CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/10
[2011] ZACC 11

THE CITIZEN 1978 (PTY) LTD	First Applicant
KEVIN KEOGH	Second Applicant
MARTIN WILLIAMS	Third Applicant
ANDREW KENNY	Fourth Applicant
and	
ROBERT JOHN MCBRIDE	Respondent
together with	
LARA JOHNSTONE	First Amicus Curiae
FREEDOM OF EXPRESSION INSTITUTE	Second Amicus Curiae
SOUTH AFRICAN NATIONAL EDITORS' FORUM	Third Amicus Curiae
JOYCE SIBANYONI MBIZANA	Fourth Amicus Curiae
MBASA MXENGE	Fifth Amicus Curiae

Heard on : 30 September 2010

Decided on : 8 April 2011

JUDGMENT

CAMERON J:

Introduction

[1] This case turns on the effect of amnesty granted under the Promotion of National Unity and Reconciliation Act[1] (Reconciliation Act). The statute provides that once a person convicted of an offence with a political objective has been granted amnesty, any entry or record of the conviction shall be deemed to be expunged from all official documents 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".[2]

[2] What effect does the fact that a conviction is deemed "for all purposes" not to have taken place have on the law of defamation? The main question before this Court is whether a person convicted of murder, but granted amnesty for the offence, can later be called a "criminal" and a "murderer" in comment opposing his appointment to a public position. The case thus cuts deeply into charged issues about the meaning of the legislative and social compact that ended apartheid, and the extent to which our Constitution guarantees freedom of expression, including freedom of the press and other media.[3]

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[1] 34 of 1995.

[2] The relevant subsections of section 20 are set out in [49] below.

[3] Section 16 of the Bill of Rights provides that:

> "(1) Everyone has the right to freedom of expression, which includes—

[3] In the latter half of 2003, the respondent, Mr Robert John McBride, was a candidate for a senior police post – that of head of the metro police in one of South Africa's largest municipalities, Ekurhuleni. Seventeen years before, on 14 June 1986, as an operative of the African National Congress (ANC), he carried out a car bomb attack outside the Magoo's Bar and Why Not Restaurant on the Durban beachfront. The explosion killed three young women and injured 69 other people. For this Mr McBride was found guilty of multiple murders and was sentenced to death.[4] But in 1991 he was reprieved, and in 1992 he was released. In 1997 he applied for amnesty under the Reconciliation Act for the murders and associated crimes. This was granted on 19 April 2001.

[4] The Citizen newspaper, the first applicant (Citizen), is widely distributed and read throughout South Africa. It was vehemently opposed to Mr McBride's appointment. In September and October 2003 it published a number of articles and editorials critical of

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(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[4] The background is set out in *S v McBride* 1988 (4) SA 10 (A), in which the then Appellate Division of the Supreme Court (per Corbett CJ, Viljoen, Hefer, Grosskopf and Vivier JJA concurring) dismissed Mr McBride's appeal against the death sentence that the trial court, by a majority, imposed.

his candidacy. The then-editor was Mr Kevin Keogh (second applicant). The articles were written by two journalists, Mr Martin Williams (third applicant), and Mr Andrew Kenny (fourth applicant) (together, journalists). They contended that Mr McBride was unsuitable for appointment because he was a criminal and a murderer, and because in 1998 he had been arrested and detained in Mozambique on suspicion of gun-running.

[5] Soon after the last article appeared, Mr McBride instituted action against the Citizen and the journalists. He claimed damages totalling R3.6 million for defamation and for impairment of dignity.[5] He also asked that the defendants be ordered to publish an unconditional and full apology to him on the front page. The South Gauteng High Court, Johannesburg (Maluleke J) upheld his monetary claims and awarded him damages of R200 000. On appeal, the Supreme Court of Appeal reduced this to R150 000, because it found that Mr McBride had not established his case of defamation on the gun-running allegations. But on the substance of the other allegations, the majority of that Court upheld the findings of the trial court.[6]

[6] The Citizen and the journalists now apply for leave to appeal against the judgment of the Supreme Court of Appeal. Mr McBride seeks leave to cross-appeal against the reduction of his damages. On appeal to this Court, Ms Lara Johnstone, the Freedom of

[5] The publishers and distributors of the Citizen, CTP Limited, and two of its associated companies, Caxton and CTP Publishers and Printers Limited, were initially also sued, but the claims against them were withdrawn at the commencement of the trial by agreement between the parties.

[6] *The Citizen 1978 (Pty) Ltd and Others v McBride* 2010 (4) SA 148 (SCA), per Streicher JA, Ponnan JA, Mhlantla JA and Tshiqi AJA concurring; Mthiyane JA dissenting (*The Citizen*).

Expression Institute (FXI), the South African National Editors' Forum (SANEF) and Ms Joyce Mbizana and Mr Mbasa Mxenge were admitted as amici, and the Minister for Justice and Constitutional Development was invited to and did submit argument.[7] Before setting out the litigation history, I first deal with jurisdiction and then set out the statements complained of, and how the parties pleaded.

Jurisdiction

[7] There is an application for leave to appeal, as well as to cross-appeal. For this Court to entertain either, there must be a constitutional issue,[8] and it must be in the interests of justice to hear the matter.[9] As indicated, the case concerns the impact of the Reconciliation Act on the right to freedom of expression. It concerns also Mr McBride's right to dignity and reputation.[10] Important constitutional issues are clearly implicated. The central issue provoked division in the Supreme Court of Appeal, which decided it by a majority of four to one. The matter is thus plainly arguable, with prospects of success. Leave to appeal should therefore be granted.

[7] See [43] - [48] below.

[8] Section 167(3)(b) of the Constitution provides that this Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters".

[9] See *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25; 2010 (4) SA 82 (CC) at para 15.

[10] Section 10 of the Bill of Rights, headed Human Dignity, provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

The Citizen articles and the defamatory statements

[8] The first article in a series focusing on Mr McBride's appointment as metro police chief appeared on the front page of the Citizen on 10 September 2003. It was titled "McBride tipped to head Metro cops". It referred to Mr McBride's rumoured candidacy for the position of police chief in Ekurhuleni Municipality, and gave an account of his role in the Magoo's Bar and Why Not Restaurant attack, his amnesty application, and his arrest on gun-running charges in Mozambique:

> "He was widely condemned for the attack on what was widely perceived to be a 'soft' civilian target though McBride insisted that the pub was frequented by SADF military personnel from a nearby barracks. No soldiers were killed or injured in the massive explosion.
>
> Later McBride applied for and was granted amnesty for the attack by the Truth and Reconciliation Commission (TRC) due largely to the fact that the ANC claimed it had ordered McBride to attack the pubs, contrary to its initial denials that it was involved in the bombing.
>
> But as McBride was deemed to be acting on the orders of a political organisation he qualified for amnesty."

[9] This was followed the next day, 11 September 2003, by an article titled "No comment on McBride – Tipped as top cop for E Rand Metropole". Mr McBride, it stated, "was sentenced to death during the apartheid era for his role in the bombing of a Durban beach-front bar. The sentence was later commuted. The Truth and Reconciliation Commission [TRC] also granted him amnesty." Like the first article, its contents were largely factual. To the previous day's reporting it merely added that

neither the municipality nor the Department of Foreign Affairs, where Mr McBride was then employed, would comment on his rumoured candidacy.

[10] Deeper in the same issue of the newspaper appeared the first of the articles on which Mr McBride sued. This was an editorial headed "Here comes McBride" (first editorial). It read:

> "Robert McBride's candidacy for the post of Ekurhuleni Metro Police Chief is indicative of the ANC's attitude to crime.
> They can't be serious.
> He is blatantly unsuited, unless his backers support the dubious philosophy: set a criminal to catch a criminal.
> Make no mistake, that's what he is. The cold-blooded multiple murders which he committed in the Magoo's Bar bombing put him firmly in that category. Never mind his dubious flirtation with alleged gun dealers in Mozambique.
> Those who recommended him should have their heads read.
> McBride is not qualified for the job.
> If he is appointed, it will be a slap in the face for all those crime-battered folk on the East Rand who look to the government for protection."

[11] The next article appeared a week later, on 18 September. It was titled "Beware ambush broadcasters operating under false pretences" (first Williams article). The author explained that he had been invited to join a radio debate on amnesty and proceeded (the portions Mr McBride claimed defamed him are in italics):

> "If anyone wants my opinion about Robert McBride and forgiveness, here it is.
> Forgiveness is intensely personal. Each individual makes their own decision. If you don't forgive, you harm yourself. That's why to forgive is divine.

> I have no relationship with Robert McBride. It is not for me to forgive him. *But his track record as a multiple murderer and a suspect in gun dealing make him unsuitable as a metro police chief in a country wracked by crime.*
> *Forgiveness presupposes contrition. McBride still thinks he did a great thing as a 'soldier', blowing up a civilian bar.*
> *He's not contrite*. Neither are Winnie or Boesak. They are not asking for forgiveness.
> Boesak wants a pardon for something he says he didn't do. That defies logic.
> *Those who want to forgive McBride don't have to push for him to get this sensitive job.*
> *The two issues are separate.*
> *In fact our comment was not about forgiveness but rather about suitability.*"

[12] After a letter from Mr McBride's attorneys arrived, demanding an apology and claiming damages, the newspaper responded on 22 September 2003 with a main front page lead story. It was titled "Bomber McBride to sue The Citizen". The article quoted the letter of demand, and repeated the nub of the first editorial. It added:

> "McBride was found guilty of the 1986 Durban bombings in which three civilian women were killed.
> . . . .
> In 1998 he was detained in a Mozambique jail on suspicions of gun-running.
> Neither his arrest nor subsequent release were fully explained.
> *The Citizen* continues to believe he is not the right person to be in charge of any police force in a major metropole in this crime-ridden country."

[13] Nearly four weeks later, on 17 October 2003, then-President Thabo Mbeki published a letter on the *ANC Today* website. It was titled "We will not abandon national reconciliation". The letter reflected on the amnesty process and commented that:

> "I do not know whether Mr McBride was ever or is interested to be Chief of Ekurhuleni Metropolitan Police. I do not know whether he has the competence to serve in this capacity. What I know is that it would be fundamentally wrong that he is denied the possibility to be appointed to any position, simply because of what he did during our struggle for liberation, for which he apologised and for which he was granted amnesty."

[14] This triggered a flurry of responses in the Citizen. An editorial on 20 October 2003, titled "Thabo Mbeki's straw man" (second editorial), contained two passages Mr McBride claimed were defamatory. These were (allegedly defamatory portions in italics):

> "*You might think our globe-trotting leader, presiding over a party riven by conflict, would have more important things to do than endorse bomber Robert McBride's right to become Ekurhuleni Metro Police Chief.*
> *Yet Thabo Mbeki devotes his weekly Internet newsletter to that dubious cause and to denigrating The Citizen.*
> . . . .
> In his usual circuitous, obfuscatory language, Mbeki hints darkly at 'the grave implications of what *The Citizen* is seeking to achieve'.
> He then wanders off down a side road of his own making, about attitudes to the TRC and 'the path of national reconciliation.'
> Rubbish.
> *Our coverage was aimed solely at making the irrefutable point that McBride is unsuitable to head any decent police force.*
> *We stand by that opinion.*"

[15] The next article, "McBride, ANC Hero" by Andrew Kenny (Kenny article) was published the next day, on 21 October (portions Mr McBride claimed were defamatory of him are in italics):

"*The three most notorious non-governmental killers of the late apartheid period were Clive Derby-Lewis, Barend Strydom and Robert McBride.*
Each was a wicked coward who obstructed the road to democracy.
Derby-Lewis, who targeted a specific political enemy, Chris Hani, is the only one not to be freed. The other two killed innocent people.
Strydom looked his helpless victims in the eyes before he murdered them. McBride did not even do this. He planted a bomb in a bar and slunk off, not caring whether it killed men, women or children.
It was the act of human scum.
. . . .
McBride's bomb was planted in 1986, at a time when apartheid was clearly in retreat and when legal avenues of resistance were opening up.
His murder of the innocent women strengthened the hand of die-hard apartheid supporters, and had the effect of prolonging the wretched regime.
. . . .
If the ANC regards Robert McBride as a hero of the struggle, it should erect a statue of him – perhaps standing majestically over the mangled remains of the women he slaughtered.
If he wants to serve the community, he should work among Aids orphans or help to improve the provision of pensions to the poor.
He should most certainly not be made a policeman."

[16] The Kenny article was followed the next day, on 22 October, by the second of the Williams articles. It was titled "Mbeki no conciliator" (second Williams article). Mr McBride alleged that it contained the following defamatory and injurious statements:

"Mbeki's support for bomber McBride is consistent with his long-held view that any liberation force action was justified.
This unfeeling attitude does not help genuine reconciliation. For example, in his latest Internet newsletter he airbrushes over the horrible reality of McBride's deed in murdering civilians".

[17] At the end of October 2003, it became known that Mr McBride had secured the job of police chief of Ekurhuleni. The Citizen responded with an editorial on 30 October 2003, "McBride cops job" (third editorial). This repeated the newspaper's views on his candidacy in a way Mr McBride claimed injured his reputation and dignity (portions alleged to be defamatory in italics):

> "*We believe we performed a civic duty on September 10 by alerting readers to the possibility that Robert McBride could be named Ekurhuleni's Metro Police chief.*
> *We said he was not the right person for the job. We maintain that view, as do a great many readers.*
> But obviously a decision had already been taken.
> President Mbeki even devoted one of his lengthy Internet messages to defending McBride and attacking The Citizen.
> *The bomber has support in high places, but that doesn't detract from the evil of his multiple murders, or make him a suitable policeman.*
> His appointment speaks volumes about the ANC's attitude to crime.
> God help Ekurhuleni."

High Court proceedings

[18] Mr McBride formulated his claim on the first editorial of 11 September. His pleading set out the grounds on which he claimed that this publication was defamatory of and injurious to him. In the case of each of the other articles, his claim referred back to this primary exposition. It averred that the article was intended to mean, and was understood by readers to mean (in slightly paraphrased form) that Mr McBride:

1. is not suited for the position of Head of the Ekurhuleni Metro Police Force;

2. is a criminal;
3. is a murderer;
4. remains a criminal and a murderer despite his:
    a. having been a soldier and a disciplined member of Umkhonto we Sizwe (MK), the former armed wing of the ANC;
    b. having participated in the attack on the Magoo's Bar as part of the armed struggle waged by the ANC and MK to eradicate the system of apartheid;
    c. having been granted amnesty in terms of section 20 of the Reconciliation Act for, inter alia, his participation in the attack on the Magoo's Bar;
    d. conviction for participation in, inter alia, the attack on the Magoo's Bar being subject to the provisions of section 20(10) of the Reconciliation Act; and
    e. having been absolved from all liability for, inter alia, his participation in the attack on the Magoo's Bar.
5. has made common cause, or attempted to make common cause, with gun dealers and criminals in Mozambique;
6. has been involved in illegal activities with gun dealers and criminals in Mozambique; and
7. is morally corrupt.

[19] The Citizen and the journalists filed a joint plea resisting the claim. They denied that the statements published were defamatory, but that defence was later abandoned. Rightly. It is incontestable that the statements in the articles diminished Mr McBride in the estimation of reasonable readers. The alternative defence pleaded was "fair comment". The newspaper and the journalists alleged that the articles contained comments concerning matters of public interest, namely Mr McBride's suitability for the post of police chief. They further allege that the comments were fair in the circumstances and that the facts on which the comments were based were true.

[20] In response, Mr McBride asked the defendants to identify each and every fact on which the comments were based, that they alleged to be true. In reply they listed these facts: (a) Mr McBride "is a murderer as a result of him planting a bomb in Magoo's Bar during 1986, when several people were killed"; and (b) Mr McBride "was detained in Mozambique on alleged arms trafficking between Mozambique and South Africa."

[21] At the trial, Mr Brian Curren, former national director of Lawyers for Human Rights, who had acted on Mr McBride's behalf in the early 1990s, testified as to his experience of Mr McBride's contrition and why he applied for amnesty. Mr McBride himself also testified. The defendants called only two witnesses, Mr Kenny and Mr Williams.

[22] The trial judge found that the articles were defamatory and that the defence of fair comment could not be sustained. He considered the publications separately, article-by-article and found that the facts on which the comments were based were not true or accurately stated, and that the comments were not in the public interest. The judge found that the effect of amnesty cannot "be willy-nilly limited and circumscribed" and that section 20(10) of the Reconciliation Act should be given its ordinary, wide meaning rather than being confined to absolution from criminal and civil liability alone.[11] Thus read, the provision expunged Mr McBride's conviction for murder "for all purposes",

[11] *McBride v The Citizen 1978 (Pty) Ltd and Others*, Case No. 03/15780, 6 February 2008, South Gauteng High Court, Johannesburg, unreported at paras 11-2.

including the law of defamation. And the discussion as to Mr McBride's candidacy for police chief was no longer in the public interest as his past conviction was not relevant, particularly in the light of his successful amnesty application.

[23] Thus, the High Court held, the statement that Mr McBride is a murderer was not true, accurately stated or in the public interest. On Mr McBride's arrest for gun-running, the Court held that the reference to McBride's "dubious flirtation with alleged gun dealers in Mozambique" was not accurately stated as it failed to refer to the fact that his charges had been quashed.

[24] The High Court held that each of the articles sued upon repeated the injurious defamation. However, the Court singled out the Kenny article ("McBride, ANC Hero") for particular scrutiny, finding that two factual inaccuracies vitiated its claim to be fair comment: the article was wrong to claim that apartheid was "in retreat" in 1986, and it ignored the fact that Mr McBride received amnesty for the Magoo's Bar and Why Not Restaurant attack.

[25] The High Court found that ordering an apology would serve no useful purpose. So the Court ordered the applicants to pay R200 000 in damages for defamation and for the infringement of Mr McBride's dignity: R100 000 for the editorials, front page stories and the Williams articles, and R100 000 for the Kenny article. The High Court granted leave to appeal to the Supreme Court of Appeal.

Supreme Court of Appeal

[26] The Supreme Court of Appeal overturned the High Court's finding that the statement about Mr McBride's "dubious flirtation with gun dealers in Mozambique" was defamatory. The Court rejected the High Court's finding that this meant that he was actually involved with gun dealers. It found instead that the assertion was only that Mr McBride's flirtation with gun dealers was suspicious and may have been criminal (but that he was a criminal anyhow because of the murders). The Court found that, while asserting "a dubious flirtation with alleged gun dealers" was itself defamatory, the defamatory meaning on which Mr McBride based his claim was not mere dubious flirtation, but actual gun-running (perhaps because he realised that the flirtation defamation "could be justified on the basis of truth and public benefit").[12] That leg of his claim could thus not succeed.

