

SADC Media Law: A Handbook for Media Practitioners

VOLUME 1

A comparative overview of the laws
and practice in Malawi, Namibia,
South Africa and Zimbabwe

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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 at strengthening democratic forces and the development of 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 foundation's range of activities, go to <www.kas.de>.

The KAS Media Programme in sub-Saharan Africa works with local partners and focuses on:

- strengthening the democratic role of the media;
- further development of the media and in the media;
- increasing freedom of speech and freedom of the press; and
- supporting free and independent media.

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



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Introduction

1 General overview

1.1 Purpose of the report

The purpose of this report is to review the right to freedom of expression of the mass media in the Southern African Development Community (SADC) region. For ease of reference we will use the term ‘mass media’ in this report to refer to the radio and television broadcast media, other electronic media and the print media. The four SADC countries chosen to be surveyed in this report (‘the target countries’) are Malawi, Namibia, South Africa and Zimbabwe.

It is intended that this report should ultimately be used as a reference resource by journalists and others working in the media and by non-governmental organisations (NGOs) involved in the media sector.

1.2 A detailed breakdown of the volume

The breakdown of each target country will comprise the following:

- an overview of the political history and the market structure for broadcast and print media;
- an analysis of the right to freedom of expression as enshrined in each country’s constitution;
- an overview of the most important legislation that impacts on the media’s right to freedom of expression consisting of, where applicable, legislation providing for the:
 - establishment of an independent communications regulator;

- regulation of broadcasting services;
 - establishment and regulation of the public broadcaster;
 - regulation of the print media;
 - censorship of films and publications;
 - promotion of access to information;
 - protection against disclosure of official state secret information;
 - disclosure of journalists’ confidential sources of information; and
 - 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 the 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 those working in media organisations and interest groups in the target countries.

1.3 The interviews with journalists

Interviews were conducted in each of the target countries. In most cases a range of 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 those working in media organisations and interest groups – were interviewed in the target countries.

Only a small minority of those interviewed (mostly people working for media interest groups) were comfortable with the full details of their interviews being made public. Most, if not all, of the journalists, editors and others that were interviewed were reluctant for their names to be disclosed, although they did not object to the contents of the interviews being made available to the public. Some of the interviewees even wanted the full details of their interviews to be kept strictly private. Even those journalists who were happy for the contents of the interviews to be made public but who did not wish for their names to be

disclosed, felt that the content of the interviews in many cases is sufficient to reveal their identities. While this is not necessarily a problem for more media-friendly countries like South Africa, this could be cause for grave concern in the case of more repressive regimes such as Zimbabwe. Realising this, the interviews were summarised and a synopsis has been provided for each country.

2 Political history, market structure and experiences of journalists in the target countries

All of the target countries have difficult political histories, a legacy of colonialism, and in some instances apartheid (in the case of South Africa and Namibia). Some countries proclaimed themselves as one-party states (such as Malawi, until recently), whereas in others the term of office for the state president was extended beyond the international norm of two terms (for example, Zimbabwe and more recently Namibia). These developments reflect a trend towards the increasing concentration of political power in the hands of the executive arm of government, with negative implications for political freedom – and by extension for freedom of expression in these countries. These political trends do not create a conducive environment for the media to thrive in, which in turn tends to restrict the number of independent and critical voices in the media.

As regards broadcasting, free-to-air television is still monopolised by the public broadcaster in most of the target countries surveyed. A notable exception is South Africa, where one private free-to-air television station has been licensed. In the other countries, privately owned television broadcasting services (where these exist) invariably tend to be provided to subscribers on a subscription basis. This renders the service unaffordable for most people living in these countries, where poverty is still rife. Most of the target countries do allow privately owned commercial and community radio broadcasters to operate within their borders.

The most notable exception is Zimbabwe, which does not have a private broadcasting sector for either radio or television. The only independent broadcaster that operates in Zimbabwe is SW radio – a radio-station that transmits signals into Zimbabwe from outside of the country's borders.

With regard to the print media, some countries (notably South Africa) have a fairly large independent print media sector, whereas many of the print media institutions in others are either government owned or effectively government

controlled, or party-political owned or controlled (the most extreme case being Zimbabwe).

Our interviews with journalists and media workers working on the ground in the target countries show that the degree of freedom of expression in the four countries varies, for obvious reasons. There is a total breakdown of the rule of law in Zimbabwe. The right to freedom of expression has been completely eroded and those fighting for its preservation are deemed to be journalists working illegally. Unfortunately, Malawi is following suit in that the independent media houses are constantly under threat of being shut down or have already been shut down. As with Zimbabwe, the state broadcaster in Malawi controls the airwaves completely, which it uses as a mouthpiece for government propaganda. Similar trends are being set in Namibia. The Namibian Broadcasting Corporation is the main source of information and it appears that it is controlled by the government, for the government. Independent media houses survive in Namibia or avoid threatening situations by staying out of politics. Comparatively speaking, South Africa far outshines its neighbours in providing an environment that supports the right to freedom of expression in the media. There are, however, some worrying tendencies towards self-censorship in South Africa.

3 Enshrining the right to freedom of expression in the constitution

All four target countries theoretically espouse the principle of constitutional sovereignty – as opposed to parliamentary sovereignty – and have adopted constitutions that are supposed to be the supreme law of the land.

The constitutions of the countries surveyed all enshrine the right to freedom of expression. However, in none of these countries is the right to freedom of expression absolute: the respective constitutions make provision for this right to be limited. Constitutional provisions that permit the right to freedom of expression to be limited generally 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’, clause-by-clause basis. Where a limitation is provided for in this way, the limitation typically tends to take the form of a list of grounds of exclusion from the right to freedom of expression. Most notable in this category is the

Zimbabwean Constitution, which permits the state to restrict freedom of expression in the name of such things as defence and public order. An example of another constitution that is constructed in this way is the South African Constitution, which excludes hate speech from the protective umbrella of the right to freedom of expression.

The second way in which limitations of rights can be provided for is on the basis of a catch-all limitations clause, which broadly applies to all of the fundamental rights that are protected by the constitution. Catch-all limitations clauses typically tend to provide that rights may only be limited in terms of a law of general application, and only on a basis that is reasonable and justifiable. Many constitutions that provide for an internal clause-by-clause limitation mechanism usually combine this with an overarching catch-all limitation mechanism, as is the case with both the South African and the Zimbabwean constitutions.

The third way in which limitations of rights can be provided for is by way of a derogation clause that allows for the suspension of certain rights during a state of emergency.

There is evidence in some of the countries surveyed that the constitutional right to freedom of expression is being interpreted in a restrictive way. Besides the obvious example of Zimbabwe, the researchers came across a case in Malawi in which the court held that a public interest organisation with no interest in a matter (other than the general public interest) does not have the standing to institute proceedings in court to enforce the right to freedom of expression in the Malawi Constitution. The effect of this judgment is to narrow the pool of litigants who may litigate to enforce the fundamental rights in the constitution.

Malawi

1 Introduction

1.1 Political landscape

Malawi has a population of approximately 11.3 million people. The country was a former British colony and gained full independence from the United Kingdom in 1964, following elections which gave Dr Hastings Kamuzu Banda's Malawi Congress Party (MCP) a majority in parliament. Two years after the elections, Banda declared Malawi to be a republic and a one-party state. In 1971 Banda became President for Life, and during his subsequent reign retained a firm grip on all aspects of the country. Opponents of the regime were jailed or exiled.

In the face of increasing criticism and political pressure, Banda was eventually forced to give way to a system of multiparty democracy. After the adoption of a new constitution (Constitution of the Republic of Malawi Act 20 of 1994), simultaneous parliamentary and presidential elections were held in May 1994, which saw the United Democratic Front (UDF) being elected as the ruling party and Dr Bakili Muluzi being elected as the new president. Muluzi won a second term in office at the presidential election of June 1999 – defeating his main opponent, MCP leader Gwanda Chakwanda – a position that he occupies to this day.

According to the new Malawi Constitution, the president is allowed to hold office for a maximum of two terms. This constitution specifically enshrines the freedom of the press to report and publish freely, as well as to obtain access to public information.

1.2 The mass media market in Malawi

Malawi has a number of radio stations. The public broadcaster, the Malawi

Broadcasting Corporation (MBC) has two radio stations, namely MBC Radio and Radio 2 FM. There are also approximately four community and three commercial radio stations.

As for the television sector, the public broadcaster operates a free-to-air television service (Television Malawi). Private satellite broadcaster DSTV (Digital Satellite Television, which is owned by South African company MultiChoice) provides satellite subscription television services.

As regards the print media sector, there are approximately eight major newspapers in circulation in Malawi. Six of these are privately owned and all but two, namely the *Saturday Star* and *The Chronicle*, are independent. The ruling party, the UDF, owns the *UDF News* which is a government inclined newspaper. There is also the *Weekly News*, which is owned by the government.

2 Experiences of journalists in Malawi

2.1 Overview

Interviewing journalists in Malawi presented a number of difficulties. Most journalists were unwilling to participate in the interview process and many failed to return calls, facsimiles or e-mails.

2.2 The television broadcast sector

Representatives of MBC did not respond to any of our telephone calls or e-mails. This may be indicative of the fact that there is a lack of openness and transparency on the part of the public broadcaster.

2.3 Radio broadcasting sector

Although the MBC dominates the television airwaves, there are commercial radio broadcasters operating in Malawi. In this regard, it was possible to interview the director and station manager of an independent commercial radio station.

According to the station manager, the ruling party in Malawi is threatened by the airwaves being opened up and there have been occasions when the station

manager himself was summoned to police headquarters. Nevertheless, there have been no direct threats to this station and there is no evidence of telephone tapping.

It became obvious, however, that freedom of expression in Malawi is threatened in more subtle ways. Independent commercial broadcasters receive no support from the state in terms of advertising revenue and all assets (including equipment and music) have to be imported from outside of Malawi and paid for in United States (US) dollars. Moreover, the state imposes import duties. This threatens the viability of independent commercial broadcasters as the high taxes limit their ability to survive. A further tax is imposed on all advertisements. The Malawi Revenue Authority will actually visit the premises of a commercial broadcaster to ensure that all advertisements have been properly recorded and that taxes have been paid on them. Failure to do so incurs penalties.

2.4 Print media sector

It proved too difficult to find journalists in the print media industry who were willing to speak openly. As mentioned, some journalists were not willing to participate while others were cagey and did not want their names to be associated with this project. It is evident from the interviews that the ruling party in Malawi does not take kindly to criticism. Journalists have experienced members of the ruling party searching their offices and seizing their office equipment. They have also seen colleagues being beaten up by members of the UDF.

Interestingly, it appears that management in charge of running certain newspapers have personal political agendas. It is not clear whether pressure to conform to the government's viewpoint or policies comes directly from government or whether management bows to government as a result of personal agendas to keep peace with the ruling party. Furthermore, it became evident from the interviews that almost all of the newspapers are owned by people with political ties. The *Daily Times* and the *Malawi News* are both owned by a company called Blantyre Newspapers Limited, which is owned by family members of former President Banda. People in the employ of these newspapers are sometimes former ministers who still have personal links to members of the ruling party and who may not want to burn bridges with the ruling party. *The Nation*, a so-called independent newspaper, is owned by the politician Aleka Banda, who was the Minister of Agriculture and the former vice-president of the ruling party. The interviewers were advised that Aleka Banda does not have much to do with the running of *The Nation*; he is said to be committed to having

a credible newspaper. Accordingly, *The Nation* does publish articles that are critical of the ruling party, which has resulted in Banda receiving flack from his colleagues and fellow politicians.

But complete independence from government influence cannot be guaranteed if a newspaper is owned by a former vice-president of the ruling party. *The Chronicle* – an independent, commercial and family owned newspaper – has faced a number of challenges in its quest to operate as an independent paper. Political forces make it difficult for the newspaper to operate freely. It has experienced reporters being abducted and is constantly under threat: this includes threatening phone calls from members of the ruling party, lawsuits being instituted against it to try to subject it to financial pressure and its phones are constantly bugged.

2.5 Results of non-confidential interviews

Interviews were conducted with radio broadcasters, with journalists in the print media sector, and with people working in media organisations in Malawi. The public broadcaster (the MBC and Television Malawi) did not respond to the researchers' calls. A number of the interviewees requested that their names, details of their interviews or both, be kept confidential.

2.6 General overview of the interviews

Of the few journalists and media workers that the researchers managed to interview, most took the view that there is media freedom in Malawi. In fact, some of those interviewed believed that some journalists were taking the concept of freedom of expression too far. One person expressed the view that: "people are going overboard to express themselves, with no consideration of defamation issues." However, other journalists said that there was a high level of awareness among the media of the law relating to defamation, particularly as the defamation laws in Malawi were felt to be "quite stringent".

Despite the widely held view that there is media freedom in Malawi, there are contra-indications which indicate that political pressures from the state do pose a subtle threat to freedom of expression. One journalist interviewed in the survey related an incident when the current president, Bakili Muluzi indicated his intention to stand for a third term of office.

The Malawi Constitution allows a president to hold office for a maximum of two terms, and the indications were that the president was going to attempt to amend the Constitution to allow for a third term. The media were highly vocal in speaking out against this. The ruling party was angry with this reaction, and in response the police raided the interviewee's office and beat up a fellow journalist for daring to oppose the President.

Most of the interviewees mentioned race and religion as being sensitive issues to report on, although there was no unanimity on this issue. Another topic that was mentioned as being a hot issue was the coverage of high-level corruption. Some journalists said that it was difficult for the media to report on high-level corruption because Malawi has not enacted any legislation – as has been done in other countries – to facilitate access to information held by the state.

Most interviewees expressed the belief that their confidential sources of information could, by and large, be safely protected against forced disclosure by the state, although one interviewee indicated that this was the case only because “this issue has not really been tested in Malawi ... we are able to protect our sources because there are no laws saying that we can be forced to reveal our sources, therefore they are always protected”.

3 Constitution of the Republic of Malawi, 1994

3.1 Commencement date

18 May 1994

3.2 Supremacy of the Constitution

The Constitution is regarded as the supreme law of Malawi. According to section 5, any law that conflicts with the Constitution will be regarded as invalid.

3.3 Establishment of an independent regulator

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

3.4 Provisions impacting on the media

The Malawi Constitution guarantees the right of the press to freedom of expression. This is enshrined in section 36 which states:

“The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.”

3.5 Limitations clause

Most of the fundamental rights listed in the Malawi Constitution are not absolute and can be limited where reasonably necessary. Section 44(1) contains a list of rights that may not be restricted (this includes, for example, the right to life, the prohibition of genocide and the prohibition of slavery). Otherwise, all rights (including the right to freedom of expression) may be limited in terms of section 44(2) which provides:

“Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.”

The circumstances under which fundamental rights may be restricted are set out in section 44(3). This section requires that all laws imposing restrictions on fundamental rights must be of general application and may not negate the essential content of the right in question. Section 45(3)(a) permits the right to freedom of expression to be derogated from during a state of emergency declared by the President of Malawi. The Constitution limits the circumstances under which a state of emergency may be declared. Specifically, section 45(2) only permits the President to declare a state of emergency when there is a natural disaster or when there is a threat of war or civil war.

3.6 Courts which have the jurisdiction to decide constitutional matters

The highest court in Malawi is the Supreme Court of Appeal (SCA). The SCA is the court of final instance in respect of appeals in terms of section 104 of the

Constitution. Below the SCA are the High Courts, which in terms of section 108 of the Constitution have unlimited original jurisdiction to preside over any civil and criminal proceedings under any law. Section 112 of the Constitution makes provision for further courts, subordinate to the High Court, including magistrates' courts.

3.7 Independence of the judiciary

Section 103 of the Malawi Constitution entrenches the independence of the judiciary from the legislative and executive arms of government. Section 103 specifically provides:

- “(1) All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of all the influence and direction of any other person or authority.
- (2) The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence.
- (3) There shall be no court established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court.”

3.8 Appointment and removal of judges

The Constitution gives the National Assembly the final say on the appointment of the Chief Justice. Section 111(1) states that even though the President appoints the Chief Justice, the appointment must be confirmed by the National Assembly by a majority of two-thirds of the members present in voting. Otherwise section 111(2) requires all other judges to be appointed by the President on the recommendation of the Judicial Service Commission (JSC).

It was said that in practice the President cannot derogate from the JSC's recommendation, and that the National Assembly has the power to reject the recommended names.

Section 111(3) stipulates that all magistrates and other judicial officers must be appointed by the Chief Justice on the recommendation of the JSC. It was also mentioned that the President cannot deviate from the JSC's recommendation in respect of the appointment of magistrates either.

4 Legislation that governs the media

4.1 Overview

The principal statutes governing the mass media in Malawi are the:

- Communications Act, 1998 (Act 41 of 1998) – which provides for the regulation of telecommunications, posts and broadcasting in Malawi;
- Printed Publications Act, 1947 (Act 18 of 1947) – which governs the print media and which provides for the registration of newspapers with the Government Archivers;
- Censorship and Control of Entertainments Act, 1968 (Act 11 of 1968) – which regulates the pre-approval of content that is distributed to the public and which provides for the regulation of entertainment productions;
- Official Secrets Act, 1913 (Act 3 of 1913) – which protects official state secrets against disclosure; and
- Commercial Advertising (Traditional Music) Control Act, 1978 (the researchers were not able to obtain the full citation) – which regulates the use of traditional Malawi music in advertisements.

Malawi does not have any legislation regulating access to information held by the state.

4.2 Communications Act, 1998

- *Date of commencement:*
31 December 1998

- *Purpose of the Act:*

The Act was passed with the intention of regulating the postal, telecommunications and broadcasting sectors in Malawi. The Act also makes provision for the establishment of an independent regulator for the communications sector in the form of the Malawi Communications Regulatory Authority (MACRA).

- *Sector of the media governed by the Act:*

The Act applies to the postal, telecommunications and broadcasting sectors.

- *Key provisions:*

In this section of the report, only those provisions of the Act relating to the broadcast media have been examined.

Part 2 of the Act establishes MACRA as an independent regulatory authority. Section 5 stipulates in addition to telecommunications, broadcasting and postal services, MACRA is also empowered to regulate the radio communications frequency spectrum. As a general rule, the Act grants the Minister the overall power to set policy for the communications sector in terms of section 105, and confers the role of regulation and implementation on the regulator.

Under the Act, the President is solely responsible for appointing members to MACRA. The Act thus posits the direct involvement of the President in appointment processes, with adverse implications for the independence of the regulator from the executive arm of government. Specifically, sections 7 and 8 require the President to appoint the members and the chairperson of MACRA without reference to anyone else, not even to Parliament. Section 9 empowers the Minister to appoint the Director General of the Regulator on the recommendation of the regulator, but without any involvement from the President. However, section 12 of the Act permits the Authority to retain licence fees and fines in order to finance its activities, in addition to any monies that it may receive by way of grants or donations or which had been appropriated by Parliament. This gives the Authority a degree of autonomy from the executive in respect of its financial affairs. Yet, in terms of section 12(2), the Minister has to approve all transactions where MACRA borrows money. Section 14 requires the Authority to report to the Minister annually.

Section 33 of the Act empowers MACRA to regulate access to and use of radio frequencies in Malawi and to licence spectrum users. The Act requires MACRA to comply with any directions that the Minister may give in relation to the radio frequency spectrum. As a general rule, the Act forbids anyone from operating a radio station in Malawi without a radio spectrum licence. The Minister may, however, make regulations granting exemptions from the requirement to hold a licence.

Part IV of the Act empowers the Authority to regulate broadcasting services in Malawi and permits the regulator to seek the general direction of the Minister in

carrying out its duties under the Act. It was said that in practice the regulator is bound to follow all policy directions issued by the Minister. As a general rule, the Act forbids the provision of any broadcasting service without a broadcasting licence. Section 47 distinguishes between three types of broadcasting licences, namely: public, private and community broadcasting licences. Part IV authorises the regulator to issue broadcasting licences for radio and television without any involvement from the executive arm of government. In terms of section 48, the Authority is empowered to invite applications for new broadcasting licences by publishing an invitation to apply in the *Government Gazette*. However, the Authority is required to obtain the approval of the Minister before inviting applications for additional public broadcasting licences. Put differently, the Minister is required to take the ultimate decision on the number and types of broadcasting service licences before the licences may be issued. MACRA is required to hear representations from prospective applicants before issuing a licence where the number of applicants for the licence exceeds the number of licences available.

Section 53 permits MACRA to amend broadcasting licences without any involvement from the executive. Section 52 binds all broadcasting licensees to adhere to the Code of Conduct for Broadcasting Services ('the Broadcasting Code') set out in schedule 3 to the Act, which the regulator administers. In terms of section 54, MACRA monitors compliance of licensees with their licence, terms and conditions and the Broadcasting Code.

Section 86 establishes the MBC as a body corporate and reaffirms its status as the public broadcaster. Section 87(2)(a) requires the MBC to function independently and without any political bias. In terms of section 89, the board of directors of the MBC is solely responsible for directing its affairs. Section 90 of the Act empowers the President to appoint both the chairperson of the board of the MBC and the other board members.

The Act requires the President to appoint board members in consultation with the Public Appointment Committee. However, section 92 empowers the MBC board to appoint its own chief executive officer (CEO) without any reference to the government. The CEO is responsible for the day-to-day operations of the MBC and is subject to the supervision of the board only.

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

Section 57 empowers the Minister to make regulations governing the provision of broadcasting services on the advice of the regulator.

- *Provisions for media not controlled by the state:*

The Act applies both to the public broadcaster (the MBC) and to the private and community broadcasting sectors.

- *Body which enforces compliance with the Act:*

MACRA bears the principal responsibility for enforcing the Act.

- *Provisions limiting media ownership:*

The Act contains a number of provisions that restrict ownership in the broadcasting sector. Section 48(7) prohibits MACRA from issuing a broadcasting licence to any entity of a party political nature. Under section 50(1), it is prohibited for any one entity to exercise direct or indirect control over more than one national private broadcaster or for any person to be a director of any entity exercising such control.

Section 50(2) similarly prevents a single entity from exercising direct or indirect control over more than two local private broadcasters and forbids any person from being a director of any entity exercising such control.

- *Consequences of non-compliance with the Act:*

Under section 100, it is an offence for anyone to provide a broadcasting service without a licence. Under section 102, contravention of this provision can render an offender liable to be fined or imprisoned.

4.3 Printed Publications Act, 1947

- *Commencement date:*

1 March 1948

- *Purpose of the Act:*

One of the purposes of the Act is to provide for a system of registration of newspapers with the Government Archivers.

- *Sector of the media governed by the Act:*

The Act applies to the print media.

- *Key provisions:*

Section 3 requires every book that is printed or published in Malawi to contain full details of the printer's name and the place where the book was printed, the

name of the publisher and the publisher's place of business, and the year of publication. Section 4 of the Act stipulates that the publisher of every book published in Malawi must deliver a copy of the book to the Government Archivist at the publishers' expense within two months of the date of publication.

Section 5(1) requires every newspaper to be registered with the office of the Government Archivers. All newspapers are required to supply the Archivers with their full details – including their title and the names and addresses of the proprietor, editor and publisher of the newspaper, as well as the details of the premises where the publication will be published.

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

Section 3(3) empowers the Minister to exempt certain classes of printed matter from the requirement to bear details of the printer, the publisher and the date of publication in terms of section 3. Section 4(5) authorises the Minister to exempt publications from having to be lodged with the Government Archivist.

There is no similar provision allowing for newspapers to be exempted from the obligation to register with the Government Archivist in section 5.

- *Provisions for media not controlled by the state:*

No specific provisions

- *Body which enforces compliance with the Act:*

The provisions of the Act are enforced by way of criminal proceedings in the ordinary courts.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

Under section 3(2) it is an offence to print or to publish a book without giving details of the printer, the publisher or the year of publication. Under section 5(2) it is an offence to print or publish a newspaper without being registered. In both cases, a contravention will render the offender liable to be fined. However, the fine amount is minimal and is restricted to a maximum of £100.

Under section 4(3) it is an offence to publish a book in Malawi without depositing a copy of the book with the Government Archivist. A contravention of this provision will render the offender liable to be fined a minimal amount of £20.

4.4 Censorship and Control of Entertainments Act, 1968 (Act 11 of 1968)

- *Commencement date:*

2 December 1976

- *Purpose of the Act:*

The purpose of the Act is to regulate the pre-approval of content that is distributed to the public, such as cinematograph pictures and print media publications. An unusual feature of the legislation is that it also regulates theatrical productions and other forms of public entertainment. The Act achieves this via the Board of Censors ('the Board'), which performs a pre-classification function under the legislation.

- *Sector of the media governed by the Act:*

The Act gives the Board fairly extensive pre-classification and pre-approval functions. The Act not only applies to films and printed publications, but extends to other forms of public entertainment, such as theatrical productions.

