

# 7

# Swaziland



## 1 INTRODUCTION

The Kingdom of Swaziland became independent from Britain in 1968. That event coincided with the passage of Swaziland's first Constitution, which established the country as a constitutional monarchy. The first elections after independence took place in 1972, where the opposition received slightly more than 20% of the vote. In response, the then-king of Swaziland, King Sobhuza II, issued a decree in 1973 in which he repealed the 1968 Constitution and assumed supreme power, expressly taking all legislative, executive and judicial powers for himself. The current king, King Mswati III, ascended to the throne in 1986 and continued to rule in terms of the 1973 decree. However, bowing to political pressure he ratified a new constitution, which came into force in 2006.

Despite the coming into force of the 2006 Constitution, Swaziland cannot be said to be a democratic country. Even though the Constitution ostensibly guarantees freedom of expression, Swaziland's media environment is extremely difficult. According to a paper by Richard Rooney, 'no discernable progress has been made in changing the existing restrictive media environment'.<sup>1</sup> The media in Swaziland is mostly government controlled. Swazi TV and radio are effectively 'departments of the Swazi civil service'.<sup>2</sup> Although there is a non-state television channel, it was created 'specifically to support King Mswati II'.<sup>3</sup>

There are two newspaper groups in the country: the Observer Group is effectively controlled by the king's family, while the Times of Swaziland Group practises strict self-

ensorship, although it is independent of government.<sup>4</sup> In 2010, Reporters Without Borders ranked Swaziland 155 out of 178 countries on its press freedom index.

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Swaziland. The chapter is divided into three sections:

- Media and the constitution
- Media-related legislation, which includes a discussion on Swaziland’s stalled Media Reform Bill of 2007
- Media-related common law based on decided cases

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in Swaziland. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Swaziland, to better enable the media to fulfil its role of providing the public with relevant news and information, and to serve as a vehicle for government–citizen debate and discussion.

## 2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

- The definition of a constitution
- What is meant by constitutional supremacy
- Which constitutional provisions protect the media
- How a limitations clause operates
- Which constitutional provisions might require caution from the media or might conflict with media interests
- What key institutions relevant to the media are established under the Constitution of Swaziland
- How rights are enforced under the Constitution
- What is meant by the ‘three branches of government’ and ‘separation of powers’
- Whether there are any clear weaknesses in the Constitution of Swaziland that ought to be amended to protect the media

### 2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or

organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities, indeed, entire nations.

The Constitution of Swaziland came into force in 2006 and sets out the foundational rules for the Kingdom of Swaziland. The coming into force of a new constitution is obviously a significant development in the political life of a country. It will be interesting to see how the people of Swaziland and the king adjust and respond to this document, and if any of its promised political and legal changes in fact come about.

The Constitution contains the underlying principles, values and laws of the Kingdom of Swaziland. A key constitutional chapter in this regard is Chapter V, which sets out directive principles of state policy and duties of the citizen. Section 58 sets out the political objectives for the country. In brief, these provide that:

- Swaziland shall be a democratic country
- The state shall be guided in the conduct of public affairs by the principle of decentralisation and devolution of governmental functions and powers to levels where the people can best manage and direct their own affairs
- The state shall cultivate respect for human rights and freedoms and the dignity of the human person
- All associations aspiring to manage and direct public affairs shall conform to democratic principles in their internal organisation and practice
- All lawful measures shall be taken to expose, combat and eradicate corruption and abuse of power by those holding political or public office
- The state shall promote a culture of political tolerance, and all organs of state and people of Swaziland shall work towards the promotion of national unity, peace and stability
- The state shall provide a peaceful, secure and stable political environment, which is necessary for economic development

Section 58 sets out some important statements of principle and admirable political objectives, which would seem to indicate that the rulers of Swaziland recognised a need to chart a new course away from the undemocratic and draconian practices of the past.

It is important to note, however, that the provisions set out in section 58 are not capable of being enforced in any court, in terms of section 56(3) of the Constitution.

## **2.2 Definition of constitutional supremacy**

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy: if a government passed a law that violated the constitution – was not in accordance with or conflicted with a constitutional provision – such law could be challenged in a court of law and could be overturned on the ground that it is ‘unconstitutional’.

