassiem to persuade Jassiem who had left the MJC because of the difference of interpretation in regard to Friday prayers, to return to that fold. Nazim testified that the Cairo fatwa was shown to Jassiem on 14 March 1965. Nazim's evidence in its very hesitancy provides support for Jassiem's version of what the ostensible purpose was of the delegation sent to him on that occasion. Nazim's version grows from "there was no discussion about support which the plaintiffs were showing for the Ahmedi creed" through "at the meeting he was told to come with us...because the Judicial Council was aware...that he had contact with the Ahmedis but we wanted to ascertain from him there...at the meeting, that is why we called him towards us" finally to "the question of his supporting...was brought up...by certain members...He was evasive". (20

Had the purpose of the meeting been to give Jassiem the election between accepting and supporting the fatwa or himself being declared murtad one would have expected Nazim to have no difficulty in remembering this. Moreover, a meeting with such

a/...

a content could not possibly have led to a letter such as Jassiem's of 28 March 1965 (Document 2). Explanation of what Ahmedism is all about, even less.

The motive behind the meeting may well have been to get plaintiff to rejoin the MJC because they wished to present a united front against the Ahmedis, but it is unlikely that that was the motivation revealed to Jassiem.

Nazim's evidence on what followed the 1965 fatwa - indeed his evidence as a whole - shows up the MJC in a poor light. After the delegation had in 1965 visited Jassiem (10 without, as I have found, giving him a clear election or proper, if any, explanation, he was in his absence declared murtad "because of our knowledge that he was involved somehow or other with the Ahmedi Movement...When we told him to come with us we expected him to respond...because he was a leading figure, Sheikh, in the community...his not coming with us actually caused us to believe now that he is sympathetic towards the Ahmedi Movement".

Sheikh Nazim's allegation that Jassiem had in 1965 been "involved somehow or other with the Ahmedi Movement" is one (20 that would not stand up to scrutiny in a court of law. The later picture does not differ save perhaps in Jassiem's favour as far as credibility is concerned.

The constitution of the MJC provides that one of its functions is through its Fatwa Committee "to handle all matters relating to the Qadayani, Ahmadi and Bahaai". (Document 9)

It did so in the sixties by the fatwa, the pressure brought to bear on Jassiem, the decision to control burials via permits. All the probabilities indicate that when Nazim attacked Jassiem at the wedding he did so not only in his personal capacity, but in pursuance of his duty as laid down in (30 the/...

the constitution of the MJC to give guidance. That the MJC did not dictate to him exactly what form that guidance or "dealing with" a person he regarded as requiring to be dealt with was to take is in my view immaterial.

When challenging Jassiem as an Ahmedi sympathiser at the wedding Nazim did so in pursuance of the policy decided upon by the MJC as expected of him by that body and not merely as an individual, just as he in his capacity as a leader within the self-appointed leader body, had acted in other instances on its behalf without any formal authorisation being minuted (1 as far as we know from discovered documents.

That Nazim testified that he was not authorised to say anything at the wedding is probably correct. That it was not challenged in cross-examination is therefore in my view irrelevant in the circumstances of this case. It was as, inter alia President of the MJC, indeed part of his function to deal with Ahmedis. The method of dealing was left to him because according to him (and Advocate Albertus's argument) a simple expedient is adopted in such cases which avoids the trauma of religious trials. The MJC did not authorise him to insult or (20 defame Jassiem. That, too, was unnecessary. Nazim merely adopted the course approved by the MJC as appropriate in similar matters: of labelling as an Ahmadi sympathiser and ejecting from the mosque a person not himself willing when called upon to do so, to take a similar stand against either the Ahmedis or anyone suspected of being one.

The second aspect in which the role of the MJC must be assessed is not as elementary as it appears at first blush.

Mr Hoberman argued that Jassiem's cause of action is not protection of the simple contractual right between employer (30 and employee, but of the right to pursue his vocation or calling/...

calling without unlawful interference from another. Since it is a prerequisite for an Imam to be a Muslim, the onus burdened Jassiem to establish that he qualifies for the post, scil. by being theologically sound.

Mr de Villiers countered with analogies from the law of spoliation: Jassiem was in de facto possession of the reputation of being a Muslim and as such qualified to be an Imam until the MJC intervened; so that the MJC is obliged to prove "other circumstances which, if they existed, leave (plaintiff) without a claim". (Wigmore 1981 Vol 9 para. 2486 p 291 as (10 quoted with approval in MABASO v FELIX, 1981(3) SA 865 (A) at 873 B-D).

Our courts accept that there is a difference between inducing someone to breach an agreement and inducing him to terminate a relationship lawfully. The particulars of claim in their original form relied on the former conduct and alleged it to be wrongful. Plaintiff, however, by a notice of amendment dated 3 February 1987, added an alternative factual allegation which, according to Mr Hoberman, inserted an alternative cause of action. Since the pleadings, as Mr Hoberman (20 stressed, determine the onus, one must look to them to see on what this claim rests. Para 6.1 of plaintiff's particulars alleges inducement by the MJC of the mosque trustees to break their contract (the duration of which is nowhere given) with ("wrongfully dismiss") Jassiem. This inducement is alleged to be wrongful, the reason being, as given in further particulars, that to the knowledge of the MJC Jassiem's dismissal was unjustified. According to para 6.2 the trustees, influenced by the defendant, wrongfully dismissed plaintiff. (30

"Q: Is it alleged that they were not legally entitled to
dismiss/...

dismiss plaintiff?

A: Yes.

(What follows underlined being inserted by the February 1987 amendment) alternatively, if legally entitled they would not have dismissed plaintiff but for defendant's conduct.

Q: If so, on what grounds is that allegation made?

A: No justification or ground existed therefor".

Para 6.3 then alleges damage flowing from this wrongful dismissal, the particulars afforded making it clear that the computation is done on the basis that Jassiem would have con- (10) tinued in his employment at Coovatul Mosque as Imam for the rest of his working life.

The underlined words, if they introduce an alternative cause of action, certainly do so obliquely and require one to re-write the pleadings so that the alternative allegation is made that the MJC's conduct in inducing the trustees to dismiss plaintiff lawfully was wrongful, because the trustees would not have dismissed him but for defendant's conduct. Since para 6.1 does not allege any false allegations about plaintiff to or coercion of the trustees by the MJC, there may (20) be some difficulty in determining why their conduct should be labelled wrongful.

It is clear on the pleadings that Jassiem's Claim B in both its forms is reipersecutory, not aimed at a solatium.

The starting point is that the MJC's conduct should have caused Jassiem damage. Were its inducement towards a wrongful dismissal (as alleged), Jassiem has an action against the trustees, but that action is limited to a claim for damage for breach of contract. NDAMSE v UNIVERSITY COLLEGE OF FORE HARE AND ANOTHER, 1966(4) SA 137 (ECD) 139G - 140A. I can think of (30) no reason why the MJC should be obliged to pay more than the actual damage suffered by Jassiem as a result of the breach of contract/...

contract by and presumably recoverable from the trustees.

In the absence of an allegation that the trustees cannot pay damages for such wrongful dismissal, the MJC has not diminished Jassiem's patrimony, merely altered its content, so that the pleadings on this score appear to me to be excipiable. (cf. MILLWARD v GLASER, 1949(4) SA 931 (A) at 942) Our cases seem to accept that it may be an injury to A should someone persuade B to break the agreement between A and B, but a rider is added "unless there is some justification for it". What would constitute a sufficient justification is far from (1 clear. If I persuade you that you would be better off with a broken contract and facing a damages claim than in abiding by your contract without seeking any advantage for myself from the breach, I doubt whether a claim against me would be held good, whether for a solatium (because my motives are dishonourable?) or for patrimonial loss. In the type of situation where A persuades B to break B's contract with C not in what is conceived as B's own interests but in those of A - for example because A wants transfer of the property B has sold to C and is prepared to pay far more than C has offered - I have (20 come across no case in which delictual damages were claimed and granted at the suit of C who in any event has adequate recourse against B for breach of contract.

Perhaps the answer to this question is the same as that in relation to the alternative cause: A person is not to be regarded as doing wrong or acting maliciously who merely exercises his own right. MURDOCH v BULLOUGH, 1923 TPD 495, 508, 519.

In regard to the so-called alternative claim, Jassiem is not on paper seeking to protect a right, as Mr Hoberman (30 argued, but wants damages caused by a completed alleged invasion/...

sion of an alleged right.

The basic rule of Roman Dutch Law is that

"When one person has caused another to suffer patrimonial loss such loss lies where it falls, unless the person who suffers it can show sufficient legal ground for shifting its incidence on to the shoulders of its author

.....

As a rule, there is sufficient legal ground for shifting the loss on to the shoulders of its author if his conduct which caused the patrimonial loss is found to have been (10

- 1) a contravention of a rule of positive law; or
- 2) tainted with dolus (evil design); or
- 3) tainted with culpa (blameworthiness).

Of these inculpatory features culpa is the great corrective. Blameworthiness is the deflection from an ideal standard of conduct...Like moral concepts this standard is not static or uniform; it is influenced by the generally accepted notions and the social conscience of this community and this age".

(Lex Aquilia, v.d. Heever, page 45)

(20

A vital ingredient is missing in the so-called alternative claim: some allegation of fact justifying the conclusion of law that the MJC's inducement of the trustess was wrongful. All that is alleged is that it was causative. Cf. NEW KLEINFONTEIN COMPANY v SUPERINTENDENT OF LABOURERS 1906 TS 241.

According to Van Der Walt, LAWSA, Volume 8 page 36, in order for conduct to be classified as wrongful it is required to be either an infringement of a recognised right or the breach of a duty to act reasonably.

One may have degrees of culpability (compare the analysis (30 of Schreiner JA, HERSCHEL v MRUPE, 1954(3) SA at 477). But rights/...

rights exist or do not. (Compare VAN DEN HEEVER JA in MRUPE'S case at 485 A-D). Whether even an allegation of express malice would by itself alter conduct otherwise lawful into an iniuria seems doubtful, despite the obiter dictum in UNION GOVERNMENT v MARAIS AND OTHERS, 1920 AD 240, 247. A has liquidity problems. I persuade his lenient creditors to put on the screws. He is compelled to surrender his estate. Does it matter whether I want to buy his business for a song or merely want revenge because he seduced my daughter? And what if I bought his creditors' claims and put on the screws myself? A has no recognised right requiring protection against me in such circumstances. Something more is required. (10

Our cases indicate that what is required is something improper in the conduct of the inducer, like fraud or duress. (Compare MILLWARD v GLASER, 1949(4) SA 931 (A), 941, GEARY AND SON (PTY) LIMITED v GOVE, 1964(1) SA 434; Pauw, DE JURE, 1979 pages 62 to 63). The burden to prove this must clearly rest on the party who alleges (or here of necessity relies on without having alleged) this, namely, plaintiff.

But glossing over any problems with the pleadings, in my view Jassiem has not cleared the first hurdle and established causation so that the question of propriety or lack of that in conduct does not need investigation. (20

Nazim was a poor witness. It is unnecessary to point out for example how time and again the grandiose and sweeping claims he makes are shown up when details cannot be provided to buttress them. Despite the fact that Nazim was a poor witness, however, that per se cannot provide evidence that it was he or any one or more of the other members of the MJC who effectively incited the members of the Coovatul Mosque Board to dismiss Jassiem. (30

The/...

The MJC had, according to Nazim, declared Erefaan Rakiep to be an Ahmedi (incorrectly according to Peck and despite Erefaan's denials to his son and to Jassiem). Asked for details about this judgment Nazim rambled almost painfully and finally lied, "because we know...the Judicial Council people - we got information that so many - he himself said that he is a - one of the leaders of the Ahmedis at a certain time. He said that himself. We are quite - it is quite common knowledge with not only the ulema but our people that he is an Ahmedi. (10

"Q. To whom did he say it?

So many...to some of our ulema. He made it clear.

Q. Did he ever say it to you?

Yes, one day in my house".

The MJC certainly did draw the attention of the members of the Mosque Board to its displeasure with Jassiem and the "problem" of his attitude towards "the Ahmadis, Qadianis and Bahaai movements, and its leaders, its followers as well as their sympathisers". (Document 26) The comment that "our main²⁰ desire is that this matter must be resolved positively in no uncertain terms" is a barely veiled order to exert pressure on Jassiem to move along the path the MJC required. The difficulty is that the Mosque Board did not react to the veiled instruction but was impertinent in Document 30, as already detailed earlier. It was tabled and discussed by the MJC as was to be expected. Although this is one of the many aspects on which Nazim was unsatisfactory, (realising the implications he back-pedalled. The MJC went into recess, his memory went into neutral and he could not explain why no minutes of such a³⁰ meeting were discovered), that does not

provide/...

provide evidence of any further steps taken by the MJC which altered the view of the Mosque Board. There is no evidence from the Mosque Committee as to what, if anything, occurred between it and the MJC.

