



SADC Media Law: A Handbook for Media Practitioners

VOLUME 2

**A comparative overview of media laws
and practice in Botswana, Swaziland and Zambia**

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SADC Media Law: A Handbook for Media Practitioners, Volume 2

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KAS Media Programme

Konrad Adenauer-Stiftung (KAS) is an independent non-profit organisation bearing the name of Germany's first Chancellor (1949-1963) after World War II.

In the spirit of Konrad Adenauer, the foundation aims to strengthen democratic forces and develop social market economies. For more than 40 years KAS has been cooperating with partner organisations in over 100 countries worldwide. For an overview of the organisation's range of activities, go to <www.kas.de>

The KAS Media Programme in sub-Saharan Africa promotes the media through support for advanced training, the development of educational materials for journalists, networking and advocacy. KAS views the media as an integral part of modern democracy, national development and integration. To this end, media have to be empowered and supported to fulfill their fourth estate role as whistleblowers and watchdogs within their society. But reporting on misdeeds of politicians and company executives who do not live up to their duties is not enough. The media must be a progressive force to support human rights and shape new ideas in an open society through informed and impartial reporting and analyses.

A free, sustainable and competent press is a catalyst and resource for literacy, modernization, informed politics and participatory development.

For more information on the KAS Media Programme and its activities, go to <www.kasmedia.org>.



The Media Institute of Southern Africa

Officially launched in September 1992, the Media Institute of Southern Africa (MISA) is a non-governmental organisation with members in 11 Southern Africa Development Community (SADC) countries. It was created to help implement the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press. MISA's work is founded on the fundamental values of freedom of expression, access to information, media diversity, pluralism and independence as enshrined in the Universal Declaration of Human Rights, and in particular Article 19.

While ensuring that gender-specific needs form an integral part of all activities, MISA seeks to play a leading role in creating an environment in which the free flow of information, ideas and opinions are encouraged through professionally run media as a principal means of nurturing democracy and human rights in Africa. MISA aims to create an environment in which civil society is empowered to claim information and access to it as unalienable rights and in which the resultant freer information flow strengthens democracy by enabling more informed citizen participation.

Through one of its activities, the Media Law Reform Programme, MISA is actively involved in the campaign to have all repressive media legislation on the statute books of countries in the SADC region repealed. Its campaign has been targeting repressive laws such as criminal defamation, which is deemed undesirable and an affront to press freedom all over the world and official secrecy laws among others. MISA campaigns for and promotes the enactment and adoption of enabling laws and policies like the adoption of Access to Information laws that make availability and accessibility of information possible. MISA has produced a number of publications highlighting anti media freedom laws still on the statutes books of various countries in SADC and calls for their repeal. A recent publication, "Undue Restriction" has exposed the extent of repressive laws that could be used to stifle press freedom in the region.

For more information on MISA and its activities, go to <www.misa.org>



The Mandela Institute



As a centre of excellence, the Mandela Institute undertakes research, develops policy and offers advanced teaching in global law at the University of the Witwatersrand - that is, those areas of law that connect South Africa and the developing world to the global economy. These include competition law, intellectual property law, banking law, company law, communications law, the development of appropriate regulatory regimes and international arbitration. The Mandela Institute is working to create an enhanced legal framework and skills base as a contribution to the wider goal of economic growth.

The Mandela Institute aims to educate a new generation of skilled South African lawyers - black and white.

The Mandela Institute comprises professors and research fellows in the School of Law, specifically recruited to endow the Institute with lawyers of the highest standing.

EDWARD NATHAN CORPORATE LAW ADVISERS

Edward Nathan

Edward Nathan (Pty) Ltd (“EN”) is a firm of corporate law advisors and consultants that is recognised as one of South Africa’s legal advisory businesses for major transactions. EN’s primary business is to provide high level specialist legal services to the African market. The corporate commercial business of EN has been active in South Africa for close on 100 years with the objective of rendering multi disciplinary services. EN is a proudly South African company and is currently playing an active role in the economical form of South Africa.

The firm’s practice operates in a variety of fields of law, not only commercial law. The Technology, Media and Telecommunications (“TMT”) Department at EN is a specialist department dealing in all aspects of communications law including telecommunications, broadcasting, satellite and media law. Because of its communications law expertise, EN was recently designated as an official industry partner of the Commonwealth Telecommunications Organisation.

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- the establishment and regulation of the public broadcaster;
 - the regulation of the print media;
 - the censorship of films and publications;
 - the promotion of access to information;
 - the protection against disclosure of official state secret information;
 - the disclosure of journalists' confidential sources of information; and
 - the regulation of defence and internal security;
- the most important codes of conduct prescribing standards of conduct for the broadcasting and print media industries;
 - the most important regulations impacting on the right to freedom of expression of the media;
 - the most important cases impacting on the right to freedom of expression of the media;
 - a summary of interviews with people engaged in the mass media sector, including academics, people working in the public and private broadcasting sectors, journalists in the print media sector, and people working in media organisations and interest groups in the target countries.

2. Political history, market structure and journalists' experiences

All of the target countries hail from difficult political histories, although a legacy of colonialism is a common thread that runs through all of them. Some countries proclaimed themselves as one party states (such as was the case in Zambia until recently), whereas in others there is a system of monarchical supremacy (notably in Swaziland). Botswana, on the other hand, has maintained a system of multiparty democracy ever since obtaining independence from the United Kingdom. In all three countries, there is a high level of concentration of media ownership and / or control in the hands of the state. This particularly the case in Swaziland, where most of the mass media is state owned. In Zambia, which has been a multiparty democracy for just over a decade now, the private media encountered a lot of resistance from the state immediately after the end of the Kaunda regime, which still persists to this day, although the situation seems to be gradually improving.

Nevertheless government interference in the private print media sector in the country has made it difficult for new newspapers to survive and flourish. In Botswana, which is often held up as a model of stability in the often volatile SADC region, the instances of overt government interference in the mass media are generally not as blatant as in Swaziland or Zambia. Rather, government interference in Botswana, where it does happen, tends to be far more insidious and subtle.

As regards the print media, some countries (notably Botswana) have a fairly robust independent print media sector. However, the print media market in all three countries are characterised by a strong presence of newspapers that are either government-owned or effectively government controlled. In Botswana, the state newspapers are distributed to people free of charge, which creates a formidable market entry barrier for smaller privately newspapers that are seeking to establish a market presence in the country. A rather worrying trend in all three countries is that the governments in Botswana, Swaziland and Zambia have all at one time or another attempted to subject the print media to statutory regulation and control. These efforts have not gotten off the ground, largely due to pressure placed from the public and the media industry alike on the governments to desist.

In the television arena, free-to-air television in all three countries is still monopolised by the public broadcaster. All of the countries have authorised privately owned South African based satellite television broadcaster, MultiChoice, to beam its DSTV bouquet of channels within their jurisdiction. However, the MultiChoice service is provided to customers on a subscription basis, which renders the service unaffordable for most people living in these countries, where poverty is still rife. In Swaziland, a privately owned terrestrial broadcasting service has been licensed in the form of *Channel Swazi*. This station has close ties to the monarchy and is not considered to be independent of the government. In Zambia, a test licence was granted to a privately owned terrestrial broadcaster, *Omega TV*, although the government closed the station down shortly afterwards.

All of the target countries allow privately owned commercial and/or community radio broadcasters to operate within their borders. However, in Zambia and Swaziland, the private radio sector is dominated by church owned radio stations, which generally tend to be quite conservative in their approach. In Botswana, the privately owned radio stations that exist are music stations, and do not have the

news as their main focus point. The effect of this is that the public broadcaster in Botswana is still the main source of news and information in the country.

Our interviews with journalists and media workers working on the ground show that the degree of freedom of expression in the three countries varies for obvious reasons. However, there were some common threads that ran throughout all of the interviews. One of the themes that emerged is that there is a culture in African countries of according respect to elders in the community. This practice can serve as a barrier to media freedom, particularly when government officials use this as a convenient excuse to deflect media criticism. Another complaint is that none of the three countries has yet enacted legislation providing for a right of access to information. Journalists interviewed in Botswana, Swaziland and Zambia lamented that they often experience great difficulty in obtaining access to government held information. A third shared problem is that most of the journalists in the three target countries have no formal training. A large part of the reason for this is that journalism was not regarded as a career-worthy discipline until very recently. No specialist courses in journalism were previously offered at the tertiary level, although this situation is beginning to change.

3. Enshrining freedom of expression in the constitution

Botswana and Zambia both espouse the principle of constitutional sovereignty (as opposed to parliamentary sovereignty), and have adopted constitutions that are the supreme law of the land. The exception to this is Swaziland which is the only SADC country without a constitution. The reason for this is that the King repealed the constitution in its entirety and established a system of monarchical supremacy in its place in 1973.

The constitutions of Zambia and Botswana both enshrine the right to freedom of expression. However, in neither of these countries is the right to freedom of expression absolute: both of the constitutions make provision for this right to be limited. Generally speaking, constitutional provisions that permit the right to freedom of expression to be limited tend to take one (or a combination) of three forms as set out below.

The first way that limitations of rights can be provided for is on an “internal”

4.1 Broadcasting

Laws related to the regulation of the broadcast industry typically deal with things such as the establishment of an independent communications regulator, the establishment and oversight of the public broadcaster, and the regulation and licensing of private broadcasting services. In some cases, the legislation also prescribes standards of conduct for broadcasters, although in other countries this is left to self-regulation via a voluntary code of conduct.

Generally speaking, the model that many countries use for broadcasting regulation posits a three-tiered separation of powers between policy-making, regulation and the provision of broadcasting services. The difference between the three functions is as follows:

- *Policy-development* is directed at addressing fundamental social objectives, rather than day-to-day implementation and problem solving. It ensures that attention is paid to the long-term implications of developments and of issues arising from them. Policy-making is appropriately seen as residing in the domain of government.
- *Operations management* is directed at separating the service provision functions of the public broadcaster from the government, so that neither politicians nor government bureaucrats can interfere in day-to-day operational decisions. Usually this is achieved by corporatising the public broadcaster, and by establishing an independent board of directors.
- *Regulation* is directed at the establishment of a regulatory agency that is independent from the broadcasting industry and from day-to-day government interference. The regulator's tasks include implementing government policy and acting as a buffer between the broadcasting industry and the government.

In reality, it is impossible to completely separate out the three functions of policy making, regulation and broadcast service provision – particularly if the government retains an ownership share in the public broadcaster, and also because the regulator is technically speaking an organ of state, and is responsible for implementing government policy.

However, there are certain indicators that can be used to measure the degree of

independence of the regulator from the government. There are a number of factors that impact on the independence of the regulator, the more important of which include things such as:

- how appointments to the regulator are made, and in particular whether the appointments are made by the line minister responsible for the communications sector, or whether reference is required to be made to another state agency such as parliament;
- whether the regulator is able to appoint its own staff, or whether it is required to defer to the line minister on this;
- whether the regulator is able to set its own remuneration scales for members and employees, or whether it is required to obtain ministerial approval for this;
- how the regulator is funded, and in particular whether the regulator is permitted to retain regulatory fees (such as licence fees, fines, etc), or whether it is funded by monies appropriated by parliament;
- how the regulator sets its budgets, and in particular whether the regulator is required to seek budgetary approval from the line minister or from parliament;
- whether or not the regulator has the final say in relation to important regulatory decisions such as licensing and regulation-making, and in particular whether the line minister is able to intervene and to overturn the decisions of the regulator. (The ability of the regulator to bear the ultimate responsibility in relation to things such as licensing, for example, is vital towards ensuring an independent private broadcasting sector that is not handpicked by the government).

Likewise, in the case of the public broadcaster, there are a number of factors that determine the degree to which it is able to operate independently of the government. These include things such as:

- how programming formats and content are determined, and in particular whether it is the regulator that administers this or whether the government or line minister is allowed to interfere in programming decisions;
- how board members are appointed to the board of directors of the public broadcaster, and in particular whether the line minister is given powers of appointment with or without reference to another government agency;

- how the management of the public broadcaster is carried out, and in particular whether the broadcaster is allowed to make its own management and investment decisions with minimal interference from the line minister; and
- whether or not there is a clear distinction between editorial and management functions, given that in many countries management appointments to the public broadcaster are often highly politicised.

All three of the countries that we surveyed have established regulatory authorities with oversight over the broadcasting sector, with varying degrees of independence. In Swaziland there is the rather anomalous situation that the television broadcasting regulator, the *Swaziland Television Authority* and the state broadcaster are one and the same entity. Moreover, no regulatory agency has been set up for the radio broadcasting sector in Swaziland.

In Botswana, although a regulatory authority has been established, the state broadcaster, BTV, has not yet been incorporated as a juristic person separate from the state. To date, BTV is technically still a division of the Department of Broadcasting Services, with negative implications for editorial independence and control.

In Zambia, legislative reforms have been introduced that allow for the appointment of an independent board of directors to the regulator and the public broadcaster. However, the appointment of these boards has been stymied by the fact that Minister of Information and Broadcasting Services wants to be able to veto the recommendations of the appointments committees responsible for recommending the appointment of members to the two boards, which serves to compromise their independence from the executive arm of government. (Currently, the applicable legislation empowers the Minister to appoint board members on the advice of the appointments committee, subject to ratification by the National Assembly of Parliament. The legislation is silent as to whether the Minister may deviate from the recommendation of the appointments committee).

4.2 Print media

The second theme area relates to the regulation of the print media. It is not uncommon for legislation to provide that all material printed and published in a country be deposited with the government archivist.

However, the governments of Botswana, Swaziland and Zambia have all attempted to take this further at some point in time by publishing draft legislation providing

for the statutory regulation of the print media, by amongst other things requiring journalists to be accredited with an appointed government agency as a prerequisite to operating legally within the country. This legislation has not yet been passed into law in any of the target countries, largely because of opposition from the public and the media sector alike to government efforts to muzzle the press.

4.3 Censorship

All of the target countries had enacted legislation providing for the censorship and classification of the content of films. Legislation of this nature typically requires certain types of films and publications to be pre-approved by a censorship board before they may be distributed to the public.

4.4 Access to information

None of the countries has passed legislation which regulates access to information held by the state and by organs of state. Some of the countries have passed draft legislation on the topic which has not yet been enacted into law. Legislation of this nature typically tends to grant a general right of access to information, but which may be withheld from disclosure on well-recognised grounds such as where there is a need to protect an individual's right to privacy, where the information is commercially sensitive, or relates to the defence and security of the state, to name a few.

4.5 Defence and internal security

It is widely recognised in comparative jurisprudence and international human rights instruments that expressive activity may legitimately be restricted on the grounds of national security.

For example, article 19(3)(b) of the International Covenant on Civil and Political Rights permits expressive activity to be limited where the limitation is "necessary ... for the protection of national security or of public order, or of public health or morals". Other international conventions, like the European Convention on Human Rights, also allow for the abrogation of the right to freedom of expression where national security considerations require this.

However, a number of defence-related, "official secrets"- type statutes are used to

restrict access to information for state security reasons. State security laws pit two crucial social interests against each other. On the one hand the state has an interest in ensuring a safe and secure society. On the other hand, the government is constitutionally obliged to protect the right to freedom of expression of all who live in the country, which is a fundamental human right.

Proscriptions on the publication of security-related information have a number of specific implications for freedom of expression. In particular, security legislation overtly seeks to criminalise the publication of information according to its content at the outset. Moreover, much security-sensitive information is fundamentally political in nature, and as such is at the core of protected expression.

Another hallmark of legislation of this nature is that it often restricts expressive activity in broad and vague terms and thus casts the net of liability extremely widely. Some of the official secrets-type legislation that we surveyed makes it an offence even to receive official state secret information, let alone to disclose it. Another problem with this type of security-related legislation is that the criminal sanctions that these statutes prescribe are often excessive in relation to the nature of the offence in question. The official secrets legislation in the countries which we surveyed all make provision for the imposition of both fines and prison sentences.

4.6 Protection of confidential sources

In some of the countries, statutory provision is made to force the disclosure of journalists' confidential sources of information.

Some jurisdictions in the world (such as the case in the USA) give journalists a statutory right to protect their confidential sources of information. Other countries allow journalists to refuse to testify in court without any fear of being held in contempt of court. (This right is otherwise known in law as a qualified privilege – the term “qualified” denotes that the privilege is not absolute in the way that attorney-client privilege is absolute). The basic rationale for the existence of a qualified privilege goes to the heart of the protection of freedom of expression. Confidential sources are essential to investigative reporting.

The protection of sources is also an ethical requirement for both journalists and the media. It is a condition for the free flow of information in society. Were

informants to know that their confidentiality would not be respected, the existing and potential sources would be unwilling to pass information onto journalists, thereby having a chilling effect on the freedom of expression of the media. This would harm the public because it is believed that many matters of major public concern ranging from maladministration through misconduct to criminal activities would not be made available to the public.

Botswana

1. Introduction

1.1 Political landscape

Botswana has a population of approximately 1.6 million people. The country was formerly a British protectorate before it gained full independence from the United Kingdom in 1966 with Seretse Khama of the Botswana Democratic Party (“BDP”) as the first president. Botswana has maintained a multiparty democracy since independence. Botswana is generally considered a model of peace and stability in southern Africa, a region that is often characterized by conflict and political struggle.

The Botswana legislature consists of a unicameral 40-elected-member National Assembly. There is also a 15-member House of Chiefs, which has advisory powers only. The main function of the House of Chiefs is to provide guidance on matters affecting custom and tradition. There has been some debate as to whether the House of Chiefs serves any useful purpose, but given the ruling party’s dependence on its rural support base, no immediate changes to the *status quo* are anticipated. Although it is a democracy, Botswana’s political system also incorporates a degree of potential authoritarianism, which depends very much on the use the president chooses to make of his extensive powers. ¹

There are two main political parties the Botswana Democratic Party (“BDP”) and the Botswana National Front (“BNF”), in addition to a number of smaller parties. The BDP is the ruling party and has been in power since Independence. General

¹ Institute for Security Studies, “Botswana: History and Politics” (<http://www.iss.co.za/AF/profiles/Botswana/Politics.html>)

elections for the National Assembly are held at least once every five years. Botswana has had four peaceful changes of president since its independence, through the same political party. Following the last round of elections in October 2004 President Festus Mogae was re-elected as the president.

Botswana has enjoyed an economic boom of remarkable proportions for much of the period since independence in 1966. From 1976 to 1992, the rate of economic growth averaged about 10% a year in real terms. The basis of this growth, however, was fragile as it depended primarily on the export of minerals (which accounted for approximately 80% of total exports in 1991) and beef. An economic slowdown began in 1992 and annual growth rates have since hovered around the rate of population growth, implying little or no increase in per capita income. In order to meet the development challenges currently facing the country, Botswana has developed its *Vision 2016* plan. One of the main thrusts of the *Vision 2016* plan is to promote sustainable economic diversification. Human resource development, poverty alleviation, job creation, a more equitable distribution of the country's wealth, more privatisation, democracy and accountability, are important pillars of this national vision, which was articulated in 1996.²

Although the Botswana Constitution guarantees the right to freedom of expression, the Constitution does not make any explicit reference to the protection of press freedom.

1.2 The mass media market in Botswana

There is one state owned newspaper, the *Daily News*, which is a daily paper. The *Daily News* has by far the widest readership in the country compared to the privately owned papers. The country's independent press is still small, although it continues to grow and has a long tradition of vigorous, candid, and outspoken coverage. The principal privately owned newspapers are *Mmegi*, which is a daily paper that is published in Setswana, the national language of Botswana; the *Botswana Guardian* and the *Midweek Sun*, both of which are weekly papers which are investigative in their orientation; the *Botswana Gazette*, which is a weekly paper

² International Labour Organisation (Multidisciplinary Advisory Team for Southern Africa), "Botswana: Economic and Socio-political Situation" (<http://www.ilo.org/public/english/region/afpro/mdtharare/country/botswana.htm>)

that carries both investigative and informative stories; and *The Voice*, which is a tabloid.

There are three television broadcasters in Botswana, Botswana Television (“BTV”), GBC TV and MultiChoice. The dominant broadcaster is BTV. BTV was established as the country’s first national free-to-air television service in 2000. The station initially began broadcasting with technical and programming assistance from the British Broadcasting Corporation. BTV is currently still a division of the Department of Broadcasting Services, and has not yet been corporatised. Aside from BTV, two private television broadcasters have been licensed in Botswana. These are GBC TV, which is a private, terrestrial, free-to-air television station and DSTV which is a satellite subscription television broadcasting service run by South African-based company, MultiChoice. In addition, the two mining towns of Jwaneng and Orapa have their own television stations. These stations were established by DeBeers. Their programming is mainly British based, although these stations are apparently not a serious force in Botswana.

