THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 277/08

THE CITIZEN 1978 (PTY) LIMITED	First Appellant
KEVIN KEOGH	Second Appellant
MARTIN WILLIAMS	Third Appellant
ANDREW KENNY	Fourth Appellant

and

ROBERT JOHN McBRIDE	Respondent

Neutral citation:	*The Citizen v McBride* (277/08) [2010] ZASCA 5 (26 February 2010)
Coram:	STREICHER, MTHIYANE, PONNAN, MHLANTLA JJA and TSHIQI AJA
Heard:	2 NOVEMBER 2009
Delivered:	26 FEBRUARY 2010
Summary:	Defamation – amnesty in terms of s 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995 – persons to whom amnesty had been granted in respect of an offence no longer considered to have committed the offence.

ORDER

On appeal from: Witwatersrand Local Division (Maluleke J sitting as court of first instance)

The following order is made:

(i) The appeal is partially upheld.

(ii) The appellants are ordered, jointly and severally, to pay 75% of the respondent's costs.

(iii) The order of the court below is set aside and replaced with the following order:

'(a) The fourth, fifth and sixth defendants are ordered, jointly and severally, to pay to the plaintiff the sum of R150 000 together with interest thereon at the rate of 15,5% per annum calculated 14 days from date of service of summons to date of payment.

(b) The seventh defendant is ordered jointly and severally with the fourth, fifth and sixth defendants to pay to the plaintiff R100 000 of the said sum of R150 000 in paragraph (a) above, together with interest thereon at the rate of 15,5% per annum calculated 14 days from date of service of summons to date of payment.

(c) The fourth, fifth, sixth and seventh defendants are ordered jointly and severally to pay to plaintiff the costs of suit.'

JUDGMENT

STREICHER JA: (MHLANTLA & TSHIQI JJA concurring)

[1] The respondent, Robert John McBride, succeeded against the appellants in a defamation action instituted in the Witwatersrand Local Division and was awarded damages in an amount of R200 000, R100 000 thereof against the first, second, third and fourth appellants jointly and severally and R100 000 thereof against the first second and third appellants jointly and severally. The latter was a composite award in respect of several claims. With the leave of the court below the appellants now appeal to this court against the whole of its judgment.

[2] The respondent's claims were based on editorials and articles published in The Citizen, a newspaper widely distributed throughout South Africa and widely read by the general public. The first appellant (fourth defendant in the court below) is the publisher and the second appellant (the fifth defendant) is the editor of The Citizen. The third and fourth appellants (the sixth and seventh defendants respectively) are newspaper journalists.

[3] On 10 September 2003, under the heading 'McBride tipped to head Metro cops' The Citizen reported as follows:

'Robert McBride – former operative in the ANC's military wing, Umkhonto we Sizwe, who bombed a Durban bar in 1986, killing several people including three women – could be heading to the Ekurhuleni Metro as Chief of Police.

The Citizen learnt from a reliable source inside the Metro that McBride`s name was mentioned as a possible replacement for Mongezi India, the former Metro police chief who resigned recently.

. . .

McBride, as an MK operative, was attached to a Special Operations Unit. He served four years on death row after being convicted for the car bomb explosion at the Magoo's and Why Not bars near the Durban beachfront in 1986.

He was widely condemned for the attack on what was widely perceived to be a "soft" civilian target though McBride insisted that the pub was frequented by SADF military personnel from a nearby barracks. No soldiers were killed or injured in the massive explosion.

Later McBride applied for and was granted amnesty for the attack by the Truth and Reconciliation Commission (TRC) due largely to the fact that the ANC claimed it had ordered McBride to attack the pubs, contrary to its initial denials that it was involved in the bombing.

But as McBride was deemed to be acting on the orders of a political organisation he qualified for amnesty.

Later he was arrested and charged with gun running in Mozambique.

He claimed that he was in fact part of an undercover investigation into gun running out of Mozambique.

He was subsequently released and sent home.'

[4] On 11 September 2003 the following article appeared in the Citizen of that date under the heading 'No comment on McBride' and the sub-heading 'Tipped as top cop for E Rand metropole':

'THE Ekurhuleni metropole on the East Rand was noncommittal yesterday over a newspaper report that controversial Foreign Affairs official Robert McBride could be their next Metro Police Chief.

McBride, currently director at the Department of Foreign Affairs and head of consular services, was sentenced to death during the apartheid era for his role in the bombing of a Durban beach-front bar.

The sentence was later commuted. The Truth and Reconciliation Commission also granted him amnesty.'

[5] The respondent did not complain about these articles but based his claim on two editorials and five articles that were published in The Citizen during the period 11 September 2003 to 30 October 2003. The first editorial published on 11 September 2003 under the heading 'Here comes McBride' read as follows:

'ROBERT McBride's candidacy for the post of Ekurhuleni Metro Police Chief is indicative of the ANC's attitude to crime.

They can't be serious.

He is blatantly unsuited, unless his backers support the dubious philosophy: set a criminal to catch a criminal.

Make no mistake, that's what he is. The cold-blooded multiple murders which he committed in the Magoo's Bar bombing put him firmly in that category. Never mind his dubious flirtation with alleged gun dealers in Mozambique.

Those who recommend him should have their heads read.

McBride is not qualified for the job.

If he is appointed it will be a slap in the face for all those crime-battered folk on the East Rand who look to the government for protection.'

[6] Thereafter in an article written by the third appellant in response to an invitation to take part in a radio debate about forgiveness and published under the heading 'Beware ambush broadcasters operating under false pretences' on 18 September 2003 it was stated:

'I have no relationship with Robert McBride. It is not for me to forgive him. But his track record as a multiple murderer and a suspect in gun dealing make him unsuitable as a metro police chief in a country wracked by crime.

Forgiveness presupposes contrition.

McBride still thinks he did a great thing as a "soldier", blowing up a civilian bar.

He's not contrite. Neither are Winnie or Boesak. They are not asking for forgiveness.

. . .

Those who want to forgive McBride don't have to push for him to get this sensitive job. The two issues are separate.

In fact our comment was not about forgiveness but rather about suitability.'

[7] In response to a letter from the respondent's attorneys demanding an apology and claiming damages suffered as a result of defamatory allegations in the editorial and article, The Citizen on 22 September 2003 under the heading 'Bomber McBride to sue The Citizen', repeated the contents of the editorial and said:

'McBride was found guilty of the 1986 Durban bombings in which three civilian women were killed.

He was released in September 1992, at the same time as multiple murderer Barend Strydom.

In 1998 he was detained in a Mozambique jail on suspicion of gun-running.

Neither his arrest nor subsequent release were fully explained.

The Citizen continues to believe he is not the right person to be in charge of any police force in a major metropole in this crime-ridden country.'

[8] The editorial and articles were commented upon by the then president of South Africa, Thabo Mbeki, in his weekly internet newsletter. In this newsletter he said:

'The ANC, its allies and supporters accepted that those who had been granted amnesty would afterwards be treated like any other citizen. There would have been no point to the TRC process if we insisted that we would act in a manner that sought to penalise those who had been granted amnesty.

During the last nine-and-a-half years of our liberation, both our movement and government have respected this approach.

. . .

I do not know whether Mr McBride was ever or is interested to be Chief of Ekurhuleni Metropolitan Police. I do not know whether he has the competence to serve in this capacity. What I know is that it would be fundamentally wrong that he is denied the possibility to be appointed to any position, simply because of what he did

during our struggle for liberation for which he apologised and for which he was granted amnesty. We will not agree that Mr McBride should be condemned for having been a liberation fighter.

In essence what 'The Citizen' is suggesting is that we were wrong to have chosen the option of the TRC. It is arguing that Nelson Mandela was mistaken when he said so many times in the past – let bygones be bygones!'

[9] The Citizen thereupon, in an editorial published on 20 October 2003, commented as follows under the heading 'Thabo Mbeki's straw man':

'You might think our globe-trotting leader, presiding over a party riven by conflict, would have more important things to do than endorse bomber Robert McBride's right to become Ekurhuleni Metro Police Chief.

. . .

In his usual circuitous, obfuscatory language, Mbeki hints darkly at "the grave implications of what *The Citizen* is seeking to achieve".

He then wanders off down a side road of his own making, about attitudes to the TRC and "the path of national reconciliation".

Rubbish.

Our coverage was aimed solely at making the irrefutable point that McBride is unsuitable to head any decent police force.

We stand by that opinion.

At his insistence, the President's functionaries emphasise race in every sphere; so he can spare us the lecture on national reconciliation.'

[10] The next day, being the 21 October 2003 *The Citizen* published an article by the fourth appellant ('the Kenny article'). He referred to President Mbeki's weekly newsletter and said:

'At a time of public conflict within the ANC government . . . President Mbeki devoted his weekly newsletter to attacking The Citizen for suggesting that Robert McBride is unsuitable for high office in the police.

The three most notorious non-governmental killers of the late apartheid period were Clive Derby-Lewis, Barend Strydom and Robert McBride.

Each was a wicked coward who obstructed the road to democracy.

Derby-Lewis, who targeted a specific political enemy, Chris Hani, is the only one not to be freed. The other two killed innocent people.

Strydom looked his helpless victims in the eyes before he murdered them. McBride did not even do this. He planted a bomb in a bar and slunk off, not caring whether it killed men, women or children.