[27] The Court held that the statement that Mr McBride was a criminal and morally corrupt derived from, and added nothing to, the claim that he was a murderer.[13] The pivotal question was therefore whether the defence of fair comment should have succeeded in respect of "murderer".

[12] *The Citizen* above n 6 at para 18.

[13] Id at para 19.

[28] The Court found that the crucial question was whether amnesty once granted rendered the statement that Mr McBride is a murderer false.[14] Streicher JA, for the majority, found that the intention of amnesty was "to advance reconciliation and reconstruction of our society on the basis that there was no need for retribution or victimisation."[15] The purpose was that those who received amnesty "should be considered not to have committed the offences and that those offences should not be held against them, so that they could be reintegrated into society."[16] The majority concluded that the statement that Mr McBride is a murderer "is therefore false."[17] Accordingly the Citizen's defence of fair comment fell to be dismissed "on the ground that the facts on which the comment was based are not true".[18]

[29] The Court however added:

> "That is not to say that [Mr McBride's] actions and the consequences of his actions are to be considered not to have taken place. It is a fact that [Mr McBride] placed the bomb that killed a number of people and it is a fact that he was convicted of the murder of those people. The amnesty granted to [Mr McBride] could not obliterate those facts or erase them from the historical record".[19]

[14] Id at para 23.

[15] Id at para 30.

[16] Id.

[17] Id at para 33.

[18] Id at para 35.

[19] Id at para 33.

[30] In the Supreme Court of Appeal the Citizen also urged that calling Mr McBride a "murderer" was itself a comment on the effect of amnesty. This defence the Court rejected because the Citizen did not plead it. Its defence was that to call Mr McBride a "murderer" was a fact supporting a comment. In its context it was anyhow not possible to construe the statement as a comment. This was because not all the Citizen articles mentioned amnesty, and, absent amnesty, "it is a well known fact that [Mr McBride] is a murderer and it is unlikely that anybody who chose to ignore amnesty would be expressing an opinion that he is a murderer."[20]

[31] In determining whether "murderer" was fact or comment, the Court noted that several of the articles used the term without referring to Mr McBride's amnesty. The Court found that these articles were to be assessed as if read by the reasonable reader in isolation from others that did mention amnesty.[21]

[32] In a separate concurrence, Ponnan JA emphasised the purpose of amnesty. Reconciliation entailed a conscious acknowledgment that perpetrators granted amnesty should not only be considered not to have committed the offences in question, but "that those offences should not count against them."[22] The success of the process required that offenders should be able to "rid themselves of the stigma and moral opprobrium of their

[20] Id at para 41.

[21] Id at para 42.

[22] Id at para 90.

deeds."[23] The fact that Mr McBride planted a bomb that killed several people, for which he was convicted, is not deemed not to have occurred: on the contrary, this remains "as deeply embedded in this nation's psyche as it does in our national records." The granting of amnesty "does not and cannot obliterate or erase the fact of those occurrences." What the provision did was to change for the future the legal consequences of the acts for which amnesty was granted. Hence the statement that Mr McBride was a "murderer" was false.[24]

[33] Mthiyane JA dissented. Noting Streicher JA's observation that, absent amnesty, "it is a well-known fact that [Mr McBride] is a murderer",[25] he found that the Reconciliation Act did not render this statement false. He had difficulty in principle with the notion that one convicted of murder may not be described as a murderer or a criminal because he has been granted amnesty.[26] Section 20(10) did not expunge the fact of a crime from the historical record, but merely protected the perpetrator from criminal and civil liability and required the conviction to be expunged from the state's records. Amnesty thus protected a perpetrator from state-sanctioned penalties.

[34] The judgment of Mthiyane JA reflects three justifications for this approach. First, the language of section 20(10) did not support the expansive interpretation the majority

[23] Id at para 91.

[24] Id at para 93.

[25] Id at paras 41 and 49.

[26] Id at para 72.

endorsed, as it largely relates to official sanctions.[27] It is primarily a deeming provision expunging all references to the conviction in state records – obviating the need to "trawl" through records to delete the conviction.[28] Second, the majority's expansive interpretation unwarrantably curtailed freedom of expression.[29] And, third, the aim of the truth and reconciliation process was not to suppress expression but to promote an understanding of the truth.[30]

Proceedings in this Court

[35] The Citizen abandoned its argument that calling Mr McBride a "murderer" was protected as comment. It reverted to its original pleading that this was a fact forming the basis for protected comment. The principal issue before us was therefore whether it could properly be stated as a fact that Mr McBride was a "murderer". The Citizen submits that the ordinary reader of the Citizen would have understood the statement to mean that Mr McBride is not fit for appointment as police chief because he is a murderer despite receiving amnesty. While Mr McBride sued only on the articles that did not mention amnesty, the ordinary reader would have known that he had received amnesty and understood this to underlie the critical comments.

[27] Id at paras 77-9.

[28] Id at para 77.

[29] Id at para 82.

[30] Id at para 79.

[36] The Citizen submits that the requisites of fair comment are fulfilled, bar only the question whether the facts on which the comment was based are true. It also submits that the decision of the Supreme Court of Appeal entails that crimes for which amnesty has been granted are for all purposes deemed not to have been committed so that it will always be false to say that they were committed, whatever the purpose. It would follow that many high profile killings for which amnesty was granted could not be called "murders", nor their perpetrators "murderers". The Citizen cites as an example a speech delivered extra-curially by Deputy Chief Justice DE Moseneke, in which he called the killers of Griffiths Mxenge, a Durban lawyer who represented many ANC clients, "murderers".[31]

[37] The Citizen urges that this interpretation runs counter to the language of the Reconciliation Act. It emphasises the historical purpose of the Act. In finding a balance between amnesty and justice, it focussed on truth-telling. The process sought to reveal and preserve the truth about the past so that it might never be repeated.

[31] Deputy Chief Justice Dikgang Moseneke, *Establishing Social Consensus on the Shifting Boundaries between Judicial and Executive Functions of the State—Lessons from the Recent Past*, Inaugural Griffiths and Victoria Mxenge Memorial Lecture, delivered at the Faculty of Law, Nelson Mandela Metropolitan University, 30 October 2009,http://www.nmmu.ac.za/documents/lectures/Griffiths_and_Victoria_Mxenge_Inaugural_Lecture_30_October_2009.pdf, accessed on 2 November 2010. Deputy Chief Justice Moseneke states that Mr Mxenge's—

> "murderers are now known. They are self confessed. They are Dirk Coetzee, Almond Nofomela, Joe Mamasela, Brian Ngqulunga and David Tshikalanga. All were policemen and agents of the apartheid government's death squads. In 1996, 15 years later the Amnesty Committee of the Truth and Reconciliation Commission granted them amnesty. The record of the hearing on the death of Griffiths Mxenge before the Amnesty Committee contains the confessions of his murderers. The confessions make harrowing reading. They amount to a chilling account [of] a state that had lost its way; that had forsaken the rule of law and justice in favour of brutality, terror and murder against its political adversaries." (Footnote omitted.)

[38] Mr McBride submits that there is no basis for assuming that the ordinary reader of the Citizen reads every article and every editorial in every edition of the paper. The articles should therefore be treated separately, as if read one at a time. He contends that the defence of fair comment cannot justify the publication of defamatory allegations of fact. These include the assertions that Mr McBride is a criminal; that he is a murderer; that he consorted with alleged gun dealers; and that he was detained in Mozambique on suspicion of gun-running. Because the Citizen and the journalists did not plead the defence of truth in the public interest, it cannot now help them.

[39] In his written argument, Mr McBride contended that the statement that he is a murderer is not true as a result of section 20(10) of the Reconciliation Act. Counsel contended that a person may be considered a murderer only after a court of law has found him to be guilty of murder. And because he was granted amnesty, Mr McBride no longer has any convictions for murder and can thus not be called a murderer. The wide terms of section 20(10) make clear that the effect of the granting of amnesty is all-encompassing. It is therefore not permissible for the media to label him a murderer: his conviction is deemed, for all purposes, not to have taken place. One of the principal objectives of the Act was to facilitate as complete a picture as possible of the causes, nature and extent of gross human rights violations committed during the conflicts of the past. Once the truth of the past has been exposed, the intention is to "close the book" on that past. This allows perpetrators to start their lives anew without being labelled forever.

[40] In argument, counsel for Mr McBride insisted that "murderer" has a technical legal meaning only – that is, a person convicted in a court of law of an unlawful premeditated killing. Since Mr McBride's conviction has been expunged, it is no longer permissible to call him a "murderer".

[41] Mr McBride contends that relevance is important when determining the fairness of a comment. His operations at the Magoo's Bar and Why Not Restaurant 17 years earlier were of no relevance to his suitability for the police chief position in 2003. The repeated defamatory statements by the Citizen were, he submits, malicious.

[42] Mr McBride also seeks leave to cross-appeal against the Supreme Court of Appeal's finding that "dubious flirtation with alleged gun dealers" was not defamatory. He submits that ordinary readers would have understood this to imply that his conduct in Mozambique was a crime, thus providing further proof that he is a criminal. He submits that the distinction drawn by the Supreme Court of Appeal between asserting that his flirtation with gun dealers may have been criminal, as against alleging that he was actually involved in illegal activities, is without substance.

Submissions of the amici curiae

[43] FXI and SANEF urge that the judgment of the Supreme Court of Appeal should be overturned. They submit that the Court failed to take into account the impact of its decision on freedom of expression. Its interpretation ousted the expressive conduct of the

Citizen, despite the fact that section 20(10) did not expressly envisage this. They join the Citizen in urging that the discovery of truth is one of the primary values underlying freedom of expression. It would be contrary to the purpose of the Reconciliation Act to require the suppression of truth and expression.

[44] FXI and SANEF also take issue with the Supreme Court of Appeal's finding that the statement that Mr McBride is a murderer would not have been understood by reasonable readers as comment or opinion because the facts underlying the opinion were not disclosed in the articles.[32] They contend that where facts are incorporated by reference or where they are notorious, they need not be explicitly stated. Furthermore, where an article forms part of a series, the courts should consider each article in the context of that series.

[45] Ms Joyce Mbizana is the sister of Justice Mbizana, one of four youths killed by apartheid security police, who came to be known as the Mamelodi Four. Mr Mbasa Mxenge is the son of Griffiths and Victoria Mxenge. They also urge that the Supreme Court of Appeal judgment should be reversed. They submitted that the ruling will have a significant effect on their ability to speak out freely about the crimes committed against their family members, and about the wrongdoers who received amnesty. Ms Mbizana

[32] *The Citizen* above n 6 at para 42. The Supreme Court of Appeal here referred to *Telnikoff v Matusevitch* [1992] 2 A.C. 343 (HL) at 352E-G, where Lord Keith found that, in determining whether readers would infer a statement in a letter to be one of fact or opinion, the letter had to be considered on its own, and not in conjunction with the original article, published five days before, to which it was written in response. Lord Ackner dissented, holding at 360E-G that in determining whether words are comment or fact, the wider context, such as documents incorporated by reference, may be taken into account.

and Mr Mxenge contend that freedom of expression is constitutive of dignity: to deny persons in their position the right to speak the truth without fear of being sued for defamation strips them of their dignity. The proper interpretation of the Reconciliation Act, they contend, is that the effect of amnesty is only on a conviction and not on the historical facts. This interpretation is also found in the dissent of Mthiyane JA.

[46] Further, they contend that individuals have a "right to truth", which is recognised as an emerging right in customary international law. They argue that the constitutional protection of this right (and the ability to engage with the truth) emerges from the values of human dignity, equality, the rule of law, free expression and access to information.

Minister's submissions

[47] The Court issued directions granting the Minister for Justice and Constitutional Development leave to file written argument on the history, objectives and processes leading to the enactment of the Reconciliation Act, in so far as these were relevant to the issues, and the interpretation of section 20. The Minister's written argument recounted the legislative history of the Reconciliation Act, contrasting it with the legislation on indemnities from prosecution and civil claims that preceded it. They contained no requirement of full disclosure and truth-telling. And their procedures were largely opaque, entailing the exercise of a ministerial or presidential discretion. By contrast, the provisions of the Reconciliation Act, specifically section 20(10), "take account of the

history, the concerns of victims, perpetrators and the general public in the quest for real reconciliation."

[48] In argument, counsel for the Minister emphasised that the Reconciliation Act could not be interpreted to mean that a perpetrator granted amnesty could be called a criminal "forever and a day". She also submitted that mere labelling could not serve the purposes of the amnesty process.

The construction of the Reconciliation Act

[49] The provisions of the Reconciliation Act that are pivotal to this appeal are sub-sections 20(7)-(10):

> "(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.
>
> (b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person.
>
> (c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence.
>
> (8) If any person—

(a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or

(b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted, the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6)[33] become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

(9) If any person has been granted amnesty in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time before the granting of the amnesty, the publication of the proclamation in terms of subsection (6) shall not affect the operation of the judgment in so far as it applies to that person.

(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." (Footnote added.)

[50] The Reconciliation Act has been the focus of two decisions of this Court. In *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South*

[33] Section 20(6) provides:

"The Committee shall forthwith by proclamation in the *Gazette* make known the full names of any person to whom amnesty has been granted, together with sufficient information to identify the act, omission or offence in respect of which amnesty has been granted."

Africa and Others[34] (*AZAPO*), the applicants challenged section 20(7) on the basis that to grant amnesty to perpetrators of offences whom the state owed a duty to prosecute, and to leave their victims without recourse to civil remedy, was constitutionally untenable.[35] This Court rejected the challenge. Despite its severe impact on fundamental rights, both criminal and civil amnesty was warranted and indeed constitutionally envisaged, since a fraught transition from grievous injustice and conflict under apartheid to realising the "objectives fundamental to the ethos of a new constitutional order"[36] demanded it.[37]

[51] The Court emphasised that amnesty was a means to an end. The mechanism the statute created, the TRC, with its three committees (human rights violations, reparations and rehabilitation, and amnesty), was necessary to uncover the truth about the injustices that scarred our country's oppressive past. The statute addressed this by encouraging "survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones":[38]

[34] [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC).

[35] Id at para 8.

[36] Id at para 17, per Mahomed DP on behalf of the majority (Didcott J wrote a separate judgment concurring in the outcome); echoed by Langa CJ in *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) at para 29.

[37] *AZAPO* above n 34 at paras 16-24 and 31-8.

[38] Id at para 17.

> "That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do."[39]

Without that incentive, the Court pointed out, "there is nothing to encourage such persons to make the disclosures and to reveal the truth".[40]

[52] In *Du Toit v Minister for Safety and Security*[41] (*Du Toit*) the question was whether section 20(10) entitled a senior police officer who had received amnesty for murder to be reinstated to a post he lost by operation of a statutory provision. The statute provided that a member of the police force convicted of an offence and sentenced to imprisonment without the option of a fine "shall be deemed to have been discharged from the Service".[42] Did the later grant of amnesty entitle him to be reinstated? This Court held No. The provision could not be given "a purely literal and decontextualised reading".[43] Contextually read, it was "inconceivable" that section 20(10) could be intended to undo "the past to a limitless degree", for past factual events cannot be undone.[44] The granting

[39] Id.

[40] Id.

[41] *Du Toit* above n 36.

[42] Section 36(1) of the South African Police Service Act 68 of 1995 provides:

> "A member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be deemed to have been discharged from the Service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged."

[43] *Du Toit* above n 36 at para 31.

[44] Id at para 32.

of amnesty "does not obliterate all the direct legal consequences of conduct in respect of which amnesty is granted."[45] There is good reason for the statute's distinction between criminal and civil liability; the consequences of a prior conviction are "primarily limited to an entry in official documents or records and the sentence that the person is serving."[46] Undoing the conviction and sentence "principally affects these records and the sentence to be served in the future"[47] – but it cannot affect time already served.

[53] *Du Toit* noted that while the statute seeks to advance reconciliation and national unity, it cannot undo what has happened in the past. Just as the statute cannot restore to the victims what they lost, it does not restore the perpetrator in every respect to his or her position before the commission of the offence, since to undo all the consequences of a conviction would be endless and unduly burdensome.[48] Alive to this, section 20(7)-(10) does not undo the direct legal consequences of the conviction and sentence "beyond the public consequences such as the removal of the record of conviction and sentence from official documents and the voiding of sentences still to be served."[49] Even in respect of public consequences, ordinary legal consequences already complete by the time amnesty is granted are not undone:

[45] Id at para 44.

[46] Id at para 45.

[47] Id.

[48] Id at para 51.

[49] Id at para 52.

> "In this manner, section 20(7)-(10) pays due regard to the interplay of benefit and disadvantage so important to the process of national reconciliation."[50]

[54] To textual clues the Court added historical context. It was important that perpetrators coming forward to the TRC "did not receive the lion's share of benefits from the process."[51] The statute was not enacted "in order to ameliorate hardship for the perpetrators of human rights abuses and to provide these perpetrators with remedies."[52] Mr Du Toit's dismissal could therefore not be undone.

[55] The two decisions set up signposts to the main questions before us. Each emphasises the instrumental role of amnesty – it was not an end in itself, but a means to the end of national transition and reconciliation.[53] They establish that truth-telling, as a means to these ends – and hence the offer of amnesty – lay at the base of the moral and operational structure of the statute and the TRC.[54] They further establish that amnesty has no necessary meaning or intrinsic effect: its operation depends on history, context and statutory wording.[55] And they emphasise that its implementation must reflect the delicacy of the constitutionally required balance implicit in the legislation.[56]

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[50] Id.

[51] Id at para 53.

[52] Id at para 55.

[53] See *AZAPO* above n 34 at paras 17-21, 32 and 36; *Du Toit* above n 36 at paras 20-1 and 55.

[54] *AZAPO* above n 34 at paras 17-21; *Du Toit* above n 36 at paras 20-1 and 28.

[55] *AZAPO* above n 34 at para 24 ("no single or uniform international practice in relation to amnesty") and at para 35 ("The degree of oblivion or obliteration [amnesty confers] must depend on the circumstances."); *Du Toit* above n 36 at para 21 (though the amnesty process "may appear to be a device to facilitate forgiveness, closing the door on the past and moving on, it is also a pragmatic venture") and at para 36 (regarding retrospectivity, "the effect of the

[56] On section 20(10), *Du Toit* asserts that the practical meaning of amnesty cannot be read down from the literal wording of the statute, but must depend on history and statutory setting. It explicitly rejects a literal reading in favour of a limited construction,[57] in which the wording of section 20(10) reflects a balance between disparate interests on the path to transition.[58]

[57] Mr McBride's argument urges a literal reading of section 20(10): the grant of amnesty expunges his conviction of murder "for all purposes". It is deemed not to have taken place. It is as though he was never a criminal convicted of murder. It is as though the fact that he committed "murder" did not occur. In the formulation of the Supreme Court of Appeal, he is "no longer considered to be a criminal in respect of the deeds committed by him."[59] To call him a murderer is thus false. And comment for his fitness for public office can never invoke the fact of the murders.

