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All That is the Case

A novel work

Reflective Essay

by Jeremy Clark

As part of the requirements for the degree of Master of Arts by Research (Creative Writing), submitted to the Faculty of Arts, University of the Witwatersrand, Johannesburg.

6th June 2018

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Law is a literature which denies its literary qualities.

– Peter Goodrich[1]

Introduction

My initial intention on registering for the MA in creative writing at Wits University was to carry on writing and editing the manuscript of a memoir called *Neroli* that I had written in 2014. On starting the MA seminars I quickly learned that that was not permissible and that I would have to start a new work for the purposes of my MA. I was curtailed at the very outset and this was to become a recurring experience in writing my work.

I was at a loss to know what to do for a new work and was under pressure to come up with a new idea very quickly for my thesis proposal. I came to think that the story, or stories, embedded in an interesting legal case I was conducting at that time would fit the bill. The case captured my imagination for the questions it posed about the nature and quality of legal writing and literature. Was the law a literature that denied its own literary qualities, as Peter Goodrich stated?

The case was fascinating to me for the contradictions it threw up about the role of powerful people, people who have a strong history in opposing apartheid over many years in South Africa and who have since reached positions of power (or Power). I was also interested in the construction of meaning from documents and the archive.

I should mention that I met with a negative, even hostile response to the project in the group seminars and my writing never failed to elicit heated debates about choice of subject, point of view, ethics and trust. There seemed to be a view prevalent in the group that would compel a certain mainstream treatment of the Steve Biko and his reputation, to protect a monolinear account of his death. Deviation would not be applauded. But would I be able to relate "all that was the case"? I didn't mind the heated discussion and criticism and felt a certain validation in my decision to pick a particularly difficult project – after all, what was the point of joining the chorus of angels, trotting out received wisdom on settled subjects? I proceeded with a contrary

[1] Goodrich, Peter. (1996). *Law in the Courts of Love: Literature and Other Minor Jurisprudences.* London. Routledge. p112. Quoted in Sanders, Mark (2007) *Ambiguities of Witnessing: Law and Literature in the Time of the Truth Commission*. Johannesburg. Wits University Press. p22. (Goodrich, 1996)

focus, if not a measure of quiet chutzpah. I was going to bring the same commitment and originality to the story as I had to the legal case. It was a story I needed to bring to the surface, to tell "all that is the case."

We have a lawyer, Clark, defending clients in a High Court application brought against them by the family of Steve Biko, demanding that they stop the auction of the autopsy report concerning their deceased relative. In this respect Clark does what any lawyer would do: he corresponds with the other side, draws up affidavits, makes press statements and so on. His job is clear: he is defending his clients and he must, within the law, produce the arguments that give them the best chance of succeeding.

But this story gradually recedes somewhat because other things intervene. As part of his research for the case, Clark visits libraries and archives in an attempt to establish the truth about the documents. This quest becomes complex when it emerges that there are many versions, thus raising the question: which is the authentic one?

This is a journey back into the past and thus Clarks gets waylaid by the court papers, newspaper reports, letters and other documents he consults: he falls down bottomless rabbit-holes and is reminded of his own role in that turbulent past.

It is at this point that the question of fiction and non-fiction perhaps most clearly arises. At the heart of the conflict are two different constructions or narratives, one might even say fictions of the past. While we all construct narratives of the past, we do so with varying degrees of care; the law, however, is called upon to arbitrate between such versions in cases of disagreement. In law, there may not be an ultimate truth, but we rely upon the legal system to establish a version that is deemed truthful enough to have consequences, to make someone win or lose the case.

Here the argument arises between the writer and the lawyer. The lawyer is bound to present his stories according to the protocols of legal discourse. The writer, on the other hand, is aware of the multitude of truths out there; of how different stories can be constructed and made compelling. The writer may therefore be interested in many forms of evidence that the lawyer may find irrelevant. There is an important overlap. Clark the writer may realise that every truth is provisional, but as a lawyer he has to defend one version – yet in doing so, he uses techniques of reconstruction that are not always that dissimilar from what the writer does.

By doing his research Clark is faced with the whole question of the role of the past in the present and how it shapes the future. He is confronted by the iconic role that artefacts and documents from the past may assume in the present; by how difficult it is to get access to the past, even when it is your own past; and, perhaps more importantly, by how authoritative narratives in the present, meta-narratives (Lyotard) determine how the past is seen. Thus, for example, the Bikos produce a narrative of martyrdom and infringed dignity that rides

roughshod over the ownership rights and dignity of the Niemands. And that narrative is rooted in the idea that the backdrop of the present is that of participation in the Struggle and reward for that struggle. So how the truth is seen, is closely connected to Power and larger narratives.

The story also gets waylaid by events in the present. Towards the end of 2014, the first year of the MA degree, new forces arose on university campuses, principally at the University of Cape Town in the form of Rhodes Must Fall and at Wits with the campaign called Fees Must Fall. It was startling to see a successful student movement cohere around Black Consciousness principles as espoused by writers and freedom fighters such as Frantz Fanon and Steve Biko, rather than the Charterist, non-racial movements of the African National Congress, United Democratic Front, progressive student movement and trade unions with which I was familiar and with which I was involved in the 1980s and 1990s. The philosophy and programmes of non-racialism of the latter groups were carried forward into the provisions of the Constitution of the Republic of South Africa, adopted as the supreme law of the Republic so as to "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."[2] The former new student movement increasingly eschewed these values, claimed that Nelson Mandela had sold out to white capital and facilitated a neo-liberal constitution as the founding law. They did this in the name of decolonisation.

These pressing current events that shook and captivated the country called for a response in the writing and hence I devised characters such as Pius Shabangu (partly real, partly fictional) and developed the plot towards its unfortunate end. The events challenged me to think anew about the recently settled past and its new iconoclasts. I had to ask myself where I fitted in and what the past demanded of me.

The library and the archive are symbols of continuity, of preserving the past as a basis for an understanding of the present and the future. For Clark to disappear into these spaces is to leave the present behind, and instead of using those visits to further his job in the present, Clark is confronted by how intractable the problem of the past is.

A story emerges by which the concrete problem – who owns the document? – is translated into a different question: who owns the past?

The point is that it doesn't really matter for the story what a court would ultimately decide about ownership of the document. The story is not aimed at resolving matters but at showing complexity.

The big issue ultimately is that the truth that the case can reveal is limited. Around it swirls a multitude of questions about power, about race, about how we conceive of the past, about how the Constitution seems rooted in a very particular narrative of the past, and so on. As Clark

[2] (Constitution of the Republic of South Africa, 1996) Preamble.

enters a subterranean world of intellectual dissent the work becomes less of a memoir and acquires a much more novelistic interest. As Clark loses his grip while the court case makes no progress, the basis is laid for the conflagration at the end.

Obstacles to the project

Subject permission

To complicate matters, some six months into the work, my client (let me continue to call her Tessa Niemand) called me to discuss my writing of her and Garth's story. As I had known from the outset, her husband was by coincidence a supervisor of another student in our MA seminars and he had expressed acute discomfort to her about attending the seminars at which my submissions were tabled and discussed, often in terms very critical of his wife's conduct in attempting to auction the Steve Biko autopsy report. She said she was not sure she should have given me permission to write the book asked me to "think about it", implying - almost imploring - that I should stop writing the book. This threw me off course, as it was too late to submit a new proposal and begin a new work. I would probably have to abandon the project and hope to begin again the following year. I had totally adopted the clients' cause and fought the legal case hard for them on a *pro amico* basis (i.e. for free), yet here a client's spouse would not show the same commitment to her. Was he embarrassed by her? Did the story wound his pride, or did he abjure upsetting the monolinear narrative about Steve Biko, George Bizos and the others? Besides, the clients' best chance of being vindicated was by permitting the writing of the work. I eventually managed to persuade the client to let me finish the project and submit it for the MA in creative writing, but beyond that point the text would die.

