

## The Constitutional Protection of Media Freedom

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**Okyerebea Ampofo-Anti**

**Associate, Webber Wentzel**

**Email: [okyerebea.ampofo-anti@webberwentzel.com](mailto:okyerebea.ampofo-anti@webberwentzel.com)**

**Tel: 011 530 5607**

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1. Good morning ladies and gentlemen.
2. The current debate on media freedom and what some perceive as an onslaught on the media, is centred around one principle issue; what are the limits of freedom of expression and by extension, what are the limits of media freedom? This central issue finds expression in many questions which are not always easy to answer:
  - 2.1 Should journalists be permitted to decide when sensitive state information ought to be disclosed to the public or is that a discretion which only state officials should be empowered to exercise?;
  - 2.2 Is it acceptable when the personal lives of politicians and celebrities are splashed across the front pages of newspapers?;
  - 2.3 is it disrespectful for the state president to be depicted with a shower affixed to his head, and even if it is, should the norms and values of any sector of society be used to limit the expression of others?;
  - 2.4 Although journalists play a key role in exposing wrongdoing by both public officials and people in the private sector, what should happen when journalists get it wrong? Can a reputation that was destroyed on the front page of a newspaper be "restored" in a small caption on page 2?



**Webber Wentzel**  
Attorneys

3. Before we seek answers to the above questions, or begin to delve into any discussion on the limits of freedom of expression, it is vital that we first explore the reasons which pertain to why the right to freedom of expression is a universally protected human right which has, as a result, been enshrined in section 16 of our Constitution. I can do no better than to quote the words of Justice Kate O'Regan in the judgment of the Constitutional Court delivered in **NM v Smith**

**Freedom of expression is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible, but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy. Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them.**

4. These words tell us that freedom of expression is valuable for several reasons which are indispensable to our Constitutional project:
  - 4.1 Firstly, freedom of expression is intrinsically valuable. The ability to say what you have to say in the way that you want to say it is an affirmation of your personhood and deeply linked with the right to dignity which is a cornerstone of our Constitution;
  - 4.2 Secondly, freedom of expression is essential to the enjoyment of many of the other rights protected in the Constitution. In **National Media Ltd v Bogoshi** the Supreme Court of Appeal adopted the words of the US Supreme Court of Appeal in **Palko v State of Connecticut** where it stated that the right to freedom of expression is the "*matrix, the indispensable condition of nearly every other form of freedom*";
  - 4.3 Thirdly, freedom of expression is a fundamental pre-requisite for democracy. The role played by the media in this regard is a vital one and has been



emphasised by our highest courts on numerous occasions. In **South African Broadcasting Corporation v Director of Public Prosecutions** the Constitutional Court stated that:

**A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.**

5. The protection given to freedom of expression in our Constitution and the generous interpretation of this right, adopted by our courts, illustrates the sharp break that our society consciously chose to make with the repressive system of thought control, the fanatical obsession with secrecy, the complete lack of government accountability and the suppression of any ideas considered to be "subversive" which characterised the apartheid state.
6. Indeed, our courts have adopted such a generous interpretation of the ambit of freedom of expression that the Constitutional Court has stated that any expressive conduct which does not fall within section 16(2) of the Constitution (i.e. hate speech, incitement to imminent violence and propaganda for war) falls squarely within the boundaries of protected freedom of expression. For example, in **De Reuck v Minister of Safety and Security** the Constitutional Court was willing to accept that child pornography is a form of freedom of expression because, and I quote, "**the right applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb**" However, the court found that limiting the freedom of expression by making the possession of child pornography an offence was justifiable.



