

## Media Freedom the Cornerstone of Human Rights in South Africa

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**ABSTRACT** Freedom of expression is a potential way of achieving a more adaptable and hence a more stable society, of maintaining the precarious balance between cleavage and necessary consensus. Courts must now ensure that common law is not locked within the limitations of the past and they must re-consider common-law rules within the new context so as to render them congruent with the fundamental values and principles. Strict liability of the press is now rejected as unconstitutional since it mars the free flow of information – a democratic principle. The onus rests on the media defendant to prove a defense excluding unlawfulness on a preponderance of probabilities rather than a mere evidential burden. The media defendant is a defamation action is often in the best position to know whether reasonable steps were taken to verify the information published and so to establish that its publication was reasonable.

### INTRODUCTION

Freedom of speech is the political right to communicate one's opinions and ideas using one's body and property to anyone who is willing to receive them. The term freedom of expression is sometimes used synonymously, but includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used. In practice, the right to freedom of speech is not absolute in any country and the right is in most cases, subject to limitations, as with libel, slander, obscenity, sedition (including, for example inciting, revelation of information that is classified or otherwise, ethnic hatred), copyright violation.

The Constitution of the Republic of South Africa 108 of 1996 has an influence on the development of press freedom. The court must develop the common law in accordance with the Bill of Rights and the values underlying it. The Constitution protects the right to equality and access to courts. Therefore it manifests unfairness in according public institutions special protection, which is not extended to private persons

with claims against the state. This may imply an absence of equal protection and benefit of the law.

Our entire social system is pervaded with a myriad of issues relating to freedom of expression. Freedom of expression is a method of achieving a more adaptable and hence a more stable society, of maintaining the precarious balance between cleavage and necessary consensus.

*Freedom of expression is a method of achieving a more adaptable and hence a more stable society, of maintaining the precarious balance between cleavage and necessary consensus (Baker 1978).*

John Manyarara describes press freedom as:  
*...Press freedom in the region is like the English weather: bright and sunny when you emerge from the comfort of your home – but if you are initiated, you will carry an umbrella because you are likely to need it on your way back. Therefore, my survey of press freedom in the region will be like a weather forecast: the forecast is always correct; it is the bloody weather which keeps changing (Duncan and Seleokane 1998).*

Section 16 of the *Constitution* 1996 states:  
*(1) Everyone has the right to freedom of expression, which includes-*  
*(a) freedom of the press and other media;*  
*(b) freedom to receive and impart information and ideas;*  
*(c) freedom of artistic creativity; and*

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- (d) *academic freedom and freedom of scientific research.*
- (2) *The right in subsection (1) does not extend to-*
- (a) *propaganda for war;*
  - (b) *incitement of imminent violence; or*
  - (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm* (Constitution 1996).

Freedom of expression is fundamental for democracy to succeed. It does, however, precipitate profound jurisprudential issues and complex problems that require dispassionate examination and a judicious weighing up of competing interests in a democratic body politic (Van der Westhuizen 1994).

The Constitutional Court has distinguished between the “core values: of freedom of expression” and “expression of little value” which is found at the periphery of the right in *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC). The latter type of expression receives less protection because its limitation by law is relatively easily justified, compared to limitations on expression at the core. Clearly political expression is at the core of the right. What are less clear are the other forms of expression at the core. In principle therefore, the specific inclusion of some forms of expression does not single them out for greater protection than other forms.

Chapter 2 of the *Constitution* 1996 contains no express hierarchy of rights and is affirmed by the Constitutional Court in *Khumalo and Others v Holomisa* 2002 (5) SA (CC0 (2002 (8) BCLR 771) nevertheless freedom of expression is a cornerstone of an authentic democracy since it is “the indispensable condition of nearly every other form of freedom”, without which other freedoms would not long endure and therefore *de facto* it must be ranked as a very important right (Carpenter 1995). In this regard a distinguished American judge. Mr Justice Cardozo, commented that “freedom of thought and speech is the matrix, the indispensable condition, of nearly every other form of freedom” (*Palko v Connecticut* 1937 302US 319).

#### **THE NATURE OF FREEDOM OF EXPRESSION**

Section 16(1) protects free expression, unlike the US First Amendment which is confined

to the “the freedom of speech”, a formulation that invites argument about whether certain forms of expressive conduct count as speech or not (De Waal et al. 2002).

Section 16(1) protects free expression and not only free speech (De Waal et al. 2002). Expression is a wider concept than speech and includes activities such as displaying posters, painting and sculpting, dancing and the publication of photographs. In principle, every act by which a person attempts to express some emotion, belief or grievance should qualify as constitutionally protected expression (De Waal et al. 2002).

