

SOUTH AFRICAN MEDIA LAW UPDATE

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JOURNALISTIC PRIVILEGE OR CITIZEN'S DUTY?

[221] Pre-1994 apartheid South Africa was characterised by oppressive limitation of press freedom. One of the reasons advanced was that the English language press was the real opposition in the South African political system.² Between 1985 and 1990, for example, the government used its emergency powers to comprehensively censor news and the media were effectively prevented from reporting events related to public violence. This action drew much adverse comment overseas. This reality is the rationale for the specific protection and independent guarantee of the press and other media by the Constitution of the Republic of South Africa, 1996, over and above the usual rationale that the press and other media contribute to and maintain an open and democratic society.³ Section 16 reads:

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

- (2) The right in subsection (1) does not extend to —
 - (a) propaganda of war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

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² TRH Davenport, *South Africa: A modern history* (1992) 385.

³ See for example G Marcus and D Spitz, 'Expression' in M Chaskalson *et al*, *Constitutional Law of South Africa* (1995) 20-20/21 who say: 'Freedom of the press is a necessary concomitant of freedom of expression. An important part of freedom of the press is the right to report on matters of public interest, however controversial or offensive, without inappropriate interference by the courts. Nevertheless, the specific textual enumeration of the press and other media ... signals the importance which the guarantee ascribes to the role of these institutions in protecting and contributing to an open and democratic society.'

[222] In *National Media Ltd and others v Bogoshi*,⁴ the Supreme Court of Appeal expressly recognised 'the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process'.⁵ However, as with all rights and freedoms, freedom of the media cannot be held to be absolute. The freedom is of necessity restricted by individual, social and state interests and demands. This is reflected in the Bill of Rights in s 36 (the limitation clause) which circumscribes the limitations which may be placed on all the rights enumerated in the *Bill of Rights*. (Section 16(2) furthermore represents, an internal limitation on the freedom of expression.) That no right is absolute holds particularly true in 'new' post-apartheid South Africa which in many respects, is still a society in transition.

One of the unfortunate manifestations of this society in transition is an unacceptably high level of violence and crime. This, in turn, puts particular strain on a police force which, in the throes of restructuring and transforming itself (from a primarily 'public order security force' to a 'community service-oriented police force') remains understaffed and overworked.⁶ Under these circumstances it is therefore not surprising that vigilantism in reaction to crime and violence and the perceived inability of the police to deal with the situation has flourished. One such vigilante group, operative in the Western Cape as *People Against Gangsterism and Drugs (Pagad)*, has gained notoriety in recent years and has been linked to a number of violent incidents.⁷

The Staggie incident

On 4 August 1996 about 2,000 *Pagad* supporters gathered and demonstrated at the home of the leader of the *Hard Livings* gang, Rashaad Staggie in London Road, Salt River (a suburb of Cape Town). As Staggie was walking down the road towards his house, he was gunned down and set alight by members of the crowd. For the next few

⁴ 1998(4) SA 1196 (SCA); 1999(1) BCLR 1 (SCA).

⁵ *Ibid* 1210H, 12C.

⁶ See, eg, *Department of State Human Rights Reports for 2000: South Africa* (released by the US Department of State 2001–02) for a reference to the position of the South African Police Service. Available online: <<http://www.humanrights-usa.net/reports/southafrica.html>>. In his reply to the debate of his 2001 budget vote, the President, Thabo Mbeki, also referred to the violence and acknowledged that '[o]ur society is subject to too high a level of violence. The government must take the lead in communicating the message that we have had enough of the violence in our society': *Pretoria News* (Pretoria) 23 June 2001, 3.

⁷ In the weekly newspaper *The Mail & Guardian*, under the heading 'A catalogue of Cape Town's reign of terror' Marianne Merten listed the incidents of violence of three years from late August 1996 until December 1999, available online at: <<http://www.mg.co.za/mg/news/99dec1/10dec-bomb.2html>>. See

days South African television and newspapers carried reports and vivid footage of this gruesome incident. Benny Gool, a specialist photographer of the *Cape Times*, took award winning photographs of the torching of Staggie.