- *Key provisions:*

Section 3 of the Act establishes the Board as a statutory body. The Minister appoints the members of the Board and designates who the chairperson of the Board should be. The functions of the Board are set out in section 6. These include examining all content falling within the scope of the Act to make enquiries into any content that it believes to be undesirable.

The Act requires anybody seeking to stage any form of public entertainment (whether in the form of stage plays or film screenings) to obtain a theatre licence. The licensing officer (essentially the Minister or his/her delegate) is empowered to refuse an application for a theatre licence or to grant the licence subject to certain restrictions that are necessary to ensure the safety of the audience attending the theatre or to ensure compliance of any theatre equipment made with any rules passed under the Act. The interviewers found that in practice, theatre licences are issued mainly to ensure the safety of audiences.

Part V of the Act requires all films to be pre-classified according to the age groups that they may be exhibited to before they are displayed to the public. Part IV of the Act likewise requires the Board to preview stage plays and other forms of public entertainment before they are performed before the public in order to ascertain, for example, whether the play may be presented to children. In the case

of a film screening or a theatrical production the Board is required to issue a certificate of approval or entertainment permit respectively. Section 19 requires a film permit to be obtained every time a film is shot in Malawi.

Section 24 of the Act empowers the Board to declare content to be undesirable. Section 23(1) makes it an offence for any person to publish and distribute content that has been declared by the Board to be undesirable under section 24.

Section 23(2) permits the Board to declare content to be undesirable under a fairly wide range of circumstances. Essentially, section 23(2) allows the Board to classify content if, among other things, the Board adjudges it to be:

- indecent, obscene, offensive or harmful to public morals; or
- if it is likely to:
 - give offence to the religious convictions or feelings of any section of the public;
 - bring any member or section of the public into contempt;
 - harm relations between any sections of the public; or
 - be contrary to the interest of public safety or public order.

Under section 23(4) there are, however, a number of exceptions to this general rule. In particular, section 23(4) does not require the pre-approval of the Board to be obtained if the publication is of a *bona fide* technical, scientific or professional nature, is part of a *bona fide* series of law reports, is of a *bona fide* religious character, is printed or distributed pursuant to the directions of a court or is connected with any judicial proceedings.

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

The Act permits the Minister effectively to override decisions of the Board. Section 31 empowers the Minister to cancel certificates, entertainment permits, film permits and theatre licences issued by the Board under the Act without any reason and without compensation. Section 28 of the Act authorises the Minister to prohibit or to restrict the private performance or presentation of any film, stage play or public entertainment required to be licensed under the Act.

- *Provisions for media not controlled by the state:*

The Act does not make any specific provisions for media not controlled by the state, but applies broadly to the private media sector.

- *Body which enforces compliance with the Act:*

Both the Board and the Minister are empowered to enforce compliance with the Act. Contraventions of statutory offences under the Act would be enforced by way of criminal proceedings in the ordinary courts.

4.5 Official Secrets Act, 1913

- *Date of commencement:*

16 May 1913

- *Purpose of the Act:*

The purpose of the Act is to regulate and prevent the disclosure of official secret state information.

- *Sector of the media governed by the Act:*

The Act applies across the board and is not a media-specific statute, although all forms of mass media fall within its scope.

- *Key provisions:*

Section 3(1)(c) makes it an offence for any person to disclose any official state secret to a third party (for example, a secret official code, word, password or any other secret information) for any purpose prejudicial to the safety or interests of the state, where the disclosure is intended to be directly or indirectly useful to an enemy.

Section 4 deals with the wrongful communication of information. Section 4 makes it a misdemeanour (as opposed to an offence) for any person who is in possession or control of official secret state information to communicate the information to any person who is not authorised to receive it. It is also a misdemeanour to use the information for the benefit of a foreign state or to use it in a manner that is prejudicial to the safety and interests of the state.

In addition, section 4 makes it a misdemeanour to retain secret state information or to fail to take reasonable care of it. It is also a misdemeanour for anybody who has information relating to munitions of war to communicate this to a foreign state or to otherwise use it in a manner that is prejudicial to the safety or the interests of the state. Any person who contravenes section 4 of the Act will be guilty of a misdemeanour unless he or she can prove that the information was communicated contrary to that person's volition.

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

None of any relevance

- *Provisions for media not controlled by the state:*

The Act does not make any specific provision for media not controlled by the state but applies broadly to the private media sector.

- *Body which enforces compliance with the Act:*

Section 20 stipulates that a statutory offence committed under the Act must be adjudicated only by the High Court and may not be tried by any subordinate court. The Act is silent about the prosecution of statutory misdemeanours, which the legislation distinguishes from offences.

- *Provisions limiting media ownership*

None

- *Consequences of non-compliance with the Act.*

In terms of section 17, any person found guilty of a misdemeanour under the Act is liable to be fined up to £50 and sentenced to prison for two years.

4.6 Commercial Advertising (Traditional Music) Control Act, 1978

- *Date of commencement:*

The Act was issued on 31 March 1978 (unable to obtain commencement date).

- *Purpose of the Act:*

The purpose of the Act is to regulate the recording and reproduction of Malawi traditional music and dance for commercial advertising purposes.

- *Sector of the media governed by the Act*

The Act is not sector specific and applies to all sections of the media that display commercial advertisements to the public. This would include the print, broadcast and mass electronic media.

- *Key provisions:*

The recording and reproduction of traditional Malawian music and dancing in commercial advertising is regulated by the Act. Section 4 of the Act makes it an offence for anyone to broadcast or publish traditional Malawian music or dancing for use in commercial advertising.

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

Section 5 empowers the Minister to prescribe regulations in order to achieve the objects of the Act.

- *Provisions for media not controlled by the state:*

The Act does not contain any specific provisions for media not controlled by the state, however, it applies across the board to the private media sector.

- *Body which enforces compliance with the Act:*

Statutory offences are enforced by the ordinary courts in the normal course.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

In terms of section 4, contravention of the requirement not to use Malawi traditional music and dance in commercial advertising renders the offender liable to be fined or imprisoned for a term of up to one year.

5 Codes of Conduct

5.1 Overview

There are two main codes in place that govern the mass media industry in Malawi. These are:

- the Code of Conduct for Broadcasting Services ('the Broadcasting Code'), which is a statutory code contained in Schedule three to the Communications Act; and
- the Malawi Code of Ethics and Professional Conduct ('the Journalism Code'), which is a self-regulatory code for journalists operating in Malawi.

5.2 Code of Conduct for Broadcasting Services

- *Date of commencement:*

The Broadcasting Code came into force at the same time as the Communications Act, namely 31 December 1998.

- *Purpose and nature of the Code:*

The Code sets out standards of conduct that radio and television broadcasters are required to adhere to. The Code is a statutory code and is thus fully binding in law.

- *Sector of the media affected by the Code:*

The Code applies to the broadcasting sector.

- *Key provisions:*

Item 2 of the Code sets out the general obligations of broadcasters. In summary, item 2 states that broadcasting licensees must:

- not broadcast any material which is indecent, obscene or offensive to public morals (the prohibition extends to the use of abusive and insulting language), that is offensive to the religious convictions of any section of the population, or that likely to prejudice the safety or public order and tranquillity of the state of Malawi;
- exercise due care and sensitivity in the presentation of material which depicts or relates to acts of brutality, violence, atrocities, drug abuse, obscenity; and
- exercise due care and responsibility in the presentation of programmes where a large proportion of the audience is likely to be children.

Item 3 of the Code sets out the standards that broadcasting licensees are expected to adhere to when reporting news events, and stipulates that:

- broadcasting licensees must report the news truthfully, accurately and objectively;
- broadcasters must represent the news in an appropriate context and in a balanced manner without intentionally or negligently departing from the facts;
- where a report is founded on an opinion, supposition, rumour or allegation, this must be indicated clearly;
- where it subsequently appears that a broadcast report was incorrect, this must be indicated immediately without delay.

Section 4 sets out the circumstances under which broadcasters are permitted to provide comment on events. Section 4 stipulates that broadcasters:

- are entitled to comment or criticise any actions and events that are of public importance;
- must present comments in a manner that clearly indicates that the statements being made are in the nature of a comment; and
- must give comment that reflects an honest expression of opinion.

Section 5 regulates the manner in which broadcasters may report on controversial issues. This section provides that broadcasters must make a reasonable effort to present differing points of view in the same programme, alternatively to do this in a subsequent programme within a reasonable period of time and in substantially the same time slot.

Section 6 governs the way in which elections should be covered. Section 6 states that broadcasters should ensure equitable treatment of political parties, election candidates and electoral issues during an election period.

Section 7 obliges broadcasters to respect individual privacy. Specifically, section 7 provides that when reporting on the news or making comment, broadcasters must take exceptional care and consideration in matters involving the private lives and private concerns of individuals. However, the Code permits the right to privacy to be overridden by a legitimate public interest.

Section 8 regulates the payment of informants in exchange for information. This section forbids broadcasters from paying an informant who has been engaged in a crime in order to obtain information, unless a compelling public interest requires this.

- *Provisions for media not controlled by the state:*

The Code is binding on all broadcasting licensees, both in the public and the private sector.

- *Body which enforces compliance with the Code:*

Section 54 of the Communications Act empowers MACRA, the regulator, to enforce compliance with the Code.

- *Consequences of non-compliance:*

In the event of a transgression, MACRA may issue orders in the form of the following:

- a direction requiring the licensee to broadcast a correction, an alternative, or a balancing opinion to the initial broadcast;
- a direction requiring the licensee to desist from non-compliance;
- a fine proportional to the effects of the non-compliance;
- a direction requiring the licensee to take appropriate remedial steps.

The Act also empowers MACRA to order the suspension of the broadcasting service for up to 30 days if the licensee fails to comply with an order.

5.3 Code of Ethics and Professional Conduct

- *Date of commencement:*

The Journalism Code was finalised in 1995.

- *Purpose and nature of the Code:*

Malawi became a one-party state soon after the country formally gained full independence from Britain in 1964. Faced with increasing pressure for political reform, the government adopted a multiparty system in 1993/94, which ushered in a new democratic era.

In response to these developments, a group of journalists from Malawi banded together to develop a code of conduct for their profession, as it was felt that the one-party regime had left journalists inadequately prepared to function in a multiparty setup. The Journalism Code was adopted pursuant to this process.

The purpose of the Code is to lay down standards for ethical and professional conduct for journalists. The Journalism Code is voluntary and non-statutory and is therefore not legally enforceable in the same way that the Broadcasting Code is. The Journalism Code is meant to exist alongside the judicial system and does not preclude complainants from instituting litigation proceedings in a court of law.

- *Sector of the media affected by the Code:*

The Code is primarily intended to govern the activities of journalists operating in Malawi in both the print media and the broadcasting sectors, notwithstanding the existence of the Broadcasting Code.

- *Key provisions:*

Many of the provisions of the Journalism Code mirror the Broadcasting Code. The most important provisions of the Journalism Code include the following:

- The Code requires all material produced by journalists to be credible, balanced and fair to all sides. Journalists are enjoined to report on events in a manner that is accurate and objective, and to distinguish comments and opinions clearly from statements of fact.
- The Code enjoins journalists to avoid sensationalism and unwarranted speculation, and to avoid using discriminatory language and slants involving racism, tribalism, religion, etc. The Code also states that journalists should avoid using traumatising, shocking or obscene pictures as much as possible.
- Journalists are also encouraged to correct mistakes promptly and to allow for a right of reply where possible. Interestingly, the Code does not require the media to carry rebuttal adverts from public officials where the purpose of the rebuttal is to protect the personal reputation rather than the office of the official concerned.
- The Code directs journalists to protect confidential sources of information.
- The Code encourages journalists to respect the right of the individual to privacy, except where otherwise justified by the public interest. The Code enjoins journalists to refrain from identifying victims of sexual assault, especially where children are involved. The Code also states that journalists should avoid unnecessarily identifying the relatives and friends of people who have been convicted of a crime.
- The Code encourages journalists to be transparent in their work by introducing themselves and by requesting permission to obtain information or to take pictures. The Code provides that journalists should not seek to obtain information or pictures through misrepresentation or subterfuge unless the public interest justifies this and the information cannot be obtained through any other means.
- The Code states that journalists should refrain from receiving favours that compromise their professional integrity. The Code also provides that journalists should not accept payment to include or exclude material on a story that they are writing.

- *Provisions for media not controlled by the state:*

The Code applies to all broadcast and print media that voluntarily chose to be bound by its provisions, including the privately controlled media sector.

- *Body which enforces compliance with the Code:*

The Media Council of Malawi is responsible for enforcing the Code. The Council was established in 1996 for this purpose. The Code applies to the members of the Media Council of Malawi. However, journalists in Malawi who do not fall within the jurisdiction of the Council are encouraged to adhere to the Code. Membership of the Media Council is voluntary. There are two criteria for membership: an organisation has to be a registered human rights institution or a media training and/or publishing institution.

- *Consequences of non-compliance:*

As stated above, the Code is not strictly enforceable in a court of law. Chapter 5 of the Code permits the Media Council to take internal disciplinary action against journalists under its jurisdiction who behave unethically and who breach the Code. Specifically, the Code permits the Council to impose the following penalties:

- issue a warning;
- ask the responsible media organisation to apologise or withdraw the article in the same medium the article was published or transmitted;
- issue a statement condemning the article if the media organisation responsible refuses to apologise or retract the article; or
- urge other media associations to disassociate themselves from the practitioner responsible until a remedy to the matter has been found.

6 Regulations

6.1 Overview

The researchers were supplied with one set of regulations that impact on the freedom of the media to report on events, namely the Public Security Regulations (GN 70/1964). These regulations were issued under section 2(a) of the Preservation of Public Security Act (Act 1 of 1960). Section 2(a) authorises the Minister to

prescribe regulations prohibiting the publication and dissemination of information that is prejudicial to public security, where he deems this to be “necessary”.

6.2 Public Security Regulations

- *Date of commencement:*

Unable to ascertain the date of commencement

- *Purpose of the regulations:*

The purpose of the regulations is to facilitate the implementation of the Act in relation to matters affecting public security.

- *Sector of the media affected by the regulations:*

The regulations are not sector-specific and apply across the board to all mass media.

- *Key provisions:*

Clause 5(1) of the regulations prohibits anyone from publishing anything that is likely to:

- be prejudicial to public security;
- undermine the authority of, or public confidence in, the government;
- promote a feeling of ill-will or hostility between any sections or classes or races of inhabitants of Malawi; or
- promote industrial unrest in any industry in Malawi in which that person has not been *bona fide* engaged in for the preceding two years.

Clause 10 of the regulations empowers an authorised officer or a police officer to request any person to furnish or produce any information or papers in his/her possession which the officer considers to be necessary in order to preserve public security. The regulations authorise officers to take possession of such information where a request is not adhered to, with negative implications for the protection of confidential sources of information for journalists.

- *Body which enforces compliance with regulations:*

No specific body has been established under the enabling legislation to enforce

compliance with the regulations. Enforcement is therefore relegated to the realm of the ordinary courts to deal with.

- *Consequences of non-compliance:*

In addition to the threat of having information and documents seized, failure to comply with clause 10 is an offence and can result in the offender being imprisoned for a period of up to seven years.

7 Case Law

7.1 *Ex parte: Civil Liberties Committee: In re: S v Registrar General & Minister of Justice (civil cause no. 55 of 1998)*

- *Date of judgment:*

5 March 1999

- *Sector of the media affected by the judgment:*

The case dealt with general freedom of expression issues in the print media context. The principles established here apply equally to the broadcasting sector.

- *Key legal principles established:*

The case laid down the principle that a public interest organisation (in this case an NGO) with no direct interest in a matter does not have the standing to institute proceedings in court to enforce the fundamental rights in the Malawi Constitution (including the right to freedom of expression) purely on the basis of public interest.

- *Court handing down the judgment:*

High Court of Malawi

- *Key provisions of the judgment:*

The facts of the case were that the Registrar General had cancelled the registration certificate of Chikonzero Communications. The effect of the decision had been to ban the publication, printing and distribution of a newspaper known as *The National Agenda*. The Civil Liberties Committee, an NGO, took the decision on review to the High Court. The Civil Liberties Committee appears not to have had any direct interest in the matter other than the promotion of human rights. The state argued that the applicant did not have the standing to institute litigation proceedings in court because it did not have a “sufficient interest” in the

matter as is required by section 15(2) of the Malawi Constitution. This section states:

“Any person or group of persons with sufficient interest in the protection and enforcement of rights under this chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights.”

The Court agreed with the state, adopting a very narrow conception of “sufficient interest”. The Court held the promotion of the public interest was not sufficient to confer *locus standi* on the Civil Liberties Committee to launch judicial proceedings in its own name. The effect of the judgment is that a generalised interest in the promotion of human rights causes, such as freedom of expression, is insufficient for the purposes of *locus standi*.

7.2 *Viva Nyimba v UDF News* (civil cause no. 987 of 1996)

- *Date of judgment:*

21 July 1998

- *Sector of the media affected by the judgment:*

The case dealt with defamation in the print media. The principles established are also germane to the broadcasting sector.

- *Key legal principles established:*

The case seems to indicate that the courts in Malawi tend to be fairly conservative when awarding damages for defamation and are loathe to award additional exemplary damages unless there are strong grounds to justify this.

- *Court handing down judgment:*

High Court of Malawi

- *Key provisions of the judgment:*

The plaintiff, an attorney by profession, sued a newspaper for defamation arising out of an article that the paper had published alleging that the plaintiff was part of a conspiracy to commit treason by unlawfully overthrowing the government of Malawi. The plaintiff suffered financially, as did his legal practice as a result, as he battled to retain and to attract new clients. The newspaper conceded liability,

which left the court with the task of quantifying damages. The court awarded compensatory damages to the plaintiff on an aggravated scale, but declined to award additional exemplary damages.

In arriving at its conclusion, the court reasoned that in assessing damages for defamation, the most important factor is the gravity of the libel. The second most important factor is the extent of publication. Also of relevance is whether or not the newspaper apologises or retracts the defamatory allegations. On the facts of the case, the court found a number of aggravating circumstances to have been present.

In particular, the degree of the libel had been grave as it touched closely on the plaintiff's integrity, loyalty and professional reputation. Moreover, the newspaper, which had national circulation, had refused to apologise or to withdraw the article.

In an attempt to persuade the court to award him additional exemplary damages, the plaintiff also alleged that the newspaper had published the article about him in an attempt to boost sales and advertising revenue. The court declined to award exemplary damages, holding that the mere fact that newspapers are run for profit does not automatically mean that they are liable to pay exemplary damages. In its reasoning the court stated:

“I am aware that all newspapers are run for profit and that everything that is published in the newspapers is published, in a sense, with a view to profit. But this mere fact does not automatically bring newspaper defendants into the category of those who may have to pay exemplary damages on the footing that what they have done has been done with a view to a profit. A newspaper which reports news in an ordinary run-of-the-mill way and happens to make a mistake in its report is not to be mulcted in its exemplary damages merely because what it does [is] with a view to profit. In this action there is no evidence that what was done was done with a view to increasing sales of the newspaper.”

7.3 *Chikhwaza & Others v Now Publications Ltd. t/a Independent* (civil cause no. 1975 of 1998)

- *Date of judgment:*
30 December 1998

- *Sector of the media affected by the judgment:*

The case dealt with defamation in the print media. The principles established apply equally to the broadcasting fraternity.

- *Key legal principles established:*

The judgment dealt with the grounds on which exemplary damages will be awarded for defamation. Exemplary damages will be awarded if a newspaper knowingly or recklessly publishes a false allegation with the intention of boosting profits.

- *Court handing down judgment:*

High Court of Malawi

- *Key provisions of the judgment:*

The plaintiffs, who were fairly high profile church pastors, sued a newspaper for defamation arising out of an article that the paper had published about them alleging that they were involved in a money scam. The plaintiffs sued the paper for compensatory damages and for exemplary damages. Having established libel, the court awarded compensatory damages but declined to order exemplary damages as the plaintiffs could not prove that the paper had published the article with the intention of increasing its circulation and profits.

The court stated that exemplary damages will be awarded in cases where the defendant's conduct was motivated by profit and where the profit received by the defendant exceeds the compensation payable to the plaintiff. The rationale behind awarding exemplary damages in such cases is to prevent the defendant from being unjustly enriched at the plaintiff's expense and to teach the defendant that defamation does not pay.

However, the court sounded a note of caution when dealing with newspapers, which are inherently profit-making enterprises. Quoting with approval from the English case of *Rookes v Barnard* ([1964] AC 1129), the court inferred that exemplary damages would only be awarded:

“in a case in which a newspaper quite deliberately publishes a statement which it either knows to be false or which it publishes recklessly [or] carelessly whether [or not it knows the statement] to be true or false, and on the calculated basis that any damage likely to be paid as a result of litigations will be less than the profit which the publication of that matter will give.”

7.4 *Chibambo v Editor in Chief of Daily Times & Others* (miscellaneous cause no. 30 of 1999)

- *Date of judgment:*

5 February 1998

- *Sector of the media affected by the judgment:*

The case dealt with an instance of defamation in the print media. The legal principles established apply equally to the broadcasting industry.

- *Key legal principles established:*

The case established that the press are not free to defame public figures with impunity merely because the general topic is of interest to the public. The press must establish one of the recognised defences to defamation in order to escape liability.

- *Court handing down judgment:*

High Court of Malawi

- *Key provisions of the judgment:*

The plaintiff, a Minister in the Cabinet of the Malawi Government, successfully sued a newspaper for defamation.

In dismissing the newspaper's defence to the claim of defamation, the court made a number of interesting comments about the defamation of public figures in the mass media.

In its reasoning, the judge handing down the judgment stated:

“In passing let me touch on a misconception of the law which the press in Malawi may have. There is a belief that one aspect of the freedom of the press is that newspapers are free to write stories which damage the character and reputation of persons holding public office in society, without incurring liability. The reason for this press immunity is said to be the public's interest in the character and conduct of persons entrusted to perform public duties. This belief is wrong and it has no basis in the law of this country ... a newspaper which writes a story that tends to damage the character or reputation of a person holding office must, just like any other ordinary person, justify it or successfully establish a defence of fair comment. Failure to do will attract liability.”

Namibia

1 Introduction

1.1 Political landscape

Namibia has a small population of approximately 1.8 million people. The country held its first pre-independence democratic elections in 1989, pursuant to which the South West African Peoples' Organisation (SWAPO) was elected into power, and the Democratic Turnhalle Alliance (DTA) – an alliance of minor ethnic-based parties lead by the white community – was elected as the main opposition party.

Immediately before obtaining independence, Namibia had been administered by South Africa. Under South African rule, a democratic system was established for the white community only and the infamous apartheid system of racial segregation was implemented.

This all changed on 21 March 1990 when Namibia officially achieved independence and SWAPO leader Sam Nujoma was installed as the president; a position that he has occupied ever since.

Under the Namibian Constitution (Constitution of the Republic of Namibia Act 1 of 1990) that was enacted in 1990, provision was made for the state president to have a maximum of two terms of office. However, the Constitution was controversially amended in 1998 to allow the first president of Namibia to stand for a third term of office. (In theory, this is a special case for Nujoma, and the two-term limit remains for other presidents.)

In the midst of mounting criticism that political power was becoming increasingly centralised in the hands of the ruling party and the president, Nujoma announced in 2001 that he would step down when his third term of office expires in 2004.

1.2 The mass media market in Namibia

The broadcasting sector in Namibia is dominated by the public broadcaster, the Namibian Broadcasting Corporation (NBC). The NBC operates a national broadcasting network consisting of a television station (NBCTV) and a radio station (NBC Radio). In the private television sector, Deukom Television Namibia offers several German language channels in Namibia as a pay television service, and MultiChoice Namibia offers several English language channels on a subscription basis. In the radio sector, a few independent commercial and community broadcasters have been licensed to operate in Namibia.

As for the print media sector, there are approximately eight newspapers in circulation. Of these, six are privately owned or independent from the government. Of the two non-independent newspapers, one (*New Era*) was established by statute and is government-owned. The other newspaper (*Namibia Today*) is party political in its orientation and is owned by SWAPO.

2 Experiences of journalists in Namibia

2.1 Overview

The journalists that were interviewed in Namibia generally believe that the degree of freedom of expression in Namibia is very good. This reasoning is based on their rationalisation that in Africa, save for South Africa, Namibia is the freest democracy. However, details of journalists' experiences in Namibia reflect that, objectively, freedom of expression is under threat.

In the television arena, many journalists assured the researchers that the NBC does criticise the government and the ruling party and that it enjoys complete freedom of expression to broadcast what it wants. Running counter to this, however, was the inference from other journalists that the NBC is partial to the ruling party in Namibia.