I was fighting against the odds in defending the Niemands' truth, but also in telling "all that is the case."[3] Intuitively, most people's sympathies would initially be with the Bikos (as was the case with participants in the course seminars), but I wanted to question the trite response that the Niemands were immoral and opportunistic.

[3] Ludwig Wittgenstein. (1974) *Tractatus Logico-Philosophicus*. English translation by D.F. Pears and B.F. McGuiness; introduction by Bernard Russell. Oxford. Routledge. (Wittgenstein, 1974)

Legal relevance

A second obstacle arose when the Biko's attorneys, found the long story about Mrs Niemand, her correspondence with Dr Gluckman, the characters of her children, the accounts of the case as portrayed in the media and so on – the literary aspects so essential to the writer – all to be legally irrelevant, defamatory and vexatious and gave notice that they would apply to court to have it all struck out. If they did that, there was a real prospect that the material would not be able to be quoted in the work. The full story could then not be told.

Judicial partiality

Yet another blow to the project came when the Deputy Judge President, at the instance of the Bikos' mendacious attorneys, removed the court file from the general office where files were open to the public and placed it under lock and key in the registrar's safe, inaccessible to members of the public. In doing so, the judge violated the precepts of administrative law. Once again, people would not be able to know "all that is the case." The story would be sealed, unable to surface. Once again, forces were at work preventing me from telling "all that is the case."

Procedural delays

A final difficulty that threatened the project was the conduct of the legal case; I could only write the work as the case progressed and had to keep myself within the limitations of the affidavits in the case. Only once they had been filed at court did they become documents of public record and only then could I quote them or comment on them without fear of sanction for breach of legal professional privilege or copyright.[4] There were long delays in the conduct of the case during which I could not develop the novel and indeed at the time of submission of the work for my MA the case has become becalmed after settlement talks broke down. I am not permitted to reveal the content of settlement discussions, so this explains why the story contains no conclusion to the legal case – it has not happened yet. I can go no further than muse about a possible settlement of the case without revealing what was discussed and why talks broke down. That puts another brake on revealing "all that is the case."

[4] Copyright Act, 98 of 1978, sections 2 and 12. (Copyright Act, 98 of 1978, sections 2 and 12.)

Quest to beat the obstacles

More and more the writing of the work – now to be accessible only to researchers in the Wits University library - was becoming the only outlet for the Niemands' truth. All other avenues had been cut off. As much as the character Clark's activities in the archives and libraries was a quest, my own writing took on the quality of a quest to beat the obstacles, to protect the narrative, to relate a truth and find a nook, library or archive in which it would be safe. This sat at the heart of my choice to write this work.

Benefits to the project

The group seminars, despite their difficulties, were beneficial to the development of my project. The Socratic interaction was enriching with so many participants approaching my work from different angles, not always complimentary. Some saw the work as an attack on the monolinear account of Steve Biko (it is not about Steve Biko at all), others felt that the case of *Biko v Niemand* was not big enough to sustain a whole book. These comments gave me pause and I had to keep asking myself why I had taken the project on and if I should finish it. It is important that a writer fully appreciate how a reader will interpret his text, so I was put on warning about the risks. Although my critics had not changed their stance by the end of the second year of classes, my supervisor and several others were bulwarks against the criticism and I felt they realised the wider value of the work.

One might also think that the pressure I came under to write a character-driven novel, or to stick to a recognised genre might be additional obstacles in the way. On the contrary, I derived strength and confidence from the criticism and relished continuing with my project as I wanted to, albeit taking my peers' inputs seriously.

On every occasion that I submitted my writing to the group, it elicited long and usually heated discussion. I took this as encouragement that if I could fashion the issues into a story, it would be interesting to the reader.

A virtuous triangle

As my writing progressed, I was fascinated to find myself writing the case (taking instructions from my clients, working out arguments, drafting and settling affidavits and so on), which led to the case writing the book (I could only make progress with the book as the case advanced and the case determined what I could include in the book – e.g. when the texts became documents of public record in the court file). To complete the triangle, I found the book writing me, changing me and making requirements of me in how I wrote and conducted the legal case, especially in order to facilitate the writing of the book, and so on. This was a dizzying idea and sat at the heart of my decision to write the book. I was skating on thin ice professionally, so I decided the lawyer and writer should discuss these aspects in the dialogues.

Genre

Selecting a genre for the work proved difficult. I wanted to deploy the non-fictional quality of the legal case, but did not want to write a long legal or journalistic essay. Creativity would have been wanting in the legal narrative and I thought it best to include fictional elements that would initially stand as a backdrop to the legal case and then come to the fore in order to throw the case into relief, to give a fuller story, or "all that is the case." Which genre would accomplish this?

And so *All That is the Case* draws on extracts from the legal case and observations about its professional handling, but moves into the redemption quest, employing the arrivant, or revenant figure, memoir and some detective fiction, founding its reality in newspaper cuttings, internet posts, letters, notes, diary entries and the like. In the search for his truth and in a quotidian Johannesburg setting, the lawyer shatters the mould of the new orthodoxy, breaks its laws and unpicks the memes of the new order. Yet, the intrepid attorney, for all his flaws and as anti-hero to people in Power, is the doomed hero of the story. The *Zeitgeist* has moved on.

At about the half-way mark in the book, the legal account becomes less important and the narrative becomes more novelistic, incorporating several big scenes (burning the effigy and the

library fire), culminating in the destruction of the archive and the new Power group beginning the archive anew, possibly based on a *hrön*.[5]

While the work discusses many ideas, it falls short of being a novel of ideas or a philosophical novel because the ideas are not presented explicitly. Ernst Cassirer calls the work of art a symbolic form; it does not argue its case in the same way that scholarship (or legal argument) does. Rather, it concretises such ideas, often obliquely, through the means peculiar to the art form in question (i.e. the novel). The structure of this work implies a continuous moving between different times and different ways of telling and, ultimately, different perspectives on truth, memory and history.

The basic framework is that of the court case, which is intended to establish, ideally, "all that is the case." The law is intended in cases of dispute to reach some pragmatic determination of the truth – pragmatic because that truth will be heavily influenced by ideas of values, rights and morality. In fact, it cannot be reached in difficult cases such as *Biko v Niemand* without some value judgments being made along the way. I am also interested in how the legal process and legal concepts are related to concepts of history. The Niemands' case is inconvenient, even embarrassing to a well-established drama about the death of Steve Biko. As written by the lawyer, it is sceptical of the narrow narrative of struggle and liberation encapsulated in the preamble to the Constitution, recognised as the founding narrative of the new South Africa

The secondary framework concerns Clark, initially the accidental and meandering flâneur, later more concerted in his quest to unearth truth and old narratives buried in the archive, his confrontation with the decolonised arrivant/revenant, John Harrison Clark, and his decline into dementia as his world collapses.