Our entire social system is pervaded with a myriad of issues relating to freedom of expression. In the past a vast number of restraints inhibiting freedom of expression were adopted and used because of the oppressive nature of our body politic. The fact that South Africa is now functioning under a *Constitution*, that protects freedom of expression, implies that there will have to be changes, also in the area of freedom of the press, where the common law is not in place with the constitutional values of freedom, equality and human dignity.

Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. As regards the interpretation of the Bill of Rights, section 39 (3) provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

#### **The Limitation of this Right**

Although freedom of expression is not absolute, it is an imminent right or “a majestic guarantee” that is indispensable for an authentic democratic order because other fundamental freedoms depend on it (Devenish 1999).

Freedom of the press is not commonly found in Africa’s 54 nations, 7 (13%) boast a free press, 19 (36%) a partly free press and 28 (52%) a not free press.

Section 16(1) protects the “freedom of the press and other media”. The usual rationale for constitutional protection of press freedom is the important contribution made by the press to one

of the goals of freedom of expression in general: establishing and maintaining an open and democratic society. This means that the press is both protected by the right to freedom of expression and has duties to promote it on behalf of the rest of society.

Fundamental rights and freedoms are not absolute (Carpenter 1995). Their boundaries are set by the rights of others and by the legitimate needs of society. In the South African Constitution, a general limitation clause- section 36- sets out specific criteria for the restriction of the fundamental rights in the Bill of Rights. The existence of a general limitation clause does not mean that rights can be limited for any reason. "Limitation" is a synonym for "infringement" or, perhaps, "justifiable infringement", a law that limits a right infringes the right. However, the infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing the right in an open and democratic society based on human dignity, equality and freedom. In other words, not all infringements of fundamental rights are unconstitutional. The existence of a general limitation clause does not mean that rights can be limited for any reason. The reason for limiting a right needs to be exceptionally strong. The limitation must serve a purpose that most people would regard as particularly important (Meyerson 1997). But, however important the purpose of the limitation, restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other way in which the purpose can be achieved without restricting rights.

A free responsible press is one of society's greatest assets. The press is the artery through which a democracy's lifeblood flows, exposing corruption, dishonesty and maladministration. Thus the press has to be the watchdog, inciting the inert and curbing the over-eager. Effective freedom of press would be frustrated if freedom of expression is limited in such a way as to intimidate the media into not publishing (Klopper 1979).

It is not without significance that section 16 of the South African Constitution, after stating that 'everyone has the right to freedom of expression', includes 'freedom of the press and other media' under the general rubric of freedom of expression, and places these facets of the

right on an equal footing with the 'freedom to impart information and ideas, freedom of artistic creativity, academic freedom and freedom of scientific research.' *"The press should not be placed in a privilege or superior position to that of the individual on the basis that the press constitutes an essential bastion of free expression in a democracy. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture... If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy"* (National Media Ltd v Bogoshi) 1998 (4) SA 1195 (SCA).

### STRICT LIABILITY OF THE PRESS

The rationale behind the acceptance of strict liability of the mass media for defamation is to protect the individual who finds himself in a vulnerable position vis-à-vis the media. Defamation by the mass media obviously has far reaching consequences for the individual: the coverage given to the publication of the defamatory statement, the prejudice suffered and, so on (Burchell 1993).

The common law of delict requires a plaintiff in a defamation action for damages to show that a defamatory statement has been published with intent and knowledge of wrongfulness (*animus inuiriandi*). In the pre-democratic era, the courts alleviated the plaintiff's burden by presuming the presence of both intent and unlawfulness when defamatory material directed at the plaintiff was published to communicate information and comment, while obviously crucial in a modern democracy, should be no greater than that of an ordinary citizen to communicate. Judge Froneman in *Gardener v Whitaker* (1995 2 SA 672 (OK) 684H- 684J) refer to the deepest norms of the Constitution should determine whether the alleged breach of a fundamental right is private litigation involves explicit constitutional adjudication, or whether it could safely be left to the rules of the common law to involve, implicitly, in harmony with the values of the Constitution. This need of substantially equal treatment of all who communicate with others has been recognised (*Pakendorf en andere v De Flamingh* 1982 3 SA 146 (A) 156B).

In the past our courts construed defamation in our common law in a very wide manner, there-

by restricting press freedom. Strict liability of the press is now rejected as unconstitutional since it mars the free flow of information - a democratic principle (Burchell 1993). Thus, *bonafide*, published untruths in the political sphere is defensible if it is of public interest. The press serves public interest by making available information relevant to the community as well as criticism on all aspects of public, political and social activities (Burchell 1993).

Through freedom of expression, the press helps to establish true democracy. The contentious issues is the extent to which freedom of expression should be permitted and the manner in which the courts ought to balance it against equally fundamental rights and considerations applying in a democratic society such as *inter alia* the right to reputation or dignity, privacy, political activity, fair trial, economic activity and property (Burchell 1993).