It was the act of human scum.

. . .

McBride's bomb was planted in 1986, at a time when apartheid was clearly in retreat and when legal avenues of resistance were opening up.

His murder of the innocent women strengthened the hand of die-hard apartheid supporters, and had the effect of prolonging the wretched regime.

Contrary to Mbeki's suggestion, I know of few public voices, and not that of *The Citizen*, which opposed the idea of the TRC.

Court cases against the criminals of the apartheid era would have taken a thousand years.

The TRC was well conceived. Its execution, however, was criticised for bias.

The more apartheid reformed, the greater the violence against it.

When it effectively ended in 1990, the violence reached its zenith.

There were more political murders per year from 1990 to 1994 than in any year of apartheid.

These were mostly ignored by the TRC.

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 he 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.'

[11] On 22 October 2003 the third appellant wrote in The Citizen of that date, under the heading 'Mbeki no conciliator' that:

'For Mbeki to project himself as a great supporter of the TRC is laughable. It's a ruse to whitewash McBride.

. . .

Mbeki's support for bomber McBride is consistent with his long-held view that any liberation force action was justified.

This unfeeling attitude doesn't help genuine reconciliation. For example, in his latest weekly Internet newsletter he airbrushes over the horrible reality of McBride's deed in murdering civilians.'

[12] In yet another editorial in The Citizen of 30 October 2003 under the heading 'McBride cops job' it was said:

'We believe we performed a civic duty on September 10 by alerting readers to the possibility that Robert McBride could be named Ekurhuleni's Metro Police chief.

We said he was not the right person for the job. We maintain that view, as do a great many readers.

But obviously a decision had already been taken.

President Mbeki even devoted one of his lengthy Internet messages to defending McBride and attacking *The Citizen*.

The bomber has support in high places, but that doesn't detract from the evil of his multiple murders, or make him a suitable policeman.

His appointment speaks volumes about the ANC's attitude to crime.

God help Ekurhuleni.'

[13] The respondent thereupon instituted action against the appellants for the payment of damages as a result of him having been injured in his reputation and dignity. In respect of each of the editorials and articles he alleged that its publication was wrongful and unlawful in that it was understood by readers and intended to have one or more of the following meanings:

'13.1 that the plaintiff is not suited for the position of Head of the Ekurhuleni Metro Police Force;

13.2 that the plaintiff is a criminal;

13.3 that the plaintiff is a murderer;

13.4 that, despite the plaintiff having been a soldier and a disciplined member of Umkhonto we Sizwe ("MK"), the former armed wing of the African National Congress ("ANC"), he remains a criminal and a murderer;

13.5 that, despite the plaintiff having participated in the attack on the Magoo's Bar as part of the armed struggle waged by the ANC and MK to eradicate the system of apartheid, he remains a criminal and a murderer;

13.6 that, despite the plaintiff having been granted amnesty in terms of section 20 of Act 34 of 1995 for, inter alia, his participation in the attack on the Magoo's Bar, he remains a criminal and a murderer;

13.7 that, despite the provisions of section 20(10) of Act 34 of 1995 being applicable to the plaintiff's conviction for his participation in, inter alia, the attack on the Magoo's Bar, he remains a criminal and a murderer;

13.8 that, despite the plaintiff having been absolved from all liability for, inter alia, his participation in the attack on the Magoo's Bar, he remains a criminal and murderer;

13.9 that the plaintiff has made common cause, or attempted to make common cause, with gun dealers in Mozambique;

13.10 that the plaintiff has been involved in illegal activities with gun dealers in Mozambique;

13.11 that the plaintiff has made common cause, or attempted to make common cause, with criminals in Mozambique;

13.12 that the plaintiff has been involved in illegal activities with criminals in Mozambique; and

13.13 that the plaintiff is morally corrupt.'

[14] The appellants in their plea denied all the aforesaid allegations. In the alternative they raised a plea of fair comment and alleged that the statements in the editorials and articles were not statements of fact, but comments concerning matters of public interest, namely the candidacy of plaintiff for the post of Ekhurhuleni Metro Police Chief and his

unsuitability for the post; that the comments were fair and that the facts on which the comments were based were true.

[15] In answer to a request for further particulars to identify each and every fact which the appellants alleged to be true the appellants replied that the facts upon which the comments were based were the following:

'The Plaintiff is a murderer as a result of him planting a bomb in Magoo's Bar during 1986, when several people were killed;

The Plaintiff was detained in Mozambique on alleged arms trafficking between Mozambique and South Africa.'

[16] In summary, it is alleged by the respondent that the editorials and articles are defamatory of him and impaired his dignity in that it is stated: (i) that he is not suited for the position of Head of the Ekurhuleni Metro Police Force; (ii) that he is a criminal; (iii) that he is a murderer; and (iv) that he has been involved in illegal activities with gun dealers in Mozambique.[1] The editorials and articles clearly do contain express statements to the effect that the respondent is not suited for the position of Head of the Ekurhuleni Metro Police Force; that he is a criminal and that he is a murderer. They also, by implication, contain a statement that the respondent is morally corrupt. Each of these statements would affect the good name and reputation of the respondent and is therefore defamatory of him. Each of these statements is also insulting of the respondent and would therefore have impaired his dignity.[2] The defences available in respect of defamation are also available in respect of an impairment of dignity. I therefore do not consider it necessary to refer to both the impairment of the respondent's dignity and the defamation and shall

[1] It is also alleged that the respondent made common cause with gun dealers in Mozambique without classifying the gun dealers as criminal gun dealers as is done in the next paragraph but that would not have been defamatory of the respondent.

[2] See Neethling, Potgieter and Visser *Law of Delict* 5 ed p 321.

henceforth, in dealing with the defences raised, only refer to the aspect of defamation.

[17] The court below held that the allegations of fact commented upon in the editorials and articles were essentially untrue and not accurately stated and that the defence of fair comment could for that reason not be sustained.

[18] The court below would seem to have found that the statement that the respondent's 'dubious flirtation with alleged gun dealers in Mozambique' amounted to a statement that the respondent was actually involved in illegal activities with gun dealers in Mozambique. I do not agree. Reference to the respondent's activities in Mozambique is made in the 'Here comes McBride' editorial, the 'Bomber McBride to sue The Citizen' article and the 'Beware ambush broadcasters' article. In the editorial it is said that the respondent is a criminal 'never mind his dubious flirtation with alleged gun dealers in Mozambique'; in the 'Bomber McBride' article the editorial is repeated and stated that in '1998 he was detained in a Mozambique jail on suspicion of gun-running'; and in the 'Beware ambush broadcasters' it is said that 'his track record as a multiple murderer and a suspect in gun dealing make him unsuitable as a metro police chief'. It is not alleged that the respondent was actually involved in illegal activities with gun dealers in Mozambique. It is alleged that the respondent's flirtation with alleged gun dealers in Mozambique is suspicious and may have been criminal but that it is not necessary to get to the bottom of that to determine whether he is a criminal because the murders that he committed put him firmly in that category. In other words it is alleged that the respondent may have been involved in criminal gun dealing in Mozambique or that there are

facts indicating that he may have been involved in criminal gun dealing in Mozambique not that he was indeed involved in criminal gun dealing. That allegation is itself defamatory of the respondent but that is not what he is complaining about, possibly for good reason, such as a realisation that the defamation could be justified on the basis of truth and public benefit.

[19] That leaves the defamatory statements that the respondent is not suited for the position of Head of the Ekurhuleni Metro Police Force, that he is a criminal, a murderer and morally corrupt. The statement that the respondent is a criminal and that he is morally corrupt derives from and thus does not add anything to the statement that he is a murderer. It is therefore only necessary to deal with the statements that the respondent is not suited for the position of Head of the Ekurhuleni Metro Police Force and that he is a murderer.

[20] The publication of a defamatory statement gives rise to a presumption that it's publication was wrongful and with the intention to inflict injury. The onus is on a defendant to rebut one or other of these presumptions on a preponderance of probabilities.[3] The lawfulness of a defamatory publication, as in the case of any other 'harmful act or omission is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community'.[4] A number of standard defences to an allegation of unlawfulness have nevertheless developed. One such defence is the defence of fair comment raised by the appellants. Another such defence is the defence of truth for

[3] *Hardaker v Phillips* 2005 (4) SA 515 (SCA) para 14.
[4] *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1204D-E.

the public benefit. The elements of the defence of fair comment are the following:

(i) the relevant statement must constitute comment (or opinion);

(ii) the comment must be fair;

(iii) the facts commented upon must be true; and

(iv) the comment must be about a matter of public interest.[5]

[21] According to the appellants' plea the matter that was being commented upon, which was a matter of public interest, was the candidacy of the respondent for the post of Ekurhuleni Metro Police Chief and his suitability for the post. The true facts upon which that comment was based were, according to the appellants, the fact that the respondent was 'a murderer as a result of him planting a bomb in Magoo's Bar during 1986, when several people were killed' and the fact that the respondent 'was detained in Mozambique on alleged arms trafficking between Mozambique and South Africa'.

