

Narratives of Past and Present, Freedom of Expression and Recognition—Justice Ngcobo’s Judgment in *Citizen 187 (Pty) Ltd v McBride*

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ABSTRACT

This contribution examines the balance to be struck between freedom of expression, on the one hand, and dignity, on the other. It does so through the lens of narratives of South Africa’s past and present in *Citizen 187 (Pty) Ltd v McBride* and a consideration of how narratives shape our construction of reality. It is argued that the newspaper narratives about Mr McBride’s planting and detonation of a bomb in 1986 contain various omissions and half-truths, which has an adverse impact on the media’s contribution to post-apartheid South Africa. In particular, such media coverage minimises Black persons’ realities in the past and present, which is an infringement of their dignity. However, the law of defamation, it is argued, is not suited optimally to addressing the shortcomings in macro-narratives of South African history advanced by the media. The use of the law of defamation for that purpose may have the effect of stifling, unduly, conversations that are integral to national reconciliation. Alternative mechanisms through which to hold newspapers accountable may include complaints addressed to the Press Council, consumer activism and the creation of a plurality of voices within media spaces, through both media ownership and the promotion of ideological diversity. Ngcobo CJ’s judgment is therefore preferred, as it protects the media’s freedom of expression while also emphasising the importance of the dignity of those who become media subjects.

Keywords: defamation; fair comment; South African history; reconciliation; dignity; freedom of expression

Introduction

Stories abound within the law. What happened to whom, how, when and why is the foundation of courts’ decisions on the legal consequences of those happenings. As



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Delgado points out, we develop and pass on stories to construct our social reality, to impose order on our experiences and, conversely, for our experiences to impose order on us.¹

Stories, or narratives, are not only about what is, but are codes in which we bind together shared understandings of what ought to be as well as what might be.² In law, in particular, the tension between reality and illusion and aspiration and prescription is mediated by norms that are partly established and certainly disseminated through narratives.³ Those narratives underpin legal prescription, are found in written and oral evidence and are contained in judgments that seek to justify judicial officers' interpretation of factual matrices and what the law requires in specific instances. When we view narratives as codes we use to create and navigate our normative worlds, it becomes all the more important that we analyse our narratives in order to examine our social norms more closely.

In *Citizen 187 (Pty) Ltd v McBride*,⁴ multiple narratives are discernible. The case dealt with a defamation claim that McBride instituted after *The Citizen* newspaper published certain articles and editorials impugning his fitness to hold the office of Chief of Police in one of South Africa's largest metropolitan municipalities, Ekurhuleni.⁵ The authors of these pieces opposed his candidacy because they stated that he was a criminal who had murdered innocent civilians during the anti-apartheid struggle and that he had had covert flirtations with weapons dealers in Mozambique.⁶

Because of its subject-matter, narratives are more obviously implicated in this case. The narratives articulated by the journalists relate to Mr McBride's detonation of a bomb that had killed three people and injured sixty-nine others⁷ as well as his subsequent political activities after the advent of democracy. The judges in the case created meta-narratives about the stories told in the form of those articles and editorials through their interpretations of the stories and their reasoning on how 'reasonable' newspaper readers would interpret what was written. Thirdly, the judges created narratives to justify their decisions on the merits of the case.

1 Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 Michigan LR 2415.

2 Robert Cover, 'Nomos and Narrative' in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence and the Law: The Essays of Robert Cover* (Michigan University Press 1993) 101–102.

3 *ibid* 102. Cover writes: 'Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.'

4 2011 (4) SA 191 (CC).

5 *ibid* paras 3 and 4.

6 *ibid* para 4. More details on the content of the editorials and articles at issue are found in paras 8–17 of the judgment.

7 For the facts around the incident, see *S v McBride* 1988 (4) SA 10 (A), the then Appellate Division's judgment that sets out its reasons for dismissing Mr McBride's appeal against his three death sentences.