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They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture... If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy (*Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) (2002 (8) BCLR 771).

### DEFAMATION

The law of defamation seeks to find a workable balance between two equally important rights: one individual's right to an unpaired reputation, and another's freedom of expression (or society's right to be informed)" (Burchell 1998). Over the years, there has been a constant tension between these competing rights. The law

of defamation lies at the intersection of the freedom of speech and the protection of human dignity, both rights protected by the Bill of Rights. In the case of *Payne Republican Press (Pty)* 1980 2 PHJ 44 (D). Judge Leon states "One must never lose sight of the fact that a man's reputation is his most prized possession whether he is a barrister, a clerk or a plumber. Without honour he is nothing". It is only proper that the law therefore should guard the right to one's good name and provide a remedy against those who violate the right.

Common law of delict requires a plaintiff in a defamation action for damages to show that a defamatory statement has been published with intent and knowledge of wrongfulness (*animus inuiriandi*). In the pre-democratic era, the courts alleviated the plaintiff's burden by presuming the presence of both intent and unlawfulness when defamatory material directed at the plaintiff was published to communicate information and comment, while obviously crucial in a modern democracy, should be no greater than that of an ordinary citizen to communicate. This need for substantially equal treatment of all who communicate with others has been recognised.

The occasion for the Supreme Court of Appeal to re-examine the common law of defamation came in 1998 in *National Media Ltd v Bogoshi* 1998 (4) SA 1195 (SCA) has recently set broad, realistic standards of reasonableness, or reasonable care, for the media in regard to the publication of matter, which could be defamatory or impair other personality rights of the individual.

While the judgment of Cameron J in *Holomisa* signifies a high-water mark in the recognition of the demands of freedom of expression in South Africa, Hefer JA's judgment in *Bogoshi* constitutes the watershed decision in the revival of the common-law emphasis on freedom of expression, in particular of the print and electronic media. The court, in rejecting the concept of strict liability for the media, re-emphasized the vital role of media freedom in a democracy, affirmed that there was no closed list of defences excluding unlawfulness, and stressed that although a high degree of care is required of editorial staff, even the publication of some falsity may be in the public interest in special circumstances.

Publication in the press of false defamatory statements of fact will be regarded as lawful if, in

all the circumstances of the case, it is found to be reasonable;... protection is only afforded to the publication of material in which the public has an interest (that is, which it is in the public interest to make known as distinct from material which is interesting to the public) *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A).

The decision in *Bogosh (National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1) relates both to the fault element of the delict of defamation and to the element of unlawfulness. So far as a fault is concerned, the usual rule is that one will be liable for defamation only if one has *animus inuiriandi*. The focus in *Bogoshi* was thus the question of fault (negligence as opposed to strict liability).

A fault criterion of negligence is necessary not only to address freedom of expression but also to emphasize the imperative that the media should not be treated in a way, which is substantially inferior to other defendants in defamation cases. In other words, fault is required for the liability of both the individual and the media defendant; intention is required for the former and negligence is sufficient for the latter. The distinction is more readily justifiable as a reasonable one than the now jettisoned distinction between intention-based liability for the individual and strict (no-fault) liability for the mass media. The press will thus not be held liable for the publication of defamatory material where it can show that it has been reasonable in publishing the material. Accordingly, the form of fault in defamation actions against the press is negligence rather than intention to harm.

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The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must also contribute to the exchange of ideas already all-

luded to. The press must act as the watchdog of the governed.

However, fault need not be in issue at all if in the particular circumstances anterior inquiry shows that the publication is lawful because it is justifiable. The novelty of the defence is to seek to shift the focus from the absence of *animus* to the absence of unlawfulness in order to escape liability. This defence is also valid under the common law. *Bogoshi* indicates that the reasonableness of the publication might also *justify* it. In appropriate cases, a defendant should not be held liable where publication is justifiable in the circumstances – when the publisher reasonably believes that the information published is true. The publication in such circumstances is not unlawful. Political speech might, depending on the context, be lawful even when false provided that its publication is reasonable. It determines whether, on grounds of policy, a defamatory statement should be actionable because it is justifiable made in the circumstances. It is for the defendant to prove all the facts on which he relies to show that the publication was reasonable and that he was not negligent. Proof of reasonableness will usually (if not inevitably) be proof of lack of negligence.

In *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 618E-F in a judgement presciently foreshadowing *Bogoshi* as regards the availability of a defence based on absence of negligence, Cameron J held that a defamatory statement “which relates to free and fair political activity” is constitutionally protected, even false, unless the plaintiff shows that, in all the circumstances of its publication, it was made reasonably made. The Court in *Holomisa* did not, however, consider it correct to import into our law the so-called *Sullivan* principle (New York Co v Sullivan (1964) 376 US 254 (1964) 11 L ed 2nd 686) that defendant press members will not be liable for defamatory statements made of public figures unless the plaintiff can show that the statement was made with actual malice. Such a principle would give far too little protection to the right of dignity. The approach that is preferred in both *Holomisa* and *Bogoshi* of reasonable publication.