7. In light of the approach of our courts, if a media tribunal which requires every journalist to subject him or herself to its jurisdiction is established, which has the power to issue sanctions for non compliance with certain rules it will be considered a limitation on the right to freedom of expression and the state will be required to establish, in terms of section 36 of the Constitution, whether such a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
8. There is a lot more that I could say about the approach to freedom of expression by our courts, but given my time constraints, I want to focus on one particular issue which has been raised in the ANC's Discussion Document on Media Transformation, Ownership and Diversity, which merits further consideration – this being the idea that there is a need to put into place a mechanism that strikes a proper balance between the right to dignity and privacy on the one hand and media freedom on the other. The media already operates in a legal environment that regulates what can and cannot legitimately be published. Individuals who feel the media has encroached upon their rights or that they have a valid complaint can sue for defamation, infringement of dignity or breach of privacy.
9. In this regard it would prove instructive to look at some of the developments that have occurred in the field of defamation and privacy law which shed light on what our courts have had to say about balancing media freedom against dignity and privacy.
10. One of the most significant developments for the media in the post apartheid era was the Supreme Court of Appeal's judgment handed in 1998 in **National Media v Bogoshi**.
11. Prior to **Bogoshi** the legal position was that the media was strictly liable for any material published unless it could establish a defence of truth and public interest, fair comment or qualified privilege. The difficulty faced by the media under this strict liability regime was proving that an allegation was true or substantially true. As we all know, the type of evidence that is often available on which to predicate a story is not necessarily the type of evidence that would be acceptable in a court of law to conclusively establish the truth of a particular allegation. An example of the type of inequity that resulted under the strict liability regime is the infamous case of **Neethling v Du Preez** which will be familiar to many of you. Dirk Coetzee was a commander in an elite unit of the South African police, known as Vlakplaas,



that was tasked with eliminating opposition to the apartheid regime. Coetzee eventually turned against the apartheid regime and informed the then editor of *Vrye Weekblad*, Max du Preez, that General Lothar Neethling had supplied Vlakplaas with poison to murder anti-apartheid activists. In 1989 the paper published a story exposing Neethling and Neethling sued for defamation. *Vrye Weekblad* relied on truth and public interest as a defence. In the High Court, Judge Kriegler –later appointed a Constitutional Court judge – upheld the defence but in the Appellate Division the court found in favour of Neethling stating that the newspaper had the onus to prove its defence and had not proved that the allegations were true. The newspaper was ordered to pay R90 000 damages plus Neethling's legal costs, which is said to have resulted in its bankruptcy.

12. The judgment in **Bogoshi** represented a clear break from the strict liability principle; the Supreme Court of Appeal held that the strict liability approach represented an improper balance between freedom of expression and the right to dignity. The court stated that "**whilst there is no constitutional value in a false statement of fact, an erroneous statement of fact is never the less inevitable in free debate**" The court then held that:

**The publication of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way at the particular time.**

13. It is evident in the judgment in **Bogoshi** that a proper calibration of the rights to freedom of expression on the one hand and the right to dignity on the other, entails an approach which allows for the possibility that inaccurate or false material will occasionally be published and further accepts that holding the media to a standard of absolute truth is not tenable and will, as a result, have a 'chilling effect' on the right to freedom of expression as editors will be afraid to publish unless they are certain that they are in possession of evidence that will have sufficient weight in a court of law.
14. A further judgment that is instructive in the defamation context is the Supreme Court of Appeal's judgment in **Mthembi Mahanyele v Mail & Guardian**. The court held that the public is entitled to call public officials to account and that when they fail to account they must bear the criticism and comment that their conduct



attracts, provided it is fair and not actuated by malice. The principle that one can extract from this judgment is that public officials are required to withstand a greater degree of public scrutiny and criticism and, therefore, cannot attempt to silence the media every time their conduct is criticised, unless of course the allegations against them are baseless.