In the radio broadcasting arena, it would appear as if radio broadcasters have complete freedom of expression to the extent that they do not engage in the political arena. English is Namibia's official language and it appears that freedom of expression for English broadcasters and for the print media is more of a threat to the ruling party as these media are able to disseminate information more widely.

2.2 Print media

The researchers were unsuccessful in contacting journalists who were willing to participate in the review from some of the print organisations such as *The Namibian*. Nevertheless, the researchers were able to interview several journalists who were able to provide a sense of the state of media freedom in Namibia.

2.3 The public broadcaster

Two people employed by the NBC were interviewed. While both parties interviewed did not explicitly state that the NBC is partial to the ruling party in Namibia, details of the NBC's operations clearly indicate that this is the case. For obvious reasons, the researchers were told that the NBC does criticise the government and the ruling party and that it enjoys complete freedom of expression to broadcast what it wants.

2.4 Private broadcasting sector

The researchers were successful in interviewing owners of independent radio broadcasters in Namibia. It became apparent that radio broadcasters do have freedom of expression, provided they do not engage in the political arena. As soon as one engages in political discourse that is critical of the ruling party, one's freedom of expression is curtailed.

English is Namibia's official language and it appears that freedom of expression for English broadcasters and for the print media is more of a threat to the ruling party as these media are able to disseminate information more widely.

2.5 Results of the interviews

The interviews were conducted with a wide range of people, including university academics, people working in the public and private broadcasting sectors, journalists in the print media sector, and people working in media organisations in Namibia.

Some of those approached for interviews did not return the researchers' calls,

either because they were too busy to do so or because they did not wish to speak to the interviewers. A number of interviewees requested that their names and/or the details of their interviews be kept confidential.

The journalists and media workers in Namibia who were interviewed by the researchers generally seemed to hold the view that freedom of expression is alive and well in Namibia. The journalists that were interviewed claimed that they “enjoy 100% freedom of expression in Namibia ... journalists can express themselves openly,” and others stated that “freedom of speech in Namibia is very liberal”.

Despite such views, the researchers detected a worrying tendency towards self-censorship among the media, particularly when it comes to reporting on political issues. This is summed up in the words of one journalist who said: “I don’t know what will happen if we criticise the government as we do not criticise the government. You can’t expect me to criticise the heroes of this country. Politicians are the heroes. If I do I will be threatened by the government.”

In addition to the chilling effect of self-censorship, the government has also used subtle means, such as withdrawal of advertising by the government and parastatals in some media. The general view here seemed to be that media freedom would be protected as long as no serious criticism was levelled against the government.

The interviewees identified a broad range of issues that they considered as being sensitive to report on, but no burning issue stood out as being especially controversial. One interviewee identified issues relating to affirmative action, land reform and the promotion of national reconciliation in the post-independence period as being particularly contentious.

Some of the interviewees noted that there was a limited awareness of media laws among journalists and media workers in Namibia. “We know the basics, but not the details,” one journalist said. Another interviewee expressed the view that because of this, many journalists censor themselves in favour of the government.

In relation to the confidentiality of sources of information, there seemed to be an almost unanimous view among those interviewed that journalists in Namibia were well-placed to protect their sources. Other interviewees declined to comment on this, on the basis that this has never really been tested in Namibia. One journalist did, however, relate a case whereby a journalist was jailed for a few days for failing to disclose a source.

3 Constitution of the Republic of Namibia, 1990

3.1 Commencement date

The Namibian Constitution came into effect on 12 March 1990.

3.2 Supremacy of the Constitution

Article 1(6) states that the Constitution is the supreme law of Namibia.

3.3 Establishment of an independent communications regulator

The Namibian Constitution makes no provision for the establishment an independent regulator for the communications sector.

3.4 Provisions impacting on the media

Article 21(1)(a) of the Constitution enshrines the right to freedom of expression. The exact wording of this section provides:

“All persons shall have the right to ... freedom of speech and expression, which shall include freedom of the press and other media.”

3.5 Limitations clause

As a general rule, none of the rights in the Namibian Constitution are absolute (including the right to freedom of expression) and may be restricted under certain prescribed circumstances. The Namibian Constitution permits the right to freedom of expression to be restricted in three instances.

Article 21(2) contains internal clause-specific limitation provisions that allow for the right of freedom of expression to be restricted where considerations such as national security warrant this. The exact wording of this provision states:

“The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia insofar as such laws impose

reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”

In addition, article 22 of the Namibian Constitution also contains a general limitations clause which provides:

“Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content, and shall not be aimed at a particular individual;
- (b) specify the ascertainable extent of such limitation and identify the article or articles on which authority to an Act such limitation is claimed to rest.”

Article 24 permits the fundamental rights in the Constitution to be derogated from in the case where Namibia is in a state of national defence or where a state of emergency has been declared under the Constitution.

3.6 Courts which have jurisdiction to decide constitutional matters

The High Court has primary jurisdiction whereas the Supreme Court has jurisdiction only as a court of appeal.

3.7 Independence of the judiciary

The Namibian Constitution entrenches the independence of the judiciary from the legislative and executive arms of government. Articles 78(2) and (3) expressly state that the courts are independent and subject only to the Constitution and the law.

The Constitution also prohibits anyone from interfering with the judiciary, including members of Cabinet and the Parliament.

3.8 Appointment and removal of judges

Article 82 outlines the appointment procedure for judges of the Supreme Court and the High Court. The Constitution empowers the President to appoint judges, but on the recommendation of the Judicial Service Commission (JSC). According to the Constitution, the normal retirement age for judges is 65. However, the Constitution empowers the President to extend any judge's retirement age through an Act of Parliament.

A judge may be removed from office in terms of article 34. This article empowers the President to remove judges from office before the expiry of their terms of office acting on the recommendation of JSC. The Constitution only permits judges to be prematurely removed from office on two grounds, namely: on the basis of mental incapacity or gross misconduct. Before the President removes a judge, the JSC is required to conduct an investigation and to recommend the removal of judges to the President if it finds evidence of either mental incapacity or gross misconduct.

4 Legislation that governs the media

4.1 Overview

The principal statutes governing mass media law in Namibia are the:

- Namibian Communications Commission Act, 1992 (Act 4 of 1992) – which provides for the establishment of a sector-specific regulator in the form of the Namibian Communications Commission (NCC), and which sets out the regulatory framework governing private broadcasting services. In addition, the Act also empowers the NCC to regulate postal and telecommunications services;
- Namibian Broadcasting Act, 1998 (Act 9 of 1991) – which provides for the establishment of the NBC as a juristic entity, and which sets out the regulatory framework governing public broadcasting services;
- Draft Communications Bill for the Republic of Namibia, 2003 – which, if passed, will result in the creation of a single regulatory authority for telecommunications and broadcasting in the form of the Communications

Authority of Namibia (CAN), and will provide for the regulation of posts, telecommunications and broadcasting in one statutory instrument;

- Press Agency Act, 1992 (Act 3 of 1992) – which provides for the establishment of a statutory, government-owned news and information service in the form of the Namibian News Agency; and
- New Era Publications Corporation Act, 1992 (Act 1 of 1992) – which provides for the establishment of a statutory, government-owned newspaper in the form of *New Era*.

In relation to broadcasting, the legislation creates a dual regulatory regime for public broadcasters and private or community broadcasters. The public broadcasting services of the NBC are regulated by the Minister of Information and Broadcasting under the Namibian Broadcasting Act, whereas private or community broadcasters are regulated by the NCC under the Namibian Communications Commission Act.

Moves are under way to promulgate new legislation that will house the regulation of posts, telecommunications and broadcasting under the same statutory roof in the form of the Communications Bill, 2003. Many of the provisions relating to broadcasting in the Bill mirror the existing legislation, with some differences.

In relation to the print media, an unusual feature of the regulatory regime is that it provides for the establishment of a government-owned newspaper and a state-run news and information service as statutory bodies.

4.2 Namibian Communications Commission Act, 1992

- *Commencement date:*
25 March 1992

- *Purpose of the Act:*

The purpose of the Act is to establish the NCC as the regulator for postal telecommunications and broadcasting services, with the exception of the public broadcaster, the NBC. In relation to broadcasting, the Act also sets out a system for the licensing of broadcasting service providers, and for the monitoring of broadcasters' licence conditions and programming content. The Act also empowers the NCC to manage and plan the spectrum, as well as to allocate frequencies.

- *Sector of the media governed by the Act:*

The Act applies to the postal, telecommunications and private broadcasting sectors, to the exclusion of the NBC.

- *Key provisions:*

Section 2 of the Act established the NCC as a statutory body.

Section 3 empowers the Minister of Information and Broadcasting to appoint the members of the NCC, thereby undermining the independence of the regulator from the line ministry. Under section 5, the Minister determines the remuneration and allowances payable to NCC members. Section 8 permits the NCC to appoint experts to assist it with its work, but only where the Minister approves this.

Section 6 sets out the grounds, on which NCC members may be removed from office. The listed grounds include such things as physical and mental ill-health, absenteeism and removal from office by the Minister. Section 6(2) empowers the Minister to revoke the appointment of members who do not disclose conflicts of interest to the Minister at the time of being appointed to the NCC. However, the Minister may only make a revocation on the recommendation of the NCC.

As a general rule, it is an offence to provide a broadcasting service without a licence (sections 16 and 25(d)). Section 12 of the Act empowers the NCC to issue broadcasting licences to new market entrants. Section 17 provides for a public process in respect of the licensing procedures.

The Act allows the Minister to prescribe licence conditions only on the recommendation of the NCC. Section 12 permits the NCC to amend broadcasting licences in a limited set of circumstances, but after granting the licence holder concerned the opportunity to make written representations to the NCC. The Act is silent as to whether the NCC has to obtain the Minister's approval before granting an amendment. Section 13 empowers the NCC to renew broadcasting licences, which in Namibia are issued for a fixed term only. The Act does not state whether the NCC has the discretion to refuse to renew a licence and, if so, on what grounds.

Section 18 prescribes standards of conduct that broadcasters must adhere to in respect of programming content. Specifically, section 18 imposes obligations on broadcasters to, among other things:

- comply with general standards of journalistic ethics;

- present news in a factually accurate and impartial manner;
- not broadcast party-political advertisements;
- limit advertisements to a maximum of 20% of the total daily broadcasting time; and
- encourage the development of Namibian expression by providing programming pertinent to Namibia.

Section 18(q) makes provision for further standards of conduct to be prescribed, other than the standards listed in the Act.

An unusual feature of the Act is that section 20 requires licensees to broadcast a counter-version whenever they broadcast false allegations against any person or an entity. The obligation only applies to persons and entities that are affected by the false assertion of fact. The obligation, however, does not apply in cases where the person making the counter-version has no direct interest in the transmission of the counter-version or if the counter-version is substantially longer than the broadcast part that dealt with the false assertion of fact. The obligation to broadcast counter-versions also does not extend to broadcasts of public meetings of the National Assembly.

Another unusual feature of the legislation is that section 26 permits the Minister (or any person authorised by the Minister) to order any licensee to broadcast any announcement that the Minister deems to be in the interest of national security or in the public interest at any time and in any specified manner. This has obvious negative implications for editorial independence and control.

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

Aside from the specific powers of the Minister in relation to such things as the appointment and removal of NCC members, section 27 grants the Minister the ultimate power to prescribe regulations on the recommendation of the NCC.

- *Provisions for media not controlled by the state:*

The Act applies to all broadcasters in the private or community sector but not to the public broadcaster.

- *Body which enforces compliance with the Act:*

The NCC enforces compliance with the Act in the main. The Act does, however,

give the Minister some powers in respect of regulatory processes that extend beyond the reach of policy making.

- *Provisions limiting media ownership:*

Section 17 states that broadcasting licences may only be issued to Namibians. Specifically, section 17 empowers the NCC to issue broadcasting licences only to Namibian citizens and to Namibian companies. (Namibian companies have to have at least 51% of their shareholding beneficially owned by Namibian citizens, they may not be directly or indirectly controlled by non-Namibian citizens and they must have their principal place of business or registered office in Namibia.) The Act does not contain any express provisions on cross-media ownership or that restrict the number of licences that any one broadcaster may hold. However, section 17(5)(c) provides that, in considering an application for a broadcasting licence, the NCC must take into account:

“... the desirability or otherwise of allowing any one person or association of persons, to have control of or a substantial interest in –

(i) more than one broadcasting service;

(ii) more than one radio station and one television station and one registered newspaper with a common coverage and distribution area or significantly overlapping coverage and distribution areas.”

Section 28 requires all transfers of broadcasting licences and all changes in ownership and control to be approved by the NCC.

- *Consequences of non-compliance with the Act:*

The NCC is responsible for monitoring compliance by broadcasters with their licences. Section 19 empowers the NCC to impose penalties on broadcasters who breach a material condition of their broadcasting licences.

The penalties that the NCC is authorised to impose include the issuing of a fine, the issuing of a directive to a licensee to effect a programme change, the suspension of the licence for a period determined by the NCC, and the withdrawal of the licence.

Under section 25, it is offence for anyone to provide a broadcasting service without a licence. It is also an offence for a broadcasting licensee either to contravene or to fail to comply with a broadcasting license condition. A

contravention of this provision will render the offender liable to be fined or to be sentenced to prison for up to six months.

4.3 Namibian Broadcasting Act, 1991

- *Commencement date:*

19 June 2001

- *Purpose of the Act:*

The primary purpose of the Act is to regulate the affairs of the public broadcaster, the NBC.

- *Sector of the media governed by the Act:*

The Act applies to the NBC as the public broadcaster.

- *Key provisions:*

Section 2 established the NBC as a juristic person. Section 4(1) of the Act sets out the powers, duties and functions of the NBC, most of which have to be approved by the Minister of Information and Broadcasting, which detracts from the ability of the public broadcaster to function independently from the executive arm of government. Section 4 also requires the NBC to obtain the Minister's approval to provide broadcasting services both inside and outside Namibia.

A feature of the legislation that has alarming implications for the right of the public broadcaster to freedom of expression is that it permits the Minister to prescribe the terms and conditions on which the NBC may provide broadcasting services, including in relation to content. These powers are set out in section 4(2), which empowers the Minister to determine terms and conditions relating to issues such as the content of programmes to be broadcast.

Section 5 makes provision for the NBC to be managed and controlled through a board. Section 6 empowers the Minister to appoint the board, and also to designate the chairperson of the board. However, section 13 allows the board to appoint its own CEO. Section 8 also permits the Minister to remove board members on a wide number of grounds – including ill-health, misconduct, incompetence, or in order to promote “efficiency”. Section 9 empowers the Minister to determine the remuneration and allowances payable to board members. As a general rule, section 12 permits the chairperson to decide when board meetings may be held, but the Act permits the Minister to request that

special board meetings be convened. Section 25 requires the NBC to report to Parliament each year by submitting reports via the Minister.

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

The Act confers general regulation-making powers on the Minister of Information and Broadcasting.

- *Provisions for media not controlled by the state:*

None

- *Body which enforces compliance with the Act:*

The Minister regulates the NBC and enforces compliance under the Act.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

None of any relevance to this report.

4.4 Draft Communications Bill for the Republic of Namibia, 2003

- *Commencement date:*

The Bill has not been promulgated as an Act, and accordingly has not commenced yet.

- *Sector of the media to be governed by the Bill:*

The Bill applies to the postal, telecommunications and private broadcasting sectors, to the exclusion of the public broadcaster.

- *Purpose of the Bill:*

The purpose of the Bill is to house the regulation of posts, telecommunications and private broadcasting under the same statutory roof. The Bill also seeks to establish a new regulator in the form of the Namibian Communications Authority (NCA), with overarching jurisdiction over all three sectors. In relation to broadcasting, the Bill by and large replicates the provisions of the Namibian Communications Commission Act.

- *Key provisions:*

Section 3 provides for establishment of a Communications and Information

Policy Unit within the Ministry of Information and Broadcasting as a policy advisory body to the Minister, while section 4 provides for the establishment of a communications regulator in the form of the CAN. In terms of section 5, the main object of the CAN is to regulate the Namibian communications industry. Section 7 empowers the Minister to issue policy guidelines to the CAN.

The Bill gives the Minister a role in the appointment of directors to the CAN, which detracts from the institutional independence of the regulator from the executive arm of government. Section 9 empowers the Minister of Information and Broadcasting to appoint the directors of the CAN. This section stipulates that the appointments must be made from a shortlist of suitable candidates drawn up by a selection committee appointed by the Minister.

The Bill provides that the selection committee must consist of representatives from the office of the Attorney-General, the Ministry and, if available, organisations in Namibia that are representative of business, the communications industry and consumer interests. Section 9 further requires that applications be submitted to the selection committee before appointments are made. Section 13 empowers the Minister to appoint the chairperson and the vice-chairperson of the CAN. The chairperson also acts as the CEO.

Section 12 empowers the Minister to remove CAN directors from office. However, the Minister may not remove a director unless the approval of the National Assembly of Parliament has been obtained first. The Bill empowers the Minister to remove directors on the grounds of physical or mental ill-health, incapacity, where they are guilty of conduct that renders them incapable of performing their duties “efficiently”, where they have participated in a regulatory matter in circumstances where there is a conflict of interest, or where they are found guilty of “conduct prejudicial to the objectives of the Authority”.

Section 14 empowers the Minister of Information and Broadcasting to determine directors’ remuneration and allowances, in consultation with the Minister of Finance. The CAN is allowed to appoint its own staff and set their remuneration under section 21. Generally, the chairperson determines when CAN meetings are to be held under section 15. Nevertheless, the Bill allows the Minister to ask for special meetings to be convened.

The CAN is allowed to retain the proceeds of licence fees, fines and other monies received by it, which form the basis of the CAN’s funding under section 22. Section 22 provides that initially, the CAN will be funded from monies

appropriated by Parliament until it is up and running. The CAN is required to submit annual financial reports to Parliament via the Minister.

As a general rule, the Bill prohibits anyone from providing a broadcasting service without a licence (section 68). Section 65 of the Bill empowers the CAN to issue broadcasting licences to new market entrants. Section 69 provides for a public process in respect of the licensing procedures. Section 65 permits the CAN to amend broadcasting licences in a limited set of circumstances, but after granting the licence holder concerned the opportunity to make written representations to the CAN. Section 66 empowers the CAN to renew broadcasting licences. The Bill states that the CAN may only decline to renew a licence if good reason exists for it to do so.

Section 70 prescribes standards of conduct that broadcasters must adhere to in respect of programming content. The standards of conduct in the Bill are almost an exact replica of those contained in section 18 of the Namibian Communications Commission Act. Like the Namibian Communications Commission Act, section 72 of the Bill retains the obligation on licensees to broadcast a counter-version whenever they broadcast false allegations against any person or an entity.

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

Section 7 empowers the Minister to issue policy guidelines to the CAN. A significant shift in the Bill from the Namibian Communications Commission Act is that it empowers the regulator (as opposed to the Minister) to prescribe regulations.

- *Provisions for media not controlled by the state:*

The Bill applies to all broadcasters in the private sector, to the exclusion of the public broadcaster.

- *Body which enforces compliance with the Bill:*

If passed into law, the CAN will be responsible for enforcing compliance with the legislation.

- *Provisions limiting media ownership:*

Similarly to the Namibian Communications Commission Act, the Bill only allows for broadcasting licences to be issued to Namibians. Specifically, section 69 empowers the CAN only to issue broadcasting licences to Namibian citizens and to Namibian companies. (Namibian companies have to have at least 51% of

their shareholding beneficially owned by Namibian citizens, they may not be directly or indirectly controlled by non-Namibian citizens and they must have their principal place of business or registered office in Namibia.)

Like the Act, the Bill does not contain any express provisions on cross-media ownership or that restrict the number of licences that any one broadcaster may hold. However, section 69(6)(c) provides that, in considering an application for a broadcasting licence, the CAN must take into account:

“... the desirability or otherwise of allowing any one person or association of persons, to have control of or a substantial interest in –

(i) more than one broadcasting service;

(ii) more than one radio station and one television station and one registered newspaper with a common coverage and distribution area or significantly overlapping coverage and distribution areas.”

- *Consequences of non-compliance with the Bill:*

The CAN is responsible for monitoring compliance by broadcasters with their licences. Section 71 empowers the CAN to impose penalties on broadcasters who breach a material condition of their broadcasting licences. As in the case of the Namibian Communications Commission Act, the penalties that the CAN is authorised to impose include the issuing of a fine, the issuing of a directive to a licensee to effect a programme change, the suspension of the licence for a period determined by the CAN, and the withdrawal of the licence. Under section 94, it is offence for anyone to provide a broadcasting service without a licence. It is also an offence for a broadcasting licensee either to contravene or to fail to comply with a broadcasting license condition. A contravention of this provision will render the offender liable to be fined, imprisoned or both.

4.5 Namibia Press Agency Act, 1992

- *Date of commencement:*

24 March 1992

- *Sector of the media governed by the Act:*

The Act applies to the Namibia Press Agency, which is a player in the electronic and print media sectors.

- *Purpose of the Act:*

The purpose of the Act is to establish a statutory news agency in the form of the Namibia Press Agency.

- *Key provisions:*

Section 2 established the Namibia Press Agency ('the Agency') as a juristic person. Section 4 states that the objects of the Agency are to conduct a news agency service and in this regard to collect and distribute news and information. Section 5 sets out the Agency's powers and functions. It empowers the Agency to, among other things:

- establish and control ways in which news and information can be collected and distributed;
- enter into agreements which deal with either the supply of information to the Agency or distribution of information by the Agency; and
- compile, print, produce, publish and distribute any literal matters.

Section 6 states that the Agency's affairs will be managed and controlled by a board of directors which is appointed by the Minister of Information and Broadcasting. The Act also empowers the Minister to designate the chairperson of the board. However, section 11 allows the board to appoint its own CEO. Section 7 permits the Minister to remove board members from office on account of continued ill-health, misconduct, incapacity, or where this will promote "efficiency".

Section 8 requires the Minister to set the remuneration and allowances payable to board members. However, section 11 permits the board to determine the remuneration of the Agency's employees and the CEO. As a general rule, section 9 leaves the discretion in the hands of the chairperson to decide when board meetings should be held. The Act does permit the Minister to request that special meetings be convened.

Section 12 states that the Agency will be financed by monies appropriated from parliament, as well as from monies that the Agency has earned itself. Section 13 requires the Minister to approve the Agency's annual financial budgets.

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

The Act does not make any provision for regulations to be prescribed under the legislation.

- *Provisions for media not controlled by the state:*
None. The Act relates only to the Agency.
- *Body which enforces compliance with the Act:*
None. There is no compliance mechanism provided for in the Act.
- *Provisions limiting media ownership:*
None
- *Consequences of non-compliance with the Act:*
None

4.6 New Era Publications Corporation Act, 1992

- *Date of commencement:*
2 April 1992
- *Sector of the media governed by the Act:*
The Act applies to New Era Publication Corporation *New Era*, which is a player in the print media sector.
- *Purpose of the Act:*
The purpose of the Act is to establish the *New Era* newspaper as a corporate entity, the primary purpose of which is to provide print media material in the indigenous languages of Namibia.
- *Key provisions:*
Section 2 established *New Era* as a juristic person. The objects of *New Era* are set out in section 3, which include the provision of a newspaper service in all Namibian languages, with national distribution.

The Act makes a number of inroads into the ability of *New Era* to function without interference from the state.

Section 2 established the Namibia Press Agency ('the Agency') as a juristic person. Section 4 states that the objects of the Agency are to conduct a news agency service and in this regard to collect and distribute news and information.

Section 5 states that *New Era's* affairs will be managed and controlled by a board

of directors which is appointed by the Minister of Information and Broadcasting. The Act also empowers the Minister to designate the chairperson of the board. However, section 10 allows the board to appoint its own CEO. Section 6 permits the Minister to remove board members from office on account of continued ill-health, misconduct, incapacity, or where this will promote “efficiency”.

Section 7 requires the Minister to set the remuneration and allowances payable to board members. However, section 10 permits the board to determine the remuneration of *New Era*’s employees and the CEO. As a general rule, section 8 leaves the discretion in the hands of the chairperson to decide when board meetings should be held. The Act does permit the Minister to request that special meetings be convened.

Section 11 states that *New Era* will be financed by monies appropriated from Parliament, as well as from monies that *New Era* has earned itself, for example, through newspaper sales and advertising revenue. Section 12 requires the Minister to approve the Agency’s annual financial budgets. Section 14 requires *New Era* to report annually to Parliament via the Minister. Section 14 also permits the Minister to request information from *New Era* in connection with its activities and financial position.

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

The Act makes no provision for regulations to be prescribed under the legislation.