Problems of narration

It was important to find the right point of view and voice for each of the narrator, Clark-the-character as protagonist and his antagonist, John Harrison Clark. At first I intended to write the whole work in the first person, the voice and perspective of the lawyer, but found that that would be too personal and subjective; it would not allow for the more sardonic, distant

[5] (Borges, Tlon, Uqbar, Tertius Orbis, 2000)

perspective that would be necessary to deal with Clark as a doughty detective of documents and as somewhat misguided in his Quixotic mission to lay bare the truth.

The narrator

Instead, I opted to tell the principal story from omniscient third person, from the mouth of a narrator who nevertheless occasionally addresses the reader directly and quietly constructs a frame in the first person voice. The narrator is thus able unobtrusively to take a more global view of the drama, commenting from a distance, while maintaining her or his own perspective on the case and the conduct of the parties and their lawyers. The narrator has an intimacy with and confides in his reader, while looking at Clark as an object, a bug on a glass slide under scrutiny. That opens up opportunities for irony.

The dialogues

Nevertheless, I was still wracked by doubts within my own mind, tensions between the perspectives of the lawyer and the writer. These debates, these conflicting aspects of the same character and personality, could not be conveyed adequately in the third person, precisely because of its degree of detachment, and here I opted for dialogue chapters interspersed amongst the main narrative chapters. Clark-the-lawyer and Clark-the-writer discuss issues thrown up by the main story, each in the first person. I found it difficult to create two distinct and believable voices for the two, no doubt because both are part of me and represent my own internal conversations and conflicts – and my own internal debates are quiet and reasoned, not the pointed contests that literature demands. I tried to distinguish the lawyer's voice by making him more formal in speech and diffident in argument, the writer's by being more colloquial, inquisitive and urgent. I hoped the device would help to explicate the main themes and releases a degree of energy and contestation between the two voices.[6]

I don't believe there is a requirement for the narrator to be even-handed, or unbiased, though as I came to realise, as discussed below, his or her point of view should be distinct from that of any of the characters. It is not a journalistic account that should try to be fair and

[6] Clingman, Stephen. (12th May 2015.) Launch of *Birthmark* at Wits Institute for Social and Economic Research. "There's definitely a continuing dialogue in my mind and in the book. Regarding the first and third person voices, my model is J.M. Coetzee, in the third person in *Boyhood*, but I was neither simply in one or the other. The present tense is used when reliving the moment, but it's also conceptual. Just because someone writes in the first person, it doesn't mean they are not speaking in the third person." (Clingman, 2015)

objective to all parties, to present their point of view on the issues, nor is it the judgment of the court, which weighs up all the evidence for and against and comes down on the side of one party or the other.

The voice of the litigant

I embarked on the writing by lifting large sections of text that I had drafted in the affidavits in the legal case, especially the main affidavit of Garth Niemand. Naturally, these were written in the first person – an affidavit is a person's (the deponent's) account of facts. In litigation, drafting the affidavit is a no-holds-barred game. Becoming a lawyer requires a new way of speaking, writing and reasoning for oneself and one's clients. The deponent does not argue both sides of the case, but goes all out to attack his or her opponent and to defend her or his own position. I then rather naively converted the lifted text into the third person point of view, simply and crudely by changing "I", "my", "your" etcetera to "he", "his" and "their." When I presented that piece of writing to the seminar group, it was met with explicit hostility. The group members objected to the hostile and self-righteous tone of the writing and they were troubled by a too-close correspondence in character between the narrator and Clark-the-character. There was no narrative distance between them; they required enough distance between the narrator and the character to allow the reader to trust the narrator. It was all very well to despise the character, but the reader did not want to despise the narrator too. To one class member it felt as if the character's blind spots were the same as the narrator's and it was impossible to judge Clark-the-character without also judging the narrator. I was told there was not enough space to judge, but one still did. The narrator thought too much like a lawyer, while Clark-the-character needed more character.

On the subject of narrative and blind spots, Terry Eagleton writes:

> *Stories try to foist some design on this weblike world, but in doing so they succeed only in simplifying and impoverishing it. To narrate is to falsify. In fact, one might even claim that to write is to falsify. Writing, after all, is a process that unfolds in time, and in this respect resembles narrative. The only authentic literary work, then, would be one which is conscious of this falsification, and which tries to tell its tale in a way that takes that into account.*
>
> *This is to say that all narratives must be ironic. They must deliver their accounts while keeping their own limitations constantly in mind. They must somehow*

> *incorporate what they do not know into what they know. The limits of the story must become part of the story. This is one reason why some of Conrad's narrators, or the storyteller of Ford Madox Ford's "The good soldier", are at pains to acknowledge their own blind spots. It is as though the nearest one can come to the truth is a confession of one's inevitable ignorance. Narratives must find a way of suggesting that there could be many versions of their subject-matter beside their own. If they are not to appear deceptively absolute, they must point to their own arbitrariness*.[7]

Another problem was the repetition that characterises affidavits. Rather like a textbook, an affidavit can be read piecemeal, here and there where counsel chooses to concentrate or the judge homes in, and the deponent needs to make the same point several times over where that may happen to occur. In lifting large sections of text from the legal papers, I also lifted up the repetitive quality of the text. This rightly elicited criticism and eliminating the repetitiveness proved difficult.

This was a humbling and valuable lesson: legal language could not translate directly into literature simply by changing the point of view, it had to undergo conversion in mood, tone and perspective. I therefore had to rewrite the work by reimagining the narrator as calmer, more balanced, less myopic and somewhat distant from the character. It was then that I decided that the narrator would occasionally introduce a sardonic, ironic note through the occasional use of the first person voice to address the reader. By trying to distinguish the tone of voice in the narrator and Clark-the-character, I hoped to increase the distance between them and make the narrator's account more acceptable to the reader.

The experience lead me to doubt Peter Goodrich's statement that "Law is a literature which denies its literary qualities." (Goodrich, 1996). Legal writing and reading – pleadings, affidavits, arguments and judgments – require special training and practice and are different in character from writing and reading literature.

Two other problems posed by lifting material from the legal papers was the prolixity of the text - in editing the novel before submission I cut out more than 44 000 words from the manuscript[8] – and continuing the litigant's tendency to tell and not show. Some of the latter difficulty was solved by the extensive editing, but traces were hard to eliminate.

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[7] Eagleton, Terry. (2013). *How to Read Literature.* New Haven. Yale University Press. pp107-8. (Eagleton, 2013)

[8] In a delicious irony, the reader will not be able to know "all that is the case" in the deleted text. I am the high priest of the texts and only I have access to it.

The voice in the portal

Clark-the-character also passes through portals, or falls down rabbit holes at points in the work, calling up personal experiences from his past which have a bearing on the actions and themes of the main narrative. To distinguish these memory passages from the main text, and to imbue them with an intimacy absent from the main story line, they are written in the first person. The portal visits to the past, told in the present tense, are less detached and offer rare moments of interiority. In one of these, the younger Clark's question, "Why do we always go out there and try to find the truth?" is emblematic of the work.

Leavening the load

With so much conflict in the work,[9] much of it contained in long extracts taken from the litigation papers, I felt the need to counteract the dry legal contestation by being somewhat ludic, to engage in small acts of profanation while discussing weighty subjects. I intended the exploits in the archives, the activities of BARK, the eccentric wanderings of John Harrison Clark and the entanglements in the footnotes to help lighten the mood, while conveying meaningful insights.