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granting of amnesty does not necessarily, by virtue of the sweeping language used, extend to all of the consequences of the conviction and sentence").

[56] *AZAPO* above n 34 at para 21 ("The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future"); *Du Toit* above n 36 at para 30 ("What is important is the delicate, constitutionally required balance that is implicit in the legislation and that must be achieved by its implementation.").

[57] *Du Toit* above n 36 at paras 31-2.

[58] Id at para 30 ("The realisation of a balanced and equitable final result must lie at the core of a constitutionally appropriate interpretation" of section 20(10)) and at para 55 (to interpret the provision literally would flout the aims of the statute "by extending too far the already delicate and difficult issue of amnesty").

[59] *The Citizen* above n 6 at para 33.

[58] Mr Du Toit, too, relied on a literal interpretation of section 20(10). If his conviction for murder had indeed been deemed "for all purposes" not to have taken place, he would have got his job back. The operation of the statute that deemed his discharge would have been set at naught. But this Court rejected the literal reading. Instead, it upheld the finality of Mr Du Toit's discharge.

[59] Mr McBride's argument runs counter to the meaning and effect of *Du Toit*. The consequences are considerable. His argument implies that the Reconciliation Act not only granted perpetrators exemption from the legal consequences of their convictions, but that it mutes the voices of those seeking to discuss their deeds. Here, the amici whose family members were killed make a plangent point. Their main concern is not public debate about a perpetrator's fitness for office. They assert primarily a subjective and expressive entitlement, one that springs from their dignity as siblings and children. They seek to vindicate their right to describe with truth and accuracy the perpetrators of the gross wrongs inflicted on their loved ones. They claim the entitlement, despite amnesty, to continue to call the unlawful intentional killing of their loved ones "murder", and those who perpetrated the killings "murderers". The literal reading urged by Mr McBride would render these descriptions false, and impose legally enforced inhibition on those expressing them.

[60] That cannot be correct. The statute's aim was national reconciliation, premised on full disclosure of the truth.[60] It is hardly conceivable that its provisions could muzzle truth and render true statements about our history false. This Court in *Du Toit* found that amnesty was granted because "[t]ruth-telling is central to the development of a collective memory".[61] And the TRC saw its own role as central to the development of that collective memory. In its Report,[62] its chairman, Archbishop DM Tutu, noted that the notion of letting bygones be bygones was inimical to the ethos of the transition, since "amnesia would have resulted in further victimisation of victims by denying their awful experiences."[63] Further, "the past refuses to lie down quietly" and "has an uncanny habit of returning to haunt one." Hence:

> "However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future."[64]

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[60] Section 20(1) of the Reconciliation Act provides:

> "If the Committee, after considering an application for amnesty, is satisfied that—
>
> (a) the application complies with the requirements of this Act;
>
> (b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and
>
> (c) the applicant has made a full disclosure of all relevant facts,
>
> it shall grant amnesty in respect of that act, omission or offence."

[61] *Du Toit* above n 36 at para 20.

[62] The Reconciliation Act required the Commission to complete a report (section 43(2)) and the President to "bring the final report of the Commission to the notice of the Nation" (section 44). Truth and Reconciliation Commission of South Africa (TRC), *Truth and Reconciliation Commission of South Africa Report*, released on 21 March 2003 (TRC report). The complete report is available at http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf, accessed on 31 March 2011.

[63] Id TRC Report, Foreword by Chairperson, the Most Reverend DM Tutu, Archbishop Emeritus, at para 26.

[64] Id at para 27.

I agree.

[61] The interpretation urged on us by Mr McBride would be antithetical to the adequate compilation of that collective memory. It is in conflict with the statute's context and historical setting, and is at odds with one of the moral impulses of the reconciliation process itself.

[62] In addition, the literal reading urged on us omits to afford weight to the speech and expressive rights of those who, like the family members before this Court, wish to speak the truth about the perpetrators who killed their relatives. The Bill of Rights protects their right to freedom of expression,[65] and values the dignity of their bereavement and the integrity of their memory. A sound interpretation of section 20(10) must afford weight to these rights. The Constitution requires that when interpreting the Reconciliation Act a court "must promote the spirit, purport and objects of the Bill of Rights."[66] This injunction does not appear to have been given any consideration in the interpretive path the Supreme Court of Appeal followed.

[65] See above n 3.

[66] Section 39(2) of the Bill of Rights provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[63] The literal interpretation in addition overreaches the delicate "interplay of benefit and disadvantage"[67] that underlies the provisions. Mr McBride received amnesty for the murders he committed. His conviction was expunged from the record book. He in fact secured appointment as police chief of Ekurhuleni. All entries relating to him in official documents or records are undone. As this Court observed in *Du Toit*, apart from the sentence itself, these entries are the primary consequence of a prior conviction.[68] Amnesty liberated Mr McBride from them, as well as from all the statutory disabilities imposed on those with prior convictions.

[64] As Mthiyane JA found, the chief function of the deeming provision in section 20(10) is to secure efficient expungement of all official documents and records, without requiring arduous physical deletion. That is why the provision was enacted. Expungement entitles the grantee of amnesty to full civic status. All civil disabilities are lifted.[69] He is entitled to stand for Parliament.[70] Should he ever be convicted of another crime, he will for sentencing purposes be deemed to be a first offender.

[67] *Du Toit* above n 36 at para 29.

[68] Id at para 45.

[69] Those who received amnesty for offences involving dishonesty are for instance exempt from the effect of section 20(2) of the Trust Property Control Act 57 of 1988, which provides that a trustee may at any time be removed from office if convicted of any offence of which dishonesty is an element, and of section 69(8)(b)(iv) of the Companies Act 71 of 2008, which prohibits those convicted and imprisoned without the option of a fine, or fined above a stipulated amount, for offences involving fraud, misrepresentation or dishonesty from being directors.

[70] See *Du Toit* above n 36 at para 45.

[65] Mr McBride seeks much more. He wants the provision to confer on him immunity from untrammelled discussion of the deeds that led to his conviction for murder, and from the moral opprobrium that some continue to attach to those deeds. He wants the provision to safeguard him from the application of terminology that, but for the grant of amnesty to him, would be factually true, namely that he committed the crime of murder.[71] That he did so in the course of an armed struggle against pernicious injustice does not detract from the historical accuracy of the appellation. In claiming that the statute exempts him from it, he overreaches the delicacy of the provision's effect and intent.

[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",[72] and that Mr McBride could no longer be "branded a criminal".[73] On this approach, the object of the statute was to enable perpetrators to "rid themselves of the stigma and moral opprobrium of their deeds",[74] 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".[75]

[71] As noted in the majority judgment of the Supreme Court of Appeal, above n 6 at para 41.

[72] Id at para 30, per Streicher JA.

[73] Id at para 33, per Streicher JA.

[74] Id at para 91, per Ponnan JA.

[75] Id at para 93, per Ponnan JA.

[67] This reading seems to attribute to the Reconciliation Act a purpose elevated beyond the reach of the practical consequences the statute regulated.[76] The difficulties inherent in it appear from the fact that it would release the perpetrator from stigma and moral burden, while, nevertheless, as the Supreme Court of Appeal recognised, the "actions and the consequences" are not "considered not to have taken place",[77] since amnesty "does not and cannot obliterate or erase the fact of those occurrences."[78]

[68] This seems to me to entail an irrepressible dissonance. If amnesty cannot erase consequences, how can it proscribe their description? What is more, this reading imputes to the mechanisms of the statute an obligatory process of social reconstruction, in which perpetrators receive not only legal, but moral and social absolution for their deeds. The Reconciliation Act's central objective was national unity and reconciliation. But moral absolution lay beyond the legal benefits the statute afforded perpetrators. Expunging moral opprobrium and condemnation lay beyond the lawgiver's powers, and the statute did not seek to confer it.

[69] The amnesty provision has a more modest and practical purport. This is evident from the fact that only those who were convicted received amnesty. It has no application to those who obtained amnesty on full disclosure of crimes of which they were never

[76] See Eusebius McKaiser's comment on the judgment of the Supreme Court of Appeal in "McBride was convicted – period!", *Mail & Guardian online*, 2 August 2010, http://www.mg.co.za/article/2010-08-02-mcbride-was-convicted-period, accessed on 17 January 2011.

[77] *The Citizen* above n 6 at para 33, per Streicher JA.

[78] Id at para 93, per Ponnan JA.

convicted. On a literal approach, those never convicted of murder, not being covered by section 20(10), could still be called "murderers", while those convicted cannot. This, as counsel for the Citizen justly contended, would be an intolerable anomaly. There is no reason for the statute to be interpreted to confer a lopsided advantage on those convicted over those never convicted.

[70] Mr McBride's argument sought to circumvent this anomaly by asserting that the term "murderer" applies only to those convicted of murder in a court of law. But this is to redefine language. In ordinary language "murder" incontestably means the wrongful, intentional killing of another. "Murderer" has a corresponding sense. More technically, "murder" is the unlawful premeditated killing of another human being, and "murderer" means one who kills another unlawfully and premeditatedly.[79] Neither in ordinary nor technical language does the term mean only a killing found by a court of law to be murder, nor is the use of the terms limited to where a court of law convicts.

[71] This ordinary use of language accords with reading section 20(10) as merely expunging official records, thereby restoring the convict to unblemished legal and civil status. Since amnesty was a means to the end of disclosure and truth-telling, there was if anything less rationale for favouring those who had been convicted, since their convictions rested on evidence that presumably recorded the events in issue. By contrast,

[79] According to the *Concise Oxford English Dictionary* (11ed revised with addenda) (Oxford University Press, New York 2009) 941, "murder" is "the unlawful premeditated killing of one person by another."

it was those not convicted whom the lure of amnesty beckoned most powerfully to truth-telling. It would be anomalous for the statute to withhold from them a benefit it affords those convicted.

[72] This points to the conclusion that section 20(10) expunges the previous conviction, and reinstates the former convict to full civic status, so that he or she is deemed never to have been convicted. But it does no more. It does not render untrue the fact that the perpetrator was convicted, or expunge the deed that led to his or her conviction. Those remain historically true. The statute does not address these facts of history, nor does it attempt to mute their description. It does not stifle the language that may accurately describe the events that led to the conviction, nor does it censor the terms that may truthfully be applied to the facts, though the law of defamation does.

[73] In addressing the legal consequences of conviction only, section 20(10) does not presume to have a linguistic effect, or to govern the discourse that arises from the conviction.

[74] The Constitution reinforces the conclusions reached earlier on the ambit of the Reconciliation Act. The Preamble to the Constitution, its founding values and this Court's jurisprudence have all emphasised that our venture in constitutionalism and democracy commits us to transforming our society from an oppressive past to a non-

racial, just and united nation. Two interlinked aspects of that quest are our understanding of reconciliation, and our approach to the democracy we wish to create.

[75] An important question is whether it is appropriate to see the Reconciliation Act as constituting a definitive and final pronouncement on the meaning of reconciliation. Has public discourse on the reconciliation process and its meaning ended, and must it in law be deemed to have ended? The answer must be No. A more supple approach is to accept that the meaning of reconciliation is still unfolding, and that the fragilities of its meaning cannot be prescribed by law: and hence the best chance for successful reconciliation lies in fostering open public discussion. In this, boundaries should be set not by assessing the reasonableness or good taste of the content of debate, but by the process within which debate occurs.

[76] This Court has already ruled in favour of an open, processual approach to understanding our democracy and the need for reconciliation that underlies it. In *Albutt*,[80] we ruled that the process of reconciliation could not rationally be extended by granting pardons under a special dispensation to perpetrators of politically motivated wrongs without hearing those injured. It rejected the argument that because the pardons at issue applied to those who did not apply for amnesty under the TRC process, and

[80] *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

therefore fell in time beyond the TRC, the requirement that victims be heard could be eschewed.[81]

[77] This decision is pertinent in that it points to the function of the law in regulating process rather than suppressing content. The law of defamation sets one of the boundaries within which public debate takes place. And public debate lies at the heart of participatory democracy. *Albutt* has enhanced our understanding of what reconciliation and our participatory democracy entail. This judgment's interpretation of the Reconciliation Act accords with that conception.

[78] To summarise. There are at least four reasons why Mr McBride's argument cannot prevail. First, it depends on a literal and acontextual approach, which runs counter to the decision in *Du Toit*. Second, it is inimical to truth-telling, which was one of the moral bases of the transition from the injustice of apartheid to democracy and constitutionalism. It is hardly conceivable that a statute premised on the necessity of truth-telling in pursuit of national unity and reconciliation should operate so as to render the truth false. Third, the interpretation fails to give weight to the right of freedom of expression. Fourth, it overreaches the benefits Mr McBride earned when he sought and was granted amnesty: it would disturb the delicate interplay of benefit and disadvantage the statute reflects, thereby also creating an untenable anomaly in that only those convicted, but not those never charged, would gain immunity from truthful description of their deeds.

[81] Id at paras 55-6 and 61-7.

Defamation and the defence of protected or "fair" comment

[79] Does this mean that, despite amnesty, Mr McBride's conviction for murder can indefinitely be flung in his face? Can he be called a murderer "forever and a day"? The answer is No. The common law of defamation conformably with the Constitution[82] protects Mr McBride's right to reputation and dignity.[83] The law of defamation requires at the outset that an issue be a matter of public interest before any defamatory allegations may be made of another. This inhibits indefinite re-conjuring of past issues.[84]

[80] As already noted, the Citizen abandoned all their pleaded defences, bar that the offending articles were protected because they were comments on matters of public interest. The defence protects criticism, comment or expressions of opinion "on facts which are true, and relate to matters of public interest, and if they are such as any fair man might make on those facts."[85] To prevail against Mr McBride's claim, the defence requires the Citizen to show that – (i) the defamatory statements are comment or opinion;

[82] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 at paras 35-45.

[83] Above n 10.

[84] This Court has held that, in general, constitutional values protect reputation only if it "is a true reflection" of character: *Khumalo* above n 82 at para 36 ("in the main, a person's interest in their reputation can only further constitutional values if that reputation is a true reflection of their character") and para 42 ("the applicants are right when they contend that individuals can assert no strong constitutional interest in protecting their reputations against the publication of truthful but damaging statements"). But to this it noted an important rider, namely that it has long been recognised that, absent any public interest in the subject matter, "past mistakes should not be raked up after a long period of time has elapsed." See *Khumalo* at fn 38.

[85] *Roos v Stent and Pretoria Printing Works, Ltd.* 1909 TS 988 at 998, per Innes CJ.

(ii) they are "fair" (in a special sense explained below); (iii) the factual allegations being commented upon are true; and (iv) the comments relate to a matter of public interest.[86]

[81] Nearly a century ago, in the judgment that firmly authenticated the defence in South African law,[87] Innes CJ remarked that the use of the term "fair" to describe the defence is "not very fortunate".[88] He was right. As he explained, the criticism sought to be protected need not "commend itself" to the court. Nor need it be "impartial or well-balanced."[89] In fact, "fair" in the defence means merely that the opinion must be one that a fair person, however extreme, might honestly hold, even if the views are "extravagant, exaggerated, or even prejudiced".[90] The comment need be fair only in the sense that objectively speaking it qualifies "as an honest, genuine (though possibly exaggerated or

[86] These elements of the defence were first set out in *Crawford v Albu* 1917 AD 102 at 115-7, per Innes CJ, summarised and applied in *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1167C-G, and endorsed and applied post-constitutionally in *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) at para 13 and *Hardaker v Phillips* 2005 (4) SA 515 (SCA) at para 26.

[87] The defence of "fair comment" was not known in the Roman-Dutch common law of South Africa. It was imported into it from English law in the 19th Century on the basis that it was consistent with Roman Dutch law (in *Roos* above n 85, Innes CJ said that the doctrine as fully elaborated by the English courts, conformed with "principles which are known to and approved by the Roman-Dutch law", and that it had "been adopted by all tribunals in South Africa."). The earliest instances of defendants invoking the defence in South Africa appear to be *Davis & Sons v Shepstone* (1886) L.R 11 App. Cas. 187 (Privy Council, on appeal from the Supreme Court of Natal) at 190, and *Ribbink v Marais and Loos* (1892) 4 SAR 236 at 245 (Kotze CJ, Ameshoff and De Korte JJ concurring). These instances are collated in *Hardaker* above n 86 at para 26 fn 1.

[88] *Crawford* above n 86 at 114.

[89] Id.

[90] Id at 137, per De Villiers AJA. See in this regard *Johnson v Beckett and Another* 1992 (1) SA 762 (A) at 780-1, per Harms AJA.

prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice."[91]

[82] So to dub the defence "fair comment" is misleading. If, to be protected, comment has to be "fair", the law would require expressions of opinion on matters of fact to be just, equitable, reasonable, level-headed and balanced. That is not so. An important rationale for the defence of protected or "fair" comment is to ensure that divergent views are aired in public and subjected to scrutiny and debate.[92] Through open contest, these views may be challenged in argument. By contrast, if views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.[93]

[91] *Johnson* above n 90 at 783B, per Corbett CJ. As the Supreme Court of Canada has held, the court "is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts." *Simpson v Mair* (2008) 293 DLR (4th) 513 (SCC) at para 28, per Binnie J on behalf of the Court.

[92] Lewis, *Freedom for the Thought That We Hate – A Biography of the First Amendment* (Basic Books, New York 2007), chapter 12: "Freedom of Thought" at 183-9. See too the judgment of O'Regan AJA (Chomba AJA and Langa AJA concurring) in *Trustco Group International Ltd and Others v Shikongo* [2010] NASC 6; 7 July 2010, http://www.saflii.org/na/cases/NASC/2010/6.html, accessed on 17 November 2010 at para 28.

[93] See *Khumalo* above n 82 at paras 22-4. In *Grant v Torstar Corporation* 2009 SCC 61; [2009] 3 SCR 640 at paras 47-52. At para 49, the Supreme Court of Canada noted that:

> "This rationale, sometimes known as the 'marketplace of ideas', extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth."

[83] Protected comment need thus not be "fair or just at all"[94] in any sense in which these terms are commonly understood.[95] 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.[96] In the succinct words of Innes CJ, the defendant must "justify the facts; but he need not justify the comment".[97]

[84] Perhaps it would be clearer, and helpful in the understanding of the law, if the defence were known rather as "protected comment".[98] A new name would not change the requirements. At common law it was rightly held that "fairness" in fair comment must draw on the general legal criterion of reasonableness.[99] In our constitutional state, comment on matters of public interest receives protection under the guarantee of freedom

[94] *Crawford* above n 86 at 137, per De Villiers AJA.

