



CONSTITUTIONAL COURT OF SOUTH AFRICA

The Citizen 1978 (Pty) Ltd and Others v Robert John McBride

Case No: CCT 23/10

[2011] ZACC 11

Date of Judgment: 8 April 2011

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 8 April 2011, the Constitutional Court delivered judgment in a case which turns on how amnesty granted under the Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act) affects a claim for defamation. The main question was whether a person convicted of murder, but granted amnesty under the Reconciliation Act, can later be called a “criminal” and a “murderer” in comment opposing his appointment to a public position.

In 2003, Mr Robert John McBride, was a candidate to head the Ekurhuleni metro police. Earlier, while working as an operative of the armed wing of the African National Congress, Umkhonto we Sizwe, he carried out a car bomb attack outside the Magoo’s Bar / Why Not Restaurant on the Durban beachfront. The explosion killed three young women and injured 69 other people. Mr McBride was found guilty of murder and sentenced to death. In 1997 he applied for amnesty under the Reconciliation Act. This was granted on 19 April 2001.

During September and October 2003, the Citizen newspaper published a number of articles and editorials questioning Mr McBride’s candidacy for the police post. It expressed the view that Mr McBride was unsuitable because he was a “criminal” and a “murderer”. The articles referred to the 1986 bombing and also to what the Citizen described as Mr McBride’s “dubious flirtation with alleged gun dealers in Mozambique” in 1998. The first two articles mentioned that Mr McBride received amnesty for the crimes of which he had been convicted. The Citizen later published editorials that called Mr McBride a “murderer” and a “criminal” without mentioning amnesty. The Citizen also claimed that he was not contrite for the deaths he caused.

Mr McBride sued the Citizen and the journalists for defamation. He contended that receiving amnesty meant that the label “murderer” did not apply to him, that the Citizen’s coverage was

malicious, and that the articles would be understood by readers of the Citizen to mean that he was a criminal because he had made common cause with gun dealers in Mozambique.

The Citizen and the journalists pleaded that the articles were protected by the defence of “fair comment” and that they contained comments on matters of public interest, namely, Mr McBride’s suitability for the police post, that the comments were “fair”, and that the facts on which they were based (namely that Mr McBride was a murderer and a criminal) were true.

The South Gauteng High Court (Maluleke J) found in favour of Mr McBride and awarded him R200 000 in damages. On appeal, the majority of the Supreme Court of Appeal (SCA) upheld the substance of the High Court’s findings on defamation. The SCA found that to call Mr McBride a “murderer” was false because he had received amnesty under the Reconciliation Act. But the SCA reduced the damages to R150 000. This was because it found that Mr McBride had not established defamation with respect to “dubious flirtation with alleged gun dealers” in Mozambique.

The Citizen and the journalists applied for leave to appeal to this Court, and Mr McBride sought leave to cross-appeal against the reduced damages award. Amici curiae, including the South African National Editors’ Forum, the Freedom of Expression Institute, and relatives of Victoria and Griffiths Mxenge and the “Mamelodi Four”, who had been murdered during apartheid, supported the Citizen’s argument.

In a majority judgment by Cameron J (Brand AJ, Froneman J, Nkabinde J and Yacoob J concurring), the Court found that the Reconciliation Act did not make the fact that Mr McBride committed murder untrue. And that Act did not prohibit frank public discussion of his act as “murderer”. Nor did it prevent his being described as a “criminal”. The Court emphasised that protected comment need not be “fair or just at all”, in any sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true. The Citizen was thus entitled to express views on Mr McBride’s suitability for the post. It did so with coverage that struck the Court as vengeful and distasteful. But the Court emphasised that its opinion is not the issue. Despite the harshness of the Citizen’s coverage, it is entitled to legal protection.

The Court upheld the Citizen’s main appeal and dismissed Mr McBride’s cross-appeal, but found that the Citizen had defamed Mr McBride by claiming falsely that he was not contrite. The Court awarded Mr McBride R50 000 for this, reducing Mr McBride’s damages from R150 000.

The majority also found that “dubious flirtation with alleged gun dealers” could not reasonably be interpreted to mean that Mr McBride was involved in criminal activities, but only that his activities were suspicious.

In a separate judgment, Ngcobo CJ (Khampepe J concurring) agreed with the majority that the Reconciliation Act did not make the facts of the commission of the murders untrue. Ngcobo CJ held however that the balancing of the right to freedom of expression, on the one hand, with human dignity on the other, required the facts upon which the Citizen’s comment was based to

include reference to amnesty having been granted to Mr McBride. Reading the Citizen's collective coverage of Mr McBride's candidacy, Ngcobo CJ also concluded that the fact that Mr McBride was granted amnesty was adequately stated. He also found that the Citizen's appeal must fail in respect of the claim that Mr McBride was not contrite.

Ngcobo CJ however held that, since the Citizen failed to make reference to the circumstances under which Mr McBride was ultimately released from detention in Mozambique, the statement amounted to a half-truth and was therefore untrue and that Mr McBride's cross-appeal should succeed.

Mogoeng J agreed with the majority and with Ngcobo CJ on contrition. He also agreed with Ngcobo CJ's finding on "dubious flirtation with alleged gun dealers" in Mozambique. However, he would have dismissed the Citizen's entire appeal and upheld Mr McBride's cross-appeal. He found the statements that Mr McBride is a "criminal" and "murderer" to be malicious and part of a well-orchestrated character assassination campaign waged by the Citizen against Mr McBride.