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Edwin Cameron and the protection of political speech

Michael Mbikiwa & Liam Minné

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Various chapters in this collection have emphasised a recurring theme of Edwin Cameron's judicial philosophy: a general suspicion and sceptical scrutiny of power, and a commitment to holding those in power to account.[1] Justice Cameron's free speech jurisprudence is no different. Overwhelmingly, his contribution to this area of law has been to protect and defend speech that allows for fierce contestation and robust debate on political matters, precisely because this is an important way in which power is scrutinised in a democratic society, and because deliberation on matters of political importance is constitutive of democracy itself.

This chapter reflects on Justice Cameron's contribution to South African free speech jurisprudence. It does so in four parts. Part 1 considers the question why we value speech, discusses some of the traditional theoretical justifications for free speech, and analyses how those justifications have been applied by South African courts in general, and by Justice Cameron in particular. Part 2 considers the historical context, and illustrates that, while normative justifications have played a role, democratic justifications for free speech have particular purchase in South Africa, and especially in Cameron's jurisprudence, because of South Africa's pernicious history of censorship. Part 3 discusses four landmark free-speech judgments penned by Cameron. The first three – *Holomisa v Argus Newspapers Ltd*,[2] *The Citizen 1978 (Pty) Ltd v McBride*,[3] and *Democratic Alliance v African National Congress*[4] – illustrate his profound commitment to the protection of political speech,

1 See eg N Ally 'Making accountability work', this volume, ch 7; J Froneman & H Taylor 'Judicial dissent and the sceptical scrutiny of power', this volume, ch 11.
2 *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).
3 *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11.
4 *Democratic Alliance v African National Congress* [2015] ZACC 1.

given its democracy-enhancing value. In each of these cases, Cameron J found that the potential harm that politically valuable speech might cause was outweighed by its importance to democratic deliberation. We contrast these three judgments with a fourth, *Le Roux v Dey*,[5] where, in a joint minority judgment (with Froneman J), Cameron J adopted a much less speech-protective approach. Here, far from enhancing democracy, Cameron J regarded the publication by schoolboys of an obviously doctored and superimposed image of their senior teachers in a sexually suggestive pose, as amounting to little more than a crude, childish prank. He concluded that the publication was an unlawful and actionable infringement of the plaintiff teacher's dignity.

Our first argument, based on these four judgments, is modest and largely descriptive: it is that Justice Cameron's free-speech jurisprudence is motivated in large part by the important function that particular kinds of speech play in a democracy, which leads him to afford capacious protection to speech that furthers democracy – even where it may be false, and even where it may cause harm – but less protection to speech which lacks democracy-enhancing value.

Part 4 looks more closely at *Holomisa v Argus*, and the defence that it created. Here we argue that Cameron J's path-breaking approach, taken so early in South Africa's constitutional democracy, of recognising a defence of reasonable publication for speech in the sphere of free and fair political activity, has been substantially vindicated. Not only was the defence largely adopted by the Supreme Court of Appeal in *National Media Ltd v Bogoshi* a few years later,[6] but, insofar as the *Bogoshi* defence differs from its *Holomisa v Argus* predecessor, *Holomisa* would, in certain respects, have been the preferable alternative. Specifically, we argue that the *Holomisa v Argus* defence, which would have been available to any person – and not merely the media – who publishes political speech, tracks more closely the democratic justifications upon which it is based, than does the *Bogoshi* defence, which also purports to be justified by democratic considerations, but which is limited to the media. Cameron J's approach in *Holomisa v Argus* also would have avoided an undesirable consequence of the *Bogoshi* defence's focus on the media, which has been the exclusion of non-media defendants from the ambit of its protection.

5 *Le Roux v Dey* [2011] ZACC 4.
6 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

This exclusion occurs in circumstances where many non-media defendants are able to reach a larger audience than the traditional media, and the limitation of the defence to the media has become increasingly difficult to justify. By eschewing media exceptionalism, and extending the defence to any defendant, provided its publication was in the sphere of free and fair political activity, Cameron J's approach in *Holomisa v Argus* was prescient and pioneering.

1 Justifications for free speech

Let us begin with the value of speech. To say that freedom of speech is worthy of protection is uncontroversial. Every modern democracy affords some protection to speech. But what precisely makes speech valuable? And, perhaps more importantly, why, in certain circumstances, might it be something worth protecting over other interests? Speech can, and does, cause real harm, and any normative justification must therefore defend and protect free speech *despite* the harm that it might cause, and not because it does not cause harm.[7] At the same time, every legal system also restricts or regulates speech in some way.[8] Generally speaking, this is where speech affects other rights and interests, like dignity, equality, or nation-building.

We begin with these questions – which may appear, on their face, abstract and theoretical – because of their importance to the practical task of adjudication in free speech cases. Striking an appropriate balance between free speech and competing interests requires an appreciation of the underlying values that the respective interests serve. And courts should, when crafting and developing legal rules – such as recognising new defences to defamation actions – aim to do so in a manner that gives better effect to those underlying values in future cases. As we shall see, it is with specific reference to these underlying values, and especially the value of democratic deliberation, that Cameron J has generally approached the balancing exercise in free speech cases. Where speech is of a kind that has the potential to enhance democracy, he has required especially weighty

7 F Schauer *Free speech: A philosophical enquiry* (1982) at 10-11.

8 See J Waldron *The harm in hate speech* (2012), who notes that every liberal democracy in the world, except the United States, has laws or codes against hate speech. The United States does, of course, regulate various other forms of speech, including defamatory speech.

and compelling reasons for it to be censored or penalised – justifications which extend beyond its probable falsity or its reputation-harming potential. But where speech is of a kind that lacks this value, far less weighty reasons for its suppression are required.

Freedom of speech has been justified with recourse to various considerations over time. Instrumental arguments for speech, like the 'argument from truth' and the 'argument from democracy', see speech as valuable because of the positive outcomes it has for society generally. 'Constitutive'[9] or 'individual'[10] justifications, on the other hand, see speech as an 'essential and constitutive feature of a just political society' and of responsible moral agency and autonomy.[11] As we shall explain, each of these justifications has, to varying degrees, been relied upon by South African courts.[12]

Speech forms a substantial part of how most of us engage with the world, and how beliefs, thoughts and desires are articulated. And it is only because of the speech and other expressive acts of others that we are equipped with information upon which to form our own beliefs, to act on those beliefs, and to make rational choices.[13] Some argue, therefore, that freedom of speech is valuable because it protects and advances the autonomy of audiences[14] and respects the dignity of speakers,[15] and because it gives effect to our inherent dignity by allowing self-fulfilment through self-expression.[16] Our courts have acknowledged these sorts of justifications for speech. As the Constitutional Court put it in *Khumalo v Holomisa*, expression itself is 'constitutive of the dignity and

9 R Dworkin *Freedom's law: The moral reading of the American Constitution* (1996) at 200.
10 Schauer (n 7) 47-48.
11 Dworkin (n 9) 57.
12 But see J Botha 'Towards a South African free-speech model' (2017) 134 *South African Law Journal* 778 at 780, who criticises courts' inclination to accept these justifications 'blindly', in the sense that they fail 'to engage with the philosophical basis of each rationale within the context of the issue in dispute'.
13 See K Greenawalt 'Free speech justifications' (1989) 89 *Columbia Law Review* 119 at 145.
14 T Scanlon 'A theory of free expression' (1972) 1 *Philosophy and Public Affairs* 216.
15 Greenawalt (n 13) 153.
16 CE Baker *Human liberty and freedom of speech* (1989) 52. And see T Scanlon 'Comment on Baker's *Autonomy and free speech*' (2011) 27 *Constitutional Commentary* 319 at 320, as discussed in C MacKenzie & D Meyerson 'Autonomy and free speech' in A Stone & F Schauer (eds) *The Oxford handbook of freedom of speech* (2021) at 62-66.

autonomy of human beings'.[17] The Court has repeatedly quoted Ronald Dworkin to the effect that '[w]e retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it'.[18] O'Regan J held similarly in *NM v Smith*, noting that freedom of expression is indispensable 'because of its importance to the development of individuals' and for the enhancement of human dignity and autonomy.[19] Cameron J, too, has recognised these sorts of justifications for freedom of expression. He did so in *Argus v Holomisa v Argus*, remarking that the rationale for the wide constitutional guarantee of freedom of expression 'must clearly extend beyond instrumental justifications'.[20] And he affirmed this in *DA v ANC*, emphasising that being able to speak freely 'recognises and protects "the moral agency of individuals in our society"'.[21]

But arguments from dignity and autonomy provide an incomplete account of why we regard speech – or at least certain kinds of speech – as deserving of special protection. Indeed, there is little to distinguish an argument of this kind from more generalised claims to individual liberty.[22] More importantly, dignity and autonomy provide little guidance as to how speech ought to be regulated, particularly when – such as in the context of hate speech, defamation, and other *iniuria* – the interest *against* which free speech is being balanced is itself dignity-based.[23] An appeal to dignity or autonomy is therefore of little assistance in determining the circumstances in which harmful speech should be protected.[24] Dario Milo notes a further shortcoming of these arguments,

17 *Khumalo v Holomisa* [2002] ZACC 12 para 21.
18 Dworkin (n 9) 200, quoted in *Qwelane v South African Human Rights Commission* [2021] ZACC 22 para 70 fn 80 and *Reddell v Mineral Sands Resources (Pty) Ltd* [2022] ZACC 38 para 102.
19 *NM v Smith* [2007] ZACC 6 paras 145-146.
20 *Holomisa v Argus* (n 2) 608E.
21 *DA v ANC* (n 4) para 123, citing *South African National Defence Union v Minister of Defence* [1999] ZACC 7 and *Holomisa v Argus* (n 2) 608G-609A.
22 See Schauer (n 7) 52, 58, 60; also Greenawalt (n 13) 153 ('The concerns about dignity and equality may seem not to be specially related to speech, but to be arguments, perhaps rather weak ones, in favor of liberty generally').
23 D Milo *Defamation and freedom of speech* (2008) 78.
24 See Schauer (n 7) 64, who explains that dignity relates primarily to self-regarding, rather than other-regarding, harmful actions, and that 'dignity and insult are no more dispositive than they would be if someone claimed his dignity to be insulted by restrictions on his freedom to pollute the atmosphere, commit assault, play the

namely that they do not apply readily to publication that is not by dignity-bearing individuals, much of which is at the heart of speech-law, such as newspaper reporting.[25]

For these reasons, although this rationale for free speech is regularly invoked by courts as one amongst others, it rarely seems to do the heavy lifting in justifying the publication of harm-causing speech. Where it does play a justificatory role, it is generally where speech causes no injury to the dignity of others, even if it is of a kind that might, for example, affront public morals.[26] For his part, while Cameron was careful in *DA v ANC* and *Holomisa v Argus* to emphasise that speech does not have *only* instrumental value, it was, as we show in the next part of this chapter, ultimately the instrumental, democracy-enhancing value of the speech that justified its protection in those cases.

Perhaps the best-known instrumental defence of speech, described as the 'ruling theory' for much of modern history,[27] and originally attributed to Milton[28] and Mill,[29] is the argument from truth. According to this argument, speech is valuable because it leads to the discovery of truth and the advancement of knowledge. And it is only through affording speech maximum protection, and allowing maximum debate, that misconceptions and errors can be exposed, and the truth can emerge.[30] A version of the argument, popularised by Justice Oliver Wendell Holmes, says that the best test of truth is its ability to be accepted through the competition in the 'marketplace of ideas'.[31]

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saxophone in church, or practice cardio-vascular surgery without a medical degree or licence'.