- *Provisions for media not controlled by the state:*

None. The Act applies only to *New Era*.

- *Body which enforces compliance with the Act:*

None. There is no compliance mechanism provided for in the Act.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

None

5 Codes of conduct

We have not heard of any codes of conduct.

6 Regulations

6.1 Overview

The researchers received only one set of regulations that is relevant to the mass media in the context of this report. This is Regulation 25 published under the Namibian Communications Commission Act, 1992 (Act 4 of 1992), in *Government Gazette* 802 of 25 February 1994. The regulations stipulate, among other things, standards of conduct that will apply to broadcast licensees operating in Namibia.

6.2 Regulations under the Namibian Communications Commission Act, 1992 (Act 4 of 1992), No. 25 in *Government Gazette* 802 dated 25 February 1994

- *Date of commencement:*

The regulations were promulgated on 25 February 1994, but do not stipulate what the date of commencement is. Presumably the commencement date is also 25 February 1994.

- *Purpose of the regulations:*

The purpose of the regulations includes, among other things, to prescribe standards of conduct for broadcasters in Namibia.

- *Sector of the media affected by the regulations:*

The regulations apply to the radio and television broadcast media.

- *Key provisions:*

Clause 6 stipulates that whenever broadcasters provide commentary, they must distinguish comments clearly as such. Clause 7 deals with the obligations of broadcasters during an election period. This clause stipulates as follows:

- Licensees may grant broadcasting time to political parties during a period of six weeks before the start of any election.
- An anomalous feature of the regulations relates to the percentage of broadcasting time that must be allocated to political parties during local, regional and national elections. The regulations stipulate that where licensees grant broadcasting time to political parties, they must grant each political party

an equal time slot in respect of 40% of a total available broadcasting. The regulations provide that in respect of the remaining 60%, broadcasters must allocate time slots to each political party on a pro rata basis, equal to the percentage of the number of votes received by that party during the previous election period.

- In the case of a presidential election, broadcasters must allocate an equal portion of the total broadcasting time to all of the candidates.

Clause 8 deals with advertising standards. This clause requires that all adverts be clearly distinguished from other programming services. The clause also prohibits broadcasters from advertising any alcoholic beverages or tobacco products in between programmes which are directed to children under 18 years of age.

Clause 9 regulates sponsored programmes. This clause requires broadcasters to account to the NCC for the content and scheduling of sponsored programmes. This clause further stipulates that all sponsored programmes must be identified clearly as such by the name and logo of the sponsor at the beginning and the end of the programme.

- *Body which enforces compliance with the regulations:*

Compliance with the regulations is overseen by the NCC, under the Namibian Communications Commission Act.

- *Consequences of non-compliance:*

The regulations do not list any consequences that will result from non-compliance.

7 Case law

7.1 *Muheto and Others v Namibian Broadcasting Corporation* 2000 NR 178 (HC)

- *Date of judgment:*

15 August 2000

- *Sector of the media affected by the judgment:*

The case dealt with defamation in broadcasting, but the principles established apply equally to the print media.

- *Key legal principles established:*

The case established the defence of “reasonable” publication in Namibian defamation law, following the decision of the South African Supreme Court of Appeal *National Media Ltd & Others v Bogoshi*. (The *Bogoshi* judgment is dealt with elsewhere in this report, under the section dealing with South Africa.)

- *Court handing down the judgment:*

High Court of Namibia

- *Key provisions of the judgment:*

The public broadcaster, the NBC, wanted to screen a television programme about the applicants which contained defamatory material. The applicants applied to the court to interdict the material from being broadcast to the public. The programme alleged that the applicants were bogus institutions set up by the first applicant to defraud members of the public. The NBC raised the defence that the allegations were true and that it was in the public benefit that the material be broadcast.

The court refused to grant the interdict. Following the decision of the South African Supreme Court decision in *National Media and Others v Bogoshi* 1998 (4) 1196 (SCA) the High Court of Namibia determined that the publication of defamatory matter in the public media will be regarded as lawful if the publication is found to be reasonable. The court stated a publication will be reasonable if it involves a matter of public interest, and if the person making the publication has reasonable grounds to believe that the allegations are true and that steps have been taken to verify accuracy of the information.

7.2 *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC)

- *Date of judgment:*

15 June 1994

- *Sector of the media affected by the judgment:*

The judgment deals with general freedom of expression issues that apply to all sectors of the mass media.

- *Key principles established:*

The case dealt with overbreadth in the context of a regulation that imposed limitations on the right of a public official to criticise the government and other organs of state.

- *Court handing down the judgment:*
Supreme Court of Namibia

- *Key provisions of the judgment:*

The appellant, an officer in the Namibian Police Force, had been a member of a television discussion programme on the NBC in which the subject of the discussion had been affirmative action and the restructuring of public institutions, such as the police force. As a result of the comments that the appellant had made, he had been charged with contravening a regulation under the Police Act, 1990 (Act 19 of 1990). The relevant regulation made it an offence for any member of the police force to “comment unfavourably in public upon the administration of the force or any other Government department”.

The police officer challenged the constitutionality of the regulation on the basis that it was overbroad and that it unlawfully limited his constitutionally guaranteed right to freedom of expression.

The court agreed with the appellant and struck down the regulation for being unconstitutional. In arriving at its conclusion, the court reasoned that the effect of the regulation was to punish officers who make unfavourable remarks about the force in public – regardless of whether the remarks were true or false. The court concluded that the regulations cast the net of liability too widely.

7.3 *Smit v Windhoek Observer (Pty) Ltd & Another 1991 NR 327 (HC)*

- *Date of judgment:*
21 June 1991

- *Sector of the media affected by the judgment:*

The judgment dealt with the publication of defamatory material in the print media but the principles established apply equally to the broadcast media.

- *Key principles established:*

The case established the principle that a newspaper cannot escape liability for repeating a defamatory allegation made by someone else solely on the basis that the allegation does not emanate from the newspaper.

- *Court handing down the judgment:*
High Court of Namibia

- *Key provisions of the judgment:*

The plaintiff, a high-ranking police officer, sued a newspaper for defamation arising out of an article published about the plaintiff. The article alleged, among other things, that the plaintiff was on the payroll of the Civil Cooperation Bureau, a clandestine organisation that operated in South Africa during the apartheid era, dedicated to eliminating those opposed to the apartheid regime. The newspaper sought to escape liability on the basis that the defamatory allegations had been made by a source, which the newspaper merely repeated in the article. The court rejected the argument and ordered the newspaper to pay damages to the plaintiff. In the reasons for its judgment, the court stated that it is well established that a publication can be defamatory and actionable even if a newspaper merely repeats the averment of another in circumstances where the newspaper cannot vouch for the accuracy of the information.

7.4 *Africa v Metzler and Another* 1994 NR 323 (HC)

- *Date of judgment:*

11 November 1994

- *Sector of the media affected by the judgment:*

The case dealt with defamation in the print media sector but the principles established apply equally to broadcasters.

- *Key principles established:*

The case established that where aggravating circumstances are present in an action for defamation, then this will impact on the calculation of the *quantum* of damages awardable and may ultimately result in a higher award of damages being made than would ordinarily have been the case.

- *Court handing down the judgment:*

High Court of Namibia

- *Key provisions of the judgment:*

In this case, the plaintiff, a medical practitioner and well-known politician, sued a newspaper for defamation arising out of a series of articles that had been published in which it was alleged that the plaintiff was, among others, a racist and dishonest person. The newspaper continued to publish defamatory articles about the plaintiff even after he had issued his summons. As a result the plaintiff had lost some of his patients and had been alienated from his family.

The court concluded that there is nothing more damaging to a medical practitioner than alleging that he is a criminal, dishonest and fraudulent. The court found in favour of the plaintiff and awarded damages against the newspaper. In quantifying its award of damages, the court found the fact that the newspaper had continued to publish libellous statements about the plaintiff after legal proceedings had been instituted to have been an aggravating circumstance. The court decided to award much higher damages in light of this.

South Africa

1 Introduction

1.1 Political landscape

South Africa is a fairly large country with an estimated population of 43.5 million people. The country officially institutionalised a system of racial segregation known as apartheid in 1948. The apartheid era was accompanied by extensive state repression of the broadcast and print media. South Africa held its first democratic election in 1994, in which people of all race groups were allowed to vote for the first time. Pursuant to the elections, the African National Congress (ANC) was elected as the majority party, and Nelson Mandela was installed as the country's first post-apartheid president; a position that current president, Thabo Mbeki took over after Mandela's first term of office expired. The ANC remains the largest party in government today, with the Democratic Alliance as the largest opposition party.

An Interim Constitution was enacted in 1993 (Constitution of the Republic of South Africa Act 200 of 1993), which entrenched the right to freedom of expression. This was carried over into the Final Constitution enacted in 1996 (Constitution of the Republic of South Africa Act 108 of 1996). A notable feature of the Final Constitution is that it safeguards the independence of the broadcasting regulator against interference by the state. The South African Constitution is the only constitution in the world to do this.

1.2 The mass media market in South Africa

The transition to democracy in South Africa has been accompanied by considerable liberalisation of the mass media sector. The print media is characterised by the presence of a number of independently owned newspaper

groups. The broadcasting sector, which was previously almost completely state-owned, has seen the introduction of a number of new private and community broadcasters that are independently owned and controlled.

In relation to television, free-to-air television is still dominated by the public broadcaster, the South African Broadcasting Corporation (SABC). The SABC has three free-to-air television channels and also owns a number of radio stations. Aside from the SABC, e-tv is the only privately owned free-to-air television station. In addition to the SABC and e-tv, there is M-Net, which offers subscription terrestrial television services. There is also one satellite broadcaster, DSTV (Digital Satellite Television) that is owned by MultiChoice and that also provides services on a subscription basis. Both M-Net and MultiChoice form part of the MIH cluster, which also has a significant ownership interest in newspaper group Naspers.

The radio broadcasting sector is comparatively more liberalised and diverse than the television broadcasting sector. A large number of private commercial and community broadcasters have been licensed in the post-apartheid era. The ownership limitations that the law imposes in respect of commercial radio stations and the legal requirements in respect of community radio stations, ensure that ownership is more spread out and that there is no market concentration in terms of ownership.

As regards the print media sector, there are a relatively large number of independently owned daily and weekly papers in circulation in South Africa.

2 Experiences of journalists in South Africa

2.1 Overview

Most of the journalists interviewed in South Africa had positive and encouraging views on the degree of freedom of expression in South Africa. Comparatively, South Africa (as expected) outshines Malawi, Namibia and Zimbabwe in its protection of the right to freedom of expression. This notwithstanding, it would be short-sighted to ignore some of the experiences of journalists which reflect subtle yet dangerous in-roads being made into the right of freedom of expression.

In some instances, journalists relayed experiences where transgressions have passed the mark of being merely subtle. However, these were in the minority.

2.2 Broadcasting

It would be fair to say that the the SABC fulfils its role as being a public broadcaster instead of it being merely a state broadcaster and the mouth-piece of the ANC government. Having said this, however, it was acknowledged that the SABC is a political organisation and therefore it is obvious that members of senior management are politically connected. It is therefore not uncommon for editors at the SABC to feel pressure from top management. It was, however, unequivocally stated that currently they have experienced no overt pressure to broadcast or not to broadcast certain stories: it is basically left to the calibre and integrity of the editor or journalist working on a story to recognise the pressure and to resist it.

One of the problems experienced in broadcasting is that while the editor may have carte blanche to broadcast content, the format does not allow for all stories and news items to be broadcast. As a result, there is a selection process to decide what will air on a news bulletin. Some journalists argued that the SABC does not cover stories which should be covered in the public interest if the story involves a competitor broadcaster. Their argument is that the SABC is a public broadcaster and accordingly its mandate is to broadcast what the public has a right to know. Their decision making should not be influenced by whether or not a story draws positive attention to a competitor broadcasting station.

It appears that the SABC is not free from political or managerial interference. The positive feedback is that the editors are well aware of these pressures and that a concerted effort is being made to recognise these pressures and to dismiss them. Moreover, these pressures have not resulted in any overt threats on the right to broadcast. As a highly politicised organisation, it would be naïve to think that the SABC would not be subject to subtle pressures; however, it is critical that journalists and editorial staff are constantly aware of pressures that come from government or senior management. It is imperative that there is a clear distinction between the role of management and that of the editorial staff.

Surprisingly, a great deal of criticism was levelled against e-tv, South Africa's only free-to-air independent television broadcaster. Journalists at e-tv reported that there is pressure on senior staff members not to broadcast certain news items. Journalists are then allegedly ordered to edit bulletins, sometimes even five minutes before a broadcast. The researchers were told that stories about government corruption often get spiked. They were also told that stories on the AIDS crisis in South Africa are often not broadcast.

Generally, however, the journalists and management staff interviewed at private radio broadcasters had extremely positive statements to make regarding their degree of freedom of expression. While private radio broadcasters are not immune to subtle pressures from government – such as telephone calls expressing their displeasure about certain stories broadcast – they were convinced that they do push the envelope of the right to freedom of expression. The journalists assured us that the boundaries between management and editorial staff are clearly drawn and that management never interferes with editorial functions.

With regard to talk radio, journalists are given *carte blanche* to discuss whatever subject matter they think will be in the public interest. In some cases, this has led to radio stations coming under fire from the ANC. Notwithstanding, the journalists have not yielded to such pressures and are supported fully by the management and executive staff of the radio station. Their main consideration is their audience and what is in the interest of the public.

Aside from government attempts to influence editorial content, broadcasters do experience pressures from other sectors, such as advertisers. As private, commercial broadcasters, they rely entirely on advertising revenue to survive. Some broadcasters have been in the position where advertisers have threatened to withdraw advertising because of certain stories broadcast. Other advertisers are not comfortable having their products associated with certain current events, such as the war in Iraq. However, the researchers were assured that broadcasters would not curb their editorial content in order to secure advertising.

On the whole it appears that private, commercial radio broadcasters are well aware of their rights under the banner of freedom of expression. It is encouraging that management fully supports the independence of their journalists and editorial staff.

2.3 Print media

All the journalists interviewed with experience pre- and post-1994, commented on the enormous changes for the better that have occurred post-1994. They all commented on the fact the processes are more accessible and transparent, and that journalists are more free to write about issues that are in the public interest. None of the journalists relayed any accounts of overt repression, threats against their property or lives, harassment or overt interference in carrying out their journalistic activities.

From the details of their experiences, however, it is apparent that there are definite pressures that erode the right to freedom of expression in the print media industry. These pressures come from management and government, and even from advertisers.

Journalists in South Africa were able to identify issues which they considered sensitive. Unlike Zimbabwe, Malawi and Namibia, the sensitive issues in South Africa include more than just government corruption. Almost all the journalists identified the following issues as being sensitive: HIV/AIDS; the arms deal; and South's Africa's position on Zimbabwe.

Some journalists indicated that they have been instructed by their editors not to write on certain subjects, such as the AIDS issue. They stated that they have even been told not to attend special conferences or events. They can only assume that government exerts pressure on management or editors who then pressurise their journalists not to write on certain issues. This usually happens when the issue is particularly politically sensitive.

Regarding HIV/AIDS, journalists find it difficult to access information on the issue. In most instances they find it almost impossible to get government officials to comment. Accordingly, journalists are left with only half the story. It was often mentioned that the Department of Health is one of the most difficult departments to get information from.

Many journalists stated that while there is no direct influence by government on what they write, they do experience being frozen out. If a journalist is perceived to be a threat to government or to the ruling party, he or she is not invited to certain events. Some journalists struggle to get interviews with ministers or even with Thabo Mbeki. This is usually the case when a minister, or the President himself, has been subject to some form of public criticism. This creates a degree of self-censorship as journalists begin to be careful about what they write. Some journalists have even admitted to being unduly flattering in order to secure interviews and to gain access to politicians. It has also been noted that government officials have become aware of how they are perceived by journalists. By this they mean that politicians have befriended newspapers and that it is not uncommon to see politicians frequenting the premises of print media houses. While they do not suggest that there is any direct influence on editorial content, this does make it more difficult for journalists and editors to be critical. Accordingly, the degree of self-censorship exercised by journalists is an issue which needs to be addressed.

Some journalists especially noted that certain government departments are cooperative and are willing to speak and give comments to journalists. In this regard, the departments of Justice, Correctional Services and Safety and Security were specifically mentioned. It was said that the courts, especially the Constitutional Court, are accessible. However, most journalists were of the opinion that the problem may not necessarily be that government departments consciously take a decision to be cagey, but rather that the media liaison officers and government spokespeople lack experience in dealing with journalists and that they do not know what is expected of them. Some journalists perceive that these government officials are scared to answer questions and there is suspicion about the media. In this regard, journalists feel frustrated by the lack of efficiency and the time delays in getting information.

Most of the journalists interviewed commented negatively about the Presidential Press Corps (PPC), which is an off-the-record forum. Most journalists felt that the PPC is used by government to feed journalists spin. They see it as a means of controlling what information gets to the media.

It would be only fair to say that some journalists and editors stated unequivocally that they deal with sensitive, political and public issues vigorously and without fear of repercussions. These journalists work for media organisations which appeal to the more liberal, intellectual reader that expects the newspaper or magazine to push the envelope of freedom of expression.

On the flip side, other journalists argued that one of the biggest obstacles they face is the public itself. They said that the public want sensationalism and easy-reads; this is what sells. As it is costly to publish, and as most newspapers struggle to survive, journalists are instructed to give their readers what they want to read.

Related to this is the 'feel good about South Africa' issue. Some journalists alluded to the fact that they are aware that what they write may affect the economy, tourism and investment in South Africa. One journalist even related that sometimes journalists have been told that crime stories should not appear on the first three pages of a newspaper.

Other journalists working for newspapers targeted at corporates are obviously extremely aware of how their stories affect the companies that they write about. According to journalists that work this beat, it becomes more difficult to write critically about companies when a relationship has developed between the journalist and company executives. However, it is a positive indication that

journalists are aware of this tension and take steps to counteract any bias. In the researchers' opinion, it is more dangerous when journalists are not conscious of the tensions involved in writing a balanced story.

Editors that were interviewed also said that advertisers are highly aware of their financial clout. Advertisers have been known, albeit not often, to threaten to withdraw advertising in the event of negative publicity. All the editors interviewed said that they do not give in to these threats. Journalists said that in the past it was usually tobacco companies that threatened to withdraw advertising if negative articles were written about the effects of smoking. In some instances, articles on this topic were spiked. This seems to be a problem of the past and almost all the editors and journalists interviewed stated that advertisers do not have an influence on editorial content.

2.4 General

Interestingly, all the journalists interviewed expressed overwhelming that a lack of skills in the journalism industry was one of the most serious issues threatening freedom of expression in South Africa. Many journalists stated that there is a perception that journalism is not a long-term profession but rather a temporary beat. As a result there are young journalists working in the profession, sometimes between the ages of 18 and 20 years, who lack the know-how, skills and perseverance required. More senior journalists stated that there is a lack of commitment on the part of many journalists to investigate a matter thoroughly and often stories go to print without there being any corroboration or in-depth research.

As some journalists working in the profession are so young, or view it as a passing-through profession, many do not concern themselves with the ethical issues of being a journalist and therefore do not carry out their job with the integrity expected of a journalist. Another result of this 'juniorism' of the profession is that journalists do not have the experience and the clout to express their opinions vigorously and to challenge ethical issues. This makes them more susceptible to managerial, political and even commercial pressures, which threaten their independence and integrity as journalists.

On the flip side, media houses hire young journalists because they are cheap to employ and because they are not a threat to the status quo. Almost all the journalists interviewed admitted to not being paid well. They said that this is one of the reasons that journalists leave the profession or perform half-heartedly.

It appears, therefore, that the most urgent crisis in South Africa is a lack of skill, commitment and experience in the journalism profession. Clearly, this is a direct threat to freedom of expression.

2.5 Results of the interviews

Interviews were conducted with a wide range of people, including university academics, people working in the public and private broadcasting sectors, journalists in the print media sector, and those working in media organisations in South Africa.

There was a general consensus among most of the journalists and media workers interviewed in South Africa that there is a high degree of media freedom and freedom of expression in that country. However, a number of journalists relayed to the researchers that there were perturbing inclinations towards self-censorship in the broadcasting and print media. Some of the journalists cited editorial interference by management as a problem, particularly in cases where top executives in management have close political ties to the government.

The dilemma of self-censorship was summed up by one interviewee who told the researchers: “There have been experiences of self-censorship. One of the senior members has on a number of occasions said to us ‘we are not in the business of knocking government’. That was said by a person who plays an important role in the editorial function ... The biggest danger in South Africa is that people ingratiate themselves to people in power ... They act as informal gatekeepers for the government. They do what they think the government wants them to do ... and therefore there is a degree of self-censorship.”

A number of journalists stated that they were sometimes told what they could and could not cover, and in some cases, the stories that they had prepared were simply not aired. HIV/AIDS reporting seems to be a particularly hot topic for journalists, given the South African government’s controversial stance on the issue. (At various points in time, the government has contested the link between HIV and AIDS and has disputed the effectiveness of anti-AIDS drugs.) Many journalists reported being pressurised into keeping quiet about AIDS. “AIDS pieces mysteriously fall out of the bulletin,” one person said. “In the news room ... we could not talk our minds. Many journalists have been fired.” Another person related: “Any story about AIDS was hacked to pieces ... and I know those occasions they were actually dropped.”

In addition, many journalists cited issues of race, crime, gender, religion and official corruption as hot topics to report on. Zimbabwe was also cited as a topic that incites controversy, particularly given the political sensitivities around issues such as land redistribution. Some journalists also indicated that they were often very careful not to create a negative impression of South Africa – particularly in relation to such things as crime and the Zimbabwe issue – lest foreign investors and overseas tourists get frightened away. “We don’t want to create hysteria because the international communities invest in South Africa”, one journalist said.

Aside from HIV/AIDS, many journalists expressed the view that although the media in South Africa was generally free, media freedom was still being threatened in subtle ways. Many journalists related experiencing pressure from all sides – both from the government and the private sector. In the words of one journalist: “... there is always tension between government and journalists and politicians and journalists and business and journalists.” Another commented: “Now, I suppose subtle is the word that I can think of. It comes from spokespeople or spin doctors in government but it also comes from commercial concerns and parties who are interested or involved in whatever stories we are doing.”

Many of the journalists also cited reliance on advertising revenue as a constraint, particularly in cases where the media want to run negative stories about people and entities who place adverts with them. One journalist quoted an instance in which an article on the harmful effects of smoking was pulled because her employer’s biggest advertisers were tobacco companies.

All the journalists interviewed felt that they could safely protect their sources, although some journalists cited section 205 of the Criminal Procedure Act as a potential threat to their ability to protect their sources. (This section allows for journalists to be subpoenaed to reveal their confidential sources of information, and was notoriously used during the apartheid era.) Most of the journalists interviewed indicated that the law enforcement authorities had never used this section against them, although some said that on occasion threats had been made, but were never carried out.

Interestingly, many of the journalists who were interviewed for this survey cited the ‘juniorisation’ of the profession in South Africa as constituting one of the biggest threats to freedom of expression in the country. Journalism is generally regarded as a poorly paid profession, and as a result many people move on into

other careers after a while. Some of those interviewed also indicated that various media houses were deliberately employing younger and more inexperienced people because they did not have the confidence or the experience to challenge the status quo. “There is a tendency ... to employ very young people, between the ages of 18 and 20 who do not know anything, do not have opinions and are basically cheap labour. Also, they do not talk back.”

3 Constitution of the Republic of South Africa Act, 1996

3.1 Commencement date

4 February 1997

3.2 Supremacy of the Constitution

In terms of section 2, the Constitution is regarded as the supreme law of South Africa.

3.3 Establishment of an independent regulator

Section 192 provides for the establishment of an independent broadcasting regulatory authority. This section states:

“National legislation must establish an independent Authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society.”

3.4 Provisions impacting on the media

The right to freedom of expression is entrenched in section 16(1) of the Constitution and expressly extends to freedom of the press and other media. However, not all forms of speech are constitutionally protected. Section 16(2) excludes certain forms of speech (such as hate speech) from being protected.

The exact wording of section 16 provides:

- “(1) Everyone has the right to freedom of expression, which includes –
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
- (a) propaganda for war;
 - (b) incitement to imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

3.5 Limitation clause

Most of the fundamental rights listed in the Constitution are not absolute and may be limited in terms of section 36. In terms of section 36, the rights guaranteed in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The section provides:

- “(1) The rights in The Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

Section 37 of the Constitution permits the rights listed in the Bill of Rights to be suspended during a state of emergency. The Constitution stipulates that certain rights may not be derogated from at all (such as the right to equality and the prohibition of slavery and forced labour), but this does not extend to the right to freedom of expression in section 16, which is one of the rights that may be derogated from during a state of emergency. Section 16 does limit the

circumstances under which a state of emergency may be declared to where there is the threat of war, invasion, general insurrection, disorder, natural disaster or some other kind of public emergency.

