

## The Boundaries of Freedom of the Press in South African Law

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### Abstract

*Our entire social system is pervaded with a myriad of issues relating to freedom of expression. A free responsible press is one of society's greatest assets. 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 press should, however not be placed in a privileged or superior position to that of the individual on the basis that the press constitutes an essential bastion of free expression in a democracy. 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 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 its publication was reasonable. 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 be recognised. 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.*

**Keywords:** Freedom of expression, unlawfulness, reasonable, democracy and values.

### 1. Introduction

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). The barometer by which the extent of press freedom existing in a country can be measured with reasonable accuracy is that country's political climate.

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
  - (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).

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).

## 2. The Nature of Freedom of Expression

Section 16(1) protects free expression and not only free speech (De Waal, Curie and Erasmus, 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, Curie and Erasmus, 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*, which 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 step with the constitutional values of freedom, equality and human dignity.

## 3. The Limitation of This Right

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. The reason for limiting a right need 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).

## 4. Strict Liability of the Press

In the past our courts construed defamation in our common law in a very wide manner, thereby 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, 1998). Thus *bona fide* published untruths in the political sphere are 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 are 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).

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)).

## 5. Defamation

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 iniuriandi*). 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 (*Pakendorf en andere v De Flamingh* 1982 3 SA 146 (A) 156B).

The Supreme Court of Appeal in *National Media Ltd v Bogoshi* 1998 (4) SA 1195 (SCA) has 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.

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-emphasised 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 (ie 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 *Bogoshi* (*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. Insofar as fault is concerned, the usual rule is that one will be liable for defamation only if one has *animus iniuriandi*. 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.

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. *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.

In *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 618E-F 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 great relief that I read the judgment of Hefer JA in *Bogoshi* and I 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, I 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, i.e. 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 applications to reply to the allegations about him or her, 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 be 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] 2 AC 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) 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".

## 6. Right to Dignity and Right to Freedom of Expression

Twenty four years after the decision in *Pakendorf v De Flamingh* 1982 3 SA 146 (A) where strict liability of the press was applied, 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).

In the matter of *The Citizen 1978 (Pty)Ltd & others v McBride* [2011] JOL 27088 (CC) where judgment was handed

down in the Constitutional Court of whether a person convicted of murder, but granted amnesty for the offence, be called later a "criminal" and a "murderer" in comment opposing his appointment to a public position. McBride lost his drawn-out defamation case against *The Citizen*. McBride sued the paper after a series of articles and editorials questioned his suitability for the post of police in 2003. The articles were published in *The Citizen* in September and October 2003. He sued for damages for R3,6 million and demanded a front page apology for alleged defamation and impairment of dignity. The Constitutional Court judgment ruled that amnestied killers can still be called "murderers".

Once it is accepted that freedom of expression is just another human right of no more or less importance than dignity and equality, for instance, then the crucial question becomes in a clash between one person's dignity (in the sense of individual autonomy of the utterer of the racial insult) and another's (in the sense of respect due to the victim of the insult, or his or her self-esteem), which is to triumph?

Freedom of expression in political discourse was necessary to hold members of Government accountable to public. And that some latitude must be allowed in order to allow robust and frank comment in the interest of keeping of society informed about what Government did. Errors of fact should be tolerated, provided that statements were published justifiably and reasonably. That does not mean that there should be a licence 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.

## 7. 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 an 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. 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 criminalise the legitimate disclosure of secrets in the public interest
- Whistle-blowers who unlawfully and intentionally disclosed classified state information in contravention of the Act would be guilty of an offence and liable to a fine or imprisonment (for a period not exceeding five years), except where such disclosures reveal criminal activity, including criminal activity for ulterior purposes.

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 hamper 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 authorizes 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 from Zuma's own claim to have showered to diminish the risk of AIDS after have 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 trail 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.

The Bill remains deeply flawed. But for the first time, there is real light at the end of the tunnel. On a policy level, the once-yawning gap between the ruling party and civil society is all but bridged. Now comes the hard part: to turn messy democratic success into good law (<http://mg.co.za/article/2012-05-11-secrecy-bill-light-at-end-of-tunnel>).

## 8. Conclusion

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* Cameron J 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 my opinion, be recognised.

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.

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* (Nel, 1998).

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