25 Milo (n 23) 78.

26 See eg *Case v Minister of Safety and Security* [1996] ZACC 7, which concerned the constitutionality of provisions criminalising possession of 'indecent or obscene pornographic matter'. Mokgoro J held at para 26, in a separate concurrence striking down the provisions, that the most relevant justification in that case was that of autonomy – 'that freedom of speech is a *sine qua non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power'.

27 Schauer (n 7) 15-16.

28 J Milton *Areopagitica: A speech for the liberty of unlicensed printing to the Parliament of England* (1644).

29 JS Mill 'On liberty' in JR Robson (ed) *The collected works of John Stuart Mill* vol 18 (1977).

30 *Grant v Torster Corporation* 2009 SCC 61 paras 47-52.

31 See his dissent in *Abrams v United States* 250 US 616 (1919): 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.

The Constitutional Court has, on a number of occasions, recognised this as an important underlying value of speech.[32] Indeed, Cameron did so in *DA v ANC,* cautioning that '[i]f society represses views it considers unacceptable, they may never be exposed as wrong'.[33] The obvious and well-documented difficulty with the argument from truth, however, is that there is no guarantee that more speech will result in error being exchanged for truth.[34] That is, there is nothing inherent in a true statement that makes it more capable than a false one of gaining general acceptance. One cannot simply assume widespread rationality, or that speakers and publishers have equal access to the 'marketplace', or equal resources with which to propagate their views.[35] The Constitutional Court acknowledged these shortcomings, at least by implication, when it lamented the spreading of 'fake news' on social media as one of the most significant threats to the search for truth in open societies.[36] In that context, quite clearly, the simple equation of more speech with more truth does not hold.

But what underlies the argument from truth – and what makes it such a resilient and invaluable contribution to philosophical thought on freedom of speech – is its recognition of fallibility as part of the human condition. According to Mill, '[a]ll silencing of discussion is an assumption of infallibility'.[37] We are only able to take confidence in a belief or opinion being true, claims Mill, if it has been subjected to contradictory and disproving beliefs. And any society committed to the truth must, therefore, be willing to be governed by norms of open and critical discussion.[38] Seen in this more modest way, the argument from truth is more of an 'argument from human fallibility':[39] an appreciation that we may always be wrong, that we will never know we are wrong without hearing other views, that we achieve 'rational assurance' in our views through the process of comparing them to other views, and that

32 See eg *South African National Defence Union v Minister of Defence* (n 21) para 7.
33 *DA v ANC* (n 4) para 122.
34 E Barendt *Freedom of speech* 2 ed (2005) at 8-13; WP Marshall 'The truth justification for freedom of speech' in A Stone & F Schauer (eds) *The Oxford handbook of freedom of speech* (2021) at 54.
35 Marshall (n 34) 54.
36 *Reddell* (n 18) para 20.
37 Mill (n 29) 229.
38 C MacLeod 'Mill on the liberty of thought and discussion' in A Stone & F Schauer (eds) *The Oxford handbook of freedom of speech* (2021) at 6.
39 MacLeod (n 38) 8.

government should never have the power to decide what is true and what is false.[40] Imperfect as the marketplace may be, it at least provides a forum for the ventilation and contestation of competing ideas. Seen in this way, as Schauer notes, '[t]he reason for preferring the marketplace of ideas to the selection of truth by government may be less the proven ability of the former than it is the often evidenced inability of the latter'.[41]

In this sense, the argument from truth has parallels with the last of the traditional justifications for free speech: the argument from democracy. Democracy rests on the idea that 'the people' are sovereign, and that political power therefore lies, ultimately, even if only indirectly, with citizens.[42] Allowing people to speak freely on those matters over which, at least notionally, we exercise collective sovereignty, is thus critical to a functioning democracy.[43] Indeed, the argument operates in two directions. It means that information must be widely available, so that we are able to make informed choices and decisions. And it means, by corollary, that we must be able vociferously to criticise our public officials, and to debate and deliberate on the matters affecting them, so as to engage in the activity of self-government.[44] In this way, freedom of expression promotes two distinct democratic functions: 'an informed citizenry and political legitimacy'.[45]

The argument from democracy has probably received the greatest acceptance in South Africa's free speech jurisprudence.[46] This is not merely because of its general predominance during the twentieth century,[47] but is also at least partly due to South Africa's history, in which,

40 Mill (n 29) 231; MacLeod (n 38) 29.
41 Schauer (n 7) 34.
42 Greenawalt (n 13) 145; Schauer (n 7) 35.
43 Schauer (n 7) 34.
44 Schauer (n 7) 41, 44; A Bhagwat & J Weinstein 'Freedom of speech and democracy' in A Stone & F Schauer (eds) *The Oxford handbook of freedom of speech* (2021) at 84.
45 Bhagwat & Weinstein (n 44) 90.
46 It is also the argument from democracy which spurred on developments in the United States (*New York Times v Sullivan* 376 US 254 (1964) 269), England and Wales (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127), Australia (*Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96), and elsewhere in the common-law world, to recognise special defences to defamation claims, where the speech is political in nature, or where it criticises public officials. See in this regard A Stone & G Williams 'Freedom of speech and defamation: Developments in the common law world' in E Barendt (ed) *Freedom of the press* (2017).
47 Greenawalt (n 13) 147.

as we shall illustrate shortly, the very forms of speech – such as criticism of government – that would, in a free society, enhance democracy, were actively suppressed. Even shortly before the advent of democracy and the Constitution, the Appellate Division expressed a reluctance to regard 'political utterances' as defamatory.[48] In the democratic era, the right to freedom of expression has been lauded as 'the benchmark for a vibrant and animated constitutional democracy like ours'.[49] The Constitutional Court has held, embracing fully the democratic benefits of speech, that without freedom of expression, 'the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled'.[50] At common law, precisely because free speech in parliament is 'crucial to representative government in democratic society',[51] parliamentarians are afforded absolute privilege to enable them to speak freely and without fear of a defamation suit.[52] For similar reasons, it has also been held that the behaviour of parliamentarians is 'political speech of the first order' and, for that reason, something 'which the public has a right to see and hear'.[53] The same justification has been relied on to justify speech regarding public officials of a different kind: judicial officers. In *S v Mamabolo*, in considering the crime of contempt of court, and specifically how far one can go in criticising a judge, the Constitutional Court held that the very purpose of open justice is that the citizenry can 'discuss, endorse, criticise, applaud or castigate the conduct of their courts', and that such scrutiny constitutes 'a democratic check on the judiciary'.[54]

As we shall see in part 3, the argument from democracy has achieved particular primacy in Cameron's free-speech jurisprudence through three politically charged cases: most notably, in *Holomisa v Argus*,

48 *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 588.
49 *Qwelane* (n 18) para 67.
50 *Khumalo* (n 17) para 21.
51 *Speaker of the National Assembly v De Lille* [1999] ZASCA 50 para 29.
52 See also ss 58(1) and 71(1) of the Constitution of the Republic of South Africa, 1996 in relation to proceedings in the National Assembly and Council of Provinces; s 117(1) of the Constitution in relation to provincial legislatures; and s 28 of the Local Government Municipal Structures Act 117 of 1998, in relation to municipal councils.
53 *Primedia (Pty) Ltd v Speaker of the National Assembly* [2016] ZASCA 142 para 28.
54 *S v Mamabolo* [2001] ZACC 17 paras 29-31.

where he recognised, in relation to criticism of a public official in the first democratic government, a new defence of reasonable publication in the area of 'free and fair political activity'; in *McBride*, where he held that a newspaper was justified in describing a candidate for public office as a 'murderer' and a 'criminal' for his involvement in an apartheid-era bombing, even though the candidate had been granted amnesty; and in *DA v ANC*, where he held that an SMS, widely disseminated in the immediate lead-up to an election, which described former President Jacob Zuma as having stolen taxpayer money, was lawful under the Electoral Act.[55]

Although often pitted against each other as competing arguments, these various justifications for freedom of speech should properly be seen as complementary. The argument from dignity and autonomy, despite its lack of explanatory power when speech comes into conflict with other dignity- and autonomy-based interests, explains the intrinsic value of very many speech acts, and reflects an important reason why publications that cause no harm should be largely immune to suppression. The argument from truth explains why statements that are 'truth-apt'[56] are deserving of protection, and why, at a minimum, we should resist the state determining what is true and what is not. And, while the argument from democracy might have little to say about much non-political, everyday speech, it explains why special protection should be afforded to speech that holds public officials to account, or which facilitates citizen engagement in public and political life, even if it is defamatory and even, potentially, when it is false.

Cameron J was alive to the complementary nature of these justifications in *Holomisa v Argus,* where, whilst emphasising the importance of robust criticism of those in power, he also acknowledged that the rationale must extend beyond purely instrumental justifications.[57] So too in *DA v ANC,*

55 Act 73 of 1998.

56 MacLeod (n 38) 13-15 explains that Mill's argument only applies to statements that are *capable* of being evaluated in terms of their truth. It has nothing to say about, for example, jokes, literature, or art.

57 See also *South African National Defence Union v Minister of Defence* (n 21) para 7, where, citing *Holomisa v Argus* (n 2), the Court held that freedom of expression 'is valuable for many reasons, including its instrumental function as a guarantor of democracy, 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'.

where he described freedom of expression as valuable for both intrinsic and instrumental reasons: 'by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed' and thus protecting democracy; in promoting 'the search for truth by both individuals and society generally'; and in recognising 'the moral agency of individuals in society', and allowing us 'to fulfil our capacity to be individually human'.[58]

Nevertheless, despite the complementary nature of these justifications, it is the argument from democracy, and the impulse to protect the free expression of political speech in particular, that has been the animating force of Cameron's free-speech jurisprudence. As we have explained, there are good normative reasons for this. But one also cannot overlook the contribution of South Africa's own history to the predominance of this justification for free speech – a history of a repressive legal and political regime, in which much speech, but especially speech that criticised the establishment, was harshly curtailed. It is to that subject that we now turn.

2 Historical context

A formidable and pernicious weapon of oppression, widely employed by the apartheid regime, was the severe restriction of speech, expression, and political activity. Censorship was rife, and prohibitions on speech and other expressive activity were used as a means to stifle political dissent.[59] Gilbert Marcus has shown that among the most censorious of speech laws were those that sought to prevent 'racial hostility'.[60] Whilst these colonial and apartheid speech laws appeared on their face to be race-neutral curbs on stoking discord, they were used overwhelmingly as a means to silence black dissent against white oppression. Starting with the Native Administration Act,[61] which made it an offence for any person who uttered 'any words or does any other act or thing whatever with intent to

58 *DA v ANC* (n 4) para 123. See also *Qwelane* (n 18) para 69, where the Court itemised the values that underpin freedom of expression: '(a) the pursuit of truth; (b) its value in facilitating the proper functioning of democracy; (c) the promotion of individual autonomy and self-fulfilment; and (d) the encouragement of tolerance'.

59 See J Dugard *Human rights and the South African legal order* (1978) at 178.

60 See GJ Marcus 'Racial hostility: The South African experience' in S Coliver (ed) *Striking a balance: Hate speech, freedom of expression and non-discrimination* (2002).