Jonathon Burchell commenting on *Bogoshi* writes,

*The test of reasonableness or public (legal) policy is a supple criterion which can ensure that the law of delict is able to meet the needs of*

*a changing society... The accommodation of freedom of expression under the unlawfulness inquiry is now firmly acknowledged by the Supreme Court of Appeal* (Burchell 1998).

The central reasoning of the Supreme Court of Appeal in *Bogoshi* for confirming that the media defendant bore a full burden of proof on a preponderance of probabilities rather than a mere evidential burden. The media defendant in a defamation action is often in the best position to know whether reasonable steps were taken to verify the information published and so to establish that the publication was reasonable. It would be unrealistic to expect the plaintiff to prove facts that he or she has very little of discovering

It was with a great relief that the researcher read the judgment of Hefer JA in *Bogoshi* and enthusiastically support the conclusions thereof. These conclusions in *Bogoshi* are momentous and signify a profound, beneficial change in direction of the common law. Freedom of expression (including media freedom) at last received due recognition. A vital function of the press is to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion (Van der Walt 1998).

However, without wishing to appear churlish, the researcher want to focus on some blurred edges in the judgment. The central problem is whether a media defendant can rely on absence of knowledge of unlawfulness and negligence, that is, whether reasonable mistake or ignorance could be a defence. Negligence of the defendant may well be a determinant of the unlawfulness of the publication.

The central issue is not whether a media defendant can rely on a defence of absence of knowledge of unlawfulness due to negligence, but whether such a defendant can rely on a defence of absence of knowledge of unlawfulness not due to negligence. Reasonableness of the publication also includes an inquiry into whether the person detrimentally affected by the publication was given an opportunity to reply, at least after publication. The fact that a media defendant, who has channels of reply available, has not granted the opportunity to a person detrimentally affected by one of its application to reply to the allegations about him or she, after publication, will be a factor to be considered in

determining the overall unreasonableness of the publication.

But the reasonableness inquiry is not completely open-ended: it involves the balancing of other rights against freedom of expression, and what is most important, in the context of freedom, equality and dignity. A right to reply (rebuttal) could according to me attractive- it may provide a quick and effective remedy and, in most cases, would not interfere with any editorial discretion because very little editing appears to take place.

The question arises 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. The *Reynolds* decision in the Court of Appeal (referred to by Hefer JA in *Bogoshi*) was confirmed by the House of Lords (*Reynolds v Times Newspapers Ltd and Others* [1999] 4 All ER 609 (HL) [2001]2Ac 127).

The House of Lords declined to recognize a special defence of political speech. It differed in this regard from the Australian High Court decision in *Lange v Australian Broadcasting Corporation* (1997 189 CLR 520 (1997) 145 ALR 1) (a case approved by Hefer JA in *Bogoshi*), finding that the common law should not develop 'political information' as a generic category of information the publication of which attracts a qualified privilege irrespective of the circumstances. In *Lange v Atkinson* (NZ 1997 2 NZLR 22-Eds) (1997) Lord Nicholls pointed out: One feature of all the judgments, New Zealand, Australian and English, stands out with conspicuous clarity: The recognition that striking a balance between freedom of expression and protection of reputation calls for a *value judgment which depends upon local political and social conditions*. These conditions include matters such as the responsibility and vulnerability of the press.

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*the judgments, New Zealand, Australian and English, stands out with conspicuous clarity: The recognition that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions. These conditions include matters such as the responsibility and vulnerability of the press”.*

The High Court of Australia extended the concept of qualified privilege to cover the publication to the general public of untrue defamatory material in the field of political discussion. But the Court was understandably not prepared to grant the media *carte blanche* in the dissemination of material of that kind.

In *Khumalo v Holomisa* 2002(3) SA 38(T) the Constitutional Court put the question as follows “whether, to the extent that the law of defamation does not require a plaintiff in a defamation action to plead that the defamatory statement is false in any circumstances, the law limits unjustifiably the right to freedom of expression as enshrined in section 16 of the Constitution”. The enquiry proceeds as follows:

- ♦ The right to freedom of expression is not principally interested in protecting false and injurious statements.
- ♦ The common law accepts that truth is central to the balance between dignity and free expression. Proving the truth or falsity of a statement must be the defendant’s problem.
- ♦ Putting the risk of the failure to establish truth on the defendant will result in a “chilling effect” on the publication of information.
- ♦ The “chilling” effect: is reduced by the defence of reasonable publication that was invented in *Bogoshi*.
- ♦ Burdening either plaintiffs or defendants with the onus of proving the statement to be true or false, in circumstances where proof one way or the other is impossible, therefore will result in a zero-sum game.
- ♦ The defense of reasonable publication developed in *Bogoshi* avoids a zero-sum result and strikes a balance between the constitutional interests of plaintiffs and defendants.

