

THE COURT'S ROLE IN CONTRIBUTING TO A CULTURE OF ACCOUNTABILITY FOR CORRUPTION

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Introduction

Early in 2016, Sonny Serite, a freelance journalist in Botswana was arrested and detained after he published a story about corruption at a State-owned entity. After being denied access to his lawyer, Serite was questioned about revealing the sources for his information and told that refusing to do so was in violation of the National Security Act of 1986.² That Act requires that if there is a reasonable suspicion that information indicating the commission of an offence under the Act is in the possession of an individual that information must be given to a police officer. The charges were later dropped, but many commentators argued that the mere fact of the arrest and detention contributed to a culture of fear pervading journalism in Botswana.

Serite's case is not the only one in Botswana where journalists have been harassed and charged with criminal offences, nor is Botswana the only country in Southern Africa where this is becoming increasingly common. In just the last two years, journalists have been charged with sedition in Botswana, publishing false news in Zimbabwe and criminal defamation in Lesotho. In many cases, criminal charges are instituted soon after the journalists published stories involving misconduct by high profile individuals, and very often the charges appeared to be an attempt to muzzle the journalists or bury the story. Corruption is a threat to effective and sustained development in any society, and the lack of ventilation of allegations prevents accountable public institutions. Sustainable Development Goal 16 seeks to “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”, and target 16.5 specifically calls on countries to “[s]ubstantially reduce corruption and bribery in all their forms”.³

Freedom of expression – including the freedom of the media – is not absolute, and there are perfectly rational reasons for seeking to limit the right in certain circumstances. The rationale behind criminalising certain forms of expression is to provide protection for other important rights and interests. Many formulations of the right in international or domestic treaties or constitutions contain internal limitations. For example, most nations explicitly exclude speech that damages others' reputations or threatens public safety. These limitations serve an important purpose as they enable individuals to fend off unwarranted attacks on their dignity and provide law enforcement officials with the tools to prevent incitement to violence and hatred.

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- 2 Cap. 23:01 of the Laws of Botswana.
- 3 A/RES/70/1 (21 October 2015) para. 59.

The problem with justifiable limitations is that they can be abused and used as a convenient mechanism to silence political opponents or other unpopular voices. While laws and principles that limit the freedom of the media to publish confidential or private information serve to protect privacy, they can also be used to hide information about wrongdoing. Corruption is often performed by those in powerful positions. These individuals can use those positions of power to suppress evidence of that corruption. This is why it is so important to make information about corruption public, and also why accountability for corruption is so hard to achieve.

In environments where laws limiting expression are being abused, courts are often an important avenue that can be used to protect journalists. This paper will examine two recent South African judgments which demonstrate how courts can protect the right to freedom of expression and ensure that the media is given space to uphold its obligation to keep the public informed. These judgments provide examples of how courts can contribute to achieving Goal 16.

The Relationship between Freedom of Expression, Media Freedom, Accountability and Transparency

Freedom of expression is a fundamental human right in and of itself: being able to express oneself freely is beneficial for the personal development of individuals. However, the right is chiefly important because of the role it plays in enabling the democratic process. Without freedom of expression, citizens' ability to form opinions about public officials and their conduct is hindered. This, in turn, impacts on their ability to mobilise around issues of concern to them and then vote for their public officials of choice. A free and independent media is an essential component of democracy because it enables information to be uncovered and disseminated to the public. Without that, individuals' opinions and participation in democracy is circumscribed.

A South African High Court provided a powerful description of how the media contributes to democracy through ensuring accountability of those who serve as public officials:

“The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.”⁴

The South African Supreme Court of Appeal explained exactly how the press plays this role:

“[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their

4 *Government of the Republic of South Africa v Sunday Times Newspaper and Another* (1995) 2 SA 221 (T) 227H - 228A.

fellow citizens, to officialdom and to government.”⁵

The African Commission has recognised the importance of the right to freedom of expression and the role the media should play in African societies. In the African Commission’s Declaration of Principles of Freedom of Expression in Africa of 2002, the preamble states that it is “[r]eaffirming the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms”. Furthermore, the Declaration highlights the central role the media plays in giving effect to the right, and providing the foundation for citizens’ informed participation in the democratic process. The Declaration was made:

