

HUMAN DIGNITY AND FREEDOM OF SPEECH IN THE POST APARTHEID STATE

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*Throughout his many decades of struggle and imprisonment, Nelson Mandela clung to a demand for human dignity for all South Africans. In the wake of his passing, it might seem pertinent to ask what human dignity represents in South Africa today. Many of us would be surprised by the answer. Focusing on three recent controversies, *The Citizen 1978 Pty Ltd v McBride*,¹ *Le Roux v Dey*² and *Zuma v Goodman Gallery*,³ this article analyses how South Africa's courts and politicians have begun to promote a notion of human dignity that privileges 'Personality Rights' — the protection of reputation, honour and privacy — over freedom of expression. If human dignity was invoked under apartheid to demand the right to publicly denounce an oppressive political system, over the last decade South Africa's jurists have drawn on a line of German constitutional jurisprudence to repurpose the dignity principle to shield public figures from criticism.*

*Even more worrying, this sudden enthusiasm for 'Personality Rights' has gone hand in hand with efforts by the government to undermine constitutional protections for an independent press and judiciary. For the moment, however, South Africa's Constitutional Court ('SACC') has yet to embrace the full rigour of 'Personality' protections embodied in German law. This article contends that the towering legacy of South Africa's Truth and Reconciliation Commission ('TRC') has restrained the Court. As a body tasked with 'restor[ing] the human and civil dignity of victims "by granting them an opportunity to relate their own accounts of the violations of which they are the victim"',⁴ the TRC articulated an interpretation of human dignity that was speech-empowering instead of speech-restrictive. As this article's analysis of *McBride* shows, when directly confronted with the human dignity violations wrought by apartheid, the SACC has responded with a speech-friendly interpretation of human dignity at odds with its other precedents. Yet, with the memory and impact of the TRC rapidly fading, South Africa finds itself at a crossroads. What will become of the robust speech protections that characterised South African democracy in its initial years?*

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¹ [2011] 4 SA 191 (Constitutional Court) ('*McBride*').

² [2011] 3 SA 274 (Constitutional Court) ('*Le Roux*').

³ [2012] 17978/2012 (High Court) ('*Goodman Gallery*').

⁴ *Albutt v Centre for the Study of Violence and Reconciliation* [2010] 3 SA 293, [60] (Constitutional Court) ('*Albutt*').

I INTRODUCTION: SPEAR OF THE NATION AND SOUTH AFRICA'S CRISIS OF DIGNITY

Basically, we fight against two features which are the hallmarks of African life in South Africa and which are entrenched by legislation, which we seek to have repealed. These features are poverty and lack of human dignity.

Nelson Mandela — Statement from the Dock in the Rivonia Trial.⁵

On 29 May 2012, a massive crowd of African National Congress ('ANC') supporters marched through the streets of Johannesburg headed for the Goodman Gallery on Jan Smuts Avenue. They wore screen-printed shirts and carried placards on which were written 'President Zuma Has a Right to Human Dignity and Privacy' and 'We Say No! to Abuse of Artistic Expression'.⁶ They had gathered to decry a painting by the well-known artist, Brett Murray. The title of his controversial piece, *The Spear*, was a reference to uMkhonto weSizwe (Zulu for 'Spear of the Nation'), the military wing of the ANC launched by Nelson Mandela in 1961.⁷ In the notorious 1964 Rivonia Trial, Mandela was sentenced to life in prison for his role as its architect. Yet, *The Spear* hardly depicted a heroic struggle against oppression. Instead, taking as its model an iconic piece of Soviet realist art,⁸ Murray had placed President Jacob Zuma in a dictatorial pose with his genitalia exposed. Zuma's privies formed the putative 'Spear of the Nation'.

The political leadership of the ANC was not amused. They immediately filed an 'urgent application' for the painting to be removed. The complaint alleged 'an infringement of President Zuma's and the ANC Party's constitutional right to [human] dignity and privacy'.⁹ Shortly after the filing, on 22 May 2012, two men entered the Goodman Gallery and defaced the work with red and black paint, obscuring Zuma's face and genitalia.¹⁰ When the judges of the Gauteng High Court rejected the ANC's filing for an urgent removal the case proceeded to trial.

This was not the first time Zuma had brought proceedings. Between 2006 and 2010, Zuma personally brought dignity complaints against eight newspapers, one radio station, two cartoonists and several journalists. His most notorious lawsuit was a 5 000 000 rand¹¹ claim brought in relation to cartoons depicting his rape trial. The claim was brought in 2008 against

⁵ Nelson Mandela, 'Statement From the Dock at the Opening of the Defence Case in the Rivonia Trial' (Statement delivered at the Pretoria Supreme Court, Pretoria, 20 April 1964) <<http://www.anc.org.za/show.php?id=3430>>. In this 1964 trial, Mandela was sentenced to life in prison for his role as one of the heads of uMkhonto weSizwe, the military wing of the ANC.

⁶ Alex Crawford, 'Cheers, Jeers and Tears Over Zuma's Spear', *Sky News* (online), 25 May 2012 <<http://news.sky.com/home/world-news/article/16234886>>.

⁷ Mandela, above n 5.

⁸ Ronald Kowalski, *The Russian Revolution: 1917–1921* (Routledge, 2005) 3. 'Lenin Lived, Lenin Lives, Lenin Will Live' by Victor Ivanov.

⁹ Jacob Gedleyihlekisa Zuma and the African National Congress versus Goodman Gallery and City Press, Filing Sheet: Applicant's Replying Affidavit to the Second Respondent's Answering Affidavit, in the South Gauteng High Court, Case Number: 17978/2012, 5.

¹⁰ David Smith, 'Zuma Portrait Court Case Reopens South Africa's Wounds from Apartheid Era', *The Guardian* (online), 25 May 2012 <<http://www.theguardian.com/world/2012/may/24/spear-zuma-portrait-court-apartheid>>.

¹¹ About US\$650 000.

Zapiro, South Africa's best-known political satirist.¹² As in his filing against *The Spear*, Zuma alleged that the cartoons violated his right to dignity.¹³

The saga around *The Spear* then took a surprising twist. During the hearing, one of the judges pressed Zuma's lawyer, Gcina Malindi, on the question of racism. The judge demanded to know why Malindi's court papers had characterised the painting as akin to 'a colonial attack on the black culture of this country'.¹⁴ Malindi responded that Murray's artwork should be considered from the perspective of the country's black majority who were angered and humiliated by the painting's message.¹⁵ When the judge retorted that attempting to prevent the dissemination of the painting on the internet would 'make an ass of the law',¹⁶ Malindi lost control and 'sank into his seat in sobs that could be heard throughout the courtroom'.¹⁷

Malindi was not only a lawyer for the ANC. In a former life he had appeared as one of 22 defendants in the Delmas Treason Trial that ran from 1985 to 1988. Sentenced to five years on Robben Island, his testimony revealed a young man scarred by life under apartheid. During that trial he had broken down in tears as well.¹⁸ In a later interview Malindi said that

for some reason, the issues and the manner in which we were asked certain questions, immediately brought back terrible memories of torture and harassment ... Once again, we were at pains to explain and justify the legitimacy of the existence of the historically oppressed as well as the legitimacy of their viewpoints.¹⁹

The Spear controversy proved no simple clash between human dignity and freedom of speech. Rather, it pitted two different orders of dignity against one another. The first order, set forth in

¹² Glenda Daniels, 'The Case of Zuma Versus Zapiro', *The Media Online*, 19 December 2012 <<http://themedialonline.co.za/2012/12/the-case-of-zuma-versus-zapiro/>>.

¹³ International Publishers Association, 'President Zuma Drops Lawsuit Against IPA Freedom to Publish Prize-Winner' (Press Release, 1 November 2012) <http://www.internationalpublishers.org/images/stories/IPAftpPrize/2012/1%20nov_2012_final.pdf>.

In one cartoon, Zuma unbuckles his belt before a hypostasised Lady Justice, who is restrained by several other members of the ANC. In a second cartoon, a beaten Lady Justice yells, 'Fight, Sister, Fight' to the personification of free speech, held in a brace by an ANC politician before a similarly unbuckled Zuma. This case, however, was but one of three lawsuits Zuma had initiated against Shapiro, totaling 15 million rand in claims. The other two are still pending.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Donna Bryson, 'African National Congress Lawyer, Gcina Malindi, Sobs in South African Courtroom', *The Huffington Post* (online), 26 May 2012 <http://www.huffingtonpost.com/2012/05/26/african-national-congress-lawyer-gcina-malindi-courtroom_n_1547591.html>.

¹⁸ Claudia Braude, 'Spear/Smear/Tear of the Nation: Trauma and Competing Rights in Post-Apartheid South Africa' (2012) 65 *Journal of the Helen Suzman Foundation* 62, 62:

George Bizos, who also represented Malindi in the Delmas Treason Trial, recalls his client's emotional testimony in the witness stand when he described apartheid's impact on black families. Prohibited from living in the city with his family, Malindi's father could only visit them for seventy two hours at a time; and as a boy of nine, Malindi tried to prevent his father being arrested by denying who he was. 'Malindi wiped away tears with his hands' as he testified in the apartheid court, Bizos remembers.

¹⁹ Ido Lekota, 'Why We Cried in Court', *The Sowetan* (online), 25 June 2012 <<http://www.sowetanlive.co.za/columnists/2012/06/25/why-we-cried-in-court>>.

Jacob Zuma's legal claim, asserted that the principle of human dignity defends against particularised harms to an individual's reputation or honour. It maintained that human dignity protections are synonymous with those against defamation. The second order, expressed by Malindi's cry, grounded its complaint in the traumatic history of apartheid's assaults on South Africa's non-white populace. It rejected a host of denigrations that were political, legal, and, above all, representational in form.²⁰ As Malindi emphasised, '[f]or activists it was worse because your body ... was used to show [that] you are nothing; you were stripped naked'.²¹ His two emotional breakdowns, some 30 years apart, were primed by mortifying stereotypes about black sexuality and degrading rituals of forced public nudity.

Both orders of human dignity are somewhat speech-restrictive. However, even in this regard they are distinct. The second order seeks to protect a class or cohort against collective abuse (hate speech). It shields an objective core of attributes that must be accorded to all members of humanity. It protects a status instead of a stature, an objective right instead of a subjective one. The first order reading of human dignity secures an individual's reputation against slights, disparagement and criticism, even when the plaintiff is a public figure. This notion of human dignity restricts a panoply of possible speech acts, from the slanderous to the satirical. It protects an individual's stature instead of his or her status.