I do not agree that witnesses were available to Jassiem - that "if the trustees had in fact been induced by the MJC to write the letter, document 26, Abdullah Atlas or one of the other trustees would surely have been called to say so". After he had been ruled a Muslim in 1984 the witch hunt against Jassiem seems to have been triggered by his neutrality in the (10 anti-Ahmedi battle sparked by the welfare organisation number application. That witch hunt would on what I refer to as the domino principle applied by the MJC damn anyone who was neutral towards him let alone anyone who actively assisted him in litigation against the hunters. (One has seen how students spend days putting dominoes on edge in wonderful patterns. When one domino is tipped over it tips over the next and so on until all are flat.) Moreover, the MJC's constitution arrogates unto itself the right to give or refuse permission to testify in religious matters, and it is inconceivable that it (20 would have given permission to any of the members of the Coovatul Mosque Board to testify against itself, i.e. the MJC. The MJC did use the Council of Masajids to communicate with the Muslim community. Nazim's evidence that the minutes of the MJC meeting on 13 November 1985 (Doc.20) do not mean what they say was aimed at separating the MJC and the Council of Masajids as far as possible from one another. Nazim said that the passage "the meeting also discussed the fact that no notices of the Masajids' decisions were ever read at the Juma-ah of this Masjid" referred not to decisions of the Council (30 of Masajids but decisions of the MJC relating to mosques.

This/...

This is unlikely, despite acceptance of the fact that the language of the secretary who prepared the minutes is hardly academic. Nazim testified that the MJC conveys its messages to the community via the mosques. Its messages to the community would logically be given to the Council of Masajids to pass on to the individual mosques as a common sense administrative measure. But even were Document 32 admissible evidence that the Council of Masajids had on 25 December held a meeting and the inference justified that this was done at the instance of the MJC, the inference that that letter, i.e. (1) Document 32, caused the Coovatul Committee to give Jassiem the ultimatum which led to his dismissal, since he refused to do what was demanded of him, is not one that complies with the accepted rules of inferential reasoning. Holt's letter is dated 30 December 1985. Vinoos's letter of ultimatum to Jassiem, Document 31, is dated 28 December 1985. There may have been some verbal communication with the Mosque Committee after it had received and replied impertinently to the MJC's letter, Document 28, but this would be an assumption or mere speculation. (AA ONDERLINGE ASSURANSIE BEPERK v DE BEER, (2) 1982(2) SA 603 (A), 620E) The terms of the trustees' letter to Jassiem do not support such assumption where Vinoos refers to animosity among the members of the Mosque Board and says that "several other organisations and Muslim institutions are applying pressure on clearing the issue".

The argument that defendant could easily and should have called a member of the Mosque Board to explain why it decided to give Jassiem an ultimatum as he did, expects the MJC to make itself vulnerable by calling someone to prove a negative where the onus of proving the positive - improper conduct (30) inducing action - burdens the opposition.

As/...

As regards the former one suspects that the MJC put the Council of Masajids up to acting as it did. Surely Nazim would have remembered an eventuality innocent as far as the MJC is concerned that when the Mosque Board's letter was tabled the MJC for example decided to leave the matter to the good offices of the Council of Masajids. That the MJC did nothing at all because its members, most of whom would have been members of the Council of Masajids anyway, were busy or vacationing, flies in the face of its zeal and aggressiveness in trying to eradicate not only Ahmedis but also "sympathisers". (10 (Compare Document 37 page 6). Nazim's failure of memory indicates something to hide, but an omission of this nature does not provide proof positive. There is no admissible evidence linking the persons who confronted Rakiep on 27 December with the MJC so that this incident takes Jassiem's case no further. What remains are a) a negative factor and b) the original alternative plea. Here too, where there was no admission by Nazim during the course of his testimony that he gave the instructions on which that was drawn, Mr Hoberman's argument is valid. We know that Sheikh Gabier left South (20 Africa before the plea and further particulars were drawn. Counsel argues that had there been written advice from the MJC to the Coovatul trustees, Vinoos would have given such document to Jassiem along with Documents 26, 32 and 33. "The obvious reason for the confused instructions that were given to Counsel is the absence of Gabier who had been dealing with the matter. It was known to the MJC that Gabier had written to the trustee (he had been instructed to do so at the meeting held on 13 November 1985 Document No 20) but they did not know exactly what he had written. A copy of the letter was not in (30 the MJC's possession as appears from its discovery affidavit.

(The/...

(The letter Document 26 was discovered by the plaintiff and not by the MJC). It must accordingly have been assumed by those that instructed counsel that the letter which Gabier wrote took the form of the advice that was pleaded. The error in the pleading was subsequently corrected by an amendment. Although the amendment involved the withdrawal of an admission it was made on notice to the plaintiff and without objection. In the absence of an objection it was not incumbent on the MJC to explain the withdrawal of the admission".

Jassiem has not succeeded in establishing that it was (10
action by the MJC that induced the Trustees of the Coovatul Mosque to discharge him, so that it becomes unnecessary to decide whether that discharge was wrongful or what the quantum of damage on this score would be.

Whether the discharge was wrongful would depend on whether, as counsel for the MJC submitted, Jassiem is bound by "the system" where the system, harsh though it may be, is not on trial. These are issues which do, however, require to be resolved in the defamation claims.

(20

WERE THE WORDS SPOKEN DEFAMATORY?

Despite the pleadings there was on the evidence no dispute between the parties that for a Muslim to be falsely called an Ahmedi sympathiser in the Wynberg Sunni Mosque would be insulting in that it would be understood by the congregation (having been so taught by inter alia the MJC) as meaning that such sympathiser is himself an apostate to be shunned by them all. Advocate Hoberman did argue that Jassiem could not have felt insulted by such a label since Jassiem admitted that he himself did not regard Lahores as apostate. That begs (30
the question. One may love and approve of the canine species
but/...

but nevertheless be insulted at being called a bitch. The insult lies not in the word but in what the speaker intends to convey thereby and is understood by the audience where there is one, to mean. The next question is whether that could constitute defamation.

Mr Albertus, who appeared for defendants in both cases: as junior to Mr Hoberman in case 1438/86 and on his own in case 1434/86, argued that it is not defamatory to impute to a person conduct or characteristics which would incur the disapproval of merely a certain section of the public even were this (10 to cause him real prejudice. In the absence of anything in the pleadings to suggest that outside the Muslim community, which constitutes a mere 1,5 percent of the population of the RSA according to Exhibit 444, being called an Ahmedi sympathiser would have any effect at all on the views of reasonable, right-thinking persons about the person so called, Jassiem's claim stands to be dismissed as bad in law, he urged. He conceded that were Jassiem's action to be dismissed on this ground, Nazim may well not only be awarded costs limited to those of an exception, but even be ordered to pay (20 portion of Jassiem's trial costs.

It is common cause that to be called an Ahmedi sympathiser is not per se defamatory any more than being called a German (G A FICHARDT LIMITED v THE FRIEND NEWSPAPERS, 1916 AD 1) or a political parson. (UNIE VOLKSPERS BEPERK v ROSSOUW, 1943 AD 519.

In the cases before me a true innuendo was pleaded, not merely one to "point the sting" of language per se defamatory: an Ahmedi sympathiser is a disbeliever, a non-Muslim, to be shunned by Muslims.

It is clear from all the evidence that Nazim, when he

refers/...

refers to an Ahmedi sympathiser, intends to convey the derogatory meaning of someone treacherous to the Islamic faith and hence also to the Muslim community, and that the MJC since 1965 has been at pains to educate the local Muslim community, to members of whom alone the words were addressed, to understand those words in exactly that meaning.

We therefore do not have to go to the notional, ordinary, reasonable member of the audience to determine whether words used would be understood by him to be defamatory per se. That fictional reader provided the touchstone for this purpose in cases such as CONROY v NICOL & ANOTHER, 1951(1) SA 653, SAAN v SAMUELS, 1980(1) SA 24, DEMMEERS v WYLIE, 1980(1) SA 835, NGCOBO v SHEMEBE & OTHERS, 1983(4) SA 66. The issue here is whether it is correct to accept literally the allegation often made that for defamation to occur it is insufficient that the esteem of the object of the defamatory appellation be lowered in the eyes of a section of the community: the imputation in question must tend to lower him in the estimation of "ordinary right-thinking persons generally". (Burchell, page 95)

(10

(20

As a matter of both language and logic there are no such animals as "ordinary, right-thinking persons generally". What is permissible in Balmoral may be anathema in Bophuthatswana. One man's courtesy (such as rising when a superior enters the room) may be another man's insult as being a denial of the superiority of the newcomer.

Defamation is the unlawful publication of a statement concerning another which has the effect of injuring that other in his reputation, and a man's reputation is not something that exists in a void. It consists of the esteem in which he is held by "society" or within "the community". How the community, society/...

(30

society, is to be defined must in my view depend upon the facts and the pleadings in each particular case. Sometimes geographical borders of a country may define what society or community is relevant in a particular case; for example, where a member of Parliament of a government within those boundaries claims to be defamed as such. If a man's reputation within the scientific community of which he is a member, or within the financial community within which he operates, or within the black community within which he lives, is tarnished by an imputation within that community of conduct disapproved on the whole by that community, the Court will use its muscle to recompense him for the loss. (GAYRE v SAAN LIMITED, 1963(3) SA 376, CHANNING v SA FINANCIAL GAZETTE AND OTHERS, 1966(3) SA 470, HRH KING ZWELETHINI OF KWAZULU v MERVIS AND ANOTHER, 1978(2) SA 521). And by his pleadings a plaintiff makes it clear whether the loss for which he claims reparation is of reputation countrywide, or in a more limited particular society. Hiemstra J, as he then was, in GAYRE'S case correctly, with respect, recognised that the plaintiff may, by putting himself in a straight jacket (as the learned Judge phrased it at page 377H) by his pleadings, put in issue his reputation in a certain field, i.e. within the specific community in which the alleged defamation is relevant, not his general reputation as a citizen of his country. (1

I do not understand anything in the Appellate Division decisions as barring such an approach, which is accepted in many other countries and urged here as a matter of common sense and fairness. Prosser, TORTS, page 743, Burchell, DEFAMATION, page 99, Street, TORTS, 5th Edition, page 288, Salmon & Heuston, TORTS, 18th Edition, 134, Amerasinghe, DEFAMATION, pages 21-23, Ranchod, DEFAMATION, page/... (30

page 156, Hahlo and Kahn, THE UNION OF SOUTH AFRICA, THE DEVELOPMENT OF ITS LAW AND CONSTITUTION, page 546. The only qualification, it seems to me, is that the particular society should not be one whose reasonably uniform norms are contra bonos mores or anti-social. Our Courts do not, as I have had occasion to comment in a different context elsewhere, lend their machinery to enforce rights when doing so would be contrary to public policy. (DREWTONS (PTY) LIMITED v CARLIE, 1981(4) SA 305, 312-3) Were a man by his pleadings to put himself within the straightjacket of relying on an undoubted (10) defamation within a group whose norms and interests are generally regarded inimical to the larger society served by the Court, the Court will not come to his assistance. To be accused of treachery is defamatory, but an accusation of treachery, for example by a lifer to the members of their prison gang although that gang constitutes a large, uniform group with clearly defined identity and norms within which he operates, would not gain him an award of damages. Cf. Prosser, (supra) at page 744 and footnote 99. The decisions in PRINSLOO v SAAN, 1959(2) SA 693 and BYRNE v DEAN, 1937(1) KB (20) 818, may be regarded as less far-fetched applications of this approach. I agree, with respect, with the comment of Conradie AJ, as he then was, in VINCENT v LONG (CPD 16.5.1986) in a slightly different context that "calling the reasonable man in aid is really just a stereotyped way of invoking public policy".

I likewise do not regard the comments of STEYN CJ in SAAN v SCHOEMAN, 1962(2) SA 613 at 617A-C as barring acceptance of the innuendo pleaded, namely, of a taint requiring Jassiem to be shunned by Muslims, as sufficient to constitute defamation. (30) STEYN CJ comments on MARUCCHI v HARRIS, 1943 OPD 15 at 21 with

its/...

its comment in turn on Van Leeuwen RHR 4.37.1 referring to the value of "de eer en het goed gevoelen dat een ander van ons heeft" as follows:

"Ek kan my nie voorstel dat dit lasterlik is om van 'n buurman se kinders te sê dat hulle masels of waterpokkies het nie of om van 'n lid van 'n Rooms-Katolieke-gemeenskap te sê dat hy na 'n Protestante kerk oorgegaan het of van 'n lid van 'n monargistiese beweging dat hy by 'n republikeinse bond aangesluit het...By almal sou die desbetreffende bewering die uitwerking kan hê dat lede van die gemeenskap waarin die betrokke persoon beweeg met inbegrip van die denkbeeldige redelike leser of hoorder onwillig word of minder geneë word om met hom om te gaan...So 'n gevolg alleen, sonder ander bykomende toespelings, hoewel dit onder gegewe omstandighede 'n aanduiding sou kon wees dat 'n bewering in defamerende sin verstaan is, sou ek nie sonder bedenkinge as 'n deugdelike maatstaf vir lasterlikheid kan aanvaar nie. Dit staan in geen noodwendige verband met die eer en "goedgevoelen" waarna Van Leeuwen verwys het nie".