61 Act 38 of 1927.

promote any feeling of hostility between Natives and Europeans',[62] various prohibitions were enacted throughout the remainder of the century. Gatherings and publications calculated to engender racial hostility were prohibited in 1930.[63] In 1950, the Governor-General was empowered to declare unlawful any organisation that engaged in activities associated with 'communism' – broadly defined to mean 'any doctrine or scheme … which aims at the encouragement of hostility between the European and non-European races'.[64] Under the same statute, the Governor-General could prohibit by proclamation any publication which, amongst other things, propagated or promoted the spread of communism, or served as a means for expressing views 'calculated to further the achievement of any of the objects of communism'.[65]

In 1963, the Publications and Entertainments Act[66] established the Publications Control Board, and prohibited 'undesirable publication', which included within its extraordinarily broad definition, 'publications which brought any section of the inhabitants of the Republic into ridicule or contempt, were harmful to relations between any sections of the inhabitants in the Republic, or were prejudicial to the safety of the State, the general welfare or peace and good order'. This led to the banning of a significant number of books for being 'undesirable'.[67] The Publications Act 42 of 1974 retained the standard of 'undesirability', which resulted in the banning of many political works.[68] In her analysis of 92 decisions of the Publications Appeal Board between 1975 and 1989, Lene Johannessen found that the provisions of the Publications Act 'were used almost exclusively to censor or to try to censor anti-apartheid

62 Section 29(1). Marcus (n 60) shows how this provision was perniciously enforced in cases such as *R v Mote* 1928 OPD 150 and *R v Rulashe* 1928 EDL 376.
63 Under the Riotous Assemblies and Criminal Law Amendment Act 19 of 1930.
64 Under s 2(2), read with the definition of 'communism' in s 1, of the Suppression of Communism Act 44 of 1950.
65 Section 6 of Suppression of Communism Act 44 of 1950.
66 Act 26 of 1963
67 E le Roux *Publishing against apartheid South Africa* (2021) at 6, citing ML Suttie 'The formative years of the University of South Africa Library 1946-1976' (2005) 23 *Mousaion* 112. According to Dugard (n 59) 193, under the predecessor regime, in 1956, there were 5 000 banned items, and by 1963 the number had risen to 9 000 items.
68 Dugard (n 59) 192. Whereas only 100 titles were banned by the apartheid government in 1948, by 1971, this number had reached an astounding 18 000: see Le Roux (n 67) 6.

publications'.[69] Three other statutes – the Official Secrets Act,[70] the Defence Act,[71] and the Prisons Act,[72] made it impossible for the media to criticise 'some of the most important areas of political life – namely, matters affecting prisons, police and defence'.[73] In 1976, the Suppression of Communism Act was amended (and renamed the Internal Security Act)[74] to make clear that it dealt not just with communists, 'but with subversion in general',[75] so that it covered organisations and individuals who engaged in 'activities which endanger the security of the State or the maintenance of public order'. In 1976, fourteen black journalists were detained under this Act for reporting on the township uprisings that occurred that year.[76]

Against this backdrop, writing in 1978, John Dugard described the notion of a genuinely free press as '[o]ne of the most skilfully nurtured South African myths' and explained that '[t]he threat of legislative, executive, or conventional sanction hangs heavily over all South African newspapers opposed to the Government'.[77] Things did not improve thereafter. The Internal Security Act 74 of 1982 consolidated and revised South Africa's security laws, and retained the substantive content of most of the existing laws concerning racial hostility. It criminalised 'subversion', which included the act of causing, encouraging or fomenting feelings of hostility between different population groups with the intent to achieve the object of bringing about or promoting constitutional, political, industrial, social or economic aim.[78] And the States of Emergency during the 1980s enabled the apartheid state to crack down even more harshly on dissentients. Singled out for especially draconian treatment were the 'alternative' media for their political reporting.[79] The 1985 State of Emergency saw many reporters, including foreign reporters, being

69 L Johannessen 'Should censorship of racist publications have a place in the new South Africa?' in S Coliver (ed) *Striking a balance: Hate speech, freedom of expression and non-discrimination* (2002) at 231.
70 Act 16 of 1956.
71 Act 44 of 1957.
72 Act 8 of 1959
73 Dugard (n 59) 182.
74 By the Internal Security Amendment Act 79 of 1976.
75 Dugard (n 59) 155.
76 Dugard (n 59) 183.
77 Dugard (n 59) 181, 186.
78 Section 54.
79 RL Abel *Politics by other means* (1995) at 259.

arrested, detained, beaten, deported, publicly condemned and compelled to reveal sources.[80] Among their supposed crimes were descriptions of the apartheid government as a 'white minority regime'[81] – hardly a controversial statement today. During the various States of Emergency between 1986 and 1990, regulations were passed that incorporated many of the racial hostility restrictions of previous decades. A 'subversive statement' was one that contained anything calculated or likely to have the effect of 'engendering or aggravating feelings of hostility'.[82] Similarly, emergency regulations in 1987 empowered the Minister of Home Affairs to close down newspapers temporarily where matter had been published which had or was calculated to have the effect of 'stirring up or fomenting feelings of hatred or hostility in members of the public' either towards the state 'or towards members of any population group or section of the public'.[83] Over this period, the so-called 'revolution-serving media'[84] remained the particular target. One deputy editor was criminally charged for giving an interview to the BBC describing the killing of African National Congress (ANC) guerrillas; an editor-in-chief was charged for reporting on a confrontation with police in Cradock; multiple publications were banned; and various critical media houses were intimidated – firebombed, threatened, and forced to flee their offices.[85]

This provides just a flavour of the historical context within which today's constitutional guarantee of free expression must be understood. And it provides a further reason why our courts are so averse to the suppression, in particular, of speech that seeks to criticise those in power. It is a historical context about which the Constitutional Court has shown an acute awareness. In *Islamic Unity Convention v Independent Broadcasting Authority*,[86] the Court unanimously struck down a provision which, by prohibiting speech that was 'likely to prejudice relations between sections of the population', bore a stark resemblance to some of the statutes described above. Langa DCJ explained that

80 Abel (n 79) 260 ff.
81 See Abel (n 79) 260-261 and authorities cited there.
82 Regulation 1(viii)(d) of Proc R109 *GG* 10280 of 12 June 1986.
83 Regulation 7A(1)(a)(iv) of Proc R123 *GG* 10880 of 28 August 1987.
84 Abel (n 79) 266.
85 Abel (n 79) 263-272.
86 *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3.

South Africa had 'recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments'.[87] These restrictions were 'a denial of democracy itself', and also exacerbated other rights violations. They were fundamentally incompatible with the democratic constitutional order.[88] The Court in *Mamabolo* likewise acknowledged the 'recent past of thought control, censorship and enforced conformity to governmental theories'.[89]

For his part, as we shall explain, Cameron J was especially conscious in *Holomisa v Argus* of the historical context within which various decisions of the Appellate Division, by which he would otherwise have been bound, had been decided – a history in which '[g]overnmental processes previously neither required nor welcomed the adjuncts of free expression and critical discussion, and our legal system did not treasure at its core a democratic ideal'.[90] In the light of this oppressive history, there was an 'urgent need' to break with the past, and to imbue the legal system with constitutional norms and principles.[91]

3 The cases

We now turn to Cameron's free-speech jurisprudence and attempt to show that – for the normative and historical reasons already discussed – the driving force behind his largely speech-protective approach has been a free-speech philosophy akin to the argument from democracy. In particular, he has endeavoured to afford special protection to speech which advances democracy – speech that is political in nature, that contributes to public deliberation on matters of governance and, especially, that criticises those in power. As mentioned, we will do so through an analysis of his decisions in *Holomisa*,[92] *McBride*,[93] and *DA*

87 *Islamic Unity Convention* (n 86) para 25.
88 *Islamic Unity Convention* (n 86) para 25.
89 *S v Mamabolo* [2001] ZACC 17 para 37.
90 *Holomisa v Argus* (n 2) 604G.
91 *Holomisa v Argus* (n 2) 604G.
92 *Holomisa v Argus* (n 2).
93 *McBride* (n 3).

v ANC.[94] We then contrast these decisions with the substantially less speech-protective approach he adopted in *Le Roux v Dey*.[95]

3.1 *Holomisa v Argus*

In May 1993, with South Africa on the cusp of its first democratic government, *The Star* newspaper published a report alleging that Bantu Holomisa, Commander of the Transkei Defence Force from 1987 until 1994, had been directly involved in the infiltration into South Africa of an armed squad aimed at killing whites in Northern Natal. In 1994, Holomisa became a Member of Parliament and Deputy Minister in the new government of national unity. Eager to clear his name, he sued the newspaper. He claimed that the defamatory sting of the article was that he had supported the 'racially inspired killings of white people' and that he had sought the destabilisation of South Africa.[96] The newspaper raised an exception, contending that a public figure who alleges defamation based on allegations concerning his official conduct, was required to prove that the defamer actually knew of the falsity of the claims, alternatively, that the defamer published the claims with reckless disregard as to their truth or falsity.[97]

This was not the existing common-law position. As a public official, Holomisa was in a position no different to an ordinary litigant. He bore an initial onus to establish that the newspaper had published a statement with defamatory meaning about him.[98] Having done so, it would have been for the newspaper to raise a defence excluding wrongfulness – that is, to show that the statement was true and in the public interest, constituted fair comment, or was subject to privilege of some kind.[99] On the existing law, the newspaper's inability to establish the probable truth of the statement would likely have been fatal to its defence. *The Star* therefore sought a development of the law, and asked the court expressly to import into South African law a protection similar to that recognised in *New York Times v Sullivan,*[100] where a majority of the United States

94 *DA v ANC* (n 4).
95 *Le Roux v Dey* (n 5).
96 *Holomisa v Argus* (n 2) 594A.
97 *Holomisa v Argus* (n 2) 594E-F.
98 See the discussion of the common-law position in *Le Roux v Dey* (n 5) para 84 ff.
99 See *Borgin v De Villiers* 1980 (3) SA 556 (A) at 571F.
100 See n 46 above.

Supreme Court held that public officials could not succeed in defamation claims except where they could prove that the defendant acted with 'actual malice' – that is, knew that the defamatory statement was false, or was reckless as to whether it was true or false.

This required Cameron J to grapple with whether the common law – including Appellate Division decisions[101] which had narrowed the ambit of free speech and debate, had confirmed that a defendant bears a full onus to prove the truth of a defamatory statement, and had refused to circumscribe the defamation action 'either in the interests of media freedom or in order to cultivate free political debate'[102] – could survive the constitutional guarantee of freedom of expression. Specifically, it required him to determine whether, and in what circumstances, public officials could claim damages for *untrue* defamatory statements made about them in the performance of their public duties.

The democratic value of the speech at issue featured prominently in Cameron J's judgment. In the first instance, it was pivotal to the rights-balancing exercise. The judgment remains today one of the most rigorous exercises in horizontal application of constitutional rights,[103] in that it deftly and skilfully engages with, and shapes, in a sensible and incremental manner, centuries of common law doctrine,[104] while at the same time displaying a profound commitment to constitutionalising the common law.[105]

101 Particularly *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) (extending the defamation action to non-trading companies), *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) (conferring the right to sue in defamation on political parties), *Neethling v Du Preez; Neethling v The Weekly Mail* [1994] ZASCA 133 (confirming that the defendant bears a full onus to establish the truth of a defamatory statement, and rejecting public policy as a justification for the media) and *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) (rejecting the argument that judges should be barred on public policy grounds from claiming defamation damages for criticism of their official judicial duties).

102 *Holomisa v Argus* (n 2) 602C.