As the circulation of privately owned print media in Botswana remains limited to the main cities and towns in the country, radio remains the most important medium of public communication. There are four free-to-air radio stations in Botswana. Two of these are run by the state, namely Radio Botswana 1, which is a news and information station and Radio Botswana 2, which is a music station geared towards the adult market. The two private radio stations are Yarona FM, which is a youth orientated music station and Gabz FM, which is an adult orientated music station, although neither of these broadcast to the entire country. Only the state-owned Radio Botswana broadcasts to the entire country.³

2. Experiences of journalists in Botswana

Overview

Freedom of expression in Botswana is good relative to other countries in the SADC region. However, there have been a few worrying instances of government interference in the media sector. Because Botswana is fairly politically stable,

³ US Department of State, “Botswana: Country Report on Human Rights Practices – 2001” (<http://www.state.gov/g/drl/rls/hrrpt/2001/af/8265.htm>)

where encroachments on media freedom do occur by government, they tend to be covert and insidious. These problem areas tend to manifest themselves where the government perceives that it is being overly criticised, and particularly where aspersions are cast on individual politicians.

Many of the interviewees indicated that matters pertaining to the government, irregularities in government, government blunders, financial mismanagement and infighting amongst politicians are considered to be sensitive topics in Botswana. Some people claimed that the media was developing a pattern of self censorship in these areas whereas others denied that this was the case. One interviewee attributed the sensitivities surrounding the criticism of politicians to the fact that Botswana is a small nation. This person claimed that because of this, many people tend to be connected to each other in some way or another, including as distant relatives. This person also said there is thus a tendency for people in Botswana to protect each other, particularly in corruption cases implicating a person's relatives. Another journalist hinted that another reason for this might be cultural. Elders occupy a very prominent place in the community in Botswana, as in many African countries. The cultural implications of this are that people traditionally are not supposed to challenge their elders. Politicians who posit themselves as the elders of the nation sometimes leverage this to deflect legitimate criticism.

Problems of ethnicity and tribalism are considered to be sensitive in Botswana. Apparently the plight of the Basarwa people (Khoisan people or so-called "Bushmen") is a particularly raw nerve. The Basarwa are a hunter-gatherer people who have been marginalized from mainstream life in Botswana. No Mosarwa currently holds office in Botswana, so the Basarwa are not represented in government. The Basarwa are also not represented in the media. Moreover, there is only one Mosarwa graduate in the entire country. There has recently been an international outcry about the relocation by the Botswana government of the Basarwa from the Central Kalahari Game Reserve which they consider to be their ancestral home. The lobby group, Survival International has claimed that the Basarwa have been forcibly removed from the reserve because government wants to mine the land which is a depository of diamonds. According to one journalist, the press tread lightly around the Basarwa issue because they fear being branded as unpatriotic or of damaging international perceptions of Botswana if they report on the issue. This person felt that the Survival International campaign is negatively affecting the outside world's perception of Botswana. This led to self-censorship

in the media around the Basarwa problem. As a result, the interviewee believed that little or no internal debate is currently taking place on this issue within Botswana.

Another issue that interviewees raised is insufficient access to government information in Botswana. One of the people who we spoke to indicated that even basic government information is often not available. This problem has been exacerbated as Botswana has not enacted any legislation entrenching access to information as a right. Journalists complained that it is often quite difficult to get hold of politicians and government ministers, and that there is no guarantee that they will respond to requests for information. We were informed, however, that the Botswana government appointed a presidential spokesperson sometime in 2003, presumably to facilitate contact between the media and the government. One interviewee expressed the hope that this was the first step in paving the way to greater access to government information in the future.

A few interviewees expressed the concern, however, that the government is not the only threat to media freedom in Botswana. Subtle pressures also emanate from the private sector, particularly from advertisers. One journalist complained that the press were constantly aware that an advertiser could withdraw support if the media ran a story that the advertiser did not like.

A further general theme that resonated throughout the interviews was that few journalists in Botswana have actually received formal training. Journalists in Botswana generally tend to learn their trade on the job, with the exception of those journalists who have been trained outside of the country. We were informed that many of the older journalists in Botswana came from the ranks of schoolteachers.

Apparently, the study of journalism is a fairly recent discipline at university. For example, the Mass Media Unit at the University of Botswana was only set up in 2002. One of the reasons for this is that apparently journalism was not previously seen as a profession worth going to school for. Another problem with this seems to be that major discrepancies exist in the levels of experience and exposure of top management *vis-à-vis* middle to lower management in the media. One interviewee claimed that the situation in the private press is even worse than in the public media, and that newsrooms in Botswana are becoming increasingly juniorised. This person said that most of the people who are employed as media personnel in

the private media sector come straight out of high school or join the media industry from other professions. There is little training going on within media institutions to counteract this trend, and all the media houses are generally run on low budgets.

2.1 The print media sector

The private press in Botswana has a long tradition of speaking out on issues affecting the public interest. Perhaps because of this, the Botswana government has sought to curtail the private print media on more than one occasion, and thereby influence editorial policy in a more pro-government direction.

In 2001 the Office of the President instructed all government ministries, departments, parastatals and private companies in which the government is a shareholder to cease all advertising in the *Botswana Guardian* and the *Midweek Sun*. This placed the *Botswana Guardian* and the *Midweek Sun* in a financial bind because the government is the biggest source of advertising revenue in the country. The withdrawal of advertising happened after the papers ran an article accusing the vice-president Ian Khama of abusing his authority. The papers responded to the ban by successfully instituting legal proceedings against the government in the High Court. One interviewee claimed, however, that the court victory was more of a moral victory than anything else. The court ruled that although it could not compel the government to place adverts with the *Botswana Guardian* and the *Midweek Sun*, it was nevertheless wrong for the government to withdraw advertising solely on account of the stories that the papers were running. The court held that the ban violated the newspapers' constitutional right to freedom of expression, as the ban had been instituted to influence the papers' editorial policies.⁴ Government advertising has been reinstated to some degree since then.

Usually, however, the threats to media freedom in Botswana are not as blatant as the case of the withdrawal of advertising. More subtle, anti-competitive threats are starting to emanate from the government-owned media. Apparently the government media (such as *The Daily News* and *Kutlwano*) used to be solely financed by the state for a long time, and never carried any adverts. However, according to one interviewee, the new Minister of Science, Communication and Technology decided that the state-owned newspapers should start running adverts

⁴ International Press Institute, "Botswana – 2001 World Press Freedom Review" (<http://www.freemedia.at/wpfr/botswana.htm>)

to generate revenue. This directly affects the viability of smaller papers because they have smaller readership than the government owned papers. At 65 000 copies per day, the government owned *Daily News* is widely circulated. Private print media with lower circulation figures cannot compete as advertisers invariably support the bigger papers, because the audience reach is wider. It was also alleged that the government papers undercut the private papers by offering lower rates to advertisers than the independent press can afford. The bigger papers can afford to do this because they are being subsidised by the state. Obviously there are major competition issues with the state papers doing this because it means that the private and the public newspapers are not competing with each other on a level playing field. This problem has been exacerbated because there is currently no competition legislation in Botswana that prevents dominant companies from abusing their position in the marketplace.

The tentacles of the government's influence also seem to be far reaching in other ways. For example, although the Botswana Press Agency ("BOPA") is supposed to be a wire service for everyone, it mostly provides news to other government owned media. An interviewee claimed that even if the BOPA did provide news to all media sources, it is doubtful that private sources would use it, as the BOPA is considered to be a propaganda tool.

Tensions between the government and the print media also surfaced a few years ago when the Botswana government attempted to introduce statutory measures to regulate the print media. In November 2001, the government submitted a draft Mass Media Communications Bill to a group of journalists and media professionals for consideration. The Bill proposed to establish a statutory press council that would have been appointed primarily by the government. The Mass Media Bill would also have required journalists to obtain government accreditation as a prerequisite to practising in the country, and would have conferred wide powers on the police to seize publications that violated its provisions. One of the interviewees expressed the view to us that the Bill was passed in reaction to the realities of the independent media in Botswana. In the face of encroaching government control, the print media sector clubbed together and established its own self-regulatory body in the form of the Botswana Press Council. The Council was launched in January 2003. The Council developed a code of ethics for urnalists which it launched on 26 June 2004.

However, the Botswana government has apparently not yet given up on its efforts to bring the print media sector under statutory control, in spite of the establishment of the Botswana Press Council. Government is still trying to push through the Mass Media Bill, notwithstanding ongoing opposition from the industry. The government has established a Media Advisory Council as a consultative forum specifically for the purpose of reworking the Bill. The Media Advisory Council consists of representatives from government and the print media industry. We were told that to date, the members of the Media Advisory Council have been unable to agree on the form that the Bill needs to take. According to one journalist, the industry is hoping that the impetus behind the Bill will eventually fizzle out with time.

2.2 The television broadcast sector

A number of interviewees cited the fact that the state-broadcaster, BTV, has not yet been corporatised, as a major problem. Apparently, the 2000 debut of BTV generated substantial debate among government officials and the Botswana public alike as to whether a fully-fledged state-owned station could function independently of state influence, especially with respect to news coverage. During the station's opening ceremonies, the Acting Minister for Presidential Affairs and Public Administration insisted that editorial policies would not be subject to government interference.⁵ However, there have been incidents since then that indicate that the state may be trying indirectly to influence the BTV's editorial policy.

According to the Committee to Protect Journalists, BTV News Director Chris Bishop resigned in April 2001 to protest alleged government interference with the station. Bishop, who claimed to have been threatened by state officials, left BTV after authorities blocked the broadcast of a feature documentary on Marietta Bosch. Bosch was a South African woman who was executed that month after a court convicted her of murder. The execution had provoked much controversy, particularly in South Africa where the death penalty has been outlawed.⁶

⁵ US Department of State, "Botswana: Country Report on Human Rights Practices – 2001" (<http://www.state.gov/g/drl/rls/hrrpt/2001/af/8265.htm>)

⁶ Committee to Protect Journalists, "Botswana – Attacks on the Press in 2001." (<http://www.cpj.org/attacks01/africa01/botswana.html>)

One of the interviewees expressed a concern that people working for state media houses such as BTV consider themselves to be government employees first, and then journalists second. This person was emphatic about the need for a public media system instead of the current state media system. Another interviewee hinted at the subtle pressures that the state broadcaster faces from the government. This person said that the Minister sometimes “panics” when BTV runs a story that he does not like, in which case he will phone BTV and express his dissatisfaction. This interviewee said to us, “That is harassment in my view.” We were also told that because of their close ties to the government, it is generally more difficult for the government owned media such as BTV to investigate issues of public morality implicating government officials. This person told us that it is probably far easier for the privately owned media to do this.

2.3 The radio broadcast sector

One journalist from the private radio broadcasting sector expressed an overwhelmingly positive view of media freedom in Botswana. This person told us that he had never had any personal experience of government harassment in the sector. His biggest gripe was a lack of access to government information. We were told that instances of government interference in the sector tended to be few and far between.

However, government has nonetheless been known to meddle with the broadcasting sector from time to time. For example, the state owned Radio Botswana used to run a popular morning radio program, *Masa-a-sele*, which means “dawn has broken” in English. Apparently it was one of the most widely listened to programs in Botswana, partly because the show allowed people to phone in and express their views on air, and partly because the show used to run during the drive-time in the morning. The format for the show was that the presenters would discuss a topic before opening the phone lines to the public. According to this particular interviewee, the new Minister of Science, Communication and Technology, Boyce Sebetlela, decided that the show had become a threat to the ruling party because people were phoning in and criticizing their elders, so he shut the programme down. The programme was revived early in 2004 after the public raised an outcry over its closure, but without Laone Segaletso, the original presenter and without the phone-in option. We were told that Segaletso has been permanently removed from his radio presenting function to a desk job instead.

3. Constitution of Botswana, 1966

Commencement date

30 September 1966.

Supremacy of the Constitution

The Botswana Constitution established a system of constitutional supremacy (as opposed to parliamentary supremacy), meaning that the Constitution is the supreme law of the land. While there is no express provision to the effect that the constitution is the supreme law of Botswana, the supremacy of the Constitution can be inferred from various provisions in the Constitution.

Establishment of an independent regulator

The Constitution does not make provision for the establishment of an independent regulatory authority for the communications sector.

Provisions impacting on the media

Chapter II of the Constitution provides for the protection of fundamental human rights and freedoms. Section 12(1) of the Constitution enshrines the right to freedom of expression but does not specifically guarantee freedom of the press. However the right to freedom of expression is not absolute and may be limited. Section 12(2) sets out the grounds on which this right may be limited, which includes factors such as defence, public safety and the like. An unusual feature of section 12 is that it expressly allows for restrictions to be imposed on the expressive activity of public officers, local government employees and teachers.

The exact wording of section 12 provides as follows:

- (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold his opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
- (2) Nothing contained in or done under the authority of any law shall be held inconsistent with or in contravention of this section to the extent that the law in question makes provision -

- (a) that is reasonably required in the interests of defense, public safety, public order, public morality or public health; or
- (b) that is reasonably required for the purpose of protecting the reputations, rights and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instructions therein, or regulating the technical administration or the technical operation of telephony, telegraphs, posts, wireless, broadcasting or television;
or
- (c) that imposes restrictions upon public officers, employees of local government bodies, or teachers, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Limitation clause

The Botswana Constitution does not have a general limitations clause. Rather, to the extent that restrictions on fundamental rights are permitted, these restrictions are set out in the text of each clause dealing with a fundamental human right, such as is the case with section 12(2).

Section 16 of the Botswana Constitution permits some of the fundamental rights entrenched in the Constitution to be derogated from during a state of emergency or during a war. The Constitution stipulates that the derogation must be “reasonably justifiable” to be constitutionally valid. However, section 16 does not make any mention of derogations from the right to freedom of expression under section 12.

Courts which have jurisdiction to decide constitutional matters

Section 18 of the Constitution confers original jurisdiction on the High Court of Botswana to hear and determine cases relating to the violation of the rights and freedoms guaranteed under the Constitution. If any question arises relating to a contravention of a fundamental right enshrined in the Constitution during the course of proceedings before a subordinate court, then this must be referred to the High Court for determination. Section 105 also requires subordinate courts to refer issues of constitutional interpretation to the High Court for determination. Such referrals may either be made of their own accord or at the instance of a party to proceedings before them. Appeals on constitutional matters lie from the High Court to the Court of Appeal as provided for under section 106.

Hierarchy of the courts

The Court of Appeal is the final court of appeal in Botswana. Underneath the Court of Appeal is the High Court, below which are the subordinate courts.

Appointment and removal of judges

Sections 96 and 100 respectively empower the President to appoint the Chief Justice and other judges of the High Court and Court of Appeal. However, the President's powers of appointment are not unfettered. The Constitution stipulates that he must act in accordance with the advice of the Judicial Service Commission. It is unclear whether the President can deviate from the Commission's advice.

Sections 97 and 101 respectively empower the President to remove judges of the High Court and Court of Appeal on the advice of the Judicial Service Commission. The Constitution provides that judges may be removed only if they are unable to perform the functions of their office or for misbehaviour. If the President believes that the removal of a judge from office ought to be investigated, he must appoint a tribunal to investigate the matter, and thereafter acts on its recommendation.

Independence of the judiciary

There is no express provision in the Constitution that enshrines the independence of the judiciary.

4. Legislation that governs the media

Overview

The principal statutes which impact on media freedom in Botswana, include the following:

- Broadcasting Act, 1998 (Act No. 6 of 1998) – which is the primary statute dealing with the regulation of the broadcasting sector;
- Cinematograph Act, 1970 (Act No. 73 of 1970) – which provides for the censorship and pre-classification of films and publications;
- National Security Act, 1986 (Act No. 11 of 1986) – which provides for terrorism, defence and internal security;
- Printed Publications Act, 1968 (Act No. 15 of 1968) – which provides for the registration of certain newspapers;
- Penal Code No. 2 of 1964 – which sets out conduct that is deemed to be

- criminal including defamation; and
- Mass Media Communications Bill, 2001 – which proposes to amend the Printed Publications Act, to provide for the registration of newspapers, to establish a statutory Press Council and to provide for the accreditation of journalists.

4.1 Broadcasting Act, 1998

Commencement date

18 August 1999 (for parts 1 and 2)

29 June 2001 (for parts 3 and 4).

Purpose of the Act

The Act establishes a regulatory framework for broadcasting services. In particular, the Act provides for the establishment of the National Broadcasting Board (“the NBB”) as the regulator for the broadcasting sector and sets out a framework for the licensing of television and radio broadcasters.

Sector of the media affected by the Act

The Act applies to television and radio broadcasters who broadcast via terrestrial, satellite, cable and optical fibre platforms. Online media broadcasters such as Internet webcasters are not covered by the Act.

Key provisions

Section 3 establishes the NBB as the regulator for the broadcasting sector. The Act does not establish the NBB as a body corporate in its own right. The telecommunications regulator, the Telecommunications Authority acts as the secretariat to the NBB in terms of section 9 (The Telecommunications Authority was established as a juristic person under section 3 of the Telecommunications Act, 1996). The secretariat carries out all functions that the NBB delegates to it. Further in terms of section 9(2), the Telecommunications Authority is empowered to designate to the NBB any of its officers as may be necessary to allow the NBB to perform its functions and to administer the Act.

Section 4 stipulates that the NBB must consist of eleven members. What is significant in Botswana is that it is the line ministry responsible for communications that appoints the members of the NBB. In terms of section 5, five of the members are appointed directly by the Minister. The remaining seven

members are also appointed by the Minister but from a list of ten nominees drawn up by the Nominating Committee.

In terms of section 8, the Nominating Committee consists of three members, namely someone from the Law Society of Botswana, the Vice-Chancellor of the University of Botswana and a representative from the Office of the President. The Nominating Committee is required to advertise NBB positions in the Gazette and in the local newspapers and conduct interviews before drawing up its list of nominees.

In terms of section 6, no NBB member's tenure can exceed five years at a time although a member can be eligible for re-appointment.

In terms of section 7 the Minister is empowered to determine the allowances payable to NBB members after consulting the Ministry of Finance and Development Planning.

As a general rule it is illegal for a broadcaster to operate in Botswana without a licence. Section 12 prohibits anyone from broadcasting or re-broadcasting without a licence issued under the Act. The NBB has the final say over the decision to award broadcasting licences.

It does not appear as if any kind of invitation for applications needs to be issued for broadcasting licences beforehand. Applicants who wish to obtain a broadcasting licence may apply to the NBB for a licence at any time. In terms of section 13, the NBB may grant an application for a broadcasting or re-broadcasting licence provided that there are sufficient frequencies available. The Act empowers the NBB to impose conditions and restrictions on broadcasting licensees, including geographical restrictions.

Section 14 states that licensees may not broadcast or re-broadcast material of which they are not the copyright owner unless written permission has been received from the copyright owner to do so.

In terms of section 15, it is necessary to seek the approval of the NBB whenever there is a change to the particulars of the licensee. The approval of the NBB is specifically required where the licensee wishes to change its name, if proprietorship of the licensee is changed, or if the directors or producers are

changed. The NBB has the discretion to approve the change or to reject it and revoke the licence. Section 17 empowers the NBB to revoke a licence whenever a licensee has failed to comply with a material condition of the licence. The NBB also has the power to renew licences that are about to expire. However, the NBB must give the licensee a reasonable opportunity to be heard first before revoking the licence or declining to renew it.

In terms of section 18, licensees who are aggrieved by the revocation of their licences or by the failure of the NBB to review their licences may appeal to the High Court.

Section 19 requires licensees to keep sound and video recordings of all programmes that they broadcast or re-broadcast for a minimum period of 3 months after the date of transmission and to produce such material when the NBB so demands.

Powers granted to the Minister or Director-General by the Act

Section 23 empowers the Minister to make regulations rather than the NBB.

Provisions for media not controlled by the state

The Act applies equally to both state controlled and non-state controlled broadcasting media, inclusive of the public, private and community broadcasters.

Body which enforces compliance with the Act

The NBB is largely responsible for enforcing compliance with the Act. The courts may hear appeals against decisions of the NBB to revoke or not to renew licences under section 17. Similarly, the courts may criminally prosecute people who commit statutory offences under the Act in terms of section 22.

Provisions limiting media ownership

There is no specific provision restricting broadcasting media ownership, except for a casual reference under section 10(2) for the need for the NBB to give preference to enterprises which are owned by Botswana citizens or in which citizens have significant shareholding.

Consequences of non-compliance

In terms of section 15(6) any person who files a false notice or who carries out broadcasting or re-broadcasting activities in contravention of section 15 will be

guilty of an offence.