The aspects of the case that have hitherto received the most attention in commentaries relate to the consequences of the amnesty Mr McBride was granted for his role in the aforementioned bombing as well as the defence of fair comment in response to defamation claims.⁸ These issues are not my primary focus in this article. Instead, my interest in the narratives in the *McBride* case stem from one of the bases on which Ngcobo CJ differed with the majority in this case. Broadly speaking, this difference in approach relates to the appropriate balance to be struck between the media's freedom of expression, on the one hand, and the right to dignity of persons implicated in the narratives disseminated by the media, on the other. In particular, Ngcobo CJ emphasised that what constitutes 'fair comment' must be determined in light of the right to dignity.⁹ In this article, I consider one of the consequences of an increased emphasis on dignity in the limitation of the right to freedom of expression, namely closer scrutiny of the impact of expression on the recognition aspect of the rights to equality and dignity. I explore this aspect in the context of media narratives about South Africa's past and present and how such narratives may promote or hinder the recognition of black persons' identities, histories and material realities. I argue that while individual cases of defamation such as *McBride* may not allow for a macro consideration of the relationship between media narratives and the recognition aspect of the rights to equality and dignity, such consideration is imperative to individual rights and ought to be protected through other democratic means.

The Newspaper's Narratives of Mr McBride's Actions

While the editorials and articles in *McBride* concerned Mr McBride's suitability to fulfil the duties of a Police Commissioner in South Africa in the early 2000s, one of the objections to his candidacy related to his involvement in the anti-apartheid struggle. More specifically, it related to his planting of a 'car bomb' outside a Durban beachfront hotel on 14 June 1986 which killed three women and injured eighty-nine other people.¹⁰ The planting of the bomb was related to his membership of the armed wing of the African National Congress, uMkhonto weSizwe.¹¹

8 See, for example, MC Buthelezi, '*The Citizen v McBride* 2010 (4) SA 148 (SCA): As a Matter of Fact: But Whose Fact?' (2011) *De Jure* 179; Julian Jonker, 'Truth, Amnesty and Defamation: *The Citizen v McBride* 2010 (4) SA 148 (SCA)' (2010) 127 *SALJ* 381; and W de Klerk, '*The Citizen v McBride* 2011 (4) SA 191 (CC): Defamation – the Defence of "Fair" Comment and Media Defendants' (2011) *De Jure* 447.

9 Paragraphs 157–158.

10 *S v McBride* 1988 (4) SA 10 (A) at 11 I–J.

11 See Truth and Reconciliation Commission of South Africa, *Final Report* 3 (1998) 330–331.

The Citizen front-page article on 10 September 2003 referred to the condemnation of Mr McBride for the attack ‘on what was widely perceived to be a “soft” civilian target.’¹² The article also mentions that Mr McBride had been granted amnesty for the attack, but emphasised that amnesty was largely possible because ‘the ANC claimed it had ordered McBride to attack the pubs, contrary to its initial denials that it was involved in the bombing.’¹³ On the following day, a follow-up article again raised the issue of Mr McBride’s candidacy for the post of Chief of Police and noted that ‘he was sentenced to death during the apartheid era for his role in the bombing of a Durban beach-front bar.’¹⁴ It further informed readers that the sentence had later been commuted and that the Truth and Reconciliation Commission (TRC) had granted him amnesty.¹⁵

The same issue of the newspaper carried an editorial that was more strident in tone. It stated that Mr McBride was ‘blatantly unsuited’ to occupy the post, ‘unless his backers support the dubious philosophy, set a criminal to catch a criminal.’¹⁶ According to the editorial, Mr McBride was a criminal because he had committed ‘cold-blooded multiple murders’ and that those who had recommended him for the job ‘should have their heads read’.¹⁷ One week later, on 18 September 2003, another article on Mr McBride appeared in the newspaper.¹⁸ Its author had been invited to participate in a radio show on amnesty and forgiveness. He stated that he had no relationship with Mr McBride and that it was ‘not for me to forgive him’.¹⁹ He then went on to emphasise that *The Citizen*’s comments on Mr McBride related to his suitability to hold ‘a sensitive job’ and that even those who forgive McBride may still think him unsuitable.²⁰ However, he did argue that ‘[f]orgiveness presupposes contrition’ and that ‘McBride still thinks he did a great thing as a “soldier”, blowing up a civilian bar. He’s not contrite.’²¹

The newspaper, in a front page article on 22 September 2003, responded to Mr McBride’s attorneys’ letter informing the newspaper of his intention to sue it for defamation.²² The article was titled ‘Bomber McBride to sue The Citizen’.²³ A few weeks later, then-President Mbeki published a letter on the ANC Today website in which he addressed issues of amnesty and national reconciliation.²⁴ He referred to the

12 Paragraph 8.

13 *ibid.*

14 *ibid* para 9.

15 *ibid* para 9.

16 *ibid* para10.

17 *ibid.*

18 *ibid* para 11.

19 *ibid.*

20 *ibid.*

21 *ibid.*

22 *ibid* para 12.