3.6 Courts which have jurisdiction to decide constitutional matters

Sections 167 and 169 of the Constitution confer the jurisdiction on the High Courts and the Constitutional Court to hear constitutional matters. Section 172(2)(a) empowers the Supreme Court of Appeal and the High Courts to make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

3.7 Hierarchy of the courts

The Constitutional Court is the highest court of final instance in respect of constitutional matters. The Supreme Court of Appeals is the highest Court of appeal in respect of non-constitutional matters. Subordinate to these two courts are the High Courts, and subordinate to the High Court are the magistrates' courts.

3.8 Appointment of judges

The Constitution gives the President the power to appoint judges to the Constitutional Court, the Supreme Court of Appeals and the High Court. The Constitution does, however, contain a number of checks and balances that constrain the President's powers of appointment. Specifically, the Constitution mandates the President to appoint judges with reference to either the Judicial Service Commission (JSC) or the National Assembly of Parliament, or both in certain circumstances.

Section 174(3) of the Constitution empowers the President to appoint the President and the Deputy President of the Constitutional Court as well as the Chief Justice and Deputy Chief Justice. The Constitutional Court appointments are made after consultation with the JSC and the leaders of parties represented in the National Assembly. The Chief Justice and the Deputy Chief Justice on the other hand, are appointed after consultation with only the JSC.

Section 174(4) empowers the President to appoint the other judges of the Constitutional Court, but only after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly. The President may only appoint candidates from a list that the JSC has drawn up.

Section 174(6) empowers the President to appoint judges of all the other courts, but only on the advice of the JSC.

3.9 Independence of the judiciary

Section 165 of the Constitution vests judicial authority in South Africa with the courts and enshrines the independence of the judiciary from the legislative and executive arms of government. This section further prohibits any person or organ of state from interfering with the functioning of the courts.

4 Legislation that governs the media

4.1 Overview

In South Africa, the principal statutes impacting on freedom of expression of the media are as follows:

- Independent Communications Authority of South Africa Act, 2000 (Act 13 of 2000) – which established ICASA as a sector-specific regulator for the broadcasting and telecommunication sectors;
- Independent Broadcasting Authority Act, 1993 (Act 153 of 1993) and the Broadcasting Act, 1999 (Act 4 of 1999) – both of which regulate the broadcasting sector in South Africa;
- Media Development and Diversity Agency Act, 2002 (Act 14 of 2002) – which aims to promote media development and diversity in South Africa;
- Promotion of Access to Information Act, 2000 (Act 2 of 2000) – which regulates access to information held by the state and by private bodies;
- Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000) – which prohibits hate speech;

- Criminal Procedure Act, 1977 (Act 51 of 1977) – which impacts on the disclosure of journalists’ confidential sources of information;
- Films and Publications Act, 1996 (Act 65 of 1996) – which governs the pre-classification of films and publications;
- Protection of Information Act, 1982 (84 of 1982) – which regulates the protection of official secret state information;
- Anti-Terrorism Bill – which regulates internal security matters.

4.2 Independent Communications Authority of South Africa Act, 2000

- *Commencement date:*

11 May 2000

- *Purpose of the Act:*

South Africa previously had separate sector-specific regulators for the broadcasting and telecommunications sectors in the form of the Independent Broadcasting Authority (IBA) and the South African Telecommunications Regulatory Authority (SATRA) respectively. The purpose of the Act was to amalgamate the two regulators into one body in the form of ICASA, with overarching jurisdiction over both the broadcasting and telecommunication sectors.

- *Sector of the media governed by the Act:*

The Act applies to both the broadcasting and telecommunication industries.

- *Key provisions:*

Section 3(1) establishes ICASA as a juristic person, with the power to regulate both the broadcasting and telecommunication sectors. Section 3(3) enshrines the independence of ICASA from commercial and political interference.

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

Section 5 of the Act empowers the President to appoint the seven councillors of ICASA. The President is only permitted to make appointments on the recommendation of the National Assembly, following a public hearing with all the candidates. Section 5(2)(a) empowers the President to appoint the chairperson of ICASA from the ranks of the councillors.

Section 10 empowers the Minister of Communications to determine the remuneration and benefits of ICASA with the concurrence of the Minister of Finance. ICASA is required to report to Parliament via the Minister under section 16.

- *Provisions for media not controlled by the state:*

ICASA is empowered to regulate all players in the broadcasting sector, including public, private and community broadcasters.

- *Body which enforces compliance with the Act:*

ICASA enforces compliance with the regulatory regime in terms of the underlying legislation governing broadcasting and telecommunications.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

The consequences of industry players not complying with the regulatory regime are laid down in the underlying legislation governing broadcasting and telecommunications.

4.3 Independent Broadcasting Authority Act, 1993

- *Commencement date:*

30 March 1994

- *Purpose of the Act:*

The primary purpose of the Act was to establish an independent regulator in the form of the IBA to regulate broadcasting in the public interest. The IBA has subsequently been subsumed into ICASA. The provisions in the IBA Act that establish the regulatory framework for broadcasting in South Africa still remain in force.

- *Sector of the media governed by the Act:*

The Act applies to broadcasting service providers and to broadcasting signal distributors.

- *Key provisions:*

As a general rule, the Act prohibits both signal distribution and broadcasting

services from being provided without a licence in terms of sections 32 and 39 respectively.

The procedure for applying for a broadcasting service licence is set out in sections 41 and 42. The regulator is empowered to invite applications by publishing a notice to that effect in the *Gazette*. The Act imbues ICASA with the discretion to hold public hearings before issuing a broadcasting service licence. ICASA is, however, required to keep a record of all applications and documentation that it receives in connection with the licensing process and to make this available for public inspection. ICASA is solely responsible for selecting the successful applicant, with no involvement from the executive arm of government.

Section 44 provides for renewal of broadcasting licences. All broadcasting service licensees are required to submit their renewal applications to ICASA before their licences expire. ICASA may only refuse to renew a licence on two grounds. These instances are where, during the existing licence period, the licensee has:

- materially failed to comply with the licence conditions; or
- has materially failed to comply with the provisions of the Act, and ICASA is satisfied that failure to comply with either the licence conditions or the provisions of the Act would continue should the licence be renewed.

Section 56 requires broadcasting licensees to adhere to the Code of Conduct for Broadcasting Services set out in Schedule 1 of the Act ('the BMCC Code'), which is administered by the Broadcasting Monitoring and Complaints Committee (BMCC). Broadcasters are also given the option of self-regulating their affairs. Section 56(2) states that the BMCC Code will not apply to broadcasters that belong to a voluntary industry representative body, and that the body's members ascribe to a code of conduct which has been approved by ICASA. To this effect, the Broadcasting Complaints Commission of South Africa (BCCSA) has developed its own code of conduct ('the BCCSA Code') which is virtually identical to the BMCC Broadcasting Code.

Section 57 requires broadcasters to adhere to the Code of Advertising Practice ('the Advertising Code'), which is administered by the Advertising Standards Authority (ASA). However, the Act empowers the BMCC to adjudicate disputes involving breaches of the Advertising Code in the case of broadcasters who are not members of the ASA.

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

Section 28 empowers ICASA to conduct ad hoc inquiries into any matter relevant to the achievement of its objects, the exercise and performance of its powers, functions and duties, and its regulation-making powers under section 78.

Section 78 empowers ICASA to make regulations without any involvement from the executive arm of government.

Section 13A(2) empowers the Minister of communications to direct ICASA to undertake special investigations and inquiries, to determine priorities for the development of broadcasting services, and to consider any matter placed before it by the Minister for urgent consideration.

Section 13A(5) empowers the Minister to issue policy directions to ICASA. Under section 13A(4), the Minister is required to consult with ICASA before doing this. However, section 13A(5)(b) does not require ICASA to follow policy directions issued by the Minister, only to take them into consideration.

In relation to the public broadcaster, the SABC, section 13A(1) provides that the Minister must approve all acquisitions and disposals of state broadcasting assets.

- *Provisions for media not controlled by the state:*

The Act applies to both the private and the public broadcasting sectors.

- *Body which enforces compliance with the Act:*

ICASA monitors and enforces compliance with the Act. The ASA enforces compliance with the Advertising Code in respect of broadcasters who are also members of the ASA. The BMCC enforces compliance with the Statutory Broadcasting Code and with the Advertising Code in respect of broadcasters who are not members of the ASA.

- *Provisions limiting media ownership:*

Section 48 limits foreign control of commercial broadcasting services. Under this section, it is prohibited for one or more foreign persons to be in direct or indirect control of a commercial broadcasting licence. This section also prohibits non-South Africans from holding a financial interest or interest in either the voting shares or paid-up capital in a commercial broadcasting licensee exceeding 20%.

Section 49 deals with the limitations on the concentration of ownership and control in respect of commercial broadcasting services. Under this section, it is

prohibited for any one entity to have direct or indirect control of more than one commercial television broadcasting licence. This section also prohibits any one entity from holding control of more than two commercial FM and AM sound broadcasting licences. Moreover, section 49 forbids any one entity from gaining control of two commercial FM and AM sound broadcasting licences, which either have the same licence areas or have substantially overlapping licence areas.

Section 50 deals with limitations on cross-media ownership. Section 50(2)(a) prohibits control of both radio and television broadcasting licences by anyone who controls a newspaper. Section 52(2)(b) provides:

“No person who is in a position to control a newspaper may be in a position to control a radio or television licence in an area where the newspaper has an average ABC circulation of 20% of the total newspaper readership in the area, if the licence area of the radio licensee overlaps substantially with the said circulation area of the newspaper.”

Section 51 prohibits ICASA from issuing broadcasting licences to political entities.

- *Consequences of non-compliance with the Act:*

Under section 67, it is an offence to contravene many of the provisions of the Act. A conviction will render the offender liable to be fined. The *quantum* of the fine depends on the nature and severity of the offence committed.

4.4 Broadcasting Act, 1999

- *Commencement date:*

30 June 1999

- *Purpose of the Act:*

One of the main purposes was to provide a regulatory framework for the public broadcaster, the SABC. Another central purpose of the legislation was to establish a new broadcasting policy for South Africa as well as to clarify powers of the Minister of Communications in relation to the regulation of broadcasting.

- *Sector of the media governed by the Act:*

The Act applies to broadcasting services, signal distribution and multi-channel distribution (multiplexing).

- *Key provisions:*

Rather confusingly, South Africa has two statutes that apply to the regulation of the broadcasting system. Together with the Independent Broadcasting Authority Act, the Broadcasting Act is the pivotal piece of legislation governing the broadcasting system in South Africa. As a general rule, all broadcasters and signal distributors providing services within the borders of South Africa or from South Africa to other countries are required to hold a licence in terms of section 34(1). This applies regardless of whether the service is rendered using terrestrial frequencies, satellite or telecommunication facilities.

Section 35 stipulates that all multi-channel distributors are required to hold a licence. The Act permits multi-channel distributors to carry both domestic and foreign channels, provided that this has been approved by ICASA. The procedure for granting licences is laid down in the IBA Act, as outlined above.

Section 4 of the Broadcasting Act deems all broadcasters who operated before the Act came into force to be licensees under the legislation, provided that they apply to ICASA within six months of the Act coming into effect. Entities that broadcast to foreign countries but whose signal is incidentally received in South Africa are not required to obtain a broadcasting licence under the Act.

Chapter IV of the Act deals with the public broadcaster, the SABC. In terms of section 6, the principal document governing the SABC's activities is the Charter. The Act empowers ICASA to monitor and enforce compliance with the Charter by the SABC. Section 6 further entrenches the right of the SABC to freedom of expression and to journalistic, creative and programming independence as enshrined in the Constitution.

Section 9 deals with the organisational structure of the SABC and provides that the SABC must have two operational divisions, namely a public service division and a commercial service division. Section 9(2) requires the two divisions to be administered separately. One of the reasons for this is to promote fair competition with commercial broadcasters in the private sector. Section 11 mandates that the SABC's commercial service division is to be governed by the same policies and regulations that apply to privately owned commercial broadcasters.

The SABC's public service obligations are dealt with under section 10. These include broadcasting in all the official languages and providing programming that reflects both unity and the diverse cultural and multilingual nature of South Africa.

Section 13 deals with the appointment of SABC board members. This section empowers the President to appoint non-executive board members, but on the advice of the National Assembly, and pursuant to a public process.

Section 18 permits the SABC to draw up its own financial regulations to govern the management of its affairs. However, these regulations have to be approved by the Minister of Communications. The section also requires the Minister's approval to be obtained whenever the SABC wants to invest any surplus funds that it may have. Section 18 of the Broadcasting Act must be read together with section 13A(1) of the IBA Act which requires the Minister to veto all acquisitions and disposals of state broadcasting assets.

Chapter V deals with commercial broadcasting service licensees. Section 29 stipulates that commercial broadcasters must hold a separate licence in respect of each broadcasting service that they provide.

Chapter VI deals with community broadcasting services, which are operated on a not-for-profit basis. Section 32 empowers ICASA to grant both free-to-air and free-to-radio community broadcasting licences. No community television broadcasting licences have yet been issued in South Africa. However, section 32(7) requires ICASA to conduct an investigation into the viability and impact of community television.

• *Powers granted to the Minister or Director-General by the Act:*

Section 3(2) vests the Minister with the ultimate responsibility for developing South African broadcasting policy. This provision in the Broadcasting Act must be read against the backdrop of section 13A(5)(b) of the IBA Act, which requires ICASA to consider (but not necessarily to follow) policy directions issued by the Minister.

The regulation-making powers of the Minister are curtailed under the Act. Section 40 allows the Minister to make regulations only relating to matters that the Act permits or requires the Minister to make regulations on, and relating to, administrative and procedural matters that are necessary to prescribe in order to give effect to the Act. Section 40(2) expressly prohibits the Minister from prescribing regulations on any matter falling under ICASA's authority under either the Broadcasting Act or the IBA Act.

• *Provisions for media not controlled by the state:*

The Act extends to all broadcasting media not controlled by the state.

- *Body which enforces compliance with the Act:*

ICASA is responsible for enforcing compliance with the Act.

- *Provisions limiting media ownership:*

None. The statutory restrictions that exist on ownership in the broadcasting and print media sectors are all contained in the IBA Act, as detailed above.

- *Consequences of non-compliance with the Act:*

None. Offences and penalties are enforced under section 67 of the IBA Act.

4.5 Media Development and Diversity Agency Act, 2002

- *Commencement Date:*

8 July 2002

- *Purpose of the Act:*

The purpose of the Act is to create an enabling environment for media development and diversity in South Africa, which the legislation envisages should be facilitated via the Media Development and Diversity Agency (MDDA).

- *Sector of the media governed by the Act:*

The Act applies broadly to the mass media sector. Section 1 of the Act defines “media” in broad terms to include “printed publications, radio, television and new electronic platforms for delivering content”.

- *Key provisions:*

Section 2 provides for the establishment of the MDDA as a juristic person. In terms of section 3, one of the key functions of the MDDA is to enable historically disadvantaged communities and other people who are not adequately served by the media to gain access to the media. The main beneficiaries of the MDDA are intended to be the community media sector and small commercial media enterprises. The other objectives of the MDDA listed in section 3 include to:

- encourage ownership and control of, and access to the media by historically disadvantaged communities, and by historically diminished indigenous language and cultural groups;
- encourage human resource development and capacity building in the media industry, especially among historically disadvantaged groups.

Section 2(4) states that the MDDA must operate independently without political or commercial interference. Section 2(5) enjoins the MDDA to respect the autonomy and specifically prohibits the MDDA from interfering in the editorial content of the media. The MDDA acts through a board whose members are appointed by the President on the recommendation of the National Assembly of Parliament pursuant to a public process. Section 9 empowers the responsible Minister to determine the remuneration of MDDA board members in consultation with the Minister of Finance. Otherwise, section 12 empowers the board to determine the remuneration of the CEO and other MDDA staff members in accordance with a system approved by the Minister, with the concurrence of the Minister of Finance. Section 16 requires the MDDA to report annually to Parliament via the Minister.

Section 17 of the Act empowers the MDDA to provide support to the media industry in a variety of ways, including, among other things, in the form of:

- financial support (either by way of direct cash subsidies or emergency funding aimed at strengthening and ensuring the survival of media projects);
- training opportunities and capacity development in the areas of media production and media distribution;
- indirect support (by way of negotiating with public utilities, organisations and financial institutions to acquire indirect support for projects – such as, for example, providing low interest rate loans and agreeing to discounts or subsidies in print and signal distribution, postal rates and telephone tariffs).

Contributions to the MDDA are strictly voluntary. Section 21 permits the MDDA to enter into agreements for financial and non-financial assistance with any organisation in order to further the objects of the Act. Section 21 does not impose any obligations on organisations to contribute towards the MDDA's funds.

• *Powers granted to the Minister or Director-General by the Act:*

Section 22 of the Act empowers the Minister to prescribe regulations in consultation with the board of the MDDA.

• *Provisions for media not controlled by the state:*

The Act does not make specific mention of the private media sector. It is clear, however, that the Act is primarily intended to benefit industry participants in the community media sector and the small commercial media sector.

- *Body which enforces compliance with the Act:*
The MDDA is responsible for administering the Act.
- *Provisions limiting media ownership:*
None
- *Consequences of non-compliance with the Act:*
None

4.6 Promotion of Access to Information Act, 2000

- *Commencement date:*
9 March 2001

- *Purpose of the Act:*

The purpose of the Act is to facilitate access to records held by both public and private bodies. In addition, the Act is designed to ensure greater accountability on the part of public and private bodies. The Act is not a media-specific statute but many of its provisions have a direct influence on the ability of the media to gather information.

- *Sector of the media governed by the Act:*

The Act applies broadly to both the public and the private sector, which by implication includes the media.

- *Key provisions:*

In broad terms, the Act mandates public and private bodies to give members of the public access to their records where they request this, subject to certain exceptions, which are clearly defined in the Act.

Section 3 of the Act stipulates that the application of the Act extends to the records of both private and public bodies. The term “public body” is defined widely in section 1 to include government departments and local municipalities as well as functionaries and institutions exercising public powers and performing public powers under any legislation (such as statutory bodies or parastatals, for example).

In relation to public bodies, section 11 stipulates that a person requesting information from a public body must be given access to the records of such body

if the person has complied with the procedural requirements under the Act and if access to the record is not refused on the basis of a ground of refusal recognised in the Act. In relation to private bodies, section 50 stipulates that a person must be given access to the records of a private body on the same basis as for public bodies, and in addition where the person requires the record for the exercise of any rights.

As a general rule, the following categories of information are completely exempt from the application of the Act:

- records that are requested in respect of criminal or civil proceedings after the proceedings have commenced (section 7); and
- records of Cabinet and its committees, records relating to individual members of Parliament and of provincial legislatures in their official capacities as such, and records relating to the judicial functions of the courts and special tribunals (section 12).

The Act permits public and private bodies to refuse access to records on a number of listed grounds – referred to in the Act as grounds of refusal. (The grounds of refusal are listed in Chapter 4 of Part 2 and Chapter 4 of Part 3 of the Act.)

In this regard, the Act distinguishes between mandatory and discretionary grounds of refusal.

The mandatory grounds of refusal include the following:

- protection of the privacy of a third party who is a natural person (sections 34 and 63);
- protection of the commercial information of third parties (sections 36 and 64);
- protection of the confidential information of third parties (sections 37 and 65);
- protection of the safety of individuals and property (sections 38 and 66);
- protection of legally privileged information (sections 40 and 67);
- protection of research information of third parties and public and private bodies (sections 43 and 69);

- protection of certain records of the South African Revenue Service (section 35 – this applies to public bodies only);
- protection of police dockets and protection of law enforcement and legal proceedings (section 39 – this applies to public bodies only); and
- protection of defence security and international relations of South Africa (section 41 – this applies to public bodies only).

On the other hand, the discretionary grounds of refusal relate to issues such as:

- the economic interests and financial welfare of South Africa (section 42 – this applies to public bodies only);
- the operations of public bodies (section 44 – this applies to public bodies only); and
- the commercial activities of public bodies (section 68 – this applies to private bodies only).

The Act requires access to be granted and the grounds of refusal to be overridden where the public interest demands this (sections 46 and 70). Essentially, the Act requires disclosure to be made in the public interest where the record would either reveal evidence of a substantial contravention of the law, or would reveal an imminent and serious public safety or environmental risk.

• *Powers granted to the Minister or Director-General by the Act:*

Section 92 empowers the Minister of Justice to prescribe regulations. The Act also contains a number of provisions that authorise the Minister to prescribe regulations in relation to specific issues.

Some of these include the following:

- Section 15 requires the Minister to publish lists of categories of records of public bodies that have to be made automatically available without a person having to request access in terms of the Act.
- Section 22(8) empowers the Minister to prescribe regulations relating to the fees that need to be paid by any person requesting access to information under the Act.

- *Provision for media not controlled by the state:*

As stated above, the Act applies to both the public and the private sectors, and by implication extends to both the state-owned and the privately owned media.

- *Body which enforces compliance with the Act:*

In terms of section 83(b), the Human Rights Commission monitors implementation of the Act.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

Under section 90 it is an offence for anybody to intentionally deny access to information by destroying, damaging, altering, concealing or falsifying a record. Offenders are liable on conviction to be fined or sentenced to imprisonment for up to two years.

4.7 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000

- *Commencement date:*

15 January 2003

- *Purpose of the Act:*

The central purpose of the Act is to promote equality and to eliminate unfair discrimination. However, the Act also makes provision for the prevention and prohibition of hate speech.

- *Sector of the media governed by the Act:*

The Act is not a media-specific statute but applies broadly to the mass media, both in the public and the private sectors.

- *Key provisions:*

Section 5 extends the application of the Act both to the state and to private persons.

Section 6 prohibits the state or any private person from unfairly discriminating against anyone. Sections 7, 8 and 9 prohibit any person from unfairly discriminating against any other person on grounds of race, gender and disability respectively. Section 11 prohibits harassment.

Section 10 prohibits hate speech. Specifically, section 10 prohibits anyone from publishing anything that could reasonably be construed to demonstrate a clear intention to be hurtful, cause harm or to promote hatred on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

It is important to note that section 10 of the Promotion of Equality Act extends far more broadly than the exception to the right of freedom of expression contained in section 16(2)(c) of the Constitution, which refers only to hate speech on race, ethnicity, gender or religion.

Section 12 prohibits the dissemination or broadcasting of information, as well as the publication or display of advertisements and notices that could reasonably be construed as demonstrating a clear intention to unfairly discriminate against any person. There are, however, a number of exceptions to this rule. Specifically, there are exemptions for *bona fide* information relating to:

- artistic creativity;
- academic and scientific enquiry; and
- fair and accurate reporting in the public interest.

Chapter 3 of the Act addresses the onus that a litigant in court must bear when proving that discrimination has taken place. Ordinarily, a complainant must prove that an act of discrimination was unfair in order to establish a contravention of the Act. However, section 15 creates an exception to this general principle for hate speech. In the case of hate speech, it is not necessary to prove fairness or unfairness in order to establish discrimination.

• *Powers granted to the Minister or Director-General by the Act:*

Section 30 empowers the Minister of Justice and Constitutional Development to make regulations under the Act.

• *Provisions for media not controlled by the state:*

The Act binds both the public and private sectors, inclusive of both the state-controlled and private media sectors.

• *Body which enforces compliance with the Act:*

Section 16 empowers the High Courts and the magistrates' courts to enforce the

Act in their respective areas of jurisdiction and to act as so-called ‘equality courts’ for this purpose.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

Section 21 empowers the equality courts to enforce the Act by way of granting civil orders. To this effect, the courts are empowered to issue interdicts, grant declaratory orders and to order the payment of damages.

4.8 Films and Publications Act, 1996

- *Commencement date:*

1 June 1998

- *Purpose of the Act:*

The purpose of the Act is to lay down a system for the pre-classification content via the mechanism of the Film and Publication Board and the Film and Publication Review Board (‘the Review Board’).

- *Sector of the media governed by the Act:*

The Act extends to the print media, the film sector and to child pornography over the internet. Certain portions of the Act also extend to public forms of entertainment, such as theatrical productions.

- *Key provisions:*

The key objects of the Act as set out in section 2 are to:

- provide for a system of pre-classifying films and publications, including through the imposition of age restrictions on these forms of content; and
- make the use of child pornography in films, publications and the internet punishable.

The Act permits the Film and Publication Board to pre-classify and effectively ban the distribution of certain types of content – typically content depicting child pornography, bestiality, explicit violent or degrading sexual conduct, and extreme violence.

