

The Citizen v McBride

2010 (4) SA 148 (SCA)

As a matter of fact: But whose fact?

1 Introduction

In the case involving *The Citizen* newspaper and Robert McBride, the SCA dismissed an appeal by *The Citizen* and others in their attempt to overturn the decision of the court *a quo*. The Witwatersrand Local Division of the High Court had ruled that articles and editorials published in *The Citizen* newspaper between 10 September 2003 and 20 October 2003 were defamatory of McBride.

The issue in this case was whether the fact that the plaintiff had been granted amnesty by the Truth and Reconciliation Commission (TRC) (in terms of section 20 of Promotion of National Unity and Reconciliation Act 34 of 1995 (the TRC Act)) rendered false any reference to him as a murderer. The majority judges of the SCA, per Streicher JA (Mthiyane and Ponnann JJA, each dissenting for different reasons), ruled that any such reference to the plaintiff who had been granted amnesty was false. As a result thereof the court rejected the defendants' defences for truth publication and for fair comment on the basis that the underlying fact upon which the opinion was based was not true. The majority was particularly at pains to regard the publication as a comment. Mthiyane JA largely disagreed with the view that the statements were portrayed as the truth as opposed to comments, and he granted the defence of fair comment. Ponnann JA, on the other hand, disagreed with both the majority conclusion and Mthiyane JA's conclusion, largely on the basis of the objectives of the TRC Act which sought to foster reconciliation and nation building.

This case note presents a critical evaluation of the conclusion reached by the majority on the main points and their bases for dismissing both defences. It partly takes issue with Mthiyane JA's acceptance of the fair comment defence. It is submitted that in respect of both defences the appeal should have failed, but for different reasons, instead of those advanced by the court. The truth defence should have failed on the basis that referring to the plaintiff who had been granted amnesty as a murderer was not in the public interest or public benefit (especially in view of the objectives of the TRC Act and the fact that the plaintiff was being prevented from taking office due to crimes for which he was indemnified). This certainly was not in the spirit of reconciliation. Of course this must be balanced against the need for the public to know the kind of person who was tipped for an onerous public office requiring integrity. The fair comment defence should have failed not on the basis that the facts on which the comment was based were rendered untrue by virtue of amnesty or that it was not a comment, but on the basis that the comment was not fair since the plaintiff had been granted amnesty in terms of a valid legal process.

2 The Facts

The facts of the case appear from the judgments of both the majority and Mthiyane JA. *The Citizen* had published a series of articles and editorials starting on 10 of September 2003. On this day, under the heading “McBride tipped to head Metro cops” (par 3), the newspaper published revelations that it had learned from its reliable sources that McBride was about to be appointed to replace the chief of police for the Ekurhuleni Metropolitan who had resigned. The revelations were published with a detailed background and history of McBride. These included his criminal conviction for placing a bomb in a bar in Durban, which killed “several people including three women”. It also mentioned his subsequent application for what turned out to be a successful amnesty from the TRC. It also mentioned how McBride was later arrested and “charged” with gun running in Mozambique and subsequently released and sent home.

This publication was followed by an editorial of 11 of September 2003 which questioned his candidacy and the African National Congress’ attitude towards crime. The editorial went so far as stating that McBride’s candidacy could be acceptable only if his backers supported “the dubious philosophy: set a criminal to catch a criminal”. The editorial branded McBride as a criminal for “the cold-blooded multiple murders” that resulted from his bombing of the Durban bar. According to the editorial, it was for this reason and for “his dubious flirtations with alleged gun dealers in Mozambique” that McBride should have been disqualified for the job of police chief. The debate of McBride’s candidacy was then joined by the then State President Mbeki who lashed out at those who criticised McBride’s pending appointment (par 10). In response to this criticism of McBride’s critics on 21 October 2003 *The Citizen* published an article by its columnist, one Andrew Kenny, which panned Mbeki for his criticism of *The Citizen*. In this article *The Citizen* referred to McBride as one of the “three most notorious non-government killers of the later apartheid period ... who obstructed the road to democracy.” In this article, *The Citizen* callously lashed out at McBride for his act of killing innocent victims in his bombing incident. It accused him of “strengthen[ing] the hand of die-hard supporters [of] apartheid” thereby “prolonging the wretched regime” by murdering innocent women.

3 Fact or Opinion?

The appellants, primarily, sought to rely on the defence of publication of truth. However, after analysing the whole effect of the TRC Act and its process, the majority in the Supreme Court of Appeal was of the opinion that this defence could not succeed. It reasoned that since McBride applied for, and was granted, amnesty, reference to him as a murderer was no longer true. The main question therefore is whether the appellants should have relied on the defence of truth publication or on that of fair comment.