23 *ibid.*

24 *ibid* para 13.

controversy surrounding Mr McBride's candidacy for the Chief of Police position and expressed the view 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.²⁵

An editorial in *The Citizen* on 20 October 2003 responded to President Mbeki and declared that its objection to McBride's candidacy was not relevant to attitudes to the TRC and national reconciliation.²⁶ This editorial again referred to McBride as 'bomber McBride'. In an article the following day, McBride was grouped with Clive Derby-Lewis and Barend Strydom as '[t]he three most notorious non-governmental killers of the late apartheid period'.²⁷ The author characterised each of them as 'a wicked coward who obstructed the road to democracy.' He also wrote the following about the nature of McBride's actions:²⁸

Strydom looked his helpless victims in the eyes before he murdered them. McBride did not even do this. He planted a bomb 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 the 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.

25 *ibid.*

26 *ibid* para 14.

27 *ibid* para 15.

28 *ibid.*

Bruner's 'Narrative Construction of Reality'

Before we examine the above narratives more closely, it would be useful to consider how narratives help towards our construction of our reality. In this regard, the perspectives of Jerome Bruner, an American psychologist who has explored the psychological impacts of narratives in various contexts—including legal contexts—offer useful frames through which to view the consequences of narrative choices. Bruner notes that when it comes to Western understandings of the world, most of the focus has traditionally been on how we understand an external natural world and how our minds develop 'reason'.²⁹ He laments that 'we know altogether too little about how we go about constructing and representing the rich and messy domain of human interaction.'³⁰ He goes on to submit that we organise our experiences and our memory of human interactions mainly in the form of 'narrative—stories, excuses, myths, reasons for doing and not doing and so on.'³¹ He also makes the point that psychologists in the 1980s came alive to the possibility that narrative may not only represent reality, but that it may constitute reality.³²

Viewed in this context, then, narratives are not merely words, but are integral to our understanding of ourselves, other people and our relationships to others. This is the case whether or not the law mediates our relationships with ourselves and others. However, the law consists of narratives that influence our personal and collective consciences. Those narratives are both implicit and explicit, or can be either, and are part and parcel of what are deemed 'facts'.

Bruner argues that two characteristics make facts malleable. First, facts are not viable until they have been categorised.³³ In this instance, what *The Citizen* newspaper said about Mr McBride has to be categorised according to whether the statements in question were defamatory and, if so, whether they qualified as fair comment. Secondly, Bruner avers, facts are not probative—even if they have been categorised—until they are shown to be relevant to 'a theory or story dealing with something more general.'³⁴ The 'theory' or 'story dealing with something more general' does not have to be one story only. As Bandes points out, narratives can be used to support any ideology, so in each instance where narrative is employed we have to analyse its purpose within a particular context and the values it seeks to advance.³⁵

From the above, it emerges that when we consider the narratives in *McBride*, three sets of narratives are of importance. First, the newspaper articles and editorials about

29 Jerome Bruner, 'The Narrative Construction of Reality' (1991) *Critical Inquiry* 1.

30 *ibid* 4.

31 *ibid*.

32 *ibid* 5.

33 Jerome Bruner, 'What is a Narrative Fact?' (1998) *The Annals of the American Academy of Political and Social Science* 18.

34 *ibid*.

35 Susan Bandes, 'Empathy, Narrative and Victim Impact Statements' (1996) 63 *University of Chicago LR* 365.

Mr McBride's actions in planting the bomb and the relevance of those acts in post-apartheid South Africa form one set. Secondly, we have the narratives that underpin the requirements for the defence of fair comment in response to a defamation claim. Embedded within these narratives are those about the media's freedom of expression and the dignity of those who are subjects in media reports and opinions. The third set seeks to locate the newspaper statements within the defence of fair comment and to justify why particular statements either qualify or do not qualify as fair comment.

In what follows, I analyse the first two streams of narratives, with particular emphasis on Justice Ngcobo's reasoning in the second stream. I consider the relevance of these narratives in contemporary South Africa and how these have shaped, and will continue to shape, our realities as well as our normative worlds.

Mr McBride's Actions in Historical and Contemporary Context

The Citizen's narratives around Mr McBride's actions beg rather important questions that we still grapple with collectively in South Africa. The nature of these narratives is influenced by the context within which the events became relevant. *The Citizen* is adamant that its negative views on Mr McBride's detonation of the bomb in 1986 had nothing do with national reconciliation and everything to do with his suitability for office in South Africa in 2003. This view reflects tensions in how far the past bleeds into our present. It also requires us to consider the relationships between the media and post-apartheid governments.