[22] In its judgment the court below summarised the facts which were common cause as follows:

'[2] At all material times during 1986 plaintiff was a member of Mkhonto we Sizwe ("MK"), a military wing of the African National Congress which was then involved in an armed struggle for political liberation against the apartheid security forces of the Republic of South Africa. On 14 June 1986 a unit of MK under the leadership of the plaintiff and acting within the context of the liberation struggle as aforesaid, carried out an attack by planting and exploding a car bomb outside the Magoo's Bar / Why Not Restaurant, in Durban and as a result whereof three female patrons were killed and many other patrons were injured. Plaintiff was subsequently arrested, charged and convicted and sentenced to death in 1987 for the three counts of murder and 79 counts of attempted murder and other charges related to the operation.

[5] *Marais v Richard and ano*ther 1981 (1) SA 1157 (A) at 1167E-G.

[3] After some four years in death row, plaintiff was reprieved from the death sentence in 1991 and on 28 September 1992 he was released from prison. Plaintiff applied for amnesty to the TRC (Truth and Reconciliation Commission) which was granted on 19 April 2001 in terms of section 20 of the Promotion of National Unity and Reconciliation Act No 34 of 1995 (the TRC Act) for his conduct in the armed struggle including the attack on the Magoo's Bar / Why Not Restaurant which was carried out on 14 June 1986 and for which he was convicted and sentenced to death and subsequently reprieved.

[4] During March 1998 plaintiff was arrested and detained for six months in Mozambique on allegations or suspicions of espionage, criminal conspiracy and gunrunning and was subsequently released without being charged after the allegations against him were quashed by the Supreme Court of Mozambique. At the time plaintiff was employed as a foreign affairs representative for the National Intelligence Coordinating Committee (NICCO) Plaintiff had travelled to Mozambique in his private or personal capacity.'

[23] The question that arises is whether the subsequent granting of amnesty to the respondent rendered the statement that he was a murderer false. In terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 a committee known as the Committee on Amnesty was established to consider applications for amnesty. Amnesty could in terms of s 20(1) be granted in respect of offences which related to 'an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3)'. For example, in terms of subsection (2)(d) the offence had to be committed by, amongst others, a member of a publicly known political organisation or liberation movement in the course and scope of his or her duties and within the scope of his or her express or implied authority. It had to be directed against, amongst others, members of the security forces of the State engaged in a political struggle against that political

organisation or liberation movement and had to be committed bona fide in furtherance of the struggle.

[24] Sections 20(7)(a), (8) and (10) of the TRC Act provide as follows:

'(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) 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[6] 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.'

[25] The respondent was convicted of murder but as a result of amnesty having been granted to him the conviction is in terms of s 20(10) to be deemed not to have taken place and in terms of s 20(7)(a) he cannot be held criminally or civilly liable for the offences he had committed.

[6] The Committee referred to is the Committee on Amnesty.

[26] The appellants submitted that notwithstanding the granting of amnesty the respondent was a murderer as it was a fact that he had committed the crime of murder and that he was convicted and sentenced to death for such crime. They tried to derive some support for this submission from the decision of this court in *Du Toit v Minister of Safety and Security and another* [2008] ZASCA 125; 2009 (1) SA 176 (SCA) and the decision of Constitutional Court on appeal to it.[7] In my view these decisions are of no assistance to the appellants. That case dealt with the effect of amnesty on past events namely the legal consequences that flowed from the commission and conviction of an offence which were complete before the date on which amnesty was granted.

[27] The epiloque to the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) which in terms of s 232(4) thereof is deemed to form part of the substance thereof, provided:

> 'This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South-African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

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[7] *Du Toit v Minister for Safety and Security of the Republic of South Africa and another* [2009] ZACC 22; 2009 (6) SA 128 (CC).

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.'

[28] Pursuant to its obligation in terms of the Interim Constitution Parliament passed the Promotion of National Unity and Reconciliation Act 34 of 1995 ('the Act'). The provisions of the epiloque were repeated in the preamble to the Act. The long title reads: 'To provide for . . . the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past . . ..'

[29] According to the *Shorter Oxford Dictionary* amnesty means 'forgetfulness; an intentional overlooking' or 'an act of oblivion, a general overlooking or pardon of past offences by the ruling authority'. In *Azanian Peoples Organisation (Azapo) and others v President of the Republic of South Africa and others* 1996 (4) SA 671 (CC) para 35 Mahomed DP said in regard to the meaning of the word:

'The word has no inherently fixed technical meaning. Its origin is to be found in the Greek concept of "amnestia" and it indicates what is described by *Webster's Dictionary* as "an act of oblivion". The degree of oblivion or obliteration must depend on the circumstances. It can, in certain circumstances, be confined to immunity from

criminal prosecutions and in other circumstances be extended also to civil liability. Describing the effects of amnesty in treaties concluded between belligerent parties, a distinguished writer states:

"An amnesty is a complete forgetfulness of the past; and as the treaty of peace is meant to put an end to every subject of discord, the amnesty should constitute its first article. Accordingly, such is the common practice at the present day. But though the treaty should make no mention of it, the amnesty is necessarily included in it, from the very nature of the agreement.

Since each of the belligerents claims to have justice on his side, and since there is no one to decide between them (Book III, § 188), the condition in which affairs stand at the time of the treaty must be regarded as their lawful status, and if the parties wish to make any change in it the treaty must contain an express stipulation to that effect. Consequently all matters not mentioned in the treaty are to continue as they happen to be at the time the treaty is concluded. This is also a result of the promised amnesty. *All the injuries caused by the war are likewise forgotten; and no action can lie on account of those for which the treaty does not stipulate that satisfaction shall be made; they are considered as never having happened.*"'

[30] From the aforesaid it is clear that the purpose of amnesty provided for in the Interim Constitution was to advance reconciliation and reconstruction of our society on the basis that there is no need for retribution or victimisation. Provision had to be made for the reintegration into the South African society of many people who had taken part in the armed struggle for liberation. It is, amongst other things, to give effect to this intention that the Act was passed and that provision was made that a person who had been granted amnesty in respect of an offence should not be criminally or civilly liable in respect of the offence, that any entry or record of the conviction should be deemed to be expunged from all official documents or records and that the conviction should for all purposes be deemed not to have taken place. I have no doubt that the intention was not only that people to whom amnesty had

been granted should not be held criminally and civilly liable for offences committed by them in the course of the conflicts of the past and with the political object of liberation, but also that they should be considered not to have committed the offences and that those offences should not be held against them, so that they could be reintegrated into society. Without an agreement on that basis a negotiated settlement may well not have been possible.

[31] The intention was to close the book on human rights transgressions of the past in order to achieve reconciliation. As was said by the Constitutional Court in the *Du Toit* case in para 55:

'[T]he primary aim of the Act was to use the closure acquired as a stepping stone to reconciliation for the future. Amnesty was an important tool in this process and one without which the process would not have been agreed to by all parties, and could not have taken place.'

And in para 56:

'The conscious decision by the legislature was that amnesty would allow people not to be trapped in the painful past, but to be given a pardoned freedom to go forth and contribute to society. Amnesty may forgive the past, but in South Africa it is intended to have the inherently prospective effect of national reconciliation and nation-building, for the past can never be undone. Only the future may be forged as desired.'

[32] In the *Azapo* case Didcott J referring to a basic object promoted by the statute said:[8]

'Once the truth about the iniquities of the past has been established and made known, the book should be closed on them so that the catharsis thus engendered may divert the energies of the nation from a preoccupation with anguish and rancour to a future directed towards the goal which both the postscript to the Constitution and the preamble to the statute have set by declaring in turn that

[8] At 701G-I.

". . . the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society"'.

[33] For these reasons I am of the view that once amnesty had been granted to the respondent he could no longer be branded a criminal and murderer in respect of the offences in respect of which such amnesty had been granted to him. That is not to say that the respondent's actions and the consequences of his actions are to be considered not to have taken place. It is a fact that the respondent placed the bomb that killed a number of people and it is a fact that he was convicted of the murder of those people. The amnesty granted to the respondent could not obliterate those facts or erase them from the historical record but had the effect that the respondent is no longer considered to be a criminal in respect of the deeds committed by him. The granting of amnesty was an attempt to shape the future not to undo the past. The statement in the editorials and articles that the respondent is a murderer is therefore false.

[34] I need not address the question whether a defence of fair comment based on some facts which are true and others which are not true could succeed. Counsel for the appellants did not submit that the defence of fair comment in respect of the defamatory allegation that the respondent was not suited for appointment as Ekurhuleni Metro Police Chief should nevertheless succeed on the basis that although the allegation that the respondent was a criminal and a murderer was not true, the allegation that there were facts indicating that he may have been involved in criminal gun dealing in Mozambique was true. It is quite understandable that they did not do so. It is only in the first editorial, the 'Bomber McBride' article (in which that editorial was repeated) and the 'Beware ambush broadcasters' article that the comment is based on the allegation that the

appellant is a murderer as well as the allegation that he is a suspect in gun dealing. In the other editorial and articles the comment is based solely on the allegation that he is a murderer.

[35] It follows that the appellant's pleaded defence of fair comment on a matter of public interest, being the suitability of the respondent for appointment as Ekurhuleni Metro Police Chief, should have been dismissed by the court below on the ground that the facts on which the comment was based are not true.