Under section 22 non-compliance with the provisions of the Act is an offence punishable on conviction by a term of imprisonment of up to three months, payment of a fine, or both.

4.2 Cinematograph Act, 1970

Commencement date

22 December 1972.

Purpose of the Act

The Act regulates the making and exhibition of films within Botswana and licensing of cinemas.

Sector of the media governed by the Act

The Act primarily applies to the film, theatre and entertainment sectors.

Key provisions

In terms of section 3 no films may be made in Botswana without a permit granted by the relevant Minister. It is an offence to make a film in Botswana without a permit. Section 4 stipulates that an application must contain a full description of all the scenes and the text of the spoken parts of the entire film. The Minister has a very wide discretion to grant or refuse permits. In terms of section 6, the holder of a permit must also apply to the Minister whenever it is proposed to make any material alteration or addition to the text or scenes of the film. Section 7 requires films to be made in accordance with the filming permit by the Minister. Failure to comply with the filming permit is a punishable offence. Section 9 gives the Minister wide powers to exempt films and classes of films from these requirements.

Section 10 establishes a Board of Censors appointed by the Minister. The Minister is also empowered to assign functions to the Board from time to time. In terms of section 14, the main function of the Board is to pre-approve and grant certificates of approval in respect of films and posters advertising films that are to be shown to the public. Section 15 of the Act gives the Minister wide-ranging powers to grant or decline certificates of approval and to impose restrictions on

the exhibition of films. Section 15 also empowers the Board to stipulate that the exhibition of a film to the public be subject to certain excisions or that age restrictions be imposed. A rather draconian feature of the legislation is that section 15(6) empowers the Board to refuse to approve films and posters that impersonate the President in an offensive manner, that ridicule the Botswana Police Force or that disparage public characters. The other grounds on which the Board may decline to grant a certificate of approval is where it is of the view that a film or a poster contains scenes:

- that are calculated to affect the religious convictions or feelings of any section of the public;
- that disparage other people on the basis of race or colour;
- that are suggestive of immorality or indecency;
- that show executions, murders and other “revolting scenes”;
- that depict “debauchery, drunkenness, brawling or any other habit of life not in accordance with good morals and decency”;
- that show successful crime or violence; or
- that “are in any way prejudicial to the peace, order or good government of Botswana”.

In terms of section 11 it is an offence for anyone to screen a film to the public without first obtaining a certificate of approval from the Minister. In terms of section 12 it is also an offence to display a poster advertising a film in a public place without ministerial approval. In terms of section 16 it is an offence for anyone to screen a film or display a poster to the public other than in accordance with the terms of the relevant certificate of approval.

The Act also requires cinemas to be licensed. It would appear as if the primary reason for this requirement is to ensure that cinema facilities are safe for public use. In terms of section 19, it is an offence for anyone to use premises for the public exhibition of a film without a cinema licence. Section 18 empowers the Minister to appoint a local authority, a city council, a town council, or a district commissioner as a licensing authority for this purpose. Section 20 gives the licensing authority wide-ranging powers to grant and to reject applications for cinema licences.

In terms of section 20(4), licensing authorities may also revoke or suspend cinema

licences if they believe that inadequate provision has been made for the safety, health or convenience the audience.

Section 22 empowers licensing authorities to endorse a cinema licence to allow the cinema to be used as a theatre for the performance of stage plays and other forms of public entertainment. Section 23 empowers licensing authorities to exempt certain premises and classes of premises from the requirement to hold a cinema licence.

Section 24 confers appellate jurisdiction on the Minister. In particular, the Minister is empowered to adjudicate appeals against decisions of the Board and the licensing authorities. In this regard, the Minister may confirm, vary or reverse the decisions of the Board or a licensing authority relating to cinema licences and permits. A rather worrying feature of the legislation is that the Minister's appellate decisions are considered to be final and may not be questioned in any court of law. This is of particular concern when it is considered that it is also the Minister who appoints the Board of Censors and the Chief Censor in terms of section 10.

Finally, section 25 of the Act empowers the Minister, the Board and the licensing authority to revoke licences, permits, approvals and permissions after giving written notice to that effect to the licensee.

Powers granted to the Minister or Director-General by the Act

Section 28 empowers the Minister to pass regulations under the Act.

Provisions for media not controlled by the state

The Act does not exempt any category of persons or institutions engaged in the activities covered by the Act. Therefore, it applies to all cinemas whether state controlled or privately owned.

Body which enforces compliance with the Act

The Minister, the Board of Censors and the licensing authorities appointed by the Minister are all responsible for administering the Act.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

Section 29 makes it an offence not to comply either with the Act or with the provisions of any certificate, licence or permit issued under the Act. Offences are punishable by imprisonment of up to one year or a fine or both.

4.3 National Security Act, 1986*Commencement date*

23 May 1986.

Purpose of the Act

The primary purpose of the Act is to make provision for matters relating to the national security of Botswana, including official state secret information. In relation to the media, the Act prohibits the dissemination or use of information that is prejudicial to the national security interests of Botswana.

Sector of the media governed by the Act

The provisions of the Act are not specifically targeted at the media, but are of general application to the public. Therefore, it applies to all sectors of the media.

Key provisions

Section 3 makes it an offence for any person to be in the vicinity of or enter any prohibited place for purposes that are prejudicial to the safety or interests of Botswana. In terms of section 1, a prohibited place refers to “any work of defence belonging to or occupied or used by or on behalf of Botswana including arsenals, navy, army or air force establishment or stations, factories, dockyards ...” The section goes further to state that prohibited places also include any place that the President has declared as a protected place under the Protected Places and Areas Act. A contravention of section 3 will render the offender liable on conviction to imprisonment for a maximum period of 30 years.

Section 5 criminalizes the communication of classified matters to unauthorised persons. It is not a defence that the accused did not know and could not have reasonably known that the information concerned related to a classified matter.

Section 9 of the Act equally makes it an offence for anyone who attempts, aids,

incites, or persuades another person to do any of the prohibited acts under the Act.

Section 13(1) empowers the Attorney-General to give a written authority to a named Police Officer to obtain information from anyone who is believed to be in possession of information about someone else who has committed or is about to commit an offence under the Act. Section 13(2) makes it an offence for anyone to refuse to disclose such information or to knowingly give false information. What is significant about this particular section in the legislation is that it could potentially be used by the Attorney General to compel journalists to disclose confidential sources of information.

Powers granted to the Minister or Director-General by the Act

The Attorney General must give his consent as required by section 15 before any person may be prosecuted under the Act. In terms of section 17(2), the Attorney General may insist that court proceedings against any person for committing an offence under the act be closed to the public if it is believed that public exposure would be prejudicial to the interests of Botswana.

Provisions for media not controlled by the state

The Act is of general application and does not specifically apply to the media only.

Body which enforces compliance with the Act

Generally, the courts are responsible for prosecuting offences committed under the Act.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

Generally, offences committed under the Act are punishable with a sanction of imprisonment.

4.4 Printed Publications Act, 1968

Commencement date

8 March 1968.

Purpose of the Act

The primary purpose of the Act is to provide for the registration of newspapers.

Sector of the media governed by the Act

The Act applies to the print media.

Key provisions

Section 4 of the Act obliges the Registrar of Newspapers to maintain a register for the registration of newspapers in Botswana. Section 3, empowers the relevant Minister to appoint the Registrar.

In terms of section 5(1), it is an offence for anyone to print or publish a newspaper in Botswana without registering with the Registrar. In terms of section 5(2), full details must be given on registration of the title of the newspaper, and the addresses of the editor, the proprietor, the publisher and the printer. In terms of section 5(3), the Registrar must be notified whenever there is a change to any of these details.

Section 8 empowers the Minister to declare any newspaper not to be a newspaper for the purposes of the Act. Further, the Minister may also exempt any person from the provisions of the Act.

Section 9 empowers the Minister to declare in the Gazette that any publication printed outside but which is intended for circulation within Botswana to be a newspaper and therefore to comply with the registration requirements under the Act.

Section 11 empowers the police to seize any publication or newspaper printed or published in contravention of the Act. The Act also empowers magistrates to issue warrants authorising the police to enter any premises where it is reasonably suspected that a newspaper that has been printed or published in contravention of the Act is being kept.

Powers granted to the Minister or Director-General by the Act

Section 12 empowers the Minister to make regulations under the Act.

Provisions for media not controlled by the state

The Act does not make a distinction between state owned and private media and

thus applies equally to both.

Body which enforces compliance with the Act

It is an offence to contravene the Act, which offence can be prosecuted in a court of law.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

Under section 13 anyone who contravenes the Act will be liable on conviction to a fine, or to imprisonment of up to six months, or both.

4.5 Penal Code, 1964

Commencement date

10 June 1964.

Purpose of the Act

The primary purpose of the Penal Code is to establish a code of criminal law in Botswana, although some of the provisions have an impact on the operations of media practitioners.

Sector of the media governed by the Act

The Code is of general application and most of its provisions are not specifically targeted at the media.

Key provisions

Section 47 gives the President an absolute discretion to declare any publication to be prohibited that in his opinion is contrary to public interest. If a prohibited publication is printed outside Botswana it is necessary to obtain a permit from the relevant Minister to import it into Botswana.

Section 48(1) makes it an offence for any person, other than a public officer in course of his duty, to print, make, import, publish, or possess or to be in control of any prohibited publication. In court it will be presumed that a person who did any

of these things knew about the nature and contents of the publication. This presumption can, however, be rebutted if the accused can show that he or she was unaware that the publication was prohibited and did not have reasonable cause to suspect that the publication was prohibited. Section 49 empowers the police and administrative officers to seize publications that they reasonably believe to be prohibited under the Code.

A noteworthy feature of the Code is that it criminalizes sedition. In terms of section 50(1) it is prohibited for anyone to publish anything that:

- brings hatred or contempt, or that incites disaffection against the President or the Government of Botswana or against the administration of justice; or
- raises discontent or disaffection amongst the inhabitants of Botswana or promotes ill-will and hostility between different classes of the population of Botswana.

Section 50(2) raises the presumption that the publisher of seditious material intends the natural consequences of the publication. Section 51(1) makes seditious publication an offence.

Section 192 creates the offence of criminal defamation. The offence of criminal defamation is defined under section 193 as a publication likely to injure the reputation of any person and expose him/her to contempt, hatred or ridicule or cause damage to his profession or trade.

Powers granted to the Minister or Director-General by the Act
None specifically in relation to the media.

Provisions for media not controlled by the state:
The Code is of general application. Therefore, it applies equally to state-owned and private media.

Body which enforces compliance with the Act
Enforcement is through criminal prosecution in the courts.

Provisions limiting media ownership
None.

Consequences of non-compliance with the Act

Persons who contravene the provisions of the Code regarding the prohibited publications are under section 48(1) liable to a term of imprisonment of up to three years, while offenders under the seditious publications provisions are liable to imprisonment under section 51(1) for a term of up to three years. There is no prescribed penalty for criminal defamation.

4.6 Mass Media Communications Bill, 2001*Commencement date*

Not applicable as this is a Bill.

Purpose of the Bill

The Bill proposes to re-enact, with certain amendments, the Printed Publications Act, 1968 to establish the Press Council of Botswana as a self-regulatory body that will monitor the activities of the press and ensure the maintenance of high professional standards. More controversially, the Bill also makes provision for the accreditation of journalists. When the draft Bill was initially published, it was met with substantial opposition and was thus put on hold.

Sector of the media governed by the Bill

The Bill applies to the print media.

Key provisions

Section 14 provides for the establishment of the Press Council as a body corporate in its own right. In terms of section 16, the main objects of the Press Council are to monitor the activities of the press and to ensure that high professional standards are maintained. The Press Council is also responsible for receiving and adjudicating complaints from the public, and for recommending disciplinary measures and imposing sanctions where necessary.

In terms of section 17, all practising journalists and all newspaper proprietors in Botswana are required to be members of the Press Council irrespective of whether or not they are engaged in the public or private sector.

Section 18 stipulates that all Press Council members must pay an annual subscription fee to the Press Council.

In spite of the fact that the Press Council is ostensibly a self-regulatory body, the Bill nevertheless gives the Minister the power to make appointments to the executive council of the Press Council, which serves as its governing body. Section 19 empowers the Minister to appoint the chairperson as well as to appoint an unspecified number of representatives of the general public, one of whom must be designated as the vice-chairperson. The Bill permits these (ministerially appointed) members of the Press Council to appoint a further three practising journalists and two newspaper proprietors onto the executive committee.

In terms of section 34 all foreign journalists who wish to cover events in Botswana must first apply for and obtain accreditation from the Director of Information and Broadcasting.

Similarly, in terms of section 35 all journalists who are resident in Botswana must apply for and obtain a press card from the Director in order to report on any official event in Botswana. These sections are problematic because they place the power to authorise journalists to operate in Botswana directly in the hands of the government. Potentially this gives the government the power to freeze out journalists whose views and opinions it does not like.

Powers granted to the Minister or Director-General by the Bill

Section 37 vests the power of making regulations in the Minister.

Provisions for media not controlled by the state:

The Bill applies to print media that is both state-controlled and that is not state-controlled.

Body which enforces compliance with the Bill

The Registrar of Newspapers, the Press Council and the Director of Information and Broadcasting have all been given powers to administer various provisions of the Bill. Otherwise, the courts prosecute statutory offences committed under the Bill.

Provisions limiting media ownership

Section 7(2) of the Bill states that a newspaper owned by a company can only be issued a certificate of registration if 80% of its equity shares is owned by Botswana citizens.

Consequences of non-compliance with the Bill:

Section 36 of the Bill stipulates that statutory offences committed under the Bill may attract a penalty of imprisonment, or a fine, or both.

5. Regulations

No regulations were made available.

6. Media Codes of Conduct

Overview

The newly established self-regulatory body, the Botswana Press Council has recently drawn up a Media Code of Ethics for the purposes of regulating standards in the print media sector.⁷ The Code was launched on 26 June 2004. It is intended that the Botswana Press Council will administer the code. The Code addresses professionalism standards, general media duties, and good practices.

Press Council of Botswana – Media Code of Ethics

Commencement date

26 June 2004.

Purpose of the Code

The primary purpose of the Code is to establish rules of conduct and rules of practice to be applied to all media in Botswana and enforced by the Botswana Press Council.

Sector of the media affected by the Code

The Code states that it will “govern the conduct and practice of all media

⁷ A copy of the Code can be obtained from the Independent Press Council's website (<http://www.presscouncils.org/library/Botswana.doc>)

practitioners, media owners, publishers and media institutions”. It is clear that the Code was primarily meant to apply to the print media sector. However, the Code contains a few references to broadcasting, which suggests that the reach of the Code extends to radio and television journalism as well.

Key provisions

The Code’s preamble extols freedom of expression and the right to access to information.

Each media sector is required to submit its own code that complements the Press Council’s Code.

The General Standards section of the Code mandates that media practitioners must maintain the highest professional and ethical standards in their work. The Code stipulates that media practitioners must take all reasonable steps to ensure that they disseminate accurate and balanced information, and that their comments are genuine and honest. The Code precludes media practitioners from publishing information that they know is false or from maliciously making unfounded allegations about others that are intended to harm their reputation.

The General Duties section of the Code places a duty on media practitioners to be honest, fair and courageous in their work. The Code also calls upon media practitioners to defend press freedom.

The Good Practices section of the Code mandates media practitioners to thoroughly verify the accuracy of the stories that they publish. The Code also mandates media institutions to take steps immediately to correct distortions in the facts that they have published when these become apparent. The Code also mandates media institutions to give people a right of reply where they have been unfairly criticised or have been the target of inaccurate reporting.

In the Rules of Profession section of the Code, media owners and practitioners are prohibited from suppressing or distorting information on account of pressure from advertisers or other private interests. They are also not allowed to submit to cultural, political, or economical intimidation. The Code also stipulates that media practitioners must practise their profession in the public interest without undue influence from any quarter.

The Code enjoins media practitioners to use open methods of gathering information. Surreptitious methods of information gathering may only be used in the public interest after open methods have failed to yield information.

The Code prohibits the media from paying their sources for information unless there is a significant public interest value. In cases where a payment has been made, the Code mandates the media to indicate that the information was paid for.

As regards reporting on criminal investigations, the Code obliges the media to respect the presumption of innocence by not publishing the names of suspects until the police have filed formal charges – unless it is in the public interest to do so.

The Code prohibits the media from reporting on a person's private life unless it is in the public interest to do so.

The Code also prohibits the media from interviewing or photographing children below the age of 16 without the consent of their parents or legal guardians. Furthermore, the Code forbids the media from publishing the names of children younger than 16 who have been arrested by the police or tried in the criminal courts. In addition, the Code enjoins the media to avoid identifying the friends and relatives of people who have been accused or convicted of crimes – unless the reference to them is necessary for the full reporting of the crime or the legal proceedings.

The Editorial Rules section of the Code obliges media institutions not to publish material that engenders hatred based on arbitrary grounds such as race, ethnicity, nationality, gender, physical disabilities, religion and political affiliation. The Code also stipulates that dehumanising and degrading pictures of people may not be published without their consent.

The Code precludes the media from publishing or broadcasting material “that will prejudice the legitimate national security interests of Botswana in regard to military and security tactics or strategy, or material held for the purpose of intelligence relating to defence.”

However, the Code does not preclude the media from exposing corruption in any of these sectors.

The Code forbids journalists from engaging in plagiarism.

The Code states that the media must protect their confidential sources of information.

Body which enforces compliance with the Code

The Press Council of Botswana is responsible for enforcing the Code.

Consequences of non-compliance

The consequences of non-compliance are not outlined in the Code. However, clause 8.2 of the Constitution of the Botswana Press Council authorises the Press Council to establish a complaints committee and an appeals committee to adjudicate and to impose sanctions relating to complaints against the media.

7. Court cases

Overview

The two principal cases that we surveyed both relate to the law of defamation. They are:

- *Ghanzi Hotel (Pty) Ltd & Others v Attorney-General* – which established the principle of strict liability for the press; and
- *Attorney-General v Ghanzi Hotel* – which laid down principles regarding the type of evidence that may be led in mitigation of damages for defamation.

7.1 *Ghanzi Hotel (Pty) Ltd & Others v Attorney-General (No.2) (1985) B.L.R.452*

Date of judgment

18 June 1985.

Sector of the media affected by the judgment

The print media.

Key legal principles established

The case established the principle of strict liability for the press. The court

stated that publication of a defamatory statement gives rise to the irrebuttable presumption that that the defendant published it intentionally with knowledge of its defamatory meaning.

Court handing down the judgment

High Court, Botswana.

Key provisions of the judgment

In this case, the plaintiff, a hotel sued the Attorney-General as the representative of a state owned daily newspaper, which published an article alleging racist practices on the part of the hotel. In particular it was alleged that the hotel had retrenched black staff on the basis of redundancy. The plaintiff claimed that the publication was defamatory, while the defendant raised justification and fair comment in his defence. The court upheld the claim on the basis that the defendant had been unable to prove the truth of all the allegations in the article. The defendant was ordered to pay damages to the plaintiff on an attorney-and-own client scale.

7.2 Attorney-General v Ghanzi Hotel (1986) B.L.R. 178

Date of judgment

26 May 1986.

Sector of the media affected by the judgment

The case dealt with an instance of defamation relating to the print media. However, the principles in the case apply equally to the broadcast media.

Key legal principles established

The case laid down principles regarding the type of evidence that may be led to minimise or reduce damages for defamation.

Court handing down the judgment

Court of Appeal, Botswana.

Key provisions of the judgment

This was an appeal from a judgment of the High Court in which a state owned

newspaper published an article alleging that a hotel had been engaging in racially discriminatory practices. The Hotel subsequently sued the newspaper for defamation, alleging that the article was malicious and defamatory of it. The newspaper denied that the article was malicious and defamatory. The paper also raised the defence of fair comment.

Based on the facts the trial court found that the newspaper had failed to establish the truth of the allegation. The court also concluded that the defence of fair comment also had to fail because there was no factual basis for the allegations. The Court then proceeded to award damages against the newspaper on an attorney-and-own client scale.

When the case was taken on appeal, the newspaper did not seek to challenge the correctness of the trial court's finding that the article had been defamatory. The newspaper's appeal was confined to the award of damages on an attorney-and-own client scale.

In its appeal, the newspaper sought to admit stories of racist practices on the part of the hotel in mitigation of punishment. The newspaper argued that in assessing damages in a defamation suit, the court was entitled to consider evidence bearing on the hotel's reputation, since the hotel's standing in the community bears directly on the amount of damages to which he should be entitled. So the argument went, if the hotel had a bad reputation, it should not be awarded as large an amount of damages as would be the case where his reputation was unblemished. The trial court held that the evidence was irrelevant and refused to admit it.