[95] In *Patterson v Engelenburg and Wallach's Limited* 1917 TPD 350 at 357, De Villiers JP said that the opinion-expresser "need not be fair, in the sense that he may give an exaggerated idea; he may be quite wrong in his opinion, but he must be honest and without malice." The same judge said in *Crawford* above n 86 at 137 that the comment "might be extravagant, exaggerated, or even prejudiced" without forfeiting protection.

[96] Innes CJ in *Crawford* above n 86 at 115 quoted with seeming approval the judgment of Collins MR in *McQuire v Western Morning News Company Limited* [1903] 2 KB 100 at 112, in which the English judge "dispensed altogether with that somewhat elusive individual, the fair man", preferring the test of honesty and relevancy.

[97] *Crawford* above n 86 at 117.

[98] In *Spiller and Another v Joseph and Others* [2010] UKSC 53 at para 117, the Supreme Court of the United Kingdom, following a suggestion by Lord Nicholls in *Reynolds v Times Newspapers Ltd and Others* [2001] 2 A.C. 127 (HL) at 165, renamed the defence "honest comment". The Court of Appeal had previously suggested that it be renamed "honest opinion": *British Chiropractic Association v Singh* [2010] EWCA Civ 350 paras at 35-6.

[99] *Marais v Richard en 'n Ander* above n 86 at 1168C-D ("Vandag word die grense van onregmatigheid by ons gesoek in die toepassing as grondnorm van wat die 'algemene redelikheidsmaatstaf' genoem kan word . . . . Dit volg dat by die bepaling van wat 'billike' kommentaar is, die grondnorm die regsoortuiging hier te lande moet wees . . . . [Today we seek the limits of unlawfulness in the application as founding norm of what may be dubbed the 'general criterion of reasonableness' . . . . It follows that in determining what is 'fair' comment, the fundamental norm must be the local legal convictions] (My translation.)) On the general criterion of unlawfulness in the law of defamation, and the inter-relation between *Marais v Richard* and *Crawford* above n 86, see Burchell *The Law of Defamation in South Africa* (Juta, Cape Town 1985) at 59-66 (*The Law of Defamation*) and Burchell *Personality Rights and Freedom of Expression – The Modern Actio Injuriarum* (Juta, Kenwyn 1998) at 282.

of expression. Hence the values and norms of the Constitution determine the boundaries of what is protected. To call the defence "protected comment" may illuminate the constitutional source and extent of the protection.[100]

[85] In applying the Constitution to the law of defamation, this Court has noted the special responsibility of the media in fostering democracy and the free fund of information that is indispensable to it. In *Khumalo and Others v Holomisa*,[101] the Court emphasised the duty of the media to be "scrupulous and reliable":

> "They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled."[102]

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[100] The Supreme Court of Canada has recently questioned the propriety of using "fair-mindedness" in setting out the requirements of the defence. In *Simpson* above n 91 at para 28, it held that "the addition of a qualitative standard such as 'fair-minded' should be resisted":

> "'Fair-mindedness' often lies in the eye of the beholder. Political partisans are constantly astonished at the sheer 'unfairness' of criticisms made by their opponents. Trenchant criticism which otherwise meets the 'honest belief' criterion ought not to be actionable because, in the opinion of a court, it crosses some ill-defined line of 'fair-mindedness'."

[101] See *Khumalo* above n 82.

[102] Id at para 24. See too *Trustco Group* above n 92 at para 28 and *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at para 63, per Ngcobo J, emphasising the media's "responsibility to report accurately."

[86] That is the role of the media. The role of the courts in fulfilling these constitutional ideals, with reconciliation as their underlying theme, is to develop and adapt legal rules to enhance the Constitution's vision of democracy. The courts cannot prescribe what people may or should say. Nor, as I have already indicated, does the proper interpretation of the Reconciliation Act suggest any greater policing or prescriptive role for the courts.

Applying the law and the principles to Mr McBride's claim

[87] The factual claims the Citizen pleaded as the basis for its comment were, first, that Mr McBride was a murderer and a criminal because of the bomb he detonated in 1986 which killed several people; and second, that he had engaged in a "dubious flirtation with alleged gun dealers in Mozambique". In addition, the Citizen's coverage claimed that he lacked contrition for what he did, because he still thought he "did a great thing as a 'soldier', blowing up a civilian bar".

[88] The defence of protected or "fair" comment requires at the outset that the facts be "truly stated".[103] This means that to receive the benefit of the defence it must be clear to those reading a publication "what the facts are and what comments are made upon

[103] *Crawford* above n 86 at 116. In *Spiller* above n 98 at para 105, the Supreme Court of the United Kingdom relaxed the requirements for statement of the fact commented upon to require only that "the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based."

them."[104] A commentator is not protected if he or she "chooses to publish an expression of opinion which has no relation, by way of criticism, to any fact before the reader".[105]

[89] The requirement that the facts must be truly stated does not mean, as Innes CJ pointed out a century ago, that "in all cases the facts must be set out verbatim and in full".[106] This is because "there may be cases where the facts are so notorious that they may be incorporated by reference."[107] And indeed, in the decision that authoritatively incorporated the defence of protected or "fair" comment into South African law, the Court took account of notorious facts about the labour disturbances on the Witwatersrand during 1913 and 1914, from which the disputed publication arose,[108] even though the comment did not expressly set them out. It was enough that the facts were "in the common knowledge of the person speaking, and those to whom the words are addressed".[109]

[90] Here, the Citizen's articles appeared over a seven-week period between 10 September and 30 October 2003. The first article mentioned that Mr McBride applied for and was granted amnesty. The second, the next day, related that his death sentence for the bombing had been commuted, and that the TRC "also granted him amnesty". The

[104] *Roos* above n 85, per Innes CJ.

[105] Id.

[106] Id at 1010 per Smith J.

[107] Id.

[108] See Burchell, *The Law of Defamation* above n 99 at 223.

[109] *Crawford* above n 86 at 126, per Solomon JA, and at 137, per De Villiers AJA.

later articles, however, called Mr McBride a murderer and a criminal without mentioning amnesty.

[91] In my view, the facts pertinent to the Citizen's comment were adequately stated. This conclusion derives from several considerations.

[92] First, Mr McBride was a very widely-known public figure. His action in detonating the Durban beachfront bomb was one of the most prominently debated acts of the anti-apartheid struggle. It is mentioned in the very first sentence of the foreword to the TRC Report.[110] Mr McBride received amnesty as part of the TRC process, which was familiar to almost every South African. Most South Africans interested or in touch with current affairs would have been aware that Mr McBride had been granted amnesty. Newspaper readers tend to show interest in current affairs, so it is reasonable to assume that the readership of the Citizen was likely to have known that Mr McBride received amnesty for his conviction for murder. This fact was so well-known as to be notorious. It would not require recitation in referring to the deeds he had committed for which he was granted amnesty.

[110] Most Reverend D M Tutu Archbishop Emeritus commences the Foreword thus:

> "All South Africans know that our recent history is littered with some horrendous occurrences – the Sharpeville and Langa killings, the Soweto uprising, the Church Street bombing, Magoo's Bar, the Amanzimtoti Wimpy Bar bombing, the St James' Church killings, Boipatong and Sebokeng."

Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, (1998) vol 1 ch 1, http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf, accessed on 27 March 2011.

[93] Second, the Citizen in any event reminded its readers that Mr McBride received amnesty. This was done in the first article, and again in the front page report the next day. In consequence, readers interested in the newspaper's comment and opinion would have been familiar with the fact that Mr McBride was convicted of murder and sentenced to death, but that he was granted amnesty.

[94] Third, it seems to me to be wrong to assume that newspaper readers read articles in isolation. This is particularly so when they read editorial comment or columnists commenting on current affairs. It is likely that, in assessing comment, readers will bring to mind recent news coverage of the events in issue. Here, the articles attacking Mr McBride's candidacy were closely linked in time (seven weeks), and theme (police chief of big metro) to a current controversy (Mr McBride's suitability for appointment). It would be unrealistic to conclude that readers who read the first Williams article (18 September), or the front page report (22 September), or the Kenny article (21 October), or the second Williams article (22 October), would not have known, and held in mind, that he had committed the bombing as part of the struggle against apartheid, and that he received amnesty for it.[111]

[111] Here the position seems to me to be different from *Telnikoff* above n 32, where a majority of the House of Lords found that in determining whether a defamatory statement is fact, only the defamatory publication itself, a letter in this case, and not an article preceding it and to which the letter was written in response, may be taken into account. The difference in this case is the public notoriety of the facts relating to Mr McBride's deed and his amnesty.

[95] This conclusion accords with decisions of the European Court of Human Rights to the effect that a publication alleged to be defamatory must be assessed in relation to the coverage as a whole.[112] Considering the Citizen's coverage as a whole also accords with the decision of the Supreme Court of the United Kingdom in *Spiller*.[113] There the Court loosened the requirements for including facts underlying comment. The Court held that the comment need only "explicitly or implicitly indicate, at least in general terms, the facts on which it is based."[114]

[96] It may be useful to pause and summarise. The Reconciliation Act did not render it untrue that Mr McBride committed murder. And it did not prohibit frank public discussion of his act as "murder". Nor did it proscribe his being described as a "criminal". The Citizen's comments, deriving from the fact of Mr McBride's deed, were based on adequate exposition of the pertinent facts.

The balance between dignity and free expression – were the Citizen's comments protected as "fair comment"?

[112] In *Bladet Tromso v Norway* (2000) 29 EHRR 125, the European Court of Human Rights (ECHR) held that reporting "should not be considered solely by reference to the disputed articles" but "in the wider context of the newspaper's coverage" of the contested issue. In *Bergens Tidende and Others v Norway* (2000) 31 EHRR 16 at para 51 the ECHR held that the publication of a defamatory article had to be seen "against the background of" a previous article some two months earlier, which mentioned the plaintiff favourably, in reaction to which those with negative experiences contacted the newspaper. Most recently, the ECHR in *Tonsberg Blad AS and Haukom v Norway* (2008) 46 EHHR 40 at para 94 looked at coverage as a whole in considering its impact.

[113] *Spiller* above n 98.

[114] Id at para 105.

[97] Apart from the claim that he lacked contrition, to which I return later,[115] the Citizen's comments on Mr McBride's suitability for office derived from two statements that were true – that Mr McBride had committed murder, and was thus a murderer, and on his episode in Mozambique.

[98] Proceeding from these factual premises, the newspaper's coverage constituted in significant part comment on Mr McBride's suitability for an important and prominent public post. The appointment would bring him power and responsibility, and put major resources at his disposal. The job accordingly demanded public trust. Public debate about his fitness for the post was therefore important.

[99] It was also important that public debate about his fitness should, within the constitutional bounds protecting Mr McBride's dignity and reputation, be untrammelled. Public debate in South Africa has always been robust. More than fifty years ago, within the then-constrained perimeter of racially-defined public life, a court noted that in this country's political discussion, "[s]trong epithets are used and accusations come readily to the tongue."[116] The Court also found that allowance must be made "because the subject is a political one, which had aroused strong emotions and bitterness", of which readers

[115] See [113] – [121] below.

[116] *Pienaar and Another v Argus Printing and Publishing Co. Ltd.* 1956 (4) SA 310 (W) at 318C.

were aware, and that they "would not be carried away by the violence of the language alone."[117]

[100] These words are still apt today.[118] Public discussion of political issues has if anything become more heated and intense since the advent of democracy. A constitutional boundary is the express provision in the Bill of Rights that freedom of expression does not extend to hate speech.[119] Another is the legitimate protection afforded to every person's dignity, including their reputation. But, so bounded, it is good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussion of public affairs.[120]

[101] The Citizen was thus entitled to express views on Mr McBride's suitability for the post. It did so with coverage that strikes me as to a degree ungenerous and distasteful. Here I have in mind statements that persons recommending Mr McBride for appointment "should have their heads read", that his appointment would be a "slap in the face" of

[117] Id at 318F-G.

[118] Nearly a century ago, in *Crawford* above n 86 at 116, Innes CJ noted that—

> "the trend of modern decision is in the direction of extending the operation of the defence of fair comment where that can be safely done".

[119] Section 16(2) of the Bill of Rights provides that the right to freedom of expression does not extend to—

> "(a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[120] In *Grant* above n 93 at para 47, McLachlin CJ noted that the guarantee of free expression in the Canadian Charter of Rights and Freedoms has three core rationales or purposes – (1) democratic discourse; (2) truth-finding; and (3) self-fulfilment.

those fearing crime, that "the evil of his multiple murders" made him unfit to be a policeman, that detonating a bomb that killed civilians "was the act of human scum" and the references, in a headline and one article, to "bomber McBride".

[102] The same applies to the Citizen's repeated use of the epithets "murderer" and "criminal" in referring to Mr McBride. These, too, strike me as vengeful, and distasteful. But my opinion is not the issue. And the Reconciliation Act does not afford those who were granted amnesty moral absolution, or freedom from opprobrious condemnation.[121] Nor does it muzzle those who choose to discuss their deeds in abrasive, challenging and confrontational terms. That is what the Citizen did. All it said flowed from its opinion on whether Mr McBride was fit to hold an important public post. It should therefore be permitted significant leeway.

Honestly held opinion and malice

[103] As already indicated, it is a requirement in our law that the comment sought to be protected must qualify "as an honest, genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice".[122] This seems to entail two requirements, one positive and one negative, namely honesty of belief, and absence of malice. The argument for Mr McBride seemed to aim at establishing lack of honest belief and presence of malice.

[121] See [67]-[69] above.

[122] *Johnson* above n 90 at 783B-C, per Corbett CJ; see also *Crawford* above n 86 at 115, per Innes CJ.

Given the facts of this case, it is not necessary for this Court to consider whether these are independent or cumulative requirements, or, if they are, whether the Constitution requires that the common law should be developed in relation to them. This is because Mr McBride's argument that the Citizen's opinion was not honestly held, and that it was maliciously expressed, failed to find any basis in the evidence.

[104] Counsel for Mr McBride insisted that the Citizen's comments were malicious. Counsel submitted that the Citizen published the articles out of personal spite and ill-will towards Mr McBride, and not out of any wish to engage in public debate about his suitability for the post. Counsel indeed contended that the articles manifested hatred towards Mr McBride that went beyond the bounds of fair comment. This goes so far as to suggest that the views the Citizen expressed were not honestly held.

[105] The question is whether the evidence established, first, that the Citizen's view as to Mr McBride's suitability for appointment was genuinely held and, second, if it was, whether the Citizen abused its right to express that view, "for malice indicates an abuse of right, which makes unlawful that which would otherwise have been lawful".[123]

[123] Footnote omitted. Boberg "Defamation South African Style – The Odyssey of Animus Injuriandi" in Visser (ed), *Essays in Honour of Ellison Kahn* (Juta, Cape Town 1989) 35-61 at 53.

[106] Mr McBride's contention, in other words, is that the Citizen used the occasion of his candidacy, and its right to comment, not to advance a genuinely-held view in relation to his fitness for office, but for purposes unrelated to the question of his appointment.[124]

[107] This contention cannot be sustained. It is correct that the Citizen stated one incorrect "fact" in support of its views – namely its assertion, which, as I conclude below, was false,[125] that Mr McBride lacked contrition. But this was only a small portion of its coverage, whose major and preponderant basis plainly was the newspaper's view about his past conduct in planting a bomb that killed innocent people.

[108] The Citizen called two of the writers, Mr Kenny and Mr Williams, to testify. There is no reason to doubt that they genuinely held the view that Mr McBride was unfit for the post of police chief. And Mr McBride did not contend that the view that his past conduct made him unfit for a police post could not be honestly held at all.[126] There was furthermore no evidence to suggest that, in expressing its views on Mr McBride's

[124] In *Simpson* above n 91 at para 1, the Supreme Court of Canada stated that malice is "an indirect or improper motive not connected with the purpose for which the defence exists".

[125] See [113] – [121] below.

[126] This litigation therefore makes it unnecessary for us to consider whether the requirement that the disputed opinion must be honestly held is objective or subjective: see *Simpson* above n 91, which held that actual honest subjective belief was not a requirement – it is enough if the opinion could be honestly held. In *Lister v Burke* 1945 SR 56 at 63, it was stated that "if a fair-minded man might upon the facts bona fide hold the opinion expressed then the expression of that opinion does not in itself disclose actual malice".

suitability, the Citizen was actuated by any motive other than stoking public debate about his appointment.[127]

[109] The comments were also relevant to that question. It is true that the bombing was seventeen years before his appointment. But Mr McBride received amnesty in 2001 only two years before the issue of his candidacy arose in 2003. The meaning and effect of amnesty in relation to a significant public appointment was thus in issue. This was not raking up the past, but determining its meaning in relation to a very current issue.

[110] The evidence offers no basis for concluding that the Citizen was acting out of improper personal or other motive, or that it was seeking to advance any cause, agenda or view in relation to Mr McBride other than questioning his fitness for public office. The inference in these circumstances that the newspaper's campaign against Mr McBride's appointment was malicious seems in my respectful view to derive solely from the vehemence with which the Citizen conducted its campaign.

[127] This fact makes it unnecessary for this Court to decide whether, if a view is honestly held, but the commentator is also actuated by malice or oblique motive in expressing it, the comment forfeits protection. In *Tse Wai Chun Paul v Cheng Albert* [2001] EMLR 777 at para 73, the Court of Final Appeal of Hong Kong held, per Lord Nicholls of Birkenhead NPJ, that a comment falling within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. However, proof of such motivation may be evidence from which lack of genuine belief in the view expressed may be inferred. The judgment is http://www.ipsofactoj.com/international/2000/Part7/int2000(7)-005.htm, accessed on 16 November 2010.

[111] As already noted, the Citizen's coverage was in my view indeed unrelentingly harsh and unforgiving. But it would be wrong to withhold legal protection from it on the ground that it evidenced malice.[128]

[112] Once the contention as to malice fails, it must follow that, aside from the claim that Mr McBride was not contrite, to which I now turn, the bulk of the Citizen's comment was based on fact that was adequately stated, and that fell within the bounds of constitutionally protected comment.

Mr McBride's contrition

[113] Mr McBride complained that the Citizen defamed him by stating that he was not contrite, but that instead he still thought "he did a great thing as a 'soldier', blowing up a civilian bar." The specific meaning he complained of was that this statement, with others, meant, and was understood by readers to mean, that he was "morally corrupt".

