



The Media and the Law

A handbook for community journalists

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1 CHAPTER

Introduction

Why has this handbook been produced?

The short answer to the question 'how free is the South African media?' the simplistic answer would be 'quite free'. After all, media freedom is constitutionally protected and South Africa has arguably the freest media in Africa. However there are signs that as the honeymoon phase of our new democracy fades, so it becomes clear that attacks on media freedom are increasing. Over the past few years, the FXI has charted a trend of increasing censorship of the media and individual journalists. This censorship is not only directly applied through laws and lawsuits, but also indirectly, through withdrawal of advertising and self-censorship. While the big media organisations are usually well equipped to deal with these dangers, small community newspapers often lack the knowledge, skills and resources to fend off these threats to their freedom to publish or their very existence.

While the over-regulation, extreme censorship and banning of media by the apartheid government is thankfully a thing of the past, media freedom is being increasingly compromised as freedom of expression is relegated to second place behind competing constitutional rights such as dignity and privacy. A favoured method to silence the media is the defamation lawsuit. While the FXI supports newspapers such as the *Sunday Times* and the *Mail & Guardian* in publishing exposes involving government ministers, corrupt officials and stories which 'shock, offend and disturb', these newspapers have sufficient resources to fight attempts to gag them. The FXI recognises that small community newspapers or radio stations often don't have the luxury of lawyers on call and

financial cushions to prevent such cases threatening their very existence. The FXI has represented several small-town newspapers sued for defamation by local politicians and business people.

Media freedom is also under threat from the courts in the form of interdicts brought by aggrieved parties against the media. This amounts to pre-publication censorship and, although the interdicts are temporary, by the time the interim period lapses, the news story is out of date and the banned copies must be pulped, with severe financial implications.

Another increasing threat to media freedom has been the pressure brought to bear on journalists and media to reveal the confidential sources of their information. Again, smaller media organisations do not have resources to defend themselves in court and a protracted court battle can result in the closure of a community newspaper or station. Also, the pressure to reveal sources is not always applied through the court, especially in smaller towns where indirect means may be used.

Under threat of such court action, it is usually the smaller, more cash-strapped community-based publications that buckle and impose severe forms of self-censorship on themselves because they simply cannot afford to go to court – either in terms of finances or in terms of time. As a result, the very real contributions that small community newspapers or radio stations can make to their communities are not realised and editors tend to favour ‘safer’ stories and adverts. With many of these smaller, independent and community media do not having sufficient resources to engage lawyers on a regular basis, it is imperative for them to have easy access to information that can inform their decisions on what to print and how to respond to legal threats and court action.

While South Africa’s democratic government has made good progress in repealing the plethora of apartheid censorship laws, several remain on the statute books, such as the National Key Points Act. Other laws contain unconstitutional restrictions on the media, for example the Divorce Act’s prohibition on court

reporting. The legislature has passed laws which have serious implications for the media and the draft Films and Publications Amendment Bill is a cause of great concern for the media in general, from small community media to the SABC. There are ever-increasing calls for government regulation of the so-called 'irresponsible' press. Community media need to be aware of their rights and duties under existing law, as well as how to influence the form and effect of proposed new laws.

What does this handbook aim to achieve?

This handbook is intended to be a desk reference for small, independent and community media organisations, equipping journalists with the following tools to:

- enable small independent and community media to counter growing media censorship in South Africa, and to ensure that these media are aware of their rights and how to protect and enforce them;
- provide user-friendly information about the current state of the law of defamation, and to provide checklists to see whether particular reports are defamatory;
- provide useful information about what to do if particular reports do attract threats or legal action;
- ensure that a working knowledge of media freedom issues is also built up at paralegal and advice office level, so that legal capacity is built to support grassroots media;
- inform such media about the other laws in existence that affect their ability to report;
- ensure that journalists are appraised of their rights around source protection, so that they are not pressurised to reveal confidential sources;
- appraise these media of the complexity of the questions around the use of journalists as witnesses;
- encourage these media to become freedom of expression advocates, and to appraise them of the avenues available to lobby on specific freedom of expression issues.

2 CHAPTER

Principles and institutions protecting freedom of expression

What is freedom of expression?

Freedom of expression is a fundamental liberty guaranteed by section 16 of the Constitution and reads:

- (1) *Everyone has the right to freedom of expression, which includes -*
- (a) *freedom of the press and other media;*
 - (b) *freedom to receive or impart information or ideas;*
 - (c) *freedom of artistic creativity; and*
 - (d) *academic freedom and freedom of scientific research.*

Why is freedom of expression so important?

The Constitutional Court has acknowledged that freedom of expression protects and fosters a number of values, including the pursuit of truth, the functioning of democracy and individual self-fulfilment:

'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.'¹

'Freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of

¹ *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) at paras 7-8

religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.^{1,2}

The right to freedom of the media has also been interpreted as protecting the 'tools of the trade' that are integral to various forms of media. Our courts have also recognised the special role that the media play as agents of expression and protectors of democracy:

'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 view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide. ... It is for this very reason that the Constitution recognises the especial importance and role of the media in nurturing and strengthening our democracy. This

² *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at para 27

recognition is obvious in s 15(1), which expressly states that freedom of speech and expression shall include freedom of the press and other media'.³

Can freedom of expression be limited?

Section 16 of the Constitution does not protect expression that constitutes

- (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.

Section 16, as all rights in the Bill of Rights, can be limited in terms of the s 36 limitation clause:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

Who regulates the media in South Africa?