103 Compare Milo (n 23) 49.

104 But see S Woolman 'Defamation, application and the Interim Constitution: An unqualified and direct analysis of *Holomisa v Argus Newspapers*' (1996) 113 *South African Law Journal* 428 at 431 who, while celebrating aspects of the judgment, is critical of the approach to horizontal application, in part, because Cameron J was insufficiently adventurous, too constrained by the 'strong gravitational pull of power and tradition' and apparently unable to break free from the shackles of the legal system.

105 See further L Boonzaier 'Three stages of Cameron constitutionalism', this volume at 146-155.

Cameron J provided a careful account of the common law of defamation, including the recent Appellate Division decisions, which constituted the 'cumulative repudiation' of the proposition that our law of defamation should be moulded to cultivate free political debate.[106] These cases had been decided under the repressive political and legal regime described in part 2 – a system Cameron described as one of 'racial oligarchy', where free expression and critical discussion were not valued, and where 'our legal system did not treasure at its core a democratic ideal'.[107] But that had all changed. The Interim Constitution had ushered in open and accountable democracy, and with it, 'an inclusive citizenry, which exacts accountability to them of all legislative and executive officials', and which depends upon 'vigorous mechanisms of public scrutiny and public debate, not only to nurture the new structures, but to guard against excesses in their exercise'.[108] It is necessary, in such a system, for there to be vigorous criticism of the exercise of power by 'alert and critical citizens' as well as by strong and independent media.[109]

But applying the Constitution did not simply generate an automatic answer. It was necessary to balance competing values: freedom of speech and the safeguarding of reputation. And it was here that the nature of the speech at issue played such a pivotal role. In conducting the balancing exercise, each right's 'implications for democracy' constituted a critical consideration.[110] Where two values competed, in other words, it was the value 'whose protection most closely illuminates the constitutional scheme ... that should be protected'.[111] Cameron J proceeded to describe the profound democratic significance of free expression in general, and the expression at issue in the case in particular. 'The success of our constitutional venture', he explained, 'depends upon robust criticism of the exercise of power' and 'requires alert and critical citizens'.[112] The Constitution as a whole – which includes the right to make free political choices, which would be meaningless without vigorous political debate – required special protection for speech which enhances the democratic

106 *Holomisa v Argus* (n 2) 591A.
107 *Holomisa v Argus* (n 2) 604.
108 *Holomisa v Argus* (n 2) 605G.
109 *Holomisa v Argus* (n 2) 609A.
110 *Holomisa v Argus* (n 2) 608A, relying on Chaskalson P in *S v Makwanyane* [1995] ZACC 3 para 104.
111 *Holomisa v Argus* (n 2) 607H-608A.
112 *Holomisa v Argus* (n 2) 609A.

and constitutional project. This was evident from the text of the Interim Constitution itself, and particularly from the limitations clause, which imposed a higher burden of justification for a limitation of the right to free expression (among other rights) when it related to 'free and fair political activity'.[113] And so at the level of principle, where speech was political in nature, and served the underlying value of enhancing democracy, the Constitution required that the reputation of the person defamed be subordinated in favour of the broader interest in the speech being aired.

What did all this mean for the common law of defamation? As a start, it meant that the rule, confirmed by the Appellate Division in *Neethling v Du Preez*,[114] that any person who makes a false statement bears the burden of proving its truth, gave undue priority to reputation, at least where the speech was related to political activity. The advent of constitutionalism, and the 'revolution the Constitution has wrought in our legal fabric', allowed Cameron J to break with the past, and to escape the otherwise binding force of Appellate Division judgments.[115] Most importantly, constitutional considerations meant that even false and defamatory statements were deserving of some protection when they concerned 'free and fair political activity'.

The question was how much protection. Despite being urged to do so, Cameron J declined to import into South African law the *Sullivan* 'actual malice' test.[116] Instead, following the approach of the Australian High Court in *Theophanous*,[117] Cameron J favoured a reasonableness standard. On this approach, it would be lawful to publish even false defamatory statements in the area of 'free and fair political activity', unless the plaintiff – in this case, Mr Holomisa – could show that the publisher had acted unreasonably.[118] This would require publishers to demonstrate that they exercised due care and undertook proper enquiries. But it

113 *Holomisa v Argus* (n 2) 606I. Such a limitation was required not only to be 'reasonable', but also 'necessary': see Interim Constitution Act 200 of 1993, s 33(1)(b).

114 See n 101 above.

115 *Holomisa v Argus* (n 2) 603D, where Cameron explained that the approach adopted in *Neethling* and *Esselen*, founded solely on common law and statute, would – but for the advent of the Constitution – have been 'judicially definitive'.

116 See the discussion at n 100 above.

117 *Theophanous* (n 46).

118 *Holomisa v Argus* (n 2) 619D.

would not silence them if they could not be certain of the truth of a statement, provided they had acted reasonably.

Just two years later, the Supreme Court of Appeal established what we know today as the '*Bogoshi* defence'.[119] While largely following the approach Cameron J had adopted in *Holomisa v Argus*, and also establishing a defence of 'reasonable publication', it departed from *Holomisa v Argus* in three important respects. In particular, under *Bogoshi,* the defendant bears the onus to establish the defence; the defence is available only to media defendants; and it is not confined to political speech. We evaluate the *Bogoshi* defence, in comparison with the *Holomisa v Argus* defence, in part 4.

3.2 *McBride*

Cameron J's first landmark free-speech judgment on the Constitutional Court was his majority decision in *The Citizen v McBride*. Robert McBride, a former ANC and uMkhonto we Sizwe operative, detonated a bomb outside Magoo's Bar at the Parade Hotel in Durban in 1986, killing three and wounding 69.[120] For this he was convicted and sentenced to death.[121] But he was reprieved in 1991, released in 1992, and, by 2001, had been granted amnesty by the Truth and Reconciliation Commission. In 2003, McBride was a candidate for head of the metro police in Ekurhuleni. *The Citizen* newspaper opposed his appointment and ran a series of articles and editorials – some factual, describing the circumstances of his involvement in the bombing and his subsequent amnesty, others going further, labelling him a criminal and murderer, and thus unfit for such an office.[122] McBride sued the newspapers and the journalists for defamation and impairment of his dignity. Very much like *Holomisa v Argus*, therefore, *McBride* concerned a plaintiff seeking public office in democratic South Africa, suing the media for defamatory remarks regarding his activities during apartheid. The defendants relied on the defence of fair comment – that is, that the comments were fair in

119 *Bogoshi* (n 6).
120 *McBride* (n 3) para 3. For a full account, see B Rostron *Robert McBride: The struggle continues* (2019).
121 *S v McBride* 1988 (4) SA 10 (A).
122 *McBride* (n 3) para 4.

the circumstances, and that the facts on which the comments were based, including, most significantly, that McBride was a 'murderer' were true.[123]

The central question was what effect the granting of amnesty under the Promotion of National Unity and Reconciliation Act[124] had on the law of defamation. The statute provided that once a person who had been convicted of a criminal offence with a political objective had been granted amnesty, records of the conviction were deemed to be expunged, 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'.[125] Did this mean that McBride had, for the purposes of the law of defamation, never in fact committed the acts in question? And did the granting of amnesty mean that he could not be called a 'criminal' and a 'murderer' by those opposed to his candidacy for public office?

The High Court said yes.[126] Expunging McBride's criminal record 'for all purposes' meant expunging it for purposes of defamation law. The High Court thus upheld McBride's claim, finding that describing him as a murderer was not true or accurately stated, and that the comments were not in the public interest. The majority of the Supreme Court of Appeal (SCA) agreed,[127] albeit on narrower grounds[128] and for a lesser damages award. It held that the claim that Mr McBride was a murderer was false – not because the events did not happen, but because the effect of amnesty under the Reconciliation Act was to change the consequences of acts for which amnesty was granted, including for the law of defamation. In a lone dissent, Mthiyane JA held that the purpose of amnesty was not to expunge the fact of criminal conduct from the historical record, and – properly interpreted – the Reconciliation Act did not do so. Describing McBride as a murderer therefore remained true, despite the granting of amnesty, and Mthiyane JA would have upheld the defence of fair comment.[129]

The newspaper appealed to the Constitutional Court. Like the SCA, the Constitutional Court was divided. Cameron J commanded

123 *McBride* (n 3) para 19.
124 Act 34 of 1995.
125 Section 20(10).
126 See the discussion in *McBride* (n 3) paras 18-25.
127 *The Citizen 1978 (Pty) Ltd v McBride* [2010] ZASCA 5 (*McBride SCA*).
128 The majority overturned the High Court's finding that certain statements regarding gunrunning were defamatory.
129 *McBride SCA* (n 127) paras 71 ff.

a majority. The purpose of the Act, he explained, was to uncover truth about apartheid injustices.[130] The granting of amnesty to those who made full and frank disclosures about their political crimes was the means by which this purpose was achieved. But amnesty did not undo the past. The provision did not mean that McBride had not committed murder. He had wrongfully and intentionally killed.[131] A statute focused on truth-telling could never have the effect of rendering false what was, in the absence of amnesty, true. And the mere fact of amnesty could not silence those that wished to discuss what McBride had done. As a result, Cameron J held that the facts on which *The Citizen*'s comments were based were true.[132]

But that was not the end of the inquiry. The defence of fair comment requires that the facts upon which the comment is based must be 'truly stated', in the sense that the reader knows what the facts are. Some of the articles never mentioned that McBride had received amnesty, despite referring to him as a murderer and criminal.[133] Nevertheless, Cameron J held, the facts were 'adequately stated', particularly given McBride's status as a well-known public figure and the notoriety of the bombing in which he was involved, and the fact that amnesty was referred to in some, even if not all the articles, and in coverage of McBride's candidacy generally at the time.[134] Cameron J thus held that the articles qualified under the defence of fair comment – or, as he renamed it, 'protected comment'. The articles formed part of legitimate and important public debate about McBride's fitness for public office. While they were in certain respects 'ungenerous' and 'distasteful', they contained an honest and genuine expression of opinion, based on facts that were true.[135]

There can be little question that truth- and dignity-based arguments for speech discussed in part 1 were important to the ultimate outcome. After all, a key reason that the publication was lawful was that the comment was based on facts that were true, and that the Reconciliation Act could not be interpreted to alter the truth about the past. And an

130 *McBride* (n 3) paras 49 ff.
131 *McBride* (n 3) paras 70-72.
132 *McBride* (n 3) para 78.
133 *McBride* (n 3) para 90.
134 *McBride* (n 3) paras 91-95.
135 *McBride* (n 3) paras 98-100. See further *Hardaker v Phillips* [2005] ZASCA 28, in which Cameron JA's judgment had articulated a strikingly wide approach to the defence of fair comment.

important reason why it was so important to recognise the right for that truth to be spoken, despite the granting of amnesty, was that otherwise victims of apartheid atrocities would be denied their dignity.[136]

Despite this, democratic justifications for free speech loom large in Cameron J's reasoning. The political nature of the speech, the fact that it concerned an aspirant public official, and its significance in the proper functioning of democratic society, was pivotal. These considerations featured in at least three ways. The first was in defining the contours of the defence of protected comment. In what remains the leading contemporary authority on the defence, Cameron J clarified that its underlying rationale is to ensure that 'divergent views are aired in public and subject to scrutiny and debate'.[137] As he explained, '[u]ntrammeled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values'.[138] Unsavoury as the comment about Mr McBride may have been, it was part and parcel of the 'heated' and 'intense' public discussion that one expects in a democracy, particularly in the context of candidacy for public office.[139] And he was a candidate for a public position that would have given him significant powers, making public debate about his appointment especially important.[140] It is, Cameron J explained, 'good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussion of public affairs'.[141] He was here following a line of authority that had endorsed the proposition that '[t]hose who fill public positions must not be too thin-skinned in reference to comments made upon them'.[142]

Second, Mr McBride's status as a public figure also featured in Cameron J's determination that the facts about him were adequately stated. That is, it was as a result of his public status, and the fact that his fitness for public office had been a matter of public debate, that it was not

136 *McBride* (n 3) para 59. See also para 45, and the reference to the submissions of the *amici curiae*, Ms Joze Mbizana and Mr Mbasa Mxenge, whose relatives were murdered by apartheid police and who would, on McBride's interpretation of the Reconciliation Act, have been precluded from speaking openly about crimes committed against their family members.
137 *McBride* (n 3) para 82.
138 *McBride* (n 3) para 82.
139 *McBride* (n 3) para 100.
140 *McBride* (n 3) para 98.
141 *McBride* (n 3) para 100.
142 *Pienaar v Argus* 1956 (4) SA 310 (W) at 318D-G, quoting *Gatley on Libel and Slander* 3 ed (1938) at 468.

necessary for every article to have referred in terms to his having received amnesty.