Wasserman, in an article on the use of history in contemporary South African journalism, avers that journalism is more often associated with the 'here-and-now than with the there-and-then' and that journalists often view the past as falling outside the scope of their work.³⁶ He argues that journalists' treatment of the present often invokes the past and that journalists' role as 'memory agents' warrants more serious consideration.³⁷

In my view, the above pieces on McBride are examples of journalists invoking the past to support their views in the present. One of the aspects that influenced the authors' views on Mr McBride's suitability for office was his detonation of the bomb in 1986 that killed three people and injured sixty-nine others. Various aspects of *The Citizen's* telling of events warrant analysis.

McBride the Individual versus McBride the MK Operative

The newspaper states that its narratives on Mr McBride have nothing to do with national reconciliation. This is coupled with various narrative choices that seek to separate

36 Herman Wasserman, 'The Presence of the Past: The Uses of History in the Discourses of Contemporary South African Journalism' (2011) 5(5) *Journalism Practice* 584.

37 *ibid* at 585.

Mr McBride as an individual from the liberation struggle in South Africa. The front-page article on 10 September 2003, for example, states that his amnesty was largely possible because the ANC claimed that it was involved in the bombings when it had initially denied such involvement. Prior to his amnesty hearing, Mr McBride testified at an inquiry in the course of an investigation by the TRC in 1997.³⁸ At that inquiry, he explained why his legal strategy minimised the role of the ANC and MK in the bombing. Leslie and Matthews summarise the strategy and its import as follows:

He left many details out of his defence that would have pointed to a planned and authorised act of sabotage. The truth was that both the target selection and car bomb method were part of the ANC's People's War – a response to Apartheid brutality and an attempt to make South Africa ungovernable. His court appearance was designed to encourage the view that he was interpreting his mandate as an MK member, alone and unsupported. By altering certain details of the car bomb plot, he hoped to avoid the ANC being stigmatised as a terrorist organisation. Also, if he had admitted to taking orders from the ANC in exile in court, McBride explains, the death penalty would have been a certainty.³⁹

Whatever one's views on the veracity of these explanations by Mr McBride and the ANC, the omission of this explanation has the effect of making it easier for a reader to separate Mr McBride from a broader liberation struggle. It also makes it easier to ignore that people's politics will influence whether they view Mr McBride as 'saboteur' or 'freedom fighter'.

Equivalence of Pro-apartheid and Anti-apartheid Struggles

This failure to engage with the historical context within which Mr McBride acted is exacerbated by the fact that the editorial on 21 October 2003 groups Mr McBride with Barend Strydom and Clive Derby-Lewis as the three most 'notorious non-governmental killers of the late apartheid period'. This categorisation imposes equivalence between Strydom and Derby-Lewis, on the one hand, and McBride, on the other. Many would argue that it is relevant that both Strydom and Derby-Lewis acted in furtherance of a system that has been recognised as a crime against humanity, whereas Mr McBride had acted in opposition to that oppressive system. Such equivalence as that imposed by *The Citizen* not only relates to Mr McBride, but has profound implications for our collective memory of South African history. It will influence our views on the present—on redistributive policies in the contexts of land reform, broad-based black economic empowerment (BBBEE), employment equity and civic issues such as monuments and street names.

38 This inquiry was conducted in terms of section 29 of the Promotion of National Unity and Reconciliation Act 34 of 1995.

39 Robyn Leslie and Debora Matthews, 'McBride and the TRC: Secrets, Lies and Legacy of Deadly Bombing' (*Daily Maverick* 2015) <https://www.dailymaverick.co.za/article/2015-06-25-mcbride-the-trc-secrets-lies-and-legacy-of-deadly-bombing/#.WVfjV_-GOT8> accessed 1 July 2017.

Such narratives of equivalence are arguably instrumental in denying the need for redress and reparations in South Africa. They allow organisations such as Afriforum to approach the Constitutional Court of South Africa in 2016 and characterise colonialism and apartheid as ‘so-called historical injustices of the past’.⁴⁰

Cameron J responded to this denial of racial injustice in unusually strong terms when he stated that

[t]his embodies the kind of insensitivity that poisons our society. There *were* historical injustices. Apartheid was all too real. And it was profoundly pernicious. These facts are not ‘so-called’ figments of black people’s imagination.⁴¹

While *The Citizen*’s narratives are not as obviously built on the denial of black people’s oppression, their failure to distinguish between struggles to maintain and entrench minority white domination, on the one hand, and struggles to eradicate it, on the other, is harmful because they skew history in ways that have an adverse impact on contemporary social relations. It is what Ngcobo CJ in *McBride* refers to as a ‘half-truth’,⁴² but it is a half-truth by omission.

