Defamation

(i) The defence of in Rixa

In Sipengo Nabileyo vs Mpentsu Cona, 1937 N.A.C. (C+O) H in the course of an altercation between himself and K used abusive language directed towards K. K in rixa and by way of retort used defamatory words about H ~~thereof~~ as a result of which H sued K for damages for defamation. K put forward the defence of that the words complained about were uttered in rixa.
The Court in awarding damages against K. said "The words used by defendant of plaintiff are clearly defamatory per se and the law presumes the existence of animus injuriandi from the mere fact that the defamatory words were ~~uttered~~ published, and thus presumption the Defendant can only rebut by proving that his case falls within certain definite and recognised categories of privilege, exemption or excuse.... A plea that the words were spoken in rixa does not avail the defendant, unless the words spoken by way of retaliation were moderate and proportionate to the injury inflicted by the plaintiff and were not deliberately persisted in." (McKerron: "The Law of Delict in SA" p.135)
"In the case in question the words used by H (the Plaintiff) were meaningless abuse ("tole lenja") whereas the words used by K (the Defendant) by way of retort were defamatory per se (they imputed illegitimacy to H) and therefore not moderate & proportionate to the injury suffered by himself (the Defendant). K. did not withdraw the words and did not express regret."

(ii) The Defence of Privilege

In Bertinde Ncume vs Elina Lebona, 1938, N.A.C. (C+O) the Court summed up the position as follows as far as the defence of privilege is concerned: "In order to establish privilege

In dealing with the defence of privilege in Ngqola Mhlekwa vs Stanford Matiwane, 1943 N.A.C.(C&O) the Native Appeal Court quoted with approval the remarks of Prof. Wille in his book "Principles of South African Law", p. 386 to the effect that "When the presumption of the animus injuriandi has been rebutted by the defendant proving that the communication was made on a privileged occasion, the plaintiff can succeed in his action only by proving affirmatively that the defendant was in fact actuated by animus injuriandi. This he can do by proving that the defendant was animated either by express malice or actual ill-will towards him or by any indirect or improper or ulterior motive or by proving that the defendant knew the statement to be false or that he made it recklessly without caring whether it was true or false."

Reference was made to the similar view of Walton in his book "The Law of Defamation" (p. 240) to the effect that "where a witness is sued for a defamatory statement made by him under oath, the qualified privilege furnished by the occasion can only be displaced, and the witness made liable to as defendant by proof of three things (which are necessary to the success of the plaintiff): first that the witness was actuated by malice; second that the words of him were false, and third that the witness who uttered them had no reasonable grounds for believing them to be true".

the Appellant must show that she had a duty or an interest legal, social or moral to make the communication and that there was an interest in the person to whom it was made to receive it. The question is not whether the Appellant thought there was such an interest or duty but whether the interest or duty did in fact exist, and the onus of proving that the occasion was a privileged one is upon the Appellant (i.e. upon the defendant)

Proof of Words used.

In the case it was pointed out that "in an action for damages for slander it is not necessary to prove the use of the exact words alleged in the declaration and it is necessary to prove the use of words to the same effect and having the same meaning or a material & defamatory part of them". (See Ch. W. Mzinyati vs Sly Mzinyati, 1930 N.R.C. (C&O)).