To add to this contrast, South Africa's TRC presumed that access to a public institutional forum in which to express one's ideas was constitutive of human dignity.²² A status-based reading of the principle can therefore *empower* speech, guaranteeing the dispossessed a right to express their views, while prohibiting language that would deny their common humanity.

Brett Murray's painting, *The Spear*, did in fact infringe upon the principle of human dignity. Not, however, according to the subjective criteria singled out by President Zuma. In his complaint, Zuma charged that the portrait 'suggests that I am a philanderer, a womanizer, and one with no respect. It is an undignified depiction of my personality'.²³ Yet, as Murray pointed out in his filing, the President's widely discussed rape trial has made his sexual escapades a matter of public interest.²⁴ Hence, rather than offending subjective standards, the painting offended the objective human dignity of an extended *class* of South Africans. It did so by reinvigorating offensive and prejudiced stereotypes about black sexuality that once formed part of an apparatus of cultural domination deployed by the racist apartheid government. When this trauma went unacknowledged by the court, Malindi lost control of his emotions.

The Spear thus mingles and confuses two modes of human dignity. As this article will discuss below, the reputational emphasis favoured by the ANC has successfully obscured and undermined a status-based and objective definition of human dignity, which could far better

²⁰ Ibid.

²¹ Ibid.

²² *Albutt* [2010] 3 SA 293, [60] (Constitutional Court). 'The Act required that the Commission help restore the human and civil dignity of victims "by granting them an opportunity to relate their own accounts of the violations of which they are the victim"'.

²³ David Smith, 'Jacob Zuma Goes to Court Over Painting Depicting His Genitals', *The Guardian* (online), 22 May 2012 <<http://www.theguardian.com/world/2012/may/21/jacob-zuma-court-painting-genitals>>.

²⁴ Brett Murray, 'Why I Painted "The Spear"' on Jonathan Shapiro, *Zapiro* <<http://www.zapiro.com/Sponsored-by/Brett-Murray-Why-I-painted-the-Spear/>>.

address the traumatic legacy of apartheid. The blacking out of Zuma's face and genitalia also effaced Malindi's cry. This is a development that should sound tocsins of alarm in an era in which South Africa's political leaders are heavily promoting a stature-based reading of human dignity. Unsurprisingly, their sudden enthusiasm for dignity rights goes hand in hand with extensive efforts to challenge the constitutional protections for press freedoms that have guided the country since the end of apartheid.²⁵

South Africa, however, is not alone. As I have discussed elsewhere,²⁶ the robust constitutional protections for human dignity, enshrined in South Africa's 1996 Constitution,²⁷ were both preceded and outclassed by Germany's 1949 Constitution ('The Basic Law').²⁸ Even more, the evolution currently remolding South African jurisprudence, via which a speech-empowering and status-based interpretation of human dignity is gradually yielding to a speech-restrictive and stature-based one, transpired in (West) Germany several decades ago.²⁹

Today, the 'Rainbow Nation' finds itself at a crossroads comparable to that reached by Germany in the early 1970s. Though the two young republics house significantly different legal and cultural traditions, their constitutions accord human dignity a similarly central role. As a result, the temptation presents itself to South Africa's elites, as it did to Germany's, to use the principle to superintend the parameters of 'acceptable' speech within the young republic. That Germany's story appears on the brink of repetition in South Africa says much about the latent volatilities inherent in the concept of dignity. Dignity's darker side may indeed be the silencing of speech.

Murray's painting provides an especially potent heuristic for this theme, for it infringes upon the principle of human dignity at the same time that it emblematises its values — ie it summons up the spectre of a racist discourse tied to a traumatic past while, at the same time, offering a tonic towards spirited public debate and advocating in the name of the oppressed.

This article will begin with a brief overview of the role of human dignity within South Africa's 1996 Constitution and its relationship with Germany's dignity regime. After conducting a survey of the landmark cases linking human dignity, defamation and free speech, it will move on to a

²⁵ African National Congress, 'NGC 2010 Discussion Document — Media Diversity and Ownership' <<http://www.anc.org.za/docs/discus/2010/mediad.pdf>>. In 2010, the ANC proposed the creation of a Media Appeals Tribunal, based on the premise that freedom of the press is not an absolute right, but must be balanced against individual rights to privacy and human dignity. Though the Media Appeals Tribunal has yet to see the light of day, the recently passed Protection of Information Bill 2013 envisions up to 25 years of jail time for anyone that reveals any 'classified' information, with little to no protection for those exposing government corruption or malfeasance. The legislation was dubbed the 'Secrecy Bill' by its opponents and catalysed massive countrywide protests. In addition, hoping to hobble judicial review of its new tactics, the ANC has proposed a special panel to review the judgments of the South African Constitutional Court, with a view to assessing its 'impact on social transformation'. The panel may recommend modifying the court's powers; See also Eusebius McKaiser, 'Democracy and Its Malcontents', *The New York Times* (online) 8 March 2012 <http://latitude.blogs.nytimes.com/2012/03/08/south-africas-governing-party-resents-the-constitutional-courts-fierce-independence/?_r=0>.

²⁶ Spencer Wolff, *The Darker Sides of Dignity — Freedom of Speech in the Wake of Authoritarian Collapse* (PhD Thesis, Yale University, 2013).

²⁷ *Constitution of the Republic of South Africa Act 1996* (South Africa).

²⁸ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany].

²⁹ Wolff, above n 26.

discussion of *Le Roux v Dey* ('*Le Roux*')³⁰ and *The Citizen 1978 Pty Ltd v McBride* ('*McBride*'),³¹ two constitutional cases from 2011. Finally, it will conclude with a second look at *The Spear* controversy and consider what it augurs for the future of South African constitutional rights.

II DIGNITY IN GERMAN AND SOUTH AFRICAN CONSTITUTIONAL LAW

The ANC had good reason to repeatedly invoke human dignity to advance its political agenda. South Africa's 1996 Constitution is pervaded with references to the principle. The right is officially housed in s 10 of the Constitution, which provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. In addition, s 1 forcefully proclaims that South Africa is a republic founded on the value of 'human dignity',³² while ss 7(1), 36(1) and 39(1) all mandate that the government respect and advance human dignity.³³ For this reason, South Africa regularly features alongside Israel, Canada and India in publications examining human dignity from a comparative law perspective.³⁴ Nonetheless, Germany remains the leader in this class. Not only does its 1949 Constitution launch with the commanding art 1(1), '[h]uman dignity is untouchable', but recent German Constitutional Court decisions have also cast human dignity as the 'foundation of all fundamental rights'.³⁵ In addition, the second sentence of art 1(1), '[i]t is the duty of all state authority to respect and protect human dignity', enjoins the government to proactively intervene to assure its integrity. In global comparative terms, the German principle of human dignity is without peer.

Nonetheless, over the past 20 years the SACC has relentlessly expanded human dignity's centrality to its jurisprudential interpretation.³⁶ In *S v Makwanyane*,³⁷ the landmark case in which

³⁰ [2011] 3 SA 274 (Constitutional Court).

³¹ [2011] 4 SA 191 (Constitutional Court).

³² *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 1. This means that any constitutional amendment that might infringe the value of human dignity would have to pass heightened constitutional muster. Moreover, s 1 of the Constitution requires the assent of a two thirds supermajority of South Africa's parliament before it may be amended.

³³ Section 7(1) states that the Bill of Rights 'affirms the democratic values of human dignity, equality and freedom', s 36(1) states that fundamental rights may only be limited to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' and s 39(1) enjoins the interpreters of the Bill of Rights to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.

³⁴ See, eg, Matthias Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 370, 375; Luís Roberto Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35 *Boston College International and Comparative Law Review* 331, 337.

³⁵ Craig Smith, 'More Disagreement Over Human Dignity: Federal Constitutional Court's Most Recent Benetton Advertising Decision' (2003) 4 *German Law Journal* 533, 533. In addition, art 79(3) of the Constitution, the so-called 'Perpetuity Clause', singles out human dignity as the only fundamental right impervious to constitutional amendment. In fact, art 79 only names arts 1 and 20 (which guarantee the 'democratic' and 'social' order of the German State) as immune from amendment.

³⁶ Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 20 *Stellenbosch Law Review* 171, 171. Henk Botha, Professor of Law at the University of Stellenbosch in South Africa, has even gone so far as to call human dignity the *Leitmotiv* of all constitutional interpretation in the Republic of South Africa.

³⁷ [1995] 3 SA 391 (Constitutional Court).

the SACC invalidated the death penalty, its justices elaborated a narrative of state legitimacy founded on the figure of human dignity. In one of the Court's most ringing passages, O'Regan J held that:

Apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.³⁸

If, in Germany, human dignity served as the 'foundation of all fundamental rights',³⁹ in South Africa it was the 'cornerstone of human rights'⁴⁰ and 'a value that informs the interpretation of many, possibly all, other rights'.⁴¹

It should come as little surprise that judicial interpretation of the human dignity principle by the German and South African Constitutional Courts exhibit striking similarities. If the triumphant declaration that 'human dignity is untouchable', in art 1(1) of the Basic Law, was intended to signal a cogent repudiation of National Socialist ideology, then dignity's inclusion as a founding value of South Africa's 1996 Constitution similarly emphasised the new republic's decisive break with its racist, authoritarian past.

The parallels in the genesis of, and symbolic work performed by, 'human dignity' in the two countries have led the SACC to actively draw on German constitutional jurisprudence to substantiate its rulings. As Ackermann J wrote in a concurring opinion in the landmark defamation case, *Du Plessis v De Klerk*:

I do believe that the German Basic Law was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and Constitution warranted. The GBL was no less powerful a response to totalitarianism, the degradation of human dignity and the denial of freedom and equality than our Constitution. Few things make this clearer than Art 1(1) of the GBL.⁴²

The majority opinion in *Du Plessis v De Klerk* not only relies on landmark German human dignity decisions,⁴³ but Justice Ackermann's concurrence hints at the deep influence of the German Basic Law on the drafters of the South African Constitution.⁴⁴

³⁸ Ibid [144].

³⁹ Bundesverfassungsgericht [German Constitutional Court], 1 BvR 1476, 10 October 1995 reported in (1995) 93 BVerfG 266, 293.

⁴⁰ *Christian Education South Africa v Minister of Education* [2000] 4 SA 757, 797 (Constitutional Court).

⁴¹ *Dawood v Minister of Home Affairs* [2000] 3 SA 936, [35] (Constitutional Court).