*Khumalo* can be read as holding that the Bill of Rights must be applied directly to the common law wherever appropriate. The Constitution reflects the wishes and aspirations of

society and its principles must now shape the common law.

### **RIGHT TO DIGNITY AND RIGHT TO FREEDOM OF EXPRESSION**

**Section 10 – States Everyone has the Right to Dignity:** this right includes “inherent dignity and the right to have their dignity respected and protected”. Human dignity is a founding value of our Constitution along with equality and freedom. “Human dignity is the source of a person’s innate rights to freedom and to physical integrity” (De Waal et al. 2002). In a case before it in 2002 the Constitutional Court stated that the law of defamation lies at the intersection of freedom of speech and the protection of dignity. In another case before the Constitutional Court it held that the onus of showing that a publication was reasonable (that is, a painting or media statement) was on the media agent (or artist) to show that the publication was reasonable and not negligently made.

All rights are interpreted generously and purposively along the backdrop of the underlying values of the Constitution. It must ensure that common law principles reflected the more of society. The decision of the court that refashions the common law must also reflect the wishes, often unspoken, and the perceptions, often but dimly discerned. All rights are limited as above and in addition can be limited both generally and then if reasonable and justifiable in “an open and democratic society based on human dignity, equality and freedom” (Chapter two of the Constitution of South Africa). The importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.

So ask yourself the right questions. Are your rights being protected? Should your rights be limited? If so, in what justified proportion? Do governments have the right to limit your rights to protect the dignity of a political office and/or secrets of state in the interests of political stability or national security?

Twenty- four years after the decision in *Pakendorf v De Flamingh* 1982 3 SA 146 (A), where strict liability of the press was apply, the *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 agree that strict liability has a negative impact on press freedom. There

must be a balance between the right to dignity, including reputation, and the right to freedom of expression. Both rights were now given special protection in the bill of Rights, and the question was whether a class of people (members of Government) had to lose the right to the protection of their dignity and reputation in the interest of public information and debate.

In *Mthembi-Mahanyele* the Cabinet Minister had asserted that words published by a certain weekly newspaper in its annual 'report card' on the performance of Government Ministers were defamatory of her. She pleaded that the respondents had acted recklessly, not caring whether the contents were true; and that they took no reasonable steps to establish whether the statement made was true. The Court had for reasons of convenience referred to Cabinet Ministers, but that could not be taken to mean that other members of Government, or parliamentarians or officials of State had to be treated differently (*Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 332).

Freedom of expression in political discourse is necessary to hold members of Government accountable to public and some latitude must be allowed in order to allow robust and frank comment in the interest of keeping of society informed about what Government does. Errors of fact should be tolerated, provided that statements were published justifiably and reasonably. That does not mean that there should be a license to publish untrue statements about politicians. They too have the right to protect their dignity and their reputations.

As Burchell puts it:

*There are limits to freedom of political comment, especially in regard to aspects of the private lives of politicians that do not impinge on political competence. Politicians or public figures do not simply have to endure every infringement of their personality rights as a price for entering the political or public arena, although they do have to be more resilient to slings and arrows than non-political, private mortals* (Burchell 1998).

But where publication is justifiable *in the circumstances* the defendant will not be held liable. Justifiability is to be determined by having regard to all relevant circumstances, including the interest of the public in being informed; the manner of publication; the tone of the material published; the extent of public concern in

the information; the reliability of the source; the steps taken to verify the truth of the information (this factor would play an important role too in considering the distinct question whether there was negligence on the part of the press, assuming that the publication was found to be defamatory); and whether the person defamed has been given the opportunity to comment on the statement before publication (*Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 332). In cases where information is crucial to the public, and is urgent, it may be justifiable to publish without giving an opportunity to comment.

The SA National Editors' Forum (Sanef) welcomes the majority decision of the Constitutional Court in upholding the Citizen newspaper's appeal in a defamation case against former Ekurhuleni Metro police chief, Robert McBride as a victory for freedom of expression and freedom of the media.

The High Court and the Supreme Court of Appeal had found in favor of McBride's claim that he had been defamed by the newspaper when it called him a murderer for planting a bomb in Magoo's Bar in Durban which killed three women and injured others during the struggle. However, the majority 5-3 judgment by the Constitutional Court found that the Reconciliation Act did not turn the fact that McBride committed murder into an untruth because he had received amnesty from the Truth and Reconciliation Commission.

The effect of the Supreme Court of Appeal judgment, according to journalists, was not only to expunge the murder conviction from criminal records but also from history. It had the additional effect of making a reference to McBride as a "murderer" a defamatory statement.