Police investigations proved to be difficult. Eventually, however, they led to the arrest of five members of *Pagad*. The five were formally charged with the murder of Staggie and a trial date set for 13 November 2000. From the outset the state encountered problems in prosecuting the case. It became evident that the widely-published footage of the killing/murder would be crucial to the state's ability to proceed. It also became evident that the footage had all the potential of creating tension between the state and the press. The first trace of the tension was already in evidence when, during the formal inquest into the death of Staggie in 1998, the inquest magistrate ordered journalists to hand over relevant footage or to testify.⁸ According to [223] media reports, the subpoenas were subsequently withdrawn. However, these subpoenas effectively drew the battlelines for the stand-off. The second incident occurred, ironically enough, on International Press Freedom Day (19 October 2000) when members of the newly-established elite police unit, the Scorpions, raided the SABC (the South Africa's public broadcaster) and two overseas news agencies, Reuters and Associated Press in search of footage of the Staggie incident. The raid was roundly condemned in the media,⁹ not only as a threat to press freedom, but also as a renegade action on the part of the government in respect of an agreement reached between it and media representatives in February 1999. In terms of the informal accord (signed by the then Minister of Justice, Dullah Omar, the Chief Director of Public Prosecutions, Bulelani Ngcuka, and the then chairperson of the South African National Editor's Forum (SANEF), Moegsien Williams) consultation will take place between journalists and directors of public prosecutions should police seek to invoke legislation compelling journalists to disclose their sources.¹⁰

too *Keesing's Record of World Events: Africa 2000* (2000) for incidents attributed to *Pagad* in 2000.

⁸ The SABC, the *Cape Times*, *Cape Argus*, *Die Burger* and the *South African Press Association* (SAPA) were served with subpoenas. See Van Breda, 'Death film at Staggie inquest' (30 August 1998), available online at <<http://www.suntimes.co.za/1998/08/30/news/cape/nct11.htm>>.

⁹ See 'Poisoning Press Freedom Day 20-10-2000', available online at: <<http://web.sn.apc.org/mmp/updates/2000/20-10-2000.0.htm>>.

¹⁰ See 'Accord to protect media sources signed' (20/21 February 1999), available online at:

Compulsory disclosure of sources: s 205 of the Criminal Procedure Act

Section 205 of the *Criminal Procedure Act*¹¹ represents and is indeed, perceived by journalists as a threat to the constitutionally protected freedom of the press. (This, despite the fact that 'any person' is compelled to reveal information in relation to suspected offences.) The particular section was used by the state in the pre-1994 era 'almost exclusively' against journalists, very often in a bid 'to coerce journalists to disclose information concerning not only alleged offences but also the identity of confidential sources of that information'.¹²

Section 205 reads:

- (1) A judge of the supreme court, a regional court magistrate or a magistrate may ... upon the request of an attorney-general or a public prosecutor authorized thereto in writing by the attorney-general, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the attorney-general or the public prosecutor authorized thereto in writing by the attorney-general, of any person 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 ...

An amendment to this section was passed in 1993.¹³ The amendment had the effect that a person appearing before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information, will not be sentenced to imprisonment if he or she has a 'just excuse' for the failure.

In *Nel v Le Roux NO and Others*,¹⁴ the Constitutional Court (the highest court in constitutional matters in South Africa) had to consider the constitutionality of [224] s 205. The Constitutional Court upheld the constitutionality of the section but said:

If the answer to any question put to an examinee at an examination under s 205 of the

<<http://www/mg.co.za/mg/za/archive/99feb/19feb-news.html>>.

¹¹ Act 51 of 1977.

¹² L Johannessen and T Cohen, *Media Law and Practice in Southern Africa: South Africa: South Africa* (1996) 21.

¹³ *General Laws Sixth Amendment Act* 204 of 1993 (s 205 was substituted by s 11 of the Act.)

¹⁴ 1996 (4) BCLR 592 (CC); 1996(3) SA 562 (CC). The applicant was subpoenaed to appear before a magistrate to be examined in connection with information relating to offences with which another person associated with the applicant had been charged. On presenting himself to the examining magistrate (the

CPA would infringe or threaten to infringe any of the examinee's Chapter 3 rights [the chapter containing the Bill of Rights in the interim Constitution, now chapter 2 in the 1996 Constitution], this would constitute a 'just excuse' for purposes of s 189(1)¹⁵ for refusing to answer the question unless the s 189(1) compulsion to answer the particular question would, in the circumstances, constitute a limitation on such right which is justified under [the limitation clause] of the Constitution. In determining the applicability [of the limitation clause], regard must be had not only to the right asserted but also to the state's interest in securing information necessary for the prosecution of crimes.¹⁶

The court therefore held that s 205 has been fashioned as narrowly as possible to meet the legitimate state interest of investigating and prosecuting crime. The court held further that similar summary proceedings (which may lead to the imprisonment of witnesses) where the normal strict criminal procedure rules were not applied, were not unknown in other open and democratic societies based on freedom and equality. (The court referred in particular to the position in the USA.)¹⁷

Commentators on the decision were nevertheless generally of the opinion that the reasoning of the Constitutional Court has left 'scope' for an argument that a refusal by any journalist to reveal sources may establish 'just excuse' in appropriate circumstances.¹⁸ Hence, any examiner in s 205 proceedings has the duty to take into consideration that compelling a journalist to give any evidence may infringe his or her right to press freedom.