The Constitution of Swaziland makes provision for constitutional supremacy. Section 2(1) specifically states that ‘[t]his Constitution is the supreme law of Swaziland and if any other law is inconsistent with the provisions of this Constitution that other law shall, to the extent of such inconsistency, be void’. Importantly, given the enormous power wielded by the king of Swaziland, section 2(2) specifically provides that the king, as well as ‘all citizens of Swaziland’, have a duty ‘to uphold and defend this Constitution’. Furthermore, section 2(3) provides that suspending, overthrowing or abrogating the Constitution through violent or otherwise unlawful means constitutes treason.

## **2.3 Constitutional provisions that protect the media**

The Constitution of Swaziland contains a number of important provisions in Chapter III, ‘Protection and promotion of fundamental rights and freedoms’, which directly purport to protect the media, including publishers, broadcasters, journalists, editors and producers. There are other provisions elsewhere in the Constitution that assist the media as it goes about its work of reporting on issues in the public interest. These are included in this section too.

### **2.3.1 Rights that protect the media**

#### **FREEDOM OF EXPRESSION**

The most important basic provisions that protect the media are set out in subsections 24(1) and (2), which state:

- (1) A person has a right to freedom of expression and opinion.
- (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say –

- (a) Freedom to hold opinions without interference
- (b) Freedom to receive ideas and information without interference
- (c) Freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and
- (d) Freedom from interference with the correspondence of that person.

This provision needs some explanation.

- The freedom applies to ‘every person’ and not just to certain people, such as citizens. Hence, everybody enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.
- Section 24(1) specifies that there is a right to freedom of opinion as well. Freedom of opinion is important for the media as it protects commentary on public issues of importance.
- Section 24(2) specifies that the right to freedom of expression includes ‘freedom of the *press* and *other media*’. This is important because it makes it clear that this right:
  - Can apply to corporate entities such as a media house, newspaper or broadcaster, as well as to individuals
  - Extends to both the ‘press’ and ‘other media’. Thus the section itself distinguishes between the ‘press’ – with its connotations of the news media – and ‘other media’, which could include fashion, sports, gardening or business publications or television channels, thereby protecting all media
- Section 24(2)(b) specifically enshrines the freedom to *receive* ideas and information without interference. This right to receive information is a fundamental aspect of freedom of expression, and this subsection enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have little access to the media.
- Section 24(2)(c) specifically enshrines the freedom to communicate ideas and information without interference and, furthermore, specifies that this freedom

relates to the right to communicate with any specific person, any class of persons or to the public generally. This is a critical freedom for the media. In at least one Southern African country, government officials have argued for the narrowest possible interpretation of the right to freedom of expression by saying that the right protects the ability of individuals to have a conversation rather than the media's right to communicate news and information to the public.

- Section 24(2)(d) specifically enshrines the freedom from interference with correspondence. This protection of correspondence (which would include letters, emails and telefaxes) is an important right for working journalists.

## RIGHT TO ADMINISTRATIVE JUSTICE

Another important provision that protects the media is section 33, 'Right to administrative justice'. Section 33(1) provides that:

A person appearing before any administrative authority has the right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.

Section 33(2) provides that '[a] person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority'. This right requires explanation.

- The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles them to written reasons for administrative action.
- An administrative body is not necessarily a state body. Indeed, these bodies are often private or quasi-private institutions. These constitutional requirements would therefore apply to non-state bodies too.
- Many decisions taken by such bodies are 'administrative' in nature. The requirement of administrative justice is therefore powerful as it prevents or corrects unfair and unreasonable conduct on the part of administrative officials.
- This constitutional right entrenches the right to 'judicial review' – that is, the right to approach a court in respect of an administrative decision.

- Having a constitutional right to written reasons is a powerful tool for ensuring rational and reasonable behaviour on the part of administrative bodies and aids in ensuring transparency and, ultimately, accountability.

## FREEDOM OF ASSOCIATION

A third broad protection is provided for in section 25, ‘Protection of freedom of assembly and association’. Section 25(1) grants a person ‘the right to freedom of peaceful assembly and association’. Section 25(2) specifies that the right to association includes the right to ‘associate freely with other persons for the promotion or protection of the interests of that person’. The effect of this is to guarantee the rights of the press to form press associations and to form media houses and operations. It also guarantees the rights of, for example, civil society to form non-governmental organisations dedicated to media freedom.