Finally, democratic justifications for uninhibited speech were relevant to the interpretation of the Reconciliation Act, and to Cameron J's understanding of the project the Act entailed. On this understanding, reconciliation is ongoing. It did not end with amnesty. Instead, 'the best chance for successful reconciliation lies in fostering open public discussion', and by setting the boundaries of the *process* of debate, and not its *content*.[143] It was in this context – of 'regulating process rather than suppressing content' – that Cameron J held that '[t]he law of defamation sets one of the boundaries within which public debate takes place' and that 'public debate lies at the heart of participatory democracy'.[144] The literal interpretation contended for by Mr McBride was therefore not only 'antithetical to the adequate compilation of that collective memory';[145] it also undermined the political aspiration of reconciliation. Although never stated expressly, Cameron J would have been alive to the implication of accepting Mr McBride's interpretation: that some of apartheid's worst offenders – those who killed in furtherance of the racist objectives of the apartheid state, for example – would also escape public scrutiny and accountability.

3.3 *DA v ANC*

The next landmark decision, in which Cameron J demonstrated his commitment to the protection of democracy-enhancing political speech, was *DA v ANC*. Unlike *Holomisa v Argus* and *McBride*, *DA v ANC* was not a defamation case. It was, as Cameron J explained in the opening line of his jointly penned judgment,[146] 'about the boundaries of free speech affecting elections'.[147] In particular, it concerned the proper interpretation and application of the Electoral Act[148] to the dissemination of allegedly 'false information' in the context of elections.

143 *McBride* (n 3) paras 75-77.
144 *McBride* (n 3) para 77.
145 *McBride* (n 3) para 61.
146 Together with Khampepe J and Froneman J.
147 *DA v ANC* (n 4) para 116.
148 Act 73 of 1998.

The genesis of the dispute was the 'Nkandla report', published by then Public Protector Thuli Madonsela.[149] Following complaints that former President Jacob Zuma had lavishly upgraded his private residence at public expense, Madonsela investigated and reported that Zuma's spending was 'unconscionable, excessive, and caused a misappropriation of public funds'.[150] She directed him to pay a reasonable percentage of the costs incurred in improving his private home.[151] The report was published on 19 March 2014, less than two months before South Africa's fifth democratic general election. The day after publication, the Democratic Alliance (DA), the main opposition party, sent a telephonic text message to 1.6 million registered voters. It said: 'The Nkandla report shows how Zuma stole your money to build his R246m home. Vote DA on 7 May to beat corruption. Together for change.'[152] The governing ANC came to its leader's immediate defence. It instituted urgent proceedings alleging that the DA had breached section 89(2) of the Electoral Act and item 9(1)(b) of the Electoral Code of Conduct,[153] and requiring the DA to retract the message, to refrain from further distributing it, and to issue a further message explaining that what it had said about Zuma was false.[154]

Section 89(2) of the Electoral Act provides that no person may publish 'any false information' with the intention of (a) disrupting or preventing an election; (b) creating hostility or fear in order to influence the outcome of an election, or (c) with the intention of influencing the outcome of the election. Item 9(1)(b) of the Electoral Code likewise prohibits the publication of false allegations in connection with an election in respect of a party, its candidates or members. The ANC claimed that the DA had violated these provisions as it had disseminated false information, regarding President Zuma, which was clearly intended to turn people away from voting for the ANC.

149 Public Protector of the Republic of South Africa 'Secure in comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province' (Report 25 of 2013-14) (Nkandla Report).

150 *DA v ANC* (n 4) para 161. See para 10.4.1 of the Nkandla Report (n 149).

151 See para 11.1.3 of the Nkandla Report (n 149).

152 *DA v ANC* (n 4) paras 13, 53, 116.

153 Schedule 2 to the Electoral Act.

154 *DA v ANC* (n 4) para 117.

The High Court dismissed the application, largely applying principles of defamation law regarding fair comment, and emphasising the need to interpret the right to free expression generously in the context of political debate and campaigning.[155] On appeal, the Electoral Court took a different view, holding that the SMS contained statements of fact, not opinion, and that the statements were clearly false because the Report had not found that Zuma had stolen.[156]

It is difficult to conceive of speech that lies closer to the heartland of political contestation than a widely disseminated message by one political party about the fitness of another to govern, given the corruption of its leader, the country's then-president. It is no surprise, therefore, that in articulating the value of freedom of expression, Cameron J and his co-authors emphasised not only its importance in protecting democracy, but also its close connection to the right to vote and stand for public office. Cameron J would later make the same point in his minority judgment in *My Vote Counts NPC v Speaker of the National Assembly*, explaining that 'only if information is freely imparted, and citizens are kept informed, are their choices genuine'.[157] On Cameron J's approach, to suppress speech in the context of an election is to deprive citizens of their ability to participate meaningfully in democratic decision-making, and to insulate those running for public office from public scrutiny, thereby denuding the right to vote of its substantive content.

The purpose of the Electoral Act, according to Cameron J and his colleagues in *DA v ANC*, was to protect the 'mechanics' of the conduct of the election.[158] And the prohibition on 'false information' served that same broad purpose. Its target was false statements that had the potential, in effect, to interfere with the practicalities and the process of the election, and thereby to undermine the right to vote and to stand for public office.[159] We see here an analogue with Cameron J's approach in *McBride*. Recall that in *McBride*, Cameron J understood the role of the law and the courts as being to foster public discussion, by setting the boundaries of the process of the debate, rather than its content. In *DA v ANC,* he had a similar understanding of the purpose of the Electoral

155 *African National Congress v Democratic Alliance* [2014] ZAGPJHC 58.
156 *African National Congress v Democratic Alliance* [2014] ZAEC 4.
157 *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 para 40.
158 *DA v ANC* (n 4) para 138.
159 *DA v ANC* (n 4) paras 139-140.

Act. Its concern is not the substantive content of electioneering and campaigns – for that should be as uninhibited as possible. It is instead to ensure that those campaigns, and the voting processes that follow, occur in a manner that allows everyone to make free political choices, vote freely, and stand for public office. Once those mechanical parameters are set, the Act has nothing to say about how one may or may not campaign. The DA's message clearly had nothing to do with the mechanics of the election. It posed no obstacle to voter freedom.[160]

While this might have been enough reason to say that the provisions of the Electoral Act simply did not apply, Cameron J decided the matter on a different basis. Section 89(2) and Item 9(1)(b) did not apply because the message did not constitute a statement of fact.[161] It was comment or opinion, in the form of the DA's interpretation of the Public Protector report, and therefore it did not constitute 'information' or 'allegations' within the meaning of those provisions. The majority also clarified that the Electoral Act could not, in the absence of clear language to the contrary, impose strict liability for the offence of publishing false information.[162]

In order to understand the significance for Cameron J's majority judgment of the political nature of the speech, and the special context of an election, it is instructive to compare its approach with that of Zondo J's minority judgment. Zondo J agreed that the Electoral Act only prohibited false statements of fact. However, he held that the message *was* a statement of fact, and further that it was not true that the Nkandla report had shown how Zuma stole taxpayer money to build his R246 million home: it merely showed that he 'failed to ask pertinent questions when he saw certain improvements being made to his home'.[163] He would accordingly have held the DA liable under the Electoral Act and the Code for the publication of false information, irrespective of whether it knew the statement to be false, or reasonably believed it to be true.[164] This conclusion was justified, according to Zondo J, because – 'to state

160 *DA v ANC* (n 4) para 142.
161 *DA v ANC* (n 4) paras 144-148.
162 *DA v ANC* (n 4) paras 154-159.
163 *DA v ANC* (n 4) para 112.
164 *DA v ANC* (n 4) paras 49-52, 114.

the obvious' – any election won on the basis of false statements 'would be an unfair election'.[165]

However, despite its glibness, this claim seems far from obvious. First, some false statements are inevitable in the context of free and vigorous debate.[166] An absolute prohibition on false statements would inevitably curtail some true and valuable statements, because it would result in certain statements not being made at all, even if they may possibly be true, for fear that they may turn out to be false. That is because 'punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press'.[167] Indeed, Zondo J never adequately considered the effect on free and fair elections of inhibiting what Cameron J describes as 'valuable speech that contributes to public debate and opinion-forming and holds public office bearers and candidates for public office accountable'.[168] Cameron J's impulse to protect even false statements made in the context of valuable political debate is reminiscent of his approach in *Holomisa v Argus*, where he was willing to protect even untrue defamatory allegations that were reasonably published in the sphere of political activity. For similar reasons, in *DA v ANC,* he was unwilling to interpret the Electoral Act as creating strict liability for false statements.

Secondly, it is not clear why the publication of false statements about another candidate should be seen to undermine the right to free and fair elections, in circumstances where there is ample opportunity to respond and debate publicly. As Cameron J and his co-authors explained, elections provide even greater scope for 'immediate public debate to refute possible inaccuracies and misconceptions aired by one's political opponents'.[169] This form of debate enhances, rather than diminishes, the political choices of voting citizens.

And thirdly, in the context of fierce political contestation, which is 'loud, rowdy and fractious',[170] and where political parties are prone to exaggeration and embellishment, determining the falsity of a political

165 *DA v ANC* (n 4) para 42, 52.
166 See *Gertz v Robert Welch Inc* 418 US 323 (1974) at 339-340, cited in *Bogoshi* (n 6) 1209H.
167 *Gertz* (n 166) 340.
168 *DA v ANC* (n 4) para 132.
169 *DA v ANC* (n 4) para 134.
170 *DA v ANC* (n 4) para 133.

statement will often be an untidy task. The facts of *DA v ANC* make this clear. Zondo J concluded that the DA's message was false insofar as it stated that the Nkandla Report found that Zuma had stolen taxpayers' money. But the Nkandla Report expressly found that the state expenditure on Zuma's residence 'was unconscionable, excessive, and caused a misappropriation of public funds';[171] that Zuma was aware of what the Nkandla project entailed;[172] and that Zuma had tacitly accepted and unduly benefitted from the improvements to his residence.[173] One can quibble about whether the charge of theft is hyperbolic, but it is surely unduly censorious, especially in the context of a hotly contested election, to prohibit a political party from saying that a report found that the President stole from taxpayers, in circumstances where the report found that public funds spent on the President's residence were misappropriated, and that he knowingly and unduly benefitted.