- Independent Communications Authority of South Africa
- Advertising Standards Authority
- Broadcasting Complaints Commission
- Film and Publication Board
- Press Council

³ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 608G – 609D

- Print Media South Africa
- National Association of Broadcasters

Which civil society organisations defend the media in South Africa?

- Media Institute of Southern Africa
- SA National Editors' Forum
- Freedom of Expression Institute
- Media Workers' Association of SA
- Communication Workers' Union

A contact list for these and other organisations is provided in Chapter 11.

3 CHAPTER

Overview of legislation impacting on media freedom

While the South African Constitution guarantees freedom of expression in Section 16, there are a number of laws which, in their application, would violate Section 16 and be contrary to the Constitutional guarantee of free expression. Some of these are laws that were drafted during the Apartheid era and continue to be used; some are new laws that were passed after South Africa's first democratic elections in 1994 and some are pre-1994 laws that have been amended more recently and still contain restrictions on free expression. This Chapter discusses five pieces of legislation (and mentions a number of others) that violate Section 16 of the Constitution.

The Protection of Constitutional Democracy Against Terrorism and Related Activities Act, 2004, aims to combat terrorism and the financing of terrorist activities. The Act provides that any person who suspects another of intending to commit or of having committed a terrorist act must report that knowledge or suspicion to the police and failure to do so is an offence. For journalists who often interview such 'suspicious' people in the course of their investigative duties, this requirement places an onerous duty on them and lays them open to prosecution for failing to report their suspicions to the police.

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, prohibits the publication of words that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful, incite harm or promote hatred. A publisher can contravene this law without the subjective intention to be hurtful, harmful, or promote hatred. This is a 'law against offensive

speech'. Editors may often find it difficult to predict whether a report will be hurtful, because what may offend one member of group may amuse another. The Act also prohibits the publication of information that could be understood to demonstrate a clear intention to unfairly discriminate against any person. This again is very broad, with no subjective intention required. The danger for journalists is in reporting provocative statements that are construed as offending against this Act. In Chapter 10 we provide discuss how this Act impacts on journalists in practice.

The Criminal Procedure Act, 1977, authorises the holding of criminal trials behind closed doors if in the interests of state security, good order, public morals or administration of justice. This is problematic because it gives presiding officers overly broad powers to ban the public and media from attending court proceedings. The Act also contains the notorious 'reveal your sources' provision, requiring the examination of any person likely to give relevant information on alleged offence, whether or not suspect has already been identified. This has a potential chilling effect on confidential sources, leading to a perceived loss of independence, a burden on media resources, as well as a threat to the safety of journalists. The only legal escape route is providing a 'just excuse' for not testifying. In Chapter 8 we provide advice to journalists on how to defend confidential sources and what to do if a journalist is compelled to disclose a source.

The National Key Points Act, 1980 provides that if the Minister of Defence believes a place is so important that its loss, damage or disruption may prejudice the State, then to ensure the safety of the State or in public interest, the Minister may summarily declare that place a National Key Point. The Act does not state how, when or where the minister is to make the declaration and how members of the public are expected to know whether a key point has been declared. The media could readily transgress this law by reporting on what happens at a key point. This danger is exacerbated because government has never identified the national key points and journalists only discover that they have

acted illegally when they report on an activity at a key point and the authorities invoke the Act.

This manifestly unconstitutional law is still being invoked by the government: in July 2006, the National Ports Authority announced that it intended to declare all ports as national key points, which will throw a blanket of secrecy over all ports. In February 2007, the Act was invoked to prevent media reporting about a wall, allegedly costing the taxpayer R90 million, that is being constructed around President Thabo Mbeki's residence.

The Film and Publications Act, 1996 established two bodies called the Film and Publication Board, through which any films that are intended for distribution and exhibition, and any publication in respect of which complaints have been made, are required to pass. The Act provides for the classification of publications and films in accordance with the material that is contained therein. The schedules to the Act set out the criteria upon which such classifications are based. The criteria are specific and were designed to create greater clarity in the area of censorship. The two types of publications and films that are subject to the greatest restrictions are the XX and X18 ratings.

Schedule 1 sets out the criteria for an XX rating for publications: it contains a visual presentation, simulated or real, of explicit violent sexual conduct; bestiality, incest or rape; explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm; or the explicit infliction of, or explicit effect of extreme violence, which constitutes incitement to cause harm.

The Act prohibits the distribution of publications or films that have been classified as XX, as well as the advocacy in a publication or film of hatred based on race, gender or religion and that constitutes incitement to cause harm, except in the case of a publication or a film of a bona fide scientific, dramatic, documentary or artistic nature (this exception does not apply to child pornography).

In addition, a person commits an offence if he is in possession of, creates or produces, or broadcasts or distributes a publication that contains child pornography (this is defined very broadly as covering any image, whether real or simulated, of a person who is, or who is depicted as being, under the age of 18 years, engaged in sexual conduct; participating in or assisting any another person to participate in sexual conduct; or showing or describing the body or parts of the body of such a person in a manner or in circumstances which amount to sexual exploitation). In order to be found guilty of the Act's criminal prohibitions, the person accused of contravening the Act must have done so knowing that the publication or film is prohibited. It should be noted however that while the possession of child pornography is prohibited, the prohibition on possession does not apply to the other XX publications or films.⁴

There are still myriad Apartheid-era laws on the statute books that restrict media freedom, such as the **Defence Act, 1957**, which prohibits the publication of secret information and photographs of military installations. **The Protection of Information Act, 1982** provides for the classification of state documents and prohibition on publishing some of them. The **Armaments Development and Production Act, 1968** prohibits the publication of information related to armaments. The **National Supplies Procurement Act, 1970** prohibits the publication of information related to strategic commodities. The **Petroleum Products Act, 1977** prohibits the publication of information related to petroleum products

There are also limitations on court reporting imposed by the **Children's Act, 2005**, **Child Care Act, 1983**, **Divorce Act, 1979**, **Maintenance Act, 1998** and others. In terms of the **Magistrates Court Act, 1944**, **Inquests Act, 1959** and others in camera hearings are permitted if it is in the interests of good order or the administration of justice.