The following facts are common cause: that McBride did bomb a Durban bar; that he applied for and was granted amnesty by the TRC;

that he was detained in Mozambique for alleged gun running; and that he was subsequently released by the Supreme Court of Mozambique as there was no evidence against him. All of this had become public knowledge. It is also common cause that the allegations about the impending appointment of McBride as the chief of police for Ekurhuleni were true, as he was subsequently appointed in that position. However, *The Citizen* was of the view that he was not a suitable candidate for the position and, through a series of articles and editorials, sought to illustrate why it held this view. Its bases were mainly the multiple murders he had committed and his detention in Mozambique (the challenge to the latter was abandoned by McBride). Therefore, it submitted that Mthiyane JA was correct to conclude that, to a reasonable reader of *The Citizen*, the series of the articles would have been regarded as a comment and not as publication of truth. Hence, the defence of fair comment should have been pursued by the appellants. Whether this should have succeeded or not is another question for consideration. However, before considering the merits of this defence of fair comment, it is imperative to first consider the defence of truth publication, which was considered and rejected by the majority judges.

4 Publication of Truth

It is submitted that when considering the defence of truth, the SCA erred when failing to consider it in conjunction with public benefit. It is trite law that it is not sufficient for the defendant to prove that the publication was the truth. In addition to being substantially true, such publication must also be for public benefit (Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 274). Widely interpreted, public benefit incorporates public interest (*Ibid*). In turn, according to Thirion J in *Buthlezi v SABC* 1997 12 BCLR 1733 (D), public interest should be understood to incorporate the concept of public concern (Burchell 275). As the author puts it, “some advantage must be conveyed to the public by the communication of the information” (Burchell 274). According to Hefer JA in *National Media Ltd v Bogoshi* 1998 4 SA 1195 (SCA), public interest refers to “the material in which the public has an interest, as distinct from the material which is interesting to the public” (Burchell 275). These two parts of the defence, that is, truth and public benefit, must not be regarded separately, but should be considered in relation to each other (Burchell 273). It is therefore submitted that the Supreme Court of Appeal erred in considering the truth in isolation from public benefit, which will be discussed in more detail later in this note. At this point it is worth considering the conclusion reached by the majority on the question of whether the statements published in *The Citizen* were false. This also requires a brief examination of the effect of the TRC process.

4 1 Truth

To suffice as a defence, only the material allegations of a statement must be true, rather than every minute detail (Burchell 272). This being the case, protection is even given to some erroneous defamatory statements,

depending on the circumstances of the publication (Burchell 272-73). The complexity of the issue *in casu* lies in the fact that McBride was granted amnesty by the TRC, in terms of a legal process. Thus, one must examine this element of the defence in relation to the effect of such amnesty granted by the TRC. The effect of the granting of amnesty is spelt out under sections 20(7)(a), (8) and (10) of TRC Act:

(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.

...

(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) [which requires gazetting the names and actions of persons granted amnesty] become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

...

(10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

The effect of amnesty spelt out in section 20 of the TRC Act was fully canvassed by both Streicher JA for the majority and by Mthiyane JA. It is submitted that section 20(7)(a) and section 20(8) must be understood with section 20(10) of the TRC Act. These sections should also be understood within the broader objectives of the TRC process which were reconciliation and nation building (addressed in more detail later). Properly interpreted, these subsections excuse anyone who has been granted amnesty from both criminal and civil liability. Put differently, no one who has been granted amnesty by the TRC committee will be held accountable for those acts for which amnesty was granted. While the amnesty granted to the respondent could not, according to Streicher JA (par 33), obliterate those facts or erase them from the historical record, it ensured that the respondent is no longer considered to be a criminal in respect of the deeds committed by him (par 33). It appears that Mthiyane

JA is in agreement with the majority that the granting of amnesty does not blot out historical record of what was committed (par 80). He differs from the majority judges on whether reference to a recipient of amnesty as a criminal is rendered false as a result of the amnesty. He is of the view that it does not render it false, whereas Streicher JA thinks it does (pars 80–81, 33). Contrary to the view of the majority, I agree with Mthiyane JA that amnesty does not render any reference to deeds for which one was amnesty granted, false. This will be misrepresenting the purpose of amnesty, namely, nation building and reconciliation, and not eradicating the facts of history.