[114] There can be no doubt that it is highly defamatory to claim that a person who carried out an anti-apartheid bombing in which innocent people died lacks contrition. It

[128] Past instances in which South African courts have rejected the defence of "fair comment" on the ground of malice seem to involve deliberate distortion by the speaker of the underlying facts. See *Brill v Madeley.* 1937 TPD 106 at 111 (actual malice found because the speaker "deliberately left out a portion" of a speech he commented on "in order to lend colour" to his own false interpretation; the inference was therefore "irresistible" that the comment "was not honestly made"); see also *Naylor and Another v Jansen; Jansen v Naylor and Others* 2006 (3) SA 546 (SCA) at paras 5 and 13 (defendant's allegation that the plaintiff was suspended from his employment "because he had misappropriated" funds, which was made knowing it to be untrue "and with the object of injuring [the plaintiff] in his reputation" held to amount to malice). For a comparable approach to the question whether malice removes the protection afforded by qualified privilege, see *Vincent v Long* 1988 (3) SA 45 (C) at 50-1 and *Yazbek v Seymour* 2001 (3) SA 695 (E) at 703-4.

is one thing to say that someone committed murder for a high political goal. It is quite another to say that, years after the event, he has no contrition for the innocent lives his deed exacted. The defamatory sting is worse when the person is aiming for prominent public office and more particularly when the public office involves the safety and security of the public, as the police chief position did.

[115] The Citizen therefore had to prove its claim that Mr McBride was without contrition. But, far from proving as a fact that Mr McBride was not contrite, the Citizen called no evidence to establish the assertion. It barely tried to cross-examine Mr McBride to draw into question his evidence that he was contrite.

[116] Alternatively, if the Citizen's pronouncement on Mr McBride's contrition was a comment, then the facts pertinent to it had to be stated, or be notorious. Yet the facts supporting Mr McBride's evidence that he did show contrition were nowhere stated in the articles claiming that he was not contrite, nor were they notorious. In his amnesty application in April 1997, he placed this on record:

> "For the injuries, deaths, sadness and loss that I have caused people through my participation in the struggle to liberate our country I am truly sorry. I hope that through this amnesty application I am able to, in some way, contribute towards the very long and painful process of reconciliation and healing."

He added:

> "All the operations detailed above were carried out in accordance with the aims and objectives of the African National Congress. As a member of Umkhonto we Sizwe my objective was the furtherance of the armed struggle against the Apartheid state with the intention of overthrowing this state and replacing it with a democratic one. All my actions were geared towards the undermining and weakening of this state so that it would be forced into a peaceful negotiated settlement with the ANC and other liberation movements."

[117] At the trial, Mr McBride's attorney, Mr Brian Curren, testified that Mr McBride had told him that "he would forever live with the memory of that deed and the people that he killed" and that he realised he "could not expect the family [of the young women killed] to forget and to forgive and to welcome his release".

[118] Mr Curren expressed the view that Mr McBride was contrite in the early 1990s after then-President De Klerk initiated negotiations. In cross-examination Mr Curren conceded that he did not know whether Mr McBride had asked the families for forgiveness. But he pointed out that the Reconciliation Act did not make this a precondition for amnesty.

[119] Mr McBride testified that he tried to meet with family members of those injured, but when he did so someone had tried to assassinate him. He remarked: "Now I might be intent on reconciliation and might be contrite but I am not an idiot, I am not going to lie down and die because someone wants to take revenge against me." He asserted that he

had not felt obliged to take part in the reconciliation process because he had already been released from prison: he wanted to do so because he truly believed in reconciliation.

[120] He testified that at the TRC hearing he had affirmed that this is what he believed in "and that is what I still believe in." He recounted that, at the same hearing, which was held in public and televised, he expressed to the families of the people he injured "contrition and remorse for the pain and sorrow that I caused." He stated that "[a] cursory glance of my amnesty application will indicate my contrition and regret for the loss of life during the struggle against apartheid."

[121] This was not shaken in cross-examination. The Citizen's claim that Mr McBride lacked contrition was therefore unfounded and false. Alternatively, if the Citizen wished to express the view that Mr McBride was not contrite, it was obliged to inform its readers of the facts underlying its opinion, since they were not notoriously known. As the trial judge found, the information was available to the Citizen at the time it claimed Mr McBride lacked contrition. It made no reference to it. Its assertion was therefore a far-going and unwarranted untruth, which would have brought Mr McBride into great disrepute with the reasonable reader. In my view, an egregious defamation was so perpetrated, and the award of damages for it should reflect this.

[122] This concludes consideration of the Citizen's application for leave to appeal. Leave must be granted and the appeal only partially upheld. I deal with the question of damages after considering Mr McBride's application for leave to cross-appeal.

"Dubious flirtation with alleged gun dealers in Mozambique" – application for leave to cross-appeal

[123] The Citizen stated that Mr McBride had engaged in a "dubious flirtation with alleged gun dealers in Mozambique". It also said that in "1998 he was detained in a Mozambique jail on suspicion of gun-running", and that he was a "suspect in gun dealing". Mr McBride claimed that this meant that he had "made common cause, or attempted to make common cause" and "been involved in illegal activities" with gun dealers and with criminals in Mozambique. The trial judge upheld this claim, but the Supreme Court of Appeal found that Mr McBride had not established the defamatory meaning on which he based his complaint. It held that the Citizen's statements meant only that the flirtation with alleged gun dealers in Mozambique was suspicious and may have been criminal – but not that Mr McBride was indeed involved in criminal gun dealing.[129]

[124] Before us, Mr McBride sought leave to cross-appeal against this finding. He urged us to find that the defamatory meaning he pleaded was the correct reading. Counsel urged that the Citizen's claim that Mr McBride's interaction with the alleged gun dealers

[129] *The Citizen* above n 6 at para 18.

was suspicious meant, in context, that his conduct in Mozambique constituted a criminal offence. Counsel also urged that the distinction the Supreme Court of Appeal drew between suspicious activities and actual illegality was without substance.

[125] But it seems to me that the Supreme Court of Appeal was correct in the meaning it gave the statements. "Dubious flirtation" with "alleged" gun dealers can not mean making common cause with dealers. Nor can it mean involvement in illegal activities with criminals. And stating that Mr McBride was a "suspect" in gun dealing does not mean that he was actually involved in gun dealing.

[126] On the contrary: as the Supreme Court of Appeal found, it conveys only that he may have been involved with criminal gun dealers. The meaning of the statement is not that Mr McBride should be regarded as a criminal because of the Mozambique episode, as Mr McBride claimed, but only that, in addition to the fact that he committed murder, the episode clouded his candidacy for police chief.

[127] It is true, as counsel for Mr McBride pointed out, that Mr Williams was unable when challenged in cross-examination to provide any facts supporting the contention that Mr McBride may have been involved in suspicious conduct in Mozambique. In addition, Mr McBride's evidence that the Mozambique charges were unfounded was not effectively challenged in cross-examination. Furthermore, though it stated that "he was subsequently released and sent home," the Citizen failed to state that the charges were

withdrawn. It may be that it would have been fairer for the Citizen to do that. But to give significance to this would allow Mr McBride to unfairly redirect his attack. It would require the Citizen, on appeal, to defend itself against a claim Mr McBride did not make. Mr McBride's claim was not that calling his activities in Mozambique suspicious was defamatory, but that referring to his "dubious flirtation" with alleged gun dealers branded him a criminal. It did not. The meaning attributing actual criminality to Mr McBride was pleaded but not established. On the other hand, the meaning that calling his activities suspicious was itself defamatory, was not pleaded, and therefore did not need to be dealt with in the evidence. We do not know whether the Citizen would have been able to mount a defence in the face of an appropriate claim by Mr McBride.

[128] The Supreme Court of Appeal was therefore correct to uphold the Citizen's appeal against the High Court's award of damages for the gun-running statements. Since Mr McBride has not established that the articles bore the meaning he alleges defamed him, his application for leave to cross-appeal must be dismissed.

Relief

[129] Except for the false accusation that Mr McBride lacked contrition, the appeal must therefore succeed. The claim that he was not contrite was seriously and grievously defamatory. In my view, a substantial sum should be awarded in recompense for it. R50 000 would be appropriate.

[130] As mentioned earlier,[130] Mr McBride's particulars of claim included a prayer that the Citizen be ordered to print a front page apology. The High Court concluded that granting this order would serve no useful purpose. Mr McBride did not cross-appeal to either the Supreme Court of Appeal or to this Court against the denial of this element of his claim. The reason the High Court gave for denying the apology was that the journalists and the Citizen remained unrepentant in their attitude to Mr McBride. This led that Court to conclude that the amount of damages should be increased, but that no apology should be ordered. It is by no means clear that ordering an unrepentant media defendant to apologise to a defamed plaintiff serves no purpose.[131] For this reason, this Court on 7 March 2011 issued directions[132] inviting the parties to submit argument on whether it would be appropriate to order the Citizen to publish an apology. The parties and the amici accepted the invitation.

[131] The Citizen accepts that an apology may be a competent remedy but should be ordered against the media only if the parties first agree on its terms. Alluding to law reform initiatives in the United States and England, it suggests that to compel a media defendant to publish an apology would otherwise be inconsistent with the right to

[130] See paras [5] and [24] above.

[131] See the remarks of Sachs J in *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 105, 108-112 and 120.

[132] The directions of 7 March 2011 invited argument on the following question:

> "Should the Court find that any statement The Citizen published about Mr McBride was actionably defamatory, would it be appropriate, in view of the findings of the High Court and the nature of the submissions before the Supreme Court of Appeal and this Court, for the Court to order The Citizen to publish an apology?"

freedom of the media. Generally however it agrees that an apology could strike the right balance between freedom of expression and the right to dignity because freedom of expression may be unnecessarily stifled by orders awarding substantial damages.

[132] The FXI and the SANEF submit that ordering the Citizen to publish an apology would be appropriate. They reflect on *Le Roux and Others v Dey*.[133] There this Court found that ordering an apology was an appropriate measure of restorative justice in a case involving ruptured personal relationships, where the defendants actionably impaired the dignity of the plaintiff.[134] They contend that an apology is a more effective way of vindicating dignity rights than a damages award, that it would minimise the chilling of lawful freedom of expression, and that the remedy has already been employed by the Press Ombudsman and Press Appeals Panel against media defendants. These amici note that a variety of possible remedies for defamation exists, including a declaration of falsity, but submit that generally the best approach would be to order a voluntary apology, with damages only as an alternative.

[133] Mr McBride advances four reasons why an apology would be inappropriate. First, the High Court found that an apology "would serve no useful purpose." Mr McBride did not cross-appeal, and therefore apology and indeed quantum of damages were not argued before the Supreme Court of Appeal or this Court. Second, ordering media defendants to

[133] [2011] ZACC 4; Case No CCT 45/10, 8 March 2011, as yet unreported.

[134] Id at para 202.

apologise raises complicated questions that need careful consideration and full argument. Third, the current dispute is different from *Le Roux* because there is no personal relationship to restore. And finally, the Citizen has displayed no remorse and therefore any apology would be hollow.

[134] It may well be that the remedies readily to hand when a court considers the relief to which a plaintiff is entitled in a defamation case should include a suitable apology. The importance of apology in securing redress and in salving feelings cannot be under-estimated. As pointed out in *Le Roux*, apology is an important aspect of restorative justice.[135] In this case, it could well have been a fit part of the order to require the Citizen to publish an apology for its ill-fitting assertion that Mr McBride lacked contrition. However, Mr McBride's contention that an apology would be inappropriate weighs against ordering it. In addition, the complexities the Citizen points to when a court orders a media defendant to apologise, and the law reform initiatives in other countries, will benefit from fuller consideration and debate on a future occasion. It would therefore not be appropriate to order an apology in this case, and the question of an apology where a media defendant has defamed another must await another day.

Costs

[135] Since Mr McBride was justified in pursuing legal action to claim compensation for the false assertion that he lacked contrition, it follows that he should receive his costs of

[135] Id at para 197.

trial. Given the magnitude of the wrong, and his public prominence, he was justified in resorting to an action in a High Court, and should therefore receive his costs of suit in that Court. The Supreme Court of Appeal, in allowing the Citizen's appeal in part, but confirming the award of most of Mr McBride's damages, ordered the Citizen to pay three-quarters of Mr McBride's costs in that Court. But both in that Court, and in this Court, each side has achieved partial success. Mr McBride was obliged on appeal to defend the award of any amount of damages to him. In that he succeeded in both the Supreme Court of Appeal and in this Court. It seems to me fair to make no order as to costs in either appellate court. The difference between the amount awarded in this Court (R50 000) and in the Supreme Court of Appeal (R150 000) permits us to intervene to replace its costs award, and to substitute instead no order as to costs there.

Order

[136] In the result, the following order is made:

1. The Citizen's application for leave to appeal is granted.
2. The appeal succeeds to the extent that the order of the Supreme Court of Appeal is set aside and replaced with the following order:
    a. The plaintiff's claim is dismissed except in relation to the defendants' claim that the plaintiff was not contrite.
    b. The plaintiff is awarded damages of R50 000, with costs of trial.
3. Mr McBride's application for leave to cross-appeal is refused.
4. There is no order as to costs in this Court or the Supreme Court of Appeal.

Brand AJ, Froneman J, Nkabinde J and Yacoob J concur in the judgment of Cameron J

NGCOBO CJ:

Introduction

[137] This case concerns three statements that appeared in The Citizen newspaper (The Citizen) during September and October 2003, namely that: (a) the respondent (Mr McBride) is a murderer and a criminal; (b) he is not contrite and is proud of having killed civilians during the struggle against apartheid; and (c) he had dubious flirtations with alleged gun dealers in Mozambique. The question to be determined in relation to each of these statements is whether they are protected by the defence of fair comment. That is the defence to defamation asserted by The Citizen and the two journalists who made these statements. They claim that the statements were made in support of their view that Mr McBride was not fit to be appointed as the Ekurhuleni Metro Police Chief.

[138] Cameron J upholds the fair comment defence in relation to all but the statement that Mr McBride is not contrite. He holds that the statement that Mr McBride is not

contrite for planting a bomb that killed civilians during the struggle against apartheid is untrue, and, to the extent that it is a comment, that it is not supported by facts accurately stated. As the facts upon which a fair comment is based must be true, the defence in relation to this statement must fail. I agree. The statement was simply false. However, I am unable to agree with his conclusion in relation to the statement that Mr McBride had a dubious flirtation with alleged gun dealers in Mozambique. This statement is based on a half-truth and is therefore also untrue.

[139] I agree with Cameron J that the defence must be upheld in relation to the statement that Mr McBride is a multiple murderer and a criminal. However, my reasons for reaching that conclusion differ both in their approach and emphasis.

[140] This case raises two important questions: first, how to achieve the appropriate balance between freedom of expression and human dignity; and second, the effect of granting amnesty on the defence of fair comment, in particular whether Mr McBride can continue to be referred to as a criminal and a multiple murderer for having been convicted of planting a bomb that killed civilians, despite having been granted amnesty in respect of that act.

Freedom of expression

[141] The importance of the right to freedom of expression cannot be gainsaid.

Freedom of expression is an important instrument to a democratic government. It is especially important to our constitutional democracy, which is both representative and participatory.[1] As the Preamble of the Constitution makes plain, ours is "a democratic and open society in which government is based on the will of the people". Free expression of opinion, including critical opinion, is essential to the proper functioning of our constitutional democracy.[2] As this Court pointed out in *Khumalo and Others v Holomisa*, freedom of expression is "integral to a democratic society", and without it, "the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled."[3]

[142] The Constitution proclaims, as one of the foundational values of our Republic, the advancement of human rights and freedoms. This is to repudiate the previous legal order, which was characterised by censorship and the suppression of freedom of

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[1] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 135; 2006 (12) BCLR 1399 (CC) at 1447F-G.

[2] Section 16 of the Constitution guarantees the right to freedom of expression and provides:

> "(1) Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (1) does not extend to—
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[3] *Khumalo and Other v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 21.

expression. Indeed, a large majority of the population was denied the right to have a say in how they should be governed. In repudiating our past and providing for freedom of expression, our Constitution recognises what the United States Supreme Court described in the landmark case of *Whitney v California*, that:

> "[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of [our] government."[4] (Citation omitted.)

Human dignity

[143] But freedom of expression must be construed in light of the other values enshrined in our Constitution, in particular human dignity. The Constitution proclaims human dignity to be one of the foundational values of our constitutional democracy. Human dignity is specifically mentioned in section 1 of the Constitution in order to contradict our racist past.[5] For this reason, the Constitution holds human dignity up as not only a human right that is given constitutional recognition, as with freedom of expression, but also as a fundamental value upon which the legitimacy of the sovereign state is based. The Republic was "founded on" the value of human dignity, and failure to

[4] 274 US 357 (1927) at 375.

[5] Section 1(a) provides:

> "1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

Human dignity is also protected by section 10, which provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

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.

[144] We have recently emerged from a legal order that was founded on racism and characterised by gross discrimination against black people, in particular, black Africans.[6] It sought to dehumanise its victims and strip them of their human dignity by relegating them to an inferior status. As the lone dissenting voice observed in *Minister of Posts and Telegraphs v Rasool*:

> "Now this [apartheid-era] Legislation, it seems to me, creates one status for the [whites], another and inferior status for [Asians], and another and more inferior status for [Africans]. . . . To my mind this relegation . . . is humiliating treatment. . . . In view of the prevalent feeling as to colour, in view of the numerous statutes treating [blacks] as belonging to an inferior order of civilisation, any fresh classification on colour lines can, to my mind, be interpreted only as a fresh instance of relegation of [Asians] and [Africans] to a lower order, and this is I consider humiliating treatment. Such treatment is an impairment of the *dignitas* [dignity] of the person affected".[7]

[145] As this passage makes plain, what was obnoxious with discrimination was not merely the physical separation it promulgated, but its basic premise. It was premised on

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[6] See *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality, as amicus curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 61 (noting that apartheid-era law was informed by "notions of separation and exclusion of Africans" and comprised "part of a comprehensive exclusionary system of administration imposed on Africans" that was designed "to perfect a system of racial division and oppression"). As this Court noted in *Bhe* (at fn 2), we use the term "African" to describe members of the indigenous race in South Africa; its use should not be construed as conferring legal or constitutional validity for its exclusive use to describe one race group, nor is it intended to exclude persons of other race groups who are entitled to or describe themselves as "Africans".

[7] 1934 AD 167 at 189-91 (per Gardiner AJA, dissenting).

the inferiority of black people.[8] They had no dignity worth protecting. Thus, it was defamatory to call a white man black.[9] Our Constitution rejected this. Under our new constitutional order, the recognition and protection of human dignity is a foundational value.[10] As we pointed out in *Dawood*[11]:

> "The value of dignity in our Constitutional framework cannot . . . be doubted. 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. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels."[12] (Citation omitted.)

[146] In *Khumalo*, and in the context of the law of defamation, we considered the content of the value of human dignity and said:

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[8] This perception of inferiority was noted by Lord de Villiers CJ in *Moller v Keimoes School Committee and Another* 1911 AD 635, where he wrote (at 643):

> "As a matter of public history we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. We know also that, while slavery existed, the slaves were blacks and that their descendents, who form a large proportion of the coloured races of South Africa, were never admitted to social equality with the so-called whites."