The court found that the Act did not prohibit frank public discussion of his conduct as a "murderer" and did not prevent his being described as such or a "criminal".

Sanef notes in 2013 the important point of principle established by the Constitutional Court that published criticism was protected even if it were extreme, unjust, unbalanced, exaggerated and prejudiced so long as it expressed an honestly-held opinion, without malice, on a matter of public interest on facts that were true. The court stated that protected comment need not be "fair or just at all" in any sense in which these terms were commonly understood.



The Citizen had campaigned against McBride's appointment as Ekurhuleni police chief on grounds that he was a criminal and murderer and thus unsuitable for the post. The court ruled that despite the newspaper's articles being "vengeful and distasteful", it was entitled to protected comment (*The Citizen 1978 (Pty) Ltd v McBride* 2010 ZASCA 5; 2010 (4) SA 148 (SCA); [2010] 3 All SA 46 (SCA)). While the Court recognised a number of important fundamental principles that should be considered in dealing with the South African past, it was its reinforcement of the primary value of the right to truth which FOIP feels is the most valuable in a political environment which is increasingly favouring the shadows of secrecy. The main two claims of defamation made by Mr McBride - that he was untruthfully accused of being a 'criminal' and 'murderer' - were dismissed by the Court. The predominant grounds for the dismissal were that the Citizen had made fair and substantiated comments that were in the public interest because of their capacity to facilitate political debate. Further, and at great length, the Court affirmed that the Promotion of National Unity and Reconciliation Act could never be used as an attempt to suppress the truth and discussions of the atrocities of our past. Instead, the goal of the Act is fundamentally one of enhancing openness instead of stepping away from it. The court upheld the Citizen's main appeal, dismissing McBride's cross-appeal, but found that the paper had defamed McBride by claiming falsely that he was not contrite over the effects of the bombing. It awarded McBride damages of R50,000.

Sanef, who supported the Citizen's appeal as a friend of the court (*amicus*), believes that the finding will aid newspapers in their battle against defamation claims and strengthen the principles of freedom of expression and freedom of the media.

Freedom of Expression Institute (FXI) has noted with growing concern the ever deteriorating state of the community media sector in South Africa. The FXI has recorded an increase in cases of internal mismanagement and negative external interference in the everyday running of community media. The institute wishes to buttress the point that under the three tier system, the public service media and community media have to be independent of both economic and political interference. Regrettably, this cannot

be said with regard to the South African situation. The challenges facing the national broadcaster (SABC) are just one example of the failure of the three tier system which is accepted as a minimum requirement internationally.

#### **FREEDOM OF EXPRESSION UNDER ATTACK IN SOUTH AFRICA**

Freedom of expression is a fundamental human right guaranteed by the Bill of Rights will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy. The key role of communication is in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy.

The South African government's assault on media freedom over the last 18 months has also emboldened other African states to further clampdown on free speech. Only eight of Africa's 54 countries have any legislation guaranteeing freedom of expression (Kretzmann 2011). Two months ago the Parliamentary Committee tried to rush attempt to complete the Protection of Information Bill but the Freedom of Expression Institute stood up and blocked the Bill in despair in the face of government pressure. It will replace the Protection of State Information Act 1982, which currently regulates these issues. The main demands are that the Bill should:

- ♦ Limit secrecy to core state bodies in the security sector
- ♦ Limit secrecy to strictly defined national security matters. Officials must give reasons for making information secret.
- ♦ Do not exempt the intelligence agencies from public scrutiny.
- ♦ Do not apply penalties for unauthorized disclosure at large.
- ♦ An independent body appointed by Parliament and not the Minister of Intelligence as the arbiter of decisions about what may be made secret.
- ♦ Do not criminalize the legitimate disclosure of secrets in the public interest

In contradiction with the preamble to this Bill, which states that the aim is to "promote the free flow of information within an open and democratic society without compromising the security of the Republic", the bill will not only ham-

per the collection and the disclosure of information, but also reward those who do with lengthy jail sentences. Any head of a state body, or duly authorized delegate of a state body, has the power to classify a document, a record or a non-physical item, as confidential, secret or top secret. A well-known example was when Zuma was highly infuriated after the appearance of a Zapiro cartoon depicting him with a shower on his head during his rape trial. The cartoon, which was born out of Zuma's own claim to have showered to diminish the risk of AIDS after having intercourse with the HIV-infected plaintiff, saw Zuma initially suing the cartoonist for R20 million- and amount that has subsequently reduced to R2 million. If the new Act was in place at that time, the government would have had the withdrawal to prevent the publication of the cartoon, to withhold information from the press and to censor any reference to his trial before it would allow going into print.

The right to freedom expression is fundamental to the existence and consolidation of democracy, Central to freedom of expression, is freedom of the press. Sadly though, it is this critical aspect of democracy that is so frequently undermined and attacked by government.