3.4 *Le Roux v Dey*

The three judgments described above provide a vivid illustration of Cameron J's commitment to the protection of political speech. In all three cases, the subjects of the impugned speech – Bantu Holomisa, Robert McBride, and Jacob Zuma – either were, or wanted to be, in public office. Although the contexts were different, Cameron J's approach was clear and consistent: when one is or has aspirations to be a public official, and is criticised in a way relevant to that role, then one better have a thick skin. And where one seeks to suppress speech that contributes to democratic deliberation, then one had better have a compelling basis for doing so. The speech may be incontestably defamatory, and it may even, on the probabilities, turn out to be false, but the law must strive to protect its publication, particularly if the publisher acted reasonably. Given its importance to the functioning of democracy, the cost of suppressing speech of this kind is just too high.

We now contrast these three cases with a fourth, in which Cameron adopted a significantly less speech-protective approach, and had far less of an expectation that the subjects of speech should be resilient. *Le Roux*

171 *DA v ANC* (n 4) paras 161, 203.
172 *DA v ANC* (n 4) paras 163, 203.
173 *DA v ANC* (n 4) paras 165, 204.

v Dey concerned the publication, by teenage schoolboys, of an image of two naked men in a 'sexually suggestive posture', onto which had been superimposed the faces of their principal and deputy principal. The image was circulated amongst learners at the school, and placed on a noticeboard.[174] The deputy principal pressed criminal charges, but also sued the boys for damages, claiming both that the image was defamatory of him and that it wrongfully impaired his dignity.

A majority of the Constitutional Court, like the SCA[175] and the High Court,[176] upheld the defamation claim. Both Yacoob J and Skweyiya J dissented, and would have dismissed both the dignity claim and the defamation claim. Cameron J and Froneman J, in their co-authored judgment, took a different path. On the defamation claim, they emphasised that Dr Dey, as the plaintiff, was required to show actual impairment of his right to reputation. It was plain to see that the image had been created by children, and any reasonable reader would have regarded it as nothing more than an immature prank. There was, in short, no 'probable impairment of his right to reputation'.[177] The image was not defamatory.

But the dignity claim stood on a different footing. Although it was not enough for Dr Dey to establish that he was subjectively injured – wrongfulness requires that the injury is one that objectively justifies the imposition of liability – and although it could never be actionable merely to depict or describe someone as gay, Cameron J and Froneman J accepted that the 'image conveyed that he masturbated in public, or in the presence of another person, or engaged in indecent exposure, or that he was a person of low moral character'.[178] They accordingly upheld the dignity claim.

What is striking about the judgment, particularly when compared with the three we have already discussed, is its relative silence on the balancing of competing values, and on the value of speech. No less than the defamation claim, the dignity claim required a balancing of the boys' right to freedom of expression with the teacher's right to dignity. But Cameron J and Froneman J's analysis is almost entirely on one side of

174 *Le Roux v Dey* (n 5) paras 12-20.
175 *Le Roux v Dey* [2010] ZASCA 41.
176 *Dey v Le Roux* 2008 JDR 1351 (T).
177 *Le Roux v Dey* (n 5) paras 170-173.
178 *Le Roux v Dey* (n 5) para 188.

the equation, assessing the nature and extent of the injury, and testing that injury against the prevailing norms of society. Hardly a word is said about the boys' expressive interest.

The unspoken premise of the judgment appears to be that the expression at stake was of little or no value. Perhaps Cameron J and Froneman J were of the view that the speech did not advance the search for truth; did not give effect to the boys' dignity or autonomy (or that of recipients of the publication); and, far from being a critique of public officials, or of one political party by another, the speech-act seemed to amount to nothing more than a 'childish, if tasteless or cruel, prank'.[179] But that misses the mark. The speech was, after all, a form of satire directed at those in positions of authority within the boys' immediate environment. It was, even if crude, an expression of their rebellious autonomy. Those considerations might not carry the day in a case where the speech objectively caused serious injury. But given that the image was so clearly doctored by children, Dr Dey's taking of offence seemed manifestly unreasonable.

Cameron J and Froneman J therefore at once under-valued the speech, and over-stated the objective reasonableness of any injury that Dr Dey may have experienced. In doing so, and particularly in finding that a reasonable person would have interpreted the image to convey that Dr Dey was a person of 'low moral character', they shared with the majority an unfortunate sexual conservatism,[180] which Cameron has since recognised extra-curially.[181] Indeed, he has gone so far as to acknowledge that he may have been wrong to uphold the dignity claim, suggesting that the outcome reached by Yacoob J and Skweyiya J, that there was no defamation, and no injury, was 'probably right'.[182]

179 *Le Roux v Dey* (n 5) para 163.

180 For a critique along these lines, see J Barnard-Naude & P de Vos 'The heteronormative observer: The Constitutional Court's decision in *Le Roux v Dey*' (2011) 128 *South African Law Journal* at 408. See also A Fagan 'The Constitutional Court loses its (and our) sense of humour' (2011) 128 *South African Law Journal* 395.

181 E Cameron 'Dignity and disgrace: Moral citizenship and constitutional protection' in C McCrudden (ed) *Understanding human dignity* (2012) at 481: 'Taken together, *Jordan* and *Le Roux* may be offered as evidence of judicial conservatism about how we express ourselves sexually. This may justly be contrasted with the assertions in the rest of the Court's jurisprudence that no particular social norm for sexual expression should be entrenched.'

182 E Cameron 'About "donderse lesbians" and "damn moffies": Jonathan Burchell's contribution to reason in the law of defamation' in PJ Schwikkard & SV Hoctor (eds) *A reasonable man: Essays in honour of Jonathan Burchell* (2019).

Our purpose here is not, however, to offer a detailed critique of *Le Roux v Dey*. The point of drawing the contrast with *Le Roux v Dey* is a different one. It is to consider why, in this case, Cameron J adopted such a different approach to the balancing of competing interests, and to the protection of speech. The answer, in our view, is the point we have already made: the animating force of Cameron J's speech-protective approach has been his commitment to protecting and defending speech that contributes to a participatory democracy, that holds public officials to account, and that contributes to public debate on matters affecting us all. When he regards speech as doing none of those things, and where he regards it as causing injury to another, then the focus of the balancing inquiry shifts inevitably to the nature and extent of the *injury*, and the speech is deserving of little or no protection.

4 Defending *Holomisa v Argus*

Having identified the animating feature of Cameron J's free speech jurisprudence, we now turn to a closer analysis of the defence established in *Holomisa v Argus*. In particular, we contrast it with the defence established in *Bogoshi*,[183] and argue that in two specific respects – that is, by extending the defence to all defendants, and not only to the media; and by focusing the defence on political speech – the *Holomisa v Argus* defence was a prescient development, which has been substantially vindicated.

Bogoshi concerned the circumstances in which newspaper defendants could lawfully publish defamatory statements that were false. Prior to *Bogoshi,* and ever since *Pakendorf*,[184] media defendants had been held strictly liable. They could therefore not escape liability on the basis that an untrue defamatory statement had been published by mistake.[185] In *Bogoshi*, the SCA expressly overruled the strict liability rule in *Pakendorf*, which it found had an intolerably chilling effect on the media.[186] Recognising the vital function of the press, the SCA held that the publication by the press of false defamatory allegations of fact will not be regarded as unlawful if it is found to have been 'reasonable to

183 *Bogoshi* (n 6) 1205.
184 *Pakendorf v De Flamingh* 1982 (3) SA 146 (A).
185 *Bogoshi* (n 6) 1205.
186 *Bogoshi* (n 6) 1210-1211.

publish the particular facts, in the particular way and at the particular time'.[187] The Court also enumerated some of the considerations relevant to an assessment of reasonableness: the nature, extent and tone of the allegations; the nature of the information on which the allegations were based and the reliability of the source; and the steps taken to verify the information.[188] In certain respects, that sounds very much like the *Holomisa v Argus* test developed just two years prior. There are, however, key differences. They are three-fold: whereas *Bogoshi* established a defence available only to the media, the *Holomisa v Argus* defence did not limit the defendants to whom it applied; whereas the *Bogoshi* defence applies to any category of speech, the *Holomisa v Argus* defence was restricted to political speech; and, whereas *Bogoshi* places the onus on the media defendant to establish the reasonableness of publication, *Holomisa v Argus* would have required the plaintiff to bear that onus.

In this part, we argue that on the first two counts – that is, by extending the defence to all classes of defendant, and by carving out political speech as a special category – the approach in *Holomisa v Argus* appropriately balanced free speech and reputation, while foregrounding democratic considerations. On the third, the question of onus, while we are sympathetic to Cameron J's view that, contrary to the Appellate Division decision in *Neethling*,[189] a defendant ought not – especially when speech is political in nature – to bear the onus to establish the *truth* of a defamatory statement,[190] it seems more difficult to justify requiring the plaintiff to establish the reasonableness of the publication, when the relevant facts are largely, if not exclusively, within the defendant's knowledge.[191]

187 *Bogoshi* (n 6) 1212G.
188 *Bogoshi* (n 6) 1212G.
189 *Neethling* (n 101).
190 *Holomisa v Argus* (n 2) 603D-E. See also Milo (n 23) 162-184, which argues that the presumption that defamatory allegations are false should not, in the context of public speech, survive constitutional scrutiny. However, see *Khumalo* (n 17), which confirmed the constitutionality of the onus rule, particularly in light of the availability of the *Bogoshi* reasonable publication defence.
191 See, in this regard, the reasoning of Thirion J in *Buthelezi v South African Broadcasting Corporation* [1998] 1 All SA 147 (D).

4.1 Media exceptionalism

By the term 'media exceptionalism', we mean the principle that the press ought to be singled out for special treatment. But special treatment does not necessarily entail greater protection. Media exceptionalism can cut both ways. In *SAUK v O'Malley*, for example, Rumpff CJ emphasised the particular need to protect citizens against the might of the mass media,[192] and these were the same policy considerations upon which *Pakendorf* relied to create a strict liability rule for the media. *Bogoshi*, on the other hand, emphasised the critical function of the press in making information publicly available and shaping public opinion.[193] These features made the media especially deserving of protection.

Cameron J was at pains in *Holomisa v Argus* to eschew any hint of press exceptionalism,[194] describing it as 'unconvincing' and 'dangerous'.[195] To be sure, he recognised the important role of the media,[196] particularly in strengthening democracy and holding government to account. But to appreciate the importance of a free press does not mean that journalists should enjoy special protection beyond that accorded to ordinary citizens.[197] The defence Cameron J established, therefore, was not confined to media defendants. It was available to any person who published a false and defamatory statement in the area of free and fair political activity. *Bogoshi*, on the other hand, created a defence available only to the press.[198] The upshot is that non-media defendants, including political parties with large followings, do not have the defence available to them, even when their publication is indistinguishable from that of the media in its content and its reach – and even when the publication lies in the heartland of political, democracy-enhancing speech.

192 *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A).
193 *Bogoshi* (n 6) 1209A-B. See also SR West 'Press exceptionalism: How to identify the press and its protections' (2014) 127 *Harvard Law Review* 2434, who argues in favour of press exceptionalism, given the unique role that the press plays in a democracy.
194 *Holomisa v Argus* (n 2) 610E.
195 *Holomisa v Argus* (n 2) 610D.
196 *Holomisa v Argus* (n 2) 608G-609A.
197 *Holomisa v Argus* (n 2) 610E-F. See also *Midi Television (Pty) Ltd v Director of Public Prosecutions* [2007] ZASCA 56 para 6 and *Johncom Media Investments Ltd v M* [2009] ZACC 5 para 28.
198 This was most recently confirmed in *Reddell v Mineral Sand Resources (Pty) Ltd* [2022] ZACC 38 para 40.