⁴ This summary of the Films and Publications Act, 1996 is based primarily on D Milo and R Bopape, 'Media and Communications; Telecommunications and Broadcasting', Webber Wentzel Bownens website, <<http://www.wwb.co.za/wwb/view/wwb/en/page3972>>

4 CHAPTER

Plagiarism and copyright

According to the Copyright Act, 1978, broadcasting scripts, articles, reports, lectures, speeches, photographs, films, sound recordings, broadcasts, programme-carrying signals and computer programs are all eligible for copyright.

The ownership of copyright in a work vests in the author as soon as that work is created, without the need for registration. However where the author is working for someone else, such as an article written by a journalist for his/her employer, then that newspaper owner is the owner of the copyright in the journalist's work. Similarly, where a magazine commissions a freelance photographer, that magazine is the owner of the copyright in photographs used in such commission. There can also be other arrangements made in terms of a contract with regard to copyright.

There are exceptions to copyright which are important for journalists to bear in mind. When reporting current events in a newspaper or magazine, copyright is not infringed if the reportage is fair dealing and the source and author's name has been mentioned. Copyright is not infringed in any other written work available to the public, as long as there is fair dealing, the extent of the quotation is justified and the source and author are mentioned. A work can lawfully be reproduced for the purposes of a report on judicial proceedings. The media can publish a complete speech, provided it is for an informatory purpose. Official texts and speeches from Parliament, courts or government administrators can be freely used.

You generally need permission from the owner of the copyright, such as the publisher, to use that owner's material. If you can't get permission, you need to comply with the Copyright Act to use the material.

Plagiarism means stealing another person's work and can be either a breach of journalistic ethics or a violation of the Copyright Act, or both. If journalists adhered to the basic rules of professional journalism, plagiarism would not be a problem. Every journalist knows the rule of attribution to reliable sources: what is written under a journalist's byline is either what the journalist witnessed and experienced first-hand or the sources of information are clearly identified. It should also be clear why confidential sources need to remain confidential.

But in practice, working under pressure against strict deadlines, some journalists have made themselves guilty of plagiarism. It is vitally important that an ethical newsroom culture is fostered by not only the journalists, from the most junior cub reporters to the professional senior editors, but also by management.

A Plagiarism Checklist

A checklist for a newsroom free of plagiarism and copyright infringements:

- Is there an ethical culture in the newsroom?
- Does everyone respect the intellectual property of others?
- Are plagiarism and copyright (and other ethical and legal issues) discussed in news conferences and/or training sessions now and then?
- Does everyone understand that serious plagiarism will lead to dismissal?
- Does everyone understand the basic principles of attribution?
- Is there a policy on quotations, information from other publications, press releases, online news providers and confidential sources?
- Is everyone, especially the less experienced journalists, skilled in note-taking, paraphrasing and attribution?
- Does everyone have a basic understanding of the Copyright Act?
- Is the workload of journalists managed fairly – or do they just have to cope under pressure?⁵

⁵ The design and content of the checklist is based primarily on F Groenewald, 'Plagiarism and Copyright', paper presented at the Grassroots Media Conference, September 2007.

5 CHAPTER

Defamation

What is defamation?

The unlawful and intentional publication of statements about a person that has the effect of hurting that person's reputation in the eyes of society. The law of defamation seeks to find a workable balance between the conflicting rights to an unimpaired reputation (the right to dignity); and the right to freedom of expression.

What are common examples of defamatory statements?

- A suggestion that a person is a criminal or has committed a criminal offence.
- A suggestion of immorality.
- A suggestion that a person is insane or suffers from a stigmatising disease.
- A suggestion that a person is unfit for her profession.
- A suggestion that a trader is insolvent or of dubious financial standing.

What are the key elements of defamation?

To successfully claim defamation, a person must be able to prove the following things:

- That the statement was *published*. A statement is considered to be published where at least one person other than the aggrieved party becomes aware of it. Each person involved in the publication of the statement may be held liable for defamation e.g. reporter, editor, proprietor etc. Publication may be oral or written.
- That the statement was *defamatory*. A statement is defamatory where it is damaging to a person's good name or reputation.

The courts will consider whether a reasonable person of ordinary intelligence would think less of the aggrieved party after hearing or reading the statement.

- That there was *intention* to injure the reputation of the aggrieved party. The statement must have been published with the intention to damage the good name or reputation of the aggrieved party. An intention to defame is presumed to exist unless the defendant leads evidence to the contrary (e.g. that the statement was a mistake or was made in jest).
- That the publication of the statement was *unlawful*. There must be an infringement of the aggrieved party's right to dignity without justification.

Who can sue for defamation?

Any human being can sue for defamation. Companies and most other organisations can sue for defamation. However, the government of South Africa cannot sue for defamation. Political parties can also sue for defamation, as can a cabinet minister in circumstances where the criticism is directed at the Minister as an individual, rather than at governmental policies or decisions.

What can you be sued for?

- Interdict: The court may make an order prohibiting the publication of the defamatory statement. The court may also order the defendant to withdraw or recall the published material.
- Damages: The court may award financial compensation to the aggrieved party for the damage caused to his/her reputation.
- The court may order the defendant to make a public apology to the aggrieved party in respect of the defamatory statement.