That obiter dictum may with respect be perfectly correct in relation to the mild deviations from the basic norms STEYN CJ mentions. Measles and chicken pox are, unlike mediaeval leprosy or modern AIDS, temporary non-lethal ailments, and it has not to my knowledge been suggested in the last few centuries that Catholics regard Protestants as such bad news that it is obligatory for Catholics generally to shun Protestants. Whether the obiter dictum postulates any principle is, however doubtful. Street, TORTS, 5th Edition, page 208 suggests/...

suggests a dual inquiry which echoes MARUCCHI'S case and thereby echoes Van Leeuwen, to determine whether a statement is defamatory:

1) Would most people (Scil. within the particular community where defamation within a particular community is relied on) avoid a man in consequence of the allegation, for example of insanity?

2) Would a substantial and respectable proportion of society think less well of a person provided this reaction is not plainly anti-social or irrational? (1)

An affirmative answer to either question classifies the statement as a defamatory one. See too QUIGLEY v CREATION LIMITED, 1971 Irish Reports 269, 272 which would seem to delete "or irrational" from paragraph 2 above.

In any event, the comments of STEYN CJ, quoted, have no application in the present matters so that my obiter on that obiter may also be ignored.

The innuendo pleaded here of necessity affects Jassiem's reputation within the only community of relevance to the action in which Jassiem sued as a Muslim claiming to have been (20) defamed as such within the Muslim community of the Cape. Nazim himself testified that that community keeps to itself to keep itself pure and for that very reason rejects anything it regards as foreign to its allegedly well-defined norms. I did not understand Mr Albertus to argue that the Court would regard those norms in a non-Islamic overall South African context as being contra bonos mores or anti-social or Muslim society as not a "right thinking" one but one "whose standard of opinion is such that the law cannot approve of it". (Salmond and Heuston, TORTS, 18th Edition page 134).

The fact that something like 98 percent of the South African/...

(30)

African population would not care a fig whether Jassiem is a traitor to Islam or not, is not in law a bar to his actions in these matters where he sues specifically as a Muslim because of an epithet which would be understood to be insulting within the Muslim community where it was applied to him, because of the innuendo it is common cause it carries.

I say that the innuendo is common cause despite Mr Hoberman's argument that not the whole Muslim community would regard an Ahmedi sympathiser as one to be shunned as only those who hold the view that Ahmedi sympathisers are murtad and should be ostricized would do so. Nazim was at pains to stress that "Muslims worldwide" were anti Ahmedi, Ghazi that Ahmedi sympathisers could not possibly be regarded as anything other than murtad with all the civil and social consequences which according to him flow from that. That evidence was aimed at establishing that a sympathiser is in terms of Islamic doctrine irrebuttably deemed to be an apostate. Whether that consequence should flow from a refusal to denounce someone else suspected of Ahmedism is a separate inquiry. The MJC and Nazim regard the proposition to be correct and it their duty to guide the opinion of local Muslims to agree with that proposition. They cannot have their cake and eat it too and rely on what they regard as deviationist views to knock out defamation as a cause of action. It is only "a substantial and respectable portion of (the Cape Muslim) society" that has to think less well of Jassiem, not each and every adherent of that faith.

That leads one logically to the next issue: Where the onus lies and what is its nature in relation to Jassiem's being Muslim on this issue.

It was common cause that Jassiem bore the onus of

establishing/...

establishing that he was a Muslim, but there was no agreement as to the content of the burden. Mr de Villiers in argument treated this as a subsidiary issue and urged that there could be no doubt that Jassiem had shown that until Nazim publicly labelled Jassiem an Ahmedi sympathiser at the wedding he was accepted as being a Muslim and had, save for the period 1965 to 1970 consistently been so accepted. He was born of a long line of Imams, studied overseas and became a fourth generation Imam himself, had been a founder member of the MJC, had in 1984 been ruled by Nazim himself to be a Muslim and was (1) accepted at the wedding by the congregation in the mosque until Nazim incited the members to call for his removal.

Mr Hoberman denied that these facts discharged the onus burdening plaintiff. Proof that he is a Muslim involved also proof of what qualifications are necessary to belong to Islam. Those qualifications were themselves disputed on the pleadings. Defendants averred that the "five pillars" advanced by Jassiem are not enough. There are many more including the requirement that Muslims are obliged to repudiate all groups and persons who accept Mirza Ghulam Ahmad as (20) a prophet and reformer. It is common cause, on the evidence, that Mirzais accept Mirza Ghulam Ahmad as a prophet (Qadianis) or reformer (Lahores). Ergo, he urged, the onus burdened Jassiem to prove

- that a person may remain a Muslim though refusing to denounce an apostate
- that Ahmedis are Muslims not apostates; so that
- it is not necessary for someone to denounce Ahmedis in order to be/remain a Muslim.

He relied on TOPAZ KITCHENS (PTY) LIMITED v NABOOM SPA (30) (EDMS) BEPERK, 1976(3) SA 470 (A) to counter any suggestion that/...

that there is usually no obligation on a litigant to prove a negative.

In that case the terms of a contract were in dispute, the contract being the fons et origo of plaintiff's claim. Here, as regards the defamation claim, the fons et origo of Jassiem's claim is an alleged invasion of his rights of personality. He is not seeking review of the decision of a doctrinal tribunal which excommunicated him becoming thereby obliged to establish that its decision was incorrect. In alleging that he is and always has been a Muslim, plaintiff was using English not theology and the Oxford Dictionary tells me "Muslim - see Moslem", and that a Moslem is "one who professes Islam". "Profess" in turn means "to make open declaration of...to confess publicly". (1)

Jassiem was asked "What is meant by the allegation that plaintiff is a Muslim?" Instead of referring Nazim to the dictionary or refusing to answer this question along with all the others he said Nazim was not entitled to ask, which included a multitude of theological questions, he elaborated in a measure on what profession of Islam entails. That both defendants denied that profession of Islam was sufficient as alleged by Jassiem and set out in the plea as particularised some aspects among an unenumerated welter of others what a (true?) Muslim should according to him believe and do, did not in my view convert Jassiem's cause of action - insult and defamation within a particular community of which he justifiably claimed to have been until then a member - into a theological dispute. The theological dispute only arose because defendants raised it in their alternative defence of privilege. Raising that defence would have been unnecessary had the onus burdened Jassiem to establish every detail/... (20) (30)

detail of belief required before Jassiem is entitled to call himself a Muslim; or be regarded as a Muslim; or be accepted in the community as a Muslim. And the case would have lasted not 101 days but 1001 and more, since in logic Jassiem would have been required to prove not merely that he declares and has always declared himself to be a follower of Muhammed but to deal with over and above the matters set out in defendants' further particulars, an unguessable mass of further "conditions...all matters for detailed and complex evidence".

Defendants certainly accepted that Jassiem's intention was to place himself within that particular community for purposes of identifying the defamation alleged, otherwise both would have or should have excepted to his particulars as disclosing no cause of action. (10

Jassiem discharged the onus of establishing prima facie that he was accepted as a member of the Muslim community until Nazim labelled him a "sympathiser". Nazim himself had ruled him to be such a member, not for theological considerations but recognising the civil rights flowing from acceptance within the community, the previous year when he accepted Jassiem's right to testify before a Muslim Tribunal. There was nothing from which it could be inferred that that position had altered before the wedding: that the community - and it would have to be a substantial portion of the community, not merely a few here and there - had altered its views about him. Ghazi himself says that saying prayers five times a day is a primary sign of being a Muslim. "It is a presumptive sign. The strongest presumptive sign that he should be considered to be a Muslim". (20

Prima facie therefore Jassiem would be entitled to damages for being insulted and having his fama impaired within

the/

the community within which he had until then been accepted unless the plea of justification succeeds. It is that plea which is the foundation of the theological dispute, since defendants' attitude is that they as representing the Muslim community are entitled to deprive Jassiem of his civil rights as a Muslim. That is what a valid declaration of apostacy according to their evidence entails. In my view the onus burdens defendants to prove that Jassiem was no longer entitled to be accepted as a member of the Muslim community, and they therefore entitled and according to them obliged to ensure his ejection. As regards the nature of the onus (a matter held to be - and left - open in JOUBERT AND OTHERS v VENTER, 1985(1) SA 654 (A) at 697), I am of the view that it is and should be a full onus, not merely a burden to adduce rebutting evidence. As set out in JOUBERT'S case, that was the position for half a century. VAN TROMP v MC DONALD, 1920 AD 1 through to BENSON v ROBINSON & COMPANY (PTY) LIMITED AND ANOTHER, 1967(1) SA 420 (A). The idea of a "weerleggingslas" slipped in by way of an obiter dictum in SAUK v O'MALLEY, 1977(3) SA 394 (A), 403B. That clashes with cases such as MABOSO v FELIX, 1981(3) SA 865 (A) without there being any reason based on logic or policy for applying different principles to cases dealing with interference with fundamental rights of different kinds.

My view goes beyond what Mr de Villiers contended for. He urged that defendants were saddled only with a "weerleggingslas". Analysis of the evidence on the theological dispute may show that the nature of the onus is immaterial to the outcome of the case.

THE EFFECT OF THE PECK JUDGMENT

Jassiem's/...

Jassiem's counsel argued that, regardless of the merits of the substantive religious issues, there could be no privilege such as claimed for Nazim and the MJC entitling Nazim to speak as he did at the wedding. On 20th November Williamson J had interdicted the MJC from defaming Ahmedis, the order made being quoted earlier in this judgment. From that moment, it was urged, it became an illegality in South African law for the MJC to persevere with its fatwa, stand and policy in so far as Lahore Ahmedis are concerned.

Defendants counter by referring to the background against (10 which the order was made, namely that only Peck remained as a litigant after the successful exception. So much of the order as purports to favour "members of the Ahmadiyya Anjuman Ashati Islam Lahore South Africa" other than Peck is either a nullity for want of jurisdiction or because it was granted per incuriam. Relevant authority was quoted and not disputed. Adv de Villiers countered that the order had been deliberately framed widely in order to protect Peck as an Ahmadi against defamation and insult by allegations disseminated by the MJC relating to Ahmedis generally. (20

I can think of no grounds on which someone not a party to a suit can claim to be entitled to elevate an order made as between those who were parties to that suit, to something equivalent to a statute. That Mr Peck might perhaps be entitled to have Nazim committed for contempt of court, should the order indeed have been deliberately framed widely for his protection, would not entitle Jassiem to do so, any more than for example The Child Welfare Society could gatecrash an unimplemented maintenance order made in favour of children in a divorce action.

THE RELIGIOUS ISSUES - THE WITNESSES

All the expert witnesses suffered from a disadvantage of one kind or another. Nuriduan Rakiep, Nazim, Jassiem rate as experts on Islam by local standards. Not one understands Urdu which was, along with Persian and Arabic, the language used by Mirza. Not one had made a study of the writings of Mirza. Not one was therefore competent without more to come to an independent, objective conclusion as to the merits or demerits of Mirza's spiritual leadership. None ever tried to do so, nor was given any opportunity, as far as the evidence reveals, to (10 hear and consider anything that might weigh in Mirza's favour. They were merely told ex Cairo that there had been an investigation by a group of men who had issued a report on the strength of which Al Azar had issued an anti-Qadiani fatwa. That opinion incidentally, did not dictate that members of the "misguided denomination" all over the world were ipso facto deprived of their rights of inheritance, divorced from their wives, debarred from testifying and so on. It merely called on listed opinion formers to "make struggle" against Mirzais. It gave no indication of the depth of the research which pre- (20 ceded its report which was demonstrated by Advocate de Villiers to have failings which were glossed over by Professor Ghazi. (Exhibit 411)

Professor Mahmood Ahmad Ghazi comes from Pakistan. His CV, Exhibit 291, looks impressive. He was either a child prodigy or standards are lower in Pakistan than in the western world since according to Exhibit 291 he acquired the equivalent of an MA degree in Arabic and Islamic studies at the age of 16 and has been teaching and lecturing on and off since the age of 17. He labels himself as "basically a Professor of Islamic (30 law". It showed. He lectured. A good deal of what he said was/...

was oratory rather than evidence.

Perhaps of interest is that he wrote an article or articles on "Political Background of the Revivalist Movements in the Muslim world" in 1973 - 1974. His book "Qadianism, a Threat to the Solidarity of the Ummah" appeared in 1984. He has been involved with various Pakistan government bodies or in government sponsored conferences and commissions, as an advisor of the Shariat Court and Shariat Appellate Bench of Pakistan.

As a witness Professor Ghazi has the disadvantage that he (10 correctly concedes that where the government of the day supports an idea that idea flourishes. The Pakistan government having legislatively declared Pakistan Mirzais to be a non-Muslim minority, he himself would have problems on his return home were he to thump any but an anti-Ahmedi tub. That tub he thumped with great vigour, displaying his total bias against Mirza. He concedes that he has the "strongest possible" anti-Ahmedi feelings - a concession it was unnecessary to extract from him since he seldom missed an opportunity of running Mirza down. He was not prepared to give (20 Mirza the benefit of any doubt whatever, to regard him as perhaps bona fide but misguided, but likened him to a "criminal" whose "justification" should not be taken at face value. Of possible interpretations put on Mirza's words and actions, he always chose the worst.