Split personality at the boundary

The conflict between the writer and the lawyer is itself a fertile theme. The novelist and the lawyer need different texts for their purposes, or the same text for different purposes and there is conflict and compromise at their interface. There is a real tussle – a conflict - between the texts that the clients, the attorneys and the advocates on each side of the dispute want to include and exclude. Clark goes about his work as a lawyer, working within the law's conventions and confining the legal texts to what the law sees as "all that is the case", eliminating all but the essential averments from the legal case. As a writer, he explodes those legal conventions in search of finding a fuller truth, "all that is the case", his writerly case. His greater truth cannot be boxed into dry legal texts.

[9] The conflicts include: the court case of Biko v Niemand; Clark's struggle against Bizos and Mouton on behalf of his clients; Clark's struggle with the advocate to retain text in their clients' affidavits; the prevalence of one string of documents against another; the struggle of a monolinear view of the past v. a series of multilinear narratives; the struggle to preserve v. the struggle to modify the past. (Biko v Niemand, 2014)

And so, in narrating the accounts in the work, I was immersed in a complicated "internal searching at the boundary of fiction and non-fiction" and the legal and the lay. "I was both the subject and the object, both inside and outside the narrative." [10]

Hrönir[11] *and modifying the past*

The idea of the custodian of memory and guardian of the truth crop up here and there in the work. The archive is understood here as the whole collection of documents and thoughts that shape our understanding of the past. Sometimes the documents have escaped the physical archive. A custodian of memory would be someone who takes upon her/himself the task of protecting things that need to be remembered. She or he would preserve the record intact, so could be expected to protect it from falsification and distortion, as George Bizos professed to be doing. But memory cannot be seen to coincide with truth: not psychologically and not politically.[12]

The call of the past

A pertinent book review considers the role of the past in the present:

> *Eventually the brothers came to a cool accommodation, but the women never gave an inch and public opinion in Britain was overwhelmingly hostile to the duke (*of Windsor, previously Edward VIII*) and, especially, the duchess* (Wallis Simpson)*.*
> *If the story fell short of tragedy, the abdication and its aftermath acquired the symmetry of parable. The dogged, decent tortoise of York* (who succeeded his brother Edward VIII as George VI) *in the end outstripped the vain hare of Windsor. With a sense of narrative more instinctive than considered, the king set out the logic that had brought them all to this point as he explained yet again why Wallis could not have the title 'Her Royal Highness. 'If she were a princess now, she could have been a queen in 1936.* ***The moral of the fable would***

[10] (Clingman, 2015)
[11] (Borges, Tlon, Uqbar, Tertius Orbis, 2000)
[12] Mbembe, Achille. (11th June 2015.) Address at the launch of *On the Postcolony* at Wits Institute for Social and Economic Research. Mbembe speaks of the impossibility of Africans using nativist epistemology in the Western archive. Africans have to use the western archive because they contributed to it and it doesn't belong to the West. Fanon, for example, was in deep conversations with the Western archive. The challenge is for Africa to speak in sounds never heard of. (Mbeme, 2015)

> ***have been lost****, or as he put it, it* ***'would not have made sense of the past.'*** [13] (My emphasis.)

The work also considers "Woman in Gold",[14] a historical film about art restitution. Maria Altmann, the lead character - in battling to recover a Gustav Klimt portrait of her aunt that the Nazis had stolen from her forbears - urges her attorney to continue her legal case[15], saying: "The past is asking something of the present."

The Bikos' and George Bizos's, guardians of memory, attempt to wrest the copy of the Steve Biko autopsy report from the Niemands and to stop the auction was avowedly made in an effort to stop the document falling into the unsympathetic hands of people who might try to rewrite Biko's story and deny that he was murdered in detention. That at least was the aim that Bizos articulated in the media to justify getting an urgent interdict in the High Court when he said, "These documents prove that the capturers were really to blame for the deaths and if the originals[16] fall into the wrong hands attempts may be made to alter what is now accepted as historical fact."[17]

Bizos was blindly trying to maintain the "moral of the fable" about Biko, or, like George VI, to "make sense of the past", even where there was no threat.

Reshaping the past

Bizos was trying to protect the past from the intrusions of any new truths or narratives. Or, perhaps, he was trying to protect the past from intrusion by any new *dramatis personae* and their truths, or their versions of the truth. He could well have had in mind the Soviet practice of erasing faces from the photographs of revolutionary heroes (also Stalin's perceived rivals) when they executed them. The Czech writer Milan Kundera famously opens "The Book of Laughter and Forgetting" thus:

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[13] How strange that George VI clung to his idea of what the past should continue to be, yet his daughter, Elizabeth II eventually overturned his position and decreed that her son Charles could marry a divorcee and still succeed to the throne. Of which version of the past was Elizabeth II custodian? How did Charles' marriage to Camilla Parker-Bowles make sense of Edward VIII's and Wallis Simpson's past? It didn't; it modified their past. The moral of the fable sometimes has to be bent into a new shape, so that a new future can take shape, so that people living in that new future can make a new sense of a now-modified past.

[14] BBC Films & Origin Pictures. Directed by Simon Curtis. (Curtis, 2015)

[15] Republic of Austria v Altmann. 541 U.S. 677 (2004). United States Supreme Court. (Republic of Austria v Altmann, 2004)

[16] The description of the auction lot made it clear they were not the original documents, itself an interesting fact when we come to consider the unearthing of *hrönir*.

[17] Transcript of eTV interview with George Bizos on 3rd December 2014. (Bizos, 2014)

In February 1948, the Communist leader Klement Gottwald stepped out on the balcony of a Baroque palace in Prague to harangue hundreds of thousands of citizens massed in Old Town Square. That was a great turning point in the history of Bohemia. A fateful moment of the kind that occurs only once or twice a millennium.

Gottwald was flanked by his comrades, with Clementis standing close to him. It was snowing and cold, and Gottwald was bareheaded. Bursting with solicitude, Clementis took off his fur hat and set it on Gottwald's head.

The propaganda section made hundreds of thousands of copies of the photograph taken on the balcony where Gottwald, in a fur hat and surrounded by his comrades, spoke to the people. On that balcony the history of Communist Bohemia began. Every child knew that photograph, from seeing it on posters and in schoolbooks and museums.

Four years later, Clementis was charged with treason and hanged. The propaganda section immediately made him vanish from history and, of course, from all photographs. Ever since, Gottwald has been alone on the balcony. Where Clementis stood, there is only the bare palace wall. Nothing remains of Clementis but the fur hat on Gottwald's head … the struggle of man against power is the struggle of memory against forgetting.[18]

Bizos would have a meta-narrative, an overarching story of destiny in South Africa and seizes on the autopsy report (copy) to protect that. He wants to privilege certain kinds of truth, of certain kinds of people and their truth, now that they have attained Power. But it is futile, there is only relativity of truths.

This ties back to Jorge Luis Borges's short story, "Tlön, Uqbar, Tertius Orbis".