Issues impacting on 'just excuse'

The difficulties surrounding the Staggie incident should be judged in the context of both the Constitutional Court decision and South African realities. It has been said that s 205 has always been used almost exclusively against journalists. Moreover, it was

first respondent) the applicant's attorney on behalf of his client raised the constitutionality of s 205.

¹⁵ Section 189(1) provides: 'If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a *just excuse* [emphasis added] for his refusal or failure, sentence him to imprisonment for a period not exceeding two years.'

¹⁶ At 599B [para 7].

¹⁷ *Ibid.*

used in the apartheid years against journalists to divulge information about the 'liberation struggle'. It is therefore not surprising that the informal accord or record of understanding reached between SANEF and the Directorate of Public Prosecutions was not welcomed by all quarters. The South African Union of Journalists (SAUJ) for example, passed a resolution at their annual congress condemning the accord as 'grossly [undermining] the principles of free media and our ethics'.¹⁹ With specific reference to the Staggie incident and the refusal of Benny Gool to testify in the case, the president of the SAUJ, Sechaba ka Nkosi, said:

We agree with Gool that journalists should not, at any given point, be made to look like security spies or agents in the eyes of the public. It would not only endanger their lives, it will also make people reluctant to give information in the future and that will result in critical information not passing through to its recipients — the public.²⁰

[225] It has been argued by some commentators, though, that a distinction needs to be drawn between the disclosure of sources and other types of evidence.²¹ In the Staggie incident video footage and press photos are at issue. Difficulties were encountered from the outset in investigating and prosecuting the five *Pagad* accused. At their appearance in November 2000, for instance, the prosecution had to request a postponement of the case arguing that *Pagad's* 'campaign of intimidation and terror' resulted in key witnesses, initially prepared to identify the accused, changing their minds for fear of their lives. Thus video footage, only thought to be used as a 'backdrop' to the trial, became vitally important. The request was granted and the case postponed for six months.²² Of course, the immediate response could be (and indeed, was) that the state (prosecution) has reverted to the use of 'journalists and photographers as informers [thereby] destroying public confidence in the media as an independent institution and placing its members at physical risk'.²³ Moreover, viewed from this perspective, the

¹⁸ Marcus and Spitz, above n 3, 21–21 and its n 1.

¹⁹ Pule Waga Mabe, 'SAUJ slams editors' agreement with police', *Mail & Guardian* May (Johannesburg) 25–31 May 2001, 4.

²⁰ *Ibid.*

²¹ De Waal J et al, *The Bill of Rights Handbook* (2001) 314.

²² See 'Pagad back in court over Staggie killing' (20 November 2000), available online at: <<http://www.mg.co.za/mg/za/archive/99feb-news.html>> and 'Staggie case postponed for six months' (22 November 2000), available online at: <<http://www.sabc.news.com>>.

²³ Response of SANEF upon news that the editor and photographer of *Die Burger* were subpoenaed to hand over all the photographic material relating to the Staggie killing. 'Staggie murder: editor to fight subpoenas' *Pretoria News* (Pretoria) 11 June 2001, 2.

argument that ‘the situation is quite different with the production of other forms of evidence, such as press photos, videotapes and the like. Here the interest of [the] press is less distinct,’²⁴ may be somewhat hasty and not taking into consideration all relevant facts pertaining to the particular situation.

Yet another aspect to be factored into the present problem is the position of the police. As said, the reality is that the South African police force is currently hugely understaffed and overworked. With reference to this reality SANEF remarked that the state should not use journalists as ‘freelance information gatherers for the police’.²⁵

On the other hand, though, South Africa remains in the grip of violent crime. This raises the question whether a journalist’s civil duties should not weigh more heavily in these circumstances. This seems to be the thrust behind the order of a British Central Criminal Court Judge on the 11 June ruling that Reuters, Associated Press Television News (APTN) and Independent Television News (ITN) must surrender their video footage of the Staggie killing to the Home Office within seven days.²⁶

In the meantime, however, the matter remains far from settled and a ‘solution’ through a meeting-ground between the non-compromise of press freedom and the interests of civil society in successful prosecution rather remote.

²⁴ De Waal, above n 21, 314.

²⁵ Pule Waga Mabe, above n 19, 4.

²⁶ See ‘UK agencies ordered to hand over Staggie tapes’ (11 June 2001); available online at: <<http://www.sabc.news.com>> and ‘Hand over Staggie videos — UK judge’, *Pretoria News* (Pretoria) 12 June 2001, 2. According to the reports, the agencies indicated their resistance to producing the material and intend to challenge the admissibility of the footage as evidence in the trial.