How much of Professor Ghazi's evidence was intended for the Court and how much for the audience in court, invited by him to attend, is difficult to judge. Accepting that he was not consciously or subconsciously "making struggle" against a "misguided denomination" by preaching to a congregation thus (3 far dictated to rather than converted in the usual sense of

that/...

that word, his evidence was often illogical, inferences unjustified. Indeed, he appears to be more interested in the political than the spiritual aspect of Islam: "Bona fides and honesty and sincerity is not very much important in matters of religion" except that someone cherishing sincere and honest doubt must have the position explained to him "after his doubts being removed from him even if he insists on his earlier point of view then he will be declared to be a murtad finally". Nor is making man come closer to God and live a good life the criterion. All religions seek that. (10)

Sher Mohamed was also at a disadvantage, though somewhat less a one than Ghazi. Ghazi did not work his way via Ahmedism to the true faith. He had doubts whether Ahmedis were really non-Muslim and then, at a stage after Cairo had already issue a fatwa which purported to be authoritative and was unreservedly adverse, read Mirza's works. Sher Mohammed came via years of study of the true faith, to Ahmedism.. He rejects not an iota of what is in the Quran and Sunnah, but merely interprets certain passages differently to the interpretation(s) given those passages by others, in the (20) light of the work of Mirza. The result is that, where both these learned gentlemen are often illogical (faith and logic are uncomfortable bedfellows), Sher Mohamed who had to break down prejudice perhaps, not any identifiable opponent, impressed as more reasonable and tolerant (being interested in the spiritual advancement of Islam rather than of Ahmedism as such) than Ghazi whose interests lie in politics rather than spirituality and in destroying what he conceives to be a threat to the solidarity of Muslims worldwide.

Advocate Hoberman argued that there was a great deal of matter placed before the Court to counter Ghazi's evidence (30) which/...

which was inadmissible; that I cannot for example take cognizance of the fact that the 1934 Yusuf Ali Quran and Commentary used by local Muslims refers (page xvi) to Muhammad Ali's earlier translation despite the fact that Muhammad Ali was the leader of the Lahore Ahmedis; and that, illogical as Professor Ghazi's interpretation of Quranic passages or inferences drawn from some hadith might sometimes seem, I am bound by his evidence where none was produced to counter it. Advocate de Villiers's suggestions in cross-examination are not evidence, and the interpretation of the hadith is regarded as a speciality, a science, so that the Court is debarred from drawing its own inferences or making its own interpretations. (10

I accept that I cannot rely on facts not produced in admissible evidence to the Court. I, however, also accept that no court is obliged to believe evidence simply because it is there, and the "science" of interpretation must at least be based on some recognisable principles and not be a purely arbitrary exercise. Advocate de Villiers's comment to Ghazi "you do seem to make up the rules as you go along" or words to that effect, was not without foundation. Ghazi has dual standards for apostacy and almost everything else, one for Mirza and one for others. As examples: (20

- A 1. The Quran says one should not steal, must pay zakat. Being a thief or not paying zakat makes one a sinful Muslim but does not prove that one disbelieves the Quranic injunction. The recidivist-thief or defaulter re zakat is therefore not murtad.
2. The Quran enjoins respect for all prophets. If one abuses a prophet that proves that one does not believe in the (validity of) the Quranic injunction or the statement that all prophets are sinless and truthful. (30

One/...

One - i.e. Mirza - is therefore murtad and that regardless of the motive with which the words regarded to be offensive were uttered.

- B 1. Whether the sufis (mystics) claimed divine revelation or saintly revelation is a mere matter of history since no sufi leader's followers deviates from the path indicated by the Holy Prophet.
2. What present-day Lahores actually believe and whether it accords in toto with the Quran and Sunnah is irrelevant: it is the history that matters because Mirza himself is allegedly unacceptable to modern Muslims. (10)
- C 1. Anyone who claims to have received revelation from God claims prophethood and is therefore if revelation is claimed after the time of the Holy Prophet, murtad.
2. The example of the mother of Moses Ghazi discounts. She is not regarded as a prophet. He says that she probably received some sort of brainwave and, on the norms he at times suggests are applicable, would make himself guilty of apostacy with this suggestion in the light of the clear words of the Quranic verse dealing (20) with the revelation she was afforded.

Ghazi concedes that logic and wisdom may take second place or apparently have no part at all in interpreting the Quran by a most unscientific exercise he refers to as the science of tafsir. The example he gave related to the Quranic verse that there shall be no compulsion in religion. That, says Ghazi, is not as obvious as it seems, and applies only to non-Muslims because of the circumstances in which the Holy Prophet uttered the edict. Arabs accepted Islam. Their children belonged to the Jewish or Christian faiths. When (30) Jews left Medina, Arab parents wished to compel their

non/...

non-Muslim children to accept Islam so as to remain in Medina. "Therefore the very situation or the cause of revelation... suggests that the verse is applicable only to those non-Muslims who have not yet entered Islam and who have not yet decided their attitude towards Islam. It is in no way applicable to a Muslim and now he wants to revert from Islam". Having chosen Islam, nothing prevents a man's being compelled to continue, not being loyal to fellow Muslims or a particular leader or paying some political debt, but believing in every word of the Quran, says Ghazi; and someone born into a Muslim (10 family who has therefore not chosen that faith is irrebuttably presumed to have done so.

My difficulty with evidence of this nature is that I can no more insult the Holy Prophet by accepting that the Quran would abandon the proposition which common sense dictates that belief is in fact not compellable, only a pretence of belief could be extracted from someone by force, than I could accept evidence that Darwin ordered men to fall pregnant and expected to be obeyed.

Ghazi's excising Muslims from the injunction against com- (20 pulsion in religion hardly accords with his earlier agreement with Yusuf Ali's note that "Islam requires discipline but not slavishness".

To deal very briefly with the other individual "experts" as witnesses. There were language problems bedevilling the testimony of all five. Sher Mohammed's interpreters were not very fluent in English. The least disadvantaged was Professor Ghazi himself who also has by far the best, widest, secular education and the most contact with people at levels other than either a very basic human one or in providing Quranic (30 guidance.

It is unnecessary to deal with the evidence of

Nuriduan/...

Nuriduan Rakiep. His knowledge of the Quran and Hadith is elementary compared with that of Ghazi and Sher Mohamed. Mr de Villiers did not in argument rely on his testimony at all.

Jassiem's evidence was tendered on factual issues rather than as an expert. So too Nazim testified on factual issues rather than on doctrinal ones. In 1982 at the mosque he stressed not doctrine but majority view: emphasising that Mirza had been "universally" declared murtad, so that anyone following his teachings or regarding him as a leader of any sort was himself murtad. (10

The evidence makes it clear that the MJC told the Sheikhs and Imams in 1965 what to think and how to act when it was spurred not by its own studies, but by an overseas fatwa. When the administrator of the MJC in 1985 allegedly received complaints about "Ahmadis and their sympathisers attending the Coovatul Islam Masjied in Loop Street" these complaints were not put to Jassiem. Instead the administrator was instructed to write a letter to the committee of the mosque to set up a meeting with them. (Document 20) He did so and in the relevant letter of invitation ordered the Mosque Board to (20 "clarify" the attitude of Jassiem towards the "Ahmadis, Qadianis and Bahaai movements and its leaders, its followers, as well as their sympathisers" (Document 26) making it clear that the view of the MJC of Jassiem was unfavourable and that the MJC expected the Mosque Board to act against him. On the evidence adduced before me this appears to be the invariable method of operation of the MJC. Nazim said "When we get a complaint from a mosque about certain people, the Judicial Council will write to the mosque to discuss the matter with the mosque" without any suggestion of interviewing, or charging (30 the accused, let alone giving him any opportunity to explain his/...

his own views.

One reason why neither Ahmedism, nor Rakiep nor Jassiem himself were given any proper hearing is not far to seek. As far as Ahmedism is concerned no study appears to have been considered necessary. The MJC regards itself as bound by what had been decreed overseas and has determined irrevocably that all Ahmedi are apostates. There is no suggestion in the evidence that any local alim was competent to answer intelligent questions based on, for example, Muhammad Ali's book on the Ahmadiyya Movement, except Nazim's unlikely statement (10 that Sheikh Mahdi did explain Ahmedism to Jassiem all those years ago. The statement is either hearsay, or untrue, or Nazim stupid in neither understanding nor remembering what was said, had a valid and effective explanation been given in his presence, since he did not claim the occasion as contributing at all to his own limited knowledge of the work of Mirza. Local ignorance is presumably why Professor Ghazi was brought from Pakistan. With this level of ignorance, any opportunity given a sympathiser to "repent" would hope to achieve "repentance" only through fear of temporal consequences and (20 not through conviction. Under cross-examination Sheikh Nazim by necessary implication conceded that the ordinary members of the community feel threatened by "alien creeds" like Ahmedism only because they have been taught by the Imams to fear anything other than what the Imams assure them is acceptable, the Imams in turn being dictated to by the MJC. Sheikh Jassiem was in 1970 expected to declare repentance, for maintaining the belief that it would be contrary to the injunctions in the Holy Quran itself, of which he was aware, that it is a sin to prevent a Muslim from entering a mosque as the (30 house of Allah (Q2.114) and that in case of doubt one is to regard/...

regard anyone who says the Kalima Shehadah and professes to be a Muslim as such, leaving it to Allah himself to determine whether he is lying. It is clear that no one succeeded in changing his belief on that score. He was coerced into acting contrary to those convictions.

Nazim's own surrogate for any trial procedure is to test someone rumoured to be an Ahmedi by requiring the suspect to denounce Ahmedis. He himself could not give off-hand any authority for the proposition that a man who refuses to denounce an apostate is apostate himself. I do not detail the (10 many matters about which Sheik Nazim was evasive, but am prepared to follow his example and declare that there were "so many". Some examples on religious or quasi religious issues, (there were many more on the facts) are his evidence

a) about the need to ostracize those who do not themselves ostracize Ahmedis and whether this did not amount to pressurisation. He at first evaded answering this directly, then settled for "no, because we have an Islamic duty";

b) in which he indulged in oratory in defence of the din (20 instead of answering the questions posed (compare page 2529 et seq);

c) about the function, role and importance of ICOSA;

d) about why the MJC never seems to confront an accused person but seems always to write to other bodies with veiled instructions. "We take everything on its merit in how best to address a situation - we address the situation on merit";

e) about why the MJC at its meeting discussed the business of the Council of Masajid and the relationship between the (30 two bodies;

f) about the grounds on which the MJC declares someone an apostate and the procedure it adopts before doing so. A glaring example:

"Question: A person asked to denounce Ahmedis who refuses may be declared murtad by the MJC?

Answer: The MJC is a fatwa-giving body guiding the Muslim community and the operation of the Judicial Council has developed since over 40 years ago. And this is a pattern in our community. When anything is wrong within that community the Judicial Council has a duty with other religious-giving bodies". (10

See also the passage that follows on this in which the witness appears to be totally incapable of giving a straight answer to any questions posed.

In his affidavit, Exhibit 283, Nazim makes his customary sweeping claims: That in 1965 he investigated Ahmedis, that he has for the last three years become "fully apprised on a day to day basis of all the activities in the Islamic communities throughout the world" and that he has taken an active part in the meetings which have considered the interpretation (20 of Islamic Law; and so on. In fact, he knew very little about Ahmedism, did not understand or did not listen to the gist of Sher Mohammed's testimony. The second claim is so grandiose that it is self-destructive. In any event, were it true he would never have said that he does not know how Muslims in the United Kingdom deal with Ahmedis wanting to enter non-Ahmedi mosques. And he has not on the issue of Ahmedism considered the interpretation of Islamic Law at all, merely accepted as irrevocably binding the Cairo fatwa.

The shaky foundations on which some of these sweeping (30 claims rest were laid bare by cross-examination. It was ijma the/...

- the opinion of Muslims worldwide, and he travelled widely to consult - which obliged the MJC to withdraw from the Peck case: that persuaded it to do so. That ijma has clearly either done a rapid volte face or is binding only when it suits the MJC. There is no logical reason why different considerations should have applied in the Peck case to any applicable here or in the matter in which ICOSA is seeking adjudication on the same issue from the secular court. Faced with cold logic pointing this out, Sheikh Nazim sought refuge in an impassioned plea for freedom of religion (for the MJC (10 and those in accord with its views), and an emotional charge that the Court is trampling (or may trample) on that religion. The only interference he alleges so far consists in the comment by Berman J that a secular court may well judge more dispassionately, which is incontrovertible since the MJC has already irrevocably prejudged the issue by accepting the ruling of "the ulema of the world". The MJC which claims to have Allah's authority to decide on who is or is not a Muslim, is totally committed and has made no bones about being so committed since 1965 to the view that Ahmedis are dangerous (20 apostates the MJC is duty bound to convert or "kill" in the next best available form in a non-Islamic state: By total ostracism. There is no suggestion that any Ahmedi has in this country, until Maulana Hafiz Sher Mohammed testified before Williamson J, been given any opportunity to defend or explain Ahmedism; nor any suggestion that any alleged Ahmedi was given an opportunity to change his views by being given a detailed analysis of why Mirza Ghulam Ahmad was to be rejected. His claims were taken at face value, that he had called himself a prophet and messenger of Allah, claimed to have received divine revelation, had claimed to abrogate (30

jihad/...

jihad and thereby tamper with the Quran and had claimed to be the promised Messiah. On the strength of those, without any attempt to analyse their content as Mr de Villiers painstakingly did in the course of many days' cross-examination of Professor Ghazi, the MJC was satisfied that Ahmedis were mur-tad and the ordinary Muslims were satisfied with what the MJC instructed them the Ahmedis claimed.

