

cases are individual in nature this case hopefully provided some guidelines (as discussed earlier under par 3 3), especially in cases dealing with *solatium* and where compensation also has a non-patrimonial component.

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Like Pontius Pilate of old, the Constitutional Court washed its hands of my human dignity: A critical review of *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC)

1 Introduction

On 8 April 2011, the Constitutional Court, through Cameron J, decided by a majority of five to three, that publications made by *The Citizen* newspaper, which referred to Robert McBride as a murderer, amongst other things – despite successfully applying for amnesty from the Truth and Reconciliation Commission (TRC) – were protected by fair comment. This was a successful appeal by *The Citizen*, an erstwhile editor and two journalists against a controversial judgment of the Supreme Court of Appeal, which found that reference to McBride as a murderer had been rendered false by virtue of the amnesty granted to him by the TRC (*The Citizen 1978 (Pty) Ltd v McBride* 2010 4 SA 148 (SCA) par 33). This meant that any such reference to him could no longer be justified either by the defence of true publication or by fair comment, as the basis for the defence had since been rendered false. The events that gave rise to this appeal are well documented and have become trite. To summarise, McBride, acting as an operative of the African National Congress (ANC), carried out a car bomb attack outside the Magoo's Bar and Why Not Restaurant on the Durban beachfront on 1986-06-14 (*The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) par 3). Sixty-nine people were injured and three young women were killed in the explosion. McBride was subsequently convicted and sentenced to death for multiple murders. However he was reprieved and released in 1991 and 1992, respectively. In 1997 McBride applied for amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995, (TRC Act), which was granted in 2001. Sometime in 2003 reports surfaced in *The Citizen* newspaper that McBride was a front runner to take a post as

a police chief of one of South Africa's largest municipalities, the Ekurhuleni Metro. These rumours were subsequently confirmed when McBride was appointed into that position, despite initial denials by the government.

The appeal before the Constitutional Court centred around three statements which had appeared in a series of articles published by *The Citizen* over a period of two months (par 137). Central to the appeal was the statement that McBride was "a murderer" and "a criminal". Here, the court had to determine if it was fair to still refer to a person who had been convicted of murder during the struggle against apartheid as a "criminal" and a "murderer", despite him successfully applying for amnesty. The first statement raised two issues: (1) whether McBride's amnesty was expressly stated; and most controversially, (2) whether *The Citizen's* comment could be said to be based on true facts, in view of the amnesty granted to McBride (par 161). In essence, this was about the effect of amnesty on the law of defamation (see par 2), that is, a determination of the role the amnesty process plays in achieving the balance between freedom of expression on one hand, and the value of human dignity, on the other. The second issue centred on the assertion that McBride was not contrite, but was instead proud of having killed civilians during the struggle against apartheid. The dispute further revolved around the statement that McBride had "dubious flirtations" with alleged gun dealers in Mozambique. In all these the appellants relied on fair comment as a defence to escape liability (parr 137, 154, 234). McBride also entered a cross-appeal against the reduction of his damages by the SCA, after finding that reference to his alleged involvement with gun dealers in Mozambique was found to be not defamatory.

In the Constitutional Court, the majority (with Ngcobo CJ, Khampepe & Mogoeng JJ dissenting) held that the first and third statements were protected as fair comment. Ngcobo CJ (with Khampepe J concurring) agreed with the majority decision that the first statement was protected by the defence of fair comment, albeit for different reasons (par 138). The Chief Justice, however, concurred with Mogoeng J that the third statement was not protected by law (parr 138, 237). However, the court was unanimous that the second statement could not be protected by the defence of fair comment (parr 121, 138), with Mogoeng J going as far as finding the statement to be malicious (par 236). *The Citizen* had raised the defence of fair comment in relation to each of these statements. This case note is a critical review of the Constitutional Court judgment. In particular, it takes issue with the majority's interpretation of section 20(10) of the TRC Act, in relation to the defence of fair comment and the constitutional value of human dignity. At the same time, the note attempts to show why Mogoeng J's opinion is legally sound and preferable.

2 The Defence of Fair Comment

The requisites for a successful claim for defamation are trite in our law. Once the plaintiff has proved that there was publication of a defamatory matter which referred to the plaintiff, intention and wrongfulness (as well as causation) will be presumed. The defendant must then prove that it has a valid defence that excludes, amongst other things, wrongfulness. This includes fair comment, which was argued by *The Citizen*. In the Constitutional Court, *The Citizen's* defence was refined to strictly fair comment, given the confusion that seemed to have arisen from the SCA judgment, where the court was caught between the defence of truth and public interest publication and that of fair comment (par 35), as well as comment on the effect of amnesty (par 30). While still relying on the fair comment defence, *The Citizen* sought to use its reference that McBride was “a murderer”, as the true basis upon which their comment that McBride was not suitable for appointment as police chief rested (par 35). However, closer examination of this argument reveals that the appellants were still commenting on the effect of amnesty granted to McBride. It is considered here whether the court was correct in upholding the defence of fair comment.

Cameron J (writing for the majority) considered that to call this defence “fair comment” was misleading (par 82). He even went on to refer to it as “protected comment” (see parr 82 - 84). However Ngcobo CJ disagreed with him in the following terms (par 158):

In my view, the requirement of fair comment is consistent with the need to respect and protect dignity. It maintains a delicate balance between the need to protect the right of everyone, including the press, to freedom of expression and the need to respect human dignity. This is the balance that the Constitution requires be struck. I do not, therefore, share the view expressed by Cameron J that the word “fair” is misleading. It must now be understood in the light of our Constitution, in particular the foundational values of human dignity and freedom upon which our constitutional democracy rests and the need to strike a balance between ensuring that freedom of expression is not stifled and insisting on the need to respect and protect human dignity.