Mthiyane JA is also of the opinion that such reference is not prohibited as a result of amnesty (par 80). However, Streicher JA seems to suggest that such reference is prohibited when he said “... the respondent is no longer considered to be a criminal in respect of deeds committed by him” (par 33). In view of the objectives of the TRC process and s20(7) of the TRC Act, I agree with Streicher JA’s view. A protracted reference to a recipient of amnesty as a criminal in respect of crimes for which he obtained amnesty renders him accountable, criminally or otherwise for such deeds, whereas in law he should not be. This would be contrary to section 20(10) of the TRC Act, which excuses recipients of amnesty from such liability. It also undermines efforts to achieve reconciliation and nation building through the integration of former political prisoners in the society. This view will be mainly relevant when I consider the second part of the truth and public interest defence, namely, public benefit.

The majority were incorrect to conclude that the statements were false as a result of amnesty granted to McBride by the TRC. It is a fact that McBride did place a bomb in a bar which killed and injured people. He was convicted for this deed. The bombing and the subsequent injuries and deaths are historical facts. Thus, notwithstanding amnesty granted to him in terms of a lawful TRC process, the published statements were substantially true.

4 2 Public Interest

The question that should also be asked is whether the public stood to derive some benefit from publishing McBride’s background and history. In this regard, the concept of “public benefit” should be given wider interpretation, such as “that which concerns the public” or “that in which public has an interest”. In this instance, McBride was tipped for a senior public office which requires extreme integrity. Thus, the public is interested in knowing the nature and character of any person who assumes such an important public office (as *The Citizen* correctly argued). However, in view of the circumstances of the case and the plaintiff, the matter does not end there. McBride had been a political prisoner and a recipient of amnesty who needed to be integrated in the society, in the name of reconciliation and nation building. Therefore, another important factor that must be considered in ascertaining

whether publication was made in the public interest is the objectives of the TRC Act and the TRC process.

This notion of public interest was widely canvassed by Ponnann JA in the present matter, although he did not specifically confine it within the bounds of any defence (paras 92–95). The Judge of Appeal was of the view that continued reference to McBride as a criminal and murderer was impermissible, as it goes against the purposes of reconciliation, nation building and a promise of integration into the public, of those who had been granted amnesty (paras 92–93). It is submitted that the reasoning of Ponnann JA is preferable as it goes to the central issue in the case. It is also in harmony with what was expressed by De Villiers CJ in *Graham v Ker* 1892 9 SC 185. The Chief Justice stated that ‘an incentive for reformation will be lost if past transgressions could be raked up with impunity’ (Burchell 275). However, Mthiyane JA expressed the view that reference to McBride as a murderer was not an unnecessary ‘raking of past ashes’, but that it was relevant to the post for which McBride was tipped (par 83). It is submitted that while such reference may have been relevant, it was not in the public interest to publish it in view of the objectives of the TRC process.

Moreover, in relation to McBride’s detention in Mozambique, regard should be had to the rule of law that requires that the public needs to respect the constitutional principle of presumption of innocence until one is proven guilty. The success of the defence of truth and public benefit depended upon the aspect of public interest, instead of the truth aspect. Therefore it is submitted that both the majority and minority made an error when they made the truth aspect of the statements a central issue in this case. While important, it does not hold the key in resolving the main issue that faced the court.

5 Fair Comment

The test for distinguishing a factual statement from comment or expression of opinion is correctly set out in the case of *Marais v Richard* 1981 1 SA 1157 (A). It is “how the ordinary reasonable reader would have understood [the statement to be]” (quoted in paras 40 and 67). According to Jansen JA in the *Marais* case, the answer depends largely on the content of the allegation, the context in which it is used and the circumstances known to the reader (par 40). The majority *in casu* were reluctant to entertain the defence of fair comment on *The Citizen’s* behalf, primarily as they were of the view that the publications purported to be truth as opposed to opinion (par 42). Nonetheless they gave *The Citizen* the benefit of the doubt and considered this defence (pars 43–44). They held that they would have dismissed the defence for lack of true basis and in the light of the amnesty granted to McBride (43–44). However, Mthiyane JA was of the opinion that the published article would have been understood by a reasonable reader to be an opinion (par 49).

The requisites for a successful defence for fair comment were laid down as early as 1917 in the case of *Crawford v Albu* 1917 AD 102 114,

namely: (i) The allegation in question must amount to a comment or opinion; (ii) it must be fair; (iii) the factual allegation on which the comment is made must be true; and (iv) the comment must be on a matter of public interest. These points were echoed by the court in the *Marais* case (1167F). These were also considered by Mthiyane JA (par [66]).