The Court of Appeal dismissed the application for appeal. The court held that evidence of facts used to justify the newspaper's defence against the charge of defamation could be led in mitigation of damages. The court also held that such evidence could be used to show the hotel's bad character. On the other hand, evidence of particular acts of misconduct as grounds for inferring the hotel's ill repute would be excluded from the determination of damages. Where it was intended to adduce evidence of a plaintiff's general bad character, it would be necessary to give the plaintiff adequate notice that his general reputation would be attacked in mitigation of damages.

On the facts of the case, the court found that the newspaper had not given adequate notice to the hotel beforehand of the evidence that it intended to lead in mitigation. Moreover, the court found that that the evidence that the newspaper was seeking to lead related to specific instances of misconduct rather than general evidence of ill repute.

Swaziland

1. Introduction

1.1 Political landscape

Swaziland is a small hereditary monarchy that has a population of approximately 1.6 million people. The country was formerly a British colony. King Sobhuza II became king in 1921. In the 1960s, political activity intensified as different political parties pushed for Swazi independence and political control. In 1964 the Imbokdovo National Movement (INM), which included traditional Swazi leaders such as King Sobhuza II, won all seats in the legislative council. A colonial constitutional committee determined that Swaziland would have a constitutional monarchy and self-government would follow parliamentary elections in 1967. Swaziland formally gained independence on 6 September 1968.

During the first post-independence parliamentary elections in 1972, the INM lost its monopoly, and the National Liberatory Congress won three seats. In response, King Sobhuza II repealed the constitution on 12 April 1973. As a result, Swaziland is the only country in Southern Africa without a constitution. He also dissolved Parliament in the process and banned all trade unions and political parties. His justification for assuming all powers of government was that he was returning to the traditional Swazi way of life. He claimed that the political practices outlined in the constitution were alien and divisive. When parliament was about to expire in 1977, King Sobhuza announced that future parliament members were to be elected by an indirect regional system based on regional committees known as *tinkhundla*. This system prevented modernists and reformers from gaining political ground. Candidates that were unassociated with a political party swayed people with promises of food and infrastructure

improvement.

King Sobhuza II died suddenly in August 1982. After a quick succession of two queen regents, the crown prince Makhosetive ascended the throne as King Mswati III on 25 April 1986. During this time, some opposition to the *status quo* began to emerge from organised labour and university students. This opposition, combined with events in neighbouring South Africa and pressure from foreign donors, pushed the King toward considering some kind of reform in the early 1990s. In response to the pressure, the King appointed a constitutional review commission in 1996. However, the commission took five years to return its report. The King did not act on the report but instead issued decrees reiterating the ban on political parties. In August 2001, the commission chairman stated that the Swazi people were satisfied with the existing system.

More recently, a group of lawyers filed an action in the Swaziland Court of Appeal opposing the King's ability to decree laws without consulting parliament first. The Court ruled that King Mswati III could decree laws only if mandated by a national constitution. However, Prime Minister Sibusiso Dlamini said that government would ignore the decision. Decree No. 2, made in 2001, forbade court challenges to any royal or government decision.

Parliamentary elections were held in October 2003. Members of parliament have to compete for seats through the *tinkhundla*. However, parliament neither writes legislation nor sets national policy. King Mswati III enjoys these privileges. Currently, parliament consists of a 65-seat House of Assembly (10 appointed seats) and a 30-seat Senate (20 appointed seats.) The King appoints all High Court and Appeal Court judges.

The upshot of all of this is that the right to freedom of expression is not protected in Swazi law.

1.2 The mass media market in Swaziland

As far as the print media is concerned, the two major newspapers in circulation in Swaziland are the *Times of Swaziland* and the *Swazi Observer*. The *Times of Swaziland*, established in 1897, is both the oldest newspaper in the kingdom and the only major news source free of government control. Douglas Loffler,

who lives in Namibia, owns the paper. The royal conglomerate *Tibiyo TakaNgwane* owns *The Swazi Observer*. This paper and its sister paper, *The Weekend Observer*, were temporarily closed in 2002 because in spite of their royal connections, the editorial direction was seen as becoming increasingly liberal. Two independent periodicals, *The Guardian* newspaper (which was a weekly investigative newspaper) and *The Nation Magazine* (which used to be a weekly news magazine) were also closed in the same time frame. *The Nation Magazine* was edited by Bheki Makhubu, the former editor of the *Times of Swaziland Sunday*, who was fired after *Times of Swaziland Sunday* ran an article to the effect that one of the King's wives, Queen Sentani Masango was a high school drop-out. Two new magazines emerged during the course of 2003, *Youth Connexion* and *Siyavena*. *Youth Connexion* addresses social issues affecting youth and *Siyavena* is a sports magazine. Neither of these publications is regarded as being particularly critical of the state.

There are two free-to-air television stations in Swaziland, the Swaziland Television Authority ("STA") and Channel Swazi. The STA is the state broadcaster and still dominates airwaves. The STA has one channel with multiple national repeaters. The government recently allowed Channel Swazi, a pro-establishment medium, to begin operating domestically. Channel Swazi is headed up by Qhawe Mamba, who we have been told is part of the royal circle. Channel Swazi broadcasts terrestrially from eZulwini, a town located midway between Mbabane and Manzini.

Satellite broadcaster, MultiChoice also operates in Swaziland. MultiChoice is a multichannel broadcaster based in South Africa which provides subscribers with access to television services over its DSTV bouquet. These services include broadcasts of Cable News Network (CNN), BBC and Sky News. None of these services, however, include local news coverage.

There are two radio broadcasters in Swaziland: the Swaziland Broadcasting and Information Services and Voice of the Church, a private Christian radio station which is a local franchise of TransWorld Radio. Voice of the Church is apparently the only privately owned radio station in Swaziland. The Swaziland Broadcasting and Information Services is a state-run national radio service. It has one Siswati-language channel, one English-language channel, and one information services channel.

2. Experiences of journalists in Swaziland

Overview

Interviewing people in Swaziland presented some difficulties. Most of the people who we interviewed in Swaziland asked for their interviews to be treated as confidential. The state owned media were also reluctant to speak to us. We attempted, without success, to interview a representative from the STA and Qhawe Mamba from Channel Swazi.

In the absence of a constitution, the King has been able to rule by decree and to bypass parliament. Some of the people that we spoke to expressed the view that there had been a break down of law in Swaziland. What emerged from the interviews is that there are no legal protections for journalists and media workers in Swaziland. In the absence of a constitution or a bill of rights, there is no constitutional protection of the right to freedom of expression in Swaziland be it political speech or general media freedom. Generally, there are no legal remedies other than in administrative reviews to the High Court. (Because Swaziland does not have a bill of rights, litigants have to rely on administrative law to fill in the gaps). Apparently the new draft constitution that has been drawn up contains a right of freedom of expression but does not specifically enshrine a right of access to information. Journalists can be subpoenaed under the Criminal Procedure and Evidence Act, 1997 as there is no qualified privilege in Swazi law available to journalists who wish to protect their confidential sources of information.

A number of interviewees told us that although people are able to criticise the Swazi government, they cannot criticise the King or the royal family. One interviewee cited an example of a member of parliament who once questioned the King's leadership abilities in public, but who later back-tracked and denied everything the next day for fear of being prosecuted for sedition. Sedition, or speaking ill of the King, is a criminal offence in Swaziland that is prosecutable under the Sedition and Subversive Activities Act, 1938. Criticism of the King and how he spends financial resources seems to be a particularly sensitive issue, especially as Swaziland is a poor country with over 50% of the population living below the poverty line. We were told that in spite of all of this, the King lives a lavish lifestyle. However, there are signs that the public are speaking out against excessive expenditures by the King, with positive results. A few people cited as

A particularly notorious piece of legislation impacting on the print media sector is the Proscribed Publications Act, 1968, which empowers the Minister for Public Service and Information to ban publications “if the publication is prejudicial or potentially prejudicial to the interests of defence, public safety, public order, public morality or public health.”

The Swazi government has flexed its muscle under this statute a number of times in the recent years. In 2001, the Minister issued orders under the Proscribed Publications Act banning *The Guardian of Swaziland* and *The Nation Magazine*. The trigger for the closure of *The Guardian of Swaziland* was that the newspaper had run an article on a member of the royal family. The story was that the King had been ill and there were rumours that he had been poisoned. One of the rumours doing the rounds at the time was that one of the King’s wives had done it. However, underlying the bans was the fact that both *The Guardian of Swaziland* and *The Nation* magazine were independent publications that were perceived as being critical of the government. We were told that after the papers were banned, a number of journalists lost their jobs, and the papers have not been relaunched since.

Some papers try to be as brave as they can be about tackling sensitive issues, such as reporting on the royal family, for example. However, the repressive climate in Swaziland has fostered a culture of self-censorship on the part of the print media. One of the interviewees cited the example that in 2003 a young South African man by the name of Lizo Shabangu had claimed that he was having an affair with Inkhosikati LaMagwaza, the King’s fifth wife. The story was never covered directly in the Swazi press, because of the sensitivities involved. However, numerous articles and photos were published in the South African media, and over the internet where they could be accessed by Swazi citizens.

Tensions between the government and the print media have also surfaced notably in the government’s recent attempts to bring the print media under statutory control. In 1997, the Minister of Information and Public Service introduced the Media Council Bill. Some of the more draconian aspects of the Bill included the requirement that all newspaper owners had to have a degree in journalism and to live in Swaziland. (The general consensus on this issue is that this was targeted at the Douglas Loffler, the publisher of *The Times of Swaziland* and who is resident in Namibia and who does not have a journalism degree). The Bill also provided

for the accreditation of journalists with the Media Council, and for hefty fines and jail sentences to be imposed on journalists who committed a serious breach of ethics. The Bill was deferred indefinitely in 1998 after strong domestic and international opposition to it. In response to this, the print media fraternity clubbed together to establish the Media Complaints Commission (“MCC”) as a self-regulatory body for the sector. We have been told that the MCC is still in its infancy. The board of the MCC apparently consists of 11 commissioners, five of whom are drawn from the media sector, five of whom are public appointees, and a chairperson, who is a judge. We have been informed that the board is appointed by the MCC itself and that there is no government representation on the board.

2.2 Television broadcast sector

The television broadcasting sector in Swaziland is not independent of the government. Perhaps this is the reason why we were unable to secure interviews with anyone from either the STA or from Channel Swazi.

What did emerge from the interviews, however, is that Qhawe Mamba who heads up Channel Swazi is also currently employed by the head of the outside broadcast unit of the STA, which was set up for the purpose of covering the King’s affairs. Obviously, this exposes Mamba to a serious conflict of interests, because Channel Swazi is the STA’s main competitor. One interviewee told us that the problems surrounding the conflict have been raised in parliament. However, nothing has been done about this because Mamba is close to the King.

The interviewees also pointed out that another anomaly with the STA is that it also acts as the licensing authority vis-à-vis its competitors in the television broadcasting sector, which it does with the help of the Ministry. This exposes the STA itself to a structural conflict of interests in that it plays the dual role of market player and regulator in the industry. We have been told that aside from Channel Swazi, only one other private radio station has been licensed in Swaziland in the form of Voice of the Church, even though there have been attempts by other parties to be licensed.

2.3 Radio broadcast sector

Aside from the Voice of the Church, which deals exclusively with religious issues, the only newsworthy radio station in Swaziland is the state owned Swaziland Broadcasting and Information Services. As mentioned previously

we were unsuccessful in our attempts to interview anyone in the public radio sector. From the little that we have been able to glean, it would appear as if the government exercises a degree of influence and control over the Swaziland Broadcasting and Information Services. One of the people that we interviewed recounted an incident where the government once banned a live talk show on one of the Swaziland Broadcasting and Information Services stations. The show was banned because people were phoning in and criticising the government.

3. Constitution of Swaziland, 1968

Overview

The Swaziland Constitution was passed into law in 1968, when Swaziland gained its independence from former colonial power, the United Kingdom. The Constitution was authored and styled by the British in the Westminster fashion.⁸

The Constitution was, however, substantially abrogated by King Sobhuza II by a legislative instrument called the King's Proclamation to the Nation in 1973 ("the King's Proclamation"). Section 3A of the King's Proclamation reads: "(t)he Constitution of the Kingdom of Swaziland ... is hereby repealed."

The reasons for the repeal of the Swaziland Constitution are set out in clause 2 of the King's Proclamation which states (amongst other things) that the Constitution permitted the importation of undesirable political practices into the country that are alien to and incompatible with Swaziland's "own essentially democratic methods of political activity."

Rather confusingly, the King's Proclamation makes provision for some of the parts of the Constitution to remain in force, subject to the King's Proclamation and other ensuing decrees. The effect of this has been to make the King's Proclamation the supreme law of the land. It should be mentioned that a Constitutional Drafting Commission appointed by the King of Swaziland is currently in the process of drafting a new constitution.⁹

⁸ Media Institute of Southern Africa, *Restrictive Media Laws in Swaziland*, MISA – Swaziland Chapter, 2003

⁹ Media Institute of Southern Africa, *Restrictive Media Laws in Swaziland*, MISA – Swaziland Chapter, 2003

Commencement date

6 September 1968.

Supremacy of the Constitution

The Kingdom of Swaziland is a monarchy. The political system in Swaziland is based on a system of monarchical supremacy, as opposed to constitutional supremacy. Clause 3 of the King's Proclamation (Amendment) Decree, 1987 expressly provides that "the King's Proclamation to the Nation dated 12th April 1973 (as amended from time to time) is the supreme law of Swaziland" and that any law inconsistent therewith shall to the extent of its inconsistency be null and void.

Establishment of an independent regulator

The Constitution does not provide for the establishment of an independent media regulator.

Provisions impacting on the media

The original 1968 Constitution contained a Bill of Rights which enshrined the right to freedom of expression. The Bill of Rights was subsequently deleted from the Constitution by virtue of the King's Proclamation.

Very controversially, clause 11 of the King's Proclamation banned "all political parties and similar bodies that cultivate and bring about disturbances and ill-feelings within the Nations", with negative implications for freedom of expression. Clause 12 also placed a ban on the holding of political meetings, processions and demonstrations without the prior written consent of the Commissioner of Police.

Limitation clause

Because there is no Bill of Rights, the Constitution does not contain a limitations clause that provides for the restriction of fundamental rights.

Courts which have jurisdiction to decide constitutional matters

The Constitution does not make specific reference to the jurisdiction to decide constitutional matters. Section 104(1) of the Constitution confers upon the High Court "unlimited original jurisdiction in civil and criminal matters."

Section 111 confers the power to hear and determine appeals from the other courts

of Swaziland on the Court of Appeal.

Hierarchy of the courts

The Court of Appeal is the highest court in the land and subordinate to it is the High Court.

Appointment and removal of judges

The Constitution empowers the King to appoint the Chief Justice, the other judges of the High Court and the Judge President of the Court of Appeal in accordance with the advice of the Judicial Service Commission. These provisions empower the King to determine the terms and conditions of these appointments on the advice of the Minister of Justice. (This is in terms of sections 98(1) and 106(1) of the Constitution). Section 106(2) empowers the King to appoint the other Court of Appeal judges in accordance with the advice of the Judge President.

Section 100 empowers the King to remove High Court judges from office only if they are unable to perform the functions of their office (for example because of infirmity) or for misbehaviour. If the King is of the view that the removal of a judge needs to be investigated, then he must appoint a tribunal to investigate the matter (the King also appoints the members of the tribunal). The King may only remove a judge in such circumstances on the advice of the tribunal. In terms of section 107(6) stipulates that the removal of the Judge President and other Court of Appeal judges will be governed by section 100.

Independence of the judiciary

The Constitution does not contain any provisions that enshrine the independence of the judiciary.

4. Legislation that governs the media

Overview

The principal statutes that impact on media freedom in Swaziland are as follows:

- Swaziland Television Authority Act, 1983 (Act 1 of 1983) – that establishes the Swaziland Television Authority as the regulator for the television broadcasting industry;

- Proscribed Publications Act, 1968 (Act 17 of 1968) – that provides for banning of publications;
- Obscene Publications Act, 1927 (Act 20 of 1927) – that regulates the sale and exhibition of indecent and obscene material;
- Books and Newspaper Act, 1963 (Act 20 of 1963) – that provides for the registration of newspapers;
- Official Secrets Act, 1968 (Act 30 of 1968) – that provides for protection of official secrets from disclosure;
- Cinematograph Act, 1920 (Act 31 of 1920) – that controls the making and public exhibition of cinematograph films; and
- Sedition and Subversive Activities Act, 1938 (Act 46 of 1938) – that provides for the suppression of sedition and seditious publications.

A notable absence from this list of legislation is a radio broadcasting statute. The STA is solely responsible for the regulation of the television broadcasting sector. A comprehensive regulatory framework has not yet been put in place for the radio broadcasting sector. Apparently the licensing of radio broadcasting is regulated by the Swaziland Radio Regulations, 1992, which modify the Posts and Telecommunications Corporation Act, 1983. It is the Minister of Natural Resources and Telecommunications who effectively holds the regulatory powers and the authority to issue licences. As things stand, the Minister is apparently under no obligation to respond to applications within a specified time limit.

Under Section 12 of the Regulations, both the licensing authority and the Minister (who are effectively the same person) may at any time revoke or suspend any licence:

- if the licensee fails to comply with any of the provisions of the Act or of these Regulations or any condition of the licence; or
- where it appears that such revocation or suspension is expedient in the public interest. In such circumstances, the licence fee is non-refundable. There is no right of appeal against decisions.¹⁰

¹⁰ Article 19, "Swaziland", *Media Law and Practice in Southern Africa*, No 17, June 2001 (<http://www.article19.org/docimages/1079.htm>)

4.1 Swaziland Television Authority Act, 1983

Commencement date

1 April 1983.

Purpose of the Act

The Act establishes the Swaziland Television Authority (“the STA”) as the regulator for the television broadcasting sector.

Sector of the media governed by the Act

The Act applies to the television broadcasting sector.

Key provisions

Section 3 establishes the STA as a juristic entity in its own right. In terms of section 4, the STA is empowered (amongst other things) to establish and operate television broadcasting stations in Swaziland and issue and withdraw licences. The effect of this is that the STA wears two caps in that it acts both as the regulator for the television broadcasting industry and as the public broadcaster under the guise of the Swaziland Television Broadcasting Corporation (“the STBC”).

Section 5 requires the STA to have a board of directors. The main function of the board is to carry out the STA’s operations on its behalf. In terms of section 5(1), it is the line ministry responsible for television broadcasting who appoints all of the members of the board. The Act also empowers the Minister to appoint the chairperson and the deputy chairperson of the board, with negative repercussions for the independence of the STA.

Section 9 establishes the Swaziland Television Authority Board of Control (“the Board of Control”). In terms of section 10, the main function of the Board of Control is to monitor programming content to ensure that it complies with “with acceptable moral standards”. Section 9 empowers the Minister to appoint all the members of the Board of Control, with negative implications for the autonomy of the regulator from the executive arm of government.

The STA is fiscally directly accountable to the Minister rather than to parliament. Section 14 of the Act states that the STA’s audited accounts must be approved

by the Minister each year. The Act also requires the STA to report to the Minister annually on the performance of its functions during the past year and its future intended operations. The Minister is required to table the audited accounts and the annual reports before parliament within a “reasonable time” after receiving them.

The Minister has the final say over the granting of television broadcasting licences rather than the STA. Section 17 states that the STA may grant licences subject to the approval of the Minister.

Powers granted to the Minister or Director-General by the Act

Section 26 empowers the Minister to pass regulations, in consultation with the STA’s board of directors.

Provisions for media not controlled by the state

The STA is empowered to regulate private and public television broadcasters. Owing to the fact that the STA also acts as the public broadcaster via the STBC, this effectively means that the STA regulates its competitors in the private sector as well.

Body which enforces compliance with the Act

Compliance with the Act is enforced by the courts in the ordinary course.

Provisions limiting media ownership

None.

Consequences of non-compliance with the code

In terms of section 22, it is an offence to contravene certain provisions in the legislation. In terms of section 23, offenders are liable on conviction to a fine, imprisonment of up to six months, or both.

4.2 Proscribed Publications Act, 1968

Commencement date

23 August 1968.

Purpose of the Act

The primary purpose of the Act is to empower the state to ban certain publications and to require that they may only be imported and possessed under licence. Because the right to disseminate information is not protected in the Swaziland Constitution, the proscription of publications in Swaziland is therefore not unconstitutional.