[9] See *Pitout v Rosenstein* 1930 OPD 112 at 117 (holding that it was defamatory to call a white man a "Hottentot" – the derogatory slang term then used to refer to persons of Khoisan origin).

[10] See above n 5.

[11] *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[12] Id. See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) at para 31; and *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41.

> "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. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution."[13] (Citations omitted.)

[147] Thus human dignity is one of the defining features of our constitutional democracy. It underscores the proposition that in us inheres the inalienable right to be treated with dignity regardless of our position in society, and to have that right respected and protected. Indeed, it seeks to reverse the dehumanising effect of the apartheid legal order, which emphasised the inferiority of black people and the superiority of white people. And it has an important role to play in establishing the new society envisioned in the Constitution. It permeates every right. The demand for equality and freedom is a demand to be treated with dignity. It is indeed difficult to think of any right in the Bill of Rights which is not informed by human dignity.[14]

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[13] Above n 3 at para 27.

[14] In some instances, rights in the Bill of Rights make specific reference to human dignity. See for example section 35(2)(e) of the Constitution, which provides that "conditions of detention must be consistent with human dignity." See also *National Coalition* above n 12 at para 30 (emphasising that "the rights of equality and dignity are closely related, as are the rights of dignity and privacy"); and *Government of the Republic of South Africa and Others v*

The proper approach

[148] But our Constitution knows no hierarchy of rights.[15] As we pointed out in *Mamabolo*—

> "the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom."[16] (Citations omitted.)

Thus freedom of expression is just as important as human dignity—"it is not a pre-eminent freedom ranking above all others."[17] The same is true of human dignity and equality. What must be stressed are points that this Court has made previously, that "[w]ith us the right to freedom of expression cannot be said automatically to trump the right to human dignity" and "freedom of expression does not enjoy superior status in our law."[18] This is true not just of freedom of expression, but also of human dignity and equality.

Grootboom and Others [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 23, where this Court acknowledged the role of human dignity in the context of socio-economic rights:

> "Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter."

[15] See *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at paras 55 (per Langa CJ), 91 (per Moseneke DCJ) and 125 (per Mokgoro J). See also *S v Mamabolo (E TV and Others, intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41.

[16] *Mamabolo* above n 15 at para 41.

[17] Id.

[18] Id.

[149] The question is how to balance these rights, both in principle and as applied to a particular set of circumstances.

[150] The tension between these rights manifests itself in the context of a claim for defamation. The law of defamation is aimed at protecting the dignity of individuals. As this Court has recognised, in democratic societies "the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name."[19] When considering a claim based on defamation, the proper approach is to strive to achieve an appropriate balance between the protection of the right of freedom of expression, on the one hand, and the right to human dignity, on the other.

[151] The evolution of defences to a claim of defamation that has taken place under our common law has played an important role in this balancing of freedom of expression and human dignity.

[152] This has been recognised by our courts, as in *Argus Printing and Publishing*,[20] where this Court said:

> "I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The

[19] *Khumalo* above n 3 at para 26.

[20] *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) (*Argus Printing and Publishing*).

> law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory."[21]

[153] While the law of defamation therefore protects the legitimate interests that an individual has in his or her reputation and thereby furthers the value of human dignity, the defences to defamation are important in balancing the right of the claimant to human dignity and the right of the defendant to freedom of expression. We must therefore analyse these defences in the context of the constitutional commitment to freedom of expression and the value of human dignity.

[154] The defence that is in issue here is fair comment in the public interest. It is necessary first to set out, in broad outline, the requirements for a defence based on fair comment.

[21] Id at 25B-E.

The defence of fair comment

[155] It is now axiomatic that the defence of fair comment is part of our law and constitutes a defence to a claim of defamation.[22] As far as I can establish, in this country the essential elements of the defence of fair comment were first considered in *Crawford v Albu* and are set out as follows:

> "Inasmuch as it is the expression of opinion only which is safeguarded, it follows that the operation of the doctrine must be confined to comment; it cannot protect mere allegations of fact. It is possible, however, for criticism to express itself in the form of an assertion of fact deduced from other clearly indicated facts. In such cases it will still be regarded as comment for the purposes of this defence. The operation of the doctrine will not be ousted by the outward guise of the criticism. Then the superstructure of comment must rest upon a firm foundation, and it must be clearly distinguishable from that foundation. It must relate to a matter of public interest, and it must be based upon facts expressly stated or clearly indicated and admitted or proved to be true. There can be no fair comment upon facts which are not true. And those to whom the criticism is addressed must be able to see where fact ends and comment begins, so that they may be in a position to estimate for themselves the value of the criticism. If the two are so entangled that inference is not clearly distinguishable from fact, then those to whom the statement is published will regard it as founded upon unrevealed information in the possession of the publisher; and it will stand in the same position as any ordinary allegation of fact. Further, the comment, even if clearly expressed as such, and based upon true facts, must be 'fair' in the sense that it does not exceed certain limits."[23] (Citations omitted.)

[156] In *Crawford*, the Court also considered the requirement that the comment must be "fair". All the members of the Court accepted, after referring to English authorities, that

[22] See *Crawford v Albu* 1917 AD 102 at 114-5 and *Johnson v Beckett and Another* 1992 (1) SA 762 (A) at 778I-779B.

[23] *Crawford* above n 22 at 114-5.

an expression of comment is fair if it is relevant and is made honestly and without malice.[24] Innes CJ also accepted that the defence of fair comment will cover imputations of evil motive if the imputations are reasonable inferences from facts that are truly stated.[25] What the defence of fair comment ultimately requires is that the defendant must justify the facts, that is, establish that the facts are true. It is not necessary for the defendant to justify the comment, but he or she must satisfy the court that it is "fair".[26]

[157] The requirement that a comment must be fair is consistent with the values that underlie our constitutional democracy. It underscores the need to balance freedom of expression, on the one hand, and the need to protect human dignity, on the other. By insisting that a comment must be fair, the common law demands that comment be fair having regard to the right to human dignity. The comment must be relevant to the matter commented upon and it must not be actuated by malice. It underscores the proposition that freedom of expression does not enjoy a superior status to other rights enshrined in the Constitution. Indeed, it gives effect to the constitutional commitment this Court articulated in *Mamabolo*[27] to "three conjoined, reciprocal and covalent values" that are foundational to our Republic, namely, human dignity, equality and freedom.

[24] Id at 115 (per Innes CJ), 133 (per Solomon JA) and 137 (per De Villiers AJA).

[25] Id at 117.

[26] Id.

[27] *Mamabolo a*bove n 15 at para 41.

[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.

[159] To sum up, therefore, the essential elements for the defence that can be distilled from our case law are: (a) the statement must be one of comment and not of fact; (b) it must be fair, in that it must be relevant to the matter commented upon and it must not be actuated by malice; (c) the facts upon which it is based must be true; and (d) the comment must relate to a matter of public interest. Of course, the statement that is protected must be a statement that is defamatory upon its face.

[160] The statements complained of are no doubt criticisms of Mr McBride. In essence, the first statement is that Mr McBride is a murderer and a criminal; the second is that he lacks contrition; and the third is that he engaged "in dubious flirtations with alleged gun dealers in Mozambique." As Cameron J observes, The Citizen and the journalists rightly abandoned their denial that the statements published and complained of

were defamatory.[28] They are indeed. The question for determination is whether they fall within the bounds of fair comment in the public interest.

[161] The issue that was debated at length in the courts below, as well as in this Court, is the effect of granting amnesty to Mr McBride in respect of planting a bomb at a bar and a restaurant in Durban. The three aspects of this issue were: (a) whether Mr McBride could continue to be called a murderer and a criminal despite the fact that he was granted amnesty; (b) whether the fact that Mr McBride was granted amnesty should have been mentioned in the articles complained of; and (c) whether the fact that Mr McBride was granted amnesty was sufficiently disclosed in the articles complained of.

The relevance of amnesty to the defence of fair comment

[162] The majority of the Supreme Court of Appeal took the view that the granting of amnesty renders calling a person who has obtained amnesty for a political murder a "murderer", a false statement.[29] This view is based upon the legal effect of granting amnesty. In terms of section 20(10) of the Promotion of National Unity and Reconciliation Act[30] (Reconciliation Act), once amnesty has been granted, "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

[28] See [19] above.

[29] *The Citizen 1978 (Pty) Ltd and Others v McBride* 2010 (4) SA 148 (SCA) (*The Citizen*) at para 33.

[30] 34 of 1995.

Parliament or any other law, be deemed not to have taken place". But does this render calling a person, who has been granted amnesty, a "murderer" false? The answer to this question must be sought in the role of amnesty in our constitutional democracy.

[163] The importance of amnesty in our country cannot be gainsaid. Amnesty has a special place in our history. One of the greatest challenges that this nation faced on the eve of our constitutional democracy was the difficult and complex task of uniting a nation that was deeply divided by the strife, conflict, untold suffering and injustice of the past; to ensure the well-being of all South Africans; and to preserve peace. It was realised that the pursuit of these national goals would require "reconciliation between the people of South Africa and the reconstruction of society".[31] Amnesty was therefore adopted in order to advance reconciliation and nation building or reconstruction. This required full disclosure of the truth. But those who knew the truth had to come forward. To get their cooperation, they needed an incentive. Amnesty was an incentive for truth-telling. Perpetrators of gross violations of human rights committed with political motive would only get amnesty if they were willing to come forward and fully disclose their past deeds.

[164] These imperatives informed our transition from our divided past to the promise of a united and democratic future. It is captured in the epilogue which was added to the interim Constitution.[32] The epilogue declared:

[31] Preamble of the Reconciliation Act.

[32] Interim Constitution Act 200 of 1993.

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past."

[165] As this Court has explained in *AZAPO*,[33] the "historic bridge" between our past and the future referred to in the epilogue may very well have been imperilled by the absence of a mechanism providing for amnesty. In the words of Mohamed DP:

> "Even more crucially, but for a mechanism providing for amnesty, the 'historic bridge' itself might never have been erected. For a successfully negotiated transition, the terms

[33] *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC).

> of the transition required not only the agreement of those victimised by abuse but also those threatened by the transition to a 'democratic society based on freedom and equality'. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming and, if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation".[34] (Citations omitted.)

[166] To my mind, conduct that threatens nation building and national reconciliation is inimical to our constitutional democracy. It would indeed undermine our Constitution.[35] What is clear from the objectives of amnesty is that conduct in respect of which amnesty was granted may not be used to undermine nation building and national reconciliation. Equally clear is that the legal effect of granting amnesty is to expunge any entry or record of a conviction. This means that in the eyes of the law, the person who is granted amnesty no longer has a conviction entered or recorded against his or her name. The effect of this is that the fact of his or her 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.

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[34] Id at para 19C-D.

[35] Section 22(1) of Schedule 6 of the Constitution, which governs transitional arrangements provides:

> "Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading 'National Unity and Reconciliation' are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity."

[167] I am unable to discern anything in the objectives of the Reconciliation Act that prevents the expression of an opinion based on the conduct in respect of which amnesty was granted. In the course of oral argument in this Court, counsel for Mr McBride accepted, properly in my view, that a person can still be referred to as a murderer despite the granting of amnesty. Counsel submitted, however, that the word murderer may not be used as a statement of fact but may be used as an expression of comment provided that the facts upon which the comment is based are stated accurately. By accurately stating the facts, I understood him to mean stating, also, that the person was granted amnesty. Having regard to the special role of amnesty in our country, the need to disclose the fact that Mr McBride was granted amnesty cannot be gainsaid.

[168] This nation, as the epilogue to the interim Constitution makes plain, is founded on the need "to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge" and on the need to address the issues "on the basis that there is 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 foundation was crucial to the twin objectives of reconciliation and reconstruction to which we, as a nation, committed ourselves, and to which, one hopes, all of us remain committed. Those who came forward to relate to the nation the gross violations of human rights that they had committed, played a crucial role in the process of reconciliation and reconstruction envisaged by the interim Constitution.

[169] We are supposed to learn from our past so as to prevent gross human rights violations from ever occurring in the future. This flows from the proposition that one of the greatest values of history is that it teaches us to become wise after the event. Indeed, those who cannot remember the past are condemned to repeat it. The challenge we face as a nation is how to remember that past. Our constitutional commitment to freedom of expression permits a person to refer to past deeds despite the granting of amnesty. But our constitutional commitment to the value of human dignity does not "allow the unjustified savaging of an individual's reputation."[36] Reference to past deeds in respect of conduct for which amnesty has been granted must therefore be made within constitutional limits. I would emphasise constitutional limits because—

> "in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences . . . which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory."[37] (Citation omitted.)

[170] To refer to conduct in respect of which amnesty was granted in the context of comment on a matter of public interest does not, in itself, undermine national reconciliation and nation building. On the contrary, it constitutes an act of free expression and thereby reaffirms freedom of expression as a foundational value of our constitutional democracy.

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[36] *Argus Printing and Publishing* above n 20 at 25C.

[37] Id at 25C-E.

[171] Also indispensible 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.[38] 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.

[172] In the context of South Africa, where reconciliation and reconstruction play the pivotal role described above in our transition to a constitutional democracy and the maintenance of our new democratic dispensation, it is especially important, when past deeds for which a person has been granted amnesty are used as the basis for impugning

[38] See above n 35.

that person's suitability to hold public office, for the statement that invokes those past deeds to also mention the fact that amnesty was granted.

[173] It follows from what I have said that I am unable to agree with the proposition that the granting of amnesty obliterates past deeds as if they never occurred.[39] I did not understand Mr McBride to contend that it is unlawful to refer to what he did in the past. His complaint was that *The Citizen* was deliberately dishonest in failing to mention that he was granted amnesty. I agree that referring to what he did in the past without mentioning that he was granted amnesty would be a half-truth and thus untrue. The question is whether, having regard to the context in which the statements complained of appeared, it is clear that he was granted amnesty.

[174] The articles which formed the basis of Mr McBride's defamation claims are set out in the judgment of Cameron J. These articles, together, provide the context within which the statements complained of must be understood and evaluated. They will not be reproduced here except to the extent that they are relevant for purposes of this judgment.

The meaning pleaded

[175] Mr McBride pleaded that the contents of the first editorial were wrongful and defamatory in that they were intended to mean, and were understood by readers of The Citizen to mean, among other things: that he is a criminal and a murderer, despite having

[39] See [166] – [167] above.

been granted amnesty; that he has been involved in illegal activities with criminals in Mozambique; and that he is morally corrupt.

The defence raised

[176] As Cameron J points out, the newspaper and its journalists initially denied that the statements were defamatory of Mr McBride, but that defence was abandoned. They then pleaded the affirmative defence of fair comment, arguing that the statements made were not statements of fact but were comments concerning a matter of public interest, namely, the candidacy of Mr McBride for the post of Ekurhuleni Metro Police Chief and his unsuitability for that post. In response to a request for further particulars to their plea, they allege that their comments were based on the facts that: (a) Mr McBride was a murderer, as a result of him planting a car bomb outside Magoo's Bar in 1986, where several people were killed; and (b) he was detained in Mozambique on alleged arms trafficking between Mozambique and South Africa.

The articles

[177] The articles that are relevant in this regard are those that were published on 10 and 11 September 2003. The first article was written by Mr Kingdom Mabuza, and it was titled "McBride tipped to head Metro cops". It appeared in *The Citizen* of 10 September 2003 and reads as follows:

> "Robert McBride – former operative in the ANC's military wing, Umkhonto we Sizwe, who bombed a Durban bar in 1986, killing several people including three women – could be heading to the Ekurhuleni Metro as Chief of Police.
>
> *The Citizen* learnt from a reliable source inside the Metro that McBride`s name was mentioned as a possible replacement for Mongezi India, the former Metro police chief who resigned recently.
>
> . . . .
>
> McBride, as an MK operative, was attached to a Special Operations Unit. He served four years on death row after being convicted for the car bomb explosion at the Mangoos and Why Not bars near the Durban beachfront in 1986. [sic]
>
> He was widely condemned for the attack on what was widely perceived to be a 'soft' civilian target though McBride insisted that the pub was frequented by SADF military personnel from a nearby barracks. No soldiers were killed or injured in the massive explosion.
>
> Later McBride applied for and was granted amnesty for the attack by the Truth and Reconciliation Commission (TRC) due largely to the fact that the ANC claimed it had ordered McBride to attack the pubs, contrary to its initial denials that it was involved in the bombing.
>
> But as McBride was deemed to be acting on the orders of a political organisation he qualified for amnesty.
>
> Later he was arrested and charged with gun running in Mozambique.
>
> He claimed that he was in fact part of an undercover investigation into gun running out of Mozambique.
>
> He was subsequently released and sent home."

[178] Mr Mabuza makes five points that are relevant to this case. First, *The Citizen* had learned that Mr McBride's name was mentioned as a possible replacement for the former Ekurhuleni Metro Police Chief, who had recently resigned; second, Mr McBride, a former Umkhonto we Sizwe (MK) operative, served four years on death row after being convicted for the car bomb explosion at Magoo's Bar in 1986; third, he was "widely

condemned for the attack" which was "widely perceived to be a 'soft' civilian target"; fourth, Mr McBride applied for and was granted amnesty; and fifth, he was later arrested and charged with gun running in Mozambique. He was subsequently released and sent home.

[179] This article did not form the basis of Mr McBride's claim for defamation. The next two articles were published the following day, 11 September 2003. The first was titled "No comment on McBride" and was published by the South African Press Association. All it said about issues relevant to this case was that (a) Mr McBride "was sentenced to death during the apartheid era for his role in the bombing of a Durban beach-front bar"; (b) his sentence was later commuted; (c) the TRC also granted him amnesty; and (d) the Ekurhuleni Metropolitan Municipality was searching for a new Metro Police Chief. This article, too, did not form the basis of the defamation claim by Mr McBride.

[180] The second article of 11 September 2003 appeared at page 22 of *The Citizen* and it was an editorial titled "Here comes McBride". It read as follows:

> "Robert McBride's candidacy for the post of Ekurhuleni Metro Police Chief is indicative of the ANC's attitude to crime.
> They can't be serious.
> He is blatantly unsuited, unless his backers support the dubious philosophy: set a criminal to catch a criminal.

> Make no mistake, that's what he is. The cold-blooded multiple murders which he committed in the Magoo's Bar bombing put him firmly in that category.
> Never mind his dubious flirtation with alleged gun dealers in Mozambique.
> Those who recommended him should have their heads read.
> McBride is not qualified for the job.
> If he is appointed it will be a slap in the face for all those crime-battered folk on the East Rand who look to the government for protection."