What can you say if you're sued?

The recognise legal defences against defamation available to the media are:

- that statement was subject to privilege or was made on a privileged occasion;

- that the defamatory statement was true and its publication was in the public interest;
- the statement was a fair comment on a matter of public interest;
- the absence of intention to defame (mistake, jest etc); and
- That the publication of the statements was reasonable.

A Defamation Checklist: how to prevent you or your organisation being held liable for defamation

Check Your Story!

- Is what you are about to publish defamatory? A statement is deemed to be defamatory under the law if it does three things:
 1. It contains a defamatory imputation
 2. Refers to the plaintiff
 3. Published to at least one person other than the plaintiff

Ask yourself!

- Does the material contain a defamatory imputation?
- Is the potential plaintiff identifiable?
- Will the material be published to a third person?

If you answer 'no' to at least one of these:

1. It contains a defamatory imputation
 2. Refers to the plaintiff
 3. Published to at least one person other than the plaintiff
- It may not be defamatory
 - Get an opinion from a qualified lawyer to be sure.

If you answer 'yes' to all of these:

1. It contains a defamatory imputation
2. Refers to the plaintiff

3. Published to at least one person other than the plaintiff
 - Story is defamatory
 - Don't worry; you may still be able to publish!
 - Legal defences may save you

Defences against defamation

1. Truth in the public interest
2. Privilege
3. Fair comment
4. Reasonableness

1. Truth in the public interest

- It is a defence to an action for defamation to prove that the defamatory statement is substantially true and that there was a public interest in its publication.
- The publication of the statement is in the public interest where the public at large has a legitimate interest in knowing it.

Check! For truth in the public interest

- Are the defamatory remarks and likely imputations true?
- Are the defamatory remarks and likely imputations in the public interest?

If you answer 'yes':

- Do you have enough evidence to prove the imputations?
- If still yes...congratulations, you may be able to use this defence after seeking legal advice!

If you answer 'no':

Sorry...this defence probably does not apply to your story.

2. Privilege

- The defence of privilege provides protection from liability where a statement was made in good faith and for a legitimate purpose, even if false or defamatory.
- Statements made by witnesses in court, arguments made in court by lawyers, statements by legislators on the floor of the legislature, or by judges while sitting on the bench, are ordinarily privileged, and cannot support a cause of action for defamation, no matter how false or outrageous.

3. Fair comment

If a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, she can rely on the defence of fair comment.

Ask yourself!

1. Is the defamatory material opinion as opposed to fact? (This can be a difficult decision. It is not enough to simply state "In my opinion". Take legal advice.)
2. Is it based on the facts stated in the article, absolutely privileged facts, or facts known by all potential receivers of the communication?
3. Is the comment fair?
4. Is it your honestly held opinion? (If it is someone else's opinion, such as a letter writer or a source, you cannot know that they DO NOT hold that opinion.)
5. Is it on a matter of public interest?

If you answer 'yes':

- If still yes...congratulations, you may be able to use this defence after seeking legal advice!
- Do you have enough evidence to prove the imputations?

If you answer 'no':

Sorry...this defence probably does not apply to your story.

4. Reasonableness

- The general rule is that the conduct will not be reasonable unless the media had grounds for believing that the defamatory statement was true. The requirements for such a belief are that the reporter:
 - took proper steps to verify the accuracy of the material and thereafter did not believe it to be untrue; and
 - sought a response from the person defamed by the statements and published any response made. (obviously, this is not required in circumstances in which it is impractical or unnecessary to give the person a chance to respond).
- In this regard, various factors will be considered:
 - 'status' or degree of public concern in the information;
 - political importance of the information;
 - nature and reliability of the source of the information;
 - nature and reliability of the material forming the basis of the allegations;
 - extent to which other material available to the reporter at the time of publication supports the allegations;
 - seriousness of the consequences for the person defamed;
 - likelihood of the same results being achieved in a less damaging manner;
 - whether 'reasonableness' grounds existed for a belief that the material allegations of the statement were true;
 - steps taken to verify the information; and the medium of publication (television is more invasive than print).

What if none of the defences apply? Can you change the story?

- **You can do one of two things:**

1. Edit the story so that it is no longer defamatory.
2. Edit the story or gather further information so it attracts one of the defences.

- If neither of the above options is possible, do not publish it!

Keep all files in a safe and private place in case future developments allow you to use a defence.

What if you publish a defamatory story to which there is no defence?

- Apologise and retract? A quick, well-crafted apology can minimise damages or even form the basis of a defence.
- Consult a lawyer to craft a suitable apology and retraction.

Remember always to:

- Keep records of everything.
- Do not throw anything away for at least 3 years, which is the standard limitation period for defamation actions.
- Always try to get sources on the record in case you end up in court.
- Keep a diary of developments along the way.
- Take the defamation checklist test again any time you make changes to the story.
- Consult with a qualified lawyer any time a story has the potential to defame someone.

6 CHAPTER

Privacy checklist

Section 14 of the constitution states: "Everyone has the right to privacy, which includes the right not to have

- (a) their person or home searched;*
- (b) their property searched;*
- (c) their possessions seized;*
- (d) the privacy of their communications infringed."*

In a networked world that operates according to the dissemination of information, issues of privacy raise many concerns for journalists. Jurisdiction, the accuracy and legitimacy of digital imagery, as well as the source and ownership of content all need to be carefully considered in the context of section 14.