The Citizen’s relaying of Mr McBride’s actions in 1986 contains another half-truth by omission. The article on 21 October 2003 states that at the time Mr McBride planted the bomb, apartheid was in retreat and that his actions had the effect of prolonging the regime. This narrative omits the fact that the apartheid government had declared a state of emergency on 12 June 1986, which allowed security forces to detain 1 000 people within its first twelve hours of operation.⁴³ It also omits the fact that the ANC, at its 1985 consultative conference in Zambia, had called for an escalation of its armed struggle that did not over-emphasise the risk of civilian casualties. The ANC statement included the following passage:

We believe that the time has come when those who stand in solid support of the race tyranny and who are its direct or indirect instruments, must themselves begin to feel the agony of our counter-blows.⁴⁴

The Narratives that Underpin the Defence of Fair Comment

How, then, are these historical half-truths relevant to whether *The Citizen* newspaper had defamed Mr McBride or not? The answer to this question lies in the requirements

40 *City of Tswane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) para 120.

41 *ibid.*

42 *ibid* para 138.

43 Leslie (n 39).

44 African National Congress, ‘Commission on Strategy and Tactics’ (1985) <<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv03445/04lv04015/05lv04016/06lv04025/07lv04028.htm>> accessed 1 July 2017.

for the defence of fair comment against a defamation claim. In what follows, I consider these requirements and some of the narratives that underpin this defence.

Statements are defamatory if they diminish the complainant in the estimation of reasonable recipients of such statements.⁴⁵ However, one of the defences against a claim for defamation is that defamatory statements constitute fair comment in the public interest. The requirements for successful reliance upon this defence are as follows:

- (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.⁴⁶

Not all of the aspects of these requirements will be traversed here. Instead, I will emphasise those aspects that influence the narrative construction of reality in the context of Mr McBride's case. First, the requirement that the statement must be relevant to the matter commented upon warrants consideration. In Mr McBride's case, his past actions were relevant to his suitability as the Chief of Police in Ekurhuleni Metropolitan Municipality. While some may argue that his actions in the fight against apartheid are not relevant to his suitability for a position in post-apartheid South Africa, the fact that the issue is debatable proves 'relevance' in the broad, neutral sense that the requirements for defamation espouse. In this sense, then, it does not matter whether one is in favour of or opposed to Mr McBride's candidacy; what matters is that the comments have a bearing on one's views on his suitability to assume the relevant public office.

The second requirement that is of interest is that the facts upon which the comment is based must be true. Mr McBride had detonated the bomb and had been convicted on three counts of murder and other charges. He had been granted amnesty. *The Citizen* had disclosed all these facts. However, the authors of the various articles and the editorials still expressed the view that he was 'a criminal' and 'a murderer'. The only untrue statement—whether it was of fact or comment—*The Citizen* made, according to the majority of the Court, was that Mr McBride lacked contrition for what he had done.⁴⁷ The statement that Mr McBride 'still thinks he did a great thing as a soldier, blowing up a civilian bar' was held by the Court to have no basis in fact. Mr McBride's amnesty application, as well as his evidence at the TRC hearings, clearly showed his contrition.⁴⁸

The third relevant requirement for present purposes is the requirement that the defamatory statement must not have been actuated by malice. Mr Williams—the author of the statement that Mr McBride lacked contrition—had made no attempt to check his statement against the public record and could give no factual basis for his assertion.⁴⁹

45 *McBride* (n 4) para 19.

46 *Per* Ngcobo CJ at para 159 of *McBride* *ibid*.

47 *ibid* 121, *per* Cameron J.

48 *ibid* 192, *per* Ngcobo CJ.

49 *ibid* 192, *per* Ngcobo CJ.