Century upon century of ***idealism could hardly have failed to influence reality****. In the most ancient regions of Tlön one may, not infrequently, observe the* ***duplication of lost objects****: Two persons are looking for a pencil; this first person finds it, but says nothing; the second finds a second pencil, no less real, but* ***more in keeping with his expectations****. These secondary objects are called* hrönir*, and they are, though awkwardly so, slightly longer. … The first attempts were unsuccessful, but the* modus operandi *is worth recalling: The warden of one of the state prisons informed his prisoners that there were certain tombs in the ancient bed of a nearby river, and he promised that anyone who brought in an important find would be set free. For months before the excavation, the inmates were shown photographs of what they were going to discover. The first attempt proved that hope and greed can be inhibiting; after a week's work with pick and shovel, the only* hrön *unearthed*

[18] Kundera, Milan. (1999). *The Book of Laughter and Forgetting.* Perennial Classics. (Kundera, 1999)

> *was a rusty wheel, dated some time* **later** *than the date of the experiment. The experiment … was repeated at four high schools. In three of them, the failure was virtually complete; in the fourth (where the principal happened to die during the early excavations), the students unearthed – or produced – a gold mask, an archaic sword, two or three clay amphorae, and the verdigris'd and mutilated torso of a king with an inscription on the chest that has yet to be deciphered. Thus it was discovered that no witnesses who were aware of the experimental nature of the search could be allowed near the site. … Group research projects produce conflicting finds; now individual, virtually spur-of-the-moment projects are preferred. The systematic production of* hrönir *(says Volume Eleven) has been of invaluable aid to archaeologists, making it possible not only to interrogate but even to* ***modify the past, which is now no less plastic, nor less malleable than the future***. "[19] (My emphasis in bold.)

Borges's story is amongst other things about how a world constructed in language, and particularly in language presented as scholarship, or truth, can end up replacing reality. Towards the end of the story it is clearly suggested that such "idealism" leads towards totalitarianism.

George Bizos was in the inquest court in 1977 when the original autopsy report was handed up to the magistrate as Exhibit A, so he must have known that the Niemands' copy was just that: a copy. Yet he went to court in 2014 alleging that the Niemands' document was the original. This is an example of what Borges writes about:

> (37 years) *of idealism could hardly have failed to influence reality … one may, not infrequently, observe the duplication of lost objects. … the second person finds a second* (document)*, no less real, but more in keeping with his expectations. … The systematic production of hrönir … making it possible not only to interrogate but even to modify the past, which is now no less plastic, nor less malleable than the future.*[20]

For George Bizos and the Bikos, the Niemands' copy – a hrön - was more in keeping with their expectations – that the document was Dr Gluckmans' private report to the Biko family - and so they rode rough shod over the Niemands to vest the facsimile with sacred, mystical importance in myth-making. They began to write a new book, invent another history for the

[19] Borges, Jorge Luis (2000). "Tlön, Uqbar, Tertius Orbis" in *Fictions*. Penguin. pp19-20. (Borges, Tlon, Uqbar, Tertius Orbis, 2000)
[20] Ibid.

original one. They might do this with good intentions, but it is often said that the road to hell is paved with good intentions. Unfortunate outcomes can result from simple human failings.

For the Borgesian conundrum - whether the writer writes the story, or it writes him - see his essay “Kafka and his Precursors”:

> *If I am not mistaken, the heterogeneous pieces I have enumerated resemble Kafka; if I am not mistaken, not all of them resemble each other. The second fact is the more significant. In each of these texts we find Kafka's idiosyncrasy to a greater or lesser degree, but if Kafka had never written a line, we would not perceive this quality; in other words, it would not exist. The poem "*Fears and Scruples*" by Browning foretells Kafka's work, but our reading of Kafka perceptibly sharpens and deflects our reading of the poem. Browning did not read it as we do now. In the critics' vocabulary, the word 'precursor' is indispensable, but it should be cleansed of all connotation of polemics or rivalry. The fact is that every writer creates his own precursors. His work* ***modifies our conception of the past****, as it will modify the future.*[21] (My emphasis.)

Monolinear narratives

I confess to having felt indignant, hurt by the Bikos’ and Mr Bizos’s treatment of my clients, going beyond how I was professionally required to react. Apropos their protecting their monolinear version of the past, I felt called upon as a lawyer to debunk their claims to the truth and to advance my clients’ claims. As a writer I had to explore other truths, to bring other versions of the truth to the surface for people to see “all that is the case.” I saw Biko jnr. and Bizos as “custodians of memory/truth”, but they were also playing the role of gate-keeper of a particular truth, or of a set of people and their truth. They were trying to protect the set monolinear narrative of Steve Biko (whose model life is not dealt with in the work) and themselves from any risk of a parallel or counter-narrative, whether malicious or not. They resisted any modification of their past. One should be very suspicious of self-appointed custodians of the truth. Bizos was trying to control the truth; and as we have seen that will imply attempts at silencing other truths, or preventing them from emerging.

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[21] Borges, Jorge Luis. (1988). “Kafka and his Precursors” in *Labyrinths: Selected Stories & Other Writings*. New Direction Books. p. 20. (Borges, Kafka and his Precursors, 1988)

Monolinear narratives are inherently appropriative and lead to authoritarianism, totalitarianism and worse. To be free, we have to proliferate stories, different narratives about the same events, in a glorious profusion.

Apposite here is a quote from Jean-Francois Lyotard:

> *… the narratives we tell to justify a single set of laws and stakes are inherently unjust.*[22]

John Berger said "Never again shall a single story be told as though it were the only one*."*[23] But why then do some stories become more powerful than others? Foucault would say it is because they become part of a dominant discourse.

On this theme, Joseph Brodsky has said:

> *… By the same token, the surest defence against Evil is extreme individualism, originality of thinking, whimsicality, even – if you will – eccentricity. That is, something that can't be feigned, faked, imitated; something even a seasoned impostor couldn't be happy with. Something, in other words, that can't be shared, like your own skin – not even by a minority. Evil is a sucker for solidity*.[24]

J.M. Coetzee spoke of monolinear narratives in his exchange with Nadine Gordimer in 1988. The Congress of South African Writers and the *Weekly Mail* had retracted an invitation to Salman Rushdie (author of the then recently published *The Satanic Verses*) under pressure from the local Muslim community.

> *Gordimer and Coetzee both appeared on the same platform at an event hosted by the Congress of South African Writers. Salman Rushdie was supposed to speak with Coetzee, but the infamous fatwa had been issued a few weeks before and COSAW decided to ask Rushdie not to come, as they could not guarantee his safety. Gordimer was invited to speak instead. Coetzee spoke first, stating two basic points: that COSAW had cut a deal with the Muslim fundamentalists as regards to the Rushdie thing, and that "**Fundamentalism abhors the free play of signs, the endlessness of writing…. It stands (for) the one founding book, and after that - NO MORE BOOKS**" (Morphet). Gordimer, the vice president of COSAW, tried to defend her group's actions, stating, "Why must Salman Rushdie's life be sacrificed for*

[22]Lyotard, Jean-Francois, quoted in James Williams "Jean-Francois Lyotard" in Anthony Elliott & Larry Ray, *Key Contemporary Social Theorists* Oxford. Blackwell. (2002) pp210-214. (Williams, 2002)

[23] John Berger. (1992) *G.: a novel*. Vintage Reprint. (Berger, 1992)

[24] Brodsky, Joseph. (1984) "A commencement address." http://www.nybooks.com/articles/1984/08/16/a-commencement-address/. 8th February 2018. (Brodsky, 1984)

> *our principles?" (Morphet). "Gordimer's choice had been to write with the authority of history because history was to be the force that would deliver freedom - to herself and to (all) the pained and oppressed lives in a human community. For Coetzee, as we have seen, there is no "history," only "histories" - endless stories moving in multiple directions and presenting themselves to him as a writer - and they can offer no deliverance" (Morphet). The speeches were never published, but brought to the surface a debate between the two that had been gathering for years.*[25] (My emphasis in bold.)