Privacy falls under the area of South African law that covers unlawful and intentional damage to one's personality. In terms of our common law, the right to privacy includes the protection of the contents of private correspondence, confidential information, certain information concerning family matters, issues of personal health, and issues of lifestyle such as sexual orientation.

Our courts have typically employed the 'boni mores' (values of society) test to establish whether an invasion of privacy has occurred. This test looks at whether the reasonable person would consider the act in question to be an invasion of another's rights. But our constitutional framework extends this idea to private information in the broadest sense which amounts to information that is private in nature, or information that the individual can reasonably expect to be kept private.

As each case will be adjudicated on an individual basis, it is worth bearing the following in mind: public interest in the information

and/or consent to publication can be argued as a defence to a claim for invasion of privacy; the public's interest in government officials, for instance, will be higher than that of the average citizen and accordingly different standards may apply; one needs to be especially careful of reports involving children and cases being heard 'in camera'; privacy rights are not only applicable to the individual in his/her personal space but are retained in social capacities such as in offices, cars and when talking on mobile telephones; privacy laws apply to both natural and juristic persons e.g. companies and CCs (although the standard for a juristic person will differ to that of the average man or woman).

Added to the above, it is important to recognise the distinction between the role of truth in a defamation case and a privacy case. While 'truth' offers a solid defence against the former charge, in privacy the element of truth may in fact work against the publisher, as it verifies the private nature of the information. Further, ownership of copyright in the material is probably not a defence. For instance, while a company may have the prerequisite contracts allowing them to access the private emails of their employees, this will not detract from the employees' rights to privacy as regards the content of those emails.

No doubt the arguments in support of press freedoms and section 16 will offer a balance to many of the issues raised above, but it is important to realise that with the new freedoms come limitations. Ultimately, it is best to err on the side of caution when dealing with potentially private information.⁷

⁷ G Hamburger, 'Private and confidential', *The Media Online, Mail & Guardian* (01 July 2003) <http://www.themedia.co.za/article.aspx?articleid=30969&area=/media_insightlegal_spin>

7 CHAPTER

A subjudice checklist

Contempt of court means illegal behaviour that affects the ability of a court, judge, or magistrate to administer justice. This can be behaviour inside the court, such as your cell phone ringing during a court session. It can also be outside the court, such as reporting which adversely affects the fairness of a criminal trial.

There is a specific crime of *scandalising the court*, meaning that unfair suspicions are cast or an attack is made on the capacity, impartiality or honesty of a judge or magistrate. To result in a conviction, the offending conduct, viewed contextually, must really be likely to damage the administration of justice, such as conduct which destroys public faith in judges.

You can also be in contempt of court if you breach the *subjudice* rule. Subjudice means that a particular case is being considered by a judge or magistrate. You cannot therefore make statements related to current court proceedings that bear a real risk of substantial harm to the administration of justice.

When does the subjudice rule apply?

- Special type of contempt, only applies after case starts (summons/arrest), until final appeal.
- Means 'the case is under consideration'.
- Media cannot publish comments that could affect how the judge decides the case.
- Ensures free & fair trial, not 'trial by media'.

Does subjudice still exist?

- Breached on a daily basis.
- Last conviction: Anton Harber, 1988.

Has the law on subjudice changed?

Whereas the current test for subjudice is whether the publication *tends to interfere* with the administration of justice, a recent court judgment in the Baby Jordan murder case requires that a real risk of *substantial harm* be demonstrated.

What are examples of contemptuous behaviour?

- Publishing accused's previous convictions before / during trial
- Identifying an accused before plea / first appearance
- Implying accused is guilty before verdict
- Threats against witnesses, judges, etc
- Simulating the court process
- Obstructing officials
- Disobeying court orders

Are there exceptions to the subjudice rule?

- Media have a privilege to report on everything said in courts and Parliament
- You can publish court proceedings without fear of prosecution if it is: accurate; in context; without spin

There are many other many other instances in which a journalist can be held in contempt of court. We shall discuss another such instance in the next section on protection of sources.

For a comprehensive guide to court reporting, including 'things you can't publish', see K Ritchie and G Ansell (ed), *Reporting the Courts – A handbook for South African journalists* (2006), available from Sanef/AIP, from which part of this section is derived.

8 CHAPTER

Protection of confidential sources

It is key for you to remember that in common law there is no such thing as journalistic privilege - you can be subpoenaed to testify on any information, whether you have published that information or not. All journalistic hope is hung on the rack of the freedom of expression clause in the Constitution. Accordingly, where you choose not to name a source, you may be faced with a jail sentence similar to the one Judith Miller of the New York Times endured in 2005. Miller spent more time in prison than any US journalist in history for refusing to disclose her source.

In South Africa, in terms of section 205 of the Criminal Procedure Act, a judge may require you to appear in court if you are likely to give material or relevant information as to any alleged offence. One of the ways that you may fight these subpoenas is to offer a 'just excuse' for your failure to provide the information. However, the court is unlikely to rule that journalistic privilege and an off-the-record discussion on their own constitute a just excuse, especially if 'national interest' is at play.

A just excuse would need to be defined on a case-by-case basis. The courts in such instances, and where the stakes are particularly high, would need a good deal of help from you on a superficial reading of the facts in order to rule in your favour. There is no doubt that journalists can become embroiled and manipulated in matters that have political implications, and a desire to retain confidentiality can easily backfire on the press and accordingly impact on the future of freedom of expression in South Africa.