The author shares the Chief Justice’s sentiments. There is nothing wrong with referring to this defence as “fair comment”. Renaming the defence, as Cameron J suggests, may inflict unwarranted violence on the common law of defamation – whereas there is a healthy co-existence between the common law and the Constitution, as clearly indicated by Ngcobo CJ (par 158).

As early as 1917, the requirements for a successful defence of fair comment were categorically laid down in the case of *Crawford v Albu* 1917 AD 102 114 and later adopted in the case of *Marais v Richard* 1981 1 SA 1157 (A) 1167F (parr 80, 155, 159; see also *The Citizen v McBride* (2010 4 SA 148 (SCA) par 66; Buthelezi “As a matter of fact: But whose fact? *The Citizen v McBride*” 2011 *De Jure* 179). There are four requirements: (a) the defamatory statements are comment or opinion and not of fact; (b) the comments relate to a matter of public interest;

(c) the factual allegations being commented upon are true; and (d) the statements are fair. These are discussed below, with special attention paid to those elements that have bearing on the decision that should have been reached in the current case.

2 1 The Defamatory Statements are Comment and Not of Fact

To succeed in his defence, the defendant needs to have been expressing an opinion rather than asserting a statement of facts (see Buthelezi 2010 *De Jure* 179 189). He must be understood to be doing such by an ordinary and reasonable reader (*Marais v Richard* 1981 1 SA 1157 (A); *The Citizen v McBride* 2010 4 SA 148 (SCA) par 40, 67; Buthelezi 2010 *De Jure* 179 184). However, at times there can be a very thin line between a statement of truth and an opinion. This, to a large extent, will also depend on the content of the allegation, the context of the statement, and the unique circumstances known to the reasonable reader (*The Citizen v McBride* supra par 40). Undoubtedly, where there have been a series of publications, as with the present case, this could require that these be considered collectively. In the light of all the circumstances (and considering all the articles together), I agree that *The Citizen* expressed an opinion on McBride's suitability for the post of Chief of Police of the Ekurhuleni Metropolitan Municipality. Hence, the three statements in contention, would have been (or should be) understood by a reasonable reader as bases for *The Citizen's* opinion on why McBride was not suitable.

2 2 The Comments Relate to a Matter of Public Interest

Another requirement for a successful fair comment defence is that the defendant should be expressing his opinion on a matter of public interest. This means that one must be airing a view or opinion on a matter that concerns the public, or a matter in which the public has an interest (Burchell *Personality Rights and Freedom of expression: The Modern Actio Injuriarum* (1998) 274-275). It is trite that any matter concerning the conduct of public figures, political and state institutions, the administration of justice, to name a few, is a matter of public interest (Burchell 283; Buthelezi 2010 *De Jure* 179 187). It is also submitted that matters of public interest would include any newsworthy information or even that which will contribute to public debate or that would help the public formulate an opinion (see par 141; *Khumalo v Holomisa* 2002 5 SA 401 (CC) par 21). It should be noted, however, that this requirement differs from that of the defence of truth, which requires that the public derive some benefit from the published statements (see Buthelezi 2010 *De Jure* 179 183). Buthelezi also suggests that this requirement perhaps should require that this element be brought in line with the one in the defence of truth and public benefit, by requiring that the comment be made *in the public interest*, as opposed to only showing that one commented *on a matter of public interest* (Buthelezi 2010 *De Jure* 179 187). Ngcobo CJ too alludes to this view by twice referring to the fair

comment defence as “fair comment in the public interest” (parr 154, 160). Thus in this matter *The Citizen’s* statements amounted to a comment in a matter of public interest. Firstly, McBride, as a politician is a public figure. Second, he is newsworthy character, as he has always been surrounded by controversy. Most importantly *The Citizen* published statements in relation to the McBride’s pending appointment as a senior public office bearer. Therefore, the appellants’ defence for fair comment could not be faltered under this requirement.

2 3 Comment Base upon True Factual Allegations

For logical reasons I have elected to deal with this requirement for the fair comment defence and the requirement that the comment should be fair last, as they were, in my opinion, central to the issues in this case. The requirement that a comment must be based on true factual allegations means that the publication will only enjoy protection if it has true factual bases. It implies that the comment should “rest upon a firm foundation” and “be clearly distinguishable from that foundation” (par 155). This “firm foundation” refers to “the facts expressly stated or clearly indicated and admitted or proved to be true” (par 155). However, the facts only need to be substantially true rather than absolutely true, or true in all respects (Burchell²⁷²; Buthelezi 2010 *De Jure* 179 185). Moreover, as shown above, these facts should be expressly stated or clearly indicated and admitted, or (if not admitted) proved to be true (see also par 155). Thus failure to comply with any of these requirements will result in the loss of protection (parr 155, 184). This is an important requirement of the defence, since the defendant is not required to “justify his comment but only to prove that it has a true foundation” (parr 83, 156).