It was with these thoughts in mind and a strong desire to strike back by proliferating multilinear narratives that I developed the dialogue concerning the *Odyssey* and submarines. Similarly, Clark burrows in the archive in search of other truths, while John Harrison Clark arrives unexpectedly to tamper with his past, reinvent it, cover his tracks by seizing the *Luangwa* manuscript and fight with Clark over its possession.

The call of ubuntu

With so many topical and eternal issues at play, and with criticism of icons of the South African scene, I felt that the work had to have a moral or ethical core, as did the legal case. Coming from an individualist (Western) outlook, I had to consider the increasing prevalence of ubuntu in our discourse, to which Nkosinathi Biko alluded in his affidavits and media interviews. Our courts have also begun to legislate ubuntu into the new *zeitgeist*, which affects us all.

A faint strand in *All That is the Case* is that of "whiteness" and what it means to us today. For example, what has happened to the old values and dignity and privacy in the context of the sale of the Steve Biko autopsy report? Demands are being placed on white people for - or whites would benefit by - self-examination of core values, rigidity, flexibility and the adoption of new values, for example ubuntu.[26]

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[25] See: http://wmich.edu/dialogues/texts/waitingforthebarbarians.html (15th August 2015) (Colonial and postcolonial literary dialogues, 2015) See also Attwell, David. (2015) *JM Coetzee and the life of writing*. Jacana. Johannesburg. pp98-100. (Attwell, 2015)

[26] The work touches on the aspect of the black body as an object in Western history and literature, an object to be bought and sold, lashed, confined and transported, worked and killed by whites/Arabs/colonialists/slavers etc. The counterbook is the burning of the wax effigy and Clark's decision to offer his (my) body for inspection, disclosing his whole health history, present medications and treatments and even inserting a new portal as an appendix, being his own health archive (a counterpoint to auctioning the pathologists' autopsy report on Steve Biko). If I were permitted to publish the book, I would incorporate a smartphone augmented reality application whereby a reader could scan an icon on the page to access clips, accompanying my doctors on their filmed gastroscopies and colonoscopies inside Clark. (This technology was used in: Kentridge, Matthew

What is ubuntu?

Ubuntu is either a fluid concept, or it has not been fully codified, but its essence is expressed in English as "I am because of who we all are", or "People are (only) people through other people." At face value, ubuntu appears to be a humanist philosophy, but to me it is still diametrically opposed to western individualism as enunciated by Brodsky above and countless others. The essence of ubuntu is more communalist, or communitarian, than individualist.

The central argument of the Bikos and Bizos is that auctioning the Steve Biko autopsy report is inhuman because it offends them, it hurts their feelings and it is an affront to their dignity. Not only that, but it offends the group or the community, as if to say "We are shamed, so you are too. If we cannot countenance it, you cannot do it." They would have the Niemands curtail their behaviour, stop the auction of Steve Biko's autopsy report and bring themselves into line with the group. That is their moral imperative.[27]

Archbishop Desmond Tutu has defined ubuntu as:

> *A person with Ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, based from a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.* [28]

In this version, it seems to be another formulation of the Biblical commandment that you should love your neighbour as yourself. In legal terms this boils down to a preference for processes of mediation and conciliation, which also require face-to-face conversation. Only if this fails, the remedy would have to be adversarial and legal.

More usefully for us, Mark Sanders analyses ubuntu in his work on the Truth and Reconciliation Commission (TRC) as follows:

(2015). *The Soho Chronicles: Ten Films by William Kentridge*. Seagull Books.) (Kentridge, 2015) This would be an example of reciprocity offered to the reader, removing the beam in my own eye before commenting on the mote in the other's eye.

[27] There is an aspect to reading the Steve Biko autopsy report that continues the study and objectification of the body in the condition of black people under subjugation. Achille Mbembe refers to the writing of Saidiya Hartman and Frantz Fanon, who write about the black body and respiration: "I cannot breathe, I am being suffocated", a chant taken up by UCT students in their "Rhodes Must Fall" campaign. See Hartman, Saidiya V. (1997) *Scenes of subjection: Terror, slavery and self-making in nineteenth-century America* (Race and American Culture series) Oxford University Press. (Hartman, 1997)

[28] Tutu, Desmond. (1999). "No Future Without Forgiveness." Image. (Tutu, 1999)

> *(6) … Ubuntu can be understood, provisionally, as a notion of reciprocity: a human being is a human being through other human beings. One is, it follows, responsible for the other in a way that, according to constitutional jurists, regulates and* ***limits the rights of the individual in favour of the collective*** *… The commission's report … does not re-create the fractured I-you reciprocity of the hearings, the uncanny identifications, and the movement of* ***self-displacement tacit in ubuntu*** *as its "founding" concept. …*
> *(7) … Long recognized in the space of contact between Africans and Christian missionaries, in the immediate post-apartheid period, ubuntu stood out not only as a political keyword and a new buzzword in participatory business management, but, under the leadership of Archbishop Desmond Tutu, supplied a unique ethical foundation for the Truth and Reconciliation Commission. …*[29] (My emphasis in bold.)

What Tutu seems to have tried is to root Christian love for thy neighbour in an African cultural concept, or vice versa. Did ubuntu figure explicitly in the contact between missionaries and Africans, or did Africans simply become assimilated into Christian attitudes? Steve Biko emphasised very strongly that communality is central in African culture, as opposed to Western individualism – something which in my view distinguishes him from Fanon, who resists the nativist views implicit in *négritude*.

An imperative for human conduct

Sanders continues:

> *(10) The Zulu phrase* umuntu ngumuntu ngabantu *has, in its tropic movement, an economy of singular and plural not captured in the banal "people are people through other people."* Umuntu *is the singular form of* –ntu*, or human being. The prefix* -ngu is copulative. Nga- *is a noun prefix for forming instrumental adverbs and combines with* abantu, *the plural of* –ntu, *to form* ngabantu. *A preliminary translation might thus be: a human being is a human being through human beings; or the being-human of a human being is realized through his or her being (human) through human beings. The* ***ontological figure of ubuntu*** *is commonly converted into an example and* ***imperative for human conduct****, as when as (Justice) Mokgoro notes, it "translates as humaneness … (or) morality." Converting ubuntu as ontology into an imperative for the subject of responsibility – to "respect … human*

[29] Sanders, Mark. (2007). *Ambiguities of witnessing: Law and literature in the time of a truth commission*. Johannesburg. Wits University Press. pp24-7. (Sanders, 2007)

> *dignity," and so forth –* ***conceals the dispropriation at the root of the concept****. It is this movement that Mokgoro tries to manage by characterizing it as "metaphorical." If there is a metaphorical shift, it is not incidental to the concept. Ubuntu depends on it, if it is not simply to be a prescription of the* ***precedence of the collective****; already, ubuntu is, as Judge Pius Langa's judgment seems to say, typically regarded as* ***antithetical to individual rights****. … The kind of dispropriation figured by ubuntu implies that being human, in an ethico-political sense, means that* ***one does not enter the public sphere with ready-made rights and duties*** *– any* ***rights and duties have to be claimed and exercised****. Making a claim to a right transforms the claimant and the one upon whom the claim is made.* ***Both parties are exiled from their "proper" selves****. Once one engages ubuntu, there is no going back to a more "fundamental sense," which would ground the subject of rights and responsibilities in prescribed duties and responsibilities, let alone do so within a predetermined communal hierarchy.* ***Ubuntu implies radical dispropriation*** *– that is why it has the transformative potential that all these writers sense and seek to appropriate and manage.*[30] (My emphasis in bold.)