Interestingly, the Act also empowers the Board to effectively ban the distribution of content that advocates hatred and incites harm based on religion.

Section 27 makes it an offence to create, produce and distribute child pornography. It is important to note that the Films and Publications Act is currently in the process of being amended to make it an offence for anyone to download, broadcast and distribute child pornography (including over the internet). If the amendments are passed into law, internet service providers (ISPs) will be guilty of an offence if they knowingly host or distribute child pornography. The amending legislation is also seeking to place positive obligations on ISPs to give the police the particulars of users who attempt to visit sites that host child pornography.

Section 29 makes it an offence to distribute, broadcast and present theatrical productions and public forms of entertainment that within their context:

- amount to propaganda for war, or incitement of imminent violence;
- advocate hatred based on race, ethnicity, gender or religion; or
- constitutes incitement to cause harm.

Section 29(4) carves out a number of exceptions to this rule. The kinds of works that are exempted under this section include *bona fide* scientific, documentary, dramatic, artistic, literary and religious films, publications and public entertainments such as stage plays and other theatrical productions. Section 29(4) also exempts *bona fide* discussions, arguments and opinions on matters pertaining to religion, beliefs and conscience, and on general matters of public interest. No similar exemption is provided for in the case of child pornography under section 27.

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

Section 31 empowers the Minister to prescribe regulations under the Act.

- *Provisions for media not controlled by the state:*

The application of the Act extends to the private media sector.

- *Body which enforces compliance with the Act:*

The Act is primarily administered by the Film and Publications Board; a statutory body established in terms of section 3, which is empowered to pre-classify films and publications. Together with the Review Board, the Film and Publications

Board is responsible for hearing complaints and appeals regarding the classification of content. Section 21 also allows for a right of appeal to the High Court.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

Non-compliance with the Act amounts to a statutory offence. Conviction can render the offender liable to be sentenced with a fine, imprisonment or both.

4.9 Criminal Procedure Act, 1977

- *Commencement date:*

27 July 1977

- *Purpose of the Act*

The primary purpose of the legislation is to regulate matters pertaining to criminal procedure in South Africa, but certain provisions of the Act impact on the disclosure of journalists' confidential sources of information.

- *Sector of the media governed by the Act:*

The Act is not a media-specific statute, but extends to all forms of the media.

- *Key provisions:*

Section 205 empowers the courts to subpoena anyone on the request of the Attorney-General or the Public Prosecutor to be examined by them who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed. In the past, state prosecutions have infamously resorted to section 205 in an attempt to compel journalists to disclose confidential sources of information.

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

None in respect of the media.

- *Provisions for media not controlled by the state:*

The Act applies broadly to all matters pertaining to criminal procedure.

- *Body which enforces compliance with the Act:*

The Act is enforced by the courts in the course of ordinary criminal proceedings.

- *Provisions limiting media ownership:*
None

- *Consequences of non-compliance with the Act:*

As a general rule, any witness who fails to adhere to a section 205 subpoena cannot be sentenced to prison. However, under section 205(4), the courts have the residual power to impose a sentence of imprisonment if they feel that the furnishing of the required information is necessary for the administration of justice or for the maintenance of law and order.

4.10 Protection of Information Act, 1982

- *Commencement date:*

16 June 1982

- *Purpose of the Act:*

The primary purpose of the Act is to guard official secret state information against disclosure.

- *Sector of the media governed by the Act:*

The Act is not a media-specific statute, but the scope of the Act extends broadly to include all forms of mass media inclusive of the broadcast, print and electronic media sectors.

- *Key provisions:*

Section 2 of the Act makes it an offence for anyone to enter a prohibited place. Section 1 defines the term “prohibited place” to refer to military locations and places where armaments are kept. In addition, section 14 permits the President to declare any location to be a prohibited place by proclamation in the *Government Gazette*. Contravention of this provision will render an offender liable on conviction to imprisonment for a period of up to 20 years.

Section 5 prohibits anyone from gaining admission or assisting another person to gain admission to a prohibited place without lawful authorisation. Any person who contravenes this section will be liable on conviction to be fined, imprisoned for up to five years, or to both.

The implications of this for the media are that the Act restricts journalists from entering certain areas for the purposes of gathering information.

Section 3 prohibits the obtaining and disclosure of certain information. Under this section it is an offence for anyone to obtain or to receive official secret state information (such as codes, passwords, documents or models) relating to a prohibited place. The section also makes it an offence for anyone to prepare or compile documentation relating to a prohibited place, or any military or security matter, among other things. The prohibition in this section extends to the disclosure of official state secret information. However, the section is framed so broadly as to make it an offence merely to receive or obtain official state information. As in the case of section 2, contravention of section 3 can result in a sentence of imprisonment being imposed for a period of up to 20 years.

Section 4(1) prohibits the disclosure of official state secret information, which includes:

- secret official codes and passwords;
- documents that have been made, obtained or received in contravention of the Act;
- documents that have been entrusted in confidence to a person by any person holding office under the government.

Section 4(1) also makes it an offence for anyone in possession of state secret information to disclose it to anyone who is not authorised to know about it, and to use and publish it for purposes that are prejudicial to South Africa's security and interests. In addition, it is an offence under section 4 for anyone to retain official state secret information without any right or to fail to take proper care of it.

Section 4(2) makes it an offence anyone to receive official state secret information when at the time of receiving the information the person had reasonable grounds to believe that the information was being disclosed in contravention of the Act. Contravention of section 4 will render an offender liable to being fined or imprisoned for up to 10 years, or both.

• *Powers granted to the Minister or Director-General by the Act:*

The Act does not grant any powers to any Minister or any Director-General.

• *Provisions for media not controlled by the state:*

The Act applies broadly and extends to all sectors of the media, including privately owned media.

- *Body which enforces compliance with the Act:*

The Act is enforced by the courts in the course of ordinary criminal proceedings.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

The Act contains numerous provisions which provide for offenders to be fined or sentenced to imprisonment. The *quantum* of the fine and the term of imprisonment vary according to the nature of the statutory offence. In some instances the Act provides for both imposition of a fine and an imprisonment term.

4.11 Anti Terrorism Bill, 2002

- *Date of enactment:*

None, the Bill was first published for comment in 2002 and has not yet been formalised into an Act of Parliament.

- *Purpose of the Bill:*

The primary purpose of the legislation is to regulate internal security matters and to combat terrorism, but certain provisions of the Bill impact on the disclosure of journalists' confidential sources of information.

- *Sector of the media governed by the Bill:*

The proposed Bill is not a media-specific statute, and applies broadly in its application to all sectors of the media.

- *Key provisions:*

Section 8 permits a police officer to make an *ex parte* application to a judge for purposes of investigating an offence under the Bill, provided that the officer obtains the consent of the National Director. In terms of section 8(3), a judge to whom such an application is made may make an order for the gathering of information if there are reasonable grounds to believe that:

“(a) an offence in terms of this Act has been committed;

(b) material information concerning the offence or information that may reveal the whereabouts of a person suspected by a police officer of having committed the offence, is likely to be obtained as a results of the order; and

(c) all other reasonable possible avenues for obtaining the information have been tried without success.”

In terms of section 8(4) a person named in the order under section 8(3) may be examined under oath and produce information in their possession.

Section 8 has the potential to be used by the state to compel the disclosure of journalists’ confidential sources of information.

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

Section 20 empowers the Minister for Safety and Security to make regulations under the Act.

- *Provisions for media not controlled by the state:*

The Bill is not a media-specific statute, and extends broadly in its application to all forms of media, including media in the private sector.

- *Body which enforces compliance with the Bill:*

It is intended that offences committed under the Bill will be enforced by the courts in the ordinary course.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Bill:*

Under section 11, any person who is called upon under section 8 to answer questions or to produce information in his or her possession may refuse to answer a question if it would result in the disclosure of information that is privileged (for example, by attorney-client privilege) or that is protected by any law relating to the non-disclosure of information. People may also refuse to answer questions or to produce information that would incriminate them – although this can be used against them in criminal proceedings.

5 Media codes of conduct

5.1 Overview

There are three codes of conduct in place that apply to the broadcast and print media, two of which are statutory and one of which is voluntary. They are:

- The BMCC Code – which is a statutory code administered by the BMCC under the IBA Act;
- The BCCSA Code – which is a voluntary code administered by the BCCSA, with the backing of the National Association of Broadcasters (NAB); the industry body for the broadcasting sector;
- The Press Code of Professional Practice ('the Press Code') – which is a voluntary code administered by the Press Ombudsman.

The Press Code applies to the print media sector, whereas the BMCC Code and the BCCSA Code both apply to the broadcasting sector. The BCCSA Code is virtually a carbon copy of the BMCC Code, however, the BCCSA Code is the more widely used of the two in the public and commercial broadcasting sectors. We will therefore deal with the substantive provisions of both codes (which we will refer to collectively as 'the Broadcasting Codes') in general terms, and make distinctions between the two where necessary.

5.2 Broadcasting Codes

- *Date of commencement:*

Both Codes came into force on 30 March 1994, however, they were amended on 7 March 2003.

- *Purpose of the codes:*

The purpose of the Broadcasting Codes is to lay down standards of conduct for broadcasters operating in South Africa.

The BCCSA Code applies only to members of the NAB. The objective of channelling disputes through the BCCSA is to achieve a speedy and cost-effective settlement of complaints against members of the NAB who have submitted themselves to the jurisdiction of the BCCSA.

The BMCC Code otherwise applies to all broadcasters who are not members of the BCCSA.

- *Sector of the media affected by the codes:*

The BCCSA Code applies only to members of the NAB, whereas the BMCC Code applies to all other broadcasters.

- *Key provisions:*

In relation to such things as violence and obscenity, the Broadcasting Codes require broadcasters:

- not to broadcast material that is indecent, obscene, offensive to public morals, offensive to anybody's religious convictions, prejudicial to the safety of the state or which is prejudicial to public order;
- to present material which depicts brutality, violence, atrocities, drug abuse and obscenity with due care;
- to exercise due care where children are likely to constitute a large portion of the audience.

In relation to the reporting of news, both codes require broadcasters to report on events truthfully, accurately and objectively. Where there are inaccuracies, the codes stipulate that these should be rectified as soon as possible.

The codes provide that broadcasters may comment on and criticise matters of public importance. However, the codes require all comments made to be based on facts and to be distinguished clearly as commentary.

When reporting on controversial issues of public importance, broadcasters are enjoined to present all viewpoints fairly. This may entail affording a right of reply to someone who has been the subject of criticism. This may also necessitate that programming space be allocated to cover an opposing point of view.

The Broadcasting Codes stipulate that during an election period, broadcasters must afford equal access to political parties and political candidates.

Both codes oblige broadcasters to respect the privacy of individuals, although the codes recognise that the right to privacy may be overridden by a legitimate public interest. In addition, the codes prohibit broadcasters from divulging the identity of rape victims and other victims of sexual violence without their prior consent. Both codes prohibit broadcasters from paying criminals in exchange for information, unless there are compelling societal interests that require this.

- *Body responsible for enforcing compliance with the codes:*

The BMCC enforces compliance with the BMCC Code, whereas the BCCSA enforces compliance with the BCCSA Code.

- *Consequences of non-compliance:*

Both Broadcasting Codes permit the BMCC and the BCCSA to adjudicate complaints relating to breaches of their respective codes of conduct.

The BMCC does not have the power to impose final orders relating to breaches of the BMCC Code, only to recommend its findings to ICASA. Section 66 empowers ICASA to take punitive action against recalcitrant broadcasters that have breached the Code. The punishments that may be meted out include the power to impose fines, and to suspend the broadcaster's licence for a period of up to 30 days.

The BCCSA Code authorises the BCCSA to impose penalties on a broadcaster that has breached the Code. The sanctions that the BCCSA is authorised to issue include imposing a fine up to R30,000 and directing that a correction be made in the case where false information was broadcast to the public.

5.3 Press Code of Professional Practice

- *Date of issue:*

6 April 2001

- *Purpose of the Code:*

The purpose of the Code is to lay down standards of conduct for the print media.

- *Sector of the media affected by the Code:*

The Code applies to the print media.

- *Key provisions:*

Many of the provisions in the Press Code mirror the provisions in the Broadcasting Codes. In relation to the reporting of news, clause 1 of the Code requires the press to report news in a manner that is truthful, fair and accurate. Specifically, the Code enjoins the press only to publish facts which may reasonably be true, and to verify the accuracy of the information and to indicate where it was not possible to verify information. Clause 1.6 requires the press to make amends for publishing inaccurate information by publishing an appropriate retraction or correction.

Clause 1.5 of the Code encourages the press to seek the views of people who are the subject of serious critical reportage. This is not required where the newspaper

has reasonable grounds to believe that this would ultimately lead to the report not being published, evidence being destroyed or witnesses being intimidated.

Clause 1.10 requires the press to respect the privacy of individuals, but recognises that the right to privacy may be overridden where there is a legitimate public interest. Clause 1.8 stipulates that the press may not release the identity of rape victims and victims of sexual assault without the consent of the victim.

Clause 1.9 states that news should not be published if it has been obtained by dishonesty or unfair means, or the publication of which would involve the breach of confidence, unless the public interest justifies this.

Clause 7 prohibits the payment of money for feature articles to people engaged in crime or other notorious misbehaviour except where it is in the public interest that the material be published and where the payment is necessary to achieve this.

Clause 1.7 encourages the press to present reports, photographs and sketches relating to matters involving indecency and obscenity with due sensitivity to the prevailing moral climate.

Clause 1.11 gives newspapers a wide discretion in matters of taste but states that this should not justify lapses of taste so repugnant that they bring the freedom of press into disrepute or that are extremely offensive to the public. Clause 8 enjoins the press to exercise due care when portraying violence, brutality and other atrocities.

Clause 2 of the Code states that the press must avoid discriminatory and denigratory references to people's race, colour, ethnicity, religion, sexual orientation, physical and mental disability. The Code also prohibits the press from referring to any of these traits in a discriminatory manner, or from reporting on matters pertaining to race in a way that is likely to promote racial hatred or incite imminent violence.

Clause 4 makes provision for the press to provide commentary and criticism on events provided this is done in a fair and honest manner. Clause 3 permits the press to advocate its own views on controversial topics. However, in so doing, the Code enjoins newspapers to distinguish clearly between fact and opinion, and to ensure that they do not misrepresent or suppress relevant facts.

Clause 5 stipulates that all headlines, pictures, posters and captions should reasonably reflect the contents of the report, and should not be misleading. Clause

6 places a positive obligation on newspapers to protect confidential sources of information.

- *Body responsible for enforcing compliance with the Codes:*

The Code is enforced by the Press Ombudsman and the Appeal Panel. Complaints must first be lodged with the Press Ombudsman before they are taken on appeal to the Appeal Panel.

The lodging of a complaint before the Press Ombudsman precludes the right to institute proceedings in court or before ICASA. The Press Code precludes complainants from referring grievances to the Press Ombudsman unless they have waived any right that they may have to claim civil relief.

- *Consequences of non-compliance:*

Because the Code is voluntary in nature, it is not strictly enforceable in a court of law. The powers of the Press Ombudsman and the Appeal Panel's powers are confined to such things as issuing reprimands, or directing that corrections be made to the publication of incorrect information.

6 Court cases

6.1 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC)

- *Date of judgment:*

11 April 2002

- *Sector of the media affected by the judgment:*

The judgment applies to the broadcast media.

- *Key legal principles established:*

The case dealt with overbreadth in the context of freedom of expression.

- *Court handing down the judgment:*

Constitutional Court of South Africa

- *Key provisions of the judgment:*

The case dealt with the constitutionality of a provision in the BMCC Code that

prohibited the broadcasting of material that was “likely to prejudice relations between sections of the population”. The court declared the provision to be unconstitutional on the basis that this clause (which was aimed at combating hate speech) was overbroad and that it constituted an unjustifiable limitation on the right to freedom of expression in section 16 of the Constitution. In arriving at its conclusion, the court stated:

“The prohibition is so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It could deny both the broadcaster and their audience the right to hear, form and freely express and disseminate their opinions and views on the wide range of subject.”

Without deciding on the matter, the Constitutional Court also hinted that certain other provisions in the BMCC Code might also be overbroad.

6.2 MEC for Health, Mpumalanga v M-Net & Another 2002 (6) SA 714 (T)

- *Date of judgment:*
29 August 2002

- *Sector of the media affected by the judgment:*
The judgment dealt with journalistic practices in broadcasting, but the principles established apply equally to the print media.

- *Key legal principles established:*
The case established the principle that even where material has been obtained illegally, the public interest may warrant that the information be broadcast if the public interest justifies this. (In this case, the public interest related to the alleged malpractices at a state hospital.)

- *Court handing down the judgment:*
High Court of South Africa

- *Key provisions of the judgment:*
In this case, an independent television station sought to broadcast an exposé on alleged malpractices at a public hospital. The applicant (who was a provincial government minister responsible for the health sector) sought to interdict the

broadcasting on the programme. The applicant alleged that the television station's team had entered the hospital without permission and that some of the material for the programme had been obtained clandestinely using a secret camera. No allegation, however, was made that the programme contained untruths, nor was the public's right to know what happens at state hospitals challenged.

The court dismissed the interdict application on the basis that the right of the public to be informed about the malpractices at state hospitals overrode any concerns that the applicant may have had about the way in which the material for the programme was gathered.

In arriving at its conclusion, the court held that the media have both the right and the duty to inform the public about matters that are in the public domain in terms of section 16 of the Constitution. The court held that the public's ability to form opinions in respect of the way in which the authorities perform their public duties, depends to a large extent on the media's ability to provide accurate information on the way in which politicians and public authorities fulfil their mandate. In this case, the right of the public to know about untoward goings-on at public hospitals was an overriding consideration in the court's decision to ultimately dismiss the interdict application.

6.3 *National Media Ltd & Others v Bogoshi* 1998 (4) SA 1196 (SCA)

- *Date of judgment:*
29 September 1998

- *Sector of the media affected by the judgment:*
The case dealt with defamation in the print media sector, but the principles established apply equally to the broadcasting sector.

- *Key legal principles established:*
The case established a new defence of 'reasonable publication' in defamation law. The nature of the defence is that defamatory allegations of facts published by the press are not unlawful if the publication was reasonable at the time, even if the facts subsequently turn out to be untrue. The nature, extent and tone of the allegations all have a bearing on reasonableness. Other relevant factors that impact on reasonableness include the reliability of the source of the information, steps taken to verify the accuracy of the information, and whether or not a right of reply was afforded.

- *Court handing down the judgment:*
Supreme Court of Appeal

- *Key provisions of the judgment:*

In this case, a politician sued a newspaper that he alleged had made defamatory remarks about him. In its pleadings, the newspaper alleged that it had published the information in circumstances that were reasonable at the time, regardless of whether the information was true. The politician took exception to this, as none of the available common law defences to defamation at the time allowed for the defence of ‘reasonable publication’. The court ruled in favour of the newspaper.

In arriving at its conclusion, the court held that there is a balance to be struck between the right to freedom of expression and the right to reputation. In establishing a new defence of reasonable publication in defamation law, the court found that the right to freedom of expression trumped the right to dignity.

The court held that factors that impact on the reasonableness of the publication include the nature, extent and tone of the allegations. Other relevant factors include the reliability of the source of the information, steps taken to verify the accuracy of the information, and whether or not a right of reply was afforded.

6.4 *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC)

- *Date of judgment:*
14 June 2002

- *Sector of the media affected by the judgment:*

The judgment dealt with defamation in the print media sector, but the principles laid down in the case apply equally to the broadcasting sector.

- *Key legal principles established:*

The court upheld the defence of ‘reasonable publication’ in defamation law as established in the seminal judgment of *National Media Ltd & Others v Bogoshi*.

- *Court handing down the judgment:*
Constitutional Court of South Africa

- *Key provisions of the judgment:*

In this case, a politician and leader of a political party sued a newspaper for

defamation. The newspaper did not content that the information that it had published about the politician was true, and sought to rely on the defence of 'reasonable publication' as laid down by the Supreme Court of Appeal in *National Media Ltd & Others v Bogoshi*. In response, the politician contended that the defence of reasonable publication was unconstitutional, which argument the court ultimately rejected.

In coming to its conclusion, the court found that in the absence of a defence of reasonable publication, the media would have to bear the burden of proving the truth of the defamatory allegations, which would have a "chilling effect" on the right of the media to freedom of expression. The court concluded that the defence of reasonable publication establishes a proper balance between the right to freedom of expression and the right to human dignity.

Zimbabwe

1 Introduction

1.1 Political landscape*

Zimbabwe has a population of approximately 11.5 million people. Present-day Zimbabwe became the British colony of Southern Rhodesia in 1911. In 1965, Ian Smith, the then Prime Minister of British-ruled Southern Rhodesia, made a unilateral declaration of independence (UDI) after Great Britain and Smith failed to agree on the conditions for independence. The Smith regime in the post-UDI period was essentially a white minority government, and was naturally opposed by the black majority. Great Britain declared UDI to be illegal.

In the meantime, the two major liberation movements, the Zimbabwe African People's Union (ZAPU) and the Zimbabwe African National Union (ZANU) had been banned and many of their leaders had been imprisoned. ZANU and ZAPU eventually formed a united alliance in the form of the Patriotic Front party in 1976. The Patriotic Front was jointly led by Joshua Nkomo (ZAPU's former president) and current Zimbabwean President Robert Mugabe (an important leader in ZANU at the time). Increasing political pressure against the UDI finally forced the Rhodesian Government to attempt an internal settlement with moderate black leaders. The settlement did not include the Patriotic Front. Bishop Abel Muzorewa became the first black Prime Minister in 1978, of a country now called Zimbabwe-Rhodesia. He ruled for only about six months.

A settlement that did not include the Patriotic Front was doomed to failure, so in 1979 new talks involving all parties were held at Lancaster House in London. In November 1979 an agreement was reached on a new constitution that protected

* See generally, Aeroflight, "Countries of the world: Republic of Zimbabwe – National history" (<http://www.aeroflight.co.uk/wab/Africa/zim/zim-national-history.htm>)

whites, while giving power to the black population. (The Constitution of Zimbabwe was published as a Schedule to the Zimbabwe Order 1979, S.I. 1979/1600 of the United Kingdom.) On 18 April 1980, Zimbabwe formally gained independence under Robert Mugabe, the leader of ZANU-PF and newly elected Prime Minister.

Once in government, tensions began to surface within the governing alliance. Mugabe's ZANU-PF party increasingly began to sideline Nkomo's ZAPU-PF party. In 1983 ZAPU-PF leader Joshua Nkomo was sacked from the government. This led to unrest in Matabeleland which was repressed, resulting in the deaths of up to 20,000 people. In late 1987 the weakened ZAPU-PF was absorbed into ZANU-PF, creating a virtual one-party state.

Mugabe's control of the country was strengthened in 1988 by the move to a US-style executive presidency. In March 1992 Parliament passed a law permitting the seizure (without compensation) of land from commercial farmers for redistribution to the poor. By 1996 intimidation and murder of political opponents by government supporters had become widespread. In the March 1996 presidential elections, the opposition candidates withdrew after the voting rules were changed to favour Mugabe.

In 1997 the Zimbabwe dollar fell to an unprecedented low level. A growing economic crisis provoked riots and strikes in 1998. In September 1999 the Zimbabwe Confederation of Trade Unions (ZCTU), civic groups, farmers and academics joined together to establish the Movement for Democratic Change (MDC) headed by Morgan Tsvangirai – the first major opposition political party in more than ten years.

In February 2000 a referendum was held on a new draft constitution favoured by the government. The MDC ran a successful campaign for a 'no' vote, which angered pro-government activists – most notably Chenjerai Hunzvi, head of Zimbabwe's War Veterans Association. Later that month, the War Veterans leadership organised the seizure of hundreds of white-owned farms by armed groups of squatters.

In the June 2000 parliamentary elections, the MDC managed to win 57 seats out of 120, despite widespread intimidation. This demonstrated the MDC's growing appeal and the rapid decline in ZANU-PF's popular support. In January and March 2002 laws were passed which seriously limited press freedom. Many foreign reporters were banned from entering Zimbabwe and local journalists were

prosecuted for reporting ‘false news’. During April 2002 a state of disaster was declared as worsening food shortages threatened to bring about a famine.

Presidential elections were held in March 2002, amid a massive increase in political violence and intimidation. MDC candidate Morgan Tsvangirai was charged with treason just before the voting took place. Mugabe was quickly declared the election winner, despite condemnation of the election process by independent observers.

The Zimbabwean Constitution makes provision for the protection of the right to freedom of expression. However, there are a number of exclusions to this right, which allow the state to impose restrictions on the right in the name of such things as defence, public safety and public order, which limit the scope of the right.