⁴² *Du Plessis v De Klerk* [1996] 3 SA 850, [92] (Constitutional Court).

⁴³ Ibid [40], [103].

⁴⁴ Ibid [106]; See also Hanri Mostert, 'Does German Law Still Matter? A Few Remarks About the Relevance of Foreign Law in General and German Law in Particular in South African Legal Development with Regard to the Issue of Constructive Expropriation' (2002) 3(9) *German Law Journal* <<http://www.germanlawjournal.com/index.php?pageID=11&artID=183>>; See also J C Van der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (Birbeck Law Press, 2005).

As one might therefore imagine, the contours that the SACC has given to the concept of human dignity closely approximate those drawn by the German Constitutional Court. As the SACC would make clear in its leading case on free speech and defamation, *Khumalo v Holomisa* ('*Khumalo*'),⁴⁵ much like in Germany, personal reputation falls under the aegis of human dignity:

The value of human dignity in our Constitution ... includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements ... No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution.⁴⁶

The Zuma-led ANC has exploited the consubstantiality of 'reputation, *dignitas* and privacy' — ie of one's objective human worth and subjective social value — to promote an uncritical conflation of the right to human dignity with a right to personal honour. This bid to swap human dignity as status with human dignity as stature has been abetted by the South African courts' German-inflected jurisprudence. With the retirement of the towering first class of Constitutional Court justices — the highly progressive Chaskalson Court⁴⁷ — the SACC is undergoing a conservative transition. How Zuma's newly appointed judges, Zondo J (2012) and Madlanga J (August 2013), will rule when it comes time to balance dignity against free speech is anyone's guess.

Of course, Germany and South Africa are hardly identical. The justices of the Rainbow Nation face a uniquely heterogeneous population whose makeup has led them to construe human dignity in quite novel ways.⁴⁸ The most important of these is the marrying of human dignity to the indigenous African concept of ubuntu.⁴⁹ Generally translated as 'a person is a person through other people', ubuntu makes forceful claims about the ethical demands of living within a tightly bound community.

⁴⁵ [2002] 5 SA 401 (Constitutional Court) ('*Khumalo*').

⁴⁶ *Ibid* [27].

⁴⁷ Theunis Roux, *The Politics of Principle: The First South African Constitutional Court* (Cambridge University Press, 2013) 2. The court is named after Arthur Chaskalson, who acted as Chief Justice from 1995–2005. As Theunis Roux describes it, the Chaskalson Court 'built an unrivalled reputation in the comparative constitutional law community for technically accomplished and morally enlightened decision-making'.

⁴⁸ Botha, above n 36, 213. For instance, in a series of cases, they have understood the principle to mandate 'respect for the multiple and divergent cultures, religions, sexual orientations, family formations, worldviews and narratives which constitute each individual as unique, and precludes the conflation of equality with the homogenisation of beliefs and behaviour'; See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] 1 SA 6 (Constitutional Court); See also *Minister of Home Affairs v Fourie* [2006] 1 SA 524 (Constitutional Court); See also *MEC for Education: KwaZulu-Natal v Pillay* [2008] 1 SA 474 (Constitutional Court). In addition, given the vast inequalities that have resulted from the economic predations and institutionalised inequalities fostered by apartheid, the Court similarly held, in the renowned case of *Government of the Republic of South Africa v Grootboom* [2001] 1 SA 46 (Constitutional Court), that human dignity obliged the State to ensure a minimum of adequate housing for its citizens.

⁴⁹ See, eg, *S v Makwanyane* [1995] 3 SA 391, [308] (Constitutional Court); *Hoffmann v South African Airways* [2000] 1 SA 1 (Constitutional Court); *Port Elizabeth Municipality v Various Occupiers* [2005] 1 SA 217 (Constitutional Court); *Dikoko v Mokhatla* [2006] 6 SA 235 (Constitutional Court).

In *S v Makwanyane*, the SACC took pains to define the term, since it played a major role in the invalidation of the death penalty:

Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities ... Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.⁵⁰

Like human dignity, ubuntu is plastic in nature. It houses big ideas that gain definition through specific historical and cultural narratives. In this regard, ubuntu has gained its clearest contours through the TRC. The African principle was included in the 1993 interim Constitution only as part of an epilogue,⁵¹ the express purpose of which ‘was to provide a basis for amnesty and the formation of a Truth and Reconciliation Commission’.⁵² Ubuntu thus draws its significance from the most narrative-heavy ‘legal’ body in memory, and its symbiotic relationship with human dignity may offer a prophylactic against the expansion of a speech-restrictive, reputational politics in South Africa.

Moreover, human dignity’s link to ubuntu situates it at the crux of ongoing public debates about the legacy of past oppression. Black South Africans may now command the nation’s political branches, but most economic and cultural institutions continue to be vested in white hands. The public sphere is fraught with quarrels over the meaning of ‘reconciliation’ (and whether it implies reparations), over entrenched racism in the media and over the ‘just’ social parameters of the new republic.

The incredible diversity that has lent South Africa the moniker ‘The Rainbow Nation’ has also ensured the lack of an elite consensus that could close the book on the past. This has so far stymied efforts to recruit human dignity to effectively manage political controversies, especially those that intersect with the legacy of apartheid. Yet, the ground slowly appears to be shifting. No case brought all these issues to the fore more surely than the 2011 controversy of *McBride*.⁵³

⁵⁰ *S v Makwanyane* [1995] 3 SA 391, [308] (Constitutional Court).

⁵¹ *Constitution of the Republic of South Africa Act 200 of 1993* (South Africa). ‘The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past’.

⁵² Drucilla Cornell and Nyoko Muvangua (eds), *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press, 2012), 7.

⁵³ [2011] 4 SA 191 (Constitutional Court).

III *THE CITIZEN V MCBRIDE*

In the latter half of 2003, Robert McBride, a former ANC activist and cadre member of ‘Spear of the Nation’ (or ‘uMkhonto weSizwe’), was tipped for Police Chief of Ekurhuleni, one of South Africa’s largest municipalities. In response, *The Citizen*, a tabloid-style national newspaper, ran a series of editorials vehemently criticising his nomination.⁵⁴ *The Citizen* particularly impugned McBride’s leading role in the ANC’s notorious car bombing of Magoo’s Bar during the armed struggle against apartheid.⁵⁵ The 1986 attack resulted in three civilian deaths and scores of injuries. In the foreword to the report of the TRC, Archbishop Desmond Tutu included this attack in his tally of apartheid’s most dreadful acts, stating that ‘[a]ll South Africans know that our recent history is littered with some horrendous occurrences. The Sharpeville and Langa killings, the Soweto uprising, the Church Street bombing, Magoo’s Bar, [and] the Wimpy Bar bombing’.⁵⁶

As the main architect of the attack, McBride was sentenced to death, along with several other accomplices.⁵⁷ However, in 1991, not long after the unbanning of the ANC, he was reprieved.⁵⁸ A year later he was released.⁵⁹ In 1997, McBride applied for amnesty under the *Promotion of National Unity and Reconciliation Act 1995* (South Africa) for the murders and associated crimes. In 2001, McBride was granted amnesty.⁶⁰

The Citizen branded McBride a ‘murderer’ and declared him unfit for the job of Police Chief.⁶¹ Its editorials were toothy. Beyond mooting his role in the car bombing, they also pointed to McBride’s 1998 arrest and detention in Mozambique on suspicion of gun-running.⁶² One of the editorials even went so far as to claim that McBride was not contrite for his acts, stating ‘[f]orgiveness 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’.⁶³

In response to the articles, then President Thabo Mbeki published an open letter on the *ANC Today* website, entitled ‘We Will Not Abandon Reconciliation’. He argued that *The Citizen* was:

urging our country to reopen the wounds of the past ... Because it feels free to denounce Mr McBride as a criminal — ‘make no mistake, that’s what he is’ — it opens the way for the rest of us to follow its example. We too have ample opportunity to denounce thousands as criminals. The serious question we must ask is — whose interests does ‘The Citizen’ serve?⁶⁴

⁵⁴ *McBride* [2011] 4 SA 191, [4] (Constitutional Court).

⁵⁵ *Ibid* [3]–[4].

⁵⁶ Truth and Reconciliation Commission of South Africa, *Report* (1998–2003) vol 1 ch 1 <<http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>>.

⁵⁷ *McBride* [2011] 4 SA 191, [3] (Constitutional Court).

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid* [11].

⁶² *Ibid* [3].

⁶³ *Ibid* [11] [emphasis altered].

⁶⁴ Staff Reporter, ‘Mbeki Hauls *The Citizen* Over the Coals’, *Mail & Guardian* (online), 17 October 2003 <<http://mg.co.za/article/2003-10-17-mbeki-hauls-the-citizen-over-coals>>.

Mbeki's article had the desired effect. McBride was appointed head of the metro police of Ekurhuleni.⁶⁵ Despite his apparent triumph in the crucible of public opinion, he brought suit against the newspaper, claiming 'damages totalling R3.6 million for defamation and for impairment of dignity'.⁶⁶

Before analysing *McBride*, this article will cast a glance over the antecedent constitutional jurisprudence on freedom of expression and defamation in South Africa, so as to better understand why McBride believed he would succeed in his claim.

A *The Limits of Free Speech in South Africa*

During South Africa's first decade of democracy, freedom of expression sprouted wings. Not only did the new Constitution offer robust protections for the principle in s 16 of its Bill of Rights — '[e]veryone has the right to freedom of expression'⁶⁷ — the SACC also wrote in expansive, often soaring language about free speech's invaluable contribution to a healthy society. 'Freedom of expression', the Court declared in *South African National Defence Union v Minister of Defence*,⁶⁸ 'lies at the heart of a democracy. It is valuable for many reasons, including ... its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally'.⁶⁹ Or, as Mokgoro J observed in *Case v Minister of Safety and Security*,

freedom of expression is one of a 'web of mutually supporting rights' in the Constitution ... The corollary of the freedom of expression and its related rights is tolerance by society of different views ... In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.⁷⁰

The Court's lofty words on the value of tolerance were meant as solemn counsel to a newly democratic citizenry still acquiring political literacy. They were also a pointed rebuke to a history of ubiquitous censorship under apartheid. While in power, the Afrikaans National Party ruthlessly curtailed press freedoms. Anti-apartheid writers and journalists were jailed, openly

⁶⁵ *McBride* [2011] 4 SA 191, [17] (Constitutional Court).