Sector of the media affected by the Act

The Act applies to a wide range of publications as defined in the Act. In terms of section 1, the publications to which the Act applies include the following:

- any newspapers, books, periodicals, pamphlets, posters or other printed matter;
- any writing or typescript which has been reproduced or made available in any manner to the public or any section of the public;
- any drawing, picture, illustration, painting, woodcut or any other “similar representation”;
- any film negative, print, photograph, engraving or lithograph;
- any figure, cast, carving, statue or model; or
- “any record or other material, contrivance or device by means of which any words or images can be reproduced either in sound or light”.

Key provisions

Section 3 of the legislation empowers the Minister for Public Service and Information to ban publications “if the publication is prejudicial or potentially prejudicial to the interests of defence, public safety, public order, public morality or public health”. In terms of section 4 a banned publication may be imported, distributed, printed or possessed only by a person with a licence to so do.

In terms of section 5, certain types of publications are not covered by the Act, with the implication that they may not be proscribed. These include: pleadings; publications of *bona fide* law report series; *bona fide* publications of a technical, scientific or professional nature made for the purposes of advancing the particular profession; and *bona fide* publications of a religious character.

Powers granted to the Minister or Director-General by the Act

The Act empowers the Minister to declare publications to be proscribed. Section 4 grants the Minister the power to appoint delegates to licence the importation, distribution, display, exhibition, exchange, printing, publication; manufacturing,

possession and control of proscribed publications.

Provisions for media not controlled by the state

The Act does not make a distinction between state-controlled and privately owned media and applies equally to both.

Body which enforces compliance with the Act

The ordinary courts of law prosecute offences committed under the Act. In terms of section 6, an offence may only be prosecuted under the Act with the written permission of the Attorney-General.

Provisions limiting media ownership

None.

Consequences of non-compliance

It is an offence for anyone to disseminate proscribed publications without a licence. Offenders are liable on conviction to be fined, or be imprisoned for up to a year, or both. Further, a court passing the conviction may allow for the destruction of the proscribed publication in question.

4.3 Obscene Publications Act, 1927

Commencement date

13 May 1927.

Purpose of the Act

The Act restrains and prohibits the dissemination of indecent and obscene publications.

Sector of the media governed by the Act

The Act explicitly applies to the print media. There is currently no restriction on obscene material transmitted over the Internet as this was not in the contemplation of the legislature at the time that the legislation was drafted.¹¹

¹¹ Media Institute of Southern Africa, *Restrictive Media Laws in Swaziland*, MISA – Swaziland Chapter, 2003

Key provisions

The Act makes it an offence to import into Swaziland, manufacture, produce, sell, distribute, possess or deal in indecent and obscene objects or publications (this is in terms of sections 3 to 5 of the Act). The Act does not define what it means by the terms “indecent” and “obscene”. Presumably this is meant to refer primarily to pornographic material.

Section 6 empowers magistrates to issue a search warrant if they have received a complaint against a person who is believed to be in possession of indecent and obscene material. The Act also authorises the police to seize indecent and obscene material.

Powers granted to the Minister or Director-General by the Act

None.

Provisions for media not controlled by the state

The Act makes no distinction between the state-controlled and privately owned media.

Body which enforces compliance with the Act

Ordinary courts of law enforce compliance with the Act.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

Non compliance with the provisions of the Act constitutes an offence. Offenders are liable on conviction to receive a fine, or be imprisoned for up to six months, or both.

4.4 Books and Newspaper Act, 1963*Commencement date*

1 September 1963.

Purpose of the Act:

One of the primary purposes of the Act is to provide for the registration of newspapers.

Sector of the media governed by the Act

The Act applies to the print media.

Key provisions

Section 2 defines a newspaper as including “any printed matter containing news, or intelligence, or reports of occurrences of interest to the public or any section thereof, or any views, comments or observations thereon printed for sale or distribution and published periodically or in parts or numbers at intervals not exceeding one month but does not include a visiting or business card, billhead, letter-head, price list, annual reports, trade circular, trade advertisement or other legal or trade or business document”.

Section 4 prohibits anyone from printing or publishing a newspaper in Swaziland unless the editor of the newspaper is resident within Swaziland and without a registration certificate issued by the Registrar of Books and Newspapers. Where a newspaper has more than one editor, the chief editor has to be resident in Swaziland. The effect of this is that newspapers have to be locally controlled and registered in order to be disseminated in Swaziland. Section 7 requires the Registrar to be notified whenever there is a change to the name or the proprietorship of the newspaper.

According to section 3, the Minister for Public Service and Information appoints the Registrar.

A rather unusual feature of the legislation is that section 12 stipulates any person who prints and publishes newspapers in must deliver a bond of 1000 Emalangeni (the local currency in Swaziland) to the Registrar with the approved sureties.

However section 11(1) exempts books and newspapers that have been printed and published by or on behalf of the Swaziland Government from this requirement. According to section 12(1)(a) of the Act, the primary purpose of this requirement is for the money to serve as security for the payment of any monetary penalty which may be imposed on a newspaper for committing an

offence under the Act. In terms of section 12(1)(b) the money is also supposed to serve as security for the payment of any damages or costs awarded against a newspaper for libel.

Powers granted to the Minister or Director-General by the Act

Section 18 empowers the Minister to make regulations under the Act.

Provisions for media not controlled by the state

The Act applies to both the state and the non state-controlled media.

Body which enforces compliance with the Act

The courts prosecute offences committed under the Act in the ordinary course.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

It is an offence for any person to print or to publish a newspaper without being registered in terms of section 4(2). Offenders are liable on conviction to be fined, or imprisoned for up to six months, or both.

4.5 Official Secrets Act, 1968

Commencement date

6 September 1968.

Purpose of the Act

The primary purpose of the Act is to protect official secrets from disclosure.

Sector of the media governed by the Act

The Act is of general application and does not specifically apply to the media.

Key provisions

Section 3 of the Act makes it an offence for any person to do any of the following (amongst other things) for any purpose prejudicial to the safety or interest of Swaziland:

- approach, inspect, or enter a prohibited place (section 2 defines a prohibited place to mean any work of defence belonging to or used by the government, any place where the munitions of war are kept, as well as any other place declared by the Prime Minister to be a prohibited place);
- make any sketch or plan where this is likely to be, whether directly or indirectly useful to an enemy;
- obtain, collect or communicate secret official code, passwords or information that it is likely to be useful to an enemy, whether directly or indirectly.

Section 4 prohibits the disclosure of official secret information. It is an offence for any person who is in control or possession of official secret information to communicate this information to any person who is not authorised to receive it or to use it for any purpose that is prejudicial to the safety and interests of Swaziland.

Section 5 prohibits any person from assisting another person to gain admission to a prohibited place without lawful authorisation for any purpose that is prejudicial to the safety or interests of Swaziland.

Powers granted to the Minister or Director-General by the Act

None.

Provisions for media not controlled by the state

The Act does not make specific provision for media not controlled by the state but applies broadly to both the private and state controlled media sectors.

Body which enforces compliance with the Act

The ordinary courts of law are empowered to prosecute offences committed under the Act. However, all such prosecutions may be instituted only with the consent of the Attorney-General.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

It is an offence to contravene the provisions of the Act. The Act provides for a maximum term of imprisonment of fifteen years or a fine.

4.6 Cinematograph Act, 1920

Commencement date

9 July 1920.

Purpose of the Act

The primary purpose of the Act is to control the making and public dissemination of films, and of pictures and placards relating to the films.

Sector of the media governed by the Act

Films and theatre industry.

Key provisions

In terms of section 3 it is prohibited for anyone to make a film showing African gatherings or African life without the prior permission of the Minister for Public Service and Information. The Act further prohibits films to be made of certain Swazi cultural occasions' celebrations namely the Incwala Day, the King's Birthday, the Umhlanga (Reed Dance) and the Somhlolo (Independence Day) without the Minister's written consent. The Minister has an unlimited discretion to grant or to refuse consent. It is an offence to contravene these provisions of the Act. In prosecutions of the provisions of section 3, the onus of proving that the accused had obtained the requisite ministerial permit lies with the accused.

A particularly draconian aspect of the legislation is that section 6 empowers the Minister to declare any picture to be objectionable (within his complete discretion) if he believes that the picture represents any of the following:

- scenes holding up to ridicule or contempt any member of the King's naval, military or air forces;
- scenes tending to "disparage public characters";
- scenes calculated to "affect the religious convictions or feelings of any section of the public";
- scenes "suggestive" of immorality or indecency;
- executions, murders and "other revolting scenes";
- scenes of "debauchery, drunkenness, brawling, or of any other habit of life not in accordance with good morals and decency";
- scenes depicting "successful" crime or violence; and

- scenes which are “in any way prejudicial to the peace, order or good government of Swaziland”.

Powers granted to the Minister or Director-General by the Act

The Minister does not have any regulation making powers under the Act.

Provisions for media not controlled by the state

The Act applies to both state and private controlled media.

Body which enforces compliance with the Act

The ordinary courts of law enforce compliance with the provisions of the Act.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

It is an offence to contravene the Act. Offenders are liable on conviction to be fined, imprisoned or both.

4.7 Sedition and Subversive Activities Act, 1938

Commencement date

30 September 1938.

Purpose of the Act

The Act is a draconian piece of legislation, the primary purpose of which is to provide for the suppression and punishment of sedition, that is criticism of the King and the Swaziland government.

Sector of the media governed by the Act

The Act applies to all sectors of the media.

Key provisions

Section 4 makes it an offence for any person to do anything or even to attempt to do anything with seditious intent. It is also an offence to conspire with

anyone who wants to do anything with seditious intent. This includes the utterance of seditious words as well as the printing and dissemination of seditious publications. The importation of seditious publications is also an offence except if the importer had no reason to believe that the publication was seditious.

Section 3(1) defines a “seditious intention” as an intention to:

- bring the King into hatred or contempt, or to excite disaffection against the King, his heirs, his successors and the government of Swaziland;
- excite the citizens and inhabitants of Swaziland to “procure the alteration, otherwise than by lawful means, of any matter in Swaziland as by law established”;
- bring the Swaziland justice administration system into hatred, contempt or disaffection;
- raise discontent amongst the citizens and inhabitants of Swaziland; or
- promote “feelings of ill-will and hostility between different classes of the population of Swaziland”.

However, section 3(2) provides that an act, speech or publication will not be considered to be seditious if it is intended only to:

- show that the King has been misled in any of his measures;
- point out defects or errors in the government or the Constitution with a view to remedying such;
- persuade the people of Swaziland to procure any matter by lawful means; and
- point out matters that produce ill-will amongst the Swazi people with the view to remove the cause of strife.

Section 5 makes it an offence for anyone to do anything with subversive intent or to utter words that are subversive.

Powers granted to the Minister or Director-General by the Act

The Act grants no powers to either the Minister or the Director-General.

Provisions for media not controlled by the state

The Act has no provisions that apply specifically to media not controlled by the state.

Body which enforces compliance with the Act

Section 7 makes provision for a Special Tribunal to be convened (which the King appoints on the advice of the Prime Minister) to prosecute offences committed under the Act where the charge relates to the security of Swaziland. The Tribunal enjoys the same status as the High Court. However, Tribunal decisions cannot be appealed against to any other court.

Rather worryingly, section 8 of the Act makes provision for Tribunal proceedings to be held *in camera*, away from the critical eye of the public and the media.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

Contraventions of the Act carry heavy penalties. Offenders who breach the Act are liable on conviction to imprisonment of up to twenty years, or to a fine. Offenders who have been found guilty of subversive activity may be sentenced to prison without the option of the fine.

5. Regulations

No regulations of any relevance were made available.

6. Media codes of conduct

Overview

No codes of conduct were made available. However, moves are underway to set up a self-regulatory body for the print media sector in Swaziland in the form of the Media Complaints Council (“MCC”). The MCC was first mooted in response to government attempts to subject the print media to statutory regulation and control. The MCC is not yet up and running. Apparently, the MCC has not formulated its own code of conduct. It intends to use the Code of Ethics of the Swaziland National Association of Journalists (“SNAJ”) as a guideline.

Code of Ethics of the Swaziland National Association of Journalists

Commencement date

Not stated.

Purpose of the Code

The Code is meant to provide a framework of reference to all practising journalists in Swaziland. The Code sets out the ethical standards of conduct to which journalists are expected to adhere.

Sector of the media affected by the Code

Broadcast and print media.

Key provisions

Article 1 of the Code mandates journalists to adhere to the truth, and to make adequate inquiries before making an allegation. The Code also requires journalists to give an unbiased and balanced account of the facts.

Article 2 of the Code enjoins journalists to be socially responsible. The Code states that in collecting and disseminating information, journalists should bear in mind their responsibility to the public at large and to “the various interests in society.”

Article 3 of the Code forbids journalists from accepting bribes or any form of inducement. The Code also enjoins journalists to refrain from placing themselves in a situation where they will experience a conflict of interests.

Article 4 of the Code forbids journalists from engaging in plagiarism and mandates them to credit their sources where they use the material of another person.

Article 5 requires journalists to respect the right of the individual to privacy and human dignity. The Code states that it is only permissible for journalists to intrude into a person’s private life where it is in the public interest to do so. The Code specifically forbids journalists from engaging in defamation, libel, slander and obscenity.

Article 6 of the Code states that journalists should not originate material that

encourages discrimination on the grounds of ethnicity, colour, creed, gender or sexual orientation. Interestingly, the Code also enjoins journalists to “respect the ethnic values of Swazi Society”.

Article 7 requires journalists to protect their confidential sources of information.

Article 8 states that “under no circumstances” may journalists suppress news “unless it borders on issues of national security or is in the public interest to do so.”

Article 9 states that journalists must take immediate steps to correct inaccurate and misleading reports.

Article 10 enjoins journalists to give individuals and organisations a fair right of reply, especially where an article carries allegations affecting the reputation of that person.

Article 11 mandates journalists to obtain information and pictures “only by straightforward means”, unless the public interest dictates otherwise. Interestingly, the Code states that journalists may “exercise a personal conscientious objection to the use of such means”. It is unclear exactly what this means.

Article 12 permits journalists to take positions on any issue, but requires them to draw a clear line between comment, fact and conjecture.

Article 13 forbids journalists broadly from publishing anything “that might promote hatred, spite and conflict amongst the Swazi or any other nation.”

An unusual feature of the Code is that article 14 states that journalists “should observe embargoes on stories”.

Article 15 enjoins journalists to avoid identifying victims of sexual assault.

Article 16 states that journalists should secure the consent of the parents and guardians of minors before interviewing or photographing them.

Article 17 states that journalists should be sensitive in cases involving somebody who is experiencing personal grief or distress.

Article 18 prohibits journalists from publishing sensational headlines that are not warranted by the contents of the articles that they announce.

Body which enforces compliance with the Code

We have been told that the Media Complaints Council will use the Code as a guideline.

Consequences of non-compliance

None are indicated in the text of the Code itself.

7. Court Cases

Overview

The most important cases that we surveyed that impact on freedom of expression in Swaziland all relate to the application of the country's rather draconian media laws that seek to restrict media expression. They are:

- *Guardian Media Group (Pty) Ltd v Attorney General & Others* – which dealt with the powers of the Minister for Public Service and Information to ban publications under the Proscribed Publications Act, 1968;
- *Swaziland Independent Publishers (Pty) Ltd t/a Nation Magazine v Minister of Public Service and Information* - which again dealt with the powers of the Minister for Public Service and Information under the Proscribed Publications Act, 1968;
- *Rex v Masuku* – which deal with the prosecution of the crime of sedition under the Sedition and Subversive Activities Act, 1938.

7.1 *Guardian Media Group (Pty) Ltd v Attorney General & Others* (Civil Case No. 1111/01)

Date of judgment

31 August 2001.

Sector of the media affected by the judgment

Print media.

Key legal principles established

The case dealt with the powers of the Minister for Public Service and Information to ban publications under the Proscribed Publications Act, 1968.

Court handing down the judgment

High Court of Swaziland.

Key provisions of the judgment

In this case, the Minister published various legal decrees under the Proscribed Publications Act banning the *Guardian of Swaziland* and the *Nation Magazine* on the grounds that the publications were “prejudicial and/or potentially prejudicial to the interest of the public order” for allegedly not being registered with the Registrar of Books and Newspapers. Presumably under the threat of a possible legal challenge, the Minister further issued legal decrees purporting to oust the jurisdiction of the courts to adjudicate cases relating to the proscription of publications. The *Guardian* applied to the High Court to set aside the proscription notice, amongst other things. (The proprietors of the *Nation Magazine* launched their own application before the High Court – see the discussion of *Swaziland Independent Publishers (Pty) Ltd t/a The Nation Magazine v Minister of Public Service and Information* below). One of the questions that the court had to decide was whether the Minister had acted *intra vires* (that is, within the scope) of the enabling legislation.

In the court papers, the Minister claimed that his reasons for banning the *Guardian of Swaziland* included the fact that this was “...necessary not only to maintain public order i.e. to ensure that the laws regulating the Kingdom are obeyed where the upholding of such laws within my responsibility as Minister for Public Service and Information, but also to protect legitimate publications from unfair and unlawful competition by illegitimate operators.”

The court found that the Minister acted *ultra vires* (that is, outside the scope of) the enabling legislation. In the reasoning for its conclusion the court stated that although the Proscribed Publications Act empowers the Minister to proscribe publications that are prejudicial or potentially prejudicial to the interests of public order, the reasons on which the Minister relied to give effect to the banning order fell outside the ambit of the empowering statute.

7.2 Swaziland Independent Publishers (Pty) Ltd t/a Nation Magazine v Minister of Public Service and Information (Civil Case No. 1155/01)

Date of judgment

The judgement is not dated.

Sector of the media affected by the judgment

Print media.

Key legal principles established

The case dealt with the powers of the Minister for Public Service and Information to ban publications under the Proscribed Publications Act, 1968.

Court handing down the judgment

High Court of Swaziland.

Key provisions of the judgment

This case arose out of the same set of facts as the *Guardian Media Group (Pty) Ltd v Attorney General & Others* case (see the discussion above). In response to the banning order, the proprietors of the *Nation Magazine* applied to the High Court for an urgent interdict to set aside the proscription decree.

The court granted the application. In its judgement, the court took issue with the fact that, in issuing the banning order against the *Nation Magazine* the Minister had refused to state the grounds upon which he had issued the proscription notice. The Minister also did not put forth any jurisdictional facts in support of the banning order.

In its reasoning for its judgement, the court stated that the Proscribed Publications Act permits the Minister to ban a publication if and only if it is prejudicial to one or more of the grounds specified in the enabling legislation – namely, defence, safety, order, morality or health. The court stated further that the Act did not give the Minister an unfettered discretion to perform a ministerial act. It held that the “ministerial act ... must conform with the formal, procedural, factual or circumstantial requirements prescribed by the empowering legislation as a prerequisite for the proper lawful and binding exercise of that power.”

The court held that the validity of the proscription order depended on the establishment of jurisdictional facts confirming the presence of the grounds specified in the legislation. The court indicated that the onus of proof to establish this lay on the Minister, but that the Minister in this case had refused to disclose his reasons for the banning order.

7.3 *Rex v Masuku* (Criminal Case No. 84/01)

Date of judgment

23 August 2002.

Sector of the media affected by the judgment

The case dealt with an instance of sedition and did not deal specifically with the media. However, the general principles established are equally applicable to the media.

Key legal principles established

The case dealt with the crime of sedition committed under the Sedition and Subversive Activities Act, 1938.

Court handing down the judgment

High Court of Swaziland.

Key provisions of the judgment

In this case, the accused was charged with two counts of the crime of sedition for criticising the King. On the first count, the accused was alleged to have shouted the words “*Phansi ngembuso waMswati*” (down with King Mswati’s reign) at a public meeting at an old bus rank. On the second count, the accused was alleged to have made a call for the overthrow of the government at another public gathering.

In acquitting the accused, the High Court held on the facts of the case that the accused had criticised the government within the allowed grounds of criticism permitted by the Sedition and Subversive Activities Act. The court accordingly concluded that the accused was not guilty of sedition.

Zambia

1. Introduction

1.1 Political landscape

Zambia has a population of approximately 11 million people. The country was a former British protectorate. In 1953, the Federation of Rhodesia was created, in response to pressures from white settlers in the area, which consisted of Zambia (which at that time was called Northern Rhodesia), Zimbabwe (then known as Southern Rhodesia) and Malawi (which was previously known as Nyasaland). The federation lasted for 10 years until it was dissolved in 1963. In 1964, Zambia gained full independence from the United Kingdom. The country's first democratic elections ushered in the United National Independence Party ("UNIP") as the ruling party, with Kenneth Kaunda as the country's first post independence president. When Zambia first gained its independence, the country adopted the English pluralistic parliamentary system.