The South African National Editors' Forum (Sanef) guidelines on "confidential briefings and sources" are informative as to the way

you should approach off-the-record discussions with sources, and may minimise problem areas. The main points are:

- it is preferable to get on-the-record statements and anonymity should be the last resort;
- in the event that a source goes off-the-record, multi-sourcing is preferred to corroborate a story. In this regard, anonymous sources should have direct knowledge and evidence of the story;
- editor-level approval should be required for use of anonymous sources as editor involvement will no doubt help the profile of the case should it become a matter of dispute;
- a story should usually indicate in its contents the reason why the source wishes to remain anonymous;
- although journalists are ethically bound to their sources, they should qualify their commitment on confidentiality in all matters to the source at the outset.

While the Sanef guidelines provide a solid benchmark for journalists in terms of the potential legal ramifications of off-the-record discussions, there are certain key points that should be highlighted. Firstly, you must ensure that the source knows that his/her identity may need to be disclosed to the editor (the source may see this as a breach of confidentiality). Secondly, you must know whether they will be able to defend their own participation in the story and will your parent organisation back them financially? Finally, is the source's information even worth defending? The way things stand, the ultimate question is always: will you be able to resist a subpoena on the facts presented by the state?

Accordingly, the media at large should be placing pressure on the courts to ensure that the notion of privilege and just excuse takes cognisance of the ethics binding journalists. Furthermore, to give credence to the freedom of expression clause in the Constitution, a distinction needs to be made between published and non-published information. Dealing with these issues will be the first steps in carving out a working formula of journalistic privilege.⁸

⁸ The content of this chapter is based primarily on G Hamburger, 'Private and confidential' *The Media Online, The Mail & Guardian* (01 November 2005) <http://www.themediaco.co.za/article.aspx?articleid=258716&area=/media_insightlegal_spin>

A Sources Checklist: how to protect confidential sources of information⁹

1. Are the terms of the briefing or interview clarified before it begins?
2. If the source wants it “off the record” at either the outset, or asks for this to commence at a later point in the proceedings, are you prepared to begin immediate negotiations on this?
3. Are you asking yourself the following questions:
 - Does the source supplying the information/briefing need the media more than vice versa?
 - Are you as a journalist using the source (in the interests of informing the public), or is the source using you for a different agenda? What is that agenda? What information is the source likely to be leaving out of the briefing? Can you, rather than the source, set the terms of the engagement?
4. Consider these options:
If the source argues for the briefing to be “confidential” in one form or another, is this absolutely necessary? Can you persuade him or her to go “on the record” before or after the engagement? Can you convince the person to take named responsibility for the sake of credibility of the story and veracity of the information?

Have you assessed how much trust and reliability is there in the relationship, before agreeing to confidentiality?

Are both the contents of the briefing, as well as the fact of its occurrence, supposed to be “confidential”? Does the source realise whether this is practical or not?

If the source is not savvy, do you have a responsibility to explain the implications of his or her name going into the media? Are there legitimate reasons why the source should be advised to operate in confidence?

⁹ This checklist is derived from on SANEF Guidelines on ‘Confidential Briefings and Sources’ <http://www.sanef.org.za/ethics_codes/sanef/326000.htm>

5. If the source speaks “on-the-record” and then retrospectively declares something “off-the-record”, you must argue that this was not agreed by you beforehand, and that it is therefore something that you are not bound to respect.
6. If the confidential engagement is agreed (in advance) as being “off-the-record”, “background”, or “deep background”, etc., is the meaning of these words mutually understood and agreed? In particular, do they mean either one of two things: “not for attribution” or “not for use”?

a. “Not for attribution” – i.e. the information may be used but not attributed to the particular source:

i. In such a case, is the precise public form of the sourcing – e.g. “a source close to the Minister” - agreed by both parties?

ii. Is it possible to increase the credibility of the source by getting as close an identification as possible without jeopardising the individual (e.g. an “official in the Presidency”, not just “a government source”)?

“Not for use” – i.e. the information may not be used:

In such a case, may the info still be followed up independently through pursuing other avenues?

If not, is it possible to point out to the source that no point is served by the briefing if the information or perspective given is not to have some manifestation in the media?

If not, is it possible to go back to the source at a later point and persuade him/her to drop the restrictions? Will changing situations affect the status of the information and enable you to re-negotiate?

If the source begins to touch on information which you already possess, and you do not want to be bound by “not-for-use-nor-for-independent-follow-up”, are you

ready to promptly and explicitly terminate your participation in the confidential briefing/interview or particular phase thereof?

7. Does the source know whether you may need to disclose his or her identity to your editor?
8. Does the source require that he or she can see your story before publication and have veto rights over what you will publish? Do you know your newsroom's policy on this?
9. Are you abiding by professional ethics and respecting the terms of a commitment to confidentiality which you have given in the name of journalism?
10. Is your negotiation on confidentiality really the best deal that can be secured for the public interest? Will you be able to defend your participation in it if the need ever arises?

9 CHAPTER

Interdicts

There is a general presumption against pre-publication interdicts. An applicant for a prior restraint on publication must make out a compelling case for the relief sought and to demonstrate that the harmful effects on freedom of expression are outweighed by the need for such a restraint. A court can grant a temporary interdict, which is an interim order that prevents publication until the case is argued a second time, for a final order.

To obtain a temporary interdict, the applicant must prove (a) a prima facie right; (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted; (c) the balance of convenience favours the granting of the interim interdict, and (d) the applicant has no other satisfactory remedy. For example, if an attempt is made to interdict the media from publishing a defamatory article, but it has yet to be established that the defamation is unlawful, the plaintiff should usually rest content with a damages award after publication. An anticipatory ban on publication would, therefore, seldom be required for that purpose.