1.2 The mass media market in Zimbabwe

Ironically, the right to freedom of expression is enshrined in the Zimbabwean Constitution, however, the ability of the media to function independently has become increasingly strained in recent times. The state has passed a number of controversial laws that severely constrain the independence of the media.

There is only one broadcaster in Zimbabwe and this is the Zimbabwe Broadcasting Corporation (ZBC), which is a public broadcaster and broadcasts through both radio and television. There are no private or community broadcasters based in the country. There is one private broadcaster, SW Radio, which broadcasts into Zimbabwe from London, England.

There are a number of newspapers in circulation in the country but many of these are effectively government controlled. The papers with the largest circulation are owned by Zimbabwe Newspapers Pvt Limited. The board of directors and the editors of these papers are government appointees. Consequently, the newspapers are government inclined. There are a few other privately owned newspapers that are also government inclined and these include the *Business Tribune* and the *Weekend Tribune*.

Despite Zimbabwe’s strict media laws, there are a few papers that are still trying to maintain their independence, specifically the *Financial Gazette*, the *Zimbabwe Independent*, *The Standard* and the *Daily News*.

2 Experiences of journalists in Zimbabwe

2.1 Overview

The degree of freedom of expression in Zimbabwe is almost non-existent. The ruling party in Zimbabwe controls the airwaves completely and within the print media industry, those journalists who are committed and dedicated to being fair, balanced and critical of the ruling party work under constant fear for their lives. Freelancers who are still brave enough to work in Zimbabwe, work under cover.

2.2 The public broadcaster

As expected, the researchers were not able to speak to anyone at the ZBC. Calls were not returned and in instances where the researchers were able to make contact with certain people, they were unwilling to answer any questions. The researchers were advised by other journalists that the ZBC is completely controlled by the Minister of Information and Publicity, Jonathan Moyo. The ZBC is completely state controlled and is used as a propaganda mouthpiece for the ruling party.

2.3 Print media

Within the print media industry, journalists that work for the independent newspapers such as the *Daily News* and *The Independent*, have been subjected to abduction, assault, harassment and unlawful arrest. Freelance journalists working in Zimbabwe have in most instances been refused accreditation in terms of the newly promulgated Access to Information and Protection of Privacy Act. Accordingly, they work illegally and undercover in Zimbabwe. According to journalists, the new accreditation laws have been introduced solely for the purpose of controlling who can work as a journalist in Zimbabwe. Moreover, Zimbabwean journalists working for foreign media must pay an amount of US\$1,000 and foreign journalists must pay an amount of US\$500 for their accreditation cards. Clearly, the accreditation process is a hindrance to journalists trying to work in Zimbabwe.

2.4 Government incursions on freedom of expression

The situation in Zimbabwe has far surpassed the stage of subtle limits on the right

to freedom of expression. The situation presently can only be described as being an environment in which freedom of expression is non-existent.

2.5 Results of the interviews

Interviews were conducted with a wide range of people, including university academics, people working in the public and private broadcasting sectors, journalists in the print media sector, and people working in media organisations in Zimbabwe. A number of the interviewees requested that we keep their names and/or the details of their interviews confidential.

Almost all of the journalists and media workers that were interviewed in Zimbabwe as part of this survey took the view that there is no media freedom in Zimbabwe. This is supported by the journalists' own experiences.

Describing the media freedom situation, one journalist said: "The situation is very bad. Our reporters and photographers have been assaulted, tortured by the police, detained for up to 78 hours during the course of their normal duties." Other journalists attested to being arrested on a number of occasions and to being attacked physically by the police. In addition, journalists also claimed that they had had threatening statements made against them.

Many of the newspapers in Zimbabwe are government controlled and therefore adopt a government-inclined stance. One interviewee pointed out that, in the same vein, journalists working for privately controlled papers are sometimes also expected to write stories that are pro the opposition. One of the journalists from an independent newspaper told the researchers: "They [referring to senior management that the journalist concerned was working for] want me to write things in a certain way ... they want me to write with a more party [X] slant." This journalist went further to express the view that what senior management was doing is wrong in the same way that it is wrong for government controlled newspapers to be pro the ruling party.

Many of the interviewees also revealed that their phones are constantly bugged. One journalist told the researchers: "I know for sure that our phones are bugged, our landlines and our e-mails, etc." Another said: "I take no notice of the bugging any longer. Ninety percent of the time I travel openly, I use my phone freely, so they know where I am." From the statements, it becomes apparent that bugging of phones has become very much a part of the journalists' lives.

Most of the journalists attributed the existing media situation to strict media laws. When referring to the media laws, one journalist stated: “Our legislation is very tight and it is difficult to operate as a privately owned newspaper.” Many of the journalists also pointed out that the promulgation of the Promotion of Access to Information Act (PAI Act), which requires journalists to register and be accredited with the Media and Information Commission, is having a particularly chilling effect on media freedom. Almost all of the journalists and media workers interviewed commented on this particular piece of legislation.

Some of the comments made were that “[i]t [the PAI Act] is the surest way of guarding the press,” that “[t]he accreditation policy is a complete violation of freedom of expression” and that “... the accreditation process was set up to resist freedom of the press of domestic and foreign journalists”.

A widespread view was that “anything that involves criticising the government” is a controversial issue, as such criticism was regarded as being anti-government. Many of the interviewees referred to Zimbabwe’s land reform programme and human rights abuses as hot issues as well.

3 Constitution of Zimbabwe

3.1 Date of enactment

The Zimbabwean Constitution was enacted in 1979.

3.2 Supremacy of the Constitution

The Zimbabwean Constitution established a system of constitutional sovereignty (as opposed to parliamentary sovereignty). This means that the Constitution is theoretically the supreme law of the land, and may not be abrogated by anyone, not even by Parliament. In terms of section 3, any law that conflicts with the Constitution is technically invalid.

3.3 Establishment of an independent regulator

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

3.4 Provisions impacting on the media

Section 20 of the Constitution guarantees the right to freedom of expression. This is enshrined in section 20(1) which states:

“Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinion and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.”

A number of expressive activities, however, are not protected by this section, which detract from the core of the protection. The activities which fall outside of the realm of section 20(1) are listed in section 20(2).

These exclusions are fairly wide, particularly because they permit the state to restrict expressive activity in the name of such things as “defence” and “public order” and make significant inroads into the right to freedom of expression.

The exact wording of section 20(2) provides:

“Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of –

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals or Parliament;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter; or

(c) imposes restrictions upon public officers;

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.”

3.5 Limitations clause

The Zimbabwean Constitution does not have a standalone limitations clause, as is common in many other constitutions containing a bill of rights. Rather, the limitation of rights is provided for on a clause-by-clause basis. In most instances where the Constitution allows for the limitation of specific rights, the restriction is required to be “reasonably justifiable in a democratic society” in order to pass constitutional muster, and section 20(2) is no exception.

The right to freedom of expression is further restricted by section 20(6) which excludes protests in public transport carriageways from the ambit of the protection. Section 20(6) states:

“The provisions of subsection 1 shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.”

Section 25 of the Constitution permits the government to derogate from certain of the rights entrenched in the Constitution in the event of a public emergency or where the President declares a state of emergency.

3.6 Courts which have the jurisdiction to decide constitutional matters

The highest court in Zimbabwe is the Supreme Court, which is the country’s final court of appeal. Below the Supreme Court is the High Court. Section 79 vests judicial authority in the Supreme Court, the High Court and any other subordinate courts established by an Act of Parliament, which include courts such as the Fiscal Appeal Court, the Water Court and the Compensation Court.

3.7 Independence of the judiciary

Ironically, the Zimbabwean Constitution enshrines the independence of the judiciary from the executive and the legislature. Section 79B specifically states:

“In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.”

However, the independence of the judiciary (from the executive arm of government in particular) is undermined elsewhere in the Constitution, particularly in relation to the appointment and removal of judges, which the Constitution gives the President a significant hand in.

3.8 Appointment and removal of judges

The Constitution gives the President the final say over the appointment of Supreme Court and High Court judges. In terms of section 84, the President is merely required to consult with the Judicial Service Commission (JSC) but is not required to follow any recommendation that the Commission may make. However, the President must inform Parliament as soon as is practicable whenever he makes an appointment that is inconsistent with recommendations of the JSC. The exact wording of section 84 provides:

“(1) The Chief Justice and other judges of the Supreme Court and the High Court shall be appointed by the President after consultation with the Judicial Service Commission.

(2) If the appointment of a Chief Justice or a judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission in term of subsection (1), the President shall cause Parliament to be informed as soon as is practicable.”

The Constitution also gives the President a hand in the removal of High Court and Supreme Court judges. In terms of section 87, a High Court or Supreme Court judge may only be removed on two grounds. These are incapacity (or what the Constitution refers to as the “inability to discharge the functions of his office, whether arising from infirmity of body or mind or any other cause”) and

misconduct (or what the Constitution terms “misbehaviour”). The Constitution empowers the President to appoint a tribunal whenever a judge’s removal from office is being investigated. If it is the Chief Justice that is being investigated, then the President may appoint a tribunal in his sole discretion. In the case of High Court and Supreme Court judges, the President may only appoint a tribunal where the Chief Justice advises that the question of removal ought to be investigated.

4 Legislation that governs the media

4.1 Overview

The legislation governing the communications industry in Zimbabwe is largely draconian in nature, and imposes significant constraints on the media’s right to freedom of expression. The principle statutes are as follows:

- Access to Information and Protection of Privacy Act, 2002 (Act 5 of 2002) – which imposes restrictions on access to information and which provides for the compulsory registration of journalists based in Zimbabwe;
- Public Order and Security Act, 2002 (Act 1 of 2002) – which regulates matters pertaining to internal security;
- Censorship and Entertainments Control Act, 1967 (Act 37 of 1967) – which regulates the pre-approval of content that is distributed to the public;
- Broadcasting Services Act, 2001 (Act 3 of 2001) – which regulates the radio and television broadcast media in Zimbabwe; and
- Zimbabwe Broadcasting Corporation (Commercialisation) Act, 2001 (Act 26 of 2001) – which governs the state broadcaster.

4.2 Access to Information and Protection of Privacy Act, 2002

- *Date of commencement:*

15 March 2002

- *Purpose of the Act:*

The Act was passed with the intention of regulating access to information held by

public bodies such as government departments, statutory bodies and government agencies. The Act also provides for the registration of mass media service providers (such as newspapers) and the accreditation of journalists with the Media and Information Commission.

- *Sector of the media governed by the Act:*

The Act applies to the print media, broadcasting and electronic media.

- *Key provisions:*

Section 5 confers a general right of access to information held by public bodies, but this right does not extend to everybody. Notably, the following categories of people are excluded from the ambit of the right:

- non-citizens and non-permanent residents;
- people who do not hold either temporary employment or study permits;
- unregistered mass media services;
- unlicensed broadcasters; and
- any foreign state or foreign state agency.

Part III of the Act protects certain categories of information against disclosure. Many of the categories listed in the Act are broadly cast and impede the ability of the media to gather information from the state and from state bodies. Some of the classes of information that are protected against disclosure include:

- Deliberations of Cabinet and local government bodies – in terms of section 14 this protection also extends to the deliberations of Cabinet subcommittees.
- Advice relating to policy – in terms of section 15, information is protected against disclosure where it relates to advice or recommendations given to the president, a Cabinet minister or a public body. However, this protection excludes certain categories of information such as statistical surveys, public opinion polls, economic forecasts and information contained in a record that has been in existence for 10 years or more.
- Information subject to attorney-client privilege (section 16).
- Information whose disclosure would be harmful to the law enforcement

process or national security may not be disclosed in terms of section 17. This requirement is peremptory (i.e. obligatory).

- Information relating to intergovernmental relations and negotiations (section 18).
- Information relating to the financial and economic interests of a public body or the state (section 19).
- Information relating to personal or public safety (section 22).
- Information relating to the business interests of third parties (section 24).
- Information relating to personal privacy (section 25).

A particularly draconian aspect of the legislation is that it requires journalists and the mass media to be authorised by the Media and Information Commission ('the Commission'). The problem with this is its chilling effect on the media, particularly as it is illegal to practice as a journalist in Zimbabwe or to provide a mass media service without first being authorised by the Commission to do so. Moreover, the Commission has the discretion to refuse an authorisation, and thus to prohibit dissenting journalists and mass media providers from operating in Zimbabwe.

The status of the Media and Information Commission is that it was established as a statutory body under section 38 of the Act. The Commission is controlled by a board whose members are appointed by the Minister in consultation with the President (section 40). As such it is not independent from the state.

Section 66 of the Act makes it mandatory for mass media providers to register with the Commission. There are three exceptions to this requirement, namely:

- broadcasters who are required to be licensed under the Broadcasting Services Act;
- the representative offices of foreign mass media that are permitted to operate in Zimbabwe; and
- the in-house publications of organisations which are not mass media service providers.

Section 67 of the Act bestows the discretion on the Commission to refuse to

register a mass media service that does not comply with the Act. The Commission also has the power to suspend or cancel the registration of mass media service providers in terms of sections 69 and 71 respectively.

It is an offence to provide a mass broadcasting service without a certificate of registration. Contravention of the registration requirement is an indictable offence which can attract punishment in the form of a fine, imprisonment or both under section 72.

All journalists have to be accredited by the Commission in order to practice their trade in Zimbabwe under sections 78 and 79. Only a limited category of journalists are eligible for accreditation, namely citizens and permanent residents of Zimbabwe. However, non-residents and non-citizens may apply to the Commission to be accredited for a limited period of time. In terms of section 84, an accredited journalist is issued with a press card that is valid for 12 months, and which has to be renewed on an annual basis. Section 82 requires the Commission to maintain a roll of journalists whom it has accredited. The significance of this is that it is illegal for journalists to be employed in any capacity connected with the journalistic profession unless their names appear on the roll in terms of section 83.

Section 85 empowers the Commission to develop a code of conduct for journalists, in consultation with industry organisations that it considers to be representative of journalists. We have been told that no such code has yet been developed. The Commission is responsible for enforcing the code and in terms of section 85(2) has the power to strike the name of a journalist who contravenes the code from the roll, among other things.

In terms of section 80 it is a statutory offence for a journalist to falsify or fabricate information, publish falsehoods or generally to contravene the Act. The problem with this section is that it enjoins journalists to employ an unreasonably high degree of hyper-vigilance and ultimately self-censorship in order to ensure compliance with the Act. Recent amendments have, however, been proposed to the Act that will soften the impact of this provision if passed into law.

The amendments, if passed, stipulate that a journalist will face criminal charges for publishing “falsehoods” only if there is “a suspicion” that this was done “intentionally or recklessly”.

Sections 86 to 89 of the Act require that if information is published that is untrue, the mass media are obliged to correct the information, and to allow a person who

has been the target of the untruth to publish a reply. These provisions of the Act unduly constrain the editorial freedom of the media.

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

Section 91 gives the Minister of Information and Publicity extensive regulation-making powers under the Act. Specifically the Act empowers the Minister to make regulations relating to the form and manner of registration with the Commission, and the form and manner of dealing with complaints against mass media service providers and journalists, among other things.

- *Provisions for media not controlled by the state:*

The Act extends to all media not controlled by the state.

- *Body which enforces compliance with the Act:*

The Act is enforced by the Media Information Commission.

- *Provisions limiting media ownership:*

The Act places significant restrictions on media ownership and control that are defined according to citizenship and political affiliation. The effect of this is to curb the number of independent voices in the mass media sector.

Specifically, section 65 of the Act prohibits the following classes of people from being in control of the mass media whether directly or indirectly:

- non-Zimbabwean citizens;
- insolvent or bankrupt persons; or
- any association whose activities have been banned or are prohibited by law.

- *Consequences of non-compliance with the Act:*

In terms of section 61, it is an offence for anyone to mislead the Commission, to obstruct the Commission from performing its duties, or to defy an order made by the Commission. A conviction can attract a fine, imprisonment or both.

4.3 Public Order and Security Act, 2002

- *Date of commencement:*

23 January 2002

- *Purpose of the Act:*

The Act was passed with the intention of regulating internal security in Zimbabwe. The Act seeks to curb activities that impact upon state security, such as terrorism and the subversion of the state. The Act also seeks to regulate public gatherings.

- *Sector of the media governed by the Act:*

The Act applies across the board, and is not a media-specific statute, although all forms of media fall within its scope. Section 2 defines a “publication” to include “a document, book, magazine, film, sound of visual broadcast, tape, disc or other material, medium or same whatsoever in which, or in which by means of which a statement may be made”, and a “statement” as “any expression of fact or opinion, whether made orally, in writing, electronically or by visual images”.

- *Key provisions:*

Section 5 deals with “subverting constitutional government”. The Act makes it an offence for any person (both inside and outside Zimbabwe) to suggest or to advocate the overthrow or attempt to overthrow the government through unconstitutional means. The implications of this section for the media in Zimbabwe are that it constrains robust criticism of the government. If convicted an accused stands to be sentenced to prison for up to a maximum of 20 years without an option of a fine. Under Schedule 3 of the Act, a section 5 offence is listed as one of the offences in respect of which power to grant bail is excluded or qualified.

Section 15 deals with publishing or communicating false statements prejudicial to the state. Under this section it is an offence for any person (both inside and outside Zimbabwe) to publish or communicate a statement to another person that is wholly or materially false where the person intends or realises that there is a risk or possibility of:

“(a) inciting or promoting public disorder or public violence or endangering public safety; or

(b) adversely affecting the defence or economic interests of Zimbabwe; or

(c) undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or

(d) interfering with, disrupting or interrupting any essential services.”

Conviction of an offence under section 15 could result in the offender being fined, or imprisoned for a period of up to five years, or both.

Section 16 deals with undermining the authority of or insulting the President. In terms of this section, it is an offence for any person to publish a statement either in the public print or electronic media about the President or an Acting President where the person:

- knows or realises that there is a risk or possibility of engendering feelings of hostility towards the President or the Acting President, or of causing hatred, contempt or ridicule of the President or an Acting President (either against him personally or against his office); or
- makes any abusive, indecent, obscene or false statement about or concerning the President or an Acting President (either against him personally or against his office).

Conviction of an offence under section 16 could result in the offender being fined, or imprisoned for a period of up to one year, or both.

Section 32 requires every person to carry an identity document when in a public place to which the public has access. The Act empowers the police to demand the production of a person's identity document at any time, failing which the person may be detained until the identity document of the detained person is established or verified to the satisfaction of the police officer.

The implications of this for journalists is that they should carry their identity documents at all public venues, else they run risk of being taken into state custody.

• *Body which enforces compliance with the Act:*

Section 4 empowers the police to enforce the Act.

• *Provisions limiting media ownership:*

None

• *Consequences of non-compliance with the Act:*

Non-compliance with the Act will render an accused liable to be sentenced to be fined, imprisoned (with or without the option of a fine) or to be both fined and imprisoned. The extent of the fine or prison sentence varies, depending on the nature of the offence.

4.4 Censorship and Entertainment Control Act, 1967

- *Date of commencement:*

1 December 1967

- *Purpose of the Act:*

The purpose of the Act is to regulate the pre-approval of content that is distributed to the public, such as magazines, videos and films. An unusual feature of the legislation is that it also regulates other forms of public entertainment, such as theatre productions and public exhibitions. The Board of Censors is responsible for administering the Act and performs all preclassification functions under the legislation.

- *Sector of the media governed by the Act:*

The pre-approval system under the Act applies to a variety of media – inclusive of films and recorded video and film material, publications, pictures, statues, public entertainment and public exhibitions.

- *Key provisions:*

Section 3 establishes the Board of Censors ('the Board') as a statutory body. The Minister of Home Affairs appoints the members of the Board, and it is the Minister who designates who the chairperson and vice-chairperson of the board should be. The President is not involved in the appointment process. The functions of the Board are set out in section 4, and include examining articles or public entertainment submitted to it for its approval.

Section 10 empowers to Board to approve or prohibit a film or film advertisement from being distributed to the public. Section 12 deals with prohibited films and provides that the Board can declare a film prohibited. In terms of section 10(2), the Board is empowered to ban any film or film advertisement which, in its opinion is:

- indecent or obscene or is offensive or harmful to public morals;
- is likely to be contrary to the interests of defence, public safety, public order, the economic interest of Zimbabwe or public health; or
- which depicts any matter in a manner that is indecent or obscene or is offensive or harmful to public morals.

Section 9 prohibits the distribution, televising and public exhibition of films and

film advertisements that have not been approved by the Board under section 10. The only exception to this is that unapproved films may be exhibited to persons involved in the filmmaking, film distribution and film exhibition sectors. However, the Act permits the Board to exempt certain categories of publications and persons from the requirement to obtain pre-approval.

Section 14 empowers the Board to examine publications, pictures, statues and records and to declare them undesirable or to declare publication or records thereof prohibited. Particularly restrictive is section 15, which imposes blanket restrictions on future periodical publications. In terms of this section, if four or more consecutive editions of a periodical publication are declared undesirable, then the Board may declare all editions of that publication subsequent to the date of the declaration to be undesirable. Section 13 prohibits the importation, production and dissemination of items that the Board has declared undesirable under section 14 or 15. The Board can declare a publication, picture, statue or record to be undesirable if it finds that it is indecent or obscene or is offensive or harmful to public morals or is likely to be contrary to the interests of defence, public safety, public order, the economic interest of Zimbabwe or public health.

Section 16 prohibits any person from performing or giving any public entertainment without the approval of the Board. However, the Act empowers the Board to grant exemptions to this requirement. Section 17 gives the Board the power to prohibit certain exhibitions and forms of entertainment, alternatively to permit them under prescribed conditions. The term “entertainment” is defined extremely widely in section 2 of the Act to refer to “any stage play, tragedy, comedy, farce, opera, burlesque, interlude, melodrama, striptease, pantomime, dialogue, prologue, epilogue, concert, cabaret, circus or other dramatic or musical entertainment”.

Section 19 allows for Board decisions to be taken on appeal to the Appeal Board. The Appeal Board consists of a president and two members appointed by the Minister (section 18). As such the Appeal Board is not truly independent from the government. Moreover, in terms of section 23 the Minister has the power to vary or alter the decisions of the Board and the Appeal Board.

Section 26 prohibits any person from having in his/her possession any publication, picture, statue, record or recorded video of any material which is indecent or obscene or prohibited – which terms the Act defines very broadly. In terms of section 33, something is deemed to be:

- indecent or obscene if:

- it has the tendency to deprave or corrupt the minds of persons who are likely to be exposed to the effect or influence thereof or if it is in any way subversive of morality; or
- whether or not related to any sexual content, it unduly exploits horror, cruelty or violence, whether pictorial or otherwise;
- offensive to public morals if it is likely to be outrageous or disgusting [sic] to persons who are likely to read, hear or see it;
- harmful to public morals if it deals in any improper or offensive manner with criminal or immoral behaviour.

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

Aside from the Minister's powers to set aside decisions of the Board and the Appeal Board, section 34 confers general regulation-making powers on the Minister and section 35 empowers the Minister to make regulations relating to safety from fires at theatres.

- *Provisions for media not controlled by the state:*

The Act applies to the private media sector.

- *Body which enforces compliance with the Act:*

The Board and the Minister are both empowered to enforce the Act.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

In terms of section 32(1), any person who contravenes the Act is guilty of an offence and is liable to a fine, not exceeding \$1,000 or imprisonment for up to two years, or to both. It is not specified whether this amount is in Zimbabwean dollars or US dollars. In addition, any article used in relation to the offence may be forfeited to the state.

4.5 The Broadcasting Services Act, 2001

- *Date of commencement:*

The Broadcasting Services Act came into force on 4 April 2001.

- *Purpose of the Act:*

The Act was passed in order to regulate the broadcasting industry in Zimbabwe. The Act also established a sector-specific regulator for the industry in the form of the Broadcasting Authority.

- *Sector of the media governed by the Act:*

The Act governs the radio and television broadcasting industry in Zimbabwe. The Act applies to conventional terrestrial broadcasting services, but also extends to newer broadcasting services such as satellite broadcasting and webcasting (broadcasting over the internet).

- *Key provisions:*

Section 3 establishes the Broadcasting Authority of Zimbabwe ('the Authority') as a statutory body and sets out the Authority's functions and powers. Before the Act came into force, this was regulated through Licensing Regulations SI 220D of 2000. These regulations made provision for the establishment of a broadcasting regulatory authority. The first board of directors of the Zimbabwe Regulatory Authority was appointed under the regulations. The Act effectively incorporated these arrangements into primary legislation.