That the *Bogoshi* defence is limited to the media is partly a function of the fact that one of the questions the court was called upon to determine was whether *Pakendorf* – the case that made media defendants strictly liable, and thereby closed the door to such defendants escaping liability on the basis that an untrue defamatory statement had been published by mistake – was correct.[199] But the mere fact that *Pakendorf* exalted media exceptionalism did not require *Bogoshi* to perpetuate that original sin. Indeed, whatever justifications may once have existed for treating the media differently to other defendants have surely all but evaporated. Many today, without any formal connection to a media house, wield substantial public influence, have significant and immediate reach and access to millions of people, and serve a critical function in disseminating information and shaping public opinion. *Forbes* reported in 2018 that social media has become the primary source of online news, with 2.4 billion users receiving breaking news via Facebook, Twitter, YouTube, Snapchat or Instagram.[200] The phenomenon is also helpfully illustrated by specific events – such as when 17-year-old Darnella Frazier captured video footage on her smartphone of the murder by police of George Floyd, and posted it to social media, triggering demonstrations and unrest throughout the United States,[201] and for which she was awarded a special award and citation by the Pulitzer Prize.[202] Or when, in the context of Israel's ongoing assault on Gaza, numerous 'citizen journalists' began to report on the experience of living under siege,[203] providing widespread access to information and perspectives that would otherwise not have been possible.

This is not to diminish the importance of traditional media. Nor is it to downplay the express constitutional protection granted to 'freedom of the press and other media'.[204] It merely demonstrates that the manner in which information is communicated and consumed has shifted so

199 *Bogoshi* (n 6) 1206D.
200 'How social media has changed how we consume news' *Forbes* (30 November 2018).
201 'Darnella Frazier, teen who filmed George Floyd's murder, awarded Pulitzer Prize' *The Independent* (11 June 2021).
202 'They used smartphone cameras to record police brutality – and change history' *Wall Street Journal* (13 June, 2020).
203 See eg R Michaelson '"I'm not just covering the news – I'm living it": Gaza's citizen journalists chronicling life in war' *The Guardian* (12 December 2023).
204 Section 16(1)(a) of the Constitution.

fundamentally over the last few decades, that the contours of precisely what constitutes 'the media' have become virtually impossible to delineate. The anachronistic nature of this aspect of the *Bogoshi* defence was recently articulated by Unterhalter AJ in *Redell* as follows:

> *Bogoshi* could not have anticipated the revolution that ubiquitous social media has wrought upon the world. *Bogoshi* looks back to a time when conventional media, and in particular the press, was the principal means by which freedom of expression was enjoyed on a large scale. That world has been overtaken. What may now be considered the media, and to whom a defence of reasonable publication should apply are matters of great importance.[205]

Despite this, recent attempts to extend the *Bogoshi* defence to non-media defendants have failed.[206] It was attempted in *Gqubule-Mbeki v Economic Freedom Fighters*, where the Court declined the development, reasoning that the fact that the media is more tightly regulated than private individuals made the extension of the defence inappropriate.[207]

It was also attempted in *Economic Freedom Fighters v Manuel*,[208] where the defendant EFF, unable to establish the truth of claims it had made regarding former Finance Minister Trevor Manuel, asked the High Court to develop the common law to extend the *Bogoshi* defence to apply to it. This time, the High Court obliged, recognising that, as a result of social media, non-media defendants often have publishing capabilities that exceed those of the print and broadcast media, and that there was no justification for affording greater protection to the press.[209] It found on the facts, however, that the EFF had acted unreasonably and therefore that the defence must fail.[210]

But the extension of the defence to non-media defendants was overturned on appeal by the SCA, where Navsa JA and Wallis JA questioned whether a reasonable publication defence for non-media

205 *Reddell* (n 18). See further H Eloff 'South Africa's media defamation law in a constitutional, digital age' (LLM thesis, University of the Witwatersrand, 2019) ch 4.
206 An earlier attempt was made by Van Dijkhorst J in *Marais v Groenewald* 2001 (1) SA 634 (T) at 646, but this aspect of his judgment has come to be neglected by our courts.
207 *Gqubule-Mbeki v Economic Freedom Fighters* [2020] ZAGPJHC 2 paras 71-75.
208 *Manuel v Economic Freedom Fighters* [2019] ZAGPJHC 157.
209 *Manuel HC* (n 207) para 67.
210 *Manuel HC* (n 207) paras 68-70.

defendants is even necessary.[211] Their reasoning was essentially this.[212] The *Bogoshi* reasonable-publication defence is born out of the *Pakendorf* strict liability regime for the media. It is a defence afforded to media defendants who would, in the absence of it, be without a defence for false defamatory statements, irrespective of the circumstances. Non-media defendants, on the other hand, were never strictly liable, and *Bogoshi* did not alter the availability of a defence of absence of *animus iniuriandi*, including in the form of consciousness of wrongfulness. If non-media defendants can rely on absence of consciousness of wrongfulness, then they can escape liability for the publication of a false defamatory statement by showing that they held the genuine but mistaken subjective belief that the statement was true and in the public interest. The *Bogoshi* defence is not available to non-media defendants, so the argument goes, because they do not need it.

But the SCA in *Manuel* does not, in truth, provide a good reason to refuse to extend the reasonable publication defence to non-media defendants. It is, in the first instance, important to understand that *Bogoshi* did two things. First, it established a defence of reasonable publication, which excludes unlawfulness. And second, it made clear that media defendants cannot escape liability merely on the basis that they lacked fault in the form of consciousness of wrongfulness: they may escape only by showing they acted reasonably.[213] That is certainly how the SCA[214] and Constitutional Court had understood the effect of *Bogoshi,*

211 *Economic Freedom Fighters v Manuel* [2020] ZASCA 172.

212 *Manuel* (n 210) para 65, read with paras 41 ff.

213 It does not matter for present purposes whether one regards *Bogoshi* as having introduced a negligence standard (J Burchell 'Media freedom of expression scores as strict liability receives the red card: *National Media Ltd v Bogoshi*' (1999) 116 *South African Law Journal* 1 at 6-7) or as having retained intention as the fault standard, while requiring any ignorance or mistake to be reasonable before it excuses the defendant (JR Midgley 'Media liability for defamation' (1999) 116 *South African Law Journal* 211 at 214-215). The point for present purposes is that its development of the law allows a media defendant to escape liability only insofar as it acted reasonably.

214 See *Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] ZASCA 67 paras 45-46; *Modiri v Minister of Safety and Security* [2011] ZASCA 153 para 10 ('It therefore matters not that, because we are dealing with media defendants, fault in the form of intent is not required and that negligence would suffice'). See also *Le Roux v Dey SCA* (n 175) para 38, where Harms DP held: 'It appears that on this analysis the discussion of negligence in *Bogoshi* might have complicated matters unnecessarily. Once it is found that the publication was unreasonable, the next question should simply be whether it was published with intention to injure.'

the latter explaining in *Khumalo v Holomisa* that Hefer JA therefore 'concluded that media defendants could not escape liability merely by establishing an absence of knowledge of unlawfulness. They would in addition have to establish that they were not negligent'.[215]

The untidy effect of *Bogoshi* is, in other words, that media defendants are in a preferable position to non-media defendants in one respect (in that they can rely on the defence of reasonable publication excluding unlawfulness), and in a potentially disadvantageous position in another[216] (in that they cannot escape liability merely because of their absence of knowledge of wrongfulness, but only if they did not act negligently).[217] There is no reason in logic or principle for this differential treatment. It is true that *Bogoshi*, as well as the cases like *O'Malley* to which it was reacting, suggested that media defendants have a unique capacity to destroy reputations. But, as we have shown, that proposition is not tenable nowadays, if it ever was.

The SCA's reasoning in *Manuel* also raises the vexed question whether consciousness of wrongfulness should be part of our law of defamation at all. The SCA proceeded from the premise that consciousness of wrongfulness is part of our law of defamation. It is true that *Bogoshi* embraced the consciousness of wrongfulness requirement,[218] though it left open whether a negligent mistake about wrongfulness could ever constitute a valid defence for non-media defendants.[219] But Cameron J adopted a different approach, and provided a detailed critique of the

215 G Penfold & D Milo 'Media freedom and the law of privacy' (2008) 1 *Constitutional Court Review* 324. Compare Midgley (n 212) 222, who distinguishes the reasonableness of a mistaken belief in the lawfulness of a publication, from negligence, being the reasonableness or blameworthiness of one's conduct.

216 Penfold & Milo (n 214) 324.

217 Burchell (n 212) 6 criticises *Bogoshi,* fairly in our view, for being 'at its weakest in failing to draw a clear conceptual distinction between the respective domains of the unlawfulness and negligence inquiries'. In this regard, the effect of *Bogoshi* is even messier than we describe if, like Midgley (n 213) 215 and 221-223 and Penfold & Milo (n 215) 324, one interprets it as having not only created a defence excluding wrongfulness, but also as having reintroduced a defence of lack of *animus iniuriandi* for media defendants, while making the defence subject to a requirement of objective reasonableness.

218 *Bogoshi* (n 6) 1214B-G.

219 *Bogoshi* (n 6) 1214B-C.

cases, starting with *Maisel v Van Naeren,*[220] which had resulted in the 'importation of subjectivity' into our law of defamation by introducing a defence of absence of consciousness of wrongfulness,[221] and which had departed from Melius de Villiers' description of *animus iniuriandi* in his commentary on Voet as simply being the 'intention on the part of the offender to produce the effect of his act'.[222]

Nearly 15 years after Cameron J's exposition in *Holomisa v Argus*, Harms JA undertook a similar analysis, and reached similar conclusions, in the unanimous SCA judgment in *Le Roux v Dey*.[223] He explained that, ever since the 1912 decision in *Whittaker v Roos & Bateman*,[224] the Appellate Division had understood *animus iniuriandi* to mean nothing more than 'colourless intent', in other words the 'intention to injure'.[225] And he suggested that consciousness of wrongfulness was a Pandectist invention, not necessarily reflective of the Roman-Dutch position.[226] He surveyed the case law to show that liability for most *iniuria* does not depend on consciousness of wrongfulness, but only on the presence of absence of intention to injure.[227] And as a matter of policy, he found it 'incongruous' that a defendant who could not establish the truth of a statement to justify a defamatory remark could escape liability based on a belief in its truth.[228] Harms JA therefore concluded that *animus iniuriandi* does not generally require consciousness of wrongfulness.[229]

220 1960 (4) SA 836 (C). Shortly after *Maisel* was handed down, Boberg noted that it conflicted with a number of decisions in which the *bona fide* but erroneous belief in the existence of privilege had been held to be no defence: see PQR Boberg 'The mental element in defamation' (1961) 78 *South African Law Journal* 171 at 183; also the cases cited at 175 fn 27.
221 *Holomisa v Argus* (n 2) 600E.
222 *Holomisa v Argus* (n 2) 601E.
223 *Le Roux v Dey SCA* (n 175).
224 *Whittaker v Roos & Bateman* 1912 AD 92.
225 *Whittaker* (n 223) 124-125.
226 *Le Roux v Dey SCA* (n 222) paras 29, 37. Compare H Scott 'Contumelia and the South African law of defamation' in E Descheemaker & H Scott (eds) *Iniuria and the common law* (2013) at 119-139, which shows that this is highly oversimplified, and that 'whatever the origins of the term "consciousness of wrongfulness", the concept itself is Roman'.
227 *Le Roux v Dey SCA* (n 222) para 33.
228 *Le Roux v Dey SCA* (n 175) para 37.
229 *Le Roux v Dey SCA* (n 175) para 39.