[36] The statement that the respondent is not suitable for appointment as Ekurhuleni Metro Police Chief is not the only defamatory statement on which the respondent's action was based. The action was also based on the allegation that the respondent is a murderer. In respect of this defamatory allegation the appellants did not raise a defence apart from the general denial of the respondent's allegations. The alternative defence of fair comment namely that the statements made in the editorials and articles were not statements of fact but comments concerning matters of public interest, was, for the reasons that follow, not intended to apply to the allegation that the respondent is a murderer. First, it is not alleged that the question whether or not he was a murderer was of public interest, the public interest alleged is 'the candidacy of (the respondent) for the post of Ekurhuleni Metro Police Chief and his suitability therefor'; and second, it is specifically stated in the respondent's further particulars that the alleged comments were based on the 'true' fact that the respondent was a murderer.

[37] Before us counsel for the appellants nevertheless submitted that the statement that the respondent was a murderer was not a statement of fact

but in itself constituted fair comment on the facts stated in the article that appeared in the Citizen of 10 September 2003 'Mc Bride tipped to head Metro cops', ie on the facts that led to his conviction on several charges of murder and attempted murder, as well as the fact that he had been granted amnesty. Counsel for the appellants submitted that the authors of the editorials and articles were simply expressing their opinion that notwithstanding amnesty the respondent was a murderer. Counsel contended that the expression of that opinion was fair. Not having pleaded this defence and having stated expressly that it was a fact that the respondent was a murderer, the defence of fair comment is, on the pleadings, not open to the appellants in respect of the allegation that the respondent is a murderer. See in this regard *Golding v Torch Printing & Publishing Co (Pty) Ltd and others* 1948 (3) SA 1067 (C) at 1083 where Ogilvie Thompson AJ said:

'As a matter of pleading, it is my opinion essential that when the defence of fair comment is raised the plea should, by appropriate averment, set out the essential elements whereupon, in the light of the circumstances of the particular case, the defence is founded.'

But the defence would in any event have failed had it been properly raised.

[38] Whether the effect of amnesty is that a person who had been convicted of murder is no longer a murderer is a matter on which opinions may differ and such opinion if genuinely held and relevant may constitute fair comment.[9] The question is however whether the statement was an expression of opinion as contended for by the appellants.

[9] *Marais v Richard and another* 1981 (1) SA 1157 (A) at 1167F-H.

[39] The appellants submitted that it is explicit in the respondent's cause of action that readers of The Citizen would have understood the assertion that he is a murderer as a comment or opinion. The respondent did plead that the readers of The Citizen would have understood the editorials and articles to mean that he is a murderer (i) despite him having been a member of MK; (ii) despite him having participated in the attack on the Magoo's bar as part of the armed struggle waged by the ANC and MK to eradicate the system of apartheid; and (iii) despite him having been granted amnesty. These allegations were, however, made as an alternative to the allegation that the editorials and articles were understood by the readers of The Citizen to mean that the respondent is a murderer. The question thus remains whether the allegation that the respondent is a murderer was made as a statement of fact or amounted to comment.

[40] In *Marais v Richard and another*[10] this court held that in order to determine whether an allegation is a statement of fact or an expression of opinion, the primary question is how the ordinary reasonable reader would have understood it. Jansen JA, who delivered the judgment, said that whether the ordinary reasonable reader would have regarded it as a statement of fact or an expression of opinion should depend largely on the content of the allegation, the context in which it is used and the circumstances known to the reader.

[41] A statement that the respondent is a murderer may be intended as a statement of fact or may be intended as a comment based on certain facts. Whether the ordinary reasonable reader would understand it as the one or the other depends on all the circumstances. If made without reference,

[10] At 1168G-H.

express or implied, to the facts upon which the statement is based, more particularly the fact that amnesty had been granted to the respondent, it will be understood as a statement of fact and not as comment.[11] Absent amnesty, it is a well known fact that the respondent is a murderer and it is unlikely that anybody who chose to ignore amnesty would be expressing an opinion that he is a murderer.

[42] Counsel for the appellants submitted that in the light of all the relevant facts relating to the offences committed by the respondent including the fact that amnesty had been granted to him which were notorious and had been mentioned in other articles published in The Citizen, the ordinary reasonable reader would have interpreted the statements that the respondent is a murderer as an expression of opinion and not a statement of fact. However, if the statement that the respondent is a murderer was intended as an expression of opinion or a comment, it is in the editorials and articles themselves that such an implication (either express or implied) of the facts upon which the opinion or comment is expressed must be found. That is so because, as stated above, whatever the prior knowledge of the readers about the subject matter, the assertion that the respondent is a murderer may be either a statement of fact or an expression of opinion and unless, having regard to all the circumstances, there is some indication express or implied in the editorials and articles that it is the expression of an opinion or inference in respect of the relevant facts, it would be understood by ordinary reasonable readers as a statement of fact. Compare in this regard *Telnikoff v Matusevitch* [1992] 2 AC 343 (HL). That case concerned a libel action brought by Telnikoff against Matusevitch based on a letter written by Matusevitch to a

[11] See in this regard *Kemsley v Foot and others* [1952] 1 All ER 501 (HL) at 504H-505H referred to with approval in *Johnson v Beckett and another* 1992 (1) SA 762 (A) at 780F-G and 782G.

newspaper in reaction to an article written by Telnikoff and published by the newspaper. One of the issues to be decided was whether statements made in the letter were statements of fact or comment and the question arose whether regard could be had to the whole of the article, not only the sentence from it quoted in the letter, to determine this issue. The house of lords held that it was not permissible to do so. Lord Keith of Kinkel said:[12]

'In my opinion the letter must be considered on its own. The readers of the letter must have included a substantial number of persons who had not read the article or who, if they had read it, did not have its terms fully in mind. If to such persons the letter appeared in paragraphs 6 and 7 to contain statements of fact about what the plaintiff had written in his article, which as I have already indicated might well be the case, then in the eyes of those persons the plaintiff would clearly be defamed. The matter cannot turn on the likelihood or otherwise of readers of the letter having read the article. In some cases many readers of a criticism of some subject matter may be familiar with that subject matter but in other cases very few may be, for example where that subject matter is a speech delivered to a limited audience. The principle must be the same in either case.'

He added at 354B-C:

'There can be no doubt that where the words complained of are clearly to be recognised as comment, and the subject matter commented on is identified, then that subject matter must be looked at to determine whether the comment is fair.'

[43] In the 'Here comes McBride' editorial it is stated that the respondent committed cold blooded multiple murders. That statement is repeated in the article 'Bomber McBride to sue The Citizen' and then the author of the article added:

'McBride was found guilty of the 1986 Durban bombings in which three civilian women were killed.

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[12] At 352E-G.

He was released in September 1992, at the same time as multiple murderer Barend Strydom.'

In the 'Beware ambush broadcasters' article it is said that the respondent has a track record as a multiple murderer. In the Kenny article reference is again made to the murders committed by the respondent and he is unfavourably compared with Clive Derby-Lewis and Barend Strydom. Clive Derby-Lewis was convicted of the murder of Chris Hani and Barend Strydom was convicted of the murder of several people. In the 'Mbeki no conciliator' article reference is again made to 'Mc Bride's deed in murdering civilians'. In the editorial 'McBride cops job' it is said:

'The bomber has support in high places, but that doesn't detract from the evil of his multiple murders, or make him a suitable policeman.'

In none of these editorials or articles is any mention made of the fact that amnesty had been granted to the respondent and in none of them is any express or implied indication to be found that a comment or opinion in respect of the effect of amnesty on the offences committed by the respondent is being expressed. In the absence of any such indication it is not possible to construe the statement that the respondent is a murderer simply as an expression of an opinion on the effect of amnesty. Moreover, in the Kenny article the respondent is classified in the same category as Derby-Lewis and Barend Strydom both of whom had not been granted amnesty which in itself is an indication that, far from expressing an opinion on the effect of amnesty, the fact that amnesty had been granted to the respondent was ignored by the author.

[44] For these reasons, had a defence of fair comment been raised in respect of the defamatory allegation that the respondent is a murderer, it would not have succeeded. It follows that the respondent's action in the court below in so far as it is based on the defamatory allegations that he is

unsuited to be appointed to the post of Ekhurhuleni Metro Police Chief and that he is a criminal, a murderer and morally corrupt should have succeeded whereas it should not have succeeded in respect of the allegation that he had been involved in illegal activities with gun dealers in Mozambique.

[45] I now turn to the question of damages. The court below awarded R100 000 damages against the first to fourth appellants jointly and severally in respect of the Kenny article and an additional R100 000 against the first to third appellants in respect of the other articles. It must have done so because the Kenny article contained no reference to the respondent's activities in Mozambique and because the statement that the respondent is a murderer were repeated several times over a period of more than a month.

[46] Before us counsel for the appellants did not persist in an argument advanced in their heads of argument that, in the event of this court finding that the appeal in respect of the appellants' liability should be dismissed the court below misdirected itself in respect of its award of damages. However, the damages awarded against the first, second and third appellants have to be adjusted in the light of my finding that the court below should not have found that they had made the defamatory allegation that the respondent had been involved in illegal activities with gun dealers in Mozambique. In my view a fair and just adjustment would be to reduce the award against the first, second and third appellants by an amount of R50 000.