### 2.3.2 Other constitutional provisions that assist the media

There are other sections in the Constitution, apart from the human rights provisions, that assist the media in performing its functions.

## PARLIAMENTARY PRIVILEGE

Section 130(1) of the Constitution entitles Parliament to prescribe laws providing for immunities and privileges for the president, the speaker, members of Parliament (MPs) and anyone else participating in or reporting on the proceedings of Parliament. It is important to note that this section only entitles Parliament to pass such laws and is not itself a guarantee of parliamentary privilege.

Nevertheless, such laws – including Swaziland’s Parliamentary Privileges Act, 1967 – do assist the media to report on the work of Parliament because they allow MPs and other people participating in parliamentary proceedings to speak freely during parliamentary proceedings, without facing arrest or civil proceedings for what they say.

## PUBLIC ACCESS TO COURTS

Section 139(4) of the Constitution provides that except as may otherwise be provided in the Constitution or as ordered by a court in the interest of public morality, public safety, public order or public policy, the proceedings of every court shall be held in public. This is an important provision because it allows journalists (and therefore the media) to attend court proceedings.

## 2.4 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false defamatory statements made with reckless disregard for the truth.

Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The Constitution of Swaziland makes provision for two types of legal limitations on the exercise and protection of rights, which limitations are contained in Chapter III, ‘Protection and promotion of fundamental rights and freedoms’.

### 2.4.1 Internal limitations

These are provisions that occur within certain specific sections of the chapter on fundamental rights and freedoms. They deal specifically, and only, with the limitation or qualification of the particular right that is dealt with in that section. Therefore, the section that contains the right also sets out the parameters or limitations allowable in respect of that right. Two of the rights that are of particular relevance to the media – namely, freedom of expression and freedom of association – are subject to internal limitations.

#### INTERNAL LIMITATION ON THE RIGHT TO FREEDOM OF EXPRESSION

Section 24(3) contains an internal limitation on the general rights to freedom of expression and opinion contained in subsections 24(1) and (2). Section 24(3) provides that nothing contained in any law or done under the authority of that law shall be held to be a contravention of the right to freedom of expression, as set out in section 24, provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality and public health
- Is reasonably required for the purpose of:
  - Protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings
  - Preventing the disclosure of confidential information

- Maintaining the independence and authority of the courts
  - Regulating the technical administration or operation of telephony, broadcasting or any other medium of communication
- Imposes reasonable restrictions upon public officers

These limitations are generally not out of step with international norms for limitations on freedom of expression, except in one respect – namely, the restriction imposed upon public officers. Clearly, many public officials do have secrecy obligations, particularly in defence, intelligence and policing posts. Nevertheless, the general ability of whistleblowers in the public service to bring illegal conduct, including corruption, to the attention of the media in the public interest is a critical part of a functioning democracy. Consequently, such limitations provisions could have a chilling effect on public servants, unduly preventing the disclosure of official misconduct.

#### INTERNAL LIMITATION ON THE RIGHT TO FREEDOM OF ASSOCIATION

Subsections 25(3) and (4) contain internal limitations on the general right to freedom of association contained in section 25(1).

Section 25(3) provides that nothing contained in any law or done under the authority of that law shall be held to be a contravention of the right to freedom of association, as set out in section 25(1), provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality and public health
- Imposes reasonable restrictions upon public officers

Furthermore, section 25(4) provides that nothing contained in any law or done under the authority of that law shall be held to be a contravention of the right to freedom of association, as set out in section 25(1), if the law:

- Deals with the registration of certain associations, for example, trade unions, employer organisations, companies, partnerships and other associations, including registration requirements, qualifications and the like
- Prohibits or restricts the performance of a function or the carrying on of any business by an association that is not registered when there is a legal requirement to do so

## 2.4.2 Limitations arising from states of emergency

Section 37(1) of the Constitution of Swaziland specifically provides that nothing contained in any law or done under the authority of a law shall be held to be inconsistent with the provisions of Chapter III of the Constitution, which sets out fundamental rights and freedoms, to the extent that the law authorises measures during a state of emergency that are reasonably justifiable.