⁶⁶ *Ibid* [5].

⁶⁷ *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2. Section 16 reads in full:

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

⁶⁸ [1999] 4 SA 469 (Constitutional Court).

⁶⁹ *Ibid* [7]–[8].

⁷⁰ *South African National Defence Union v Minister of Defence* [1999] 4 SA 469, [8] (Constitutional Court) (O'Regan J). Here, O'Regan J is commenting on the reasoning of Mokgoro J in *Case v Minister of Safety and Security* [1996] 3 SA 617.

assassinated or made to ‘disappear’.⁷¹ The apartheid state orchestrated a comprehensive regime of censorship, backed up by an unconstrained threat of violence.

Even after 1990, when South Africa could be said to have entered an era of *glasnost* — with the unbanning of the ANC and the relaxing of state supervision over the public sphere — the legal regimes that ‘guaranteed’ press freedoms remained those birthed in the apartheid era. They offered maximum protection for an individual’s ‘reputation’ or ‘dignity’ as a pretext for chilling media revelations about government wrongdoing in the event that brute force was unavailable. For instance, the leading pre-constitutional precedent, *Neethling v Du Preez* (‘*Neethling*’),⁷² required press outlets to prove the truth, by a preponderance of evidence, of any defamatory statements they published.⁷³ In the affair, two newspapers, *The Weekly Mail* and the *Vrye Weekblad*, went to press with allegations that Lieutenant-General Lothar Neethling had supplied poison for the assassination of several anti-apartheid activists.⁷⁴ Neethling brought a dignity complaint and, although Dirk Coetzee, a former Captain of the South African Police Service, testified to the truth of the allegations, the judge awarded extensive damages.⁷⁵ The *Vrye Weekblad*, one of the few Afrikaans newspapers with a record of courageously confronting the apartheid government, went bankrupt.⁷⁶

Under South African common law, the elements of defamation are the wrongful and intentional publication of a defamatory statement concerning a plaintiff.⁷⁷ Since any publication of a defamatory statement is assumed to be both wrongful and intentional, a prima facie showing of defamation is surprisingly easy to make. By rejecting a defence of ‘fair information on a matter of public interest’,⁷⁸ *Neethling* conferred maximum protection on a plaintiff’s reputation at the expense of the press.

In the decision’s wake, no editor could risk publishing an affirmation of misconduct that could not be substantiated. Confidential sources were taboo. The *Neethling* precedent stood until 1998 when the Supreme Court of Appeal,⁷⁹ in *National Media Ltd v Bogoshi* (‘*Bogoshi*’),⁸⁰ introduced a reasonability test for publication,⁸¹ with special protections accorded to political speech.⁸² Yet, within the dicta of *Bogoshi* lay the seeds for future restrictions on freedom of speech. In the

⁷¹ Peter B McDonald, *The Literature Police: Apartheid Censorship and Its Cultural Consequences* (Oxford University Press, 2009).

⁷² [1994] 1 SA 708 (Supreme Court of Appeal) (‘*Neethling*’).

⁷³ Ibid 225–235. Unless, of course, the party could raise the defence of ‘qualified privileged based on the existence of a duty on the part of the newspaper to publish the defamatory matter and a reciprocal interest on the part of its readers to have the matter communicated to them’.

⁷⁴ Staff Reporter, ‘Police General Should Be Charged With Murder, Says Max Du Preez’, *South African Press Association* (online), 17 September 1997 <<http://www.justice.gov.za/trc/media/1997/9709/s970917g.htm>>.

⁷⁵ *Neethling* [1994] 1 SA 708, 6, 251 (Supreme Court of Appeal).

⁷⁶ Staff Reporter, ‘Police General Should Be Charged With Murder, Says Max Du Preez’, *South African Press Association* (online), 17 September 1997 <<http://www.justice.gov.za/trc/media/1997/9709/s970917g.htm>>.

⁷⁷ *Khumalo* [2002] 5 SA 401, [18] (Constitutional Court).

⁷⁸ *Neethling* [1994] 1 SA 708, 234 (Supreme Court of Appeal). The Court additionally refused reduce personality protections for public figures (politicians, etc).

⁷⁹ This is South Africa’s final court of appeal, except in constitutional matters.

⁸⁰ [1998] 4 SA 1196 (Supreme Court of Appeal) (‘*Bogoshi*’).

⁸¹ Ibid. The case held that if the article was ‘reasonable to publish’ according to the ‘particular facts ... at the time’, it would not be held defamatory.

⁸² Ibid 1226–27.

democratic era, the Constitutional Court began to invoke a language of dignity that was entirely absent in the pre-constitutional *Neethling* decision.⁸³ Four years later, when the SACC finally considered its most important defamation case, the justices would deputise the principle of human dignity as the principal guardian against excesses of speech.

The controversy in *Khumalo*⁸⁴ sprang from a publication in the *Sunday Mail* that alleged a certain Bantu Holomisa was involved with a gang of bank robbers. Holomisa, the head of a major political party, responded with a dignity complaint.⁸⁵ However, before the High Court could rule, the *Sunday Mail* sought an exception to the common law rule of defamation before the Constitutional Court. The paper claimed that a public figure, defending on matters of public interest, must prove the falsity of the statement in question.⁸⁶

The SACC's opinion began with a veritable homage to the media's capacity to 'strengthen and invigorate [South Africa's] fledgling democracy'.⁸⁷ It even went on to claim that freedom of speech 'is constitutive of the dignity and autonomy of human beings'.⁸⁸ However, when it came time to decide the case on its facts, the judges quickly changed their tune. Writing for a unanimous Court, O'Regan J concluded that 'although freedom of expression is fundamental to our democratic society, it is not a paramount value'.⁸⁹ As the Court went on to underscore, human dignity is a *foundational* value.⁹⁰ Moreover, since the law of defamation safeguards 'the legitimate interest individuals have in their reputation ... [it] is one of the aspects of our law which supports the protection of the value of human dignity'.⁹¹ *Khumalo* thus fully assimilated the common law definition of defamation into the constitutional armature of human dignity. The Court concluded (correctly in this author's mind) that it would 'clearly put plaintiffs at risk' if public figures, who had been defamed, would 'never succeed unless they [could] establish that a defamatory statement was false'.⁹² However, by integrating the private attributes that determine one's social stature into the categorical status of the 'human', the judges set the stage for a slew of battles over free speech.

Hindsight is 20-20, and both the *McBride* and the *Spear of the Nation* controversies offer easy evidence of this retrospective assessment. Nonetheless, the fire took some time to light and the major South African decisions on freedom of expression in the decade leading up to *McBride* were decidedly mixed. While the Constitutional Court ploughed ahead, carving out a passage for the expansive carriage of free speech, the lower courts forcefully restricted public expression.

⁸³ Ibid 1213, 1214, 1237–8.

⁸⁴ [2002] 5 SA 401 (Constitutional Court).

⁸⁵ Ibid [7].

⁸⁶ Ibid [2].

⁸⁷ Ibid [24].

⁸⁸ Ibid [21].

⁸⁹ Ibid [25].

⁹⁰ Ibid [26]–[28]. See also *Dawood v Minister of Home Affairs* [2000] 3 SA 936 (Constitutional Court), which provides a similar interpretation.

⁹¹ *Khumalo* [2002] 5 SA 401, [28] (Constitutional Court).

⁹² Ibid [44].

As a 2009 document put out by the South African Democratic Alliance noted:

Over the last decade the right to freedom of speech has been rigorously upheld by the higher courts but in lower courts and tribunals freedom of expression invariably loses out to dignity and equality. It seems that although there is symbolic deference to free speech, there is a growing quasi-legal tendency to erode its importance.⁹³

Only a few years after *Khumalo* human dignity first battered the ship of press freedoms. In 2005, the Johannesburg High Court enjoined one of South Africa's major weeklies, the *Mail & Guardian*, from running an 'Oilgate' exposé.⁹⁴ The articles alleged that a South African company, Imvume Management, had embezzled money from an Iraqi oil company run by Sandi Majali, and had redistributed it in the form of kickbacks to various ANC members shortly before the 2004 elections.⁹⁵

Although the publication weighed in the public interest, involving high-level officials and evidence of widespread corruption, the plaintiffs argued that the article was tainted because the *Mail & Guardian* had illegally accessed Majali's bank accounts.⁹⁶ The newspaper corroborated its allegations through several other sources. However, when the *Mail & Guardian* refused to reveal the original source of its information, the judge, citing the dignity and privacy of Sandi Majali, handed down a gag order.⁹⁷ Protecting free speech, the judge wrote, was

cold comfort to someone whose privacy has been invaded and whose reputation is in tatters ... The harm to reputation cannot always be restored, especially where a public figure is involved.⁹⁸

Though the truth of the information was not in dispute, the right to dignity and privacy nevertheless trumped the public interest. The decision was more speech-restrictive than *Neethling*,⁹⁹ and its resonances seemed dire. The newspaper noted that:

This is the first time since the apartheid state's banning of the *Mail & Guardian* under emergency regulations in the late 1980s that the paper has been muzzled. It is the first time

⁹³ Victoria Bronstein, 'What You Can and Can't Say in South Africa', *Freedom of Expression Institute* (online) 19 August 2009 <http://www.da.org.za/docs/548/Censorshipvictoriabronstein_document.pdf>. This article pretends to no overarching theory of why the South African lower courts have shown themselves more solicitous to dignitarian rights than their constitutional brethren. Of course, most of the apartheid-era judges continued to occupy their posts after the advent of democracy, and their judicial culture was stamped by an authoritarian regime which had made extensive appeals to honour and dignity. This was then compounded by the appointment of a new crop of judges, who had started their careers within the apartheid era 'homelands', where the jurisprudence was influenced by traditional African cultures that put a premium on 'respect' and 'authority'. That none of these values translate easily to a democratic culture of political contestation and debate, especially in a country as ethnically, economically and historically riven as South Africa, goes without saying.

⁹⁴ *The Public Prosecutor v Mail and Guardian* [2011] 4 SA 420, [37] (Supreme Court of Appeal).