A recent example of problems besieging the community media sector is internal censorship taking place took place at Radio Grahamstown, a local community radio station. The station manager, Pamela Zondani is reported to have been heard by listeners shouting at the presenter, Makhaya Mzongwana and his guests to shut down the program Masabelane, a public service discussion. Zondani allegedly threw out three guests from the Unemployed People's Movement (UPM) as well as the presenter while there was an on-going debate on the issue of RDP housing distribution in the Makana Municipality.

Such behavior is alleged as an act of censorship restricting the major function of community radio as an advocacy mouth piece for the community and its service delivery issues. In addition, the presenter is now allegedly being monitored while on air curtailing the right to freedom of expression as enshrined in section 16 of the Constitution.

The FXI (Freedom of Expression Institute) is a not-for-profit organisation that was established in 1994 to protect and foster the right to freedom of expression and to oppose censorship. Its vision is a society where everyone en-

joys freedom of expression and the right to access and disseminate information) views the challenges facing community media as stemming from the flawed funding structure. The highly bureaucratic and complicated funding structure that involves funds having to go through municipal and council channels compromises the independence of community media and exposes such media outlets to undue political interference. In established democracies funding for public and community media is channeled through oversight bodies like parliament. By virtue, community media is meant to be an alternate voice which is independent of the government and its structures.

FXI believes community media has to be empowered and allowed to open up debate among the members of particular communities so as to give their issues prominence as these may not be adequately captured by mainstream media. The Institute will continue to engage the sector with the view to further capacitating community media to effectively discharge their mandate. The FXI will also continue to offer legal advice and assistance to community media who often face intimidation through frivolous law suits whose primary intention is to silence the voices of the people.

Artist Brett Murray's controversial painting showing Zuma with his fly open and penis exposed, sold for R136 000 at the Goodman Gallery in Johannesburg.

ANC spokesperson Jackson Mthembu said the "disgusting and unfortunate display of the president" is insulting, and the party is taking the matter to court.

It has also been investigated that this distasteful and vulgar portrait of the president has been displayed on a weekend newspaper and its website, we again have instructed our lawyers to request the said newspaper to remove the portrait from their website."

The African National Congress (ANC) expressed outrage at an artist's depiction of President Jacob Zuma, saying the representation of its leader is distasteful and indecent.

Murray's so-called piece of art dents the image and the dignity of Zuma as both president of the ANC, president of the republic and as a human being, Mthembu said.

The ANC also took exception to a second portrait, which displays the party's logo "with-

out the permission of the ANC”, with the inscription “FOR SALE” on it.

“Both these portraits are a clear calculation to dismember and denigrate the symbols and the representative of the ANC, chief amongst them, the president of the ANC.”

Mthembu said the ANC believes in both freedom of the press and artistic expression, but views “the vulgar portrait and the dismembering of the ANC logo by Brett Murray an abuse of freedom of artistic expression and an acute violation of our constitution, apart from being defamatory.

The ANC and President Jacob Zuma are seeking an urgent court interdict against the newspaper and the gallery to prevent the painting by Brett Murray from being published or exhibited. The painting, which depicts Zuma posing with his genitals exposed, has pitted two constitutional rights against one another. The ruling party and Zuma have argued the artwork infringes on the president and his office’s constitutional right to dignity and privacy, while both the newspaper and gallery argue their right to exhibit and publish the painting is protected by the constitutional right to freedom of expression.

The matter was originally supposed to be heard in front of Judge Fayeeza Kathree-Setiloane on Tuesday but Deputy Judge President Phineas Mojapelo ordered it to be heard in front of a full Bench due to “national importance. Judges Neels Claassen and Lucy Mailula were deputed for hearing of the matter. Malindi attempted to argue before his breakdown that despite many constitutional rights – such as access to water and sanitation – not being fulfilled, it did not usurp their importance. He argued that even though the painting’s distribution would be difficult to control as it was already in the public space and being disseminated via the internet, an apology from both the gallery and newspaper would go a long way to “assuaging the president’s wounded feelings”. “Everyone has a right to dignity, regardless of their position as president or otherwise,” Malindi told the court.

There have been continuous debates whether the painting was racist or not, as labeled by the ANC and Zuma. Claassen said it was a non-issue because some black people found it racist, while others did not. Malindi said that although it may not be deemed racist by some, Murray should have taken cultural sensitivity into account when he produced the painting.

During court proceedings Malindi was also forced to concede dignity and privacy rights did not apply to Zuma’s office as president of the country or the ANC as they only inherently apply to a person or being. The case was postponed and is set to be heard in front of a full Bench over three days. The case was withdrawn by the Zuma parties.

While South Africa is described as a country where freedom of expression is a reality, its ranking was affected by the threat posed by the Protection of State Information Bill to investigative journalism in the country. After a year of debate, the contentious, amended bill was passed by the National Assembly in April 2013.

