The Citizen v McBride
2011 4 SA 191 (CC)

Defamation – the defence of "fair" comment and media defendants

1 Background and Context

Over a period of some seven weeks in 2003, the Citizen newspaper published a series of articles and editorials dealing with the candidacy of Robert McBride as chief of the Ekurhuleni metro police. Two initial articles, largely factual in nature, informed readers of McBride's candidacy for the post as chief of police. It related McBride's infamous conviction of murder for the 1986 bombing of the *Why Not Restaurant* and *Magoo's Bar* on the Durban beachfront in which three women were killed and sixty-nine other people injured. It also recounted McBride's 1998 arrest and detention in Mozambique on suspicion of gun-running. The initial articles mentioned that McBride was sentenced to death for the 1986 bombing, that the sentence was later commuted and that he was ultimately granted amnesty by the Truth and Reconciliation Commission (parr 8 – 9).

The initial articles were followed by a range of editorials and articles, expressing strong views on McBride and his suitability for the post of chief of police. The subsequent articles included statements to the effect that McBride is "blatantly unsuited" to the post; that he is a "murderer" and "criminal" for having committed "cold-blooded multiple murders"; that he engaged in a "dubious flirtation with alleged gun-dealers in Mozambique"; that he "still thinks he did a great thing as a 'soldier' blowing up a civilian bar"; that he is "not contrite", a "wicked coward who obstructed the road to democracy"; and that his act was one of "human scum". (parr 10 – 17). Importantly, these later articles made no mention at all of McBride's amnesty.

McBride sued the owner, editor and columnists of the Citizen for defamation and injury to his dignity and was awarded R200 000 by the South Gauteng High Court (par 25). The Citizen appealed to the Supreme Court of Appeal, which also found against it but reduced the damages to R150 000 as it found the statement that McBride engaged in a "dubious flirtation with alleged gun dealers" in Mozambique did not bear out the meaning assigned thereto by McBride (par 26). The matter then went on appeal to the Constitutional Court.

In essence, the case turned on the defence of fair comment. In tracing the origins of this defence, its incorporation into South African law and its post-constitutional development, Cameron J confirmed the elements of the defence of fair comment to be as follows (parr 80 & 88): (a) The statements complained of must constitute comment as opposed to fact; (b) The factual allegations being commented upon must be true; (c) The facts upon which comment is expressed must be truly stated; (d) The comment must be honestly expressed, without malice; (e) The comment must relate to matters of public interest.

The elements listed in (b) and (c) above are usually grouped together by authors on the topic, but for purposes of this discussion I have separated them due to the respective attention they received in the judgment by the Constitutional Court. Each of these requirements, to a greater or lesser extent, was at issue during the course of litigation in the High Court, the SCA and the Constitutional Court. In what follows, I will seek to analyse the judgment by the Constitutional Court by dealing with each of these requirements sequentially, with reference to the facts in the *McBride* matter.

2 Comment *Versus* Fact

Whether a statement amounts to an expression of opinion or a statement of fact has been the pivot on which many a defamation case has hinged (see cases cited in Brand *LAWSA* (ed Joubert) 7 (2005) (par 253). This was incidentally also the case in the first judgment that "firmly authenticated" the defence of fair comment in South African law (par 81), *Crawford v Albu* 1917 AD 102.

In the *McBride* matter this issue did not arise except insofar as the defendants sought to introduce the distinction in argument before the SCA as an alternative argument to the one asserting that McBride is a "murderer" as a matter of fact. Whether or not a person remains a murderer and may accurately be branded as such after having received amnesty was central to the issues before the court. The alternative argument before the SCA went something like this: If the court finds that McBride is no longer a murderer by virtue of having received amnesty, then the Citizen's description of him as a "murderer" constitute a statement of opinion, based on the facts leading to McBride's conviction on several charges of murder. In other words, that McBride may still be viewed as a murderer as a matter of opinion notwithstanding his

amnesty. (*The Citizen 1978 (Pty) Ltd v McBride* 2010 4 SA 148 (SCA) par 37).

This argument was rejected by the SCA as not having been pleaded, and was abandoned before the Constitutional Court (par 35), thus removing any substantial comment *versus* fact debate in this matter

3 Comment must be Based on Facts which are True

The requirement that in order to qualify as fair comment the facts upon which comment is expressed must be true, required a detailed examination of the effect of the Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act) and in particular section 20(10) thereof. This section provides (as summarised by Cameron J) (par 1) 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 other law, be deemed not to have taken place.'

McBride successfully contended before the court *a quo* and the SCA that this means he is as a fact no longer a murderer and cannot accurately be branded as such and therefore that any comment expressed on the basis that he is a murderer or criminal fails to be protected for lack of being based on facts which are true (parr 22 – 28).