5 1 Comment or Opinion

Firstly, the imputation must be an expression of a comment or opinion, as opposed to an assertion of facts. In other words, one must be expressing a viewpoint as opposed to stating an assertion of facts, and one must be understood by a reasonable listener, or as in the present case, a reasonable reader of the newspaper, to be expressing an opinion. It is submitted that that Mthiyane JA was correct in his dissenting finding that, under the present circumstances, the articles and editorials amounted to an opinion (par [49]). Viewed as a whole, I submit that a reasonable reader of *The Citizen* would have regarded these statements as an expression of opinion, rather than an assertion of facts; and would have understood them to be an opinion about McBride's unsuitability for the post of chief of police for the reasons they expressed therein.

5 2 True Facts

A second requirement for a fair comment defence is that an opinion should be based on true facts. It is trite that the facts need not be absolutely true or true in all respects, but it is sufficient that the facts be substantially true (Burchell). The court spent a considerable amount of time (in respect of both the defence for truth publication and fair comment) probing whether the appellants' comment was based on true facts, in view of the fact that McBride successfully applied for amnesty. In fact, for the majority, the whole issue of the appellants' defence stood or fell on this one element. The majority held that the granting of amnesty had rendered the bases for *The Citizen's* comment false. As submitted earlier, this conclusion is incorrect, for the reasons already advanced above. This view would be contrary to the cause of the amnesty granted in terms of TRC Act, which was not to render deeds of the past obliterated. As already mentioned, it is common cause that the bombing, for which McBride was convicted and then given amnesty, did occur. Moreover, it is true that he was arrested in Mozambique on allegations of gun running between Mozambique and South Africa, but subsequently discharged by the Supreme Court of Mozambique. Therefore, the comment by the appellants was based on facts that are substantially true.

5 3 The Comment Must be Fair

The third requirement for fair comment defence is that the comment must be fair. It is submitted that while the element of truth is necessary for a successful defence of fair comment, the element of fairness of the statements made by the appellants held the key to the success of their entire defence. This requirement entails that the comment be an honest

or bona fide expression of an opinion; it must be relevant; and that it must not be motivated by malice or ulterior motives on the part of the defendant. The latter is a subjective criterion. It is submitted that the articles and editorials in question may have been motivated by ulterior motives or malice. It cannot be ruled out that Appellants' intention was to taint McBride's reputation thereby ensuring that he did not get the post of chief of police. They were aware that he had been granted amnesty for his actions in terms of a lawful process. Yet they relentlessly referred to him as a "criminal", "bomber McBride" or a "murderer". They went as far as casting a shadow of doubt on his credentials as a genuine freedom fighter. Judged by their tone, it is submitted that, at worst, the articles were intended to arouse hatred for McBride. Therefore it is humbly submitted that the opinion expressed by the appellants was not motivated by honesty. Thus, they do not pass the test for fairness.

Moreover, McBride is branded a criminal who is not suitable to head any decent police force. His legitimacy as a true freedom fighter is further questioned when he is equated with a notorious apartheid killer and accused of strengthening the hand of apartheid. Therefore, the comments made by the appellants reflect negatively on McBride's integrity. Hence a stricter test of fairness must be applied (Burchell 278). This requires invoking an additional requirement for fairness, namely, that the comment must also constitute a reasonable inference from the facts. *In casu*, McBride was granted amnesty by the TRC in terms of the TRC Act, which was intended to ensure full integration for political prisoners and to give them a new lease on life. The Act intended that persons granted amnesty should not be held accountable for crimes perpetuated in the name of the struggle (paras 73-74). However, the appellants on more than one occasion referred to McBride as a criminal or a murderer. Therefore it is submitted that in the circumstances, reference to McBride as a murderer or criminal, after he had been granted amnesty, is not a reasonable inference from the facts. Instead, it amounts to holding him accountable for actions for which he had been granted amnesty. Alternatively, it is submitted that if the effect of amnesty does not fall under the requirement for fairness of the comment, it must at least play an integral role under the fourth requirement for fair comment defence, namely, whether the appellants' comment was in the public interest.

Furthermore, reference to McBride's arrest in Mozambique is also questionable as far as the motivation for making such a reference is concerned. It imputes dishonorable motives to McBride, by implying that he contrives with criminals from the underworld or that he is corrupt. It is common cause that McBride was arrested in Mozambique, but he was subsequently acquitted by the Supreme Court of Mozambique because there was no evidence or substance to the allegations. It is submitted that this fact, as well as the constitutional principle of presumption of innocence until proven otherwise, render the appellants' comment unreasonable. Nevertheless, it is submitted that in view of the nature of

the position for which McBride was aspiring, he was wise to abandon this part of the claim.