To obtain a final interdict, the applicant must prove: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy. For example, a risk of prejudice to the administration of justice must be clearly established, that it cannot be prevented from occurring by other means, and a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

A recent case has changed the law regarding interdicts in favour of the media. Now, a publication ban can only be ordered if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Second, a party seeking a prior restraint cannot simply rely on conjecture or speculation that harm will occur. Third, even if this high threshold test is met, the court must still be satisfied that the ban is necessary and proportionate to prevent the prejudice from occurring. Even then, the publication will not be banned unless the advantages of curtailing the free flow of information outweigh the disadvantages. In this balancing exercise, the court must consider not only the interests of those involved with the publication, but the interests of every person in having access to information. Where there are rights not capable of subsequent vindication, such as an award of damages, a narrow ban, if at all, would be all that is required.

These principles would apply to any application for a publication ban that requires a limitation on press freedom in order to protect the administration of justice. But this new test would also seem to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right.

If court papers are served on you then you should immediately try to find a lawyer to help you. A list of free lawyers is provided in Chapter 11.

Working with lawyers

Advice seekers sometimes experience problems with lawyers. These are some of the most common problems that they experience:

- They do not explain the law and procedures in plain language.
- They are often not interested in discussing the community's other legal, socio-economic or political problems.
- They are less interested in dealing with rural or poor clients.

- They have little personal contact with clients and client communities.
- They do not say how much the case is going to cost.
- They make decisions on what steps to take without properly consulting client communities.
- They do not give full updates or report backs on cases.

How can you overcome problems with lawyers?

- Telephone regularly to find out what is happening with the matter.
- Ask for explanations on any points that you or anyone else does not understand.
- Work through an interpreter if there are language problems.
- If asked to help with collecting information or papers, contacting clients or witnesses, setting up meetings, and so on, then do this as soon as you can. Advise as soon as the task is done.
- Keep the lawyer well informed of any changes or developments in the matter, or relevant developments in the community if it is a community matter.
- Make sure that the lawyer consults properly with the client or representatives of the community before he or she takes any big steps in the case. The lawyer can only act with a mandate from the client.
- Ask the lawyer how much the case is going to cost. If the client or the community cannot afford this, ask the lawyer if it is possible to get Legal Aid or any other kind of funding for the case.
- Encourage the lawyer to look at 'non-legal' ways of solving a problem, such as through mediation and negotiation.
- Ask the lawyer not to use too many legal or technical words while explaining something.¹⁰

¹⁰ Black Sash & Education Training Unit, 'Paralegals and the Legal System'
<<http://www.paralegaladvice.org.za/docs/chap15/04.html>>
For an excellent legal dictionary, go to <http://www.paralegaladvice.org.za>.

10 CHAPTER

Hate Speech

As discussed in the 'Overview of legislation impacting on media freedom' in Chapter 3, one of the aims of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ('Equality Act') is the prevention and prohibition of hate speech. Sections 10 and 12 of the Equality Act are important provisions that purport to regulate hate speech. They provide:

Prohibition of hate speech

10 (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to -

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

Prohibition of dissemination and publication of information that unfairly discriminates

12 No person may -

- (a) disseminate or broadcast any information;
- (b) publish or display any advertisement or notice that could

reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

Section 10 of the Act has a number of important features. Firstly, it states that no person may 'publish, propagate, advocate or communicate words based on one or more of the prohibited grounds...'. The Act is surprising in that it does not distinguish statements made in private conversation from public utterances. It aims to regulate all speech.

Secondly, although section 10 purports to regulate hate speech, the provision is much more far-reaching than that. It targets language that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred. Consequently a speaker, publisher or communicator can contravene this law even when he or she has no subjective intention to be hurtful, harmful or to propagate hatred. An unwitting communicator could fall foul of this provision simply because his or her statement could reasonably be construed to demonstrate a clear intention to be hurtful.

In our modern and complex society language or images have a range of meanings. Some material clearly promotes or propagates hatred, but in less stark situations it is often difficult to predict whether a member of a targeted group will find a particular advert or report hurtful or harmful. One member of the group might be offended by a particular statement, another might not care about it and a third might find it amusing. Section 10 is disturbingly wide as it effectively strives to protect citizens from speech which may offend them. This also illustrates the very real problems of creating laws against group defamation. Some members of a group may

well be offended by a particular statement but it is often difficult to logically support a claim that depends on defamation of an entire group.

Section 12 of the Act is aimed at information, advertisements or notices that 'could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person'. This provision is also very wide as it also prohibits speech in instances where the communicator has no subjective intention to discriminate. The section seems to be aimed partly at discriminatory advertisements like adverts that pronounce 'only white men need apply', but a cursory look at the provision shows that its ambit is far wider than this. When one examines the wording of the section it is very difficult to imagine what the outer limits of the prohibition would be.

One cannot comment upon the difficulties inherent in these provisions without taking into account the proviso to which both sections 10 and 12 are subject. The proviso excludes certain expression from the ambit of sections 10 and 12 by effectively creating a number of 'defences' for those 'accused' of breaching the sections. The proviso has to be read with section 13 which shifts the burden of proof. In cases where a complainant makes out a prima facie case that he or she is the victim of discrimination on a listed ground, the onus shifts onto the respondent to show that his or her conduct was not discriminatory or that it was not unfairly discriminatory. (It is however arguable that section 13 does not apply to cases of hate speech.)

The proviso ensures that expression that fits into the following categories will be allowed:

- bona fide engagement in artistic creativity, or
- bona fide engagement in academic and scientific inquiry, or
- bona fide engagement in fair and accurate reporting in the public interest, or
- publication of any information, advertisement or notice in accordance with section 16 of the Constitution.