In terms of various subsections of section 36 of the Constitution, a state of emergency for up to three months may be declared by the king, acting on the advice of the prime minister, by publication in the Government Gazette, provided that:

- Swaziland is at war or about to be at war with a foreign state
- There is a natural disaster or threatened natural disaster in Swaziland, or
- Action taken or threatened by a person or body of persons is of such a nature and scale as to be likely to endanger public safety or deprive the community of supplies or services that are essential to the life of the country

Furthermore, the state of emergency is required to be ratified by a two-thirds majority vote taken in a joint sitting of the members of the House and the Senate within 21 days of the declaration, otherwise it ceases. Provision is made for the state of emergency to be extended for additional periods of three months by a three-fifths vote taken in a joint sitting of the members of the House and the Senate. Importantly, section 38 sets out the rights that may not be derogated from during a declared state of emergency. These are:

- The right to life, equality before the law and security of the person
- The right to a fair hearing
- Freedom from slavery or servitude
- The right to approach the High Court for redress in respect of the contravention of constitutional rights
- Freedom from torture, cruel, inhuman or degrading treatment or punishment

Unfortunately, it is clear that the right to freedom of expression is derogable during a declared state of emergency.

## **2.5 Constitutional provisions that might require caution from the media or might conflict with media interests**

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions *from* the media. It is important for journalists to understand which provisions in the Constitution can be used against the media. There are a number of these in the Swaziland Constitution.

### **2.5.1 Internal limitations on the right to freedom of expression**

Although we have dealt with this issue in the section immediately above, it is important to reiterate that section 24(3)(b)(i) specifically allows for laws that limit the right to freedom of expression, provided that this is reasonably required for ‘protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings’.

Laws that protect reputations, of course, are used against the media in defamation cases. Similarly, the right to privacy in legal proceedings is often given effect by prohibiting the publication of names of complainants in sexual offences cases or divulging private details in divorce cases.

As already mentioned, these internal limitations, while they do limit the freedom of the press, are not out of step with international norms, save in respect of the restriction upon public servants.

### **2.5.2 States of emergency provisions**

It is also important to note the provisions of sections 36–38 of the Constitution of Swaziland, which deal with declarations of emergencies and derogations (see discussion on limitations arising from states of emergency, immediately above).

## **2.6 Key institutions relevant to the media established under the Constitution**

The Constitution of Swaziland establishes a number of important institutions in relation to the media, namely, the judiciary, the Judicial Service Commission (JSC), and the Commission on Human Rights and Public Administration.

### **2.6.1 The judiciary**

In terms of section 138 of the Constitution of Swaziland, ‘[j]ustice shall be administered in the name of the Crown by the Judiciary which shall be independent

and subject only to this Constitution’. This important statement on the role of the judiciary is supported by section 140(1) of the Constitution, which provides that ‘[t]he judicial power of Swaziland vests in the Judiciary. Accordingly, an organ or agency of the Crown shall not have or be conferred with final judicial power’.

The judiciary is an important institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential for building public trust and respect for the judiciary, which is the foundation of the rule of law in a society. The media needs the judiciary because of the courts’ ability to protect the media from unlawful action by the state and from unfair damages claims by litigants.

Section 139(1), read with other sections of the Constitution of Swaziland, sets out the hierarchy of the courts in that country.

In brief, these are the Superior Court of Judicature, comprising the:

■ Supreme Court

- The Supreme Court is the apex court – section 146.
- The Supreme Court has jurisdiction to hear appeals from the High Court – section 146(2).
- The Supreme Court consists of the chief justice and at least four other justices of the Supreme Court – section 145(1).

■ High Court

- The High Court has unlimited original jurisdiction in civil and criminal matters – section 151(1)(a). Note that section 151(2) further specifies that the High Court has the jurisdiction to enforce the fundamental human rights and freedoms guaranteed by the Constitution, and can determine any constitutional matter. It is important to note, however, the provisions of section 151(8), which specifically take decisions regarding certain traditional matters out of the jurisdiction of the High Court and reaffirms that these will continue to be governed by ‘Swazi law and Custom’.
- The High Court consists of the chief justice, at least four justices of the High Court and such justices of the Superior Court of the Judicature as may be assigned to sit as such by the chief justice, in terms of section 150(1) of the Constitution.
- Specialised, subordinate and Swazi courts or tribunals exercising judicial functions, as established by Parliament by law.