5 4 Matter of Public Interest

Finally, a successful defence of fair comment requires that the defendant should have commented on a matter of public interest. In other words, the matter commented on must concern the public (Burchell 274-75). Matters of public interests include, *inter alia*, matters about the administration of justice, the conduct of public figures, political and state institutions, books, films, and works of art (Burchell 283). The appellants were commenting on a matter of public interest, as Mthiyane JA correctly held (par 83). Their comment related to a public figure who aspired to a senior public position. Thus this element is satisfied in respect of *The Citizen's* case. However, the comment *per se* was not in the public interest, as it was against the spirit of reconciliation and nation building engendered by the TRC Act.

Hence, it is submitted that, perhaps, this requirement should be given an extended meaning which also looks at whether the comment made is *in the public interest*, rather than simply requiring that one be commenting *on a matter of public interest*. In other words, it must be shown that the public stands to derive some benefit from comments in the same way as is the case in the defence of truth and public benefit.

6 Conclusion

In the final analysis, it is submitted that the majority judges erred by making their central focal point the truthfulness or falsity of referring to McBride as a criminal after his successful application for amnesty. Secondly, by finding that such reference was false, in view of his amnesty. This does not reflect a proper interpretation of section 20 of the TRC Act which indemnifies any one granted amnesty from criminal and civil liability. Hence, it was an error to conclude that the defence of fair comment had no basis as a result of the effect of obtaining amnesty from the TRC. The correct view is that the comment *does* have substance as the act of killing (for which amnesty was granted) was committed. However, the perpetrator is *no longer accountable* as a result of obtaining amnesty, as Mthiyane JA correctly held. It was also incorrect of the majority to conclude that the published articles and editorials were statements of truth, rather than opinion. They do indeed amount to comments. As Mthiyane JA correctly held, a right-thinking reader would have understood them as expressions of opinion (paras 49–50). Therefore Mthiyane was correct in accepting them as opinion, for the purposes of the defence for fair comment. It is also submitted that the majority erred in dismissing the defence for fair comment on the bases of lack of true facts, after concluding that granting of amnesty rendered the statements false. This was as a result of missing the real issue, which was either fairness of the publications or perhaps, whether the articles and editorials were made in the public interest. Moreover, it is submitted that Mthiyane JA, on the other hand, was correct in his finding that the

effect of the amnesty was not to render true events of the past false. However, it is submitted that he nevertheless erred in deciding the defence of fair comment mainly on that basis. Instead, the main focus should have been whether it was fair to refer to a person who had been lawfully granted amnesty as a murderer and a criminal. Alternatively, his focus should have been whether a continued reference to McBride as a murderer and criminal was in the public interest, as was Ponnann JA's argument, although he did not categorise it either under the fair comment defence or truth publication. It is submitted that Ponnann JA was correct in this approach. Lastly, while Mthiyane JA combines fair comment and freedom of expression, it submitted that the tone of the articles borders on hate speech which will not enjoy the protection of the Constitution (section 16(1)). Therefore, in the final analysis, the published comment on the suitability for McBride for the post of the chief of police for Ekurhuleni is neither fair nor in the public interest.

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Postscript

The Constitutional Court has since made its ruling on an appeal filed by *The Citizen* newspaper against the Supreme Court of Appeal's (SCA) judgment in this matter (Case CCT 23/10[2011] ZACC 11). In the judgment delivered on 8 April 2011, the Constitutional Court decided by majority of 5 to 3 (led by Cameron J) that the publications made by *The Citizen* that referred to McBride as a murderer, among other things, despite successfully applying for amnesty from the TRC, was protected by the defence of fair comment. The court found that finding for McBride in the matter would amount to muzzling the freedom of expression, and would inhibit the healing process for the victims of gross human rights violations. This overall finding is generally supported by Ngcobo CJ (with Khampepe J concurring). However, the Constitutional Court unanimously found for McBride in so far as *The Citizen* falsely asserted that McBride was not contrite for his action in bombing a bar, despite available evidence that he was remorseful. On the other hand, my view that a continued reference to McBride as a murderer and a criminal, despite obtaining amnesty, was vindicated by Mogoeng J. Mogoeng J (in a separate minority judgment) held that such a comment was not justified under the defence of fair comment as it goes contrary to the public interest as manifested in the main objective of the TRC, namely reconciliation and reconstruction – which is national unity and nation building. He, in fact, emphatically found that *The Citizen* went beyond the exercise of its right to freedom of expression, but was actuated by malice and hatred for McBride. Hence, he concluded, it was not protected by the defence of fair comment. I fully agree with Mogoeng J's sound and well-reasoned judgment. However, this judgment of the Constitutional Court will be the subject of a forthcoming note. -
MCB