WEBBER WENTZEL NEWS

NEWS FROM THE MEDIA PRACTICE GROUP

SEPTEMBER 2010

NAMIBIAN SUPREME COURT INTRODUCES REASONABLENESS DEFENCE

In a recent judgment penned by Acting Judge Kate O'Regan (formerly a judge of South Africa's Constitutional Court), *Trustco Group International Limited v Shikongo* (SA 8/2009) [2010] NASC 6 ("**Trustco**"), the Namibian Supreme Court introduced a defence of reasonable publication for media defendants. The reasonableness defence has subsequently been adopted in various forms in a number of jurisdictions, including England, Australia, Canada, Ireland, Pakistan and South Africa. In South Africa, the defence is also known as the *Bogoshi* defence as it was first set out by the Supreme Court of Appeal in its ground breaking judgment in *National Media v Bogoshi* 1998 (4) SA 1195 (SCA).

The *Trustco* case related to allegations that were published in a Namibian weekly newspaper, *Informaté*, against the mayor of Windhoek, Mr Shikongo. The article alleged that Shikongo had, in his capacity as a board member of Bank Windhoek, failed to prevent an underhanded property deal in which land belonging to the Windhoek municipality was sold to the Wanderers Sports Club at a subsidised price. The article also described the sports club as a 'broederbond' cartel. The land was later sold by the sports club to a company that was constructing a housing development financed by Bank Windhoek.

The Namibian Supreme Court building in Windhoek

The article further alleged that the mayor had failed to declare his association with Bank Windhoek.

The court held that when defending a defamation claim a media defendant need not establish that a defamatory allegation is true, but only that the allegation is important, that it was in the public interest that it be published and that in all the circumstances it was reasonable and responsible to publish it.

RECENT ARTICLES AND INTERVIEWS BY THE TEAM

State secrecy Bill returns worse than ever, Dario Milo, *Sunday Times*, 11 July 2010

Okyerebea Ampofo-Anti appeared as a guest on David Gleason's **'State of the Nation'** on Classic FM talking about the ANC's proposed Media Tribunal, 14 July 2010. Click here to listen to the full interview

Media Freedom at the Crossroads, Dario Milo and Okyerebea Ampofo-Anti, *Sunday Tribune*, 25 July 2010. Also published in the Sunday Independent under the headline *Bill can't stand Constitutional Scrutiny*.

Dario Milo was interviewed on Carte Blanche, 3rd Degree, eNews, Al Jazeera, BBC and National Public Radio (USA) concerning the Protection of Information Bill in August 2010.

The more things change the more…, spot the difference between 1982 and 2010, Pamela Stein and Dario Milo, Sunday Independent, 15 August 2010

Okyerebea Ampofo-Anti appeared as a guest on Redi Direko's Roundtable on Media Freedom on Talk Radio 702, 17 August 2010, click here to listen to the show

When deciding whether a journalist acted reasonably the court will look at whether the journalist acted in accordance with generally accepted good journalistic practice as set out in journalistic codes of ethics.

The judgment also acknowledges that courts must take into account the pressured circumstances under which journalists work and not expect more than is reasonable, but it cautions that the court will also look at the importance and urgency of the story and whether a delay would allow the journalist more time to verify the information.

In deciding whether the newspaper's conduct was reasonable the court looked at a range of different facts. Firstly, the court held that the newspaper had been unable to establish that the facts contained in the article were true or substantially true. The journalist spoke to several anonymous sources within the City of Windhoek and was shown a document prepared by the City suggesting that the land sale should be rescinded. The journalist used an anonymous source to confirm that the mayor was a board member of Bank Windhoek (which turned out to be incorrect). The court held that this flew in the face of the journalistic ethics principle that an anonymous source may only be used to confirm information that cannot be confirmed using a normal source.

The journalist also did not attempt to obtain copies of the minutes of City Council meetings at which the property sale issue was discussed, even though he testified that he knew these were publicly available. The court held that the obligation for journalists to exercise care to check information is more acute where reliance is placed on an anonymous source who may have an axe to grind. Another important factor considered by the court was the right of reply offered by the journalist.

The journalist had tried to call the appellant several times on his cell phone. However, he did not call the appellant at his office or send him a text message. The court said that this did not constitute a diligent attempt to provide a right of reply.

The Court also noted that the journalist had contacted a person in the City's Management Committee, Mr von Finckenstein, and asked him about the issue, but von Finckenstein had said that he would need to obtain the relevant background information before commenting. The journalist did not give von Finckenstein time to refresh his memory and instead published the story.