“[c]onsidering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy”⁶

As already mentioned, in many societies beset by corruption it is the media that provides citizens with the information required to make those informed decisions referred to in the Declaration. Although a handbook to the United Nations (UN) Convention Against Corruption identifies that there is no internationally accepted definition of corruption because of the diverse legal, criminological and political systems, it does comment that all working definitions of corruption are variations of this general formulation: corruption is “the misuse of a public or private position for direct or indirect personal gain.”⁷

Whatever definition we use, it is widely accepted that corruption is a threat to good governance, political stability and economic and social development. The UN Secretary General remarked that corruption “undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish.”⁸ The African Union’s (AU) Convention on Preventing and Combating Corruption also recognises “the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples.”⁹ In addition the AU acknowledged that “corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent.”¹⁰

The Convention also recognises the important role the media plays in the fight against corruption. Article 9 states that “[e]ach State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.” Article 12(4) requires States to “[e]nsure that the Media is given access to information in cases of corruption and related offences on condition that the dissemination of

5 *National Media Ltd and Others v Bogoshi* (1998) 4 SA 1196 (SCA) paras. 23-24 (citations omitted).

6 African Commission Declaration of Principles of Freedom of Expression in Africa (2002) Preamble.

7 “United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators” (September 2004) 23 available at <https://www.unodc.org/pdf/crime/corruption/Handbook.pdf> (last accessed: 20 November 2016).

8 KA Annan, Foreword to “United Nations Convention against Corruption” UN (2004) iv.

9 African Union Convention on Preventing and Combating Corruption (2003) Preamble.

10 *Id.*

such information does not adversely affect the investigation process and the right to a fair trial.”

Investigative journalists like Serite seek to play that important role of uncovering corruption and making citizens aware of that corruption so as to hold their public officials accountable. But, uncovering corruption is one of a journalist’s most dangerous jobs. The Committee to Protect Journalists (CPJ) analysed all the deaths of journalists between 1992 and 2016, and 20 percent of the victims had reported on corruption.

Journalists who seek to report on stories of corruption face considerable risks. When it comes to corruption, the balance between rights too often falls against freedom of expression. The individuals engaged in corruption also tend to be in charge of law enforcement and will use that power to shield themselves from accountability. Courts have the tools to reverse this.

Some South African Examples

Two recent judgments from South Africa have demonstrated a strong commitment to uphold the right to freedom of expression.

In the first, *M and G Centre for Investigative Journalism and Others v National Director of Public Prosecutions and Others*,¹¹ the North Gauteng High Court reviewed the decision by the National Director of Public Prosecutions (NDPP) to refuse a request from a media house that sought to gain permission to publish information related to a corruption investigation. In 2011, the Mail and Guardian’s investigative journalism centre had learnt about an investigation into Mr Mac Maharaj – at that time the Minister of Transport – and his wife, and had obtained copies of the record of the investigation. The investigation related to the “Strategic Defence Package” (colloquially known as the “Arms Deal”) and allegations of widespread corruption in the South African government’s acquisition of military equipment. The transcripts the Mail and Guardian had obtained contained interviews from 2003 with Mr Maharaj about his relationship with Mr Schabir Shaik, an individual who had since been convicted of corruption and who had close ties with President Jacob Zuma. The Mail and Guardian believed that the content of the transcripts contradicted what had actually happened and that the discrepancies indicated that a criminal offence may have been committed, an offence which had not been prosecuted. The newspaper submitted that this meant that their publication of the information would provide the public with information about wrongdoing by Mr Maharaj and the National Prosecuting Authority.

The high profile of the individuals involved in the investigation meant that it was of significant public interest. However, section 41(6) of the National Prosecuting Authority Act¹² makes it an offence to disclose the record of an investigation, unless permission has been granted by the NDPP. The sanction for infringing section 41(6) is a fine or imprisonment for a period up to fifteen years.¹³ The purpose behind the legislative requirement of seeking permission from the NDPP is to preserve confidentiality, but because the NDPP retains discretion on whether the information can be published the confidentiality is not absolute. After being warned by Mr Maharaj’s lawyers

11 (37510/2012) (2016) ZAGPPHC 613.