Ngcobo CJ reasoned that this fact, together with the language and tone of the articles that, in some instances, amounted to a personal attack, ‘comes very close to justifying an inference of malice.’⁵⁰ He, however, held that there was nothing to suggest that Mr Williams had deliberately spread a falsehood and had therefore been actuated by malice.⁵¹ He cautioned against drawing inferences of malice—as Mogoeng J did in his minority judgment in *McBride*⁵²—in cases where facts ‘are incorrectly stated or stated in an exaggerated or vitriolic manner.’⁵³

The three aforementioned requirements—relevance, veracity and absence of malice—seek to balance the newspaper’s right to freedom of expression and Mr McBride’s right to dignity. Ngcobo CJ’s statements on this balancing exercise are instructive. Importantly, he emphasises that what is considered ‘fair’ must now be interpreted

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.⁵⁴

In this balancing, the freedom of expression of the media is protected because its importance to democracy is recognised. This recognition also imposes constitutional duties on the media, as recognised in *Khumalo v Holomisa*:

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.⁵⁵

Ngcobo CJ’s judgments have been instrumental in developing the Court’s conceptions of democracy, as is apparent in several of the contributions in this issue.⁵⁶ Those conceptions are no doubt relevant to the role we envisage for the media in South Africa. However, that role must be considered in the context of balancing the media’s right to

50 *ibid* para 195.

51 *ibid* para 197.

52 *ibid* para 236.

53 *ibid* para 197.

54 *ibid* para 158.

55 *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 24.

56 See Victoria Bronstein, ‘Justice Ngcobo’s Rich Legacy at the Intersection of Federalism and Democracy’ and Ziyad Motala, ‘Brexit, the Election of Donald Trump and Activism in South Africa, Lessons for Democracy: The Contribution of Justice Sandile Ngcobo’.

freedom of expression, on the one hand, and the right to dignity of those who are the subjects of media narratives.

Expression and Dignity

Ngcobo CJ's judgment in *McBride* discusses the indignities inflicted upon black persons, particularly black Africans, by centuries of institutionalised racism. He notes that discrimination was harmful not only because it separated people, but because its basic premise was that black people 'had no dignity worth protecting'.⁵⁷ He then reminds us that the recognition of dignity as a right and a foundational value seeks to 'reverse the dehumanising effect of the apartheid legal order' and permeates every right accorded in the Constitution.⁵⁸

One aspect of human dignity that I deem important in this context is recognition, particularly in how the media deals with South African history. Recognition, as conceived of by Charles Taylor, relates to how individual or group identities can be influenced by the views society expresses about particular individuals or groups. In Taylor's view,

a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.⁵⁹

The media, as a collective, have the power either to recognise or to misrecognise individuals and groups. In my analysis above, I argued that *The Citizen's* relaying of events involving Mr McBride's detonation of the bomb in 1986 contained material statements and omissions that not only implicated Mr McBride, but skewed the narratives on apartheid. In particular, the failure to offer a balanced account of the context of apartheid South Africa in 1986, and of Mr McBride's and the ANC's explanations of what had occurred, the repeated choices to separate Mr McBride from a wider struggle for black emancipation and the equivalence imputed to the pro-apartheid and anti-apartheid struggles are disappointing.

Ngcobo CJ reminded *The Citizen* that it has a constitutional obligation to carry out its functions in the service of democracy. This reminder, in my view, lends credence to the fact that Ngcobo CJ was not satisfied with how the newspaper had conducted itself.⁶⁰ The judgment of Cameron J similarly intimates that he found some of *The Citizen's* statements on Mr McBride's suitability for office 'ungenerous and distasteful'.⁶¹ Unlike Mogoeng J, however, he held that *The Citizen* had a right still to portray Mr McBride

57 *ibid* para 145.

58 *ibid* para 147.

59 Charles Taylor, *Multiculturalism* (Princeton University Press 1994) 25.

60 *McBride* para 196.

61 *ibid* para 101.

as a criminal and a murderer, as these comments were based on facts that were true, relevant and without malice, and were made on a matter of public importance.

These requirements, as discussed above, are interpreted in a way that seeks to respect the media's freedom of expression. This begs the question as to whether the respect for the media's freedom of expression in *McBride* did not infringe unjustifiably on Mr McBride's right to dignity and indeed the dignity of black persons affected by racial oppression in South Africa. Mogoeng J held that view in his majority judgment and reasoned that whereas Mr McBride's detonation of the bomb in 1986 is undisputed,

[t]his 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.⁶²

He therefore concluded that *The Citizen* had acted with malice, which is not in furtherance of the constitutional project of national unity and reconciliation, and unduly infringed upon Mr McBride's dignity.⁶³