In finally deciding the issue the Constitutional Court found (in a majority judgment delivered by Cameron J with Brand AJ, Froneman J, Nkabinde J and Yacoob J concurring) that "truth-telling … lay at the base of the moral and operational structure" of the TRC Act (par 55) and that "(t)he statute's aim was national reconciliation, premised on the disclosure of the truth" (par 59). Cameron J confirmed the minority finding by Mthiyane JA in the SCA that "the chief function of the deeming provision in section 20(10) is to secure efficient expungement of all official documents and records … [which] entitles the grantee to full civic status" (par 64). He held that the moral absolution McBride sought from the TRC Act "lay beyond the legal benefits the statute afforded perpetrators … and … beyond the lawgiver's powers" (par 68). In short, Cameron J held that a murderer is someone who wrongfully and intentionally killed another and is not dependent on a finding of guilt by a court of law (par 70). Consequently, the court found that the expungement of a criminal record for murder through a process of amnesty does not expunge the deed itself, nor does it "stifle the language that may accurately describe the events that led to the conviction … [or] … the terms that may be truthfully applied to the facts" (par 72).

The inevitable result of this line of reasoning is that it is true that McBride is a murderer and thus that the comment expressed by the Citizen was indeed based on facts which are true.

In a separate, but concurring judgment (on this point) Ngcobo CJ found that although describing McBride as a "murderer" is factually true, it alone is a half-truth "and thus untrue" unless amnesty is also mentioned (par 173). Ngcobo CJ reached this conclusion after considering the "special place" amnesty occupies in our constitutional democracy, which renders the fact of amnesty an indispensable part of the truth (par 163 - 167). However, after considering the references to amnesty in the initial articles, Ngcobo CJ found that the statement that McBride was a murderer was indeed "accurately stated" (par 189).

4 Facts Must Be Truly Stated

Having crossed that hurdle, the Citizen was faced with the compelling argument that the defence of fair comment must fail due to the newspaper's failure to accurately state all the facts upon which it expressed its opinions in each and every publication on the issue. Recall that the issue of amnesty was only raised in the two initial articles, followed by a series of seven articles over a period of some seven weeks, containing a vicious attack on McBride's character, without a single mention of his amnesty whatsoever.

It may be useful at this juncture to recall one of the earliest statements on this point by then Chief Justice Innes in the matter of *Roos v Stent and Pretoria Printing Works* 1909 TS 988:

> there must surely be a placing before the reader of the facts commented upon, before a plea of fair comment can operate at all. I do not want to be misunderstood upon this point; I do not desire to say that in all cases the facts must be set out verbatim and in full; but in my opinion there must be some reference in the article which indicates clearly what facts are being commented upon. If there is no such reference, then the comment rests merely upon the writer's own authority (999 - 1000).

The reason for having to adequately state the facts upon which an opinion is expressed is to enable the average reader to judge for himself whether the opinion is warranted or not (*Roos supra* 1010). This dictum was developed in subsequent cases, for example *Crawford v Albu* 1917 AD 102 where the court assumed readers to be aware of certain notorious facts even though they were not expressly set out in the newspaper report at the time (126 – 127). Also in *Johnston v Beckett and Another* 1992 1 SA 762 (A) the court accepted that facts may be incorporated by reference and need not always be expressly stated (774G *et seq*). These cases were however of little assistance to the Citizen in the SCA where the majority of the court relied on a decision by the House of Lords in *Telnikoff v Matusevich* (1992 2 AC 343 (HL) – see par 42 SCA) where the court refused to have regard to a previous publication on the basis that "a substantial number of persons" may not have read the preceding article, or if they had "did not have its contents in mind" when reading the subsequent publication (par 42 SCA). The result was that the SCA assessed each of the Citizen's articles "as if read by the reasonable reader in isolation from others that did not mention amnesty" (par 31).

The Constitutional Court showed much more faith in the fictitious average reader's interest in and knowledge of current affairs. Cameron J recognised that "[m]ost South Africans interested or in touch with current affairs would have been aware that McBride had been granted amnesty" and that newspaper readers "tend to show interest in current affairs" (par 92). He distinguished the *Telnikoff* case on the basis of the "public notoriety" of McBride's deed and amnesty (par 94 n111). Besides, he found, "the Citizen … reminded its readers that McBride received amnesty" in the initial articles (par 93). But most importantly, in relying on decisions of the European Court of Human Justice and the Supreme Court of the United Kingdom, Cameron J expressed the view that it is "wrong to assume that newspaper readers read articles in isolation" especially when (as in the Citizen's case) the articles were "closely linked in time … and theme … to a current controversy" (par 94 - 95).