Section 141 of the Constitution of Swaziland contains a number of detailed provisions designed to protect the independence of the judiciary, including provisions relating to its judicial and administrative functions as well as to the financing of the judiciary, including provisions regarding salaries, pensions and the like for judges.

In Swaziland, the chief justice and other judges of the superior courts are appointed by the king on the advice of the JSC (section 153(1)).

Section 158 of the Constitution of Swaziland deals with the removal of judges of the superior courts. Essentially, these judges may be removed only for serious misconduct or inability to perform their functions. Judges are removed by the king, acting on the advice of the JSC, after a full enquiry. The JSC also appoints and exercises disciplinary control over lower court officers such as magistrates (section 160).

### **2.6.2 The Judicial Service Commission**

The JSC is a constitutional body established to participate in the appointment and removal of judges. The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy.

In terms of section 159(2) of the Constitution of Swaziland, the JSC is made up of the chief justice (the chairman), two legal practitioners of not less than seven years' practice and in good professional standing to be appointed by the king, the chairman of the Civil Service Commission, and two persons appointed by the king.

It is clear that the king has an enormous amount of say as to who sits on the JSC. The JSC in Swaziland is therefore not independent of executive influence.

### **2.6.3 The Commission on Human Rights and Public Administration**

The Commission on Human Rights and Public Administration (CHRPA) is an important organisation in respect of the media. It is established in terms of Chapter XI, Part 2 of the Constitution of Swaziland.

In brief, in terms of section 164, its primary functions are to:

- Investigate complaints concerning:
  - Alleged violations of fundamental human rights and freedoms
  - Injustice, corruption, abuse of power and unfair treatment by public officers

- The functioning of any public service or administrative organ of the state in relation to:
  - Delivery
  - Equitable access
  - Fair administration
  
- Take appropriate action for the remedying, correction or reversal of the above
  
- Promote the rule of law, and fair efficient and good governance in public affairs

Section 166 of the Constitution of Swaziland specifies that the CHRPA is independent in the performance of its functions and shall not be subject to the direction or control of any person or authority.

In terms of section 163, members of the CHRPA are the commissioner for human rights and public administration and at least two deputies, appointed by the king on the advice of the JSC. It is clear that the king has an enormous amount of say as to who sits on the CHRPA. The CHRPA is therefore not independent of executive influence.

## **2.7 Enforcing rights under the Constitution**

A right is only as effective as its enforcement. All too often, rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

Section 14(2) of the Constitution of Swaziland provides that '[t]he fundamental rights and freedoms enshrined in this Chapter [being Chapter III] shall be respected and upheld by the Executive, the Legislature and Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland and shall be enforceable by the courts as provided for in this Constitution'.

Section 35, 'Enforcement of protective provisions', and subsection (1) essentially provide that any person may apply to the High Court for redress if he or she alleges that any rights provision of Chapter III has been, is being, or is likely to be contravened in relation to that person, or in relation to a group of which that person is a member, or in respect of a detained person.

While rights are generally enforceable through the courts, the Constitution also envisages the rights of people, including of the media, to approach a body such as the CHRPA to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected, at least theoretically, under the Constitution of Swaziland is through the provisions of the Swaziland Constitution that entrench Chapter III – the chapter setting out fundamental rights and freedoms. Section 246 of the Constitution requires that a constitutional amendment to any of the provisions of Chapter III requires a vote of three-quarters of the members of both the Senate and the House, voting in a joint sitting.

## **2.8 The three branches of government and separation of powers**

All too often, politicians, commentators and journalists use political terms such as ‘branches of government’ and ‘separation of powers’, yet working journalists may not have a clear idea what these terms mean.

### **2.8.1 Branches of government**

It is generally recognised that governmental power is exercised by three branches of government, namely: the executive; the legislature; and the judiciary.