[47] The downward adjustment of the damages awarded to the respondent should not have any effect on the costs order made by the

court below. On appeal the fourth appellant has achieved no success. He should therefore be liable for the respondent's costs of appeal, but only in respect of the claim against him. The other appellants have achieved a measure of success in having had the damages awarded against them reduced by R50 000. But although the damages award, which is a composite award in respect of several claims, is reduced, their appeal is largely unsuccessful. In this court the question whether the respondent's action should have succeeded in respect of the allegations in respect of his activities in Mozambique was of relatively minor importance. Some recognition should nevertheless be given in the costs order to the limited success achieved by the appellants on appeal. In my view it would be fair and just if the respondent is awarded 75% of his costs on appeal against the appellants jointly and severally.

[48] In the result the following order is made:

(i) The appeal is partially upheld.

(ii) The appellants are ordered, jointly and severally, to pay 75% of the respondent's costs.

(iii) The order of the court below is set aside and replaced with the following order:

'(a) The fourth, fifth and sixth defendants are ordered, jointly and severally, to pay to the plaintiff the sum of R150 000 together with interest thereon at the rate of 15,5% per annum calculated 14 days from date of service of summons to date of payment.

(b) The seventh defendant is ordered jointly and severally with the fourth, fifth and sixth defendants to pay to the plaintiff R100 000 of the said sum of R150 000 in paragraph (a) above, together with interest thereon at the rate of 15,5% per annum calculated 14 days from date of service of summons to date of payment.

(c) The fourth, fifth, sixth and seventh defendants are ordered jointly and severally to pay to plaintiff the costs of suit.'

P E STREICHER
JUDGE OF APPEAL

MTHIYANE JA: (dissenting)

[49] I have had the benefit of reading the judgment of my colleague, Streicher JA and regret that I am unable to agree with the reasoning and the conclusion to which he has come. The reason, which relates to the claim of defamation based on the statement that the plaintiff was unfit for appointment as a Metro Police Chief because he is a murderer, is that we differ over the proper interpretation of the relevant provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995 ('the TRC Act'). That difference will need to be explained more fully after dealing with the basis for the respondent's (plaintiff's) claim and the relevant legal principles. Broadly speaking however we are in agreement, as he says in para 41 that as a matter of fact the plaintiff is a murderer. Where we disagree is in the conclusion (in para 33) that the effect of the provisions of the TRC Act is that he may no longer be described as such and is no longer to be regarded as a murderer thereby rendering a statement to that effect false and hence fatal to the defence of fair comment advanced by the appellants (the defendants). In my view the relevant provisions of the TRC Act under which amnesty is granted do not have that effect. The result of our disagreement on this point is that I would uphold the defence of fair comment and also the appeal.

[50] The statements relevant to the plaintiff's action are contained in two editorials and five articles published in The Citizen newspapers between September and October 2003. In the offending statements the authors contended that the plaintiff was not suitable for appointment as the Head of the Ekurhuleni Metro Police Force for two reasons. First, that he is a murderer and in consequence he is also described in the first editorial as a criminal. The articles and editorials cite the bombing by the plaintiff of Magoo's bar, his conviction and sentence for murder and attempted murder to justify their stance. Second, reference is made to the plaintiff's arrest and detention in Mozambique on the suspicion of gun-running although this is clearly treated as being of less significance.

[51] The plaintiff took offence to these statements and instituted action for defamation, alleging in his particulars of claim that the said allegations were defamatory (and injurious) of him, because he had been granted amnesty by the Truth and Reconciliation Commission (the TRC) for the murders and the other offences he had committed, and his convictions had thereby been expunged. He took offence to the allegations pertaining to his arrest and detention in Mozambique claiming that they amounted to saying that he had been involved in unlawful activities involving gun dealers in that country.

[52] In their defence the defendants pleaded that the published statements constitute comment or opinion, which was fair and related to a matter in the public interest. They contended that the factual allegations being commented upon were true.

[53] Although the plaintiff had pleaded that the allegation that he was unsuitable for the post of Metro Police Chief was in itself defamatory of

him, the evidence presented at the trial on his behalf and by himself limited his complaint to two grounds. The first was that he was labelled a murderer and a criminal notwithstanding that he had been granted amnesty under the TRC Act. The second was that the statements relating to his arrest and detention carried the imputation that he had consorted with gun-runners in Mozambique notwithstanding that the charges against him arising out of these allegations had been quashed by the Supreme Court of Mozambique.

[54] At the trial it seemed that the allegation in relation to the plaintiff's suitability for the position of police chief fell away as a basis for the defamation claim, when reliance thereon was disavowed by the plaintiff. The plaintiff's apparent change of tack was recorded and dealt with by Maluleke J when he said:

'it was correctly conceded on behalf of the plaintiff that the statements that "he [meaning the plaintiff] is blatantly unsuited for the post of Ekurhuleni Metro Police Chief" and is, not qualified for the job' qualify to be comment or an opinion and that such a statement is not an allegation of fact and cannot be defamatory.'

My colleague's judgment proceeds on the basis that the plaintiff's suitability was still in issue on appeal. With this I have no difficulty. Even if it is in issue it is, in my view, disposed of together with the defence relating to the claim that he is a murderer. If it is fair comment then the statement that he is not suitable is also justified on the same basis.

[55] In conclusion Maluleke J held that the impugned statements (relating to the murder and the allegations of gun-running in Mozambique) could not be understood by the right thinking reader of The Citizen to be 'a comment or an opinion but rather as an allegation of fact' which could only be justified if it was true or accurately stated.' The

learned judge continued that 'the statement that the plaintiff is a "criminal, a coldblooded multiple murderer" . . . who behaves suspiciously with gun-runners in Mozambique will be defamatory in the absence of proof that such allegations are in fact true and accurately stated.'

[56] In my view the above conclusion is in the context of the offending articles read as a whole, flawed as I will attempt to show presently.

[57] Before dealing with the question whether the defence of fair comment is sustainable it is necessary to refer to the relevant texts. They comprise the two editorials and the articles quoted in paragraphs 3 to 10 of my colleague's judgment. For convenience they will not be repeated here save for two which will be dealt with in full. For the rest it will suffice to refer merely to the headings of the texts.

[58] Of the articles referred to above that which appeared on 10 September 2003 and quoted in paragraph 3 does not form the subject of the complaint. The article in question made the front page of The Citizen under the heading 'McBride tipped to head Metro Cops' and dealt with the possibility that the plaintiff might be appointed as the new chief of police for the Ekurhuleni Metropolitan Municipality. It traced the plaintiff's past activities and alluded to the fact that he had served four years on death row upon being convicted of murder and other offences, arising out the explosion of a bomb he had planted in consequence of which three women were killed and 79 persons injured. The article stated that the plaintiff was widely condemned for the attack on what was perceived to be a soft civilian target, although the plaintiff insisted that the pub, the site of the attack, was frequented by SADF military

personnel from the main local barracks. The article referred to his application for and the grant of amnesty to him by the TRC. It was also reported that the plaintiff was on a later occasion arrested, detained and charged with gun-running in Mozambique and sent home.

[59] The above article set the scene for the fierce and robust debate that followed on the plaintiff's suitability for appointment to the post of police chief. The impact was felt in the higher echelons of political power, which saw the then President, Thabo Mbeki, joining the debate through his weekly news letter. The president was critical of those who opposed the appointment of the plaintiff. The full text of his comment appears in paragraph 8 of my colleague's judgment.

[60] Subsequent to what may be referred to as a forerunner article on 10 September 2003, The Citizen carried an editorial on 11 September entitled 'Here comes McBride'. I quote the text in full. It reads as follows:

'Robert McBride's candidacy for the post of Metro Police Chief is indicative of the ANC's attitude to crime.

They can't be serious, he is blatantly unsuited, unless his backers support the dubious philosophy: set a criminal to catch a criminal.

Make no mistake that is what he is. The cold-blooded multiple murders which he committed in the Magoo's Bar bombing puts him firmly in that category.

Never mind his dubious flirtations with alleged gun dealers in Mozambique. Those who recommend him should have their heads read. McBride is not qualified for the job. If he is appointed it will be a slap in the face for all those crime battered folk on the East Rand who look to the government for protection.'

[61] The second item I wish to refer to appeared in The Citizen on 21 October 2003 and is referred to in paragraph 10 of my colleague's judgment as 'the Kenny article'. It reads as follows:

'At a time of public conflict within the ANC government . . . President Mbeki's devoted his weekly newsletter to attacking The Citizen for suggesting that Robert McBride is unsuitable for high office in the Police.

The three most notorious non-government killers of the later apartheid period were Clive Derby-Lewis, Barend Strydom and Robert McBride.

Each was a wicked coward who obstructed the road to democracy.

Derby-Lewis who targeted a specific enemy, Chris Hani, is the only one not to be freed. The other two killed innocent people. Strydom looked his helpless victims in the eyes before he murdered them.

McBride did not even do this. He planted a bomb in a bar and slunk off not caring whether he killed men, women or children.

It was the act of human scum.

. . .

McBride's bomb was planted in 1986, at a time when apartheid was clearly in retreat and when legal avenues of resistance were opening up.

His murder of the innocent women strengthened the hand of die-hard apartheid supporters, and had the effect of prolonging the wretched regime.

Contrary to Mbeki's suggestion, I know of few public voices and not that of The Citizen who opposed the idea of the TRC.