This differs markedly from the Western idea that one enters the world with a bundle of readymade rights. If Sanders is right, ubuntu deviates fundamentally from the concept of individual human rights rooted in the idea of the autonomous individual that goes as far back as the Enlightenment. A question might be whether the concept as understood by Sanders, as implying a displacement of the self in an engagement with the other, can be reconciled with orthodox Western or Christian views on the individual, as Tutu tries to do. Sanders continues:

> *(11) It is not clear what sense of metaphor Mokgoro entertains when she writes that "[m]etaphorically, ubuntu expresses itself in umuntu ngumuntu ngabantu." The syntax of the phrase figures the essence (ngumuntu) of* ***umuntu as a synecdoche of abantu****. Yet the syntax posits or promises* ***umuntu apart from or prior to abantu****, although, as the phrase constates, umuntu has no "proper" sense until it has made the tropic passage by way of abantu. Ubuntu thus does not simply state that human individuality depends on membership of a collective, even if it is inscribed by a communalist interpreter.* ***The collectivity of abantu is contingent*** *– historical, so to speak – and, unlike the statement umuntu ngumuntu,* ***can claim no authority of identity or essence****. If umuntu awaits a propriety delivered to it as a synecdoche of abantu, abantu itself, being the contingency of umuntu's dispropriation, has no authority apart from being posited or promised by ubuntu*

[30] Ibid. p28.

> *phrased as umuntu ngumuntu ngabantu. A related logic comes to light when as Langa observes to be commonplace, "distraught members of society decry the loss of ubuntu" … Ubuntu takes the place of something absent,* ***something that may never have existed****, that lacks a proper name yet* ***is promised by being posited****. A distrait trace, phrased as a cry for something lost that may never have been, ubuntu could itself stand in for a "distraught member … of society*[31] (My emphasis in bold.)

Perhaps ubuntu is given life so that the "moral of the fable is not lost", so that it "makes sense of the past." Does the African orator, like *"every writer creat(e) his own precursors*"?[32] Does his oratory *"modif(y) our conception of the past, as it will modify the future"?*[33] Is ubuntu being used, like "(*t)he systematic production of hrönir … making it possible not only to interrogate but even to modify the past, which is now no less plastic, nor less malleable than the future"*?[34]

What is the relevance of all this to *All That is the Case*? Clark is the lone seeker, the iconoclast in the more Western tradition, who seeks truth where others do not, where they are scared to go. In doing so he treads on the toes of those who invoke communalism, ubuntu and the "precedence of the collective", which is "antithetical to individual rights." (See Sanders supra.) Here we have the basis for much of the conflict in the work, between an African collective tradition and a Western Enlightenment tradition, between "I am because we are" (ubuntu) and "I think, therefore I am" (Descartes).

On the other hand, John Harrison Clark, a decolonised man of Africa, respects human dignity and values humaneness and compassion, prefers persuasion and negotiation to confrontation and favours face-to-face encounters to resolve disputes rather than conflict and victory for the most powerful.[35]

Ubuntu as a hrön

As to ubuntu and the hrön, the latter it is a 'secondary object'. It is something somebody – perhaps even I myself – has lost; I find something that resembles that object, but it is not that object; yet I make it that object because it accords better with my expectations. One can then imagine a future constituted by the production of objects (or ideas) that ostensibly are rooted in

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[31] Ibid. pp25-28.
[32] (Borges, Tlon, Uqbar, Tertius Orbis, 2000) p20.
[33] (Borges, Kafka and his Precursors, 1988)
[34] (Borges, Tlon, Uqbar, Tertius Orbis, 2000) pp19-20.
[35] See *Afri-Forum and Another vs. Malema and others*, (The Equality Court, Johannesburg 12th September 2011). (Afri-Forum and Another vs. Malema and others, 2011)

the past, but in fact serve current preferences. From this perspective, ubuntu can be considered a hrön: something that claims to be an inheritance, but has become lost and is now rediscovered. For doesn't ubuntu make the claim that it is an essential part of an African past and way of life that has been destroyed by Westernised influences and is now rediscovered? So the future is shaped by shaping, or reshaping, the past. And this is done in the face of much evidence that the idealised African past, before the Europeans arrived, was in fact not a peaceful co-habitation. Would Shaka have been a proponent of ubuntu?

Perhaps this is the path that every new creed, ethic or religion follows? Borges suggests it:

> *Sometimes stranger and purer than any* hrön *is the* ur – *the thing produced by suggestion, the object brought forth by hope. The magnificent gold mask I mentioned is a distinguished example.*[36]

Borges is a postmodernist *avant la lettre* for playing with ontology and suggesting that the world is primarily constituted through text and narrative. He also attacks extreme idealism – in its philosophical meaning (e.g. Berkeley) – in which there is no 'world' outside of what's inside the mind. Thus do ideologies and religions survive or fade away.

I like this quote from Borges's "Tlön, Uqbar, Orbis Tertius":

> *"Their books are also different from our own. Their fiction is but a single plot, with every imaginable permutation. Their works of a philosophical nature invariably contain both the thesis and the antithesis, the rigorous* pro *and* contra *of every argument. A book that does not contain its counterbook is considered incomplete*."[37]

As an ethical necessity, the narrator's account and the dialogues deal with both the positive and negative aspects of Clark's character and conduct by including the counterbook. Certainly, Clark has blind spots, where he doesn't see that he too is guilty of doing what he criticises the Bikos and George Bizos for doing. The novel deals ironically with this by leaving the blind spots in place for the reason that they in turn prompt reactions that reveal the reader's own blind spots. From an ethical perspective, the writer justifies pointing out the motes in the eyes of the Bikos and George Bizos only by taking the beam out of his, the narrator's and Clark's own eyes. See Lyotard supra, which is heeded in the author's effort to be fair and just (for example through the dialogues), as opposed to the narrator's more biased, non-journalistic approach. This is a metafictional trait in this book.

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[36] (Borges, Tlon, Uqbar, Tertius Orbis, 2000) p20.
[37] Ibid. p18.

The Constitutional Court prescribes ubuntu

Regarding ubuntu further, the Constitutional Court recently handed down an important judgment on the renaming of streets in South Africa. It is fascinating in its treatment of ubuntu and history, memory and forgetting. The case is *City of Tshwane Metropolitan Municipality v Afriforum & another* [2016] ZACC 19. Justice Mogoeng CJ said:

> *[11] All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision* ***must embrace*** *the African philosophy of "ubuntu'. "Motho* ke motho ka batho ba bangwe*" or "*umuntu ngumuntu ngabantu*" (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected,* ***must also enjoy prominence in our approach and attitudes to all matters of importance in this country****, including name-changing.*[1] *(*My emphasis in bold*.)*

In this case, the court was split 9 – 2, all of the 9 being black judges and the 2 being the only white judges on the bench. In the minority judgement, Justice Cameron said:

> *[130] What does concern us is the broad statement … that any reliance by white South Africans, particularly white Afrikaner people, on any* ***historically-rooted cultural tradition*** *finds no recognition in the Constitution, because that* ***history*** *is inevitably rooted in oppression.*[3] *…*
> *[132] … Our country has a rich and* ***complex history****. It has meaning for each of us, in diverse ways, which the Constitution accommodates and respects. The complexities of* ***history cannot be wiped away****, and the Constitution does not ask that we do so.*[4] *…*
> *[137] Again, we agree that it would be beneficial if all South Africans approached matters with appreciation and respect for others. But the Constitution does not impose that as an obligation on citizens, either by enjoining the adoption of the* ***ubuntu*** *world-view, or*

[1] C*ity of Tshwane Metropolitan Municipality v Afriforum & another* [2016] ZACC 19 at [11], p6. (City of Tshwane Metropolitan Municipality v Afriforum & another, 2016)
[3] Ibid p48.
[4] Ibid p49.