#### **THE EXECUTIVE**

Executive power in Swaziland vests, in terms of section 64(1) of the Constitution of Swaziland, in the king as head of state. Section 64(3) provides that, as a general rule, the king exercises his executive authority either directly or through the Cabinet or a minister.

Section 65 makes it clear that the king does not wield executive power unilaterally as the section requires the king to act ‘on the advice of Cabinet or a Minister acting under the general authority of Cabinet’, except for certain specified circumstances in which he is free to act unilaterally. The effect of this is to require the king to involve, and act along with, Cabinet or the relevant minister in wielding executive power.

In terms of section 66 of the Constitution of Swaziland, the Cabinet consists of the prime minister (who chairs Cabinet), the deputy prime minister and such number of ministers as the king may deem necessary for administering the functions of government, after consultations with the prime minister. In terms of section 67, the appointments processes for key Cabinet posts are as follows:

- The king appoints the prime minister from among members of the House of Assembly, on the recommendation of the King’s Advisory Council.
- The king appoints ministers from both chambers of Parliament, namely, the

House of Assembly and the Senate, on the recommendation of the prime minister. Note that at least half of the ministers must be from among the elected members of the House of Assembly. Note further that in terms of section 70, the king, after consultation with the prime minister, may assign responsibility for government business, including the administration of any government department, to the prime minister or any other minister.

Section 64(4) sets out the functions of the king as head of state, and these include:

- Assenting to and signing bills
- Summoning and dissolving Parliament
- Receiving foreign envoys and appointing diplomats
- Issuing pardons, reprieves or commuting sentences
- Declaring a state of emergency
- Conferring honours
- Establishing any commission or like body
- Ordering a referendum

Section 69 sets out the functions of Cabinet, and these include:

- Keeping the king fully informed about the general conduct of government and providing the king with any information he may require regarding government
- Being collectively responsible to Parliament for:
  - Any advice given by it to the king
  - All things done by any minister in the execution of the office of minister
- Formulating and implementing government policy in line with national development strategies or plans
- Performing other functions conferred by the Constitution or by any law

## THE LEGISLATURE

Legislative (that is, law-making) power in Swaziland vests, in terms of section 106(1) of the Constitution of Swaziland, in ‘the King-in-Parliament’. Thus both the king and the Parliament are involved in making laws. Section 106(2) specifies that they ‘may make laws for the peace, order and good government of Swaziland’. In terms of section 93 of the Swaziland Constitution, Parliament consists of ‘a Senate and a House of Assembly’.

In terms of section 94 of the Swaziland Constitution, the Senate consists of not more than 31 members, comprising:

- 10 senators (at least half of whom must be female) elected by members of the House of Assembly so as to represent a broad cross-section of Swazi society
- 20 senators (at least eight of whom must be female) appointed by the king on the basis of:
  - Representing economic, social, cultural, traditional or marginalised interests not already adequately represented in Parliament
  - Being able to contribute to the good government and progressive development of Swaziland

Note that while there is a consultation requirement regarding these appointees, this is extremely weak as the king has the discretion to determine which bodies to consult.

In terms of section 95 of the Swaziland Constitution, the House of Assembly consists of not more than 76 members, comprising:

- 60 members elected from *tinkhundla* (constituencies based on one or more chiefdoms – section 80)
- 10 members nominated by the king
- Four female members specially elected from the four regions – but this is done only if, after a general election, less than 30% of the members elected ordinarily are female (see section 86)
- the attorney-general as an ex officio member

## THE JUDICIARY

Judicial power, as already discussed in this chapter, vests in the courts.

### 2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine. The aim, as the Constitution of Swaziland has done, is to separate the functions of the three branches of government – the executive, the legislature and the

judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a ‘watchdog’ role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution. Sadly, the actual exercise of power by the monarch in Swaziland means that there is no effective separation of powers in the country.

## **2.9 Weaknesses in the Constitution that ought to be strengthened to protect the media**

There are a number of important respects in which the Constitution of Swaziland is weak. If these weaknesses were addressed, there would be specific benefits for the media in Swaziland.

### **2.9.1 Access to information**

In an information age, where states wield enormous power, particularly in regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding public power – that is, government – accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability through providing the public with information, having a right of *access* to information is critical to enable the media to perform its functions properly. It is unfortunate that there is no free-standing right of access to information in the Swaziland Constitution.