The story also misleadingly recorded the response given to the journalist by von Finckenstein. The court considered it important that the facts on which the story was based had happened more than a year before the story was published and that the allegations were highly defamatory. In the circumstances the journalist's conduct in not providing a right of reply was found to be unacceptable.

Although the reasonableness defence was not successful in this case, this judgment is to be welcomed as it represents a significant step forward in the protection of freedom of expression in Namibia. It also indicates that the reasonableness defence continues to gain traction internationally.

The judgment is useful for South African journalists because it indicates the type of conduct that a court will consider important when evaluating the reasonableness of a story. Of particular importance are the findings made by the court in relation to the right of reply and the use of anonymous sources.

Recent work, articles and interviews continues..

Okyerebea Ampofo-Anti delivered a talk on the Constitutional Protection of Freedom of Expression at the SANEF Summit on media freedom held on 30 August 2010. Click here for a copy of the speech.

NEWS FROM THE TEAM

Newspaperman's Guide to the Law
Pamela Stein and Dario Milo have been commissioned by Lexis Nexis Butterworths to prepare a revised version of Kelsey Stuart's *Newspaperman's Guide to the Law*.

The book is designed to be a user friendly guide to media law for journalists and is due to be published in 2011.

Emma Sadleir leaving for LSE
Emma Sadleir has been admitted to the London School of Economics and will be studying a Masters in Information Technology, Media and Communications Law during the 2010/2011 academic year. The course includes modules on regulating newsgathering, regulating publication, regulation of internet content, data protection, defamation and privacy law. Emma's last day in the office before she leaves is 8 September 2010. She will return to Webber Wentzel on 1 September 2011.

UK COURT OF APPEAL OVERTURNS HIGH COURT DECISION IN FLOOD CASE

In our February 2010 newsletter we reported on the case of **Flood v Times Newspapers Limited** [2009] EWHC 2375. The case concerned an article published by *The Times*, in both its print and online editions in which it alleged that Detective Sergeant Gary Flood ("**Flood**"), a police officer in the Extradition Unit of the Metropolitan Police was under investigation for accepting bribes from some of Russia's most wanted criminals. The article alleged that Flood had sold confidential information to these individuals regarding attempts to extradite them to Russia for prosecution.

The article referred to payments made by a security firm, ISC Global (UK) ("**ISC**"), which had facilitated the payments. The journalists involved had relied on an ISC financial dossier which showed payments to a person code-named "Noah". The dossier was handed over by an unnamed source within ISC, who speculated that Noah was in fact Flood.

The article also relied upon a police press release which named Flood as the officer under investigation, and stated that the allegations were supported by a dossier of information. The dossier did not, however, name Flood.

After the article was published, Flood was cleared of the allegations by an investigation conducted by the Directorate of Professional Standards ("**DPS**").

In the High Court the Times had raised the defence of reasonable publication, also known as *Reynolds* privilege after the case of *Reynolds v Times Newspapers* 1999 [4] All ER 609 (HL) which developed and explained the defence.

Gary Flood – the police officer accused of corruption and subsequently cleared

The headquarters of the Metropolitan Police Service

The defence requires the court to consider the question whether the article as a whole was on a matter of public interest, whether the defamatory statement ought to have been included in the article and contributed to it and whether the journalist had taken reasonable and fair steps prior to publishing the information.

The High Court upheld the defence in relation to the print edition of *The Times*, but held that the defence failed in relation to the online publication as *The Times* had kept the article on its website even after receiving notification from Flood that he had been cleared by DPS. Flood appealed the finding in relation to the print edition of the newspaper and The Times appealed the finding that the continued publication of the article on its website had been unreasonable.

The appeal was heard by the Court of Appeal and judgment was handed down on 13 July 2010 ***(Flood v Times Newspapers Limited*** [2010] EWCA Civ 804). The court considered the *Reynolds* test and disagreed with the statement by Lord Nicholls that "[a]ny lingering doubts [as to whether the defence should be applied] should be resolved in favour of publication."

The Court instead held that the rights to reputation and freedom of expression have equal weight, and this must be considered when considering the applicability of the *Reynolds* defence.

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The Court differentiated between publishing the fact that a named person is being investigated, and publishing details of the allegations themselves. On appeal, Flood accepted that he had no objection to the article in as far as it named him as the person under investigation. His objection was to the publication of the details of the allegations made to the police against him.

Flood argued that the *Reynolds* defence cannot apply to publishing allegations that are made to the police against a person. This argument was rejected by the Court. The Court held that the *Reynolds* defence is available for both the fact of the investigation, and the specific allegations published.