⁹⁵ Staff Reporter, 'Oilgate: We've Been Gagged', *Mail & Guardian* (online), 26 May 2005 <<http://mg.co.za/article/2005-05-26-oilgate-weve-been-gagged>>.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ [1994] 1 SA 708 (Supreme Court of Appeal). In *Neethling*, the truth of the allegations had been the central matter in the dispute.

since the mid-Eighties that the newspaper once again features blacked-out text to illustrate that it has effectively been banned.¹⁰⁰

Around the same time that the Johannesburg High Court imposed the first media ‘blackout’ since the end of apartheid,¹⁰¹ the Constitutional Court endorsed a rather half-hearted stand towards free speech. In *Laugh It Off Promotions CC v South African Breweries International* (*‘Laugh It Off’*),¹⁰² a student-run outfit printed T-shirts that satirically condemned the exploitation of black labourers in South African Breweries’ factories.¹⁰³ The company brought a complaint for trademark infringement and secured an order of interdiction from the Johannesburg High Court.¹⁰⁴ The order was then upheld by the Supreme Court of Appeal (‘SCA’).¹⁰⁵ Laugh It Off Promotions responded with a constitutional complaint, arguing that trademark law does not oust the right to freedom of expression.¹⁰⁶ The Constitutional Court agreed, in fact if not in principle, holding that ‘[i]n an open democracy valuable expressive acts in public ought not to be lightly trampled upon by marginal detriment or harm unrelated to the commercial value that vests in the mark itself’.¹⁰⁷

These were hardly the stirring words about free speech’s central role in democracy that had stamped the Court’s early decisions. Even worse, the verdict seemed to suggest that, had the commercial harm been more substantial, the satirical T-shirts could have been banned. At least one of the judges sensed the gathering storm. Sachs J took the occasion to write a stirring concurrence that to this day represents a high watermark in free speech jurisprudence.

¹⁰⁰ Staff Reporter, ‘Oilgate: We’ve Been Gagged’, *Mail & Guardian* (online), 26 May 2005 <<http://mg.co.za/article/2005-05-26-oilgate-weve-been-gagged>>. The history behind the blacked-out text is long. During the apartheid era, newspapers had to apply for registration if they published more than 11 times a year. The government at the time also enforced regulations controlling what newspapers could and could not publish — especially articles against the apartheid system; See also Karen Zamora, ‘South Africa’ on *Free Speech and Free Press Around the World* (2012) <<http://freespeechfreepress.wordpress.com/south-africa/>>:

Newspapers were not allowed to quote banned organizations or people, report on conditions inside prisons or about security forces. During the 1980s, two states of emergency were declared and newspaper censorship regulations were tightened. News outlets were prohibited from reporting on any demonstrations, activities against the apartheid system or any laws. Newspapers protested by printing full black pages or paragraphs of printed articles were blacked out. Many newspapers only lasted several more issues after their protests, but others are still in publication today. Those who were able to continue publication had a larger readership and were able to survive through advertisements and distribution. The government tried to shut them down by banning certain issues, which caused financial hardship to these newspapers. At the same time the anti-apartheid groups started setting up smaller papers of their own.

¹⁰¹ Unfortunately, the dispute never reached the Constitutional Court. An opposition party known as Freedom Front Plus presented the same information before Parliament that the *Mail & Guardian* had wished to publish. Under South African law, political groups making representations in Parliament are not subjected to legal action for the content of their statements. Since all the information was now in the public domain, the *Mail & Guardian* was able to print the article.

¹⁰² [2006] 1 SA 144 (Constitutional Court) (*‘Laugh It Off’*).

¹⁰³ Ibid [9].

¹⁰⁴ Ibid [12].

¹⁰⁵ Ibid [21]–[25].

¹⁰⁶ Ibid [13]. ‘The purpose of copyright and trademark laws in an open and democratic society is not to shut out critical expression or to throttle artistic and other expressive acts in a manner that gives way to inordinate brand sway’.

¹⁰⁷ Ibid [56].

‘Laughter too has its context’, Sachs J wrote:

What has been relevant in the present matter is that the context was one of laughter being used as a means of challenging economic power, resisting ideological hegemony and *advancing human dignity*. ... A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. ... It is an elixir of constitutional health.¹⁰⁸

A former freedom fighter,¹⁰⁹ Sachs J retired in 2009 alongside O’Regan and Mokgoro JJ.¹¹⁰ They were the last of the Court’s original judges to give up their seats. Two years later the SACC, comprising judicial officers appointed either by Thabo Mbeki or Jacob Zuma¹¹¹ handed down a decision entitled *Le Roux v Dey*.¹¹² The ruling pared back many of the positions endorsed by Sachs J in *Laugh It Off*.¹¹³ It seemed that the dignity jurisprudence of the lower civil courts had finally begun to filter up into the august realm of constitutional adjudication. One month after *Le Roux*,¹¹⁴ an identical Court ruled in *McBride*.¹¹⁵ The two decisions appear to offer contradictory road maps to South Africa’s future. They leave those of us interested in that future standing at a fork in the road.

B *The Woes of Le Roux*

The controversy in *Le Roux*¹¹⁶ began when a 15-year-old student crudely pasted photos of the principal and deputy principal of his high school onto an image of nude body builders. After the sophomoric ‘clipart’ made the rounds at the school, two other students posted it on the school notice board where it remained for half an hour.¹¹⁷ The school authorities disciplined the three students. Forced to sit detention for five consecutive Fridays, the students were also banned from school leadership positions. When Dr Dey brought criminal charges against them, they were further sentenced to clean animal cages at the Pretoria Zoo.¹¹⁸ Dr Dey then brought an additional dignity complaint before the High Court of Johannesburg, for which he demanded the astonishing sum of 600 000 rand in damages.¹¹⁹ As in countless other cases, both the High Court of Johannesburg and the SCA showed themselves solicitous to dignity claims. The High Court

¹⁰⁸ Ibid [108]–[109] [emphasis added].

¹⁰⁹ South African History Online, *Judge Albert Louis ‘Albie’ Sachs* <<http://www.sahistory.org.za/people/judge-albert-louis-albie-sachs>>. Perhaps the most iconic of all the constitutional justices, he lost his arm in 1988 when South African security agents placed a bomb in his car in Mozambique.

¹¹⁰ Judiciary, *Retirement of CC Justices: Tribute on Behalf of the Constitutional Court of SA* (2009) <<http://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp04-05.pdf>>.

¹¹¹ With the exception of Yacoob J, who was Mandela’s final appointment when Didcott J suddenly passed away in 1998.

¹¹² [2011] 3 SA 274 (Constitutional Court).

¹¹³ [2006] 1 SA 144 (Constitutional Court).

¹¹⁴ [2011] 3 SA 274 (Constitutional Court).

¹¹⁵ [2011] 4 SA 191 (Constitutional Court).

¹¹⁶ [2011] 3 SA 274 (Constitutional Court).

¹¹⁷ Ibid [17].

¹¹⁸ Ibid [18]–[20].

¹¹⁹ Around US\$90 000.

awarded 45 000 rand in damages.¹²⁰ Although it fell short of Dr Dey's demands, it was still a tidy sum. The SCA upheld this verdict.¹²¹

To formulate their constitutional defence, the defendants relied on *Laugh It Off*.¹²² Specifically, they invoked a child's 'right' to satirical and subversive expression.¹²³ The governing opinion, written by Brand AJ and joined by 8 of the 11 judges, rejected this claim. Reducing Dr Dey's award to 25 000 rand plus partial costs,¹²⁴ the Court promoted a definition of dignity/defamation that cast a surprisingly wide net over all manner of social expression.

The judges first noted that defamation controversies tend to arise when a person has been labelled 'guilty of dishonest, immoral or otherwise dishonorable conduct'.¹²⁵ However, they argued that defamation encompasses a far more capacious category, suggesting:

It also includes statements which are likely to humiliate or belittle the plaintiff ... Everyday experience demonstrates that *a caricature or cartoon* can be more devastating to the image of the victim than, say, an accusation of dishonesty.¹²⁶

Though no one would mistake the student's crude pastiche for fact,¹²⁷ the Constitutional Court found that 'the reasonable observer would infer some association between the two teachers, on the one hand, and the situation described in the picture, on the other'.¹²⁸ As Brand AJ remarked, 'that renders the picture difficult to distinguish from a *caricature or a cartoon*: in all these cases it is obvious that the person identified is not an actual depiction of that person, but that there is some association between that person and what the picture conveys'.¹²⁹

As to the fact that this was a schoolboy prank, the majority conceded that 'the reasonable observer would accept that teachers are often the butt of jokes by their learners and that these jokes must not be taken too seriously. *Yet*, there is a line that may not be crossed. That must be so because teachers are entitled to protection of their dignity and reputation; no less than to the protection of their bodily integrity'.¹³⁰ The line, as drawn by the Court, was any statement in which 'there is an element of *contumelia* in the joke, that is, when it is insulting or degrading'.¹³¹

¹²⁰ Around US\$6500.

¹²¹ *Le Roux* [2011] 3 SA 274, [25] (Constitutional Court).

¹²² [2006] 1 SA 144 (Constitutional Court).

¹²³ *Le Roux* [2011] 3 SA 274, [29] (Constitutional Court).

¹²⁴ *Ibid* [206].

¹²⁵ *Ibid* [91].

¹²⁶ *Ibid* [emphasis added].

¹²⁷ *Ibid* [164]. As Cameron J notes in his concurrence:

the heads are misaligned with the bodies, and wrongly sized; the two faces are different in size; the cut and paste job is evident from the edging of the inset; and indeed Dr Dey's face is pasted over the remnants of the hair of the person in the original: he is invested with a fuzzy halo of another's hair.

¹²⁸ *Ibid* [103].

¹²⁹ *Ibid* [emphasis added].

¹³⁰ *Ibid* [117]–[118] [emphasis added].

¹³¹ *Ibid* [113].

Although the Court provided a number of exceptions to this rule,¹³² it subsequently proceeded to drastically lower the threshold, not only for defamatory speech, but for dignity violations as well.

1 *Dignity versus Defamation*

In a concurring opinion written by Froneman and Cameron JJ, the spirit and legal reasoning of which the nine-judge majority affirmed, the SACC elaborated a novel constitutional contradistinction between reputational rights and dignity rights. Clarifying that in South African common law the category of dignity is not coterminous with defamation, Froneman and Cameron JJ explained:

The one reflects inwardly, the other outwardly. In dignity claims, the injured interest is self-esteem, or the injured person's feelings. In defamation, it is public esteem or reputation. ... It is in our view plain that ... an affront [could] not damage a person's reputation, while at the same time concluding that, objectively seen, the injury to that person's feelings was palpable and reasonably felt, and hence actionable.¹³³

Both reputation and dignity, the Court assured, were shielded by the constitutional principle of human dignity. However, whereas defamation required a cognisable injury to a person's standing in the community, a dignity claim only required an affront to one's pride. The verdict in *Le Roux* thus seized on a public good and privatised it. This public good had drawn its importance from a history of objective status discrimination where '[b]lack people were refused respect and dignity and thereby the dignity of all South Africans was diminished'.¹³⁴ Henceforth it would safeguard subjective slights to a person's self-perceived stature. It was a monumental bait-and-switch.