12 Act 32 of 1998.

13 *Id* at section 41(7).

that publishing the information amounted to a criminal offence under the National Prosecuting Authority Act, the Mail and Guardian sought permission from the NDPP to publish the information. The newspaper argued that not only was the information in the public interest, it was also already in the public domain; its confidentiality had already been breached.

The NDPP refused the request, stating that the legislation requires a “general policy of non-disclosure” and that any disclosure could negatively affect the inquiry into the arms deal.¹⁴ This decision served to shield the information from public scrutiny and prevented the public – and therefore voters – from learning about the connections between a cabinet minister and a convicted fraudster. The Mail and Guardian then submitted the NDPP’s decision for review, arguing, in part, that the NDPP had failed to consider that it would be in the public interest to publish the information and that she had safeguarded the interests of those mentioned in the investigations.¹⁵

The NDPP and Mr Maharaj and his wife argued that if the NDPP had given permission to the Mail and Guardian to publish the information, it would have put future investigations at risk as individuals who may be questioned under the legislation may refuse to cooperate knowing that their confidentiality may not be preserved.

In its judgment the High Court recognised the manner in which the legislation infringes the right to freedom of expression, but also how, in this case, the NDPP had a responsibility to ensure that the right is not disproportionately limited:

“The provisions of section 28(1) is a drastic interference with freedom of expression, which requires the NDPP to strike the correct balance between securing the integrity of the criminal justice system and upholding freedom of expression.”¹⁶

The Court characterised the National Prosecuting Authority Act’s prohibition on publication as a “prior restraint” on publication and refers to South African jurisprudence which held that prior restraints can only be justifiable when there is a “real risk” that prejudice or injustice would result.¹⁷ This position is a powerful one: it means that a party arguing that the publication of information is detrimental to them must demonstrate the extent of that harm. In *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*, the Supreme Court of Appeal explicitly noted that “it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information.”¹⁸

In coming to its decision, the Court in *Mail and Guardian* also made reference to the quote mentioned above that the duty of the media was to “ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators.”¹⁹ Although the deciding factor in determining that the NDPP had acted irrationally in refusing to permit the publication was that the information was already in the public domain, the Court made it very clear that it was in the

14 *M and G Centre for Investigative Journalism* (37510/2012) (2016) ZAGPPHC 613, paras. 9 and 10.

15 *Id* para 11.

16 *Id* para 69.

17 See *Print Media South Africa v Minister of Home Affairs* (2012) 6 SA 443 (CC); *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* (2007) ZASCA 56.

18 *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* (2007) ZASCA 56, para 19.

19 *Government of the Republic of South Africa v Sunday Times Newspaper and Another* (1995) 2 SA 221 (T) 2271.

public interest that the information be published, and that the NDPP was wrong in not taking that public interest into account when she refused the request to publish.

The High Court took its lead from the Johannesburg High Court in *Tshabalala-Msimang and Another v Makhanya and Others*²⁰ which had stated that “the publication of...unlawfully obtained, controversial information was capable of contributing to a debate in our democratic society relating to a politician in the exercise of her functions.”²¹

In another South African High Court case, *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others*,²² the Johannesburg High Court looked at the question of whether public interest could override conditions of legal privilege. As the High Court noted, the financial affairs of South African Airways (SAA), the South African national airline, had been of great public interest and concern. In this case, the particular controversy centred around the purchase of new aircraft by SAA and where the funds for this purchase had come from.²³ The general manager of SAA’s legal risk department had provided a legal memorandum to SAA’s chief executive officer setting out, among other things, the legal position of SAA not paying Airbus, and whether such non-payment would constitute a breach of South African legislation. As a legal memorandum, this document was confidential and covered by attorney-client privilege. However, the contents of this document were made public, and various media houses published stories in connection with it.