[181] This article argues that Mr McBride, a candidate for the post of Ekurhuleni Metro Police Chief, is "blatantly unsuited" for the job. It gives, as a reason for its comment on Mr McBride's suitability, the fact that he is "a criminal". Two reasons are given for him being "firmly in that category": first, the "cold-blooded multiple murders which he committed in the Magoo's Bar bombing"; and second, "his dubious flirtation with alleged gun dealers in Mozambique." This article formed the basis of Mr McBride's first claim for defamation.

[182] It is common cause that Mr McBride was being considered for the position of Ekurhuleni Metro Police Chief. *The Citizen* and the journalists consistently made the statement that he was not suitable for this position, using statements that "he is blatantly unsuited" and "if he is appointed it will be a slap in the face for all those crime-battered folk on the East Rand who look to the government for protection." This theme is also emphasised by Mr Williams in his article, where he stated "[b]ut his track record as a multiple murderer and a suspect in gun dealing make him unsuitable as a metro police

chief in a country wracked by crime."[40] I will refer to it as "the first Williams article" as Cameron J does. And in the third editorial, dated 30 October 2003, *The Citizen* maintained that it performed a civic duty when it alerted its readers of the possibility that Mr McBride could be named as Ekurhuleni Metro Police Chief and maintained its view that "he was not the right person for the job." This is in line with the stance taken by the newspaper that Mr McBride was a criminal.

[183] I am satisfied that the statements that were made by The Citizen and the journalists constituted in substance what they were in form – a comment on the suitability of Mr McBride for appointment to the post of Ekurhuleni Metro Police Chief. That comment related to a matter of public interest. The next question, then, is whether the facts underlying the comment were truly stated.

Mr McBride is a "murderer"

[184] The statement that Mr McBride is a murderer may, depending on the context, be either a statement of fact or an expression of opinion. In this case, it was pleaded as a statement of fact. This is how the Supreme Court of Appeal treated it. And indeed, having regard to the context in which it occurred, it would have been understood by the readers as a statement of fact in support of the comment that Mr McBride was not suitable for the position of Ekurhuleni Metro Police Chief. The question is whether the granting of amnesty renders this statement false.

[40] The article is excerpted at [190] below.

[185] In my view, what would render the statement false is the omission of the fact that Mr McBride was granted amnesty. It is a fact that Mr McBride planted a bomb that killed civilians in the Why Not Restaurant and Magoo's Bar; that he was subsequently convicted of multiple murders as a result thereof; and that he was granted amnesty in relation to these deeds by the TRC. The omission of a reference to amnesty would render statements concerning the deeds, in respect of which Mr McBride was granted amnesty, a half-truth.

[186] Counsel for the newspaper and the journalists conceded, properly, in my view, that the omission of a fact may make an expression of comment untrue in relation to the stated fact. Thus the omission of the fact that Mr McBride applied for and was granted amnesty would have rendered the fact that he is a murderer, stated in relation to the comment that he is unsuitable for the position of Ekurhuleni Metro Police Chief, a half-truth and thus untrue. The question, therefore, is whether, in setting out the facts in support of the comment, the newspaper and the journalists omitted to mention the fact that Mr McBride was granted amnesty.

[187] The proper approach in determining whether the facts were accurately stated is to read the articles as a whole, in particular, the first article by Mr Mabuza which was published on 10 September 2003. This article stated that Mr McBride was: being considered for the position of Ekurhuleni Metro Police Chief; he was convicted for the

car bomb explosion in Durban; he served four years on death row; he was an MK operative at the time; and he subsequently applied for and was granted amnesty. There was no suggestion that this article did not accurately state the facts.

[188] The statement complained of appeared in the editorial of the following day, that is, 11 September 2003. It did not mention amnesty. However, an article of the same date repeated that Mr McBride was sentenced to death during the apartheid era for his bombing of a bar and that "[t]he Truth and Reconciliation Commission also granted him amnesty." The statements complained of which appeared in the first editorial must therefore be understood in the context of the articles of 10 and 11 September 2003, both of which refer to amnesty. A person who reads the editorial of 11 September 2003 would have known from the articles of the previous and the same day that Mr McBride was granted amnesty by the TRC in respect of the bombing.

[189] In my view, having regard to the proximity of all three articles, the fact that Mr McBride was granted amnesty was stated as part of the facts upon which the comment was based. In the result, I am satisfied that the statement that Mr McBride was a murderer was accurately stated.

Mr McBride is not contrite

[190] The next article appeared on 18 September 2003 and was titled "Beware ambush broadcasters operating under false pretences". Mr McBride also relied on this article for his claim, in particular, the underlined parts. The article read as follows:

> "If anyone wants my opinion about Robert McBride and forgiveness, here it is.
> Forgiveness is intensely personal. Each individual makes their own decision. If you don't forgive, you harm yourself. That's why to forgive is divine.
> I have no relationship with Robert McBride. It is not for me to forgive him. <u>But his track record as a multiple murderer and a suspect in gun dealing make him unsuitable as a metro police chief in a country wracked by crime</u>.
> <u>Forgiveness presupposes contrition</u>.
> <u>McBride still thinks he did a great thing as a 'soldier', blowing up a civilian bar</u>.
> <u>He's not contrite</u>. Neither are Winnie or Boesak. They are not asking for forgiveness.
> Boesak wants a pardon for something he says he didn't do. That defies logic.
> Those who want to forgive McBride don't have to push for him to get this sensitive job.
> The two issues are separate.
> In fact our comment was not about forgiveness but rather about suitability." (Emphasis added.)

[191] This article repeats the theme that Mr McBride is not suitable for the position of Ekurhuleni Metro Police Chief. It tells its readers that Mr McBride is unsuited because of (a) "his track record as a multiple murderer"; (b) he was "a suspect in gun dealing"; and (c) he is "not contrite." This article makes it clear that the statements made about Mr McBride are "not about forgiveness but rather about suitability" for the post of Ekurhuleni Metro Police Chief. This article was apparently written by Mr Williams to

explain why he had declined an invitation to join a radio debate on "forgiving people". This article formed the basis of Mr McBride's second claim based on defamation.

[192] I agree that the statement that Mr McBride is not contrite and "still thinks he did a great thing as a 'soldier', blowing up a civilian bar", has no basis in fact and is therefore untrue. One need only have regard to the amnesty application by Mr McBride as well as his evidence at the TRC hearings to demonstrate the untruth of the statement that Mr McBride is not contrite. For this reason, alone, the defence of fair comment must fail with respect to the statement that Mr McBride is not contrite.

[193] My colleague Mogoeng J has gone further and found that there was malice on the part of the newspaper and the journalists. The High Court also found that the statements in question were malicious.[41] In the light of its conclusion on the accuracy of the facts, the Supreme Court of Appeal did not reach the issue of malice.[42] The question of malice was argued in this Court, and the applicants contended, with reference to certain authorities,[43] that so long as the opinion expressed is genuinely or honestly held there can be no malice. In *Naylor*, it was held that when a statement is made with knowledge of its

[41] *McBride v The Citizen 1978 (Pty) Ltd and Others*, Case No 03/15780, Witwatersrand Local Division, 6 February 2008, unreported.

[42] See *The Citizen* above n 29.

[43] *Yazbek v Seymour* 2000 (2) SA 569 (E); *Vincent v Long* 1988 (3) SA 45 (C); and *Naylor and Another v Jansen*; *Jansen v Naylor and Others* 2006 (3) SA 546 (SCA).

untruthfulness, in the absence of any indication to the contrary, the inference would arise that the statement was actuated by malice.[44]

[194] There is nothing on the record, in this case, which indicates that the journalist who made the statement in question, Mr Williams, knew that the statement he was making was false. His evidence on this issue does also not shed light on the question of whether or not he had knowledge of the falsity of his statement. On the contrary, it suggests that he made the statement as a matter of comment rather than as a matter of fact. In his testimony, Mr Williams said that while he acknowledged what Mr McBride said in his amnesty application, Mr McBride, in his view and in his experience, does not actually feel contrite. The statement that Mr McBride is not contrite appears from Mr Williams' evidence to have been a statement made not as a matter of fact, but as a matter of comment, with respect to which the facts giving rise to the comment were never, in the article in question, disclosed.

[195] In the light of this, it appears that Mr Williams did not consider it necessary to further investigate what Mr McBride said in his amnesty application because he simply did not believe what Mr McBride said. In other words, Mr Williams did not concern himself with checking the statements he made relating to Mr McBride's contrition against the public record or provide any facts at all upon which his statement regarding contrition was based. This, taken together with the language and tone in the articles, which, in

[44] *Naylor* above n 43 at para 11 (analysing malice in the context of qualified privilege).

some instances, amounted to a personal attack that appears to have been designed to stigmatise Mr McBride for actions taken in the struggle against apartheid for which he has since received amnesty, comes very close to justifying an inference of malice.[45]

[196] Just as this Court has recognised the importance of freedom of expression in a democratic society,[46] it has also recognised the special role that the media plays, and the obligations incumbent upon it, in facilitating the exchange of ideas that is at the core of this freedom. It is fitting, in this case, to remind *The Citizen* and its journalists of the cautionary note that this Court gave to the media in *Khumalo*:

> "They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and *they have a constitutional duty to act with vigour, courage, integrity and responsibility*. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. *If they vacillate in the performance of their duties, the constitutional goals will be imperilled*."[47] (Emphasis added.)

[197] Nevertheless, I am unable to infer from this that Mr Williams must have known the untruthfulness of his statement and that it was therefore actuated by malice. Nor can I

[45] See *Vincent* above n 43 at 50-1 (holding that malice may be inferred, in the context of qualified privilege, where the defendant acted with a reckless disregard for the truth).

[46] See [141] above.

[47] Above n 3 at para 24.

conclude, on the record, that there is any other evidence of malice. One should be careful in a case like this to not readily draw an inference of malice from facts which are incorrectly stated or stated in an exaggerated or vitriolic manner.[48] All of these statements were made in the context of lending support to the view that Mr McBride was not suited for the post of Ekurhuleni Metro Police Chief. Indeed, that is what the first editorial said and what the last editorial emphasised. In the light of this, I am unable to find that there was malice.

[198] Whether stated as a fact upon which the comment as to Mr McBride's suitability for the post of Ekurhuleni Metro Police Chief was, in part, based, or whether stated as a comment with respect to which the facts grounding the comment were never stated, the defence of fair comment, with respect to the statement that Mr McBride is not contrite, must fail.

Mr McBride's "dubious flirtation with alleged gun dealers"

[199] Before analysing whether it is protected as fair comment, it is first necessary to establish the meaning of this statement. The context in which it occurs indicates the meaning that the author wanted to convey to the ordinary reader of *The Citizen*. The author expresses an opinion that Mr McBride is "blatantly unsuited" for the position of Ekurhuleni Metro Police Chief. He can only be suited in the minds of those who believe in the "dubious philosophy: set a criminal to catch a criminal. Make no mistake that's

[48] See *Vincent* abovc n 43 at 50.

what he is." And there are two reasons why he is a criminal: first, he committed cold blooded multiple murders in Magoo's Bar; and second, he has a morally suspect background with alleged gun dealers.

[200] A reasonable reader would have understood that he was involved with gun dealers in Mozambique and was thus involved in some criminal activity. This statement must be understood in the context in which it occurs. This statement occurs in the first editorial. This editorial accused Mr McBride of being a criminal – "set a criminal to catch a criminal". "Make no mistake", the article asserts, "that's what he is". And in support of the assertion that Mr McBride is a criminal, the editorial advances two factual allegations. The first, dealt with above, is that the murders he committed as a freedom fighter place him in the category of "criminal". The second is that he engaged in a "dubious flirtation with alleged gun dealers in Mozambique."

[201] In my view, and given this context, it is difficult to understand the "dubious flirtation" statement as suggesting anything other than that Mr McBride is a criminal, who is involved with criminals, who are involved in gun running in Mozambique. That is how a reasonable reader would understand the statement.

[202] The question is whether the facts relating to Mr McBride's arrest, detention and release were accurately stated. The article of 10 September 2003 stated that Mr McBride was arrested and charged with gun running in Mozambique. It also stated that he was

part of an undercover investigation into gun running in Mozambique and that "[h]e was subsequently released and sent home." The article of 22 September 2003 asserted that "[n]either his arrest nor subsequent release were fully explained." The articles left the reader with the impression that Mr McBride had a dubious flirtation with alleged gun dealers in Mozambique and his arrest and release had not been fully explained.

[203] It was common cause between the parties, however, that Mr McBride was released and that his lawyer held a public press conference at OR Tambo International Airport, which was covered by the *Mail & Guardian*, at which he explained that the Supreme Court of Mozambique quashed the charges. None of the articles that appeared in *The Citizen* mentioned these facts, in particular, the explanation that the charges were quashed by the Supreme Court of Mozambique. Reference to the quashing of the charges was vital information as it would have enabled the reader to understand why Mr McBride was released. The omission of this information, in my view, resulted in the facts relating to the arrest and release of Mr McBride in Mozambique to be a half-truth. The facts relating to Mozambique were therefore not accurately stated. The cross-appeal must accordingly succeed.

[204] For these reasons, I would uphold the appeal in relation to the claim for defamation based on the statement that Mr McBride is a multiple murderer and criminal, but dismiss it in relation to the other claims. I would also uphold the cross-appeal.

[205] In assessing damages, I would have regard to the fact that, in relation to both the statement that Mr McBride was not contrite and the statement that he had a "dubious flirtation with gun dealers" in Mozambique, the newspaper and the journalists had every opportunity both to verify the facts and to state them accurately but they nevertheless failed to do so. For this reason, I would award Mr McBride damages in the amount of R 75 000.

[206] In relation to costs, Mr McBride's success is substantial and, in the circumstances, he is entitled to costs, which must include those consequent upon the employment of three counsel. In this case, the applicants were also represented by four counsel including two senior counsel. Mr McBride was therefore entitled to be represented by three counsel.

Khampepe J concurs in the judgment of Ngcobo CJ.

MOGOENG J:

Introduction

[207] I have had the benefit of reading the judgments of my Colleagues Ngcobo CJ and Cameron J. I agree with their judgments in so far as they conclude that the Citizen is liable for the false assertion that Mr McBride showed no contrition for the offences he was convicted of and subsequently granted amnesty and with Ngcobo CJ's findings in relation to Mr McBride's so-called "dubious flirtation with alleged gun dealers in Mozambique." I, however, part ways with Ngcobo CJ and Cameron J with regard to their conclusion that statements that Mr McBride is a murderer and a criminal are protected by fair comment and are not malicious. In my view these statements are part of a well-orchestrated character assassination campaign waged by the Citizen against Mr McBride.

[208] Whether or not the Citizen should be held liable for the balance of the defamatory statements it made about Mr McBride must be determined within the context of, among others, the objective sought to be achieved through the amnesty process discussed below.

The purpose of amnesty

[209] Mahomed DP captured the need for the amnesty process identified by those involved in the negotiations that culminated in this country's democratic political dispensation in these terms:

> "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."[1]

Leaders across the political divide deeply appreciated the need for all South Africans to commit to reconciliation and national unity. To this end they sounded a clarion call to a firm and generous commitment, beginning with the amnesty process.[2]

[210] Amnesty owes its origin to the epilogue to the interim Constitution.[3] It follows from the epilogue that our political leaders committed the nation to the pursuit of a future

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[1] *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) (*AZAPO*) at para 2.

[2] Addressing this issue in respect of a related but somewhat different process, Ngcobo CJ said, in *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) (*Albutt*) at paras 53-4:

> "The objectives that the special dispensation sought to achieve were national unity and national reconciliation. These objectives were to be achieved through the application of the 'principles and values which underpin the Constitution', including the 'principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process'. But what are the principles, criteria and spirit that inspired and underpinned the amnesty process?
>
> These emerge from the fundamental philosophy of our negotiated transition to a new democratic order. It was recognised early on, during the negotiation process, that the task of building a new democratic society would be very difficult because of our history, and that this could not be achieved without a firm and generous commitment to reconciliation and national unity." (Footnote omitted.)

[3] Act 200 of 1993. The epilogue captures the vision of our Constitution, highlights the essence of the amnesty process, and specifies who would qualify for amnesty as follows:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

founded on peaceful co-existence, a 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."

[211] In order to take this painful and yet necessary national project forward the Promotion of National Unity and Reconciliation Act[4] (Reconciliation Act), alluded to in the epilogue, was enacted. It established the Truth and Reconciliation Commission whose primary purpose was "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past . . . ."[5] While it is true that the amnesty process was a vehicle through which the truth was uncovered and that this truth would, in many cases, otherwise never have been known,[6] truth-telling was but one of the key instruments through which objectives of a fundamental nature were to

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> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past . . . and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament . . . shall adopt a law . . . providing for the mechanisms . . . through which such amnesty shall be dealt with . . . ."

[4] 34 of 1995.

[5] Section 3(1) of the Reconciliation Act. See also *AZAPO* above n 1 at para 4.

[6] See *Albutt* above n 2 at para 56.

be achieved.[7] Apart from being one of the prerequisites for granting amnesty to political offenders, the truth was also meant to help the victims of gross human rights violations to know what happened to their loved ones and to set them on a path towards healing. Additionally, it was intended to lay a firm foundation for the challenging process of national unity, reconciliation and reconstruction.[8]

[212] In line with these observations, Mahomed DP saw the objective of amnesty as being to ensure that the country—

> "begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue."[9]

A mature understanding, a commitment to reconciliation and an ever-abiding national consciousness of the collective responsibility to extinguish the raging flames of racial hatred are all necessary to create a climate for the actualisation of the healing which is in turn critical for the attainment of lasting peace, prosperity and stability of this nation.

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[7] See *AZAPO* above n 1 at para 17 and *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) (*Du Toit*), where this Court held at para 20:

> "The amnesty process was an important mechanism that allowed those who otherwise would have had to deal with their convictions or secret guilt to come clean and be allowed to start their lives anew. The process was a necessary tool in a larger scheme of things."

[8] See *Albutt* above n 2 at para 59:

> "The participation of victims is not only crucial to establishing the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation. In this regard, the TRC makes the following comment in its report: 'In some cases . . . the Commission assisted in laying the foundation for reconciliation. Although truth does not necessarily lead to healing, it is often a first step towards reconciliation.'" (Footnote omitted.)

[9] *AZAPO* above n 1 at para 17.

[213] What the epilogue seeks to achieve through amnesty is the facilitation of "reconciliation and reconstruction" by the creation of mechanisms and procedures which make it possible for the truth about our past to be uncovered.[10] Amnesty was dependent upon truth-telling fundamentally for the purpose of making healing possible and for the advancement of a core national imperative of unity, reconciliation and reconstruction.