The court then had to consider whether the publication of the allegations made by an anonymous source to the police was protected by the *Reynolds* defence.

An important preliminary point dealt with by the court was Flood's argument that the *Reynold*'s defence was not applicable because the conduct of the journalists had been partly responsible for the initiation of the police investigation. The court dismissed this argument as it would essentially mean that journalists who reported matters to the police could not subsequently rely on a defence of reasonable publication.

The Court also held that the publication of the allegations was not covered by the neutral reportage defence, which is an off-shoot of the *Reynolds* defence. The neutral reportage defence protects a journalist who has merely reported the fact that allegations have been made, in circumstances where the public interest lies in the fact that allegations have been made and not necessarily in the truth of the allegations themselves.

The court held that it will rarely be considered justifiable neutral reportage to report that an anonymous person has made allegations which, if true, will incriminate the plaintiff. Such a position would tip the scales too far in favour of freedom of expression at the expense of the right to reputation.

The court then applied the factors set out in *Reynolds* to assess whether publication of the article was reasonable. The court considered the allegations of corruption to be very serious and the quality of the evidence supporting the allegations weak. The journalists had no information themselves that linked the appellant to the person in the dossier; the journalists did not make much effort to verify the information; there was no urgency in publishing the information; and importantly the public interest in the fact that a police officer was under investigation did not justify publishing the allegations themselves. The Court accordingly upheld Flood's appeal in relation to the print publication and dismissed the cross-appeal by The Times in relation to the website publication.

Our courts have not yet adopted a neutral reportage defence and the case law concerning reasonable publication is not well developed. It is likely that in future, the courts will look to judgments such as this one for guidance on these issues. The judgment raises a number of important issues. Of particular note is the fact that whilst a court may be willing to accept that a journalist has acted reasonably in publishing that a certain individual is under investigation (if there is public interest in the matter), the same will not necessarily apply in respect of the details of the allegations made. The courts will review the different components of the article, each of which will need to be justified. Journalists should accordingly ensure that when reporting on allegations that emanate from official statements or reports, particularly where the journalist also makes use of external sources of information, steps should be taken to verify the allegations as far as possible.

Farewell from Keneilwe Matidze

"At the end of August 2010 I will be leaving Webber Wentzel: I have been granted an opportunity which I feel it would be a sin not to pursue. I have decided to change careers and move into film making and television producing and directing, and maybe even continue with my work in front of the camera. The decision to leave has not been an easy one because n the past four and half years I have made many great friends both at the firm and with clients of the firm that I have worked closely with. I wish to thank Pam, Dario and our clients, I have grown professionally and also developed skills which I know will come in handy in the near future. I will miss the exciting work (in particular running to urgent court in the middle of the night to protect freedom of the media), but I am hoping that I will not miss any of the friends that I have made while at WW because to me this is not a "goodbye" but rather a "see you later alligator"."

The media team wishes Keneilwe well in her new career.

Keneilwe Matidze

CUTTING THROUGH THE CONFUSION: A STEP BY STEP GUIDE TO THE PROTECTION OF INFORMATION BILL AND THE MEDIA APPEALS TRIBUNAL

In recent weeks there has been much publicity about the Protection of Information Bill and the ANC's proposal for the establishment of a Media Appeals Tribunal and how both of these developments represent a serious threat to media freedom. Unfortunately some media reports have tended to conflate the two issues and one could be forgiven for feeling confused. What follows is a broad overview of both issues.

What is the Protection of Information Bill?

- The Protection of Information Bill is a piece of draft legislation that is primarily aimed at (i) regulating the Government's powers to classify certain information (ii) determining the manner in which classified information must be dealt with and (iii) creating certain offences in relation to classified information.
- The Bill sets out a classification regime in terms of which information can be classified as either, 'confidential', 'secret' or 'top secret'. It also sets out principles and procedures that guide classification decisions, de-classification, and the manner in which classified information must be dealt with by the courts.
- In principle, there is a need for a law of this nature because it seeks to introduce proper regulation into the Government's classification regime, which is currently based on the Minimum Information Security Standards, a cabinet policy that in several respects is even more problematic than the Bill. The Bill will also repeal the Protection of Information Act, 1982 which is the draconian apartheid-era secrecy legislation that has remained on the statute books.

What are the problems with the Protection of Information Bill?