Whereas both governing opinions concurred on the quantum of damages and both recognised a dignity violation, Froneman and Cameron JJ disagreed that the prank was a defamatory act. Holding that there had been no other reported case in South Africa of schoolchildren defaming their schoolteachers, Froneman and Cameron JJ wrote:

Every generation of schoolchildren includes individuals who try to make fun of their teachers ... Some of their peers may laugh at their jokes ... But for none of them, we suggest, would the jokes ... imply that the teacher is ... diminished by the attempted joke, ridicule or subversion of authority.¹³⁵

Given that the offending image in *Le Roux* was only distributed at the school and that its inept nature indicated its 'childish origins',¹³⁶ the assertion of reputational injury simply did not stand up to scrutiny. Nonetheless, nine of the 11 judges recognised a dignity violation on the basis of Froneman and Cameron JJ's reasoning. The Court noted that Dr Dey experienced the prank as 'a deep affront to his personal dignity'.¹³⁷ It moreover found that 'a reasonable person in Dr Dey's

¹³² Ibid [126]: 'fair comment, privileged occasion, and justifiable publication'.

¹³³ Ibid [179].

¹³⁴ *S v Makwanyane* [1995] 3 SA 391, [329] (Constitutional Court).

¹³⁵ *Le Roux* [2011] 3 SA 274, [158] (Constitutional Court).

¹³⁶ Ibid [159].

¹³⁷ Ibid [174].

position ... is understandably affronted by being depicted in, or aligned to, a naked, indecent and probably lewd picture'.¹³⁸ Dr Dey's 'wounded feelings'¹³⁹ were hence legally actionable.

Froneman and Cameron JJ's finding of a dignity injury, independent of any reputational harm, boded poorly for artworks like Murray's *The Spear* or Zapiro's satirical cartoons. If a mix of indecency and hypersensitivity could trigger a human dignity violation, it could render political satire all but taboo. The dissent, authored by Yacoob J and joined by Skweyiya J, makes this very case. Both had been anti-apartheid 'freedom fighters',¹⁴⁰ and the dissent is bathed in the history of this struggle. 'Before our Constitution came into effect', Yacoob J writes:

thought control was the order of the day ... Having regard to our recent past, freedom of expression is no less important than it is in the United States of America.¹⁴¹ It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way.¹⁴²

If the new coterie of judges was willing to indulge a vindictive deputy principal in a sophomoric row with several children, how much would they yield when it came time to chasten venal politicians looking for strategic tools to quell merited criticism? Faced with a Court that seemed to have forgotten the lessons of South Africa's authoritarian past, Yacoob J suggested a new framework from which to interpret human dignity:

I would commend the rule that people claiming damages consequent upon attacks on their dignity will succeed only if ... the injury is sufficiently serious to limit freedom of expression or any other right in the Constitution. ... In this case, even if Dr Dey was hurt to some extent ... The expression did not amount to an attack on Dr Dey's sense of *equal self-worth* ... Most importantly, the expression was by a relatively powerless child in relation to the exercise of authority by a more powerful older man.¹⁴³

By urging that dignity violations should succeed only if 'the injury is sufficiently serious to limit freedom of expression or any other right in the Constitution', Yacoob J mobilises dignity in favour of the right to speak. He claims that South Africa's democracy, like *Le Roux*, is still in 'the process of growth and development'.¹⁴⁴ Its speech should be cultivated, not disciplined. Moreover, such a reading of dignity honoured the principle's roots as a repudiation of

¹³⁸ Ibid [190].

¹³⁹ Ibid [174].

¹⁴⁰ In another historical twist, Yacoob J was one of the lawyers that defended Gcina Malindi in the Delmas Treason Trials.

¹⁴¹ Yacoob J likely had in mind the majority opinion from *Du Plessis v Klerk* [1996] 3 SA 850, [58] (Constitutional Court), in which the Court held that:

in cases of defamation, courts have tried to strike a balance between the protection of reputation and the right of free expression. Presumably ... a court would wish to take account of the fact that our Constitution, like that of Germany but unlike that of the United States, expressly recognises the right to dignity and to personal privacy, and might find guidance in the German cases to which I have referred as well as in the American cases.

¹⁴² *Le Roux* [2011] 3 SA 274, [72] (Constitutional Court).

¹⁴³ Ibid [73] [emphasis added].

¹⁴⁴ Ibid.

apartheid.¹⁴⁵ If human dignity was meant to rebalance the playing field between the oppressors and the oppressed, then, as Yacoob J writes, ‘I would regard the violation of the dignity of a relatively powerless and vulnerable person by a powerful, strong person in authority as more serious than the allegedly wrongful conduct involved here’.¹⁴⁶

He therefore endorses a doctrine of human dignity that does not protect ‘self-esteem’, but, rather, shields a ‘sense of equal self-worth’.¹⁴⁷ As Yacoob J underscores, important constitutional values may be at stake but the right to ‘reputation’ (*fama*) is not one of them. Human dignity, he urges, should no longer shield individuals against defamation, nor tend to their slighted feelings of pride. There was the common law for that.¹⁴⁸

C *Here Comes McBride*

One month later an identical Court handed down its decision in *McBride*.¹⁴⁹ As the majority explains in the lead in to its decision, the case turned ‘on the effect of amnesty granted under the *Promotion of National Unity and Reconciliation Act* ... The statute provides that once a person convicted of an offence with a political objective has been granted amnesty, any entry or record of the conviction shall be deemed to be expunged from all official documents and — “the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place”’.¹⁵⁰

Cameron J then asserted:

The main question before this Court is whether a person convicted of murder, but granted amnesty for the offence, can later be called a ‘criminal’ and a ‘murderer’ in comment opposing his appointment to a public position. The case thus cuts deeply into charged issues about the meaning of the legislative and social compact that ended apartheid, and the extent

¹⁴⁵ *Albutt* [2010] 3 SA 293, [60] (Constitutional Court). It also pays heed to the TRC’s efforts to ‘restore dignity’ to its victims by providing them with a forum in which to express themselves.

¹⁴⁶ *Le Roux* [2011] 3 SA 274, [46] (Constitutional Court).

¹⁴⁷ *Ibid* [73].

¹⁴⁸ One fascinating and hopeful footnote to the ruling in *Le Roux* [2011] 3 SA 274, [202] (Constitutional Court), was the fact that the majority of the Court ordered the students to apologise to Dr Dey as well. The majority argued that:

Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other’s dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.

This ruling demonstrates how the rituals of reconciliation *via communication*, established by the TRC, have been assimilated into both the legal and cultural architecture of South African society. This may provide a platform for resistance against overly speech-restrictive readings of dignity.

¹⁴⁹ [2011] 4 SA 191 (Constitutional Court).

¹⁵⁰ *Ibid* [1].

to which our Constitution guarantees freedom of expression, including freedom of the press and other media. ... It concerns also Mr McBride's right to dignity and reputation.¹⁵¹

The affair would not only resituate the very questions of human dignity, defamation and free speech considered in *Le Roux* into a decidedly political context. It would also illuminate them within the dramatic light of South Africa's history and the national drama of truth and reconciliation.

1 McBride and the Civil Courts

In the first instance, the South Gauteng High Court (Johannesburg) found that the articles and editorials were defamatory. The judge held that the discussion as to McBride's suitability for Police Chief was not in the public interest, since his past conviction was no longer relevant in light of his successful amnesty application.¹⁵² The High Court wrote that 'the effect of amnesty cannot "be willy-nilly limited and circumscribed" ... Thus read, the provision expunged Mr McBride's conviction for murder "for all purposes"'.¹⁵³ *The Citizen's* articles were held to have impaired McBride's human dignity. Of the 'damages totaling R3.6 million for defamation and for impairment of dignity',¹⁵⁴ that McBride had demanded, the High Court awarded 200 000 rand. On appeal, the SCA reduced the award to 150 000 rand.¹⁵⁵ It nonetheless concurred that it was impermissible to label McBride a murderer.¹⁵⁶ Writing for the majority of the SCA, Streicher JA held that those who received amnesty 'should be considered not to have committed the offences ... so that they could be reintegrated into society'.¹⁵⁷ The publications about McBride were consequently false.¹⁵⁸

The Citizen submitted a constitutional challenge invoking its right to freedom of expression.¹⁵⁹ Although *Khumalo* formed the governing precedent, the Court's recent reputation-heavy ruling in *Le Roux* boded poorly. Certainly, *McBride* turned on a matter of political speech as opposed to a boyhood prank. However, the deeds for which *The Citizen* was lambasting McBride had occurred 17 years earlier and were carried out in a de facto state of civil war. The question that hovered over the case was whether, 'despite amnesty, McBride's conviction for murder [could] indefinitely be flung in his face'.¹⁶⁰

The matter held wide implications for the countless individuals who had committed criminal acts for which they later received amnesty. The Court's ruling would set in place a discursive framework for a society in which victims and murderers lived alongside one another. Was it best

¹⁵¹ Ibid [2], [7].

¹⁵² Ibid [22]–[23].

¹⁵³ Ibid [22].

¹⁵⁴ Ibid [5].

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid [28].

¹⁵⁸ Ibid.

¹⁵⁹ Ibid [35]–[38].

¹⁶⁰ Ibid [79].

to enforce a culture of civility and to ‘close the book’ on the past, as McBride argued?¹⁶¹ What would this mean for the victims? Conversely, what might be the potential damage to national unity ‘should the media be allowed to unrelentingly rake up the past?’¹⁶²

For the moment, free speech’s fortress held and the majority opinion, written by Cameron J, struck a decidedly different tone from *Le Roux*. Indeed, a comparison of the two cases offers a veritable study in contrast. When the Court was forced to balance personal reputation against satirical speech, the principle of human dignity became a cudgel of intolerance, ready to punish even marginal slights to a person’s self-esteem. However, when the same judges were tasked to reanalyse reputation and speech rights within the loaded history of reconciliation, the principle of human dignity tended much closer to that emblem of communicative dignity, enabler of the voiceless and the weak, invoked by Yacoob J in his dissent in *Le Roux*.