Ngcobo CJ held that when amnesty had been obtained, that fact should also be mentioned for the defence of fair comment to succeed (par 170). Failure to mention amnesty would amount to “a half-truth and [would] thus be untrue” (par 173). However, this does not necessarily mean that each article should contain this fact, even where the statements complained of were part of a series of articles (as in the present case). In such a case, they should not be considered in isolation from each other, as a reasonable reader would regard each article as part of a series (parr 92, 174, 187, 231). I share this view. In this case, the requirement that the facts should be expressly stated or clearly indicated and admitted or proved to be true was satisfied. I concur with Cameron J, that McBride’s amnesty had become public knowledge (par 92). Therefore, contrary to Ngcobo CJ’s view, reference to this fact was no longer necessary (par 184), and the statement that McBride was a murderer was accurately stated (par 187). It was also argued for McBride that the appellants’ defence lacked a true foundation as the respondent had obtained amnesty. I concur with the majority opinion that the effect of amnesty is not intended to render as false acts the commission of which is an historic fact (parr 96, 97, 166; Buthelezi 2010 *De Jure* 179 185). Hence, their defence for fair comment did not also lack true foundation.

However, in my view, neither this aspect of the element of the defence nor the one mentioned earlier was central to the issues before the court. What was key, I submit, is whether it was still fair (under the next element of the defence, with specific reference to the elements of relevance and reasonableness) to keep on referring to a recipient of amnesty as “a criminal”. Thus, I do not entirely share the emphatic conclusion reached by Cameron J that: “Mr McBride had committed murder, and was thus a murderer ...” (par 97). Surprisingly, after making his decision, Cameron J stated that it does not mean that “Mr McBride’s conviction for murder can indefinitely be flung in his face” (par 79). However, this is not to say that past deeds in respect of which amnesty was granted are not to be mentioned, but they should be mentioned with due regard to public interest (see par 170).

2 4 The Statements are Fair

Lastly, to succeed, the appellants needed to justify their published statements as fair. To satisfy this requirement the statement must be honest or *bona fide*, relevant and not actuated by malice (parr 81, 156). The opinion is fair if it is an opinion that “a fair person, however extreme, might honestly hold, even if the views are “extravagant, exaggerated, or even prejudiced” (parr 81, 156). It will be fair comment speaking it objectively qualifies “as an honest [and] genuine ... expression of opinion relevant to the facts upon which it was based, and not disclosing malice” (par 81). The defendant need not necessarily have to justify the comment, but he or she must satisfy the court that it is “fair” (par 156). In essence, the comment is fair if it meets the requirement of honesty/genuineness, relevance and lack of malice. These are determined objectively, save for the element of malice, which is assessed subjectively (Burchell 278; Buthelezi 2010 *De Jure* 179 186). Relevance means that the opinion be relevant to the matter commented upon or to the facts upon which it is based (parr 157, 103). Malice, meanwhile, denotes abuse of the right and renders a statement which would otherwise have been lawful, wrongful and unprotected (see par 105). Mogoeng J, quoting Joubert JA in *May v Udwin* (1981 1 SA 1 (A) 19A-B), had this to say regarding malice (par 239):

In my opinion *Voet’s* criterion must be accepted as being consistent with the position where a judicial officer, under the guise of performing his judicial functions, has been actuated by *personal spite, ill will, improper motive, unlawful motive (ongeoorloofde oogmerk of motief)* or *ulterior motive*, that is to say, by *malice*, in his publication of the defamatory matter in order to expose the defamed person to odium, or ill will, and disgrace.

It is submitted that the process of establishing malice inadvertently involves interrogating the statements and their purpose (see also par 231). I also submit that whether the statements complained of were fair or not, is the determining factor in this matter. The “fairness” of the comment is determined in terms of the general legal criterion of reasonableness, taking into account the constitutional values and norms setting boundaries for what is protected as “fair” (par 84; see also

Cameron J's interpreted version of parr 1168C-D of *Marais v Richard* 1981 1 SA 1157 (A) in n 99). Cameron J states that "the fundamental norm must be the local legal convictions" that determines what is fair (*ibid*). I concur entirely with this analysis. This is especially important given the main issue in this case. Further, it is my submission that in order to do justice *in casu*, appellants' statements should be considered both individually and collectively. This will ensure that they are understood within their context. Such a view was also held by Mogoeng J (par 231). Lending support to this view is the general approach adopted by the majority when determining whether *The Citizen* clearly expressed the basis for fair comment on the main issue before the court (par 90). The majority considered the statements as a series of one continuous publication in view of the period of their publication. For this reason and for practical purposes the following section interrogates this element of the defence in respect of each statement.

(a) "Lack of Contrition"

Mogoeng J was of the view that by *The Citizen* touted the untrue statement that McBride "lacked contrition" as a true fact to support their opinion that McBride was not suitable for heading any metropolitan police force (par 236). I submit that this view is reasonable. Whatever the case may be regarding the true nature of this statement, the court was unanimous that it was not protected. As the court stated, there is ample evidence to the contrary, both in the TRC report and a statement by McBride's lawyer (par 21, 92). I also submit that the fact that McBride voluntarily opted to seek amnesty, despite his reprieve and release in 1991 and 1992, respectively should also tip the probabilities in his favour tip (par 3). This should have been sufficient to indicate McBride's remorsefulness. Thus, *The Citizen's* statement in this regard is unfair. It also does not pass the test in 2.3 above as it lacked a true foundation. Hence, whether this statement was a comment or an assertion of true facts, I concur with the court that it was not protected by fair comment defence.