Court cases against the criminals of the apartheid era would have taken a thousand years.

The TRC was well conceived. Its execution however, was criticised for bias.

The more apartheid reformed, the greater the violence against it.

When it effectively ended in 1990, the violence reached its zenith.

There were more political murders per year from 1990 to 1994 than in any year of apartheid.

These were mostly ignored by the TRC.

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 improve the provisions of pensions to the poor.
He should most certainly not be a policeman.'

[62] In my view on a proper reading of the above articles the right thinking reader of The Citizen would have been left with the impression that the authors are clearly and principally commenting or expressing an opinion on the suitability of the plaintiff as a candidate for appointment as police chief. As I see it the reader would have understood the writers to be arguing, rightly or wrongly, that because of the plaintiff's involvement in the bombing of Magoo's bar and the Why Not restaurant in 1986, which had fatal and disastrous consequences for many innocent people, and his subsequent conviction and sentence, he ought not to be appointed to the post of chief law enforcement officer of a large municipality.[13] Despite the strong and robust language used and the somewhat extreme (if not, right-wing) views expressed, the articles and editorials remain comment or opinion on the issue of his suitability for the position of the Metro Police Chief. The other articles I have not quoted also deal with the plaintiff's suitability for that post.

[63] I agree with Maluleke J that the appointment of a police chief is a matter of public interest. I also think judicial notice can be taken of the fact that with the advent of the Constitution and the new democratic order South African citizens feel very strongly about who gets to be appointed to public office and do not hesitate to venture opinions in matters of that nature. Accordingly the right thinking reader of The Citizen would have to be aware of this and his or her right to freely express an opinion in matters of public interest. In this regard it has been said:

[13] Reference is also made to his arrest and detention in Mozambique, which I deal with separately but this is in passing and is not the major thrust of the original editorial.

'In cases of comment on a matter of public interest the limits of comment are very wide indeed. This is especially so in the case of public men. Those who fill public positions must not be too thin-skinned in reference to comments made upon them.' (*Pienaar & Another v Argus Printing and Publishing Co Ltd*)[14] It therefore follows that the impugned statements would *prima facie* have been protected as free speech.

[64] In *Khumalo & Others v Holomisa*[15] we were reminded of the importance of the right of freedom of expression. This right has been acknowledged by the Constitutional Court and other South African courts as integral to democratic society for many reasons. We are also reminded that freedom of expression is constitutive of the dignity and autonomy of human beings and that without it the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled. Dealing with the role of the media (that is The Citizen in this case, as it is one of the defendants) the Constitutional Court said:

'In a democratic society, then, the mass media play a role of undeniable importance. 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 fledging democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the

[14] 1956 (4) SA 310 (W) at 318D-G.
[15] 2002 (5) SA 401 (CC) at para 21.

media in the performance of their obligations to the broader society, principally through the provisions of s 16.'[16]

Section 16 reads as follows:

'(1) Everyone has the right to freedom of expression, which includes ─

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas . . .'.

[65] The right to free speech is of course not unlimited as pointed out in *Khumalo*[17] and must be construed in the context of the values enshrined in the Constitution, in particular the values of human dignity, freedom and equality. It is the task of the law of defamation to hold a balance between these competing interests.

[66] Against the background of the above broad principles of the right to free speech and expression of opinion and the limits placed on that by the countervailing interest in dignity it remains to consider whether the defence of fair comment or opinion advanced by the defendants is sustainable. The nature of the defence was articulated by Cameron JA in *Hardaker v Phillips*[18] as follows:

'Defendants in this country first sought to invoke the deference as early as the 19th century; and it was authoritatively imported into our law from the English law of libel nearly 90 years ago in *Crawford v Albu* (1917 AD 102 at 114.) Innes CJ explained that the defence "rests upon the right of every person to express his real judgment or opinion upon matters of public interest."'

Drawing on that explanation by Innes CJ this court in *Marais v Richard & 'n Ander*[19] summarised the requirements of the defence as follows: (i) The statement must constitute comment or opinion; (ii) it must be fair; (iii) the factual allegations being commented upon must be true; and (iv)

[16] Para 24.
[17] Para 25.
[18] 2005 (4) SA 515 (SCA) at para 26.
[19] 1981 (1) SA 1157 (A) at 1167F.

the comment must relate to a matter of public interest. If the defence of fair comment is well-founded it follows that a claim for defamation that is based on the facts on which that comment is based must also fail because it will be justified.

[67] I turn to consider whether the impugned statements comply with the requirements of fair comment or opinion. The test for fair comment is whether the reasonable reader would understand the statements as a comment. One of the hallmarks of comment is that it is connected to and derived from discernible fact. In each of the offending statements it is clear that the authors are expressing an opinion as to the suitability of the plaintiff as a candidate for the post of police chief. The two editorials and the articles that caused offence appear to be part of a series of interrelated commentary on the suitability of the plaintiff as a candidate for the position of police chief. One has only to consider the sequence and context in which the statements are made to come to the conclusion that this constitutes comment or opinion. The article dated 10 September 2003 entitled 'McBride tipped to head Metro cops' provided the background facts and served as a launching pad for the subsequent editorials and the rest of the articles on the subject of the plaintiff's pending appointment to the position he had applied for. The location of the two editorials within the comment and opinion section of the newspaper and the proper construction to be placed on the editorials and articles suggest nothing other than comment and free expression of views as to whether the plaintiff should be appointed as police chief. Accordingly, the conclusion is in my view inescapable that the impugned statements constitute comment or opinion and requirement (i) in *Marais v Richard* has therefore been met. The concluding sentence in the Kenny article says it all where it is asserted:

'He should mostly certainly not be made a policeman.'

It is arguable that the reference in the article to the plaintiff being a murderer was also comment or opinion to advance the view that the plaintiff was not the right person for the job but in view of my later conclusions it is unnecessary for me to explore this. The statement that he was a criminal is clearly dependent upon the statement that he is a murderer. If the latter is correct the plaintiff can hardly complain about the former. It is the factual correctness of the latter statement that matters.

[68] To this may be added the fact that the plaintiff was a public figure, having previously been the subject matter of public commentary, on occasion both controversial and critical, and the focus of many a newspaper publication. Where one is dealing with the criticism of a public figure a measure of leeway is allowed by our courts and the limits of public criticism are wider as compared to a private individual (*Mthembi-Mahanyele v Mail & Guardian Ltd*).[20]

[69] The second requirement is that the offending statement 'must be fair'. What the authors of the editorials and the articles did was to base their assertions that the plaintiff was not suitable for appointment on two grounds namely that the plaintiff had committed murder and other crimes for which he was convicted and sentenced to death. In their minds, rightly or wrongly, a person with that track record ought not to be a police chief. The second matter that they advanced as a disqualification was his alleged activities in Mozambique for which he was arrested and detained for 6 months. The question is whether, based on those matters, the comment that the plaintiff was unsuited for appointment as a Metro police chief was fair. In determining whether the comment is 'fair' there

[20] 2004 (6) SA 329 (SCA) at 356A-E.

is no room for consideration of the merit of the comment of opinion. As Cameron JA observed in *Hardaker*,[21]

'More importantly, whether the jibe is "fair" does not in law depend solely or even principally on reason or logic. In *Crawford v Albu*, Innes CJ suggested that the use of the word "fair" in connection with the defence "is not very fortunate". This is because it is not what the court thinks is fair (a critical comment or opinion, Innes CJ said, need not "necessarily commend itself to the judgment of the Court"). Nor does the comment have to "be impartial or well-balanced". Indeed, "fair" in this context means only that the opinion expressed must be one that "a fair man, however extreme his views may be, might honestly have, even if the views are prejudiced". Hence Innes CJ's observation that the defendant "must justify the facts; but he need not justify the comment".'

[70] I have already alluded to the fact that the views expressed in the impugned statement may well be regarded as extreme or even right-wing but on the above test they cannot be taken to be unfair. To succeed in their defence all that was required of the defendants was to justify the facts and not their comment and it was sufficient for them to show that they were expressing a genuine view on the subject of whether the plaintiff should be appointed as police chief. The plaintiff has not raised malice on the part of the defendants and none has been proved. Accordingly, requirement (ii) relating to fairness has been met.

[71] The third requirement, which holds the key to the outcome of this case, is that the factual allegations being commented upon must be true. If they are and the defence of fair comment is established in relation to the comment or opinion based on those facts then it follows *a fortiori* that the publication of the stated fact is justified. The statement that the plaintiff was not suitable for appointment was not a factual allegation. It was a

[21] Para 32.

comment and as indicated above the plaintiff, rightly or wrongly, conceded that it cannot found a claim for defamation. The allegations in relation to murder and the commission by the plaintiff of the other crimes were expressly said to be the facts on which the comment or opinion on the suitability of the plaintiff for appointment as chief of the Metro Police was based. Their factual accuracy is thus fundamental.

[72] In principle I have difficulty with the notion that a person who has been convicted of the crime of murder may not be described as a murderer or as a criminal if he has been granted amnesty. In *Crawford v Albu*,[22] Innes CJ had occasion to address the subject where he said:

'The ordinary meaning of criminal is one who has committed a crime, that is, an offence against society punishable by the State. As generally used it connotes moral guilt.'