A consequence of this proviso is that in a specific case a newspaper could argue that a particular article does not contravene sections 10 or 12 because the journalist was engaged in 'bona fide fair and accurate reporting in the public interest'.

On one interpretation, the proviso is drafted in a way that gives narrow protection to the press. It is useful to compare the 'defences' that the proviso makes available, to the common law defences in standard defamation cases. In cases where a plaintiff appears to have been defamed in the press, the defendant has recourse to a number of defences, such as fair comment, truth and public benefit and qualified privilege. Additionally 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 and at the particular time.' This formulation differs from the proviso in section 12 which states that reports must be 'accurate' in order for liability to be avoided under the Act. (A further complication with this requirement is that the type of reports that could attract attention under these sections often don't lend themselves to a simple pronouncement upon whether they are true or false.) One could argue that the Equality Act aims to protect groups against hurt more than the common law protects particular individuals whose dignity has been specifically assailed.

In the context of defamation our courts have conceded that the press should not automatically be held liable for any defamatory statement that they cannot prove is true. The proviso should be interpreted consistently with this principle of the law of defamation which has been developed in the light of the Bill of Rights. 'Fair and accurate reporting' can also be read as requiring a high standard of ethical reporting as opposed to truth on every issue.

The last part of the proviso provides that sections 10 and 12 do not preclude publication 'of any information, advertisement or notice

in accordance with section 16 of the Constitution'. Section 16 is the freedom of expression clause. It is not obvious what qualifies as communication in accordance with the freedom of expression clause, but the last part of the proviso could be interpreted to make a range of constitutionally necessary defences available. This formulation may help to insulate sections 10 and 12 from constitutional attack.¹¹

¹¹ V Bronstein, 'What you can and can't say in South Africa'
<<http://www.da.org.za/da/Site/Eng/campaigns/cancantsayinSA.asp>>

11 CHAPTER

Where to go if you're sued: A list of free lawyers

Contact these organisations for free advice and legal assistance. Call the national office to get the number of the branch office in your area.

Freedom of Expression Institute

Law Clinic, Johannesburg
Tel: 011 403 8403
www.fxj.org.za

Lawyers for Human Rights

National Office, Pretoria
Tel: 012 320 2943
www.lhr.org.za

Media Institute of Southern Africa

South African Chapter, Johannesburg
Tel: 011 339 6767
www.za.misa.org

Legal Aid Board

National Office, Johannesburg
Tel: 011 877 2000
www.legal-aid.co.za

SA National Editor's Forum

Johannesburg
Tel: 011 442 3785
www.sanef.org.za

Legal Aid Justice Centres

Tel: 0861 053 425

Media Workers' Association of SA

Johannesburg
Tel: 011 337 1019

University of Cape Town

www.law.uct.ac.za

Communication Worker's Union

National Office, Johannesburg
011 838 8188
www.cwu.org.za

University of Free State

www.uovs.az.za/law

Legal Resource Centre

National Office and Constitution and Litigation Unit, Johannesburg
Tel: 011 836 9831
www.lrc.org.za

University of Johannesburg

general.uj.ac.za/law

University of KwaZulu-Natal

www.nu.ac.za/law

University of North West

www.uniwest.ac.za/faculties/law

University of Port Elizabeth
www.upe.ac.za/faculties/law

University of Potchefstroom
www.puk.ac.za/fakulteite/regte

University of Pretoria
www.up.ac.za/academic/law

Rhodes University
www.ru.ac.za/academic/faculties/law

University of South Africa
www.unisa.ac.za/contents/faculties/law

University of Stellenbosch
law.sun.ac.za

University of Witwatersrand
www.law.wits.ac.za

University of Western Cape
www.uwc.ac.za/law

Other useful resources are these government and industry regulators:

Independent Communications Authority of South Africa
Tel: 011 321 8200
www.icasa.org.za

Advertising Standards Authority
Tel: 011 781 2006
www.asasa.org.za

Broadcasting Complaints Commission
Tel: 011 325 5755
www.bccsa.co.za

Film and Publications Board
Tel: 011 483 1084
www.fpb.gov.za

Press Council
Tel: 011 788 4837/27
www.presscouncil.org.za

Print Media South Africa
Tel: 011 721 3200
www.printmedia.org.za

National Association of Broadcasters
Tel: 011 325 5741
www.nab.org.za

The South African media enjoy constitutional protection, and enjoy unprecedented levels of freedom. Yet, in spite of this widespread freedom, the FXI has charted a trend of increasing media censorship. While the big media organisations are usually well equipped to deal with these dangers, small community newspapers often lack the knowledge, skills and resources to fend off these threats to their freedom to publish.

This handbook is intended to be a desk reference for small, independent and community media organisations, equipping journalists with the following tools:

- enable small independent and community media to counter growing media censorship in South Africa, and to ensure that these media are aware of their rights and how to protect and enforce them;
- provide user-friendly information about the current state of the law of defamation, and to provide checklists to see whether particular reports are defamatory;
- provide useful information about what to do if particular reports do attract threats or legal action;
- ensure that a working knowledge of media freedom issues is also built up at paralegal and advice office level, so that legal capacity is built to support grassroots media;
- inform such media about the other laws in existence that affect their ability to report;
- ensure that journalists are appraised of their rights around source protection, so that they are not pressurized to reveal confidential sources;
- appraise these media of the complexity of the questions around the use of journalists as witnesses;
- encourage these media to become freedom of expression advocates, and to appraise them of the avenues available to lobby on specific freedom of expression issues.