By attributing a higher level of knowledge of current affairs to the fictitious average reader and compelling courts to assess comment in the press in the wider context of the newspaper's coverage as a whole, significant leeway is created for media defendants to justify the publication of defamatory comment in the course of a campaign or ongoing public debate.

5 Comment Must Be "Fair"

The requirement that comment must be "fair" was probably one of the most controversial issues in the case, with three different approaches adopted by Cameron J (for the majority), Ngcobo CJ (separate judgment) and Mogoeng J (minority judgment). The cause for this dissent was the particularly harsh and offensive manner in which the Citizen criticised McBride and the difficulty of reconciling such comment with the constitutional right to human dignity. Few cases could better have tested the resolve of the court to look beyond the nature of the comment to the underlying principle, namely the right to hold and express such comment.

Neethling (*Law of Personality* (2005) 158) summarises the common law requirements for "fairness" as follows:

> the comment must meet two qualifications, one objective and the other subjective: First, viewed objectively, the comment must be *relevant* to the facts involved; and second, viewed subjectively, the comment must convey the *honest* and *bona fide* opinion of the defendant. If the defendant can prove that his comment fulfils these two qualifications, it will be held to be fair (or reasonable) no matter how critical, exaggerated, biased, ill-considered or unbalanced it is. [footnotes omitted]

Cameron J reiterated the common law approach in that the content of the comment was not the issue. He was at pains to point out that the word "fair" does not mean the comment must be "just, equitable, reasonable, level-headed and balanced" (par 82) and held that criticism will be 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" (par 83). Cameron J accordingly preferred the name "protected comment" to "fair comment" (par 84) and concluded this line of reasoning with the crisp statement: "The courts cannot prescribe what people may or should say" (par 86).

In considering whether the constitutional right to dignity renders the Citizen's comment "unfair" Cameron J noted that political debate in South Africa has always been robust (par 99) and, if anything, has "become more heated and intense since the advent of democracy" (par 100). It is good for democracy, he said, that "open and vigorous discussion on public affairs" should "maximally" be allowed (par 100). Turning to the epithets employed by the Citizen in criticizing McBride, he described them as "ungenerous … distasteful … abrasive, challenging and confrontational" (par 101 – 102) but immediately qualified his view by stating: "But my opinion is not the issue" (par 102).

As to malice, a factor which if proven would negate the "fairness" of comment, Cameron J found no evidence that the Citizen's was actuated by any motive other than "stoking public debate" (par 108). Ngcobo CJ supported this finding, although stating that the "language and tone" in the articles "comes very close to justifying an inference of malice" (par 195).

Ngcobo CJ however parted ways with Cameron J on the meaning of the word "fair", finding that "(b)y insisting that a comment must be fair, the common law demands that comment be fair having regard to the right to human dignity" (par 157). This approach, he said, "underscores the proposition that freedom of expression does not enjoy a superior status to other rights" (par 157) and is "consistent with the need to respect and protect dignity" (par 158). Although Ngcobo ultimately agrees with the majority that the defence of fair comment succeeds, his judgment on this point implies that the content of the comment, insofar as it impacts on another's dignity, is indeed relevant in considering its "fairness". Having stated this as a general principle is assessing comment, the chief justice's failure to then apply it squarely on the facts renders its application somewhat uncertain.

Mogoeng J in his minority judgment makes no secret of the fact that he supports the judicial sanctioning of views based on considerations of good taste. After bemoaning the decline in "values and moral standards which once characterised and defined the very nature of [the] … substantial majority of … citizens", when language was used "in moderation" and "courteous interaction" was at the order of the day, he reminded us of the biblical injunction that one should do unto others as one would have them do unto you (par 218). Mogoeng J then identified a "new culture" which has "taken root" and continues to "cancerously eat at *botho*" (par 219) and even hints at a racist agenda on the part of the Citizen (par 232 and 241). In what Mogoeng J terms "constitutionally

acceptable bounds" he declares it "impermissible" to use the truth revealed in the amnesty process to "insult, demonise and run down the dignity" of those who confessed (par 220). As exceptions to this "rule" Mogoeng J lists remarks made "in the heat of the moment", "in jest" or the somewhat obscure "where … strong language is essential for the effective communication of the message" (par 222). He concludes that freedom of expression must be exercised with "due deference" to the pursuit of national unity and reconciliation (par 233). Mogoeng J finally proceeds to criticise reliance by South African courts on foreign law emanating from countries which do not "share the same history and experience with us" and whose decisions "leave very little of the right to human dignity" (par 243). In the result, Mogoeng would have found for McBride in all respects (par 245).