Sheikh Nazim more than once sought refuge in emotion when logic let him down. There is a marked discrepancy between his claim of the wholehearted unanimity of "the entire Muslim world" as to the fallacy of Ahmedism and the necessity for protecting Muslims from its dangerous contamination by the extremes of ostracism on which the MJC insists. He tried to justify the cruelty inherent in that by averring the great danger of Ahmedism to Muslims in their faith which accords ill with the very foundation on which he relies - ijma - the opinion of the entire Muslim world - to justify the MJC's acceptance of the Cairo fatwa. If the entire Muslim world is unanimous in its condemnation of the creed, there is no need to protect it from contact with the people who adhere to that creed particularly since there is not an iota of admissible evidence of any attempt at indoctrination by any member of the Lahore Jumaat which on the evidence before me seeks to propagate Islam, not Ahmedism. (10 (20

Nazim's "entire Muslim community" in any event shrank to those who represent the community which altered immediately to "those who have to inform the community" who are, as I have pointed out, self-appointed. Moreover, once a view is expressed with enough conviction, it often appears not to be questioned until perhaps someone bold enough to think independently challenges the "establishment" (perhaps to become a martyr in/... (30

in his own day and the mujaddid of a later era?) Nazim justified the procedure whereby Jassiem could be called on to denounce Ahmedis as murtad with reference to "the laws of Riddah", that is apostacy and not with reference to any fear that Ahmedis might corrupt the faith of other Muslims. He is content to be led by the nose by overseas authorities without addressing the problem of religion himself. Local Muslims are bound by "the consensus of the ummah" that Ahmedis are non-Muslim, but apply their own "laws of Riddah" as regards punishment for that offence - which may be more stringent than those of Pakistan. That a follower of Mirza does not claim prophethood for Mirza is irrelevant. Such follower must be declared apostate since "the Muslim ummah" has pronounced Mirza's teaching non-Islamic; just as anyone - especially an Imam - who refuses to declare the follower apostate must himself be denounced as murtad. (10

At the end of Sheikh Nazim's evidence I was left with a strong impression that he and the MJC were interested in wielding power and influence via religion rather than propagating religion in the basic meaning of the word Islam, that is submission to the will of Allah. Compare his comment, merely as an example, "we have issued a fatwa and will not permit contravention", which accords ill with Ghazi's testimony that each man is responsible for his own fatwa and that common Muslims are obliged to follow only a fatwa which each considers to be in accordance with the Quran. Nazim's stance that the MJC only gives religious guidance and does not exert pressure on anyone to act in a particular way cannot be taken seriously, and his making short shrift of those who enquired why sympathisers had to be ostracised at the meeting of 3 August 1986 (Document 37) is revealing, dictatorial, emotional/... (20 (30

tional, relying on the technique of the demagogue and not that of a man of learning persuading his audience through clear exposition of the relevant authorities and texts. He could in court give no logical justification for his call to the blood on that occasion but merely repeated it in large measure, fairly incoherently, perhaps to impress the audience in court. That power rather than the din may be at the heart of the local quarrel is perhaps in small measure also supported by the fact that no steps were taken against plaintiff's brother Abdullah who was assistant Imam and therefore in exactly the (10 same situation as plaintiff as regards alleged Ahmedis being permitted in the mosque where he served until the Gydien-Abrahams wedding. The only reason that comes readily to mind why he should have been spared is that he, unlike Jassiem, does not appear at any stage to have challenged the position or authority of the MJC.

Out of sequence I mention also the very last witness called by defendants Shaker Ahmed El Sayed who was born in Egypt and now lives in Washington DC. He was called primarily to prove that Ahmedis are also excluded from mosques by Sunni (20 Muslims in non-Islamic countries such as the USA. He was not called as an expert on Islamic law or theology, but his evidence makes interesting reading nevertheless. He himself attended an Ahmedi function and sought and acquired an invitation to enable him to do so. He blandly says that the international Islamic community has always rejected the claims of Mirza Ghulam Ahmad and his followers to be Muslims but he knows nothing about the Lahores himself and says that Mirza Ghulam gave loyalty to the British Government and that constitutes an act of kufr. His evidence on the first day on which (30 he testified was far more favourable to plaintiff than to defendant/...

defendant, but he had a change of heart and of tone on the second day and the reason lies perhaps in his own evidence where he said that the Muslim is one who does not give loyalty to anyone but to the Muslims nor does he accept any judgment from anyone except from a Muslim. His own knowledge of the rules according to which Professor Ghazi says one must operate if you are a Muslim or be in danger of being declared kufr yourself, is shaky. For example, he says that there is some difficulty about a second generation Ahmedi, whether he is an unbeliever or an apostate. (10

That brings one to the two important experts, Maulana Sher Mohammed for plaintiff and Professor Ghazi.

Sher Mohammed's knowledge of the Quran and Hadith is on a totally different plane to that of someone like Rakiep or Nazim since he has made them his life's study and that life has been a long one. He appears to understand some English but does not speak it. He testified in Urdu. There was some difficulty arising from translation. Mr Aziz is reasonably fluent in English but his successor as an interpreter Mr Chowdry is not. Mr Chowdry's pronunciation often made one strain to grasp what words he was using and his vocabulary is not large enough to cope with subtle and even not so subtle differences between ostensible synonyms. (20

The method by which Sher Mohammed's evidence-in-chief was presented was that he prepared papers on various topics, elaborated on some of the statements made in those, read out some of what had been written and confirmed the rest. Sher Mohammed is probably nearer to 80 than to 70 years of age since he commenced his theological studies in Pakistan in 1929. He spent altogether a decade at two Sunni institutions, then a year in the missionary training classes of the Ahmedi Movement at/... (30

at Lahore. There he met, much later worked with, Muhammad Ali, who had been the secretary of the organisation set up by Mirza Ghulam Ahmad. He told the Court that there was during Mirza Ghulam Ahmad's lifetime a great clash of religions in that part of the world with adherents of each attacking the others. Mirza wrote books and pamphlets and replies in newspapers, both in defence of Islam against other faiths and to urge Muslims out of apathy and formalism into a more sincere pursuit of the commands of the Quran and the example of the Holy Prophet. Maulana Hafiz Sher Mohammed, (the "hafiz" (10 is a title indicating that he is one of those who knows the Quran by heart) was attracted by Mirza Ghulam Ahmed's writings and so became involved with the movement.

I have no doubt as to the sincerity of the belief of this witness that Mirza was not only a Muslim but a great reformer (mujaddid) in Islam, a saint, the promised Messiah, not the egotistical apostate or religious adventurer the opposition paint him to be, nor have I any doubt as to the sincerity with which he claims that he and all Lahore Ahmedis are themselves adherents of the Muslim faith entitled to be recognised as (20 such instead of ostracised and treated as pariahs. His evidence made it clear that Ahmedis are not accepted as Muslims in many places, especially in Pakistan. According to his evidence there are throughout the world, and even in Pakistan, many groups and sects all holding themselves bound by the Quran as the word of God, but each convinced that its own interpretation of the Quran is the only correct one, that the later interpretative works each accepts are the only reliable ones and that all other groups are on the primrose path. They readily issue fatwas excommunicating one another and chaos (30 reigns. The Ale Hadith refuse to pray behind a Sunni Imam.

Barailvi/...

Barailvi debar the Deobandis, Hanifi followers do not pray behind a Shiah Imam. Each sect has a separate dar-ul-ifta from which opinions against others are issued, the Shafi against the Shiahs in retaliation, both against the Ale Quran. The Munir report of the commission of inquiry into the disturbances leading to the imposition of martial law when partition between India and Pakistan was effected concluded that no two scholars could agree on the definition of a Muslim.

Sher Mohammed conceded that among the imperatives of the Quran are the following: Belief that (1

1. The Quran is the word of God as revealed through Muhammad. It is authentic and complete.

2. Therefore no prophet will appear after Muhammad. Anyone denying this will correctly be declared to be an unbeliever.

3. The revelations of the precursors of Muhammad are true, and that all prophets are to be revered. Rejection of a prophet makes one an unbeliever, and places one outside the religion of that prophet. (20

4. Jihad is incumbent on all Muslims.

He urged that Mirza himself believed all of this, lived in accordance with the injunction of the Quran to pray, give alms, fast during Ramadan and so on, as external evidence of inner conviction, valiantly defended Islam against the attacks of especially Christian priests and won many unbelievers over to Islam and was himself not only accepted but at his death eulogised as one who had done great service in reviving Islam and fighting the evil of takfir which rends Islam apart, and in attempting to unify and strengthen Islam. His follower, Muhammad Ali, who became the/... (30

the leader of the Lahore group when this group splintered from the body headed by Mirza's son, was also upon his death in 1951 accepted and lauded as a Muslim. In 1937 scholars who were generally accepted as authoritative held Lahore Ahmedis to be within the fold of Islam. See for example Exhibit 83. Only in 1947 did agitation start against Ahmedis as a political rather than a religious issue related to the separation of Pakistan from India and the removal of Muslims into and Hindus from the former. Certain scholars who had opposed partition sought popularity by starting a witch hunt against Ahmedis whose founder had discouraged resistance to the British Government, so much so that all praise of Mirza in the Persian work *Isharat-i-Faridi* by Kwawajah Ghulam Farid (See Exhibit 82, page 8 para 12) was omitted when it was translated into Urdu. Somewhat later Sher Mohammed laid the origin of the problem at the door of some Qadiani who sought office after people got the vote in the Punjab, but insisted that the problem was a Pakistani political problem not a worldwide theological one.

(10

(20

In cross-examination the suggestion was often made by implication, and in argument directly, that Sher Mohammed had either been misguided or not been honest in the preparation of his testimony and presentation of his authorities by misquoting or quoting only partially something as supporting his views which within the proper context was actually opposed to his contentions. Often the suggestion was adequately countered. One must accept that the witness worked under difficult circumstances. Many of his books had been confiscated by the Pakistani authorities so that he often worked from notes³⁰ made earlier, often years earlier. It is clear too that there/...

there is much room for error or dispute from the very nature of the writings dealt with and relied on. Theologians, including Mirza, made speeches or held discourses which others reported or wrote down and translated. According to Sher Mohammed, the work of Islamic scholars was often tampered with and issued incorrectly. Ghazi agreed but mentioned different works as suspect.

There were, however, undoubtedly incorrect references given on occasion by the witness or sweeping statements made which he was unable to justify or support offered which was non-existent because it was not only improbable but chronologically irrelevant. (10

The major difficulty with the evidence of this witness, and indeed with that of all the theologians dealing not with facts but matters of belief, is that religious belief and logic are uncomfortable companions.

Even when Sher Mohammed was to a layman illogical, he never, any more than Professor Ghazi did, lost his confidence in the witness box, nor did Mr Hoberman succeed in dislodging one iota of his conviction not only that Mirza Ghulam Ahmad was a saint, a reformer, the promised Messiah, but also that he himself and all adherents of the Ahmadiyya movement are Muslims. When confronted with utterances of Mirza Ghulam that appeared to contradict Mirza Ghulam's himself having adhered to the Islamic religion, he had an explanation for them all. They were not all adequate to a lawyer any more than Professor Ghazi's evidence was unfailingly logical. But about Sher Mohammed's sincerity there can be no doubt. (20

Defendants' expert, Professor Mahmood Ahmad Ghazi, neatly suited, 37 years old, is widely read within his own field and confident, at times almost imperious or impertinent. He was in/... (30

in the witness box so long that either his English improved markedly or one's ear became accustomed to his accent. When he became angry or excited he developed a slight speech impediment. He did not become excited or angry very often, was soon so much at home in the witness box that he enjoyed playing to the gallery, often stealing a glance at the audience when he thought he had scored a point off Mr de Villiers which he tried to do more often as time dragged by and cross-examination sometimes degenerated into argument.

He admitted that he himself had originally had doubts whether he should regard Ahmedis as apostates or Muslims. He then studied the Mirza's works. What became more and more apparent as the case dragged on, is that he now has tunnel vision as far as Mirza is concerned. (10

APOSTACY

The witnesses were agreed that serious temporal consequences follow when a Muslim goes outside the pale of Islam. According to Ghazi the apostate for example loses his right to inherit from a Muslim. His marriage to a Muslim woman is automatically dissolved. He is incompetent to testify, will not be buried in a Muslim graveyard, loses contact with friends and family. (20

Two questions therefore are vital: 1) What takes a man outside the pale of Islam? 2) What makes his diminished status, loss of rights apparent should there be nothing in the nature of a declaratory court order that does so?

Ghazi accepts the proposition of Sher Mohammed and other weighty authorities he quoted, that profession of Islam is sufficient to entitle one to be reckoned among the Muslims in this/... (30

this world, but adds the rider: unless there is "a strong doubt and circumstantial evidence after his declaration to be a Muslim" (which disposes, according to him, of any problems with Exhibits 320 and 321 or Maududi's distinction between legal Islam and true Islam and statement that for the former one has regard to the outward signs).