Following independence, Kaunda and the UNIP remained at the helm of Zambia for 27 years, a feat that he accomplished by declaring the UNIP to be the only legal party and himself as the sole presidential candidate. It was thus that Kaunda imposed the one-party political system in 1973.

Over this time, the UNIP regime rapidly bankrupted the country. The reasons for this included a bloated civil service and a nationalisation scheme that was wracked

¹² The websites are as follows: *The Post* (<http://www.post.co.zm>); the *Times of Zambia* (<http://www.times.co.zm>) and the *Daily Mail* (<http://www.daily-mail.co.zm>).

by corruption and mismanagement. Falling copper prices negatively impacted on the Zambian copper mining industry that was one of the country's economic mainstays. By the mid-1980s, Kaunda was eventually forced to turn to the International Monetary Fund ("IMF") for financial assistance. The IMF imposed severe conditions for aid, including the withdrawal of basic food subsidies and the floating of the currency, which sent prices skyrocketing and sparked nationwide riots that killed thousands.

As a result, there arose a heterogeneous anti-Kaunda coalition which campaigned for the restoration of multiparty democracy in the country. In 1991, the current ruling party, the Movement for Multiparty Democracy ("MMD") was elected into power, with ex-trade union leader Frederick Chiluba as its president. Chiluba remained in office for only two terms, after parliament passed a Bill in 1996 that limited a president's service to a maximum of two terms of office. Chiluba was replaced in the 2001 elections by current Zambian president, Levy Mwanawasa, who had been chosen by Chiluba as his successor. Mwanawasa narrowly pipped opposition candidate, Anderson Makoka at the polls, in an election that local and foreign election monitors questioned for being fraught with voting irregularities.

The Zambian Constitution protects the right to freedom of expression and press freedom. However, the Constitution specifically allows the state to pass laws making provision for the registration and regulation of the print media.

1.2 The mass media market in Zambia

As regards the print media sector, the newspaper market in Zambia is dominated by a powerful government presence. The government owns the two most widely circulated newspapers in Zambia, the *Times of Zambia* and the *Daily Mail*. The most widely circulated private newspaper is *The Post*. *The Post* was founded when Zambia was reconstituted as a multiparty democracy in 1991, and has been a vocal critic of the government since then. The government has responded by targeting *The Post* with multiple criminal accusations and lawsuits in an attempt to quell some of the anti-government criticism. Other smaller privately owned newspapers in Zambia such as *The Today* and *The Monitor* recently closed down due to a lack of funding, which suggests that the viability of the non-government media in Zambia may be under threat. These newspapers all maintain

online versions of their publications on the internet.¹² Although at present there are no restrictive or coercive laws that have been passed against online media or ISPs, Zambia continues to be listed by Reporters Sans Frontières as an “Enemy of the Internet.” Zambia attempted to censor an internet publication, when in 1996 the authorities blocked access to a censored issue of the Post. Government officials also threatened the host, Zamnet, with lawsuits if they re-posted the forbidden issue online.¹³

The main television broadcaster in Zambia is the government owned Zambia National Broadcasting Corporation (“ZNBC”). In addition, MultiChoice, the satellite broadcaster based in South Africa, provides satellite and analogue wireless subscribers with television services. These services include broadcasts of Cable News Network (CNN), BBC, Sky News, and the SABC’s Channel Africa. None of the services, however, include local news coverage.¹⁴ There was another privately owned television station, *Omega TV* that operated briefly under a test transmission licence. However, *Omega TV* was subsequently shut down in 2003 by the government on the basis that the closure was in the “public interest”.

As far as the radio broadcast sector is concerned, the government-controlled ZNBC radio stations still enjoy a virtual monopoly over the airwaves. However, the regulatory agency, the Communications Authority has granted licenses over the past decade to several church-related radio stations, two private commercial radio stations, including Radio Phoenix (which is affiliated to the Voice of America and the BBC), and three community radio stations.

2. Experiences of journalists in Zambia

Overview

On the whole journalists and media workers in Zambia believe that the degree of freedom of expression is fairly good relative to other countries in the SADC region. Media freedom in Zambia was severely constrained during the 27 years of Kaunda’s

¹³ Reporters Sans Frontières, “Enemies of the Internet: Zambia”, (<http://www.rsf.org/rsf/uk/html/internet/ennemis.html>)

¹⁴ US Department of State, “Zambia: Country Reports on Human Rights Practices, 2001”, Bureau of Democracy, Human Rights, and Labor, March 4, 2002 (<http://www.state.gov/g/drl/rls/hrrpt/2001/af/8410.htm>)

one party rule, but has generally been steadily improving since Zambia became a multiparty democracy again in 1991. However, the people that we interviewed were unanimous that a number of worrying signs of government repression still persist, which indicates that media freedom in Zambia is still not what it should be. Some interviewees suggested that the Zambian government is particularly intolerant of criticism of individual members of government. They claim that the government is more relaxed where the criticism relates to general policy and economic issues.

2.1 Print media sector

The print media sector is still dominated by the two state-owned daily newspapers, the *Times of Zambia* and the *Daily Mail*. The Minister of Information and Broadcasting appoints the boards of the state owned newspapers, and the state appointed boards in turn appoint the editors. Apparently, while the Minister does not exercise much direct control in the newsroom, his influence is far more subtle. One interviewee told us that although the state owned papers do carry stories of government corruption, the public media are generally not too comfortable with reporting on scandals in government, particularly where this will result in the exposure of individual public officials and particularly where the scandal relates to the ruling party. We were informed that generally speaking, the state owned press tends to be more comfortable with exposing scandals relating to the opposition party. The media tend to exercise a large degree of self-censorship when it comes to reporting on the ruling party.

Another interviewee expressed the view that the prevailing situation with the state media undermines press freedom because political criticism of the government is limited as a result. This person claimed that there have been instances where journalists in the employ of the public media have been singled out for victimisation for not towing the government line, in particular where they have authored “embarrassing” stories about the personal lives of government members.

The third privately owned daily newspaper *The Post* has filled this gap in the public media to a large degree. *The Post* is generally far more willing to expose the Zambian government and its leaders when they step out of line. As an outspoken critic of the establishment, *The Post* has been subject to numerous instances of government interference. Several interviewees cited the plight of Roy Clarke as an example of the type of harassment to which *The Post* has been subject. Clarke

is a journalist who writes a weekly column for *The Post*. At the beginning of 2004, Clarke wrote a satirical piece about the Zambian government in which he compared President Levy Mwanawasa to a “foolish elephant” and two government ministers to “baboons”. In response to the article, the Zambian Minister of Home Affairs attempted to have Clarke, a British national and a permanent resident of Zambia, deported to the United Kingdom. Clarke successfully challenged the deportation order. On April 26 2004, Lusaka High Court Judge Phillip Musonda quashed the deportation order on the basis that it was unlawful and violated freedom of expression.

However, this was not the first time that *The Post* has come under fire. For example, in August 2001, Zambian authorities arrested *The Post*'s editor-in-chief, Fred M'membe, reporter Bivan Saluseki, and a member of parliament, Edith Nawakwi, on charges of defaming the president. Nawakwi had publicly accused President Chiluba of theft, which Saluseki subsequently reported in the paper. M'membe reiterated the claim in a later editorial.

Even earlier than that, in 1999, M'membe and various other journalists from *The Post* were arrested and charged with espionage following the publication of an article in the paper in which the military weaknesses of the Zambian army were highlighted. The article, entitled “Angola Worries Zambia Army”, appeared in *The Post* on 9 March 1999, and questioned the capability of the Zambian army to withstand an incursion from Angola. The context for the story was that in 1999, the Angolan government accused Zambia of backing Jonas Savimbi's UNITA rebels in that country's ongoing civil war. UNITA is a Portuguese acronym that stands for the National Union for the Total Independence of Angola. The Zambian government claimed that Angola's accusations were the result of Zambia's refusal to get involved in the conflict by not allowing Angola to fight against UNITA rebels on Zambian soil. The accusation nevertheless sparked speculation that Angola might attack Zambia.

One of the interviewees told us that the police in Zambia arrest and detain journalists “every now and then”. Apparently in Zambia, the police are empowered to detain people for 48 hours before bringing them before a court of law. We were informed that most detentions of journalists tend to take place during the course of police investigations, when they do happen.

With the exception of *The Post*, the financial viability of some of the smaller privately owned newspapers is precarious. An independent newspaper, *The Today*, which was founded in 2001, was closed down only two years later in 2003 because of lack of funding, specifically advertising funding. An interviewee believed that one of the reasons for this was that advertisers were reluctant to be associated with *The Today* because it was seen as being too critical of government. The same fate befell another independent newspaper in Zambia, *The Monitor*, which also shut down due to lack of financial resources. Another interviewee claimed that *The Monitor* closed because it was bombarded with lawsuits from government officials. In the case of *The Monitor*, the lawsuits were apparently brought by two commissioners of the Human Rights Commission. It is not clear, however, whether the Zambian government actually funded the litigation or not.

One journalist reiterated that a major problem with the print media in Zambia is that the press is mostly government owned. The Ministry of Information and Broadcasting appoints the boards of the public newspapers and also issues grants to such papers. This has resulted in the creation of an uneven playing field between state owned newspapers that are subsidised by the government and private newspapers that are not. Another complicating factor is that advertising revenue in Zambia derives largely from the government, which tends to favour the state owned newspapers. The effect of this has been to create a barrier to market entry for the private press, which generally experiences great difficulty in competing with the state funded public media. Private papers generally find it difficult to survive for this reason, and tend to have a short life span, with the exception of *The Post*.

Like *The Post*, *The Today* was not immune to government harassment while it was still in circulation. One of the interviewees related an incident involving *The Seer*, which was a tabloid newspaper. *The Seer* apparently wanted to publish a story about a sex scandal at the State House involving the First Family. Following government pressure, *the Seer* ultimately did not follow through with the story. When *The Seer* story failed to surface, *The Today* followed up on the issue with its own report about the sex scandals. After the story was published, the former editor of the paper, Masautso Phiri apparently received a phone call from the police instructing him to go to the police station at a specific time. During this time the police allegedly visited Phiri's house, presumably to intimidate him.

We were told that on another occasion, *The Today* covered a story about the appointment of the current vice-president of Zambia, Nevers Mumba. The background to the story is that Mumba contested the presidency in 2001 and lost dismally. According to the Zambian Constitution an official who has lost in a general election cannot be appointed as a minister or a vice-president. In spite of this, current Zambian president, Levy Mwanawasa appointed Mumba as the vice-president. There was an outcry from the opposition political party about the appointment. The opposition even went as far as to refer the dispute to the courts on the basis that the appointment was unconstitutional. The dispute was never resolved. In the midst of the controversy, *The Today* carried a story which questioned the role of the Chief Justice of the Supreme Court in the matter. In particular, the allegation was made that the president had consulted the Chief Justice before appointing the vice-president. The clear inference from the article was that the Chief Justice would have been compromised if the court case were ever taken on appeal to the Supreme Court. In response to the article, the editor, Masautso Phiri was summonsed to appear on a charge of contempt of court. Ultimately, the summons was quashed on the basis that it had been issued irregularly. No further summons was issued after that.

The Monitor also seems to have experienced its fair share of government harassment during its heyday. One of the people who we spoke to said that in January 2003, a journalist at *The Monitor*, Chali Nondo, was arrested by the police after the paper published an article asserting that Harry Mwanawasa, the brother of President Levy Mwanawasa, was involved in corruption. Nondo was released several hours later, after being questioned about the paper's publication of the allegations, which the state claimed were false.

Another incident which appears to have resulted in a major public outcry was when a tabloid, *The People* was forced to disclose a confidential source of information. The background to the incident is that *The People* ran an article in 2002 in which it alleged that president Levy Mwanawasa was suffering from Parkinson's disease. The police arrested a number of journalists at *The People* following the publication of the article. The editor was also charged with defamation of the president. However, the state later withdrew the charges after the paper apparently caved in and revealed its sources, pursuant to which the journalists were released. One interviewee was under the impression that the government had struck a deal with *The People* to release the journalists from jail

in exchange for the paper revealing its confidential sources and turning over any relevant documentation in its possession. *The People* subsequently closed down and is no longer in circulation.

The tension between the print media and the government is also evident in the recent attempts of government to bring the print media sector under statutory regulation. Virtually all of the interviewees cited this as a problem in Zambia. The media fraternity reacted to the threat of greater government control by clubbing together to establish the Media Council of Zambia (“MECOZ”) as a self-regulatory body. Apparently MECOZ is not yet up and running because it has not been registered formally with the Registrar of Societies, as is required by Zambian law. (Under the Societies Act, all NGOs, political parties, churches, etc. have to be registered with the Registrar of Societies. This was an old colonial requirement that has survived into the independent era). One interviewee expressed a fear that if self-regulation does not work, there is the danger that the state will step in and assume statutory control of the press, which will limit freedom of expression. Moreover, in the face of government intervention and legal action against the media, an organisation called the Zambia Independent Media Association (“ZIMA”) has been set up. ZIMA has established a Legal Defence Fund which provides funding for legal assistance to journalists who are facing lawsuits.

A number of interviewees cited lack of access to information as a major inhibitor of media freedom in Zambia. Apparently the Zambian government published a Freedom of Information Bill for comment in 2001 but the Bill was later withdrawn by Parliament at the committee stage in November 2002. Many interviewees claimed that since then, the government has not afforded the Bill the priority it deserves. As a result, the Bill has still not been passed into law.

2.2 Television broadcast sector

The television broadcast media is still dominated by the government owned ZNBC. Unfortunately, the government still appears to wield a significant influence over the public broadcaster. An indication of the degree to which this is the case could be seen when we attempted to secure an interview with the ZNBC. We were told to obtain the permission of the Ministry of Information and Broadcasting Services first. The interview never materialised.

Many interviewees cited as a problem that the board of the ZNBC is still directly government appointed. This, they argue, seems to translate into the government sometimes exercising editorial control over the ZNBC's broadcasts. The recent banning of live TV programme, "Kwacha Good Morning Zambia" on the ZNBC was cited as an example of this. The background to the banning order is that the programme used to run every Saturday morning. The programme was presented by two independent journalists, Edem Djokotoe and Anthony Mukwita, who used to review the front pages of all national daily newspapers. The prevailing view amongst interviewees was that the government banned the programme as this segment was perceived as being too critical.

The Zambian government has attempted to reform the broadcasting sector by facilitating its autonomy from the state, in particular in passing the Independent Broadcasting Authority Act ("the IBA Act") and amendments to the Zambian National Broadcasting Corporation Act ("the ZNBC Act") in 2002. However, the implementation of both pieces of legislation has been dogged by controversy, in particular because the Minister of Information and Broadcasting Services wants be able to veto the recommendations of the appointments committees who are responsible for recommending members to be appointed to the respective boards of the IBA and the ZNBC.

As far as the IBA Act is concerned, one of its primary purposes is to remove the power to issue broadcasting licenses from the Ministry of Information and Broadcasting Services (which currently serves as the licensing authority pending the establishment of the IBA) to an independent regulatory authority (in the form of the IBA). However, to date the IBA board has not yet been appointed because of the dispute that erupted over the powers of the Minister to veto appointments to the IBA. The controversy relates to how section 7(2) of the IBA Act should be interpreted. This section states that "[t]he Board shall consist of nine part-time members appointed by the Minister, on the recommendation of the appointments committee, subject to ratification by the National Assembly". The appointments committee recommended a list of names to the Minister, however, the Minister wanted to veto the names prior to submitting them to the National Assembly for ratification. Unfortunately, the IBA Act is silent about whether the Minister can change the recommendations of the appointments committee, which is why the dispute arose in the first place.

Likewise the ZNBC faces a similar problem. The primary purpose of the 2002 amendment to the ZNBC Act was to provide for the conversion of the ZNBC from a state broadcaster into a public broadcaster. A key aspect of the reformed ZNBC Act was that it made provision for the appointment of the ZNBC board by the public. Section 4(2) of the ZNBC Act provides that “[t]he Board shall consist of nine part-time members appointed by the Minister, on the recommendation of the appointments committee, subject to ratification by the National Assembly”. (The wording of this provision in the ZNBC Act is identical to the wording of section 7(2) of the IBA Act). The appointment of the ZNBC board was held up by the same controversy as the appointment of the IBA board. In both cases there is a dispute as to whether the Minister has the power to veto the recommendations of the appointments’ committee.

Aside from the state television sector, there are also worrying signs of government attempts to quell the private television sector. A few of the interviewees cited the plight of *Omega TV* as a case in point. *Omega TV*, a privately owned television station in Lusaka was granted permission by the Minister to run on a test transmission basis. On 1 November 2003, police officers raided the station and ordered staff to immediately cease test broadcasts. The station's closure followed a letter by the Solicitor-General, Sunday Nkonde to the Minister of Information and Broadcasting Services on 27 October 2003, which said that the station was operating illegally and should be shut down by police. In response to the letter, the Minister cancelled the construction permit (a temporary broadcasting licence) of the television station stating that it was "in the public interest" to do so. It is unclear to what extent the closure was politically motivated. *Omega TV* was owned by the former public relations advisor to the former Zambian president Frederick Chiluba. At the time that *Omega* was closed, the Minister claimed the station was operating illegally, even though it had been given a test transmission licence.

An interesting issue that arose during the interview process is that media self-censorship in Zambia is fairly widespread where issues of sex and sexuality are concerned. For example, one interviewee told us that the music station Channel O, which used to be broadcast on the ZNBC was eventually banned after the churches raised an outcry about the content of the music that was being carried on the channel. (Channel O carries a large percentage of American R&B and hip-hop music). Apparently, the churches in Zambia tend to be conservative as a

general rule. The churches expressed the concern that many of the songs and dancing in the music videos promoted sex and nudity and compromised morals of the country. Ironically, South African based private subscription broadcaster, MultiChoice, still broadcasts Channel O in Zambia as part of its bouquet of channels on DSTV.

2.3 Radio broadcasting sector

Many of the interviewees said that the state broadcaster, the ZNBC does not offer much of a platform for debate on the radio.

That gap is being filled by the commercial station, Radio Phoenix, which has been in operation since 1996. Radio Phoenix has proven to be popular with the public. Radio Phoenix runs two talk shows, called “Face the Media” and “Let the People Talk”. What is interesting about Radio Phoenix is that apparently government officials often appear on its radio programmes, including the president and the vice-president, largely because the station is so popular with the people. One of the programmes is sponsored by MISA Zambia (“Face the Media”) and is presented by Anthony Mukwita.

However, Radio Phoenix has not been without its fair share of government harassment. One person confirmed that there have been many bottlenecks and hiccups since the inception of the station. First of all the station burnt down in a fire in 1997 allegedly as a result of arson. Apparently, seven years later, investigations into the arson are still under way and the culprit has not yet been identified. After the fire, Radio Phoenix had to rebuild itself from its own resources.

Radio Phoenix operated without interruption until 2000 when the station had a second run-in with government. The government shut the station down for being “too daring”, apparently hoping that the closure would drive the station into the ground. Instead, the closure strengthened the station, which gained massive public support as a result. On 18 September 2000, Radio Phoenix officially reopened. The station was allegedly offered its license on the condition that it toned things down. However, Radio Phoenix rejected this condition.

In 2003, the government tried to introduce a new licence condition to permit only indigenous Zambians to hold a broadcasting licence. This was apparently

aimed at the proprietor of Radio Phoenix who was born in Zimbabwe but who resides in Zambia. The law was not passed, and Radio Phoenix has been at peace with the government ever since.

Aside from Radio Phoenix, the independent radio broadcast media are dominated by Catholic religious radio stations which tend to be fairly conservative.

3. Constitution of Zambia (Amendment) Act, 1996

Commencement date

26 May 1996.

Supremacy of the Constitution

Section 3 states that the Constitution is the supreme law of Zambia.

Establishment of an independent regulator

No provision has been made in the Constitution for the establishment of an independent regulatory authority for the communications sector in Zambia.

Provisions impacting on the media

The Zambian Constitution contains a Bill of Rights, section 20 of which enshrines the right to freedom of expression, and which specifically protects freedom of the press. Section 20 also incorporates an internal limitation mechanism that allows for the limitation of freedom of expression. Interestingly, section 20(3)(b) specifically allows the state to pass laws to make provision for the registration and regulation of the print media. The specific wording of section 20 states as follows:

- (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.
- (2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from the freedom of the press.