Nonetheless, whereas *Le Roux* was decided 9:2, the *McBride* controversy split the Court 5:2:1 (with only eight judges ruling). Also, McBride once again won the case, though not because the newspaper had branded him a ‘murderer’. Five judges found against *The Citizen* for claiming that McBride was not contrite.¹⁶³ A two-judge partial dissent held that the remarks about McBride’s alleged gun-running were also defamatory.¹⁶⁴ Mogoeng J’s lone dissent found for McBride on all counts.¹⁶⁵

More importantly yet, both dissents manifested an obdurate defence of personal reputation against the public interest. This was nowhere more palpable than in Mogoeng J’s opinion, to which this section will now turn. Mogoeng J introduces a radical new reading into the realm of South African constitutional law. To substantiate his position that calling Robert McBride a ‘murderer’ violated his human dignity, Mogoeng J invokes none other than the traditional African principle of ubuntu.

2 *Ubuntu as Honour*

Zuma’s appointment of Justice Mogoeng in 2009, and his subsequent elevation of Mogoeng J to the position of Chief Justice in 2011, were heavily criticised in the press.¹⁶⁶ Mogoeng J has been noted for his ‘deference’ to executive power¹⁶⁷ and his opinion offers a window into the legal

¹⁶¹ Ibid [39]:

One of the principal objectives of the Act was to facilitate as complete a picture as possible of the causes, nature and extent of gross human rights violations committed during the conflicts of the past. Once the truth of the past has been exposed, the intention is to ‘close the book’ on that past. This allows perpetrators to start their lives anew without being labelled forever.

¹⁶² W De Klerk, ‘*The Citizen v McBride* 2011 4 SA 191 (CC): Defamation — The Defence of “Fair” Comment and Media Defendants’ (2011) 27 *De Jure* 447.

¹⁶³ *McBride* [2011] 4 SA 191, [136] (Constitutional Court).

¹⁶⁴ Ibid [203]–[206].

¹⁶⁵ Ibid [245].

¹⁶⁶ Pierre De Vos, ‘On the Appointment of a Chief Justice’ on Pierre De Vos, *Constitutionally Speaking* (29 July 2011) <<http://constitutionallyspeaking.co.za/on-the-appointment-of-a-chief-justice/>>.

¹⁶⁷ Ibid. Constitutional scholar, Pierre De Vos, mooted both these concerns in his piece on the occasion of Mogoeng J’s appointment as new Chief Justice.

strategies being deployed by an ANC Party that has shown itself increasingly hostile to media autonomy and public criticism.

Mogoeng J begins his dissent by invoking the epilogue to the 1993 interim Constitution, which created the TRC: ‘Black and white South Africans ... [must] embrace, “a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization”’.¹⁶⁸ According to Mogoeng J, these words show that the truths revealed by the TRC ‘were not intended to lay the foundation for the endless vilification of South Africans who grossly violated human rights ... in the name of freedom of expression’.¹⁶⁹

Within the context of the case, this would suggest that describing McBride as a murderer should be impermissible. However, Mogoeng J casts a much wider net.¹⁷⁰ He enlists ubuntu to demand South Africa’s return to a mythologised traditional order characterised by universal cordiality and respect:

Botho or ubuntu is the embodiment of a set of values and moral principles which informed the peaceful co-existence of the African people in this country ... Language was used in moderation and foul language was frowned upon by the overwhelming majority. A forgiving and generous spirit, the readiness to embrace and apply restorative justice, as well as a *courteous interaction* with others, were instilled even in the young ones in the ordinary course of daily discourse.¹⁷¹

Justice Mogoeng’s prelapsarian take on indigenous African culture was not his own giddy invention. Heavily parlayed during the Truth and Reconciliation hearings in order to lend a historical heft to the practice of restorative justice, this ‘romanticised’ vision has been roundly attacked for denying the conflict inherent in a pluralistic society.¹⁷² Such an ubuntu-inflected reading of human dignity would push the SACC into the business of dictating etiquette or, as Yacoob J termed it in his dissent to *Le Roux*, ‘thought control’.¹⁷³

Within Mogoeng J’s ideal society, people would ‘express themselves on the gross violation of the rights of their loved ones’¹⁷⁴ in a restrained and courteous fashion, and human dignity would be the constitutional principle empowered to chaperone such expression. ‘What is impermissible’, Mogoeng J writes:

is the use of truth revealed to insult, demonise and run down the dignity of self-confessed human rights violators. ... human dignity must colour the spectacles through which we view defamatory publications, particularly those which are inextricably linked to our painful past. And so should our rich values, like ubuntu.¹⁷⁵

¹⁶⁸ Ibid.

¹⁶⁹ *McBride* [2011] 4 SA 191, [218] (Constitutional Court). ‘No wonder the drafters of our interim Constitution deemed it meet [sic] to cite ubuntu as one of the ingredients essential to the healing of our country’.

¹⁷⁰ Ibid.

¹⁷¹ Ibid [217] [emphasis added].

¹⁷² Richard A Wilson, *The Politics of Truth and Reconciliation: Legitimizing the Post-Apartheid State* (Cambridge Studies in Law and Society, 2001).

¹⁷³ *Le Roux* [2011] 3 SA 274, [72] (Constitutional Court).

¹⁷⁴ *McBride* [2011] 4 SA 191, [220] (Constitutional Court).

¹⁷⁵ Ibid [220], [243].

Similar to the ANC's denunciations of Murray's *The Spear*, Mogoeng J's 'defence' of human dignity conflates two distinct and opposing strands — that of status and that of stature. This is nowhere more evident than at the end of his dissent where he writes:

Black South Africans have been subjected to untold indignities for centuries. It is partly for this reason that the value of human dignity and the right of all to have their dignity respected and protected features so prominently in our Constitution. This right ... should not be relegated to near insignificance at the appearance of the right to freedom of expression.¹⁷⁶

Like the Court in *Le Roux*, Mogoeng J conceptualises human dignity as at odds with free speech. He thereby neglects a long history of apartheid censorship, which was fundamentally intended to deprive the black majority of any political voice to contest the bodily 'indignities' daily inflicted upon them. Ironically enough, the very 'courteous interaction' and 'moderate' language he now wishes to enforce was foisted upon black citizens under apartheid as part of their highly scripted interactions with 'superior' white citizens.

The irony compounds for, as with *The Spear*, the controversy considered in *McBride* may in fact have given rise to a human dignity violation other than the one recognised by the Court. In Thabo Mbeki's essay, cited earlier, he notes the deplorable role played by *The Citizen* as the unofficial spokesperson of the National Party under apartheid.¹⁷⁷ The only English language newspaper to lend its support to the racist government, the newspaper's financing was later discovered to have come from a slush fund set up by the Department of Defence.¹⁷⁸ Given *The Citizen's* past and the admittedly calumnious language of some of the editorials, one of which describes the bombing as an act of 'human scum',¹⁷⁹ it is at least conceivable that its campaign against McBride was actuated by racial 'malice'.¹⁸⁰

However, by taking a stand for a society-wide norm of 'courteous interaction' and 'moderate language', and by grounding human dignity in a right to chivalrous treatment as opposed to the 'sense of equal self-worth' proposed by Yacoob J, Mogoeng J undermines the particular in his reach for the general. Indeed, were his reading of human dignity ever to become constitutional doctrine then the relatives of those tormented to death by the apartheid secret police would no longer be permitted to refer to the perpetrators as 'murderers'.

¹⁷⁶ Ibid [241].

¹⁷⁷ Staff Reporter, 'Mbeki Hauls *The Citizen* Over the Coals', *Mail & Guardian* (online), 17 October 2003 <<http://mg.co.za/article/2003-10-17-mbeki-hauls-the-citizen-over-coals>>.

¹⁷⁸ Ibid.

¹⁷⁹ *McBride* [2011] 4 SA 191, [238] (Constitutional Court). Though, here too, Mogoeng J toys with the facts, arguing that *The Citizen* referred to McBride himself as 'human scum'.

¹⁸⁰ Ibid [195]. As Mogoeng J claims, and Ngcobo CJ and Khampepe J suspect

Mr Williams did not concern himself with checking the statements he made relating to McBride's contrition against the public record or provide any facts at all upon which his statement regarding contrition was based. This, taken together with the language and tone in the articles, which, in some instances, amounted to a personal attack that appears to have been designed to stigmatise Mr McBride for actions taken in the struggle against apartheid for which he has since received amnesty, comes very close to justifying an inference of malice.

3 'Dignity' in the Light of History

In their concurring opinion in *Le Roux*,¹⁸¹ Froneman and Cameron JJ reformulated human dignity as a right to self-esteem ('*dignitas*'), independent of any injury to reputation or a deeper 'sense of equal worth'. They thereby endorsed a doctrinal stance guaranteed to embolden litigation around insult and to chill polemic debate in South Africa for decades to come. Yet, in *McBride*, when tasked to rule on human dignity in the context of national reconciliation, Cameron J produced a speech-friendly ruling worthy of the American Supreme Court.

The contrast between the two opinions delivered by Cameron J, and between the opinions of Cameron J and Mogoeng J in *McBride*, provides the most compelling evidence that the TRC's linking of human dignity to rituals of storytelling and expression may help stave off the principle's slow evolution towards reputational priorities, even despite the manifold forces in South African politics campaigning for this goal.

The clouded equities of the *McBride* controversy only favour this interpretation. Powerful arguments weighed on the side of the plaintiff. The acts had occurred nearly two decades prior and were part of a justifiable struggle against a brutal regime. It was not clear that *The Citizen* should prevail. Yet, the TRC's unprecedented decision to place victims rather than perpetrators at the centre of its juridical process¹⁸² accomplished the rare feat of drawing the Court's gaze to the victims' dignity instead of merely McBride's. The majority opinion thus consecrates special attention to a joint amicus curiae filed by the relatives of individuals murdered by apartheid security police. The amicus curiae claimed that:

the ruling will have a significant effect on their ability to speak out freely about the crimes committed against their family members, and about the wrongdoers who received amnesty. Ms Mbizana and Mr Mxenge contend that freedom of expression is constitutive of dignity: to deny persons in their position the right to speak the truth without fear of being sued for defamation strips them of their dignity.¹⁸³

Unlike in *Le Roux*, where Cameron J ignored dignity's speech-empowering possibilities, here he is moved by this argument:

The amici whose family members were killed make a plangent point ... They assert primarily a subjective and expressive entitlement, one that *springs from their dignity as siblings and children*. ... to continue to call the unlawful intentional killing of their loved

¹⁸¹ [2011] 3 SA 274 (Constitutional Court).