Where there are grounds to doubt the content of a man's faith, "we are under an obligation to investigate and decide and treat accordingly". The inferential reasoning by which he justifies this rider and the alleged duty has nothing to do with the principles of logic as summarised in REX v BLOM: an hadith enjoins against acting on gossip, therefore it is inferred not that one should avoid action in such circumstances, but that one must investigate. That the hadith relates to immoral conduct does not prevent what he accepts as an injunction to act being transferred to any topic including belief. In Pakistan, cross-examination revealed, "investigation" by requiring persons suspected of being Ahmedis not only to deny the fact, which would normally be adequate, but to go further by condemning and denouncing Mirza, is necessary because of the legislative provisions regulating where they may vote and what they may do. Why the "solution" to a Pakistani political problem should be transplanted to South Africa is not clear. A person born a Muslim, he says, is presumed to remain that. A man reciting the Kalima is presumed to be a Muslim unless there is proof of something having occurred which made him cease to be a Muslim. Proof would have to be a profession or statement or denial, something expressed by the person in question. What that "something" is which may visit awesome consequences on a Muslim in the here and now seems, on Ghazi's evidence, to be determined by "Muslim/..."

"Muslim scholars, jurists" like himself, whose duty it is to convey the commandments of the Quran and the hadith to "the people" and tell them that "this is the judgment of the Holy Prophet" in respect of such and such a matter. "The people" are then bound to accept wholeheartedly what they are told, failing which they would not be submitting fully to the Prophethood. And for a Muslim to repudiate a single injunction of the law of Islam is for him to nullify his Kalima, to go outside the pale of Islam himself.

What follows (page 2831 et seq.) reveals Ghazi as a confused thinker, dictatorial and paying but lip service to the statement that Muslims are not expected to be slavish. Since Iman, faith, should be free from doubt, a Muslim should be fully aware of what is not Islam (which is impossible for the common ones to whom Taftazani refers, unless slavishly accepting what they are told by some alim presumably in the hope that that alim is not missing or misinterpreting something). If someone is confused about what is Islam and what not, he is under an obligation to proclaim his dissociation in religious context from all other un-Islamic beliefs - how, if he is confused about what are and what are not, Ghazi does not spell out. (10 (20

Of importance nevertheless is Ghazi's stressing in the long lecture dealing with Exhibit 293, that a necessary precondition to excommunication is

"that his doubts are to be removed, his misunderstanding is to be removed, and the true position, true Islamic point of view, is to be properly explained to him. If, after the removal of doubts, if after listening to the arguments and authorities (my underlining) he still insists that he holds the same view, then he will be considered/...

(30

sidered to be a kafir, a non-Muslim. In spite of their being explained to him, and in spite of his association with the Muslims, a person is living in a Muslim society, a person is co-existing with fellow Muslims, day and night he is with them and he hears them, he sees them, he witnesses them but there they are performing in a certain manner. They are offering five time prayer. They are having such and such beliefs and in spite of that the true position is explained to him and even then he says that he does not believe, then he is unanimously considered to be (10 kafir. He will not be excused on the basis that he did not know because once he has been explained, everything has been explained to him, he is living in a Muslim society, he is living with company of the Muslims, and in spite of that when, after being prosecuted, after being taken to the task in a court of Islamic Law when the final judgment is given, then he says I didn't know, so this excuse will not be accepted because all the precautionary measures were taken".

This, of course, begs the question as to what "the true (20 position" is. According to the majority opinion of ulema world wide? How on earth is a man to be satisfied that what is advanced as the (present) majority opinion is indeed irrevocably that? Who counts the heads or their value? There may be no difficulty about the so-called five pillars, but Ghazi concedes that some Muslim scholars who in the past were reviled, are revered now. At what stage in history, where for example a book subsidised by the Pakistani Government still lauds Muhammad Ali and the missionary zeal of the Ahmediyya movement, did religion-by-democracy among the learned gain (30 such momentum that it has now become obligatory for a Muslim,

to/...

to avoid being declared murtad himself, to denounce Ahmedis as murtad when called upon to do so? And this passage presupposes a hearing after "arguments and authorities", not merely the ipse dixit of a self-appointed body following an ambiguous overseas fatwa. A decision by a self-appointed body conflicts with the requirements that Ghazi poses. He says that in non-Islamic countries like South Africa, the Muslims should agree on their leader and he may appoint qazis to adjudicate among themselves. The MJC makes no pretence to having been voted into power. And the 1962 Cairo fatwa is ambiguous (10 because although the sketchy report on which it is based almost in passing lumps the Lahores with the Qadianis, it relates in itself only to Qadianis. In any event Ghazi's evidence is that a fatwa is not binding on anyone. It is merely a man's own opinion. Where the MJC derives the authority to issue fatwas and impose them on the local Muslim community remains unexplained.

I have already found that there was no adequate process of "arguments and authorities" explaining to Jassiem what Ahmedism really is, let alone one with any opportunity afforded²⁰ Ahmedism to defend itself. The evidence that Ahmedis are not permitted to appear before the Shariat Court in Pakistan was not disputed and the decision of that court, where anti-Ahmedism has a nationalist anti-British-imperialism flavour and is a legislative imperative, is not binding in South Africa.

Ghazi, having made it, thereafter in the bulk of his evidence ignored the concession that some procedure is required to excommunicate a Muslim. He testified that in case of doubt about a Muslim's adherence to Islam, he could and should (30 be called upon to make his stand clear. Failure to do so would/...

would ipso facto result in excommunication. He not only contradicts his concession, but is self-contradictory in dealing with the maxim he alleges to be axiomatic and time and again applies a dual standard of morality.

He admits the principle that the matter about which a Muslim should have no doubt because doubt is the equivalent of disbelief, is that there is only one God, that the Holy Prophet is his messenger and that the Quran is that message. There may be questioning about the content of that message. To ask whether Allah meant his unqualified injunction that there is to be no compulsion in religion to be taken literally or to be interpreted as qualified, is not doubt but merely a search for knowledge, a question to be answered. He almost immediately retracts that. Where there are two interpretations of the message, the man who sticks to the wrong one once the true position has been explained to him is guilty of kufr. (10)

Accepting that "faith" bears two meanings in Arabic as in English, it is indisputable that "belief that does not rest on logical proof or material evidence" is a gift from God, not something which can be compelled. "Loyalty to a person or thing, allegiance" is a different kettle of fish, and can, and is. (20)

The determination of what the rules are to which a Muslim is bound, rests according to Ghazi in the hands of the ulema - an amorphous body consisting of an indefinite number of "those who know the Quran, the Shariah, the ahadith". Who determines whether an alim is competent and is correct, is uncertain since men in authority - who are or include "according to the great commentators" the jurists of Islam - are entitled to obedience only as long as they correctly interpret the commands/... (30)

ments of the Quran and the Sunnah which require interpretation and understanding. Who determines whether a jurist is correct in his understanding and interpretation of the Quran and the Sunnah is not clear, especially where Ghazi proffers an exhibit (309) which accepts that the need for revision of opinion may exist perhaps because of parallel deductions by scholars of equal caliber or because circumstances have changed.

Ghazi's statement that the stage at which a Muslim is to be ejected from the community (and the mosque) is "where the overwhelming majority of the ulema and the Muslim community (10 considers him to be outside the fold of Islam" is meaningless. That cannot be limited here to the ulema and community of Cape Town since it would deny the universal brotherhood of Muslims in their submission to the will of God. The moment that brotherhood is conceded to exist the question recurs, how many ulema are there worldwide? Where no head count or determination in regard to quality or vote has been taken, how is "the overwhelming majority" ever discovered as an absolute fact except perhaps by a retrospective long distance view many centuries later?

(20

FUNDAMENTALS

Ghazi admits that there are disputes among various Muslim schools of thought as to the correct rules to apply in discovering rules of law, and that there is no unanimity about what are the fundamentals of Islam: broadly, the teachings embodied in the Quran and Sunnah, but "what is a fundamental depends on the context" in which the question is posed - which of course throws the question wide open. What must a man believe in order to be Muslim whose life and property are (30

guaranteed/...

guaranteed, who is safe from ostracism? Ghazi appears to regard iman irrelevant. What matters is what a man says, not what he does or actually believes. (See page 3571 et seq.) This does not seem to accord happily with the Quranic view of hypocrites. What is a fundamental is important because Ghazi concedes that one may interpret a teaching of Islam which is not fundamental in a way contrary to the "unanimously held" interpretation without being murtad. Elsewhere he undoes the effect of that concession by making every iota contained in the Quran a fundamental. (10

What is a fundamental is important also from the point of view of this judgment. If Mirza and/or his Lahore followers deviate blatantly from a matter which is a fundamental of Islam, then there would have been no need for anyone to explain to Jassiem that Mirza and/or the Lahores are apostates. Jassiem agreed with the proposition that he who associates with apostates is an apostate himself. Whether that concession is correct is not one for a secular court to determine in the process of a frolic of its own. If the matter in which the MJC and the Cairo fatwa accept that Ahmedis are apostate is not as clear as the MJC and the Cairo fatwa blithely accept, then different considerations apply and Jassiem should have been given an opportunity to be persuaded of that apostacy before he himself can be thrown out of the community on the domino principle. (20

I accept, as Ghazi appears to have conceded reluctantly and in passing, that Islam has two aspects. There are religious issues and socio-political issues. In an Islamic state they are irretrievably intertwined perhaps, but unless they can be separated Muslims would be unable to emigrate happily because they would be unable to take all their political rules with/... (30

with/...

with them to a country not under Islamic rule which would refuse to enforce what Ghazi for example says is the Quranic injunction of compulsory corporal punishment or death for illicit sexual intercourse and death for apostacy.

The Holy Prophet Muhammad was a political as well as a religious leader. He offered his followers paradise in the hereafter for support of his cause in the here and now, by which I do not wish to offend any Muslim by suggesting that he was insincere or not advancing Allah's cause along with his own or his own in furtherance of Allah's. The two were one (10) and the same in his eyes and in the eyes of his companions which made it good sense to secure that cause by ensuring that no one else would lead those followers astray by also offering that same greatest reward attainable by man, namely paradise, but along a different route to the one spelled out by Muhammad according to the revelations of Allah as enshrined in the Quran. According to that Muhammad is the Khattam-an-Nabiyyeen - the seal of the prophets.

The witnesses were ad idem that a true Muslim finds guidance in and leads or attempts to lead his life according (20) to the Quran and Sunnah, the sayings, actions and reactions of the Holy Prophet as recounted down the ages. There is a complicated score system to determine the reliability of the hearsay evidence, known as the hadith, depending on the origin of a story, the number of people who told it at each stage, their character and therefore reliability, and so on. Nothing contradicts the Quran, not even itself. Apparent contradictions are resolved by interpretation. Where the Quran and hadith are silent ijma, the alleged consensus of scholars down the ages, is regarded and failing that ijtehad, (30) or the use of one's own powers of reason.

The/...

The Quran is often cryptic and Arabic a language capable of much ambiguity, to judge by the translations with the many words and phrases in brackets to indicate that they are understood, not expressed. The English Quran in both versions before the Court has a good deal in parenthesis and almost 3000 footnotes in the Muhammad Ali version, over 6000 in Yusuf Ali's. Interpretations of the literal words are necessary, not only because of ambiguity, but also because of subsequent history which appears to contradict a prophesy or apparent internal conflict if words are taken at face value. (10)

The evidence, garbled as it is, of Rakiep and initially of Sher Mohammed, must be correct that there is a difference between political acceptance, i.e. within the community as a Muslim, "which guarantees life", and being a true Muslim - in the judgment of Allah - which guarantees paradise.

Ghazi conceded almost in passing that where civil rights are in issue should a Muslim not accept the "unanimous view" of the community that he had deviated from Islam, a court would have to make a ruling on the matter, obviously after hearing evidence, particularly the evidence of the person to be (20)

deprived of his rights, say of inheritance. I can think of no reason why Nazim and the MJC should be entitled as a coercive measure to deprive Jassiem of his normal rights within the community by a unilateral denunciation merely because he similarly refused to denounce another unheard on the strength of an opinion given by a body of foreign ulema, the merits or otherwise of which were unknown to either the MJC or Jassiem, particularly since Jassiem relies on verses of the Quran which are in themselves perfectly straightforward, such as Q2.114, that those who want to pray to Allah should not be denied (30)

entry to a mosque and Q2.256 against compulsion in religion.

Mirza himself was never charged or given an opportunity to refute charges against him before a tribunal of theologians nor was Muhammad Ali and both are now by necessary implication declared murtad post-mortem should they be held, or should Mirza be held, to have been deviationist in regard to a fundamental of Islam.

Nazim had no doubts that the laws of apostacy apply in a case like the present. Ghazi was more ambivalent. Perhaps realising that laws relating to "politico-religious rebellion", a "form of high treason" in an Islamic state, hardly export (10 well, he at one stage insisted that because in the RSA Muslims cannot apply the death penalty for apostacy they are under a religious obligation to keep no religious relationship, no contact with the apostate, not to treat him as one of themselves. He watered this down faced with the problem of a son, not obliged to denounce his father denying he is an Ahmedi (after saying that an Ahmedi insisting he is a Muslim should be ostracised) to a vague statement that every Muslim will judge for himself to what extent he should disassociate himself from Ahmedis. That, of course, is either no option at (20 all if all Muslims are bound by ijma to ostracize Ahmedis as murtad and dangerous or ijma is not all it is cracked up to be.