Buthlezi has commented in support of Mogoeng J's approach and has argued that *The Citizen's* comments regarding Mr McBride's actions in 1986 were not relevant to Mr McBride's suitability to hold the post of Chief of Police in a major metropolitan municipality.⁶⁴ Mogoeng J held that relevance was not established because, inter alia, the bombing had happened seventeen years prior to the articles being published, Mr McBride had been granted amnesty, the bombing had occurred in a particular political context and that no real public interest was served in the continued branding of Mr McBride as a criminal and a murderer.⁶⁵ In contrast, the majority (including Ngcobo CJ) held that the granting of amnesty to Mr McBride had not erased his conviction on charges of murder as a historical fact.⁶⁶

I disagree with Mogoeng J's assertion that the period of time that had elapsed since the bombing renders the discussion irrelevant. The fact that Mr McBride's actions still elicit emotive responses from various sections of the South African population—whether in support or in opposition—means that at the very least conversations need to be had.

62 *ibid* para 231.

63 *ibid* para 234; Mogoeng J (para 232) referred to what he termed *The Citizen's* 'apparent determination to depict Mr McBride as amongst the dregs of humanity.' He held (para 236) that Mr Williams, who stated that Mr McBride lacked contrition, had published that statement 'in reckless disregard for its potential falsehood'. He condemned this recklessness in strong terms: 'This gross recklessness by a media outlet that ought to know its own responsibilities to the public and to those it chooses to write about, can 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.'

64 *ibid* para 220; MC Buthelezi, 'Like Pontius Pilate of Old, the Constitutional Court Washed Its Hands of My Human Dignity: A Critical Review of *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC)' (2011) De Jure 499.

65 Buthelezi (n 64).

66 *ibid* paras 72 (*per* Cameron J) and 166 (*per* Ngcobo CJ).

The narratives that form part of those conversations may be open to criticism, but, in my view, should not be unduly stifled. As I argue below, other avenues of censure may prove more fruitful.

My agreement with Ngcobo J's approach does not rest solely on my views on the time periods that have elapsed and the effect of amnesty, but on what I view as the limitations of individual defamation claims in addressing macro issues regarding collective memory and individual and group recognition. In what follows, I argue that Ngcobo CJ's judgment in *McBride* appropriately stresses the need to balance freedom of expression and dignity, while it does not unduly expand the requirements that defendants who plead the defence of fair comment need to satisfy.

Omissions in the Narratives that Underpin Protection of the Media's Freedom of Expression

It is arguable that reference to 'the media' in South Africa may be misleading, as not all forms of media and media institutions possess equal power. The composition of the media could itself imperil constitutional goals if it is not sufficiently diverse and inclusive of diverse perspectives. As the former chairperson of the South African National Editors' Forum, Mathatha Tsedu, has pointed out, 'two publics' are identifiable in relation to the media in South Africa—one public is well organised and aware of how to promote its interests via the media while the other is marginalised because it is not represented in the media.⁶⁷ Tsedu recognised that commercial interests may incentivise the media to serve the interests of the first public at the expense of the second public, but urged a more balanced approach.⁶⁸ Of course, the dichotomy of the two publics is oversimplified, but it does require us to engage with the values the media promotes in its reporting. Who do the media's narratives serve?

In *McBride*, *The Citizen* argued that it had acted in the public interest by airing its views on the unsuitability of Mr McBride for the particular public office. Those views are 'on a matter of public interest', as required for the successful invocation of the defence of fair comment. However, the requirement is 'neutral', because it does not prescribe to the media *how* the matter of public interest should be addressed. As Cameron J emphasised, the Court does not require comment to be 'just, equitable, reasonable, level-headed and balanced'.⁶⁹ On this reasoning, then, the approach to unfair comment is not to use the courts to suppress it but to contest it in argument.

67 Jane Duncan, 'Another Journalism is Possible: Critical Challenges for the Media in South Africa' *Harold Wolpe Lecture Series* (2003) 6 <<http://ccs.ukzn.ac.za/files/wolpe2.pdf>>.

68 *ibid.*

69 *McBride* (n 4) para 82.