- Unfortunately, there are several aspects of the Bill which are constitutionally suspect.
- From a media and whistleblower perspective the most problematic aspect of the Bill is that it creates a number of criminal offences which relate to the disclosure of classified information but does not include a public interest defence. The practical implication of this is that if a journalist is handed classified information by a whistleblower which, for instance, exposes corruption or maladministration, the journalist would not be able to publish that information and could be jailed if he or she does, notwithstanding the clear public interest in the disclosure of the information. The whistleblower could also be jailed for leaking the information to the journalist.
- The Bill also creates an offence relating to the disclosure of a 'state security matter' which is defined to include all matters (whether classified or not) that fall within the responsibilities of the state intelligence apparatus, such as the National Intelligence Agency. This vaguely defined offence could be used to prevent the media and whistleblowers from publishing any information about the activities of the intelligence agencies.
- A further aspect of the Bill that is of serious concern is that several of the key definitions used in the Bill, such as 'national interest', 'national security' and 'security', are overboard and therefore open to abuse. For example, 'national interest' includes "*all matter relating to the advancement of the public good*". This means that there is the potential for massive over-classification of information, and hence unjustified secrecy
- The classification levels set by the Bill, i.e. 'confidential', 'secret' and 'top secret', are each problematic because the threshold of harm that is set by the Bill for each classification level is too low. For example, a document will be classified as 'confidential' if its disclosure "*may* be harmful to the security or national interest of the Republic or *could* prejudice the Republic in its international relations". The words 'may' and 'could' are speculative in nature and allow for information to be classified even if it does not pose a real risk to national security (which itself needs to be narrowly defined). The net effect of this is that a document could be classified on the basis that it 'may' be harmful to what the classifier belies to be the 'advancement of the public good'.
- The Bill does not make provision for the creation of an independent oversight mechanism that can review classification decisions. Although the Bill allows for members of the public to request a review of classified information in furtherance of a genuine research interest or a legitimate public interest, the final decision about whether to declassify information will rest with the head of the organ of the state concerned. The head of an organ of the state is also tasked with conducting a review of all classified information every 10 years or when there is a proposal to use that information in a court or tribunal. This is problematic because the head of an organ of state may well have an interest in ensuring that certain information is not disclosed to the public even if it has been improperly classified. There ought to be independent oversight of these tasks

What is the ANC's proposed Media Appeals Tribunal?

- The Media Appeals Tribunal ("**the media tribunal**") is an idea that has been discussed within the ANC and its alliance partners. There is currently no draft legislation that seeks to establish the media tribunal.
- The idea of establishing the media tribunal began to gather momentum in 2007 in the lead up to the Polokwane conference. This culminated in the adoption of a resolution at the conference that the government would explore the establishment of the tribunal to "strengthen, complement and support the current self regulatory institutions". The proposal was eventually put on the back burner amidst heavy protest from civil society.
- In recent weeks ANC secretary general, Gwede Mantashe, the minister of higher education, Blade Nzimande, and the ANC Youth league, have made renewed calls for the establishment of a media tribunal. The ANC has also recently released a Discussion Document on Media Transformation, Ownership and Diversity which is due to be discussed at the ANC National General Council in September 2010. The Discussion Document re-iterates the need for the establishment of a media tribunal.
- Based on the Discussion Document it appears that the media tribunal will take the form of a government-appointed "independent" tribunal which will serve as a forum for appealing decisions made by the Press Ombudsman and which will be accountable to Parliament.

Why has there been opposition to the Media Appeals Tribunal?

- The fact that the media must report fairly and accurately and adhere to the highest standard of journalist ethics goes without saying.
- The need for some form of accountability and redress for inaccurate reporting is also self-evident.
- However, the media has also put into place mechanisms to address these issues in the form of the Press Code and the Press Ombudsman. The Ombudsman, the veteran and well-respected journalist Joe Thloloe, hears disputes with a representative of the public and a media representative. Appeals are heard by retired judge Ralph Zulman, also sitting with a media representative and a public representative. The Ombudsman has issued a number of judgments against the media, often requiring the publication of prominent (and sometimes front page) apologies.
- Our courts also regularly entertain claims for defamation and breaches of privacy when the media oversteps lawful boundaries of reporting.
- Whilst there may be a need to strengthen the office of the Press Ombudsman, the media tribunal will not properly address this issue and instead has the capacity to chill speech on public interest issues and lead to the creation of a docile and compliant media fraternity that reports only news that is approved by the Government.
- Although the Discussion Document states that the ANC is committed to media freedom, it is also highly critical of the media and states, amongst other things that certain factions of the media have an "*anti-transformation", anti-development and anti-ANC stance*"; self regulation only serves the interests of the media; the appointment of a former journalist as the..cont.page 7

RECENT WORK

Submission on the Protection of Information Bill

The team made oral submissions to the Ad-Hoc Committee on the Protection of Information Bill on behalf of Print Media South Africa during the public hearings on the Bill on 22 July 2010.