- (3) Nothing contained in or done under the authority of any law shall be held inconsistent with or in contravention of this Article to the extent that the law in question makes provision-
- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
 - (b) that is reasonably required for the purpose of protecting the reputations, rights and freedom of other persons or the private lives of persons concerned legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of newspapers and other publications, telephony, telegraphs, posts, wireless, broadcasting or television; or
 - (c) that imposes restrictions upon public officers; and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society".

Limitation clause

The Zambian Constitution does not contain a general limitations clause. Rather this is done on a clause-by-clause basis, as has been done in section 20. However section 25 makes provision for the suspension of fundamental rights, including the right to freedom of expression, during wartime or when a state of emergency has been declared under section 30 of the Constitution. The exact wording of section 25 provides as follows:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Articles 13, 16, 17, 19, 20, 21, 22, 23 or 24 to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under Article 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question.”

Courts which have jurisdiction to decide constitutional matters

The Supreme Court of Zambia is the final court of appeal in Zambia in terms

of section 93. The High Court has unlimited original jurisdiction in relation to hearing and determining civil and criminal matters as provided for in section 94(1).

Hierarchy of the courts

The Supreme Court of Zambia is the highest court of the land in terms of section 91(1) and the final court of appeal in terms of section 92(1). The High Court is next in hierarchy and below the High Court are the subordinate courts.

Appointment and removal of judges

In terms of sections 93, all judges of the Supreme Court, the Chief Justice and the Deputy Chief Justice are appointed by the President subject to ratification of the National Assembly. There is no requirement in the Constitution that the advice of the Judicial Service Commission has to be sought first.

Puisne judges and other judges in the lower courts are appointed by the President on the advice of the Judicial Service Commission, although all appointments are still subject to ratification by the National Assembly in terms of section 95. In terms of section 98, all judges of the Supreme Court and the High Court are required to retire when they turn 65 years old. However, the President may permit a judge to continue in office after the age of 65. Such permission can only be granted on the advice of the Judicial Service Commission.

Section 98 empowers the President to remove judges of the Supreme Court or the High Court and the Chairperson or Deputy Chairperson of the Industrial Relations Court from office on the basis of infirmity of the body or mind, incompetence or misbehaviour only. The President may appoint a tribunal to investigate a judge if he is of the view that the removal of a judge from office warrants further investigation. The President may only remove or suspend a judge in such circumstances on the advice of the tribunal.

Independence of the judiciary

Section 91 entrenches the independence of the judiciary from the executive and legislative arms of government and establishes the principle that the judicature is subject only to the Constitution.

4. Legislation that governs the media

Overview

In Zambia, the principal statutes that impact on media freedom are as follows:

- Independent Broadcasting Authority Act, (Act 17 of 2002) – which establishes the Independent Broadcasting Authority as the regulator of the broadcasting industry in Zambia, and which generally provides for the regulation of the broadcasting industry;
- Zambia National Broadcasting Corporation Act, (Act 16 of 1987) – which defines the functions and powers of the public broadcaster, the Zambia National Broadcasting Corporation (“the ZNBC”);
- Theatres and Cinematograph Exhibition Act (Act 54 of 1929) – which provides for the regulation of films and theatres;
- Penal Code Act, (Act 42 of 1930) which establishes a code of criminal law for Zambia;
- Criminal Procedure Code Act, (Act 23 of 1933) which sets out the procedures applicable to criminal proceedings; and
- Freedom of Information Bill, 2002 – which provides for a right of access to information held by public authorities.

4.2 Independent Broadcasting Authority Act, 2002

Commencement date

1 July 2003.

Purpose of the Act

The primary purpose of the Act is to establish a regulatory framework for the broadcasting sector in Zambia.

Sector of the media governed by the Act:

The Act applies to radio and television broadcasting over terrestrial and satellite platforms.

Key provisions

Section 4 establishes the Independent Broadcasting Authority (“the IBA”) as a

juristic person. The functions of the IBA include the licensing of broadcasters and broadcasting signal distributors (or what the Act refers to as diffusion services), and to manage the broadcasting spectrum. The other broadcasting regulatory functions of the IBA include the development of local content regulations, obliging broadcasters to develop codes of practice, developing programming standards for the industry and receiving and adjudicating complaints.

Section 6 of the Act entrenches the independence of the IBA by stating that the IBA may not be made subject to the direction of any other person or authority except to the extent that this is expressly provided for in the Act.

Unfortunately, the independence of the regulator from the executive arm of government is eroded somewhat by the fact that the line minister responsible for the communications sector, the Minister of Information and Broadcasting Services, appoints the members of the IBA in terms of section 7. There are some checks and balances in that the Minister may make an appointment only on the recommendation of the appointments' committee which is subject to ratification by the National Assembly of Parliament (although the Minister constitutes the appointments' committee in terms of section 8).

Section 7 empowers the IBA members (rather than the Minister) to appoint a chairperson and vice-chairperson from among themselves. Section 17 empowers the IBA to appoint its own chief executive officer ("CEO") (which the Act refers to as the Director-General). However, the appointment of the CEO is subject to ministerial approval. Section 18 permits the IBA to appoint its own staff, but once again subject to ministerial approval.

Section 19 prohibits the provision of any broadcasting services without a licence. The Act distinguishes between five different types of broadcasting licences for this purpose, namely commercial, community, religious, subscription and public broadcasting licences.

In terms of section 20, the IBA may invite applications for new licences whenever it determines there is a need for the provision of additional broadcasting services. Section 20 provides that the selection of new licensees must be subject to a public process. After receiving applications, the IBA must short-list the applicants who in its opinion qualify for a licence. All short-listed applicants must then attend

a public inquiry before the IBA. The IBA has the final say with regards to whom to award a licence. Section 29 stipulates that licences are not transferable and cannot be bought, sold or leased.

Section 28 empowers the IBA to renew licences. Section 31 also permits the IBA to refuse to renew licences and to cancel licences where the IBA determines that this is necessary.

Section 30 empowers the IBA to suspend or revoke licences. The Act stipulates that the IBA must give the licensee an opportunity to be heard before taking a decision to revoke or suspend a licence. All decisions of the IBA in relation to the suspension or revocation of licences may be taken on review to a court. The grounds on which a licence may be suspended or revoked include a situation where:

- a broadcaster or broadcasting signal distributor notifies the IBA that it wishes to surrender the licence;
- it is determined that the broadcaster or broadcasting signal distributor presented incorrect data when applying for the licence;
- a broadcaster or broadcasting signal distributor has not commenced operations within 120 days of the issue of the licence;
- a broadcaster or broadcasting signal distributor stops its operations for more than 60 consecutive days or more than 90 days in one year without a justified reason for doing so;
- a broadcaster or broadcasting signal distributor has failed to comply with its licence conditions; or
- a broadcaster or broadcasting signal distributor does not pay the prescribed fees.

Section 23 stipulates that subscription broadcasting licensees may draw revenue from subscriptions, advertisements and sponsorships. However, subscription broadcasting licensees may not acquire exclusive rights to the broadcasting of national or sporting events or other events that the IBA determines to be in the public interest.

Section 24 stipulates that free-to-air television broadcasters must include significant proportions of Zambian drama, documentaries and children's shows that reflect Zambian themes, literature and historical events.

A draconian feature of the legislation is that section 32 empowers the President to

make an order authorising an officer or the IBA to take over or control any or all broadcasting stations in the event that a state of emergency is declared.

Section 33 mandates the public broadcaster, the ZNBC and all other broadcasting service licensees to develop a code of professional standards that provides for the protection of human dignity, human rights and freedoms, unbiased and independent news broadcasts and tolerance for different opinions and beliefs, amongst other things. Sections 34 to 37 empower the IBA to receive and to adjudicate complaints relating to breaches of the codes of professional standards.

Powers granted to the Minister or Director-General by the Act

Section 47 empowers the Minister to make regulations on the recommendation of the IBA. The Act specifically empowers the Minister to pass regulations relating to the form and manner in which licence applications must be made as well as the terms and conditions of such licences.

Provisions for media not controlled by the state

None.

Body which enforces compliance with the Act

The IBA is primarily responsible for enforcing and for monitoring compliance with the Act.

Provisions limiting media ownership

According to section 19(3) of the Act, the following may not be awarded broadcasting service licences:

- political parties or any other entity founded by a political party; and
- non-citizens of Zambia (in the case of natural persons) and juristic persons whose shares are not 70% owned by Zambian citizens.

Consequences of non-compliance with the Act

The IBA may suspend or cancel the licence of anyone who does not comply with their licence conditions in terms of section 30(3). Section 33 empowers the IBA to apply to the High Court for an order compelling broadcasting licensees to comply with any portion of a code of conduct of which they are in breach.

4.3 The Zambia National Broadcasting Corporation Act, 1987

Commencement date

24 April 1987.

Purpose of the Act

The primary purpose of the legislation is to provide for the establishment of the ZNBC and to define its powers and functions.

Sector of the media affected by the Act

The Act applies to the public broadcaster.

Key provisions

Section 3 establishes the ZNBC as a juristic person. The ZNBC is controlled by a board of directors. Section 4(7) of the Act entrenches the independence of the board by indicating that the board may not be subject to the direction of any other person or body except as provided for in the Act. This independence is eroded somewhat by the fact that all ZNBC directors are appointed by the line minister responsible for communications, the Minister of Information and Broadcasting Services.

Some checks and balances have been put in place in that section 4(2) stipulates that the Minister may make appointments only on the recommendation of the appointments committee (which the Minister also appoints in terms of section 4A), which in turn is subject to ratification by the National Assembly of Parliament. However, section 4(4) permits the directors to elect a chairperson and a vice-chairperson from amongst themselves.

Section 4(5) stipulates that the following people may not be appointed as directors of the ZNBC: non-citizens of Zambia, members of Parliament and office bearers or employees of any political party, amongst others.

As part of the functions of the ZNBC, section 7 mandates the ZNBC to contribute to the tolerance of different opinions and beliefs, to contribute to the development of free and informed opinions and to defend democratic freedoms, amongst other things.

In terms of section 21, the ZNBC may derive its funds from monies which are payable to it or from monies appropriated by parliament, amongst other things. Section 24 requires the ZNBC to submit a report to the Minister each year detailing its activities during the previous financial year, which the Minister must then table before the National Assembly.

Powers granted to the Minister or Director-General by the Act

Section 30(1) grants powers to the Minister to make regulations to give effect to the Act. The regulations may include registration of dealers with the ZNBC, fees to be paid under the provisions of the Act and any other matter required to be prescribed under the Act.

Provisions for media not controlled by the state

None.

Body which enforces compliance with the Act

The Corporation is empowered in terms of section 26(1) to establish an inspectorate unit to ensure that consumers are complying with their obligations to obtain TV licences.

Provisions limiting media ownership

None.

Consequences of non-compliance

None of any relevance.

4.4 Theatres and Cinematograph Exhibition Act, 1929

Commencement date

1 January 1930.

Purpose of the Act

The primary purpose of the Act is to regulate and control theatres and cinemas.

Sector of the media affected by the Act

Films and theatres.

Key provisions

In terms of section 3, no one may use a theatre to stage plays or to screen films without a licence obtained from a licensing officer. The Act empowers licensing officers to grant licences if they are assured that the safety and convenience of the audience is adequately catered for. In terms of section 1, the term “licensing officer” is defined to mean the district secretary of the district in which the theatre is situated or any other person appointed by the Minister of Information and Broadcasting Services.

Section 7 empowers the Minister to establish one or more Film Censorship Boards. The Act permits the Minister to determine how many people should sit on the Board.

In terms of section 8, no person may screen a film or display any posters advertising a film without the permission of the Board.

In terms of section 9, any person who feels aggrieved by a decision of a licensing officer or the Board may appeal to the President.

Powers granted to the Minister or Director-General by the Act

Section 12 authorises the President to pass regulations under the Act.

Provisions for media not controlled by the state

There are no specific provisions in the Act that target the non-state media. However, the Act applies to media that is not controlled by the state.

Body which enforces compliance with the Act

The licensing officers and the Board are primarily responsible for administering the Act. The courts are empowered to prosecute statutory offences committed under the Act.

Provisions limiting media ownership

None.

Consequence of non-compliance

It is an offence to contravene the Act in terms of section 10. An offender will be liable on conviction to a fine or to imprisonment for up to three months.

4.5 Penal Code Act, 1930

Commencement date

1 November 1931.

Purpose of the Act

The principal purpose of the Code is to codify Zambia's criminal law.

Sector of the media affected by the Act

The Code is not specifically targeted at the media sector, but certain of its provisions impact the media directly.

Key provisions

Section 53 of the Code empowers the President to ban publications "in his absolute discretion" that in his opinion are contrary to public interest. However, anyone who wishes to import a particular edition of a banned publication into Zambia can apply to a competent authority for a permit to do so, provided that the authority is satisfied that the publication does not contain any matter that is contrary to the public interest. (The Code does not define what it means by a "competent authority").

The Code also criminalizes the offence of sedition. Section 57 makes it an offence for anyone to print, publish or disseminate seditious publications. The section also makes it an offence to import seditious material, even if the person importing the publication has no reason to believe that the publication is seditious.

The meaning of sedition is defined very widely in the Act. Section 60 defines a seditious intention to include an intention:

- to advocate the desirability of overthrowing the Zambian government by unlawful means;
- to bring the Zambian government or the justice administration system into hatred and contempt and to excite disaffection against either of them;
- to excite the people of Zambia to bring about change in the country unlawfully;
- to raise discontent or disaffection amongst the people of Zambia generally;
- to promote feelings of ill will or hostility between different communities or different parts of a community, as well as between different classes of the Zambian population;

- to advocate the desirability of the secession of any part of Zambia from the Republic of Zambia;
- to incite violence or any offence prejudicial to public order or in disturbance of the public peace;
- to “incite resistance, either active or passive, or disobedience to any law or the administration thereof”.

However, section 60 contains a number of exceptions that save material from being classified as seditious. As a general rule, an intention will not be considered to be seditious if it is an intention:

- to show that the government has been misled or has made a mistake in anything that it has done;
- to point out any errors or defects in the government, the Constitution or any law with a view to reforming them;
- to persuade the people of Zambia to bring about lawful change in the country;
- to point out any matters which tend to create feelings of ill will or hostility between different classes of the Zambian population;

In terms of section 61, editors, assistant-editors and publishers can be held criminally liable for the publication of seditious material, except if they can prove that the material was published without their consent.

In terms of section 58 the written consent of the Director of Public Prosecutions needs to be obtained before any person can be prosecuted for sedition.

Section 67 of the Code makes it an offence for any person to publish “any statement, rumour or report that is likely to cause fear and alarm to the public...” that the publisher knows is false. It is no defence for the publisher to claim that he did not know or that he had no reason to believe that the material was false unless the publisher can show that he took reasonable measures to verify the information before it was published.

A particularly draconian feature of the legislation is that it makes it an offence for anyone to insult the national anthem of Zambia.

Under section 69 it is an offence for anyone to defame the President.

Section 191 makes publication of defamatory matter a misdemeanour.

Powers granted to the Minister or Director-General by the Act

The sections discussed above do not grant any powers to either the Minister or the Director-General.

Provisions for media not controlled by the state

The reach of the Act is broad enough to extend to both state and privately owned media.

Body which enforces compliance with the Act

Offences committed under the Act are prosecuted by the courts in the ordinary course.

Provisions limiting media ownership

None.

Consequence of non-compliance

Under the Code, the following offences attract the following penalties:

- the offence of sedition under section 67 will attract a penalty of imprisonment for up to seven years or a fine or both;
- the offence of publishing false news under section 67 is considered to be a misdemeanour and carries a maximum penalty of three years' imprisonment; and
- the offence of insulting the national anthem under section 68 attracts a maximum penalty of two years' imprisonment;
- the offence of defaming the president under section 69 attracts a maximum penalty of three years' imprisonment.

4.6 Criminal Procedure Code Act, 1933

Commencement date

1 April 1934

Purpose of the Act

The principal purpose of the Act is to set out the procedures applicable to criminal proceedings.

Sector of the media affected by the Act

The Code is not specifically targeted at the media sector, but certain of its provisions impact the media directly.

Key provisions

Section 143 authorises the courts hearing criminal matters to compel witnesses to attend court and to give evidence if it appears that the witnesses are able to give material evidence or if they have documents in their possession that are relevant case. In terms of section 145, a court may issue a warrant for the arrest of any witness who has been subpoenaed but who does not attend court without a lawful excuse.

The significance of this section to the media is that it is couched in terms that are wide enough to allow the courts to subpoena journalists to disclose their confidential sources of information.

Powers granted to the Minister or Director-General by the Act

The sections discussed above do not confer any powers either on the Minister or the Director-General.

Provisions for media not controlled by the state

The reach of the Act is broad enough to extend to both state and privately owned media.

Body which enforces compliance with the Act

Offences committed under the Act are prosecuted by the courts in the ordinary course.

Provisions limiting media ownership

None.

Consequence of non-compliance

Anyone who has been summonsed to attend court as a witness, but who fails to do so without a lawful excuse, will be liable on conviction to be fined.

4.7 Freedom of Information Bill, 2002

Commencement date

Not applicable since this is still a Bill.

Purpose of the Bill

The primary purpose of the Bill is to facilitate the availability of public information held by public authorities and access to information held by private bodies. The Bill also seeks to establish a Public Information Commission (“the Commission”) to assist with providing such access.

Sector of the media affected by the Bill

All sections of the media.

Key provisions

Section 5 establishes the Public Information Commission (“the Commission”) as a juristic entity. The primary purpose of the Commission is to facilitate access to information by the public. The mandate of the Commission under section 7 is quite wide and includes the power, amongst other things, to:

- act as a conduit for requests for access to information from members of the public, to identify the relevant public authority and to collect the requested information;
- consider and receive applications for the review of decisions of public authorities relating to access to information; and
- make recommendations to the relevant public authorities arising out of reviews of their decisions.

In terms of section 28, reviews to the Commission do not preclude an aggrieved party from seeking redress before the High Court or the Human Rights Commission.

Section 6 empowers the President to appoint the members of the Commission. All appointments must be made on the recommendation of the appointments’ committee, subject to ratification by the National Assembly. The Bill does not state who must appoint the appointments’ committee. However, the Act permits the members of the Commission to elect a chairperson and vice-chairperson

from amongst themselves.

Section 10 stipulates that “every person shall have the right of access to information which is under the control of a public authority”. Section 10 further requires public authorities to generally provide to the public information held by them. With regard to private bodies, the Act requires only that they make available information that they hold when so requested.

In terms of section 13, a public authority may be exempted from this requirement if the information requested involves the privacy interests of a third party. In terms of section 14, a public authority may also claim an exemption where the information requested relates to the national defence or security of Zambia, or would result in the disclosure of trade secrets and commercial or financial information, amongst other things.

Section 19 requires public authorities to publish manuals that include details such as the general description of documents that they hold.

Powers granted to the Minister or Director-General by the Bill

No regulation-making powers are conferred on the Minister or the Director-General. However, section 39 empowers the President to pass regulations on the recommendation of the Commission.

Provisions for media not controlled by the state

There are no specific provisions in the Bill dealing with non state-controlled media. However, the rights of access to information conferred in the Act do apply to the non-state controlled media.

Body which enforces compliance with the Bill

The Commission is primarily tasked with administering the Bill.

Provisions limiting media ownership

None.

Consequences of non-compliance

If passed into law, it would be an offence to contravene the Bill. In terms of section 38, offenders are liable on conviction to be sentenced to imprisonment for up to 5 years or to be fined.

5. Regulations

No regulations of any relevance have been made available.

6. Media Codes of Conduct

Overview

The Media Council of Zambia (“MECOZ”) has recently been established as a non-statutory, voluntary, self-regulating council. MECOZ has drawn a code of ethics for its affiliates that sets out the journalistic standards that its members are expected to follow.

Another important non-governmental organisation in the country is the Zambia Independent Media Association (“ZIMA”) which established the Zambia Independent Media Council (“ZIMA”). The role of ZIMA includes promoting and defending press freedom within Zambia and investigating complaints about the conduct of its members and any other person or organisation towards the media. Zima has also established a Media Legal Defence Fund to aid workers and media organisations with law suits affecting media freedom.

Constitution of the Media Council of Zambia – (Code of Ethics)

Commencement date

None.

Purpose of the Code

The primary purpose of the Code is to establish standards of conduct that journalists must adhere to.

Sector of the media affected by the Code

The Code does not contain an applications’ clause detailing the specific sectors of the media to which it applies. It would appear as if the Code was primarily targeted at the print media, although there are references in the Code to “telecasts” which seem to suggest that the reach of the Code might extend to broadcasting as well.

