Who's afraid of the probing press?

best illustrated, perhaps, by examining its effect on the law of defamation as interpreted by the Appellate Division in the Neethling case.

The case turned on articles published in *Vrye Weekblad* and *The Weekly Mail* regarding claims by former SAP captain Dirk Coetzee that the general had supplied his unit with poison to kill anti-apartheid activists. Neethling denied the allegations and claimed R1,5 million from the newspapers but his suit was dismissed by Justice J Kriegler in the Rand Supreme Court.

In examining the evidence the court was unable to find, on a preponderance of probability, one way or the other; in other words, it was unable to decide whether Coetzee's allegation or Neethling's denial was true. For this reason the case turned on the legal question of the onus of proof: the court had to decide what proof a newspaper must produce when it is sued for defamation and bases its defence on truth and public benefit.

Justice Kriegler's finding, on the strength of a number of earlier judgments, was that such a newspaper bears no more than an evidentiary burden, in the sense that if, at the end of the case, the court is uncertain as to whether the defence has been established, the defamation action should fail.

Given the Appellate Divsion's inability to establish whether Coetzee or Neethling was telling the truth, the Kriegler approach to the law would have meant the end of Neethling's challenge.

Justice Kriegler also examined and accepted the defence of qualified privilege raised by *The Weekly Mail*. He relied in this on the decision of *Zillie v Johnson* in which Justice Coetzee had held that "one must not lose sight of the special position of the press in our modern society when deciding whether as a matter of policy an action should lie in circumstances like the present".

But the Appellate Division rejected this reasoning, finding that the *Zillie* case accorded the press a "licence" recognised neither by South African law nor by the legal systems of most countries in the English-speaking world. In short, the Appeal Court rejected the view that the media occupy a special position in relation to claims of justification of defamation.

This judgment is obviously devastating to the concept of media freedom. The media now bear a full onus of proof when pleading truth in the public benefit, which puts the tightest of shackles on the kind of investigative reporting which is vital to ensure government accountability and transparency.

Equally extraordinary is the inability of the highest court in the land, in the last decade of the 20th century, to understand the unique role of the media in the enforcement of democratic government.

There is almost an air of surrealism about the Appellate Division judgment. Justice Hoexter opines, for example: "I am driven to the conclusion that the matter defamatory of the appellant (Neethling) contained in the *Weekly Mail* article was in no sense for the public benefit, and that it was not published in the discharge of any journalistic duty such as would be recognised by the mass of right-thinking people in the community."

NO doubt "right-thinking people in the community" find nothing alarming about the possibility that a senior police officer was poisoning government opponents! But to any concerned citizen, this was a story of enormous public interest. There have been sustained claims about police atrocities and most citizens are rightly suspicious of police action. The almost hysterical attempts by the government and police to get blanket anmesties before the election does nothing to allay this suspicion.

This decision will not stand once the matter is brought before the Constitutional Court. Liability without fault has not been accepted by the American Supreme Court: public officials have not been able to recover damages for defamation unless they have been able to prove malice, in the sense that the offending matter was published despite knowledge of its untruth or with a reckless disregard for its veracity or lack of it.

This is best illustrated by the famous decision of *New York Times v Sullivan*, an appeal against a libel judgment awarded to the Police Commissioner in Alabama against four clerics who had paid for an advertisement published in *The New York Times*. The advertisement solicited contributions for Martin Luther King's Civil Rights Movement in the South, and claimed that there had been police brutality and harassment during racial disturbances in Alabama in 1960.

The clerics argued that the advert had not named the Commissioner and that its only link with him was through his offical position as supervisor of the police whose conduct had been criticised. The Alabama courts had no difficulty in finding for the Police Commissioner. But the Supreme Court found that public officials bringing libel suits must establish that the defamatory statments were directed at them personally, and not simply at state units.

The Supreme Court also ruled that because criticism of the government will invariably involve attack on officials, the defamation actions of aggrieved public officials should be scrutinised in order to prevent what would otherwise be a form of official censorship.

The court said the Constitution required "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his (sic) official conduct, unless he proves that the statement was made with actual malice – that is, with knowledge that it was false, or with reckless disregard of whether it was false or not".

There can be little doubt, unless the Constitutional Court adopts the most myopic jurisprudence (and certainly there is cause for concern if the Appellate Divsion's recent record on press freedom is anything to go by), that the Neethling case would have gone the other way under the protection of the freedom of expression clause of the Interim Constitution.

In short, in contrast to the chilling effect of the *Neethling* decision, the freedom of expression clause will nurture investigative journalism. It will promote critical debate and outlaw the old style SABC habit of using state media for propaganda purposes.

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