(b) "Flirting with Gun-Runners" in Mozambique

The main contention regarding the statement that McBride had "dubious flirtations with alleged gun dealers in Mozambique" centred on its interpretation (parr 123, 199). The majority of the court did not agree with McBride's interpretation that, within the context, the statement meant that he was involved in criminal activities in Mozambique (par 124, 125). Instead, the majority of judges shared the same sentiments as the SCA, that the statement should be understood to mean that "in addition to the fact that [McBride] committed murder, the episode clouded his candidacy for police chief" (par 126). I disagree that, taken within context, the "flirting with gun-runners" statement should not be understood to mean that McBride cannot be trusted as he is a criminal who gets involved in criminal activities. In my opinion, a reasonable conclusion in the circumstances is Mogoeng J's assertion that the appellants used this statement to reinforce the view that McBride is an

unrepentant “dangerous criminal” who was not fit to be entrusted with the position he aspired to (par 226, 227). Ngcobo CJ is also in agreement with Mogoeng J that this is the imputation that a reasonable reader would attach on the statement at issue (par 199 to 201). Mogoeng J is also, in my opinion, correct that this statement should be regarded as having a cumulative effect on deciding the whole issue of appellants’ liability (par 231). Indeed, all three statements in contention, and the series of the articles published by *The Citizen*, should not be regarded as separate from one another, but must be considered collectively. In fact, this view is unwittingly supported by Cameron J’s own analysis of the meaning of this statement (par 126). Nevertheless this statement was relevant, for the appointment of McBride to a public office as the police chief for the Ekurhuleni Metropolitan Municipality was a matter of public interest (par 108, 109; Buthelezi 2010 *De Jure* 179 186).

However, as Ngcobo CJ held, the question was whether the facts regarding this matter were accurately stated (par 202), and whether a true foundation was laid for the defence of fair comment. I concur with the Chief Justice that the appellants did not fully state facts about the arrest, the release and the subsequent quashing of the charges against the respondent, by the Supreme Court of Mozambique (par 202). The appellants did not publish anything about the press conference at OR Tambo International Airport, where the latter fact was explained (par 203). I disagree with the stance that Cameron J alluded to that the appellants’ failure to ascertain the statement’s accuracy is excusable or that they should be given the benefit of doubt (par 127). Such failure belies the appellants’ claim for a desire to carry out their public duty of contributing in the fight against crime (see par 239). In fact, this failure borders on *dolus eventualis* (see also *MN v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC) at par 64). Thus, in my opinion, Ngcobo CJ and Mogoeng J were correct in finding for McBride in this regard (par 203, 237). At worst, this statement could be viewed as malicious as Mogoeng J found (par 237), or at least it evidenced gross recklessness on the part of the appellants. I therefore submit that Mogoeng J’s analysis of the statement about lack of contrition, applies with the same force in this statement (par 236). Further, as Mogoeng J stated, this was also a reckless violation of section 4.3 of the South African Press Code, which states that “[c]omment by the press ... shall take fair account of all available facts which are material to the matter commented upon” (see footnote 32 under par 236, Mogoeng J’s dissenting judgment).

Moreover, as stated in *Khumalo v Holomisa supra*, the media have a heavy and noble responsibility placed on them. They are constitutionally obligated “to act with ... integrity and responsibility” (*Khumalo v Holomisa supra* par 24). This duty binds the media to report accurately (see also *Brümmer v Minister for Social Development* 2009 6 SA 323 (CC) par 63). It is not difficult to understand why this is an integral part of media reporting. “[T]hey are, inevitably, extremely powerful institutions in a democracy ...” (*Khumalo v Holomisa supra* par 24). It is submitted

that if left unchecked such power could destroy human dignity, thereby imperilling one of the goals of the South African Constitution, namely, bringing about a republic founded on the value of human dignity (par 143). Therefore, the court, in my opinion, erred in dismissing McBride's cross-appeal. The statement is a half truth and, contrary to the majority's view, carries a defamatory meaning. Alternatively, I submit that the majority should have at least regarded the statement as having a bearing on inferring malice on the part of the appellants as it was made to bolster the main allegation that McBride was a murderer and a criminal owing to the bombing incident.

(c) A “Murderer” and a “Criminal” in Spite of Amnesty

The court was unanimous that amnesty granted in terms of the TRC Act does not render as false the commission of an act for which amnesty was granted. However, the court was divided on the effect of the amnesty process. Interestingly, Cameron J (for the majority) and Mogoeng J, in a dissenting judgment, reached different conclusions here although they used the *AZAPO* case to explain the effect of amnesty on its recipients. Cameron J concluded that amnesty in the TRC process was a means to an end – a statutory mechanism that was created to uncover the truth (par 51). For him, it seems that the main objective of the TRC was about helping victims of gross human rights violations (survivors and the dependants of the dead) – to “discover what did in truth happen to their loved ones” (par 51). According to the justice, amnesty was “an incentive used to encourage perpetrators to disclose the whole truth” (par 51). On the other hand, for Mogoeng J, the TRC process was more than about the telling of truth. Instead it was about the pursuit of a two-pronged constitutional objective, namely: “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past ... ” (par 211). He quotes Mahomed DP in the same *AZAPO* case (par 209):

It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity ... It might be necessary in crucial areas to close the book on that past.

For Mogoeng J, the discovery of truth or truth-telling was secondary or subsidiary to the main purpose of the TRC process (par 211). Mogoeng J traces this objective (as envisaged in the amnesty) to the epilogue in the interim Constitution of the Republic of South Africa 200 of 1993. He said (par 210):

It follows from the epilogue that our political leaders committed the nation to the pursuit of a future founded on peaceful co-existence, recognition of human rights, national unity, reconciliation of the people of South Africa and reconstruction of society. It dawned on them that this dream could only become a reality if black and white South Africans, who had been at war with each other, would embrace “a need for understanding but not for vengeance,

a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.”