15. With respect to political satire and humour the judgment of the Constitutional Court in **Laugh it off Promotions v SAB** is particularly noteworthy, although this was not a media case and was decided in the context of trade mark law,. The court had to consider a claim brought by SAB against Justin Nurse's company, Laugh it Off, on the basis that Laugh it Off had unlawfully made use of SAB's Carling Black Label trademark. The dispute arose from the unauthorised use of the well known trademark on one of the T-shirts printed by Laugh it Off. The trademark was parodied and stated "Africa's lusty lively exploitation since 1652, black labour, white guilt, no regard given world wide". Laugh it Off argued that this amounted to a legitimate use of SAB's trademark. In finding in favour of Laugh it Off Justice Albie Sachs made the following comments in his separate concurring judgment which are well worth noting:

**Laughter too has its context. It can be derisory and punitive, imposing indignity on the weak at the hands of the powerful. On the other hand, it can be consolatory, even subversive in the service of the marginalised social critics. What has been relevant in the present matter is that the context was one of laughter being used as a means of challenging economic power, resisting ideological hegemony and advancing human dignity. We are not called upon to be arbiters of the taste displayed or judges of the humour offered. Nor are we required to say how successful Laugh it Off has been in hitting its parodic mark. Whatever our individual sensibilities or personal opinions about the T-shirts might be, we are obliged to interpret the law in a manner which protects the right of bodies such as Laugh it Off to advance subversive humour. The protection must be there whether the humour is expressed by mimicry in drag, or cartooning in the press, or the production of lampoons on T-shirts. The fact that the comedian is paid and the newspaper and T-shirts are sold,**



**does not in itself convert the expression involved into a mere commodity. ...**

**A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health.**

16. Based on these comments it is evident that our courts will protect humorous expression, particularly of the type often contained in political cartoons or satirical works, regardless of whether it is considered to be in poor taste. Of course the courts do not always decide in favour of free speech - the Prophet Mohamed cartoons being a case in point.
17. Our courts have also pronounced themselves on the clash between freedom of expression and privacy. In **Tshabalala Msimang v Makhanya**, the court held that it was not unlawful for the Sunday Times to publish information about the former Health Minister's medical condition as it had been in the public interest to do so, which, given the circumstances, outweighed the Minister's right to privacy. However, the courts have also rapped the media over the knuckles when they have gotten it wrong. In **RCP Media V Rapport**, Rapport refused to return pornographic photographs that it had received (but not published) of two well known advocates. One of the arguments made by Rapport was that society has an interest in the sexual conduct of advocates because of their position in society. The court rejected Rapport's arguments and held that when publishing pictures of two consenting adults in the privacy of their own home, the right to dignity and privacy could only be outweighed if there was a public interest issue of an extremely serious and important nature.
18. Whilst there is still much to be debated in the area of media freedom, it is clear from the judgments of our highest courts, which I have discussed above, that the media is not operating in a legal vacuum. Our courts have already articulated some of the principles that apply when balancing freedom of expression, dignity



and privacy and are well versed in the application of these principles in concrete cases.

19. The question of whether people have access to the courts in order to enforce their rights is a separate issue which is related to the broader question of access to justice in our society. This is a matter which requires urgent attention from the government; however, it should not be conflated with the question of whether there is adequate legal regulation of the media. It is ironic that one of the reasons put forward for the MAT is that taking court action is too expensive. In my personal experience the majority of summonses that are issued against our clients are from politicians and high ranking public officials who hardly fall into the category of individuals who are not able to afford to take legal action.
20. Furthermore, any "balance" that the MAT seeks to impose between freedom of expression, dignity and privacy must be done within the context of the principles that have already been articulated by our courts, lest the balance tip too far in favour of dignity and privacy and fall foul of the Constitution.
21. In closing, I think it is important to state that the current debate does have a positive aspect in that it gives the media an opportunity for introspection in forums such as today's summit. As was stated by the US Supreme Court in **Miami Herald v Tornillo**, "**press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated**". Whilst this is true it also reveals the need for the media to conduct some deep soul searching and to put into place internal mechanisms that are sufficient to ensure that its responsibility of keeping the public accurately informed is properly carried out and that the trust placed in the media by the public continues to be well deserved.

Thank you