The plaintiff placed a car bomb outside a bar and when it exploded three people were killed and many injured. This is not in dispute and he does not cavil at being described as a 'bomber'. Nor does he suggest that his conviction on charges of murder and attempted murder was wrong. My colleague says that these facts cannot be obliterated from the historical record and that it is a well known fact that he is a murderer, but then goes on to suggest that the granting of amnesty rendered that fact false ─ a suggestion with which I join issue. This is by no means intended to downplay the broader motives which the plaintiff may have had, namely to free the then downtrodden majority of the people of this country from the evil system of apartheid.

[73] It follows therefore that the reference to the plaintiff as a murderer or a criminal is strictly speaking factually correct. The question is

[22] At 118.

whether it is in law rendered untrue or false by the granting of amnesty. In my view the TRC Act does not have this effect. The consequences of the granting of amnesty in respect of the murder and other offences committed by the plaintiff and for which he was convicted is governed by s 20 of the TRC Act. The relevant portion of s 20 reads as follows:

'(7) (a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable . . . and no person shall be vicariously liable, for any such act, omission or offence.'

'(8) If any person ─

(a) . . .

(b) has been convicted of, . . . an offence constituted by the act or omission in respect of which amnesty is so granted . . . the sentence so imposed shall upon such publication lapse . . .'.

Section 20(10) reads as follows:

'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 the 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.' [Emphasis added]

[74] The consequences of a grant of amnesty are dealt with first in s 20(7)(a), which provides that no person who has been granted amnesty 'shall be criminally or civilly liable' in respect of the actions that gave rise to the application for and grant of amnesty. The later provisions of that section deal with the situation where criminal or civil proceedings have been commenced and held in abeyance pending consideration of the application for amnesty and also with the position of persons who have already been tried and sentenced for crimes in respect of which amnesty

is granted. In the former instance the grant of amnesty puts an end to the proceedings and in the latter the prior criminal proceedings are rendered void, the sentence imposed lapses and the person is released. In terms of s 20(10) any entry or record of the conviction is deemed to be expunged from all official documents or records and the conviction shall 'for all purposes' be deemed not to have taken place. It is this last provision that is relevant for present purposes.

[75] In *Du Toit v Minister of Safety and Security & Another*[23] the Constitutional Court considered the scope and effect of s 20(10) and said:

'The section is couched in very broad terms and appears capable of the widest possible interpretation. A purely literal and decontextualised reading might suggest that the grant of amnesty has the effect of expunging not only the record of the conviction and sentence imposed on the perpetrator, but also all consequences that follow that conviction and sentence, past, present and future. There are, however, serious difficulties with that interpretation.[24]

Read in its context it is inconceivable that the purpose of s 20(10) of the Reconciliation Act could be the undoing of the past to a limitless degree. Not even the applicant contends for unrestricted retrospectivity. For, indeed, factual events that occurred in the past cannot be undone.'[25]

In that case the Constitutional Court held that the effect of a grant of amnesty was not to reverse the consequence of the appellant's conviction that his service with the South African Police Services was terminated in accordance with the regulations governing that service. It is significant that in doing so it said that an interpretation of s 20(10) that it expunged all the consequences of the appellant's conviction and sentence including future consequences occasioned serious difficulties. In my view such an interpretation in the present case illustrates the legitimacy of that concern.

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[23] 2009 (6) SA 128 (CC).
[24] Para 31.
[25] Para 32.

[76] The plaintiff contends that the effect of the grant of amnesty is that it is now impermissible to say that he committed murder or is a murderer irrespective of the factual accuracy of that description. That is a far-reaching construction of s 20(10) that does not appear expressly in the language of the section. It is necessary to consider that language in order to see what it does say before turning to consider from whence the respondent derives his contention.

[77] In the first place what the section says expressly is that the entry or record of any conviction shall be deemed to be expunged from all official documents or records. In other words the records of conviction that are produced in criminal courts on a daily basis in this country on the form SAP 69 are, in the case of a person granted amnesty, to be read on the basis that any reference to their convictions are expunged. Any other official record kept for any purpose that refers to those convictions is to be read as if reference to it had been expunged. The purpose of the deeming provision is to avoid the need to trawl through all public documents that record the conviction and amend them to delete that reference. Instead the simpler expedient is adopted of deeming such reference to have been expunged. Accordingly all public records of the plaintiff's conviction are effectively expunged and show that, as far as official records in this country are concerned, he has not been convicted of the crime of murder.

[78] Altering public records is one thing, but expunging from the historical record the fact of what the plaintiff did is another. That can only be said to follow, if at all, from the further provision that his 'conviction shall for all purposes . . . be deemed not to have taken place'. However

this relates only to his conviction and is a 'catch-all' provision intended to supplement the deemed expungement of the convictions from official records. It does not in terms relate to what may be said about the plaintiff arising from the conduct that gave rise to the application for and grant of amnesty. The section nowhere says that it is no longer permissible to refer to what the plaintiff did that caused him to apply for amnesty. That would be contrary to the requirement of his application that he make a full disclosure to the Committee on Amnesty of all relevant facts concerning the act, omission or offence associated with a political object in respect of which he sought amnesty. In the case of the plaintiff those facts are set out in the passage from the judgment of the court below quoted in paras 22 and 33 of my colleague's judgment. The offences were the murders and attempted murders he committed when he planted a car bomb outside Magoo's Bar/Why Not Restaurant in Durban, killing three women and injuring many other patrons. Those are part of the public and historical record of this country. As Langa CJ said in the passage quoted above 'factual events that occurred in the past cannot be undone'. If, as my colleague says, they are part of the historical record and not obliterated by the grant of amnesty I fail to see on what basis it has become impermissible to say simply and in summary of their effect that the plaintiff is a murderer. That is a conventional description in common parlance of someone who perpetrates such acts and to say it is false in these editorials and articles is, with respect, not correct and involves an alteration of the historical record.

[79] It is hardly surprising that s 20 does not in its terms require that the historical record be altered so that there can be no reference to the plaintiff's deeds. That would be wholly contrary to the expressed purpose of the TRC Act which was amongst other things 'to establish the truth in

relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future'.[26] The interim Constitution that sanctioned the entire process of the Truth and Reconciliation Commission, including the amnesty process, protected the right of freedom of expression as the Constitution now does.[27] It is in my opinion wholly contrary to that constitutional guarantee to require that the facts of our historic past should be disregarded and, if stated, treated as false, which is what the respondent wishes this court to do.

[80] I do not differ from my colleague in his broad statement of the purpose of the TRC Act or the importance of the role of the Truth and Reconciliation Commission, including the amnesty process, in furthering the purpose of reconciliation in this country. Where we differ is that in establishing the amnesty process the TRC Act quite clearly spells out the consequences of the grant of amnesty and those stated consequences do not involve a blotting out of the historical record nor do they impose a prohibition on saying that persons to whom amnesty was granted may no longer be described as having committed the offences for which they obtained amnesty.

[81] In my view the reference to the plaintiff as a murderer is not false because as a matter of historical record that is a correct statement and it is a statement the truth of which the plaintiff had to acknowledge when he applied for amnesty. It is unnecessary in order for the statement to be true that the person about whom it is made has been convicted of that offence, although the respondent had been so convicted, or that any conviction is

[26] The purpose is stated in both the long title to the TRC Act and its preamble.
[27] Section 16(1) of the Constitution. In particular s 16(1)(b) protects the right to impart information.

still to be held against him in the public record. The Biblical descriptions of Cain, Moses and King David as murderers[28] have never so far as I am aware been challenged as false because they had not been convicted in a court of law of that crime. Accordingly the primary foundation for the defence of fair comment, namely that the comment is upon facts that are themselves truly stated is established. I should add in this regard that, as appears from the various articles and editorials, the facts giving rise to the description of the plaintiff as a murderer are briefly mentioned and their accuracy is not challenged. Equally the fact that he was granted amnesty was also stated at the outset and is in any event well-known.

[82] I conclude therefore that the fact of the murders and other criminal acts perpetrated by the plaintiff having taken place is not obliterated in the sense that mention thereof may not be made if an occasion arises. The TRC Act does not have the effect of obliterating these facts. The impact of the relevant sections referred to above is limited to protecting convicted persons (such as the plaintiff) from civil or criminal liability as a consequence of an act committed with a political motive (ss (7)(b)). Secondly the effect is that the sentences imposed on the plaintiff lapsed (ss (8) (b))). Thirdly the offence is deemed not to have taken place in the sense that the 'any entry or record of the conviction shall be deemed to be expunged from all official or documents records . . . '. The TRC Act does not proscribe all reference to the criminal conduct that formed the subject matter of an amnesty application, in the sense that if one does so he or she would be liable for defamation. That construction will have a chilling effect on freedom of expression guaranteed under the Constitution and is not required by the wording of s 20 or the fact that what is sought and granted is amnesty. Accordingly requirement (iii) of the defence of fair

[28] Genesis 4 vs 8; Exodus 2 vs 14 and 2 Samuel 12 vs 9.

comment is satisfied insofar as the statement that the plaintiff is a murderer is concerned. For the reasons given by my colleague in para 18 of his judgment I agree that there is no falsehood in relation to the plaintiff's activities in Mozambique nor any foundation for a separate claim for defamation based on these statements.