This view is equally shared by Ngcobo CJ who held that “amnesty was adopted in order to advance reconciliation and nation building or reconstruction” (par 163, 164). As the Chief Justice put it, it meant that: “[the recipient’s] conviction may no longer, in law, be used against him or her. But the facts upon which his or her conviction rested are not obliterated; they are historical facts” (par 166). I fully endorse this analysis of the minority. The amnesty was primarily intended to promote reconciliation and nation building. Hence, I disagree with the view entertained by the majority that the central theme of the TRC process was the quest for disclosure of the truth. This view is narrow in its focus, as it seems elevate to the interests of the victims above the national interest envisaged in the epilogue just mentioned above. In my opinion, this error is reflected in the final conclusion reached by the majority, which was largely motivated by the need of the victims and their relatives to talk openly about their past suffering (par 45, 46, 76, 78). Instead, the notion that “truth-telling was but one of the key instruments through which objectives of a fundamental nature were to be achieved” is in my opinion the correct one (par 211). In fact, as Mogoeng J correctly held, “... this truth was supposed to be used as the brick and mortar for laying a firm foundation for enduring peace, national unity and reconciliation. Amnesty was, so to speak, designed to help level the playing field and enable all South Africans to make a new beginning” (par 215).

Furthermore, the majority of the court relied on the decision in *Du Toit v Minister for Safety and Security and Another* (2009 (6) SA 128 (CC)) (*Du Toit*), in their assessment of the effect of amnesty on its recipient (par 60). I concur with the decision reached in *Du Toit*. However, I further submit that the case of *Du Toit* is distinguishable from the present one. *Du Toit* sought reinstatement at work, owing to his amnesty, whereas McBride was seeking affirmation of his human dignity. *Du Toit* would only have been in the same footing as McBride if he were to be denied new employment from the police service on the basis of the offences for which amnesty was granted. Put differently, the *Du Toit* case was about a retrospective remedy, whereas McBride was seeking a proactive relief. Hence, *Du Toit* could not have been central in disposing of the issues in the *McBride* case. Also, in their analysis of the effect of the TRC process, to some degree the majority seem to be suggesting this same view (par 60, 74, 75).

It is also my submission that the pivotal question in this case was about the relevance of the appellants’ comment to the question of McBride’s suitability for appointment in a public office. Cameron J deemed that the appellants’ statement was not an unnecessary raking of McBride’s past (par 98). According to Cameron J, regardless that the bombing took place seventeen years prior, the statement was relevant since McBride’s amnesty was granted “only two years before the issue of his candidacy as police chief arose in 2003” (par 109). Mogoeng J on the other hand, regarded the length of time between McBride’s amnesty and

his appointment as irrelevant (par 220). I am generally in agreement with the majority that the branding of McBride a murderer and criminal may be *prima facie* relevant, in view of the nature of the position he aspired for. However, in view of the objectives of the TRC Act, I submit that such raking of McBride's past is rendered irrelevant. Instead I share Mogoeng J's view that what should have made the difference is not time space between amnesty and the appointment of McBride as police chief, but: "[t]he age of the violation, the granting of amnesty, the political background and underlying purpose of amnesty, coupled with the absence of any genuine public interest being advanced by the branding ..." (par 220). McBride, by virtue of amnesty, was now free to be integrated into the society. Notwithstanding, *The Citizen*, contrary to the advancement of reconciliation and reconstruction published the statement in contention (par 107). Put differently, would it have been relevant in 1994 to oppose the election, into the Presidency, of former state president Mandela (who had been released from prison four years before becoming a state president, for having been imprisoned for serious crimes committed 27 years earlier under the apartheid regime), branding him a "criminal" and "seditionist"? I submit that, within the South African context, it would neither have been relevant nor fair nor reasonable. In many respects, McBride was in a similar position. In fact, McBride was in an even better position, as he was granted amnesty, in addition to his reprieve and subsequent release.

Moreover, a publication actuated by malice is unfair and unprotected by the fair comment defence. Whereas Mogoeng J categorically concludes there was malice on the part of *The Citizen* (par 231, 237), McBride's argument that there was malice on the newspaper's part was rejected by the majority (par 111) and Ngcobo CJ (par 197). How Cameron J could not infer malice from "ungenerous and distasteful" tone of statements and the "vengeful, and distasteful" "murderer" and "criminal" epithets, is a mystery (parr 101, 102). In the justice's own words malice "indicates the abuse of right" (par 105). Granted the appellants were constitutionally entitled to express their opinion. However, in my view, they went beyond the exercise of their constitutional right and pursued a vengeful agenda against McBride (par 101, 102, 207). As Mogoeng J held, they embarked on a "character assassination" against McBride (see par 231, 233). Their "agenda" is evident when one takes a holistic view of the articles that the appellants published. I share the view of Mogoeng J, who stated (par 232) that:

Anyone genuinely driven by a civic duty to prevent the subversion of metropolitan security, consequent upon the appointment of a Metro Police Chief who is disqualified for the job, would have checked the facts before the articles were published. Surprisingly, the Citizen chose not to undertake this simple verification exercise to satisfy itself whether (i) Mr McBride ever expressed contrition for what he did and (ii) the arrest and failure to prosecute Mr McBride for his alleged association with alleged gun dealers were fully explained before, at the time of or after the quashing of charges against Mr McBride by the Supreme Court of Mozambique, or at the press

conference at the airport which has since become known as OR Tambo International, and whether information in this regard was available. This conduct lines up with the Citizen's apparent determination to depict Mr McBride as being amongst the dregs of humanity. And this level of bitterness evinces a desperate effort to crush Mr McBride for some deliberately withheld reason, somehow linked to the bombing, under the guise of an honest attempt to merely oppose his appointment by reason of his alleged unsuitability.