Advice for online media

The team is acting for a broadcaster to consider the implications of the Protection of Information Bill for internet streaming.

The team is acting for a website publisher to assess the legality of publishing defamatory allegations online.

Le Roux v Dey Constitutional Court appeal

The team represented three boys in the much publicised schoolboy defamation case that was argued before the Constitutional Court on the 26th of August. Earlier this year the Supreme Court of Appeal (SCA) confirmed the judgment of the Transvaal Provincial Division (now the North Gauteng High Court) in which the schoolboys were held liable for defaming the vice principal of their school when they created and published a crudely manipulated image of the principal and vice principal who appeared to be sitting naked together on a couch.

Press Ombudsman automatically leads to bias in favour of the media; the ANC's objective is to "*vigorously communicate the ANC's outlook and values…versus the current mainstream media's ideological outlook*"; that the media lacks integrity and that there is a serious problem of 'brown envelope journalism"; and that "*freedom of expression can also be a refuge for journalist scoundrels, to hide mediocrity and glorify truly unprofessional conduct*" ;

- The media has expressed grave concerns about the media tribunal not least because, based on the statements made by various politicians, the Polokwane resolution and the Discussion Document, there is concern that the purpose of the media tribunal is to introduce government oversight of the media.
- From the perspective of media freedom, the media tribunal is indeed a grave concern. Government oversight of the content of publications and/or sanctions and fines for journalists who the Government deems to have engaged in "irresponsible" reporting, will effectively lead to both external and self censorship and have a chilling effect on freedom of expression. A tribunal of this nature would be a serious restriction on the right to freedom of expression enshrined in section 16 of the Constitution and would represent a step backwards for accountability and transparency in Government affairs.

Dario Milo and Okyerebea Ampofo-Anti
This article was originally published in the Saturday Star on 7 August 2010

Recent work continues…

SANEF Urgent Interdict

The team successfully acted on behalf of the South African National Editors Forum ("**SANEF**") to obtain an interim interdict to stop a meeting of the Parliamentary Portfolio Committee on Communications ("**the Committee**") with the Board of the South African Broadcasting Corporation ("**the SABC Board**") which the Committee intended to hold behind closed doors. At the meeting, which was scheduled to take place at 10h00 on 24 August 20210, the Committee was to receive presentations from SABC Board on the turnaround strategy of the SABC Board, a briefing on filling the post of the Group Executive and a briefing on the functionality of the SABC Board.

The team was instructed by SANEF to address a letter of demand to the Committee Chair, Ismail Vadi, in terms of which SANEF requested that the Committee reconsider the decision to close the hearings to the public. In response to this letter we received notification from the Secretary of the National Assembly that only the full Committee could change the decision and that the matter would be considered at the start of the meeting at 10h00 on 24 August 2010. Counsel was accordingly instructed to prepare an urgent application for hearing in the Western Cape High Court in terms of which we requested an order that the decision of the Committee to exclude the public from the hearing was invalid, alternatively, that the meeting be interdicted from continuing pending a final determination of the matter either by the Cape High Court or the Constitutional Court.

At approximately 11h30 on 24 August 2010 we were informed that the Committee had decided not to change its earlier decision. We immediately sought an interim order to interdict the Committee from proceeding with the hearing, which was granted by Acting Judge Sven Olivier.

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The court ordered the Committee not to proceed with the hearings pending the final order in the matter. According to reports, the Committee, despite being fully informed and aware of the pending court proceedings, continued with the hearing until the court order was obtained at about 11h30. We are awaiting a further court date for hearing of the substantive application.

Seminars on Protection of Information Bill and Media Appeals Tribunal

We are currently conducting a series of seminars for our clients on the Protection of Information Bill and the ANC's proposed Media Appeals Tribunal. Please let us know if you are interested in having a seminar on either of these issues.

PRE-PUBLICATION REVIEW AND URGENT INTERDICTS

The media team offers a pre-publication review and urgent interdict management service which includes vetting of articles to check that they comply with the requirements of responsible journalism. We are also on call 24 hours a day to manage applications for urgent interdicts. To make use of this service, contact **Dario Milo** or **Pamela Stein**. You can also contact us on our dedicated media line **08604 MEDIA** (63342)