> *otherwise. And, again, the Constitution does not allow the Judiciary to impose that obligation generally, ….*[5]
> *[139] Consider this. What is the effect of a failure to embrace* ***ubuntu****, by evincing appreciation of and respect for others? Does the person lose his or her constitutional protections? The first judgment seems to suggest Yes. This lies in its finding that even if Afriforum members had the kind of right they claimed – a sense of historic belonging and space – their loss of that sense can never qualify as irreparable harm. But this denial of that kind of possibly irreparable harm is not extended in our law to other infringements of rights whose loss cannot be quantified in material terms.*[6] (My emphasis in bold.)

Despite the views of Justice Cameron, the majority view prevails and the new law of South Africa is that South Africans – of whatever background - whose world-view is inspired by our constitutional vision "must embrace the African philosophy of ubuntu." It's interesting to read what Cameron J says about history and his comments here can be read in the light of what he said about tampering with history in *McBride v The Citizen*. (See below.)

Regarding the work, Clark ignores the cultural paradigm shift, the new moral imperative, fails to deploy ubuntu in his dealings with John Harrison Clark, the unexpected arrival, and maintains the lawyer's adversary approach in his dealings with others – all to his detriment and downfall. Like Cameron permits, perhaps, he feels justified in living his life as an iconoclast and an individualist. He does not heed the new *zeitgeist* and so has to succumb.

Power and privilege

Does text live, or can it die? Or can it be moved into an un-dead state, in existence, but unable to be quoted? Text behind a veil. In *Biko v Niemand*, if I did not take the advice of our advocate to delete dozens of pages of text and I retained it all in my clients' final answering affidavit, that text would be included in the papers in the court file and would fall into the public domain; any journalist or member of the public could go to the courthouse, draw the file and read the affidavits.[38] Moreover, they could quote and publicise the contents of the affidavits. The

[5] Ibid p51.
[6] Ibid p51.
[38] *City of Cape Town v South African National Roads Authority Limited & others* (20786/14) [2015] ZASCA 58 (City of Cape Town v South African National Roads Authority Limited & others, 2014)

applicants (the Biko family and trustees) might then apply to court under Rule 23 of the Uniform Rules of Court to have the irrelevant material struck out of the answering affidavit.

Suppose that the court did order the material to be struck out, my clients would have to attest to new, shorter affidavits that excluded that irrelevant text. The interesting question is: what would the status of the struck out text be, the text in the earlier affidavit? Certainly, the court could not read it or take it into account in deciding the case, but that would not alter the historical fact that the material had once been included in an earlier affidavit that was still lying as an artefact in the court file (perhaps already quoted in the mass media), bearing the registrar's purple ink date-stamp. Would it be some sort of zombie document, neither fully alive nor dead? Could the applicants argue that the deleted text, a physical artefact, should be treated as if it had never been written – and what would that mean? Could the genie be put back in the bottle?

The case of *The Citizen 1978 (Pty) Ltd. & others v McBride* is discussed in the work.[39] Briefly, in 1986 Robert McBride had carried out a bomb attack outside a bar and restaurant, killing three and wounding 69 others. We was found guilty of murder and sentenced to death, but he was granted amnesty in April 2001. The Citizen newspaper later expressed the view that he was a criminal and a murderer. Mr McBride sued the Citizen for defamation. He contended that receiving amnesty meant that the label "murderer" did not apply to him. The trial court found in favour of McBride and awarded him R200 000 in damages. On appeal, the majority of the Supreme Court of Appeal (SCA) upheld the substance of the High Court's findings on defamation. The SCA found that to call Mr McBride a "murderer" was false because he had received amnesty under the Reconciliation Act.[40]

In a further appeal to the Constitutional Court, the apex court found that:

> *… the Reconciliation Act did not make the fact that Mr McBride committed murder untrue. And that Act did not prohibit frank public discussion of his act as "murderer". Nor did it prevent his being described as a "criminal". The Court emphasised that protected comment need not be "fair or just at all", in any sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true*. [41]

[39] *The Citizen 1978 (Pty) Ltd and Others v McBride* (CCT 23/10) [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (The Citizen 1978 (Pty) Ltd. & others v McBride, 2011)
[40] Ibid.
[41] Ibid.

If the Roman emperor Caligula made his favourite horse Incitatus a senator, or consul, would it actually have been one? I would say not; no more could the Constitutional Court make him one, or un-happen Robert McBride's murders. And yet, that is exactly what the SCA went so far as to say, before the Constitutional Court finally scotched that idea. So, by including all the material in the text of my clients' answering affidavit, it would become part of the documents of public record, the historical record and would remain in the public domain, even though it could not be used in court. It could therefore be quoted in my work, *All That is the Case*, and anywhere else. This would be a worthwhile attack on Power and privilege, in its legal and ordinary senses.

From a novelist's perspective, I would be wise to include the text in the affidavit (as I did), even at the risk of it being struck out, but from a lawyer's perspective, it would risk annoying the judge and incurring costs for my clients (as it threatened to do). This poses interesting questions of praxis for novelists, lawyers and philosophers.

Conclusion

I was indignant about my clients' treatment in the court papers and in the public realm and wanted to bring their story (the counterbook) to the surface, yet I was reluctant to go against the grain by appearing to attack the settled account of the death of Steve Biko. My desire for truth to prevail proved to be the stronger urge, but I faced diverse obstacles to my project. I thought that this would prove interesting to the reader.

Before long, and in view of the criticisms I received in the seminars, I felt I needed a moral armature for my pursuit. I found this firstly in the figure of multilinear narratives, the need to thwart the tendency of monolinear narratives towards authoritarianism. (Berger; Coetzee.) Secondly, I looked at – but ultimately side-stepped - the blandishments of ubuntu to look at my approach to both the legal case and the novel anew. I discovered that my approach was informed more by individualism and the Enlightenment tradition than the moral precepts of ubuntu. In the face of new actors and the revived *hrön* of ubuntu, I was happy for the only outcome for Clark to be perdition. This is a quiet apology for being a man out of the new place and time.

I had to doubt myself from time to time: was I right to take on the case, was I right to turn its story into a book? The work is now there for the reader to decide.

Rather than writing a character-driven story in a recognised genre, I allowed my characters to be mute (the Niemands) while they were constructed from documents, media reports,

affidavits and other fragments, which do the work. The work does not fit into any single genre, but draws on several.

It is sometimes said that autobiographical material should not be allowed to stand in the way of the development of the narrative. In this case, the narrative could only advance as the case advanced. The autobiographical material steered the narrative.

At the conclusion of the work, I have not reached the conclusion. The legal case is ongoing and the literary work is interrupted until the last documents are filed at court and judgment is given, if ever. This leaves me and the work in something of a limbo and I have to ask myself if the structure is entirely successful – an account of a legal case that fades into a tale about a revenant and the protagonist's decline takes over.

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(For my more comprehensive bibliography, see the bibliography in the accompanying work *All That is the Case*.)

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