Granted, this conclusion was with reference to 'contrition'. However, I submit that it was also relevant in determining malice, in general, on *The Citizen's* part of (see also parr 187, 188). As Mogoeng J also asserted, the "criminal" branding was used to support the appellants' personal attacks on McBride, despite the appellants' failure to verify the records about the arrest and withdrawal of the charges against him in Mozambique (par 232). Further, while Ngcobo CJ did not infer malice on the appellants' part, when he dealt with the statement about McBride's "lack of contrition" he tacitly supports Mogoeng J's conclusion. Therein, the Chief Justice regarded personal attack on McBride as calculated to stigmatise him (par 195). I submit that had the Chief Justice considered all the statements jointly, when ascertaining their fairness, he too would have found "malice" (see par 161). This approach was also unwittingly supported by the majority of the court when dealing with the main issue. They viewed the appellants' articles collectively (par 91). Moreover, Mogoeng J regards *The Citizen's* likening of McBride to notorious criminals such as Mr Barend Strydom and Mr Clive Derby-Lewis and an article referring to him as "Bomber McBride" as telling (par 230). The justice calls these "an outward manifestation of a well-orchestrated character assassination mission" (par 230). I submit that Mogoeng J's analysis in this regard is almost irrefutable (par 231 - 233). I am mindful that the law would protect one's views however "extravagant, exaggerated, or even prejudiced" they might be (parr 81, 156). I submit nonetheless that, *in casu*, the appellants' articles subsequent to the first one amounted to an abuse of the right to freedom of expression. Hence, while may have been expressing an honestly held opinion, their view was malicious due to lies and half truths. This honesty would have been vitiated by this personal attack perpetuated against the respondent. Consequently appellants should not have been protected by the defence of fair comment. McBride was therefore entitled to full protection by the law.

Furthermore, as stated earlier, whether a comment is fair is assessed in terms of the general legal criterion of reasonableness, taking into account the constitutional values and norms setting boundaries for what is protected as "fair" (par 84). I submit that *The Citizen's* main statement does not pass this test of reasonableness, for the same reason stated above, under relevance. Also, already stated above, constitutional values and norms set boundaries for what is protected as "fair comment" (par 84). The next section considers these constitutional values and norms in some detail.

4 Constitutional Values

Three constitutional values are considered in this section, namely, free speech, human dignity and reconciliation and reconstruction or nation building as encapsulated under amnesty. The first two constitutional values are considered together as they are traditionally the two competing values present in the law of defamation (par 140).

4 1 Freedom of Expression versus Human Dignity

The protection of the freedom of expression was the main argument advanced against finding for McBride. It was argued that such an order could muzzle media freedom and free speech in general, and more specifically, in respect of victims of gross human rights violations. By its nature, the law of defamation is about striking the balance between the two often conflicting rights, namely, freedom of expression and right to dignity (par 140). Ngcobo CJ approached the main issue from this perspective. On the one hand, he used *Khumalo v Holomisa* (*supra*) to highlight the importance of freedom of expression and the value of human dignity, on the other (parr 141, 146). After highlighting how freedom of expression is “integral to a democratic society”, the Chief Justice went on to state that “without [the freedom of expression], the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled” (par 141). At the same time, the judge also expressed the following view on human dignity (par 146):

The value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual ...

Despite there being no hierarchy of rights, human dignity is all-encompassing and permeates every other right in the Constitution (see parr 147, 148). Unlike in the case of freedom of expression, the South African Constitution regards human dignity “not only [as] a human right that is given constitutional recognition ... but also as a fundamental value upon which the legitimacy of the sovereign state is based ...” (par 143). Therefore, “failure to uphold that value is both a violation of a constitutional right and a threat to a bedrock principle that underpins the legitimacy of the state” (*ibid*). The words of Ngcobo CJ quoted from *Dawood* (*Dawood and Another v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs; Thomas and Another v Minister of Affairs* 2000 (3) SA 936 (CC) at par 35) underscore importance of dignity (par 145). The Chief justice, as stated in this regard: “... The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings” (*ibid*). Elsewhere, Ngcobo CJ referred to freedom of

expression as “a foundational value of our constitutional democracy” (par 170)). Mogoeng J, meanwhile, stressed the need to strike a balance between the exercise of one’s freedom of expression, on the one hand, and the dignity of others, on the other. The judge stated: “... freedom of expression is not so much in the vitriol as it is in the clear and logical articulation of one’s viewpoint without trumping the intrinsic worth of others ...” (par 223). Consequently, freedom of expression may not be elevated above the constitutional value of human dignity, as did the majority *in casu*. Instead, it should be exercised within the permissible constitutional limits (see Mogoeng J at par 221). Hence, I am in harmony with the view that natural persons, especially victims and their relatives, should be allowed to express themselves without undue restriction of their right to freedom of expression. However, the media in particular, have a responsibility to lead South Africa into reconciliation, instead of taking the country backwards to hatred and revenge (see parr 168 & 210).