State Security Minister Siyabonga Cwele told parliament that the bill was aimed at protecting sensitive state information and the information of ordinary people, such as marriage certificates and business registrations. The bill gives the minister control over the classification of information.

The government insists that whistle-blowers would be protected and no one will be able to use the bill to hide corruption. Opponents to the bill, which include human rights and legal experts, opposition parties and civil society bodies, say it preferences state interests over transparency and freedom of expression.

## CONCLUSION

Freedom to speak and write about public questions is as important to the life of our government as is the heart of the human body. Freedom of expression is, therefore, a part of the very definition of self-government; the process of free discussion is required no matter whether the process leads to the truth or not. In fact, this privilege is the heart of our government! If that heart be weakened, the result is debilitation; if it be stilled, the result is death. “It is reporting that puts the needs of society first and everything else; including the need for the media to make profit, last... Responsible reporting is reporting that reflects reality as it is not as journalists and those propping them up would like it to be.

If one is serious about protecting freedom of expression, a right of rely given to a person about whom injurious statements have been made is a most attractive way of continuing the debate, while giving the person whose personality rights have been impaired an inexpensive and

expeditious way of correcting the record. Midgley suggests legislative intervention to empower a court to order the defendant to grant the plaintiff an opportunity to reply in such conditions as it may deem fit. Midgley also suggests that an offer to grant a reply should be considered a mitigating factor.

The right has its greatest impact in regard to the correction of injurious statements in the media, but could also operate effectively in publications via the Internet. The benefits of continuing the debate by providing an opportunity for reply to the person detrimentally affected by a publication can in fact easily be incorporated under a broad common-law criterion of the unlawfulness, or the unreasonableness, of the publication. The fact that a media defendant, who has channels of reply available, has not granted the opportunity to a person detrimentally affected by one of its publications to reply to the allegations about him or herself, before or even after publications, will be a factor to be considered in determining the overall unreasonableness of the publication.

Now that South African Supreme Court of Appeal in *National Media Ltd v Bogoshi* has affirmed the parameters of reasonableness contained in the unlawfulness element of liability in the *action injuriarum* and the reasonableness issues in a negligence-based system of fault, ethical norms would carry weight in determining the ultimate criterion of the legal convictions of the community or the bounds of legally determined unreasonable conduct.

To become self-aware, people must be allowed to hear a plurality of opinions and then make up their own minds. They must be allowed to say, write and publish whatever they want. Freedom of expression is the most basic, but fundamental, right. In absence of it human beings are reduced to automatons.

### RECOMMENDATIONS

Freedom of expression – in particular, freedom of the press- guarantees popular participation in the decisions and actions of government, and popular participation is the essence of our democracy.

The Constitution guarantees “freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom

of scientific research.” However, it also includes constraints, and freedom does not extend to “propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender, or religion and that constitutes incitement to cause harm.” The judiciary in South Africa is independent. The *Constitution* 1996 requires the government to respect the principle of democracy when dealing with citizens. Therefore, in a democratic system of government, the relationship between state and the citizen is not simply a power relationship. Rather than state power, the consent of the governed is the defining characteristic of the relationship.

In *Holomisa* (1996) Cameron said:

*Our Constitutional structure seeks to nurture open and accountable democracy. Party to that end, it encourages and protects free speech and expression, including that practised by the media. If the Constitution affords is to have substance, there must in my view be some protection for erroneous statement of defamatory fact, at least in the area of ‘free and fair political activity’ (Holomisa v Argus Newspaper Ltd 1996 2 SA 588 (W)).*

In a system of democracy dedicated to openness and accountability, as ours is the especially important role of the media, both publicly and privately owned, must, in the researcher’s opinion be recognized.

South Africa ranks 52nd out of 179 countries in Reporters Without Borders’ (RSF’s) 2013 index of press freedom – down from 42nd position the year before. Within Africa, South Africa comes in sixth position, after Namibia (19th), Ghana (30th), Botswana (40th), Niger (43rd) and Burkina Faso (46th). Malawi, up by 71 places to 75th, “registered the biggest leap in the index, almost returning to the position it held before the excesses at the end of the [Bingu wa] Mutharika administration,” reported the organisation. Ivory Coast (96th, up 63 places), has emerged from its post-electoral crisis between the supporters of Laurent Gbagbo and Alassane Ouattara with its best position since 2003.

Our entire social system is pervaded with a myriad of issues relating to freedom of expression. Courts are obliged to consider the Bill of Rights and the values embodied therein, when assessing whether conduct is wrongful. The Bill of Rights is therefore a medium or prism through which the light of every aspect of the law of

delict will eventually be refracted. Limitations on freedom of expression should only be justifiable when it can show that the non-limitation would probably cause specific harm.

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