[214] *Du Toit*[11] highlights the crucial role that the truth told during the amnesty process was intended to play in creating the desired future.[12] The mere telling of truth did not amount to national reconciliation and reconstruction.[13] Truth-telling merely supplied some of the material necessary to put an end to the strife and hatred that characterised race relations in South Africa for centuries. The primary objective of the Reconciliation Act was thus to use the amnesty process "as a stepping stone to reconciliation for the future."[14] The perpetrators are given—

[10] Id at para 36.

[11] Above n 7.

[12] Section 20(10) of the Reconciliation Act, which expunges the offender's criminal record upon the granting of amnesty, was not enacted to provide people convicted of gross human rights violations with a remedy. Just as the termination of Mr Du Toit's employment, by reason of his conviction, could not be undone by the subsequent granting of amnesty, Mr McBride could not, for example, sue the state for malicious prosecution and unlawful detention on the basis that he has since been granted amnesty.

This is so because at the time when Mr Du Toit's employment was terminated and Mr McBride was incarcerated and prosecuted, these were the permissible and legal consequences of their actions. The subsequent granting of amnesty could not nullify the previous lawful consequences of their illegal activities. I hold the view that it is inimical to nation-building, reconciliation and reconstruction to label human rights violators across the political divide who were granted amnesty.

[13] See *Albutt* above n 2 at para 59.

[14] *Du Toit* above n 7 at para 55. See also *Albutt* above n 2 at para 59.

> "freedom to go forth and contribute to society. Amnesty may forgive the past, but in South Africa it is intended to have the inherently prospective effect of national reconciliation and nation-building, for the past can never be undone. Only the future may be forged as desired."[15]

[215] Truth-telling during the amnesty process was thus not intended to lay the foundation for the endless vilification of South Africans who grossly violated human rights, either in the furtherance of the crime of apartheid or the struggle for freedom from apartheid, in the name of freedom of expression. Nor was the truth, uncovered during the amnesty hearings or even during the trials of those who committed gross human rights violations, intended to be used to undermine the pursuit of national unity and reconciliation.[16] On the contrary, 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.

[216] Bridge-building, national unity and reconciliation are essential to the destination to which all South Africans should forge if the glorious future mapped out in our Constitution and the epilogue to the interim Constitution were to become a reality. Added to this is the special recognition given in the epilogue to the important role that ubuntu or *botho* could play in healing the wounds we have inflicted on each other.

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[15] *Du Toit* above n 7 at para 56.

[16] See *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) (*Islamic Unity*) at paras 29-30.

[217] We live in an African country which is rapidly being denuded of the values and moral standards which once characterised and defined the very nature of who a substantial majority of its citizens were and what they stood for. *Botho* or ubuntu is the embodiment of a set of values and moral principles which informed the peaceful co-existence of the African people in this country who espoused ubuntu based on, among other things, mutual respect.[17] Language was used in moderation and foul language was frowned upon by the overwhelming majority. A forgiving and generous spirit, the readiness to embrace and apply restorative justice, as well as a courteous interaction with others, were instilled even in the young ones in the ordinary course of daily discourse. The unforgiving, the arrogant and the unduly abusive were described by the Batswana, and presumably other African communities, as those who are bereft of *botho*.

[218] Ubuntu gives expression to, among others, a biblical injunction that one should do unto others as he or she would have them do unto him or her.[18] The law, order, generosity, peace and common decency that previously characterised many communities in South Africa were attributed to an unwavering commitment to the philosophy of

[17] In *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), Mokgoro J defined ubuntu at para 308 as follows:

> "Generally, ubuntu translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality."

[18] Matthew 7:12 (New International Version).

ubuntu. No wonder the drafters of our interim Constitution deemed it meet to cite ubuntu as one of the ingredients essential to the healing of our country. Sadly, a new culture has taken root and continues to cancerously eat at *botho*.

[219] Bearing this in mind, it appears that the truth told during the amnesty process was not meant to be used in a manner that undermines the fundamental objective of amnesty, which is national reconciliation and reconstruction. That truth was rather intended to be the launching pad for that objective.[19]

[220] People are free to express themselves on the gross violation of the rights of their loved ones without being unduly restrained, provided they do so within constitutionally acceptable bounds.[20] What is impermissible is the use of truth revealed to insult, demonise and run down the dignity of self-confessed human rights violators. This could never have been the purpose of the Reconciliation Act read with the epilogue. For it is inimical to truth-telling for the purpose of advancing national unity, reconciliation and reconstruction to be publicly labelling as criminals and murderers, those who committed human rights violations some 17 years prior to the labelling and who were subsequently granted amnesty. It ought to make no difference that amnesty had just been granted and was somewhat topical when the labelling took place. The age of the violation, the

[19] See generally *AZAPO* above n 1 at para 36.

[20] In relation to amnesty matters, the constitutionally acceptable bounds would be the right to dignity (section 10 of the Constitution), the pursuit of national unity and reconciliation (See *Islamic Unity* above n 16) and section 16(2) of the Constitution.

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, should make all the difference.

[221] None of this, however, precludes anybody from freely accessing information relevant to perpetrators' convictions and expressing themselves freely within permissible constitutional bounds. To suggest otherwise would be to deny South Africans the exercise and enjoyment of their right to freedom of expression.

[222] This notwithstanding, the right to human dignity must always be allowed to assume its rightful place even when the right to freedom of expression enters the equation. Sufficient room and flexibility has in any event always been allowed to accommodate truthful yet defamatory remarks made in the heat of the moment,[21] in jest[22] and even in circumstances where a somewhat strong language is essential for the effective communication of the message.[23]

[223] The truth does not however draw its force from insults or a highly inflammatory language. For indeed, 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

[21] See *Bester v Calitz* 1982 (3) SA 864 (O) at 881E-G.

[22] See *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA) at paras 9-10; *Peck v Katz* 1957 (2) SA 567 (T) at 572H-573A; *Glass v Perl* 1928 TPD 264 at 267; and *Masch v Leask* 1916 TPD 114 at 116.

[23] See *Pienaar and Another v. Argus Printing and Publishing Co. Ltd.* 1956 (4) SA 310 (W) at 318C-D; *Young v. Kemsley and Others* 1940 AD 258 at 278; and *Rubel v Katzenellenbogen* 1915 CPD 627 at 635.

others. Bearing this in mind, discussions about amnesty ought to take place with due sensitivity to the national project that was triggered by the amnesty process. This leads me to the analysis of the defamatory statements.

The defamatory statements

[224] The Citizen contends that the articles it published contained comments on a matter of public interest and that the comments are not malicious, but fair. Malice is sought to be discounted on the further basis that the Citizen was merely expressing an honestly held opinion based on the truth.[24] Whether the Citizen merely sought to, and did, exercise its right to freedom of expression within constitutionally permissible bounds or abused this right, falls to be determined with reference to a series of articles it published.

[225] The first article was written by Mr Mabuza and the second by the South African Press Association. They were both factual and balanced. Subsequent articles were written by Mr Williams and Mr Kenny whilst the editorials were written by Mr Williams. The nature of the comments and the language employed bear highlighting.

[24] It is trite that the defence of fair comment is negated by malicious comments. See *Johnson v Beckett and Another* 1992 (1) SA 762 (A) at 783B; *Marais v Richard en ´n Ander* 1981 (1) SA 1157 (A) at 1167E and 1170B-C; *Moolman v. Cull* 1939 AD 213 at 224; *Waring v. Mervis and Others.* 1969 (4) SA 542 (W) at 545H; *Brill v. Madeley.* 1937 TPD 106 at 111; and *Coetzee v Union Periodicals Limited and Others* 1931 WLD 37 at 43-4.

[226] The first editorial stated that Mr McBride's candidacy "is indicative of the ANC's attitude to crime." Mr McBride is said to be blatantly unsuited for the post that he was rumoured to be earmarked for, unless his backers believe in setting "a criminal to catch a criminal." It went on to say:

> "Make no mistake, that's what he is. The cold-blooded multiple murders which he committed . . . put him firmly in that category. Never mind his dubious flirtation with alleged gun dealers in Mozambique. Those who recommended him should have their heads read."

To the Citizen, Mr McBride is as dangerous a criminal as he was 17 years before the articles were published. His cold-bloodedness has not abated. If anything, it is reinforced by his dubious flirtation with alleged gun dealers in Mozambique. Any support for his appointment to the position of Metro Police Chief would be so outrageous as to suggest possible mental instability.

[227] An allegation is then made that he is an unrepentant criminal who thinks he is a hero for blowing up a civilian bar. In order to underscore these assertions, the publication likens Mr McBride to Dr Allan Boesak and Ms Winnie Madikizela-Mandela, who reportedly did not ask for forgiveness in respect of the offences of which they were convicted.

[228] The next article reiterates Mr McBride's killing of three women, that he was a suspect in a gun running case some five years prior to the publication, and that his arrest and release were never fully explained.

[229] President Mbeki then expressed the view that it would be fundamentally wrong to deny Mr McBride the possibility to be appointed to any position simply because of what he did during the struggle for liberation, for which he apologised and was granted amnesty. The President also noted that the amnesty process was meant to set the nation on a path to national reconciliation. In his opinion the Citizen appeared to be urging the country to reopen the wounds of the past that were healing.[25] These remarks triggered amongst others a spirited editorial from the Citizen in which it poured scorn on the President's views.

[230] The next article addressed Mr McBride's alleged unsuitability for appointment as a Metro Police Chief, likening him to Mr Barend Strydom and Mr Clive Derby-Lewis. The three of them were dubbed the "most notorious non-governmental killers of the late apartheid period" and each was labelled a "wicked coward who obstructed the road to democracy." What Mr McBride did was described as an "act of human scum." The vitriolic nature of the attack is laid bare by the following comment:

[25] Mbeki "We will not abandon reconciliation" *ANC Today* Vol. 3 No. 41 (17 October 2003), http://www.anc.org.za/docs/anctoday/2003/at41.htm, accessed on 25 February 2011.

> "If the ANC regards Robert McBride as a hero of the struggle, it should erect a statue of him—perhaps standing majestically over the mangled remains of the women he slaughtered."

Although reference is made to the ANC, Mr McBride is also the target of attack and derision here. Another article, which described Mr McBride as "Bomber McBride", reinforces the conclusion that this was not just a series of articles intended to expose an ill-considered attempt to appoint a person to a position for which he is "blatantly unsuited". They are an outward manifestation of a well-orchestrated character assassination mission.

The effect of the false allegations

[231] The Citizen's statements about the kind of person they believed Mr McBride to be and his alleged unsuitability for appointment, published in a series of articles and editorials, must be read and understood as one message and not be dealt with as individual statements independent of each other.[26] The comments are premised on the undisputed truth that Mr McBride killed three women and injured about 69 other people some 17 years before the publication of the articles.[27] This truth is planted in a thicket of assertions which are either untrue or half true and whose veracity could have been ascertained by any person who was interested in finding out the whole truth.

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[26] See *Tonsbergs Blad AS v Norway* (2008) 46 E.H.R.R. 40 at para 94; *Bergens Tidende and Others v Norway* (2001) 31 E.H.R.R. 16 at para 51; and *Bladet Tromso v Norway* (2000) 29 E.H.R.R. 125 at para 63.

[27] See *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo*) which held at fn 38:

> "However, it has long been recognised that past mistakes should not be raked up after a long period of time has elapsed. See *Graham v Ker* (1892) 9 SC 185."

[232] 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.[28] 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.

[233] Freedom of expression is a right to be exercised with due deference to, among others, the pursuit of national unity and reconciliation.[29] It cannot be the ground for

[28] Even if Mr Williams was desk-bound and had no authority to send a journalist to the press conference as he says, nothing forbade him from getting that information after the press conference especially prior to the publication, if he was interested.

[29] See *Islamic Unity* above n 1616, where it held at paras 29-30:

> "The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of 'human dignity, the

excusing the Citizen from liability that it made the defamatory statements in the course of exercising its right to freedom of expression, whereas it did so in a manner that infringes the dignity of Mr McBride and impairs the pursuit of national unity and reconciliation.[30]

Should the Citizen's appeal be upheld?

[234] The Citizen can only escape liability on the same basis it sought to defend itself all the way from the High Court through the Supreme Court of Appeal and to this Court. That basis is fair comment.

[235] Against this defence stands the collective impact of the false assertions in relation to contrition, allegations of gun running in Mozambique, raking up the past which serves

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> achievement of equality and the advancement of human rights and freedoms'. Thus, open and democratic societies permit reasonable proscription of activities and expressions that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.
>
> *There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation*. The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests. Thus in *Mamabolo* the following was said in the context of the hierarchical relationship between the rights to dignity and freedom of expression:
>
> > 'With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.'" (Emphasis added.) (Footnotes omitted.)

[30] Id.

no real public interest, the pursuit of national unity and reconciliation[31] and the vitriolic attacks launched by the Citizen against Mr McBride.

[236] When the Citizen asserted that Mr McBride is not contrite, it was, in my view, stating a fact and not merely making a comment. To support this false factual allegation it went on to cite Dr Boesak and Ms Madikizela-Mandela as other people who, like him, did not show contrition. Even if this contrition issue were a comment, it would still not escape a finding that it is malicious. For if all that Mr Williams wanted to achieve were purely to prevent the appointment of Mr McBride owing to the murders he had committed, he would have ensured that this serious comment about this lack of contrition is correct. Instead he went ahead and published the "comment" in reckless disregard for its potential falsehood. I infer from Mr Williams' evidence that he essentially shut his mind to the possibility that this serious comment, with far reaching implications on the life of Mr McBride, could be false. This gross recklessness by a media outlet[32] that ought to know its own responsibilities to the public and to those it chooses to write about, can

[31] Id.

[32] See section 4.3 of the South African Press Code on "Comment" which reads as follows: "Comment by the press shall be an honest expression of opinion, without malice or dishonest motives, and shall take fair account of all available facts which are material to the matter commented upon." See also *Khumalo* above n 27 which had this to say about the media at para 24:

> "They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled."

only be traceable to a blind and malicious desire to savage the dignity of its target with everything within its reach, including unchecked and false comments.

[237] Added to this are the allegations of Mr McBride's dubious flirtations with alleged gun dealers. The publications are marred by falsities that substantially water down the little truth that is left. More importantly, these statements coupled with the vitriol firmly establish the malice in the publications.

[238] The Citizen could have expressed itself freely on the possible appointment of Mr McBride without maligning him in the manner it did. The bitterness in the editorial comments and the articles betray the mission to undermine the intrinsic dignity of Mr McBride for a reason that runs deeper than the mere objection to his appointment. He is, according to the Citizen, a cold-blooded multiple murderer, human scum and a wicked coward who would probably feel highly honoured if a statue of him standing majestically over the mangled remains of the three women he killed, were to be erected.

[239] The campaign waged by the Citizen in a long chain of articles and editorial comments vilified Mr McBride and severely undermined his reputation and right to dignity. Along the way, the Citizen told untruths and used inflammatory and unduly abusive language. It did so claiming that it merely wanted to inform the public about the detrimental effect Mr McBride's appointment would have on the security of the

Ekurhuleni Metro, but the viciousness and brutality of the attack demonstrates the contrary. Joubert JA must have had this in mind when he said:

> "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."[33]

The Citizen's statements and comments were, in my view, calculated to expose Mr McBride to odium, ill will and disgrace and are malicious. The malice renders the comments wrongful.

[240] I would have granted damages on the basis that the Citizen was wrong in the respects set out in this judgment. This being a minority judgment, it is unnecessary to determine the amount of the damages.

Conclusion

[241] Black South Africans have been subjected to untold indignities for centuries. It is partly for this reason that the value of human dignity and the right of all to have their dignity respected and protected features so prominently in our Constitution.[34] This right

[33] *May v Udwin* 1981 (1) SA 1 (A) at 19A-B.

[34] See section 1 of the Constitution which reads:

is just as important as the right to freedom of expression and should not be relegated to near insignificance at the appearance of the right to freedom of expression.

[242] The right to free expression must be balanced against the individual's right to human dignity.[35] The recognition and protection of human dignity is a foundational constitutional value under our democratic order.[36] This was re-affirmed in these terms:

> "The value of dignity in our Constitutional framework cannot . . . be doubted. 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. Human dignity

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> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Further see section 10 of the Constitution which reads "Everyone has inherent dignity and the right to have their dignity respected and protected."

[35] *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41. See *Khumalo* above n 27 which held at para 25:

> "[A]lthough freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality." (Footnote omitted.)

See also *Independent Newspapers Holdings Ltd and Others v Suliman* 2005 (7) BCLR 641 (SCA), where the Supreme Court of Appeal held at para 44, in relation to public benefit or interest, that—

> "there is obviously a potential clash between constitutionally entrenched rights: the rights to dignity and privacy on the one hand and, on the other, the right of freedom of the press, of expression, and of receiving or imparting information. None of these rights should be regarded as permanently trumping the others in the sense that there is a preordained and never shifting order of priority to be assigned to each of them. The weight to be assigned to each of them in a given situation will vary according to the circumstances attending the situation."

[36] *Khumalo* above n 27 at para 26. See also the preamble to the Constitution.

> therefore informs constitutional adjudication and interpretation at a range of levels."[37] (Footnote omitted.)

[243] Indeed, human dignity must colour the spectacles through which we view defamatory publications, particularly those which are inextricably linked to our painful past. And so should our rich values, like ubuntu, which are consistent with the Constitution, our shameful history of institutionalised human rights violations, our commitment to make a decisive break with this past as well as our pursuit of the noble objectives of national unity and reconciliation also inform the interpretation and exercise of the rights to dignity, freedom of expression, privacy and property in this country. To this end, we ought to be slow to borrow from comparable jurisdictions which do not necessarily share the same history and experience with us.[38] This ought to be so because very few, if any, of these jurisdictions have made a firm and generous commitment to national unity and reconciliation. In cases of defamation that relate to the amnesty process sensitivity to this national project is called for. The law cannot simply be applied with little regard to the truth and reconciliation process and ubuntu.

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[37] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[38] See for example cases in the USA, such as *The New York Times Company v L. B. Sullivan. et al.* 376 U.S 254 (1964) at 279-80 and *Snyder v Phelps et al.* 562 U.S. - (2011) and other American authorities on freedom of expression in general, which leave very little of the right to human dignity. We should only borrow what we do not have. Our first port of call should be the interpretation and development of our Constitution and our law in general based on our unique history, experience and conditions such as those outlined in this paragraph.

[244] Our constitutional values and our unique and rich history, with all the challenges in which it is steeped, have so much more to offer in the development of our jurisprudence.[39] We need to tap into this treasure.

[245] To sum up I would therefore find for Mr McBride, dismiss the appeal and uphold the cross-appeal with costs.

[39] This is said mindful of the provisions of section 39 of the Constitution.

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