4 2 Amnesty

As stated in the introduction, the issues that gave rise to McBride’s court action centred on the effect of amnesty on its recipient. The majority in the present judgment did not pronounce much on the role of the amnesty in the law of defamation (see par 79). In contrast, both Ngcobo CJ and Mogoeng J gave much attention to the role of amnesty in the law of defamation, within the South African context. The Chief Justice states the following (par 171):

Also indispensable to creating and maintaining our constitutional democracy, however, is the reconciliation and reconstruction process this nation embarked upon with the establishment of the Truth and Reconciliation Commission (TRC). Reconciliation and reconstruction are the twin pillars on which our transition from a deeply divided past to a future founded on the recognition of universal human rights, democracy, and peaceful co-existence firmly rest. When the Constitution was adopted, all the provisions relating to amnesty contained in the [interim] Constitution under the heading of ‘National Unity and Reconciliation’ were retained. This underscores the importance of reconciliation and reconstruction to our democracy. The values of reconciliation and reconstruction are constitutionally protected and, to my mind, they are worthy of protection by this Court. Just as freedom of expression does not automatically trump the value of human dignity, the value this country places on reconciliation and reconstruction must enter into the balance when weighing freedom of expression against the value of human dignity, in the context of a defamation claim in which fair comment is pleaded as a defence.

Two points stand out from this passage, namely: “reconciliation and reconstruction” (inherent in amnesty) are constitutional values, and as such they are worthy of legal protection by the courts, including the Constitutional Court. Equally significant are the concluding remarks by Ngcobo CJ that the value South Africa’s democracy places on the constitutional value of reconciliation and reconstruction needs to be considered when the court is deciding on the balance between human dignity and freedom of expression (par 171). According to the Chief

Justice, this is an essential requirement when assessing the defence of fair comment where amnesty had been granted by the TRC (par 171). A similar view is shared by Mogoeng J, who asserted that people should be allowed to express themselves, but “without trumping the intrinsic worth of others” (par 223). According to Ngcobo CJ, any reference “to past deeds in respect of conduct for which amnesty has been granted must therefore be made within constitutional limits” (par 269). Doubtless this puts the value of amnesty into perspective. Indeed, where fair comment defence is pleaded against the backdrop of amnesty, freedom of expression has to be balanced against the constitutional value of reconciliation and reconstruction (or nation building), in addition to the value of human dignity. This was echoed by Mogoeng J when he asserted that “[f]reedom of expression is a right to be exercised with due deference to, among others, the pursuit of national unity and reconciliation” (par 233). Accordingly, *in casu*, the court needed to strike this balance to establish if *The Citizen’s* statements were indeed within the said constitutional value of reconciliation and reconstruction, or in pursuit of national unity and reconciliation. This is well illustrated by the approach taken by Mogoeng J. The justice said that liability of *The Citizen* had to be determined, *inter alia*, within the context of the objective of the amnesty process (par 208). Yet, the majority erred in discharging their duty for various reasons that are considered in the final section of this note. Closely related to the issue of amnesty, is the proper interpretation of section 20(10) of the TRC Act. The following section explores this issue.

5 The Reconciliation Act

A proper interpretation of section 20(10) of the TRC Act was also at the centre of the dispute in question. McBride consistently argued that it obliterated his criminal record, with the effect that any reference to his past deeds would be rendered false. This view was upheld by the majority of the SCA judges (SCA par 33). However, this view was vehemently opposed by the appellants. They argued that this would amount to muzzling freedom of expression (CC par 102 & 60). Were McBride’s view to be accepted by the court, it would mean that the appellants would not be able to rely on the defence of fair comment, as their defence would lack a true foundation (see par 155). The meaning of this section has been repeatedly canvassed by both courts (see par 49). In order to understand the section within its context, section 20(7) and (10) are set out below:

(7)(a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence ...

(10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or

records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

The expressions “deemed to be expunged” and “the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place ...”, in section 20(10), must be understood in the light of section 20(7) of the TRC Act. Section 20(7) exonerates the recipient of amnesty from criminal and civil liability in respect of an act for which amnesty was granted. I concur with Cameron J that this section was never intended “to undo the past to a limitless degree” and that “past factual events cannot be undone” (par 52). However, within the context of the epilogue found in the Constitution, section 20(10) deals with future accountability. Within this context the subsection means that anyone who successfully applied for amnesty would not be held accountable in respect of the actions for which they obtained amnesty (Buthelezi 2010 *De Jure* 179 182). As Mogoeng J correctly puts it, “amnesty (as evident from s 20(10)) was intended to enable all South Africans to make a new beginning” (par 215). It is thus submitted that when applied to the law of defamation (and the defence of fair comment), section 20(10) should be understood to mean amnesty renders past acts irrelevant, such that the defendant may no longer rely on fair comment to escape liability for defamation. In other words, amnesty should be regarded a retroactive justification of the conduct of the recipient of amnesty. To that end, any person in McBride’s position would no longer be regarded as a criminal by virtue of amnesty, as held by the SCA (par 33). However, contrary to the SCA findings, that is not to say that amnesty granting renders reference to past acts as false (par 33). Such a view was correctly rejected by the majority in the present case (par 60). Instead, I submit, amnesty should be regarded as rendering the defence of fair comment unsustainable for lack of relevance, as opposed to lack of true foundational basis. This view is preferable to the one advanced by McBride and upheld by the majority in the SCA. Alternatively, amnesty should impact on the question of reasonableness, such that it would be unreasonable to continue holding the recipient of amnesty accountable, as statements in *The Citizen* did.