Key provisions

Clause 1 of the Code enjoins journalists to report the truth and to represent what their sources tell them fairly, accurately and objectively.

Clause 2 mandates that newspapers should carry headlines that are fully warranted by the contents of the articles that they accompany. Likewise, photographs and telecasts should give an accurate picture of an event and should not highlight an incident out of context.

Clause 3 of the Code enjoins journalists to respect the confidentiality of sources to whom they have pledged anonymity.

Clause 4 states that journalists should only use fair methods to obtain news, photographs and documents except where the overriding public interest justifies the use of other means.

Clause 5 enjoins journalists not to accept bribes or compensation in any form in consideration for the dissemination or suppression of information.

Clause 6 states that journalists should promptly correct any harmful inaccuracies and should ensure that corrections and apologies receive due prominence. Where necessary the person affected must be afforded the right to reply in order to get a balanced view.

Clause 7 alerts journalists to the dangers of discrimination on arbitrary grounds such as sex or race and enjoins journalists not to encourage discrimination.

Clause 8 discourages journalists from obtaining secondary employment, becoming involved politically, holding public office and serving in community organisation if this is going to compromise their integrity or that of their employers.

Clause 9 condemns plagiarism as a dishonest practice.

Clause 10 enjoins journalists to respect the moral and cultural values of Zambian society. Journalists are also encouraged to respect the privacy of others unless the public interest demands otherwise.

Body which enforces compliance with the Code

MECOZ is responsible for enforcing compliance with the Code.

Consequences of non-compliance

MECOZ may impose the following penalties on persons who breach the Code: a reprimand, a demand that the error corrected within two weeks, a demand that an apology be published within a specified time, or a demand that compensation be paid to the complainant.

7. Court cases

Overview

The landmark cases are as follows:

- *Michael Chilufya Sata v Post Newspapers Limited & Another*, which dealt with the ability of a public official to claim damages for defamation and the dangers of the chilling effect that this might have on the media;
- *M'Membe & Mware v The People*, which dealt with the constitutionality of section 69 of the Penal Code which criminalized the defence of defamation against the President;
- *Times Newspapers v Lee Chiluso* which held that the courts are reluctant to readily interfere with the assessment of damages by lower courts in defamation cases unless a total misapprehension of facts or the law is shown;
- *Peter Gino v Times Newspaper Zambia Ltd* which dealt with reasonable comments on privileged words.

7.1 *Michael Chilufya Sata v Post Newspapers Limited & Another* (1992/HP/1395 and 1804 and 1993/HP/821, 13 February 1995)

Date of judgment

31 February 1995

Sector of the media affected by the judgment

The judgment dealt with defamation in the context of the print media but the

principles established in the case apply equally to the broadcast media.

Key legal principles established

The case affirmed that public officials may recover damages for defamation when sued in their capacity as a public official for public official conduct. However, in order to mitigate the potentially chilling effects of litigation, the court held that when considering the defence of fair comment in this regard, the court would be generous and expansive in the application of the defence.

Court handing down the judgment

The Supreme Court of Zambia.

Key provisions of the judgment

The plaintiff was a politician. The defendants published in their newspaper various articles and a cartoon which the plaintiff complained was defamatory.

During the course of legal argument, the court was asked to consider whether to import the principles established in the well-known US Supreme Court case of *New York Times v Sullivan* 376 US 254 (1964) into Zambian defamation law. The *Sullivan* case established the principle in American law that public officials may not recover damages for defamatory falsehoods relating to their official conduct unless they can prove that the statements were made with “actual malice”, that is with the knowledge that they were false or with reckless disregard as to whether they were false or not.

The Supreme Court of Zambia declined to import the *Sullivan* principle into Zambian law, with the effect that public officials may recover damages for defamation when sued in their capacity as a public official for public official conduct. In coming to its decision, the court reasoned that the Bill of Rights in the Zambian Constitution attached equal importance to the rights of press freedom and reputation.

However, the court recognised that litigation by public officials has the potential to chill freedom of expression. In order to counter the effects of this, the court held that it was permissible to draw a distinction between an attack on the official public conduct of a public official and imputations that attack the private character of the individual.

7.2 *M'Membe & Mware v The People* (1995-97) ZR 118 (SC)

Sector of the media affected by the judgment

The principles in the case apply equally to the print and the broadcast media.

Key legal principals established

The case upheld the constitutionality of section 69 of the Penal Code which criminalizes the offence of defamation against the President.

Court handing down the judgment

Supreme Court, Zambia.

Key provisions of the judgment

In this case, the two accused had been charged and convicted in a magistrate's court with contravening section 69 of the Penal Code for allegedly defaming the President. Section 69 reads as follows:

“Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.”

The two accused appealed against their conviction on the basis that section 69 of the Penal Code was unconstitutional because it violated the right to freedom of expression enshrined in the Bill of Rights.

The court upheld the constitutionality of this section in the Code. In the reasons for its judgement, the court stated that the maintenance of the public character of public men for the proper conduct of public affairs was a very important public interest that ranked alongside freedom of speech. The court reasoned that this public interest required that they be protected from destructive attacks upon their honour and character and that when the public person was the head of the state, this public interest was even more self-evident.

7.4 *Times Newspapers Zambia Limited v Lee Chiluso* No. 19 of 1984 (4 December 1984)

Sector of the media affected by the judgment

This case dealt with an instance of defamation in the print media sector. However, the principles established would be of equal application to the broadcasting sector.

Key legal principles established

The court held that on appeal unless the lower court has misapprehended the facts or misapplied the law or awarded damages so high or so low that it is clear that they are erroneous, the appellate court will not interfere with the assessment of damages.

Secondly, the court held that, an adequate apology even when tendered late will expunge the damages arising out of any defamation.

Court handing down the judgment

The Supreme Court of Zambia.

Key provisions of the judgment

The libel/defamation complaint arose out of a publication alleging that the plaintiff, an advocate, had not been granted a practising certificate. The plaintiff was found to have not suffered any actual damages as a result of the publication and an apology was tendered some days later. The court awarded minimal damages as a result.

7.5 *Peter Siwo v Times Newspaper Zambia Ltd*, No. 7 of 1987 (30 September 1987)

Sector of the media affected by the judgment

This case dealt with an instance of defamation in the print media sector. However, the principles established would be of equal application to the broadcasting sector.

Key legal principles established

The case established the principle that it is not actionable to make reasonable comments on privileged words from which it could be reasonably be inferred that the defendant is guilty of an offence.

Court handing down the judgment

The Supreme Court of Zambia.

Key provisions of the judgment

In this case a newspaper commented on proceedings in the National Assembly. The Attorney General made certain comments in parliament to the effect that the appellants were involved in fraudulent activity and were guilty of some offence. The proceedings were relayed in an article that the newspaper carried and were supplemented by an opinion piece in the newspaper's opinion column. In defending the case, the newspaper raised the defence that the Attorney General's words were uttered in parliament and were therefore protected by an absolute privilege. (Those taking part in proceedings in parliament enjoy absolute privilege). Alternatively, the newspaper claimed that the words were true and alternatively fair comment.

The court held that it is not actionable to make reasonable comments on privileged words from which it could be reasonably be inferred that a defendant is guilty of an offence.

ANNEXURES

Swaziland

The Swaziland National Association of Journalists Code of Ethics ¹⁵

The journalist shall honour this pledge whatever the consequences to himself and herself.

Preamble

The SNAJ Code of Ethics has been drawn up as a ready guide and is applicable to members of the association in the state owned media and local freelance journalists.

1. The Code provides a framework of reference to all practicing journalists in Swaziland, both full- time and freelance when it becomes necessary to initiate disciplinary action any journalist who flouts any Articles of the Code.
2. The Code is meant to ensure that members adhere to highest ethical standards, professional competence and good behaviour in carrying out their duties.
3. As the fourth estate of the realm, the public expects the media to play their watchdog role. They should do this with a high sense of responsibility without infringing on the rights of individuals and society in general.

Interpretations

- *Publisher(s)*: newspaper and broadcast station owners.
- *Journalist*: anyone who is employed and is directly involved in the practice of news gathering, whether on freelance or full - time basis.

¹⁵ Independent Press Councils, "Swaziland National Association of Journalists Code of Ethics", (<http://www.presscouncils.org/library/SWAZILAND.doc>)

- *Ethics*: principles and guidelines of professional standards and behaviour.
- *Bribe*: any gift, present or offer given to a journalist in relation to and influencing the manner in which a journalist treats the news article (deliberate distortion).
- *Plagiarism*: is the lifting of another person's writing, claiming it as your own. Fraudulent representation of someone's work without due credit or attribution.
- *Credit*: attributing "lifted work" by stating the name of the writer and, in the case of a book, mention the title.
- *Public interest*: all matters pertaining to and promoting public safety, security, health and the general well being of society.
- *Intrusion*: unwarranted entry into private property or invasion of individual ambience or privacy for the purpose of soliciting information or pictures.
- *Confidential source*: a news informant who provides information on condition that his or her identity shall not be revealed.
- *Minor*: any person below the age of 18.
- *Conflict of interest*: presence of obligation to any interest, or interest group, other than the public's right to know the truth.

Article 1: People's Right to Information

1. The duty of every journalist is to write and report, adhere to and faithfully defend the truth.
2. A journalist should make adequate inquiries, do cross-checking of facts in order to provide the public with unbiased, accurate, balanced and comprehensive information.
3. The public must have unfettered access to all media.

Article 2: Social Responsibility

1. In collecting and disseminating information, the journalist should bear in mind his/ her responsibility to the public at large and the various interests in society.

Article 3: Professional Integrity and Conflict of Interest

1. Journalists should not accept bribes or any form of inducement to influence

the performance of his/ her professional duties;

2. There should be no conflict of interest in the carrying out of the journalists duties:

3. Journalists should not, unless under understandable circumstances hide their identity by avoiding the by-line.

Article 4: Plagiarism

1. A journalist should not plagiarise because it is unethical and illegal.

2. Where there is the need to use another's material, it proper to credit the source.

Article 5: Respect for Privacy and Human Dignity

1. Journalists should respect the right of the individual, privacy and human dignity.

2. Enquiries and intrusions into a person's private life can only be justified when done in public interest.

3. A journalist should guard against defamation, libel, slander and obscenity.

Article 6: Respect for National and Ethnic Values

1. A journalist should not originate material, which encourages discrimination on the grounds of ethnicity, colour, creed, gender or sexual orientation.

2. Journalists should respect ethnic values of Swazi society.

Article 7: Confidential Sources

1. Journalists are bound to protect confidential sources of information.

Article 8 :Suppression of News

1. Under no circumstances should news or a publication be suppressed unless it borders on issues of national security or is in the public interest to do so.

Article 9: Corrections

1. Whenever there is an inaccurate or misleading report, it should be corrected promptly and given due prominence. An apology should be published whenever it is appropriate.

Article 10: Rejoinders

1. A fair opportunity to respond to issues should be given to individuals and organizations.
2. Any report or a write-up affecting the reputation of an individual or an organization without a chance to reply is unfair and must be avoided by journalists.

Article 11: Information and Pictures

1. A journalist shall obtain information, photographs and illustrations only by straightforward means.
2. The use of other means can be justified only by overriding considerations of the public interest.
3. The journalist is entitled to exercise a personal conscientious objection to the use of such means.

Article 12: Separating Comment from Fact

1. While free to take positions on any issue, journalists should draw a clear line between comment, conjecture and fact.

Article 13: Hate Speech

1. Journalists shall avoid by all means the publication of speech that might promote hatred, spite and conflict amongst the Swazi or any other nation.

Article 14: Respect Embargoes

1. Journalists should observe embargoes on stories.

Article 15: Victims of Sexual Assault

1. Journalists should avoid identifying victims of sexual assault.

Article 16: Dealing with Minors

1. Journalists should protect the rights of minors and in criminal and other cases the consent of parents or guardians should be secured before children are interviewed or photographed.

Article 17: Personal Grief and Distress

1. In case of personal grief or distress, journalists should exercise tact and sensitivity in seeking information and publication.

Article 18: News Headlines and Sensationalism

1. Newspaper headlines should be fully warranted by contents of the articles they announce.
2. Photographs and telecasts should be given an accurate picture of an event not highlight an incident out of context.

Botswana

Press Council of Botswana ¹⁶ Media Code of Ethics

Preamble

The safeguarding of the freedom of speech in Botswana should be closely connected to the right of access to information. The media should endeavour to collect information and news and to publish them as correctly as possible. In pursuance of this endeavour the media recognizes that the individual citizen is entitled to respect for his/her personal integrity and the sanctity of his/her private life and the need for protection against unjustified violations. Journalists are however encouraged to demonstrate receptiveness to unfamiliar realities, and an ability to report on these realities without prejudice.

Application

The Code will govern the conduct and practice of all media practitioners, media owners, publishers and Media Institutions to be enforced by the Press Council of Botswana.

Each media sector shall submit its Code of Ethics, which will align to that of the Press Council of Botswana.

General Standards

Media practitioners must maintain the highest professional and ethical standards.

They must carry out their functions, which include informing, educating and entertaining the public professionally and responsibly.

They must take reasonable steps to ensure they disseminate accurate and balanced information, and their comments upon events are genuine and honest.

¹⁶ Independent Press Councils, "Botswana Press Council Code, 2003", (<http://www.presscouncils.org/library/Botswana.doc>)

They must never publish information that they know to be false or maliciously make unfounded allegations about others that are intended to harm their reputation.

General Duties of a Media Practitioner

A media practitioner has a duty to maintain the highest professional and ethical standards by being honest, fair as well as courageous in gathering, reporting and interpreting information.

A media practitioner shall at all times defend the principle of the freedom of the press and other mass media by striving to eliminate news suppression and censorship.

Good Practice

Accuracy

When compiling reports, media practitioners must check their facts properly, and the editors and publishers of newspapers and other media must take proper care not to publish inaccurate material. Before a media institution publishes a report, the reporter and the editor must ensure that all reasonable steps have been taken to check its accuracy. The facts should not be distorted by reporting them out of the context in which they occurred.

Special care must be taken to check stories that may cause harm to individuals, organizations or the public interest. Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to ascertain and include the response from the individual or organization.

Correction of Inaccuracy and Distortion

If a Media Institution discovers that it has published a report containing a significant distortion of the facts, it must publish a correction promptly and with comparable prominence. If a Media Institution discovers that it has published an erroneous report that has caused harm to a person or institution's reputation, it must publish an apology promptly and with due prominence.

A Media Institution must report fairly and accurately on any finding by the Press Council on its performance.

Right of Reply / Rebuttal

Where a person or organization believes that a media report contains inaccurate information or has unfairly criticized the person or organization, the Media Institution concerned must give the person or organization a fair opportunity to reply.

Comment, Conjecture and Fact

A media practitioner shall distinguish clearly in his/her publications between comment, conjecture and fact. The comment must be a genuine expression of opinion relating to fact. Comment or conjecture must not be presented in such a way as to create the impression that it is established fact.

Rules of the Profession**Undue Pressure and/or Influence**

Media owners and publishers, and media practitioners must not suppress or distort information about which the public has a right to know because of pressure or influence from their advertisers or others who have a corporate, political or advocacy interest in the Media Institution concerned.

A media practitioner must not succumb to cultural, political or economical intimidation intended to influence the outcome of the published or broadcast material.

Public Interest

A media practitioner shall exercise his/her profession in the public interest without undue interference from any quarter.

Payment for Information

Media Owners and Publishers and Media Practitioners must never publish or suppress a report or omit or alter vital facts in that report in return for payment of money or for any other gift or reward.

Media owners, publishers and media practitioners must not pay people to act as information sources unless there is demonstrable public interest value in the information. (They must also indicate when the information has been paid for).

Reporting of Investigations

In our law a person is presumed to be innocent until proven guilty. Media institutions are entitled to inform the public about arrests of suspects by the police and the trial of persons accused of crimes. They should, however, not publish the names of suspects until the police have filed formal charges against them unless it is in the public interest to do so.

Where a media institution has started to report a criminal investigation, it should normally follow up and report subsequent developments in the case.

Privacy

It is normally wrong for a media practitioner to intrude into and to report upon a person's private life without his or her consent. Reporting on a person's private life can only be justified when in the public interest to do so. This would include: detecting or exposing criminal conduct; detecting or exposing seriously anti-social conduct; protecting public health and safety; and preventing the public from being misled by some statement or action of that individual where such a person is doing something in private which he or she is publicly condemning.

Intrusions into Grief or Shock

In cases involving personal grief or shock, enquiries should be carried out and approaches made with sympathy and discretion.

Interviewing or Photographing Children

Media Practitioners should not normally interview or photograph children under the age of sixteen in the absence of or without the consent of a parent or a legal guardian/authority.

In interviewing and photographing children in difficult circumstances or with disabilities, special sympathy and care must be exercised.

Children should not be approached or photographed while at schools or similar institutions without the permission of the school authorities or institutions.

Children in Criminal Cases

Media Institutions must not publish the names of any offenders under sixteen arrested by the police or tried in the criminal courts.

Victims of Crime

Media Institutions must not identify victims of gender violence or publish material likely to contribute to such identification unless the victims have consented to such publications or law has authorized them to do this. In cases where consent is given subject to certain conditions, then such conditions must be respected.

Innocent Relatives and Friends

Media Institutions should generally avoid identifying relatives or friends of persons convicted or accused of crime unless the reference to them is necessary for the full, fair and accurate reporting of the crime or the legal proceedings.

Gathering of Information

Media Practitioners should normally use open methods of gathering information in which they clearly identify themselves as media practitioners. Generally they should not obtain or seek to obtain information or pictures through misrepresentation, subterfuge or undercover techniques.

Surreptitious methods of information gathering may only be used where open methods have failed to yield information in the public interest. These methods may thus be employed where, for example, they will help to detect or expose criminal activity, or will bring to light information that will protect the public.

Editorial Rules**Hatred and Disadvantaged Groups**

Media Institutions must not publish material that is intended or is likely to cause hostility or hatred towards persons on the grounds of their race, ethnic origins, nationality, gender, physical disabilities, religion or political affiliation. Media institutions must take utmost care to avoid contributing to the spread of ethnic hatred or dehumanising disadvantaged groups when reporting events and statements of this nature. Dehumanising and degrading pictures about an individual may not be published without the individual's consent.

National Security

Media Institutions must not publish/broadcast material that will prejudice the legitimate national security interests of Botswana in regard to military and

security tactics or strategy, or material held for the purpose of intelligence relating to defence.

This provision does not prevent the media from exposing corruption in security, intelligence and defence agencies and from commenting upon levels of their expenditure and overall performance.

Plagiarism

No media practitioner should engage in plagiarism. Plagiarism consists of making use of another person's words or ideas without proper acknowledgement and attribution of the source of those words or ideas.

Protection of Sources

When sources are promised confidentiality, that promise shall be honoured, unless released by the source.

Zambia

Code of Ethics of the Media Council of Zambia ¹⁷

Explanatory note

The purpose of distributing news and informed opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust. Journalists uphold the right to speak unpopular opinions and privilege to agree with the majority while at the same time respecting the will of the minority. A journalist shall at all times defend the principle of the freedom of the press in relation to the collection of information and the expression of comment and criticism. Council members therefore agree to abide by the following ethics.

Code of ethics

1. The public has the right to know the truth. Therefore journalists have a duty to report the truth either as representing objective reality or representing what the source says fairly, accurately and objectively.
2. Newspaper headlines should be fully warranted by the contents of the articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight an incident out of context.
3. Journalists should respect the confidentiality of sources to whom they have pledged anonymity.
4. Only fair methods should be used to obtain news, photographs and documents except where overriding public interest justifies the use of other means.

¹⁷ Independent Press Councils, "Code of Ethics of the Media Council of Zambia", (<http://www.presscouncils.org/library/Zambia.doc>)

5. Journalists should regard as grave professional offence, the acceptance of bribes in any form in consideration of either dissemination or suppression of information.
6. Journalists shall rectify promptly any harmful inaccuracies, ensure that correction and apologies receive due prominence and afford the right of reply to persons criticised when the issue is of sufficient importance.
7. Journalists shall be aware of the danger of discrimination being furthered by the media, and shall do the utmost to avoid facilitating such discrimination based on among other things, race, sex, religious, political or other opinions of national or social origins.
8. Secondary employment, political involvement, holding public office, and service in community organisations should be avoided if it compromises the integrity of journalists and their employers. Journalists and their employers should conduct their personal lives in a manner that protects them from conflict of interest, real or apparent. Their responsibilities to the public are paramount.
9. Plagiarism is dishonest and unacceptable.
10. Journalists must respect the moral and cultural values of the Zambian society. Journalists should respect people's privacy unless when public interest demands otherwise.