[83] The fourth and final requirement is that the comment must relate to a matter of public interest. In this particular case the comment could relate to a matter of public interest only if it was germane to the issues in those proceedings. This is because there is no discernible value in protecting litigants who make irrelevant comments to injure the reputation of others. In this case the comment was relevant. The reference in the articles to the plaintiff's conviction for murder was, in the context of the view, contended for by the authors of the articles, relevant to the plaintiff's alleged unsuitability as police chief and it was a matter of public interest. The reference to the bombing incident was not a question of raking up the ashes of the past but, as the defendants saw it, bore relevance to the law enforcement post applied for by the plaintiff. There can be no question that this was relevant to that appointment.

[84] The position applied for is of great importance and aroused public interest and the plaintiff himself was a public figure. At the time of the publication of the offending articles he was the Director of Foreign Affairs. It is not disputed that the question of the plaintiff's appointment to the position was a matter in which the public was legitimately interested. Accordingly the (iv) fourth requirement of fair comment was met.

[85] In my view the defence of fair comment raised by the defendants is well taken and should have been upheld by the court a quo. I would accordingly uphold the appeal and dismiss the plaintiff's claims with appropriate orders for costs.

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KK MTHIYANE
JUDGE OF APPEAL

PONNAN JA:

[86] I have had the benefit of reading the judgments of my colleagues Streicher and Mthiyane. I concur in the order proposed by Streicher JA and agree in general with the comprehensive reasons given by him for the conclusions to which he has come. That Mthiyane JA arrives at a different destination is attributable, as he himself acknowledges, to the view that he takes on the reach of the amnesty granted to the respondent under the provisions of the TRC Act. I feel constrained to disagree with my learned colleague and to explain separately the line that I take in attempting to resolve this complex and troublesome issue.

[87] The task of building a new democratic social order, given the deep conflict that dominated our social landscape, was a difficult one. It ultimately became manifest to the minority who controlled the levers of state power that the only way out of that quagmire was to negotiate a different (hopefully brighter) future with those who had sought to resist that domination. Those negotiations culminated in an interim Constitution that ushered in our new democratic political order. There was an appreciation even at that stage that much of what had occurred during that protracted period of internal political dissension could never ever be fully

reversed and that nation building required a selfless and generous commitment to reconciliation and national unity. The genesis of amnesty is founded in that pragmatic appreciation. But for it the negotiated settlement and our new social contract may well have been stillborn. Amnesty was born out of the recognition that notwithstanding the lingering pain and personal reticence of some to it, that painful chapter of our history had to be brought to a close.

[88] It is against that historical backdrop that the matter must be viewed. For, it informed the epilogue to the interim Constitution, pursuant to which the TRC Act came to be enacted. Mahomed DP thought it more reasonable to infer that what the epilogue contemplated was legislation that would be wide enough to allow for an amnesty that would protect a wrongdoer who told the truth from both the criminal and civil consequences of his or her admissions (*AZAPO*[29] para36). But for the promise of amnesty the 'historic bridge' contemplated in the epilogue might not have seen the light of day and the prospect of unending revenge and retaliation may well have continued to bedevil us. The grant of amnesty was dependent on the perpetrator of the misdeed making full disclosure of all relevant facts. Were it not so, it could hardly have engendered the catharsis that Didcott J talks of (*AZAPO* para 59].

[89] What is clear from s 20(7), read with s 20(8), (9) and (10) of the TRC Act, is that, once a person has been granted amnesty in respect of an act, omission or offence, the offender can no longer be held criminally liable for such offence and no prosecution can be maintained against him or her (*AZAPO* para 7). Tellingly, what the Act envisaged was the grant of amnesty not just in respect of 'offences' but also 'acts' and

[29] Cited in para 29 of Streicher JA's judgment.

'omissions'. Subsection 10 provides in clear and unambiguous terms that the conviction shall for all purposes be deemed not to have taken place. That such is the case was recognized by Langa CJ who stated: 'In return, the weight of the offence is lifted from the perpetrator's shoulders with a guarantee of immunity from prosecution, a clean criminal record, and the assurance that never again can the conviction be counted against him or her' (*Du Toit*[30] para 28). Consistent with that theme, subsection 8 provides for the discontinuation of criminal proceedings that have not yet been finalized, the voiding of criminal proceedings, the lapsing of sentences and the release forthwith of persons in custody. Accordingly, from the date on which amnesty is granted, the direct legal consequences of the criminal conduct for which amnesty was granted will no longer obtain (*Du Toit* para 43).

[90] Whilst the TRC Act seeks to advance reconciliation and promote national unity, it cannot undo, obliterate or blot out what has happened in the past. There was thus a conscious decision on the part of the legislature, acting in accordance with the mandate given to it by our new social contract, that people not be trapped in the painful past but that they 'be given a pardoned freedom to go forth and contribute to society' (*Du Toit* para 56). That entails, as it must, a conscious acknowledgement that not only should the perpetrators not be considered to have committed the offences in question but moreover that those offences should not count against them. Were that not to be so, the grant of amnesty would be rendered meaningless and illusory. There would thus be little incentive for a perpetrator to seek amnesty.

[30] Cited in footnote 7 of Streicher JA's judgment.

[91] Amnesty was not to be had simply for the asking. The Truth and Reconciliation Commission established in terms of the Act was required to facilitate the granting of amnesty to persons who made 'full disclosure of all the relevant facts relating to acts associated with a political objective' (s 3(1)(b)). The main objective of the Commission as set out in s 3 was to promote national unity and reconciliation 'in a spirit of understanding that transcends the conflicts and divisions of the past'. The Act enjoined the Commission to establish as complete a picture as possible of 'the causes, nature and extent of the gross violations of human rights' committed during the relevant period. Amnesty was thus but one, yet significant, facet of the entire TRC process. The whole TRC process was in no small measure dependent for its success on perpetrators, particularly of gross human rights violations, making full and frank disclosure. I can hardly imagine that those perpetrators would have embraced the process if it were to have been suggested to them that notwithstanding the grant of amnesty, they could never ever rid themselves of the stigma and moral opprobrium of their deeds. Moreover, such an approach would run counter to the 'spirit of understanding' postulated by the Act and far from transcending would actually have exacerbated the conflicts of the past. After all as Langa CJ put it (*Du Toit* para 52): '… section 20 (7) to (10) pays due regard to the interplay of benefit and disadvantage so important to the process of national reconciliation'.

[92] The historical purpose of the legislation and the social need it was designed to address, as also the scheme established by the provisions of s 20 (7) to (9) as already discussed, all point ineluctably to the conclusion that it was impermissible to continue to brand the respondent a murderer and criminal in respect of those acts and offences for which amnesty had

been granted to him. Any other approach would be to treat the respondent as if amnesty had not been sought and obtained by him. That could hardly have been the intention of the legislature, which plainly envisaged a change in the status of the person who had successfully applied for amnesty.

[93] The grant of amnesty to the respondent heralded the promise of his reintegration into South African society. To continue branding him a criminal and murderer runs counter to that promise. It strikes me as inconsistent that he be obliged to continue wearing the mantle of a criminal or murderer notwithstanding the fact that his conviction is 'deemed not to have taken place' and any record of it is 'deemed to be expunged from all official documents or records'. After all, expunging the conviction means that the person no longer has a previous conviction (*Du Toit* para 45). That is not to suggest that the fact that the respondent planted a bomb that killed several people for which he was convicted is likewise deemed not to have occurred. On the contrary that remains as deeply embedded in this nation's psyche as it does in our national records. The granting of amnesty to the respondent does not and cannot obliterate or erase the fact of those occurrences. That would be at odds with the notion of establishing as complete a picture as possible. What s 20(7) does do is it changes the legal consequences of the acts for which amnesty was granted, for the future, from the date on which amnesty was granted (*Du Toit* para 40). It must follow that to have ignored the grant of amnesty as the appellants had done in describing the respondent was plainly impermissible. Streicher JA can hardly be faulted therefore in concluding that the statement in the editorials and articles that the respondent is a murderer (made with full knowledge of the grant of

amnesty and the respondent's changed status it must be added) is therefore false.

[94] In my view our template for transition - an imperfect one some have suggested – clearly contemplated two parallel yet intertwined processes. Neither, I daresay, conceptually incompatible with the other. First, disclosure with as full a recordal as possible by the Commission of the deeds of perpetrators and, second, amnesty. The second was clearly designed to go hand in hand with the first, and as was intended, altered markedly the standing of the perpetrator. That it did without a re-writing of our history. The first ensured as much. Thus when the Act came to be passed, sections 20(7) to (10) expressly encapsulated the various formal and procedural consequences of amnesty designed to achieve that end.

[95] I have favoured an interpretation that not only accords with the scheme of s 20 but also best achieves the goal of reconciliation and national unity (*Du Toit* para 50). The primary aim of the Act as the Constitutional Court has pointed out is to 'use the closure acquired as a stepping stone to reconciliation for the future' (*Du Toit* para 55). Amnesty was an important tool in that process, for without it, the closure sought could not have been achieved. Nor, without it, could the much desired and anticipated consensus between the political foes during the negotiation process have materialized. To thus render the effect of amnesty nugatory would be the very antithesis of all that our negotiated settlement has come to symbolize.

V M PONNAN
JUDGE OF APPEAL

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