This opportunity for contestation, however, is not equally accessible to all. Accessibility is influenced by the material and cultural availability of platforms to certain individuals or groups. This inequality in power is perhaps recognised at the extreme end in the denial of protection to expression that constitutes propaganda for war; incitement of imminent violence; and hate speech based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm.⁷⁰ However, the harm done by narratives that misrecognise oppressed groups' struggles is caused long before the threshold of constitutionally unprotected speech is reached. As Delgado points out, for many minority persons, their subordination lies

in the prevailing mindset by means of which members of the dominant group justify the world as it is, that is, with whites on top and browns and blacks at the bottom.⁷¹

In my view, *The Citizen's* approach set out above constitutes misrecognition of Mr McBride's struggle as well as misrecognition of the struggle for racial equality. It distorts liberation history and, as a result, it inhibits the implementation of policies that seek to develop redress and redistribution. This is so because there is a link between recognition and distribution. Fredman points to three developments that illustrate this link, namely (1) the relative economic disadvantage of marginalised groups, such as black people and women; (2) the fact that groups such as disabled people, who had previously only been dealt with in terms of welfare, are now protected by anti-discrimination laws; and (3) the fact that justiciable socio-economic rights means that economic disadvantage is now infused with rights analyses, which had not traditionally been the case.⁷² Distributive justice is therefore imperilled by widespread misrecognition.

If enough media outlets act the way *The Citizen* did in this instance, the poison Cameron J referred to in the *Afriforum* case above is likely to spread and contribute to the maintenance of the stark racial fault lines we experience in the political, economic and social spheres in South Africa. This acknowledgement does not mean, however, that remedies secured through the courts in individual defamation cases are necessarily the most appropriate in addressing these risks.

Defamation Claims, Power and Recognition

The emphasis on discrete, essentially private matters in a defamation claim such as Mr McBride's is reflected in the fact that the impact of the historical omissions and inaccuracies discussed above are not directly relevant to whether the comments that Mr McBride is a criminal and a murderer are fair or not. It does have an impact on his

70 Section 16(2) of the Constitution.

71 Delgado (n 1) 2413.

72 Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23(2) South African J on Human Rights 215.

dignity, but at the time he was a politician who was being considered for an important public post. His past deeds were therefore relevant and the media should be free to discuss those deeds and their implications for his suitability. It is part and parcel of a healthy democracy.

It is also not incumbent upon the courts to prescribe to the media the views they must form in relation to controversial political issues. Ngcobo CJ therefore—correctly, in my view—reminded *The Citizen* of its constitutional obligations, but nevertheless held that the newspaper's comments were protected insofar as they were true, relevant and not actuated by malice. This approach creates sound principles, because individual cases of defamation will in future also have to show due respect for the media's freedom of expression. What, then, about curbing the media's power to impinge on the dignity of individuals and groups?

First, that power is somewhat circumscribed in the requirements for the defence of fair comment in that there must be a public interest served by media comments and that those comments must be fair—that is, relevant and made without malicious intent. Secondly, the power of individual newspapers that are sued for defamation may vary, so it may be dangerous to set principles on the assumption that all newspapers are powerful and all subjects are necessarily vulnerable and marginalised. Thirdly, the power exercised by the media over its subjects has a structural dimension that will not necessarily be curbed by individual defamation claims. Similarly, the concern that the media may distort history also has social dimensions, because it relates to shared memories of South Africa's past. Group misrecognition of black South Africans, in my view, is therefore better addressed through mechanisms that do not possess the coercive power of the courts. These mechanisms may include complaints addressed to the Press Council, consumer activism and the creation of a plurality of voices within media spaces regarding both media ownership and the promotion of ideological diversity.

At base, then, my agreement with the approach adopted by Ngcobo CJ in *McBride* is based on the freedom for democratic contestation it promotes. Yes, courts may not be able to protect individuals and groups in individual cases, but they can give guidance on the role the Constitution requires our media to fulfil. In this way, media actors retain the freedom to express views, but those of us who are media subjects may also find cheaper, more accessible and more democratic means through which to hold the media accountable.

Conclusion

The *McBride* case in many ways constituted a microcosm of the broader challenge of deciding how far to allow our pasts to bleed into our presents. It dealt with a controversial bombing, the justification for which remains contested. Within that contestation diverse voices exist, but those voices are not necessarily equally represented in the media. These

inequalities skew the narratives the media may construct about South African history. As Bruner points out, these narratives construct not only our histories but also our present.⁷³ When *The Citizen* printed the articles and editorials discussed above, it spread narratives about Mr McBride, but also about the liberation struggle in South Africa and the importance of those struggles in the now. I have argued that those narratives were unfair and that, in some respects, they constitute misrecognition of black South Africans' struggle for equality, dignity and freedom.

However, Ngcobo CJ's approach of affirming the dignity of black persons in South Africa, while exercising restraint in curbing the media's freedom of expression, is commendable. It requires the media to be honest, to act in furtherance of democratic goals, but it also challenges us to use other, arguably more democratic tools at our disposal to challenge unbalanced and unfair media coverage.

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73 Bruner (n 29) 5.

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