On appeal, however, the Constitutional Court held that this aspect of his reasoning was unnecessary, and left the question open.[230]

There is much to be said for the policy objections to a defence excluding consciousness of wrongfulness in the law of defamation.[231] A consciousness of wrongfulness requirement allows a person to defame another, and escape liability, due to the honest belief that their conduct was justified, even if such justification was found to be non-existent. It sanctions the unjustified savaging of the reputation of another, provided the defamer subjectively believes her speech to be true and in the public interest, or protected comment or said on a privileged occasion. It thereby allows everyone's reputation to be 'perpetually vulnerable to attack with impunity by every idiot or busybody well informed as to calumny but ill versed in elementary law'.[232] That concern is only compounded by the difficulty a plaintiff will inevitably have in proving the absence of a subjective mistake on the defendant's part. These were the very policy considerations that led *O'Malley* and *Pakendorf* to favour a strict liability regime for the media.[233] That was no doubt a step too far. But the same considerations provide good reason for recognising *animus inuriandi* in its 'colourless' form, merely as the intention to injure.[234] If that step is taken, it removes an important plank in *Manuel*'s argument.

Notably, equivalent reasonable-publication defences in comparative jurisdictions have generally not been limited to the media in the same way as the *Bogoshi* defence, even if the cases that established those defences

230 *Le Roux v Dey* (n 5) para 137. Note however that A Fagan 'The gist of defamation in South African law' in E Descheemaker & H Scott (eds) *Iniuria and the common law* (2013) at 179 regards the Supreme Court of Appeal as having 'closed the door' on the possibility of consciousness of wrongfulness being a requirement for *animus iniuriandi*.

231 See Scott (n 225) 122: 'It may well be that a concept of *animus iniuriandi* that incorporates consciousness of wrongfulness is incompatible with the analytical structure of the modern law of defamation: that a defamation regime that recognises (as South African law has done since the nineteenth century) the stereotyped defences of English law – truth (in the public interest), fair comment and privilege – and that conceives of these defences (as South African law now does) as defences to wrongfulness, cannot also accommodate a fault regime that allows liability to be defeated by proof of the absence of wrongful intention.'

232 PQR Boberg 'Animus injuriandi and mistake' (1971) 88 *South African Law Journal* 57 at 68.

233 See *Pakendorf* (n 184) 156B-C; *O'Malley* (n 192) 404H-405A.

234 Compare Boberg 'Animus injuriandi' (n 231) 69: '*Animus injuriandi* is the intention to injure, not the intention to injure and be liable for it'.

involved media defendants. The *Reynolds* defence,[235] for example, was (prior to its abolition by the UK Defamation Act of 2013) available to 'anyone who published material of public interest in any medium';[236] *Sullivan* itself included both media and non-media defendants, all of whom enjoyed the benefit of the actual malice rule; and the *Lange* defence[237] has always been available to non-media defendants.[238] A similar approach would have been preferable in South Africa. *Holomisa v Argus* would have made the defence of reasonable publication available to all. It would have made the status of the defendant an irrelevant consideration in determining what defences are available and what fault standard applies. And it would, in doing so, have given better effect to the underlying value that the reasonable publication defence is intended to serve – that is, as described in *Bogoshi*, 'the democratic imperative that the common good [is] best served by the free flow of information'.[239] This democratic imperative is not advanced by limiting the defence to media defendants alone.

4.2 Political speech

In *Holomisa v Argus,* Cameron confined the reasonable publication defence to political speech – or speech in the sphere of 'free and fair political activity'. One reason for this was that unless he found an expressly constitutional basis for the development, he would have been bound by pre-constitutional Appellate Division authority to dismiss the newspaper's exception. As we saw, the Interim Constitution, which imposed a higher burden of justification for a limitation of the right to free expression when it related to 'free and fair political activity', provided the hook. Grounding the defence in the express text of the Interim Constitution, and limiting it to speech on 'free and fair political activity', gave Cameron J an avenue by which to avoid the pre-constitutional precedents. But he also had more principled reasons for limiting the defence in this way. The purpose of recognising the defence was to ensure that speech which enhances democracy, even when it cannot be proved to

235 See n 46 above.
236 *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 para 54.
237 See again n 46 above.
238 See further Milo (n 23) 84-88.
239 *Bogoshi* (n 6) 1210G-H.

be true, is not curtailed, and that there is no chilling effect on democracy. But the less that speech contributes to democracy – that is, the more that it moves away from the political – the more that reputation-based concerns weigh in the balance.

The *Bogoshi* defence, by contrast, is not confined to political speech. It applies to any speech, although it makes the nature of the publication, and whether it is in the public interest, a factor relevant to whether the publication is reasonable in the circumstances. Having said that, the SCA's reasoning – particularly its express endorsement of cases such as *Theophanous* and *Lange*, which created a defence for untrue defamatory material in the field of political discussion, and its recognition that 'greater latitude is usually allowed in respect of political discussion' – was so motivated by democratic justifications for protecting political speech that commentators were uncertain whether the defence was 'limited to averments in the political arena or whether it is to extend to all false information which the media publish'.[240]

It is true, as Cameron J acknowledged, that in defining political speech, there are 'difficulties of demarcation'.[241] But *Holomisa v Argus* would only have been the first case to recognise such a defence. Had it been followed, courts hearing future cases would have been required to determine whether the facts before them fitted the defence – that is, whether the speech in question was in the realm of free and fair political activity. In that way, gradually and incrementally, content would have been given to the defence, and lines would have been drawn around speech constituting free and fair political activity. There would have been the clear cases of paradigmatic political speech, of which *Holomisa v Argus* was clearly one.[242] And there would have been the penumbral cases, involving the defamation of private parties which wield public power, for example. So the 'difficulties of demarcation' are not insuperable. And they are no less pronounced where the category of protected speech is even more amorphous, such as speech that is in the 'public interest'.

240 Midgley (n 212) 220.

241 *Holomisa v Argus* (n 2) 618E.

242 See *Holomisa v Argus* (n 2) 619C: 'Whatever the legislative formalities of Transkeian "independence", there can in my view be no doubt that the plaintiff in his capacity as military ruler of Transkei was a participant in political activity in the Republic of South Africa. The defamation relates directly to his conduct in that capacity.'

To be clear, our argument is not that a reasonable publication defence must, necessarily, be narrowly confined only to political speech.[243] Our defence of this aspect of *Holomisa v Argus* is more qualified. It is that, given the democratic justifications underpinning the defence, Cameron was right to identify the *core* of a reasonable publication defence as being political speech. That is the kind of speech that deserves greatest protection, and which should be most difficult to censor or punish. The less that speech falls within that core, the more justifiable is its regulation. The objective of protecting speech of this kind might be achieved in more than one way. It could be achieved, as *Holomisa v Argus* did, by creating a special reasonable publication defence for political speech. It could also be achieved by recognising a defence encompassing more than only political speech, but, in doing so, to allow the reasonableness threshold to operate on a sliding scale, so that the more that the speech in question advances the value of democracy, the easier it is to justify as reasonable. *Bogoshi* certainly hinted at the fact that political speech is worthy of special protection. But it did not build this into the defence that it created.

Indeed, *Bogoshi*'s failure to provide sufficient express protection for political speech was borne out in *Mthembi-Mahanyele*,[244] where Lewis JA, if she and Howie P had commanded a majority on the issue, would have all but revived *Holomisa*'s focus on political speech. The case concerned the publication by the *Mail & Guardian*, in its annual tradition of giving government ministers 'report cards', of an award to the Minister of Housing of an 'F' grade, coupled with a serious allegation that she had awarded a massive housing contract to a close friend. Lewis JA noted that, in *Bogoshi*, the SCA had not specifically recognised a defence relating to 'political speech'.[245] And the question that arose was 'whether special principles should be invoked to protect the press, or for that matter individuals, when they make defamatory statements about a member of government'.[246] After surveying the position in comparative jurisdictions, many of which singled out political speech or speech

243 See *Buthelezi* (n 191) 153, where Thirion J gave the example of the publication of allegations regarding fraudulent manipulation of the stock market as one which would warrant protection.
244 *Mthembi-Mahanyele* (n 213).
245 *Mthembi-Mahanyele* (n 213) para 32.
246 *Mthembi-Mahanyele* (n 213) para 53.

regarding public officials for special protection, Lewis JA emphasised, with express reliance on *Holomisa v Argus*, the importance of freedom of expression for holding government accountable, and the need for robust and frank comment and to tolerate errors of fact where the statements are published reasonably and justifiably.[247] She would have recognised a special defence of 'justified political speech', and would have found the publication justified and reasonable.[248]

While Dario Milo may be correct that the minority's proposed development was not strictly necessary, because the *Bogoshi* defence could notionally have done the same work,[249] the fact that two judges of the SCA thought it a necessary development is itself telling, and speaks to the under-specificity of the *Bogoshi* defence, and its consequent under-protection of speech most worthy of protection. It is also telling that the Court split 2:2 on the question of whether the publication was reasonable in the circumstances.[250] On the facts, whether special recognition was given to the political nature of the speech plainly made a difference to the outcome.[251] So here too, Cameron's approach in *Holomisa v Argus* is to be lauded – not because *Bogoshi* should necessarily have been limited to political speech, but because *Holomisa v Argus* did well to make clear that such speech was deserving of special protection, and to build that protection into the defence that it established.

5 Conclusion

We have aimed to show that, among the traditional justifications for free speech, it is the argument from democracy that has been the animating feature of Justice Cameron's free speech jurisprudence. This has led Cameron J, through a series of landmark decisions, in *Holomisa v Argus*, *McBride*, and *DA v ANC*, to afford special protection to speech that enhances democratic deliberation and is constitutive of democracy itself,

247 *Mthembi-Mahanyele* (n 213) para 65.
248 *Mthembi-Mahanyele* (n 213) para 69.
249 D Milo 'The Cabinet Minister, the *Mail & Guardian*, and the report card: The Supreme Court of Appeal's Decision in the *Mthembi-Mhanyele* case' (2005) 122 *South African Law Journal* 28 at 29, 35-39.
250 Mthiyane JA (with Mpati DP concurring) held that the publication was unreasonable, applying the *Bogoshi* test. In a lone judgment, Ponnan JA held that the publication was not defamatory.
251 Compare Milo 'The Cabinet Minister' (n 248), which argues that Mthiyane JA misapplied *Bogoshi*.

and especially that which criticises public officials. By contrast, in cases concerning speech which is seen as having no democracy-enhancing capability, Justice Cameron has shown substantially less willingness to adopt a speech-protective approach. This commitment to protecting democracy-enhancing speech led him to fashion a pioneering new defence of reasonable publication for speech in the sphere of 'free and fair political activity'. Although the precise ambit of the defence was informed in part by the text of the Interim Constitution, and although it was soon overtaken by subsequent developments, the *Holomisa v Argus* defence has, in certain respects, been vindicated. This is essentially because, by focusing on the content of the speech – in particular, political speech – rather than the identity of the speaker, the *Holomisa v Argus* defence more closely and coherently tracks its underlying normative justification than does *Bogoshi*. It also avoids the anomalies to which the *Bogoshi* defence has given rise, such as its non-applicability to so-called 'non-media defendants', even where those defendants sometimes have greater reach, and sometimes play a greater role in shaping public opinion, than the traditional media.