6 Comment Must Concern Matters of Public Interest

The final leg of the defence of fair comment ultimately presented little difficulty for the majority of the court. Yet this is deceiving, for the public interest requirement holds a crucial key to the judgment as a whole. All else aside, the fact remained that McBride's deeds took place some seventeen years prior to the Citizen's reportage. Although McBride's amnesty was barely two years old at the time, the bulk of the Citizen's comments were based on the acts for which he received amnesty and not his amnesty itself. These acts were committed nearly two decades prior and under very different circumstances. The question that persistently hovered over the case was whether, despite amnesty, McBride's conviction for murder can "indefinitely be flung in his face" and whether he may be called "a murderer 'forever and a day'"(par 79). This question of course holds much wider implications for the many who committed criminal acts with political motives for which they later received amnesty, and the general public debate around the case often focused on the potential damage to national unity should the media be allowed to unrelentingly rake up the past.

The court *a quo* found that because of amnesty, McBride's past conviction is irrelevant to any debate as to his suitability as chief of police (par 22). Ponnan JA in the SCA alluded to this issue when he stated that "[t]he grant of amnesty to [McBride] heralded the promise of his reintegration into South African Society. To continue branding him as a criminal and murderer runs counter to that promise" (SCA par 93). In his minority judgment in the Constitutional Court Mogoeng J termed the Citizen's campaign as "raking up the past which serves no real public interest" (par 235).

Cameron J for the majority dealt with this issue briefly and decisively: "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" (par 79). In support of this rule Cameron cited the judgment in *Khumalo v Holomisa* 2002 5 SA 401 (CC) which held that "past mistakes should not be raked

up after a long period of time has lapsed" (par 79 n 84). On the facts, Cameron found that McBride was granted amnesty only two years before the issue of his candidacy for the post of chief of police arose and that the "meaning and effect of amnesty in relation to a significant public appointment was thus the issue". He concluded that "[t]his was not raking up the past, but determining … (the) meaning (of amnesty) in relation to a very current issue" (par 109).

7 Conclusion

The court unanimously found that the Citizen's statement that McBride was not contrite constituted actionable defamation, whether or not viewed as a statement of fact or comment (par 113 – 122), and in the result awarded him R50 000 in damages (par 129). As to statements relating to McBride's "flirtation with alleged gun dealers in Mozambique" the majority of the court found on the evidence that it does not bear the meaning McBride assigned thereto on the pleadings. Ngcobo CJ and Mogoeng J arrived at a different conclusion in this regard, but that is neither here nor there.

A final issue in relation to the relief granted by the court deserves mention. Shortly before judgment was handed down, the court issued directions inviting the parties to submit argument on whether an apology would constitute an appropriate remedy, should the court find against the Citizen on any issue (par 130). This invitation coincided with the Constitutional Court judgment in the matter of Le *Roux v Dey* (2001 3 SA 274 (CC)) where the court found that ordering a defendant in a defamation action to unconditionally apologise to the plaintiff may in certain circumstances constitute appropriate relief (see par 202). Clearly the court was considering the possibility of ordering the Citizen to apologise to McBride for the "not contrite" statement, but stopped short of doing so mainly because McBride himself indicated that he considered an apology inappropriate for several reasons (parr 133 – 134). Cameron concluded that "the question of an apology where a media defendant has defamed another must wait for another day" (par 134). The *Le Roux* and *McBride* judgments constitute clear signposts that the Constitutional Court is willing to explore a more prominent role for apologies in the law of defamation, whether as a defence to an action or as a remedy to a wronged plaintiff.

In all, the judgment in this matter constitutes an unequivocal endorsement of the common law relating to protected comment and demonstrates liberal support for the voicing of divergent opinions in South Africa. Cameron's finding that newspaper articles cannot be assessed in isolation from a wider context is particularly important. The Constitutional Court's new approach to apologies is an exciting and encouraging development in media law. But these findings must be contrasted with the views expressed by Mogoeng J in his minority judgment, which are most disturbing from a freedom of expression perspective. For once one allows judicial discretion to determine the

lawfulness of comments on the basis of good taste, one falls into a quagmire of uncertainty. Allow me to repeat the principle voiced by the majority of the court in this regard, which would hopefully become a mantra: "The courts cannot prescribe what people may or should say" (par 86).

Postcript

The author of this note acted as the attorney of record for the Citizen and related parties in the court *a quo*, the Supreme Court of Appeal and the Constitutional Court. However, this note is not based on privileged knowledge of the case or documents made available to the author, nor does it represent the views of any of the parties or their legal advisors, nor should the views set out in this note be attributed to anybody but the author. It is nothing more than an academic discussion of the case by an individual commentator.

W DE KLERK
University of the Witwatersrand