¹⁸² *Albutt* [2010] 3 SA 293, [60] (Constitutional Court). As the Court wrote in *Albutt*,

[w]hat is plain from what I have said above is that the victims of gross human rights violations were at the centre of the TRC process. As the TRC observed:

One of the unique features of the Act was that it provided guiding principles on how the Commission should deal with victims. These principles constituted the essence of the Commission's commitment to restorative justice. The Act required that the Commission help restore the human and civil dignity of victims 'by granting them an opportunity to relate their own accounts of the violations of which they are the victim'. Through the public unburdening of their grief — which would have been impossible within the context of an adversarial search for objective and corroborative evidence — those who were violated received public recognition that they had been wronged.

¹⁸³ *McBride* [2011] 4 SA 191, [45] (Constitutional Court).

ones ‘murder’, and those who perpetrated the killings ‘murderers’. The literal reading urged by Mr McBride would render these descriptions false, and impose legally enforced inhibition on those expressing them. This cannot be correct.¹⁸⁴

Cameron J’s recognition of a ‘subjective and expressive entitlement’, which springs from the victims’ ‘dignity’, offers a constitutional architecture in which dignity and expression might collude instead of colliding. In what appears to be a pointed rebuke to Mogoeng J’s vision of a courtly South Africa, Cameron J rhetorically asks whether public discourse about the reconciliation process and its meaning have ended. He responds by saying:

The answer must be No. A more supple approach is to accept that the meaning of reconciliation is still unfolding, and that the fragilities of its meaning cannot be prescribed by law: and hence the best chance for successful reconciliation lies in fostering open public discussion. In this, boundaries should be set not by assessing the reasonableness or good taste of the content of debate.¹⁸⁵

This includes barbed and even rancorous commentary. An important rationale for the defence of protected or ‘fair’ comment, Cameron J writes, ‘is to ensure that divergent views are aired in public and subjected to scrutiny and debate. ... [I]f views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth finding’.¹⁸⁶

The question before the Court was how to set the parameters of debate for a citizenry united by statehood but torn apart by a history of racial violence. The mottled morality of Robert McBride, both murderer and freedom fighter, and of *The Citizen*, now organ of a democratic public but one-time mouthpiece for the apartheid government, spoke to the frayed and complex ethical landscape facing the judges. Confronted with these appreciable stakes, Cameron J’s voice in *McBride* could not sound less like his voice in *Le Roux*. Cautioning his countrymen that ‘public discussion of political issues has if anything become more heated and intense since the advent of democracy’,¹⁸⁷ Cameron J opines that ‘fair comment’ is a misnomer.¹⁸⁸ Fair comment, he writes, ‘need not be “fair or just at all” ... Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true’.¹⁸⁹ It was a studied expansion of free speech rights in the Republic of South Africa. Cameron J went on to insist that ‘fair comment’ should be renamed ‘protected comment’. This, he believes, would better remind those interpreting constitutional rights that ‘the Court may not prescribe what people may or should say’.¹⁹⁰

¹⁸⁴ Ibid [59] (emphasis added).

¹⁸⁵ Ibid [75].

¹⁸⁶ Ibid [82].

¹⁸⁷ Ibid [100].

¹⁸⁸ Ibid [81].

¹⁸⁹ Ibid [83].

¹⁹⁰ Ibid [86].

IV CONCLUSION

The role of the cartoonist is to knock the high and mighty off their pedestals. To be irreverent; to be a sceptic and not to be sycophantic; cartoons can be powerful and not all are funny.¹⁹¹

Zapiro (Jonathan Shapiro)

McBride was something of a *rara avis* in the recent jurisprudence of the SACC. By forcing the Court to situate the principle of human dignity in relation to apartheid's human rights violations, the majority endorsed a more sizeable expressive component to human dignity than ever before. Similar language is absent from landmark cases like *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa*,¹⁹² *Du Toit v Minister for Safety and Security*¹⁹³ and *Albutt v Centre for the Study of Violence and Reconciliation*,¹⁹⁴ in which the Court similarly grappled with the meaning of amnesty and reconciliation but was not tasked with articulating human dignity. Moreover, in benchmark decisions like *Khumalo*, which considered both 'freedom of expression' and 'human dignity', the two principles are strategically set at odds.

Of course, Cameron J's magnificent stance in favour of participatory democracy failed to sway either Ngcobo CJ or Khampepe J. Though they hardly promote a societal vision as extreme as Mogoeng J's decorous arcadia, they continue to espouse human dignity's capacity to superintend the etiquette of public debate. Chief Justice Ngcobo writes:

By insisting that a comment must be fair, the common law demands that the comment be fair having regard to the right to human dignity. The comment must be relevant to the matter commented upon and it must not be actuated by malice. ... In my view, the requirement of fair comment is consistent with the need to respect and protect dignity. ... I do not, therefore, share the view expressed by Cameron J that the word 'fair' is misleading.¹⁹⁵

Ngcobo CJ and Khampepe J (along with Mogoeng J) therefore held that *The Citizen's* language about 'McBride's dubious flirtation with gun-runners' violated McBride's human dignity.¹⁹⁶ Overall, Ngcobo CJ's dissent cleaves much closer to the reputational stance adopted by the nine judges in *Le Roux*. It is pure speculation, but had *McBride* come before the full court, the scales might have tipped in the other direction. In fact, for all the governing decision's rousing language about the expressive rights of the victims and the integrity of their memory, these sentiments are couched in a very specific context: the meaning of the 'for all purposes' clause in the *Promotion of Unity and National Reconciliation Act 1995* (South Africa).

¹⁹¹ Jonathan Shapiro (Zapiro) cited in Glenda Daniels, 'The Case of Zuma Versus Zapiro', *The Media Online*, 19 December 2012 <<http://themedialonline.co.za/2012/12/the-case-of-zuma-versus-zapiro/>>.

¹⁹² [1996] 4 SA 672 (Constitutional Court).

¹⁹³ [2009] 12 BCLR 1171 (Constitutional Court).

¹⁹⁴ [2010] 3 SA 293 (Constitutional Court).

¹⁹⁵ *McBride* [2011] 4 SA 191, [157]–[158] (Constitutional Court).

¹⁹⁶ *Ibid* [199]–[203]. Nonetheless, Ngcobo CJ does not go so far as to rule that calling McBride a murderer violates the canons of 'fair comment'. As a former prisoner of the apartheid government, he likely felt the impact of Desmond Tutu's words, cited in the majority opinion: 'The notion of letting bygones be bygones was inimical to the ethos of the transition, since amnesia would have resulted in further victimization of victims by denying their awful experiences'.

In this respect, *McBride* sets South Africa at a fork in the road. The future alone will tell whether this decision signals a newly combative stance on the part of the Court in favour of public debate or if it will be remembered as the swan song of a communicatively grounded notion of human dignity. South Africa's lower courts, for instance, continue to ape the SACC's more recalcitrant judges. Only a few months after *McBride*, Julius Malema, the leader of the Youth League of the ANC, was found guilty of hate speech by the Johannesburg Equality Court for singing the anti-apartheid struggle song, 'Dubula Ibhunu' or 'Shoot the Boer'.¹⁹⁷ As constitutional scholar Pierre De Vos writes, both on this score and that of *The Spear*:

The problem is that the law is a rather blunt instrument with which to mediate this clash between widely differing values, ideas and principles. ... The Afriforum's hate speech case against Julius Malema is a case in point where a body turned to the court to fight what was essentially a political battle about who gets to decide what is acceptable speech in our democracy.¹⁹⁸

'Dubula Ibhunu' was a chant that had been sung at countless ANC rallies for decades. The verdict evidenced a growing cultural intolerance for divisive language and an unfortunately legalistic approach towards socially contentious issues that would normally be submitted to the crucible of public debate. The ANC's proposed Media Appeals Tribunal and its recently passed *Protection of Information Act 2013* (South Africa) (dubbed the 'Secrecy Bill') offer similar dispiriting signs of a waning forbearance and broad-mindedness on the part of the nation's political and legal elite. For a party seeking to bootstrap social consensus, human dignity offers but one more cynical weapon in a growing arsenal of 'thought control'.

This brings us back to Gcina Malindi's crying collapse in his argument before the High Court of Johannesburg. Nothing has been more emblematic of the exponential expansion of 'Personality Rights' than President Zuma's multiple dignity suits against satirists like Brett Murray and Zapiro. An overly muscular regime of 'Personality Rights' is destructive for participatory democracy. It chills free expression and silences topics of public concern. However, an ancillary and equally worrisome matter is that the political revamping of human dignity into an Achilles' shield for the individual's ego¹⁹⁹ may conspire to obscure actual human dignity violations. In this regard, Malindi's cry offers an extraordinary intervention into a case myopically focused on the person of President Zuma. Though the President's complaint mentions some of the historical indignities suffered by black South Africans, it makes no motion on behalf of them. The structure of the legal proceedings thus silenced a painful legacy of oppression to which Malindi responded.

Unfortunately, as De Vos has written, 'the law is a blunt instrument'.²⁰⁰ Malindi's cry provoked the adjournment of the proceedings. Shortly thereafter the Goodman Gallery took down the painting and the suit was dropped.²⁰¹ This is a shame. It would have been enlightening to see

¹⁹⁷ *Afri-Forum v Malema* [2011] 6 SA 240 (Equality Court).

¹⁹⁸ Pierre De Vos, 'Unpacking the Legal Arguments in the Spear case' on Pierre De Vos, *Constitutionally Speaking* (24 May 2012) <<http://constitutionallyspeaking.co.za/unpacking-the-legal-arguments-in-the-spear-case/>>.

¹⁹⁹ Achilles may have had a weak tendon, but he also sported an unbreakable shield.

²⁰⁰ De Vos, above n 166.

²⁰¹ Smith, above n 10.

how, or if, the Court might have responded to the events of that day. Nonetheless, Malindi's semantic collapse offers an eloquent argument that the right to speak is constitutive of human dignity, that structures of dominance, whether racist, economic or authoritarian, impede certain categories of human beings from making their voices heard. Human dignity is meant to shield against this sort of dominance. It is meant to guarantee all actors an equal voice in the body politic.

The TRC's procedures of narrative empowerment no longer form an active part of South African law. Human dignity/ubuntu may be the sole caretaker of its legacy. Yet, Malindi's collapse into silence provides perfect evidence of how a reputational reading of the principle of human dignity can in fact do violence to *human* dignity.