The main issue in Court was whether SAA, through various actions, had waived the legal privilege attached to the memo, and whether publication could be prohibited when the relevant information was already in the public domain. The Court held that it would be futile to find that SAA should be protected by legal privilege because the confidentiality of the information had already been breached. However, the Court took the opportunity to discuss the relationship between freedom of expression, the public interest and legal privilege. The Court commented that even if it had found that a prohibition would not be futile, the public interest would require that it be published:

“[T]he controversy about SAA and its dependence on taxpayer funds seems to me to be a demonstrably obvious topic about which every citizen has a tangible interest to be informed. If the constitutional promise of transparency in public administration is to mean anything, then awareness of what public bodies do with the nation’s money is a low threshold to demand. When an existing controversy is raging, this is all the more so. Accordingly, the public interest in being informed outweighs the right of SAA to confidentiality in the contents of the document.”²⁴

In both these cases the courts considered the nature of the institutions and individuals involved, and gave weight to their high profile and political connections. The High Court then held that because of this, the public had a right to be informed about misconduct. In this case, the right to freedom of expression outweighed the individuals’ or institutions’ rights to confidentiality. These cases demonstrate that the courts have the power to apply a rights based analysis that can give effect to accountability and that provides the media with the legal space to pursue stories with potentially serious political ramifications.

20 *Tshabalala-Msimang and Another v Makhanya and Others* (2008) 6 SA 102 (W).

21 *Id* para. 46.

22 *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others* (2016) 2 SA 561 (GJ).

23 *Id* para 4.

24 *Id* para 65.

A Cautionary Tale

The misconduct in the two cases mentioned above was predominantly professional, and the private affairs of public officials were not at issue. Another South African case, *Tshabalala-Msimang v Makhanya*,²⁵ is an example of how difficult balancing the rights to freedom of expression and privacy can be when private lives are affected.

In that case, the personal medical results of Manto Tshabalala-Msimang, the then-Minister of Health, were published in the Sunday Times newspaper. The report created an inference that the Minister was an alcoholic and that she should have been disqualified from receiving a liver transplant as a result. The Minister's conduct appeared to be in direct conflict with conduct she, as Health Minister, was recommending as medical guidelines. The Johannesburg High Court found that a law prohibiting the sharing of medical records *had* been contravened making the publication of the medical information unlawful. However, the Court stated that the public "has the right to be informed of current news and events concerning the lives of public persons such as politicians and public officials."²⁶

The effect of this judgment is that, while recognising the right of public persons to privacy, sometimes the public interest in private information may well override that privacy. The Court characterised this case as one "where the need for truth, is in fact overwhelming."²⁷

But, the judge expressed his discomfort with the ruling and the impact the violation of confidentiality had on Ms Tshabalala-Msimang and her family. The judgment ends with a lengthy comment on the conduct of the journalists in publishing information that has not been legally obtained. The Court stated that even though it might be in the public interest to have published that information it still may not have been the correct decision. The Court mused that the Press Ombudsman (to determine the journalistic ethics) and the National Prosecuting Authority (to determine the criminal responsibility) may be required to look into the journalists' conduct.

Misconduct by public officials is a serious threat to democracy, accountability and transparency and should generally be exposed. However, the officials' rights to privacy, reputation and dignity may well be severely infringed in the process. The judgment in the *Tshabalala-Msimang* case demonstrates that the true public interest of the information may be the defining factor in determining whether it should be published – but that this often remains a difficult decision.

Conclusion

The recognition of the need to substantially reduce bribery and corruption as a means to achieve SDG 16's goal of peaceful and inclusive societies for sustainable development and accountable institutions is instructive. The SDGs therefore, as the UN and AU have before, acknowledge the threat corruption poses to development and the need for action to curb it. This paper seeks to stimulate a debate on how judges, by creating the conditions for free reporting on corruption, can contribute to creating more accountable institutions. It acknowledges that the rights to privacy and

²⁵ *Tshabalala-Msimang and Another v Makhanya and Others* (2008) 6 SA 102 (W).

²⁶ *Id* para 38.

²⁷ *Id* para 50.

confidentiality may be infringed – sometimes harshly – but that in order to truly fight corruption, the media needs to be given the tools to expose it. The South African courts have recognised that as long as information is of sufficient importance, the public interest in publishing it may override competing considerations of confidentiality.