Ghazi concedes that during the last half century or so modern Muslim thinkers have doubted the validity of the qualifications tagged on to the Holy Prophet's unambiguous injunction: "There shall be no compulsion in religion". Their thinking has, according to him, not been accepted by the Muslim community as a whole, but there was no hint that those thinkers have been declared murtad on the domino principle as (30 Nazim intended Jassiem to be.

Ghazi's evidence in my view fell short of showing, despite his sweeping claims and those of Nazim, that it has without doubt been established as a principle of Islam by majority vote or view of appropriately qualified scholars within the Muslim family, members of which are found in almost every country of the globe that Ahmedis are to be declared murtad.

Defendants' counsel argued that it has been established that Mirza deviated from Islam in five fundamental aspects,

- a) his claim to prophethood,
- b) his claim to be the promised Messiah, (10
- c) his abrogation of jihad,
- d) his abuse and denigration of the prophet Jesus,
- e) his attitude in regard to the virgin birth of Jesus.

Apostacy, in the only sense which can be relevant in South Africa, relates to belief, not to political loyalty. Ghazi's evidence was, as pointed out earlier, that sinful conduct does not make a person an apostate, only incorrect belief does so. Paragraph (d) above relates only to conduct, not to belief, unless the conduct is so outrageous that the only inference (20 one can draw from it is that it evidences a rejection of the prophethood of Jesus. Muslims are required to revere all the prophets. According to the Quran there are thousands, most of them unknown. The Sunnah also requires Moslems to be neutral about, that is neither accepting nor rejecting what appears in the Old and New Testaments but is not taken up in the Quran. Bathsheba is not mentioned in the Quran. If one is obliged to be neutral about her the possibility must exist that David, although a man of God, remained a man with human frailties. The injunction to revere all the prophets can only mean, particularly in the light of the injunction not to attempt the (30 impossible/...

impossible, namely compel belief, that Muslims should not abuse or denigrate them any more than they are to drink alcohol or commit adultery. But indulging in liquor and alcohol only prevents a man from being a good Muslim, it does not expel him from the fold of Islam and result in his forfeiting patrimony or liberty.

During Mirza's lifetime Muslims had no difficulty with Mirza's using what he conceived to be the Jewish view of Christ's conduct as improper to counter Christian missionaries' hurtful allegations about the character and conduct of the Holy Prophet.⁽¹⁰⁾ No one, on the evidence before me, then went into shock at what Mirza was saying about Jesus because his writings were not interpreted as being intended, nor even merely as being, in contravention of the Quranic injunction to revere the Quranic prophet.

To use his writings on this issue now as a ground on which to rule him an apostate, seems to accord with the cliché that one can always find a stick if you want to beat a dog. Mirza's Lahore followers have not deviated in their interpretation from that of Mirza's contemporaries on this score. Mirza nowhere⁽²⁰⁾ rejected Jesus as a prophet or stated that he did not accept him to be such.

Ghazi on this issue, as on many others, makes a quantum leap. Even if Mirza had no intention to abuse or insult or ridicule any prophet and thought he was serving the cause of Allah, his action is not merely a sin, a contravention of a rule of conduct laid down by the Shariah, but amounts to disbelief and therefore apostacy, he says.

Rakiep junior was prepared to take the same quantum leap. Should it be proved that Mirza insulted Jesus he would not⁽³⁰⁾ regard him as a Muslim because "we have to believe in all the prophets"../...

prophets". That both made the leap does not justify the conclusion as a necessity where other conduct contrary to injunctions of the Shariah merely render one sinful, not an unbeliever. Sher Mohammed here again gave evidence of the background against which Mirza wrote and of other writers who adopted the same style of writing and forms of argument, such as Maududi. They were not declared murtad. He stressed that one should not read Mirza's writings as isolated excerpts out of context, but in the frame of his own explanation that "Isa of the Quran is not meant for our strong words" and that (10 "Allah knows the intentions".

Ghazi says that Muslims do not believe Mirza professed faith in Islam, though obliged to concede that in "some of his writings" he says Islam is superior to all other religions. He accepts that Mirza intended to insult Jesus and was not writing in retaliation and gets a good deal of mental exercise by leaping to conclusions and referring to authority which, when tested, proved fallible. For example, retaliation is in any event forbidden by the Quran in terms of Q6.108. This, however, dealing with those who have taken false Gods, enjoins (20 "revile not ye those whom they call upon besides God lest they out of spite revile God in their ignorance". Even accepting Ghazi's evidence that "and his prophet or prophets" should as a general principle be inserted after the word "God" where it appears the second time, he ignores the fact that there was no question of a reaction to be avoided. The Holy Prophet had already been reviled. Ghazi merely says that Mirza did not adopt that line of argument. If he had, no one would have objected to him.

As regards the alleged denigration of Jesus, Ghazi says (30 that Mirza insulted him by claiming superiority over Jesus.

Sher/...

Sher Mohamed points out that Mirza claims only partial superiority. Ghazi concedes that there are some scholars who have expressed the view that a non-prophet can have partial excellence over a prophet and that it is not kufr in all circumstances, for example where it relates to tasks allotted or functions to perform. He misinterprets Mirza's statement that "there has been no single prophet from whose special qualities or attributes a share has not been given to this humble one" to mean that Mirza claims to have all the qualities of all the prophets; insists that Mirza's intention is irrelevant, but retracts when pressed and says intention is required to "convict" him but Mirza's words so clearly and simply reveal the insult that any protestation that he intended none is not acceptable. He goes further. When it was put to him that in claiming superiority over Jesus, Mirza as the zill or reflection of the Holy Prophet was claiming superiority for Islam over Christianity, he reacted: "I admit, I have thought before that it was only Mirza Sahib who is claiming superiority to Jesus Christ. Now it turns out that all the followers of Mirza Sahib claim that", because "if every Muslim according to them can have that potentiality to be superior to Jesus Christ then every Ahmedi could have that". I confess that his logic escapes me. Sher Mohammed made it clear that in claiming as a zill of the Holy Prophet to be or to have partial excellence over the prophet who came only to the Christians, Mirza was propagating Islam as opposed to Christianity.

According to the evidence Mirza's Lahore followers accept and revere Jesus as a prophet of Allah. Even if Mirza himself sinned, there is on the evidence adduced by defendants, a dual/...

dual standard of morality relating to Mirza's followers and the followers of others. Imam Shaker Ahmed El Sahid says that Elijah Muhammed professed to be a prophet and to having received revelation. During his lifetime his followers were not within the mainstream of Muslims within the United States. They are now. "After he died his son corrected the faith of the group and everyone of them now believes in Islam much more appropriately than before", after the son had declared publicly that the organisation "does not any more recognise his father as a prophet" (my underlining). Lahore Ahmedis (10 have, according to Sher Mohamed, never regarded Mirza as indeed a prophet or that he intended to abuse Jesus.

PROPHETHOOD AND REVELATION

Sher Mohammed is adamant that despite his use of the words nabi and rasul for himself Mirza himself did not claim prophethood in competition with the Holy Prophet. He used terminology and concepts of the sufi who were not excommunicated for their use of those words and concepts, but are accepted by all Sunni as being within the fold. Sher Mohammed (20 gives authority in his exhibits.

Lahore Ahmedis do not regard Mirza as a prophet. Ghazi says the sufis are fare too rich for ordinary Muslims to understand and should rather be avoided, although they (or most of them) have not been declared outside the fold of Islam. Indeed, at one stage he mentioned that certain people criticised Mirza for not having attended one of the four sufi schools. Without that one was not properly educated as far as religion is concerned.

Ghazi said that anyone who claims revelation claims

(30
prophethood/...

prophethood and tried to analyse revelation and contact with Allah by formulae. He makes excuses for the sufis. Some merely used the wrong word to describe their experience as wahy instead of ilham. He also claims, and was not alone in this, though other claims relate to other religious writers which adds to the traps in the religious minefield, that "sufi writings have often been distorted" and that "all of Ibn-Arabi not in conformity with the Shariah is fabricated" - I presume, the Shariah as interpreted by Ghazi.

He conceded that every Muslim holds that "true visions, (10 good news, is continuing" but denied that there is any longer any direct contact between God and man in the sense in which there was contact with the prophets. The sufis are to be excused for calling themselves nabi and rasul and receiving wahy and generally for what would otherwise be kufr because "ecstasy may excuse any mistake including a claim to prophethood", a state which Ghazi does not recollect Mirza himself ever claiming to have achieved. Ultimately the issue of revelation seemed to fall by the wayside. Whether the (20 sufis claimed saintly or prophetic revelation, divine revelation, and whether they were right or wrong does not matter because they did not profess to take anyone from the teachings of the Holy Prophet and submission to the will of Allah. If someone today accepts a sufi as his religious leader, that too does not matter provided the path along which the follower is led is the same as the Holy Prophet's.

When Mirza commenced writing about his revelations, some ulema objected, some ignored him, some, including Batalvi (who is accepted as orthodox, not himself regarded as having been murtad for approving this "kufr") praised Mirza's "Barahin (30

Ahmadiyya". Though some ulema did call the sufis unbelievers, Ghazi himself does not go that far. He tells us that Iqbal was a sufi and says elsewhere that sufis deal with their spiritual experiences which are difficult to convey in words, are explained symbolically and can lead into error those who have not had the same experience to enable them to interpret sufi writings correctly.

It is in my view significant that Iqbal, as a sufi himself, did not reject Mirza on the strength of his writings or beliefs until long, long after his death and then, according (1 to chapter 29 of "Thoughts and Reflections of Iqbal" as read into the record by Mr Hoberman,

"that eminent Muslim, the late Maulvi Chiragh Ali, the author of several English books on Islam co-operated with the founder of the movement", (i.e. Mirza) "and I understand made valuable contributions to the book called Barahin-i-Ahmadiyya. But the real content and spirit of a religious movement does not reveal itself in a day. It takes decades to unfold itself".

What put Iqbal against Mirza was not anything Mirza himself (20 had written, but "the internal quarrels between the two sections of the movement". Iqbal became suspicious when a claim to new prophethood was "definitely put forward and later my suspicions developed into positive revolt when I heard with my own ears an adherent of the movement mentioning the Holy Prophet of Islam in a most disparaging language".

Sher Mohammed said Iqbal rejected the Qadianis, not the Lahores. The passage relating to Iqbal's suspicions becoming aroused seems to confirm this. We know that the Qadianis do "definitely put forward" the claim that Mirza was a prophet, (30 whereas the Lahores do not. Iqbal had the title or descrip-

tion Alama. According to Ghazi that means "the greatest alim". His belated rejection of Mirza as primarily "a traitor to India" suggests also that that rejection was on political rather than on religious grounds.

I do not understand Ghazi to say that modern Lahores follow a path other than that indicated by the Holy Prophet: nevertheless they are not to be accorded the same tolerance as Ghazi is prepared to show towards the follower of a sufi. Lahores are murtad by reason of acceptance of Mirza as their leader. (10

That Iqbal and others were wrong in their long held assessment of Mirza's teachings is, though not in those terms, the tenor of the evidence of Professor Ghazi; who is so adamant about the flaws in Mirza's religious philosophy that he virtually accuses anyone who has read Mirza's writings who accepts him to have been a Muslim, to be a fool. The matter is to Professor Ghazi today one of perfect clarity. All Mirza's protestations which Sher Mohammed listed year by year until that in which Mirza died, that he did not claim to be a prophet in the sense in which the Holy Prophet and his precursors are prophets; that he was merely the passive reflector to spread their light; are according to Ghazi to be ignored as mere dishonest bluff. (20

VIRGIN BIRTH OF JESUS

Here again it is quite clear that two views are possible. Sher Mohammed says that whether Jesus was born as the result of a miracle or whether he had a real father is a matter of history, not belief. What a Muslim should believe is that Jesus was a prophet. Sher Mohammed also says (30 that Muslims differ on the question of the virgin birth and/...

and verse in the Quran from which it is clear that it is possible to find, or to interpret those verses, so as to negate the conception of Jesus by Mary without human intervention.

Ghazi says that the Quran is clear about this. Jesus is always referred to as the Son of Mary. Mirza initially accepted that Mary was a virgin when she gave birth to Jesus, then started doubting it.

No one had done so before he did. It amounts, Ghazi says, to a denial of part of the Quran, and if Mirza left it open to his followers to accept or reject the virgin birth. (1) it is a clear denial of the Quran in itself. When the Quran is clear neutrality is the equivalent of rejection.

Sher Mohammed gave authorities who do differ from the view which, according to him, Mirza held and he himself holds, of acceptance of Mary's virginity. Among these is an hadith to which Ghazi gave a very strained interpretation: when the Holy Prophet was questioned on this, he said that Mary conceived as women conceive. Ghazi says this does not refer to conception at all, despite that word being used. It (2) refers merely to gestation. The gestation of Jesus in Mary's womb was normal.

THE PROMISED MESSIAH

Ghazi's evidence was that Mirza's claim to be the promised Messiah puts his followers out of the fold of Islam because it involves a denial of the second coming of Jesus. That involves a rejection of many reliable ahadith on the topic.

This entire concept of Mirza's, of his being indeed the fulfilment of a prophesy, is dependent on concepts of buurooz (30) and zill that come from the sufis. According to Sher Mohammed, this is not the concept of reincarnation, but of reflection of the virtues of the prophets. The entire concept

is set out in summary in the judgment of Williamson J, document 21, at pages 21 - 25 and is dealt with in greater detail in Sher Mohammed's evidence in summary in his exhibits. Professor Ghazi would have nothing to do with Sher Mohammed's exposition of Mirza's philosophy and was adamant that what Mirza was doing was merely dressing up the totally un-Islamic concept of reincarnation in the words of the sufis.