The Act also empowers the Authority to plan and advise on the allocation and distribution of the frequency spectrum. The Authority is not empowered to licence broadcasting service providers or signal distributors, only to recommend candidates to the Minister of Information and Publicity. The Minister bears the ultimate responsibility for issuing licences, and is not bound to follow the Authority's recommendations. The effect of this is to confer co-jurisdiction on the Minister and the Authority in relation to licensing decisions, with negative implications for the autonomy of the regulator. The danger of giving the state this degree of power over licensing processes is that the state is free to handpick new market entrants that will not be critical of the government.

The Act effectively allows the President to appoint board members of the Authority. Section 4 states that the Minister must appoint the board after consultation with the President and in accordance with any directions that the President may give.

One of the most problematic aspects of the legislation is section 6, which requires the Minister to act as the licensing authority for broadcasting service providers and signal distributors, not the Authority. This has adverse implications in the industry, given that the state is a shareholder in the public broadcast. An unusual

feature of the Act is that it requires webcasting services to be licensed. (Internet broadcasting services are historically unregulated in many countries.)

Effectively, the Act empowers the Minister to issue licences on the recommendation of the Authority, which the Minister is not obliged to follow. The procedure for applying for a licence is set out in section 10. The Authority may invite applications for additional broadcasting licences by publishing a notice in the *Gazette* and in one national newspaper. Once applications are submitted, the Authority examines the applications and short-lists the applicants. The applicants are then required to attend a public enquiry conducted by the Authority. Once the Authority has considered the applications, it recommends to the Minister either to issue or refuse to issue a license. The Minister (who is not bound by the Authority's recommendation) then decides whether to issue or refuse to issue the licence. Once the Minister has reached a decision, the Authority notifies the applicant of the Minister's decision in writing and where an application is refused, reasons for the decision must be provided. Section 11 empowers the Minister to set licence terms and conditions after consultation with the Authority.

The Act also empowers the Minister to renew, amend, suspend and cancel licences. The Minister is empowered to renew licences on the recommendation of the Authority in terms of section 14. As in the case of licence applications, licence renewal applications must be made to the Authority, although the Minister is not bound to follow any recommendation that the Authority may make. Section 15 permits the Minister to renew a licence after consultation with the Authority. Section 16 permits the Minister to suspend and cancel licences after consulting with the regulator.

Under section 43, any decision of the Minister in relation to licensing can be taken on appeal to the Administrative Court.

Section 24 requires the Authority to develop codes of conduct to govern the broadcasting industry in consultation with the broadcasters concerned. The Act authorises codes to be developed to govern things such as the rules of conduct to be observed by broadcasters, advertising standards, classification of programmes, Zimbabwean and African music quotas and public complaints procedures, among other things. A particularly draconian feature of section 24 is that it mandates that codes of conduct be developed to cover political programming content such as:

- the safeguarding of national security;

- the “ethics and standards of coverage of civil and public disorder”;
- programmes that simulate news and events that mislead or alarm the audience.

Section 25 empowers the Minister to direct the Authority to determine programming standards if he believes that an existing code of conduct is inadequate because it does not provide “adequate community safeguards”. The Minister may also direct the Authority to vary or revoke any standard in relation to a matter.

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

Besides the Minister’s powers in relation to licensing and in relation to the prescription of programming standards, section 46 confers all regulation-making powers on the Minister. Item 7 of Schedule 6 to the Act also permits the Minister to prescribe local content conditions.

- *Provisions for media not controlled by the state:*

The Act applies both to the public broadcaster (the ZBC) and to the private and community broadcasting sectors.

- *Body which enforces compliance with the Act:*

The Act confers co-jurisdiction between the Authority and the Minister to enforce compliance with the Act.

- *Provisions limiting media ownership:*

A number of provisions limiting media ownership are contained in the Act. It imposes restrictions on the number of broadcasting and signal carrier licences that may be issued, which limit the number of new market entrants. In addition, the Act imposes limitations on cross-media ownership and on the concentration of ownership of licences.

Section 9(1) provides that, other than the public broadcaster, only one national free-to-air radio broadcasting service and one national free-to-air television broadcasting licence may be issued. Section 9(2) only allows for one signal carrier licence to be issued to a person other than the public broadcaster. Section 9(3) prohibits a broadcasting licence and a signal carrier licence from being issued to the same person, although the public broadcaster is exempt from this provision.

Section 19 places limitations on cross ownership between broadcasters, signal carriers, newspapers, telecommunications licensees and advertising agents. This section prohibits broadcasting licensees from owning, controlling or holding

securities in another broadcasting licensee. A broadcaster may also not own more than 10% of the securities in a newspaper.

The Act further prohibits the same person from simultaneously owning or controlling a broadcasting licensee and a signal carrier licensee, and provides that no licensee may be owned or controlled by an advertising agent.

Section 20 prohibits political parties and organisations from holding or having control of either a broadcasting or signal carrier licence. In terms of section 21, no person is allowed to have more than one commercial radio or television broadcasting licence.

- *Consequences of non-compliance with the Act:*

It is an offence to provide a broadcasting service or a broadcasting signal carrier service in Zimbabwe. Non-compliance can result in a fine or a sentence of imprisonment being imposed on conviction under section 7 or section 27 respectively. A conviction can result in all of the broadcasting apparatus that was used to commit the offence being forfeited to the state. Under section 25, licensees can also be ordered to pay a fine for breaching a code of conduct. Licensees run the risk of having their licences cancelled if they do not pay the penalty.

Section 32 requires every licensee to pay a prescribed annual levy into the Broadcasting Fund set up in terms of the Act. Failure to pay the levy is an offence which could result in the licensee's licence being suspended or in the licensee being ordered to pay double the levy due.

4.6 Zimbabwe Broadcasting Corporation (Commercialisation) Act, 2001

- *Date of commencement:*

The Act was passed in 2001, but the researchers were unable to ascertain the exact commencement date.

- *Purpose of the Act:*

The purpose of the Act was to corporatise the ZBC into a broadcasting company and a signal carrier company.

- *Sector of the media governed by the Act:*

The Act governs the public broadcaster, the ZBC and its two successor companies. The researchers have been told that the two successor companies

were established after the Act was passed: they are the ZBC, which now provides broadcasting services only, and Transmedia, which is a signal carrier.

- *Key provisions:*

Section 3 provides for the breaking up of the ZBC, and for the formation of a signal carrier company and a broadcasting company as successor companies to the ZBC. According to section 4(1), the primary objects of the signal carrier company extend beyond mere signal distribution services to include satellite broadcasting and subscription television services. According to section 4(2), the primary object of the broadcasting company is to provide broadcasting services, among other things. In terms of section 9, both successor companies are deemed to be licence holders, and as such do not need to apply for licences under the Broadcasting Services Act.

In terms of section 5, it is intended that the state should be the initial sole shareholder in both successor companies. This section provides that on incorporation, the Minister must nominate all the shareholders after consultation with the President, with adverse consequences for the autonomy of the public broadcaster. The Act makes it clear that whoever the shareholder is must hold the shares on behalf of the state.

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

The Minister has the power to secure the formation of the two successor companies and to nominate shareholders in the companies after consultation with the President.

In consultation with the Minister responsible for Finance, the Minister is also empowered in terms of section 6, to specify the assets and the liabilities of the Corporation to be transferred to the successor companies. In terms of section 8, the Minister also has the power to give binding directions to the ZBC's Board to ensure proper transfer of the Corporation's assets and liabilities to the two successor companies, with negative implications for the autonomy of the public broadcaster from the state.

- *Provisions for media not controlled by the state:*

None

- *Body which enforces compliance with the Act:*

The Zimbabwe Broadcasting Authority is vested with regulatory powers over the ZBC in terms of the Broadcasting Services Act.

- *Provisions limiting media ownership:*

None

- *Consequences of non-compliance with the Act:*

None of any relevance to this report.

5 Regulations

None of the regulations received are relevant to this report.

6 Media codes of conduct

We have no record of any codes of conduct.

7 Court cases

7.1 Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for State for Information and Publicity in the President's Office & Others (ZSC, SC20/03, 11 September 2003)

- *Date of judgment:*

11 September 2003

- *Sector of the media affected by the judgment:*

The judgment applies to the print media.

- *Key legal principles established:*

This controversial case effectively resulted in the closure of the *Daily News* – one of the independently owned newspapers in Zimbabwe – that had refused to register with the Media and Information Commission, as is required by the Access to Information and Protection of Privacy Act.

- *Court handing down the judgment:*

Zimbabwe Supreme Court

- *Key provisions of the judgment:*

Section 66 of the Access to Information and Protection of Privacy Act requires

all mass media providers (including newspapers) to register with the Media and Information Commission. One of the independently owned newspapers, the *Daily News*, refused to register on the basis that section 66 is unconstitutional. As a result of the applicant's non-compliance with section 66 of the Access to Information Act, the *Daily News* was shut down.

The *Daily News* subsequently launched an application in the Supreme Court of Zimbabwe challenging the closure on the basis that the registration requirement unduly infringed the newspaper's constitutionally protected right to freedom of expression. The court took a so-called 'clean hands' approach in rejecting the applicant's argument. It held that even though the constitutionality of section 66 of the Access to Information Act was debatable, the section was not blatantly unconstitutional. The court was at pains to point out that licensing of the print media is not peculiar to Zimbabwe and also takes place in other jurisdictions. The court concluded that "citizens are obliged to obey the law of the land and argue afterwards ...". The court therefore held that it could entertain the *Daily News'* constitutional challenge only once the paper had registered with the Commission in terms of section 66 of the Access to Information Act. Accordingly, the court dismissed the application.

7.2 *Tsvangirai and others v the Editor, Herald Newspaper and Another* (High Court of Zimbabwe HC – 5182/2002 9 April 2003)

- *Date of judgment:*
9 April 2003

- *Sector of the media affected by the judgment:*
The judgment is of primary application to the print media but the principles established in the case are of equal application to the broadcasting sector.

- *Key legal principles established:*
The court upheld the constitutionality of a statute that provided for a mandatory right of reply.

- *Court handing down the judgment:*
High Court of Zimbabwe

- *Key provisions of the judgment:*
In this case, *The Herald* newspaper had published a number of allegations about

Morgan Tsvangirai, leader of the opposition MDC party in Zimbabwe. Tsvangirai sought to exercise his statutory right to reply under section 89 of the Access to Information and Protection of Privacy Act.

The wording of this section provides:

“(1) A person or organisation in respect of whom a mass media service has published information that is not truthful or impinges on his rights or lawful interests shall have a right of reply in the same mass media service at no cost to him, and the reply shall be given the same prominence as the offending story.

(2) The reply shall be featured in the next issue of the mass media service.”

The Herald declined to grant Tsvangirai a right of reply, pursuant to which Tsvangirai instituted proceedings in the High Court in an attempt to enforce compliance with the Act. In his pleadings, Tsvangirai asked the court to order the paper to publish his reply without amendment, so as not to nullify the effect of the amendment. (In its judgment, the court referred to this as an “amendment-proof right of reply”.)

The Herald opposed the application on the basis that the relief sought would have unduly interfered with editorial judgment and control, thus detracting from the right to freedom of expression. The court dismissed Tsvangirai’s application.

In reaching its decision, the court considered that an amendment-proof right of reply invites the criticism that it “make[s] unwarranted inroads into editorial control in respect of quality of the material published and the way in which issues of public interest are treated”. In its judgment, the court referred with approval to the US Supreme Court’s ruling in *Miami Herald Publishing Co v Tornillo* (418 US 241 (1974)), where a statute providing for the right of reply was considered. In that case, the Supreme Court declared the statute to be unconstitutional. This was because the statute in question obliged the print media to publish replies in a certain way.

Specifically, the statute provided that the right of reply had to appear in a conspicuous place and in the same kind of type as the charges that prompted the reply. Following the US decision in *Miami Herald Publishing Co v Tornillo*, the Zimbabwe High Court dismissed Tsvangirai’s wish for the paper to publish his reply verbatim.

The court also declared that Tsvangirai's request did not have any statutory basis. This is because section 89 of the Access to Information and Protection of Privacy Act did not specify how the right of reply should be exercised. The court accordingly upheld the constitutionality of section 89.

The court found that Tsvangirai therefore could avail himself of the statutory right of reply under section 89. However, the court held that in order for the right of reply to kick in under the Access to Information and Protection of Privacy Act, a person seeking to rely on section 89 would have to establish that the information that was published is untruthful or that it impinges on his rights and lawful interests. In this case, the court held that Tsvangirai did not qualify to exercise the right of reply under section 89 because he had merely alleged that the article contained falsehoods without establishing this.

7.3 *Mandaza v Daily News & Another High Court of Zimbabwe (HC-7016/01, 28 August 2002)*

- *Date of judgment:*

28 August 2002

- *Sector of the media affected by the judgment:*

The judgment dealt with the application of the right to privacy in respect of the print media but the principles established apply equally to the broadcasting sector.

- *Key legal principles established:*

The case dealt with the right to privacy of public figures.

- *Court handing down the judgment:*

High Court of Zimbabwe

- *Key provisions of the judgment:*

The applicant, who was a renowned academic, author and publisher applied to the Zimbabwe High Court to interdict a newspaper from publishing defamatory material about him. In this case, the newspaper concerned had published photographs of properties that the applicant acquired and had also published an article alleging that the plaintiff had obtained the properties by illegal means.

The court granted the applicant an interim interdict but refused to issue a final

interdict as the applicant had not established a clear right to relief, which is one of the requirements for a final interdict.

In motivating for the interdict, the applicant alleged that the photographs had been taken without his consent, and that this amounted to a violation of his right to privacy.

The applicant could not prove that the newspaper had illegally trespassed on to his properties or over his airspace to take the photographs. In arriving at its decision to decline the granting of a final interdict, the court considered that photographs of a public figure did not constitute “sensitive personal data”, and that the intrusion did not amount to an unwarranted intrusion on the applicant’s right to privacy.

7.4 Retrofit (Pvt) Limited v Minister of Information, Posts and Telecommunications 1996 (1) SA 847 (ZS)

- *Date of judgment:*

29 August 1995

- *Sector of the media affected by the judgment:*

The case dealt with the telecommunications sector; however, it enumerates a number of general principles about the right to freedom of expression and the right to receive and impart information and ideas that are of equal application to the broadcast and print media.

- *Key legal principles established:*

The case established the principle that a government monopoly on telecommunications interferes with the right of the public in their means of expression – the medium through which the public communicates.

- *Court handing down the judgment:*

Zimbabwe Supreme Court

- *Key provisions of the judgment:*

The applicant, a hopeful mobile operator, challenged the constitutionality of section 26(1) of the Postal and Telecommunications Act, which granted a monopoly on the Zimbabwe Posts and Telecommunications Corporation in the provision of telecommunication services. The applicant contended that the

monopoly constituted an unjustifiable limitation on the right to freedom of expression. The court agreed with the applicant and declared the monopoly of the Zimbabwe Posts and Telecommunications Corporation to be unconstitutional. In arriving at its decision, the court reasoned that the right to freedom of expression does not only extend to the right of individuals to express themselves but also guarantees that individuals are not hindered in the means in which they express themselves. The court held that in addition to applying to content, the right to freedom of expression also applied to the means of transmission and reception of ideas and information.

7.5 *Capital Radio (Pvt) Ltd v Minister of Information* 2000 (2) ZLR 243 (S)

- *Date of judgment:*

22 September 2000

- *Sector of the media affected by the judgment:*

The judgment applies to the broadcast media.

- *Key legal principles established:*

The case established the principle that a government monopoly over the broadcast media constitutes an unjustifiable infringement on both the right to freedom of expression, and on the constitutionally entrenched right to receive and impart ideas and information.

- *Court handing down the judgment:*

Zimbabwe Supreme Court

- *Key provisions of the judgment:*

The applicant, a privately owned radio station, brought a constitutional challenge to section 27 of the Broadcasting Act which granted the ZBC a monopoly in broadcasting services, and sections 14(1) and 14(2) of the Radiocommunication Services Act, which prohibited anyone other than the ZBC from operating a radio station. The applicant contended that these provisions were inconsistent with the right to freedom of expression in the Zimbabwe Constitution.

The court agreed with the applicant that the ZBC's broadcasting monopoly was unconstitutional. The court placed reliance on the *Retrofit* cases in concluding that the monopoly interfered with the applicant's freedom of expression, and more particularly the right to receive and impart ideas and information.

7.6 *S v Modus Publications (Pvt) Ltd and Another* 1996 (2) ZLR 553 (S)

- *Date of judgment:*

7 November 1996

- *Sector of the media affected by the judgment:*

The case dealt with a charge of criminal defamation against the print media but the legal principles established in the case are of equal application to the broadcast media.

- *Key legal principles established:*

The case established that in a case of criminal defamation, the state must prove that the accused had the necessary intention to defame (*animus injuriandi*), unlike in a civil defamation action, where there is no presumption of *animus injuriandi*.

- *Court handing down the judgment:*

Zimbabwe Supreme Court

- *Key provisions of the judgment:*

One of Zimbabwe's independent newspapers, the *Financial Gazette*, had published a number of articles in which it alleged that the President of Zimbabwe had married the mother of his two children at a secret ceremony. The stories further alleged that a named judge of the High Court had conducted the ceremony and that a named Minister had been a witness at the ceremony. The publication of the articles led to the newspaper, the editor of the newspaper and the reporter who wrote the story being convicted of criminal defamation. The three accused took their convictions on appeal all the way to the Zimbabwe Supreme Court. However, the court confirmed the convictions and dismissed the appeal. The court held that criminal defamation consists of the unlawful and intentional publication of matter concerning another which injures his reputation. The court stated that the defamation has to be serious before it can be said to constitute a crime.

The court ruled that the degree of seriousness should be determined with reference to the extravagance of the allegation, the extent of the publication and whether the words are likely to detrimentally affect the interests of both the state and the community. On the facts of the case, the court found in the circumstances of the case that the accuseds did not honestly believe the wedding story, but had nevertheless proceeded to publish it recklessly. The court inferred that the accuseds thus had the necessary intention to defame.

7.7 *Mujuru v Moyses & Others* 1996 (2) ZLR 642 (H)

- *Date of judgement:*

27 November 1996

- *Sector of the media affected by the judgment:*

The judgment applies to the print media.

- *Key legal principles established:*

The case established the principle that it is an insufficient defence for the printer or distributor of a publication seeking to escape liability for defamation to allege that it was unaware of defamatory content contained in the publication. The court held that the printer or distributor must discharge the onus to satisfying the court that reasonable measures were taken to ensure that the publication did not contain a defamatory statement.

- *Court handing down the judgment:*

High Court of Zimbabwe

- *Key provisions of the judgment:*

The editor, owner, printer and two distributors of a monthly magazine were sued for defamation. The printer and the distributor sought to escape liability on the basis that they were unaware that the publication contained defamatory comments, impliedly because they had no hand in the content of the article.

The court rejected this defence. In arriving at its conclusion, the court stated that a printer or a distributor of a publication has a duty of care not to reproduce or disseminate publications containing defamatory material. The court further stated that printers and distributors have a positive obligation to take reasonable steps to avoid printing or distributing defamatory matter. The judgment thus places a heavy onus on printers and distributors who ordinarily are not involved in the production or editing of the content of publications. The potential of such a rule in the common law to chill freedom of expression in the media is enormous.

Annexure

Legislation and law impacting on freedom of expression in the target countries

1 General overview

The researchers surveyed legislation in a number of areas in each of the four countries. The statutes that were analysed can be categorised into some broad theme areas, namely: broadcasting; the print media; censorship; access to information; defence and internal security; and the protection of confidential sources. Each of these themes is dealt with separately below.

Not all of the target countries have enacted legislation in each of these areas, and in some cases, the researchers were unable to ascertain the existence of legislation in these areas. Many countries have supplemented their statutory regime with regulations and codes of conduct. Codes of conduct tend primarily to be used to regulate standards of conduct in the broadcasting and print media industries, and take a combination of forms that range from being prescribed by way of statute or regulation to being administered on a voluntary basis.

The case law that was surveyed related broadly to the application of the right to freedom of expression in the common law, the application of statutes that restrict the right to freedom of expression of the media, and to the development of the law of defamation. In some countries, particularly Zimbabwe, the statutory regime has been applied to independent media houses with the result that they are sometimes forced to close down.

In this section, only an overview of the legislation and policy trends will be given. Reference will be made to ancillary instruments, such as regulations and codes of conduct, as well as to the common law in the overview where applicable, all of which tend to track legislation in any event.

2 Broadcasting

The first theme area relates to the regulation of the broadcasting industry. Legislation in this area typically deals with such things 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, the regulatory 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 daily operational decisions. This is usually 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 formulation, regulation and broadcasting 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.

There are, however, certain indicators that can be used to measure the degree of independence of the regulator from the government. A number of factors impact

on the independence of the regulator, the more important of which include such things 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; and
- 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 such things as licensing, for example, is vital for ensuring an independent private broadcasting sector that is not handpicked by the government.)

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

- 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.

3 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, some countries take this further (notably Zimbabwe) by requiring newspapers to pre-register with an appointed government agency before they can operate legally.

In Zimbabwe, both journalists and newspapers are required to apply for pre-approval with the Media and Information Commission, which has the discretion to approve and reject applications. This is problematic because it effectively allows the government to handpick who it will permit to establish newspapers in the country and to silence dissident voices. We have also come across case law in Zimbabwe indicating that papers not registered with the Commission will be forced to close down.

4 Censorship

All of the target countries surveyed had enacted legislation providing for the censorship and classification of the content of films and printed matter. (The exception is Namibia, where we did not ascertain whether or not such legislation exists.)

Legislation of this nature typically requires certain types of films and publications to be pre-approved by a censorship board before it may be distributed to the public. In South Africa, the legislation also empowers the Film and Publications Board to pre-classify material before it is made public.

In some countries, however, censorship legislation takes this further. Notably in Zimbabwe, the censorship board's powers also extend to the pre-approval of live

forms of public entertainment, such as theatrical productions and the like. Censorship legislation in Malawi stipulates that anyone seeking to stage any form of public entertainment (such as stage plays and film screenings) must obtain a theatre licence. However, the primary purpose behind the issuing of the theatre licences is to ensure such things as the safety of audiences, and not to control the content of what may be screened at a theatre.

5 Access to information

South Africa and Zimbabwe have both passed legislation which regulates access to information held by the state and by organs of state. (The researchers did not ascertain whether Namibia and Malawi have enacted similar legislation.) In South Africa, the legislation takes it one step further and also provides for a right of access to information that is held by private bodies.

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 where it relates to the defence and security of the state, to name a few.

6 Defence and internal security

We came across a number of defence-related, 'official secrets'-type legislation which restrict access to information for state security reasons.

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, such as the European Convention on Human Rights, also allow for the abrogation of the right to freedom of expression where national security considerations require this.

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 very broad and vague terms and thus casts the net of liability extremely widely. Some of the official secrets-type legislation 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 surveyed all made provision for both fines and prison sentences to be imposed.

7 Protection of confidential sources

In one of the countries surveyed (South Africa), statutory provision is made to allow for the disclosure of journalists' confidential sources of information. This provision in the South African legislation is a carry-over from the 'bad old days' of apartheid, and it probably would not withstand constitutional muster today. Interestingly, the Press Ombudsman Code in South Africa (which governs journalists in the print media sector on a voluntary basis) precludes journalists from disclosing their confidential sources of information.

Some jurisdictions in the world (such as in the US) give journalists a statutory right to protect their confidential sources of information. Other countries allow journalists to refuse to testify in court without 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, existing and potential sources would be unwilling to pass information on to journalists, thereby limiting 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.

List of acronyms

ANC	African National Congress
ASA	Advertising Standards Authority
BCCSA	Broadcasting Complaints Commission of South Africa
BMCC	Broadcasting Monitoring and Complaints Committee
CAN	Communications Authority of Namibia
CEO	Chief executive officer
IBA	Independent Broadcasting Authority
ICASA	Independent Communications Authority of South Africa
ISP	Internet service provider
JSC	Judicial Service Commission
MACRA	Malawi Communications Regulatory Authority
MBC	Malawi Broadcasting Corporation
MCP	Malawi Congress Party
MDC	Movement for Democratic Change
MDDA	Media Development and Diversity Agency
NAB	National Association of Broadcasters
NBC	Namibian Broadcasting Corporation
NCA	Namibian Communications Authority
NCC	Namibian Communications Commission
NGO	Non-governmental organisation
PPC	Presidential Press Corps
SABC	South African Broadcasting Corporation
SADC	Southern African Development Community
SATRA	South African Telecommunications Regulatory Authority
SCA	Supreme Court of Appeal
SWAPO	South West African Peoples' Organisation
TMT	Telecommunications, Media and Technology
UDF	United Democratic Front
UDI	Unilateral declaration of independence
US	United States
ZANU-PF	Zimbabwe African National Union–Patriotic Front
ZAPU	Zimbabwe African People's Union
ZBC	Zimbabwe Broadcasting Corporation