Also, I generally concur with Cameron J’s assessment of the benefits that accrue to a person as a result of being the recipient of amnesty. This includes the view that “[e]xpungement entitles the grantee of amnesty to full civic status” (par 64). However, I respectfully disagree with the Justice Cameron’s criticism of the SCA’s appraisal of the protection sought by McBride in courts (par 66 CC; par 91 SCA). In my opinion, the SCA was correct in its view on the effect of amnesty obtained in terms of the TRC Act. This view is found in the following words of Cameron J (par 66):

In understanding the implications of Mr McBride’s argument, it is significant that the Supreme Court of Appeal held that the intention of the Act was that perpetrators’ offences could no longer “be held against them”, and that Mr

McBride could no longer be “branded a criminal”. On this approach, the object of the statute was to enable perpetrators to “rid themselves of the stigma and moral opprobrium of their deeds”, so that “branding” became impermissible, with the result that Mr McBride would no longer be “obliged to continue wearing the mantle of a criminal or murderer”.

I submit that this is not merely a literal interpretation of section 20(10) of the Reconciliation Act, but that it is a proper understanding of the effect of amnesty. A literal view would be one that regards amnesty as having the effect of obliterating the act from historical record, such that any reference to the acts committed are false. *In casu*, what McBride was seeking was protection or affirmation of his dignity, as guaranteed under the Constitution. To use Cameron J’s own assessment, McBride was asking for the court to affirm his dignity as a South African citizen, whose “full civil status” has been guaranteed by amnesty (par 64). This is in harmony with the SCA’s assessment, albeit incorrectly reaching a conclusion that amnesty renders reference to one’s past false. Disturbingly, the Constitutional Court denied the affirmation of McBride’s dignity. Paradoxically, Cameron J asserted that “[his] opinion [was] not the issue” (par 102). In my view, the judge’s opinion was indeed the issue. Ironically, when “stripping McBride of his dignity”, Cameron J stated that it did not mean that “Mr McBride’s conviction for murder can indefinitely be flung in his face” (par 79). The pressing question is: when would this reference to his conviction stop, if the Constitutional Court, being the custodian of our constitutional values, could not give McBride protection? The justice went on to suggest that defamation law would protect him through the condition that “the issue should be a matter of public interest, before any defamatory allegations may be accorded legal protection” (par 79). I respectfully disagree with Cameron J when he seems to suggest that McBride’s benefit should be limited to his appointment as a police chief (par 63), and that he is therefore not entitled to the protection of his human dignity. After all, McBride’s situation was unique in that he was not in need of amnesty, as he had already been out of prison for some five years when he had applied for amnesty. In my opinion, what Cameron J did was to wash his hands off the fundamental right to human dignity, as did the ancient Roman governor, Pontius Pilate, when he handed Jesus over to the mob to be impaled, despite pronouncing him innocent (Matthew 27:24-31). I submit that reconciliation and nation building is a matter of public interest, which was violated when McBride was branded as a “murderer and a criminal”, despite amnesty. Granted, in an attempt to assert his human dignity, McBride relied heavily on the erroneous findings of the SCA. However, it is significant that he did raise malice (or abuse of a right by) on the part of *The Citizen*.

6 Conclusion

Clearly, amnesty does not render the commission of past acts false (par 96, 166). However amnesty is a constitutional value that should be considered, where it is relevant, for the purposes of fair comment defence (par 171). Also, s 20 of the Reconciliation Act does not mean that

events that occurred prior to the constitutional era are obliterated from historical records. Nevertheless, the final decision of the Constitutional Court is jurisprudentially inappropriate and, in my opinion, it is unconstitutional. Firstly, it elevates freedom of expression above anything else, even the value that the Constitution places on human dignity and individual self-worth, especially for those whose dignity was trumped in the past (see par 233). Secondly, it allows for vengeance to be perpetuated by the media against those they hate - for whatever reason. It takes the country backwards, as the court did not properly apply its mind to other constitutional values, especially the value of reconciliation and reconstruction. How this could have been done is well illustrated by Mogoeng J and to some extent by Ngcobo CJ. Instead, the majority allowed themselves to be sidetracked by the linguistics of s20 of the TRC Act, and by the judgment in *Du Toit (supra)*, rather than focussing on the values of nation building, (see parr 34, 56 - 60). Granted, McBride was partly to blame for the linguistic error, as he did not vigorously argue his case on the basis that *The Citizen's* statements were not protected by fair comment. The Respondent attempted to defend the erroneous interpretation of the SCA that amnesty rendered them false. In my opinion, as his main argument before the CC, McBride's should have vigorously challenged the Appellants' statements as a malicious abuse of its right to freedom of expression. In an alternative approach, McBride could have challenged the relevance and/or reasonableness of raking his past by virtue of the primary objective of the constitutional value of amnesty, which sought to ensure a new beginning for its recipients. It was also an error to determine the main issue on the basis of *Du Toit (supra)*, instead of delving deeply enough into the case of *AZAPO (supra)*, as did Mogoeng J. Had they done so, they would not have missed the two-fold objective of amnesty, namely reconciliation and reconstruction and not truth-telling, as correctly concluded Ngcobo CJ and Mogoeng J. Also, the main issue did not rest on whether the defence is truthfully founded, but on the fairness of the statements, with due regard to: (1) the honesty or genuineness of the opinion; (2) the relevance of the opinion; or (3) absence of malice. Therefore, in my view, the seven judges of the Constitutional Court erred regarding the main issue. Save for Ngcobo CJ and Khampepe J (to some extent), Mogoeng J's analysis of the law, the issues and the conclusion are preferable as jurisprudentially sound and factually reasonable.

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