On the evidence before me Sher Mohammed's evidence is no less credible than Professor Ghazi's insistence that the prophesy, that Jesus will come in person before the last day (10 and break the cross and kill the swine after killing an individual who will be the anti-Christ or Dajjal, must be accepted literally and not metaphorically.

The name of Iqbal bears repeating here. Though himself a sufi he did not as far as the evidence reveals judge this aspect of Mirza's philosophy to be mere window-dressing nor did he as far as we know ever suggest, as Ghazi avers, that Mirza was in fact relying on reincarnation via complicated and subtle piracy of sufi terminology.

(20

JIHAD

According to Sher Mohammed, Ghiad in the sense of physical violence is not called for to propagate Islam, but is called for in defence of self or of religion. Ghazi purported to agree, but in fact went somewhat further. Qital, or jihad with the sword, is also permissible in honouring a treaty or in going to the assistance of Muslims in another country who are oppressed. He also includes under circumstances where qital is permissible, those where preachers and missionaries are not permitted to carry on their missionary work. The effect is (30 that he comes close to contradicting his concession, if he does not/...

not in fact contradict that, that the Quran does not permit qital for the propagation of Islam: a Muslim may not coerce directly with the sword, but may use the sword to create the opportunity for preachers to woo with the tongue.

On the topic of jihad, as on others, Ghazi contradicted himself many times. One of the concessions he made is that there must be a duly constituted political authority which authorises jihad otherwise use of violence is not jihad but disorder and tumult which is frowned on by the Quran. At another stage he says no, Muslims may invite an outsider to wage war to establish the requisite political authority. Making that battle their own constitutes jihad as permitted by the Quran.

Sher Mohammed's testimony was that Mirza did not purport to abrogate jihad permanently. He merely pointed out that the sword as the means for propagating Islam was unnecessary since he himself, as the likeness of the Messiah, was the fulfilment of a prophecy and would as such propagate Islam with the pen and the tongue. His purpose was to influence those Muslims who had a warped idea that attacking unbelievers was a matter of virtue, or kidnapping British and holding them to ransom permitted by the Quran. Secondly, since there were baseless narrations accepted by some that linked the promised Messiah to a bloody Mahdi who would oust those who had conquered the Muslims, he countered this by stressing the Holy Prophet's statement that the Messiah would suspend war or bring an end to it. His message was aimed at two audiences. The British Government, to assure them that a second mutiny under his leadership was not imminent, and Muslims because the conditions prerequisite for Quranic jihad did not exist: the British did not prevent Muslims from practising their religion/...

gion. Sher Mohammed's allegations of what Mirza intended to say about jihad, and why, taken in context, are not so far-fetched that they must be dismissed out of hand. Mirza's followers according to the uncontested evidence do not regard Mirza as having abrogated jihad or having attempted to alter indisputable Quranic material in any way.

I do not analyse in detail the evidence relating to the five so-called fundamentals wherein Mr Hoberman says that Ghazi has established Mirza to be an apostate. The reams of evidence produced on the issues make it clear that there are (10 two views possible on every one of those questions.

For the purposes of the defamation action it is not necessary for this Court to pretend to determine finally whether Ahmedis are Muslims or not, an exercise in comparative futility where the MJC and Nazim have already intimated that they regard this Court's ruling on that score as irrelevant and where the next legal tussle is already in the pipeline. I can no more compel belief that Ahmedis are Muslim than the Pakistani Shariat Court's ruling can compel belief that they are not. (20

It seems to me that there is a serious flaw in the testimony of Professor Ghazi insofar as it sketches an untenable system under which

(a) a man may at some quite undefined stage perhaps even long after his death become or be regarded as an apostate;
 (b) and apostacy unconjoined with treason determines civil rights, dissolves marriages, alters devolution etc., or may sometimes do so, and may moreover, should Ghazi have his wish, lead to the ultimate penalty in Pakistan in the future;

(c) but it is impossible that faith in the sense of belief should/... (30

should be in fact the touchstone for determining whether a man is an heretic or not, since faith is incapable of being coerced and the opportunity of which Ghazi testifies which is to be given someone to "repent" his unbelief, can mean only that he is to be given an opportunity either to promise fealty to a political leader or to utter hypocritical words without necessarily actually believing what he protests he suddenly does;

(d) moreover, neutrality is impossible. Other Muslims called upon to take a stand are obliged to denounce an alleged apostate, failing which they themselves may be declared to be apostate with all the disadvantages and loss of civil rights consequent upon that. (10

That is in a nutshell, the main version of the system sketched by Ghazi. As a Muslim. Adv Hoberman argued, Jassiem is willy-nilly bound by the rules of the Islamic system, harsh though it may be.

The main version (and Adv Hoberman's argument here) ignores the concession made by Ghazi in passing, that before someone is declared apostate there would be an opportunity to argue the matter out, to be convinced and not merely dictated to, a trial. (20

I refer to Ghazi's "main version" because there were many variations as to the details of the system, particularly under cross-examination. Despite the fact that he gave a great deal of evidence about the laws of apostacy, he ultimately watered down his evidence and talked of the obligation of the Muslim community to keep itself pure by rejecting deviationists from that community. The obligation to reject is as amorphous and undefined as the system he sketches in other respects. For example, a man does not have to denounce a friend who holds a belief/... (30

belief that he himself does not share. The obligation to denounce only arises when people start querying his own belief and then it is not enough to say "I do not share my friend's views". He is obliged to denounce his friend's belief as kufr, not denounce the individual, except if the friend is influential. (Record page 4098).

The "rule" that he who approves kufr is himself kafir seems to hold good only when it suits the proponent. Exhibit 421 was published by the Institute of Islamic Culture and subsidised by the Pakistan Government. I have referred to it in (10) passing before. Ghazi says "it is a book of history and it is continued to be published by that subsidised institute". That book of history praises the Lahores' form of jihad consisting of preaching to propagate Islam and praises Muhammad Ali's English translation of the Quran though the writer was well aware of "the strange beliefs of the Qadianis and certain traits of their founder".

That in itself is a further indication that the last word has not been said in regard to the apostacy or otherwise of the Ahmedis. Other Ahmedis, influential ones at that, were certainly not declared apostate or ostracised by the community. 20

Exhibit 339 gives various examples of fatwas which claim to express the "unanimous opinion" of the Ulama of Mecca and Medina, a grandiose claim of support which Ghazi says was untrue. He concedes that the ulema are sometimes wrong, that it is their duty to investigate facts and that sometimes they do not do so. Moreover, even the founder of the Aligar Muslim University had problems. Though a fatwa was issued against him, and supporting his school was declared forbidden, and though according to Ghazi "all" were unanimous that his beliefs were un-Islamic, nevertheless most of the ulema supported/... (30)

ported his western educational campaign. Ghazi does not accord Mirza the same courtesy: he has no virtues whatever. Referring to Exhibit 411 Ghazi says that he does not think that that fatwa gives an unfair version of Mirza's philosophy. He agreed with the proposition that "One who stands in the way of jihad against imperialism and supports the latter in its struggle against the Muslims does not belong in the Muslim nation". He says that that is not incorrect guidance or enlightenment of the ordinary people: by bringing in their own educational system and courts, the British acted against Muslim religion in terms of the Islamic Law. Why he approves of the fatwa against Mirza, but is apparently not offended by the concept of the university founded by Khan to advance western education, one does not know. (10

What is even more interesting in his analysis of when one can classify a fatwa or an opinion as being one held by the majority of those who count in the community, is his statement which amounts to a "heads I win, tails you lose" approach against the Ahmedis. Despite the fact that the 1962 fatwa refers to an apparently non-existent writing by Mirza, and gives no idea of Mirza's glossary and Mirza's philosophy but merely the orthodox literal interpretation of Mirza's writings, Ghazi regards that fatwa as a fair representation of the truth. About that fatwa he says that the common man is not interested to know what are the claims of Mirza Sahib and what are not. A common man is interested only in being told whether Mirzais are Muslims or not; and in the counting of heads to decide whether a sufficient number of ulema have agreed with the fatwa to make it obligatory for the common man to hold himself bound by that, the ulema who joined Mirza were automatically outside the fold so that their adverse views do not/... (20 (30

not affect the validity of the fatwa, according to Ghazi.

In short, the finding of the Court is that there are different views about what are fundamentals of belief, deviation from which takes one outside the fold of Islam. Ghazi's evidence that there can be no doubt that Mirza was an apostate and his followers are apostate is contradicted by history. Many respected scholars accepted him and his Lahore successor Muhammed Ali as devout Muslims and fighters in the cause of Islam. It is unnecessary to choose between Ghazi's view and those historical opinions. What is important is not their (10 content but that they existed. Zafarullah Khan, a Mirzai, was President of the Muslim League. Iqbal proposed a son of Mirza for public office in America. An Imam in the USA recently asked for and received an invitation to an Ahmedi function and saw many members of his congregation there. Sher Mohammed says that he gets requests for literature from people interested in Islam from all over the world. "We have not heard of anti-Ahmedi actions in Iran. There are Ahmedis employed in Lebanon. Elsewhere we are opposed only if there is maulvi from Pakistan who has a clique with him". The (20 Cairo fatwa, in terms of Ghazi's own evidence has not the effect of a statute, is not in itself binding, and is especially not binding on Muslims in South Africa.

Against that background Jassiem was entitled to adopt the attitude that he was unsure whether Ahmedis were or were not apostates and felt himself bound by the Quran itself not to make any possible Muslim a kafir. He was never given a proper opportunity to "repent" though it is not established that "repentance" is or was necessary.

In passing, comment should perhaps be made as regards Mr (30 Albertus's argument in relation to Nazim's alleged legitimate interest/...

interest in labelling Jassiem an Ahmedi sympathiser. He argued, in support of this, that Muslims in the Western Cape should be left to practise their religion as they see fit. That includes applying the test to determine who is an Ahmedi sympathiser, of simply asking Jassiem (as being under suspicion) to denounce the Ahmedis as unbelievers and apostates. "The said test is practically expedient because of its simplicity and by its very nature eliminates religious trials which in themselves can become traumatic inquisitions which needless to say should be avoided". (10

That, of course, means nothing else but that it is "expedient" that the MJC and Nazim should be left to deprive someone "under suspicion" of any opportunity to be heard, to enquire, to question, to proffer arguments. The "freedom of religion" he seeks is the freedom to coerce loyalty under the guise of belief or faith since what is to be excluded and ostracised is not an Ahmedi but someone, a Muslim, with an enquiring mind and a crisis of conscience. Advocate Albertus's reliance on decisions in regard to voluntary associations for the proposition that the absence of a proper inquiry does not necessarily vitiate the decision to expel Jassiem cannot help him. Jassiem did not adopt Islam, he was born a Muslim. Ghazi says that born Muslims do not benefit from the Holy Prophet's admonition against compulsion in religion. But on Ghazi's evidence, even if one takes his most wide-ranging evidence of the community's alleged right to compel faith, Nazim jumped the gun. Jassiem should have been given an opportunity to "repent" before he was called an Ahmedi sympathiser. I would have thought it unnecessary to belabour what seems to be common cause; that that means and would have been intended to mean that he is himself an apostate/...

(20

(30

apostate and to be ostracised had Advocate Albertus not argued "well, he could have challenged the assertion", i.e. by himself denouncing the Ahmedis which again merely accepts that Nazim's approach and that of the MJC, so practically expedient and one-sided, is reasonable and acceptable and their view, as taken over from the Cairo fatwa, unquestionable and unimpeachable.

The MJC had no authority to impose its will on Jassiem, or rather the will of Cairo which it adopted as gospel. The MJC could try to persuade Jassiem, but, as I have already found, (10 never did so. The coercion effected against Jassiem of which the accusation of his being an Ahmedi sympathiser was an integral part, was under those circumstances wrongful and constituted defamation. The results of that iniuria were intended. Nazim intended that Jassiem should be ostracised from the community and dealt with "appropriately" by the community. Passions were inflamed and we know that Jassiem and his attorney were assaulted outside the court on the first day of the trial.

Nazim's evidence was that a call for ostracism would (20 accord with the laws of Riddah, as the next best substitute for the death penalty which, according to him, would have been compulsory in an Islamic state in terms of the Quran. Where Nazim is totally unrepentent, and reflects also the attitude of the MJC, I agree with Jassiem's counsel that this is a case for exemplary damages. Money is a poor consolation for being intentionally deprived of any meaningful contact with friends and even relatives and treated as a harmful pariah; which is the effect Nazim intended to achieve by the words he spoke, in which he seems to have succeeded.

The following order is made:

1./...

(30

1. Jassiem's claim against the MJC based on wrongful dismissal is dismissed.
2. The defamation action succeeds and R25 000 is awarded as damages in respect of the iniuria, payable jointly and severally by Nazim and the MJC.
3. In the ordinary course the orders would have carried costs against the respective losers. Because of the joinder and the various agreements between the parties, the question of costs stands over to be argued on a date to be arranged with the Registrar should the parties not agree on this issue. (10


.....
VAN DEN HEEVER J