### **2.9.2 Access by the public to parliamentary processes**

It is disappointing that the Constitution does not specifically provide as a general rule that parliamentary processes are to be open to the public, including members of the media. Media reporting on government in action is one of the most important mechanisms for ensuring an informed citizenry. The general principle of public observance of the workings of the legislature (government) ought to be enshrined in the Constitution of Swaziland.

### **2.9.3 Independent broadcasting regulator and a public broadcaster**

It is disappointing that the Constitution of Swaziland does not provide for an independent broadcasting regulator to ensure the regulation of public, commercial and community broadcasting in the public interest. Similarly, it is disappointing that the Constitution does not provide for an independent public broadcaster to ensure

access by the people of Swaziland to quality news, information and entertainment in the public interest.

### 3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- Key legislative provisions governing the operations of the print media
- Key legislative provisions governing the making and exhibition of films
- Key legislative provisions governing the broadcasting media generally
- Key legislative provisions governing the state broadcasting media
- Generally applicable statutes that threaten a journalist's duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information
- Generally applicable statutes that hinder the press in performing its reporting functions
- Swaziland's stalled media reform initiatives

#### 3.1 Legislation: An introduction

##### 3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed in accordance with the Constitution. As we know, legislative authority in Swaziland vests in 'the King-in-Parliament' and consequently involves both the king and Parliament (made up of the Senate and the House of Assembly).

As a general rule, both Parliament and the king are ordinarily involved in passing legislation. There are detailed rules in sections 49, 107, 108, 110 and 112–117 and in Chapter XVII of the Constitution of Swaziland, which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Swaziland requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Swaziland, there are five kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in sections 107, 108(2) and Chapter XVII of the Constitution

- Ordinary legislation – the procedures and/or applicable rules are set out in sections 49, 107 and 108 of the Constitution and, where the Senate and House of Assembly disagree thereon, in section 116 of the Constitution
- Legislation that deals with financial matters – the procedures and/or applicable rules are set out in sections 107, 110(a), 111, 112 and 113 of the Constitution
- Legislation deemed urgent by the king – the procedures and/or applicable rules are set out in sections 107 and 114 of the Constitution
- Legislation dealing with matters involving Swazi law and custom – the procedures and/or applicable rules are set out in sections 107, 110(b) and 115 of the Constitution

### **3.1.2 The difference between a bill and an act**

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process.

As a general rule, if a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the king. It is important to note that sections 108 and 117 of the Constitution of Swaziland contain provisions regarding the process of how the king assents to legislation, including provisions that enable him to refer provisions of a bill to a joint sitting of Parliament. In terms of section 109 of the Swaziland Constitution, the attorney-general has the responsibility for ensuring that once a bill has been duly passed and assented to, it must be published in the Gazette, and it becomes law only when it has been so published.

## **3.2 Statutes governing the print media**

The Books and Newspapers Act, Act 20 of 1963, is a colonial-era statute that has not been repealed. There are a number of key requirements laid down by the Books and Newspapers Act in respect of books (the definition of which specifically includes magazines and pamphlets) and newspapers:

- Section 4(1) prohibits any person from printing or publishing a newspaper (defined as any printed matter published at least monthly and intended for sale or distribution, which contains ‘news, or intelligence, or reports of occurrences of interest to the public or any section thereof, or any views, comments or observations thereon’) unless the editor is resident in Swaziland and a certificate

of registration has been issued. Failure to comply with these requirements is an offence, and the penalty is the payment of a fine or, in the event of non-payment, a period of imprisonment.

- In terms of section 5, the newspaper registration requirements include: the full and correct name of the newspaper and address at which it is to be published; and the full names and addresses of the proprietor, printer, publisher, manager and editor of the newspaper. Section 7 also requires any changes of such information to be provided to the Registrar of Books and Newspapers, who is appointed by the minister responsible for the administration of the Books and Newspapers Act. In terms of section 5(4) of the Books and Newspapers Act, making a false statement when giving particulars in respect of the registration of a newspaper is an offence that carries a fine as a penalty or, failing payment thereof, a period of imprisonment.
- Section 10(1) requires the publisher of every newspaper printed in Swaziland to provide two copies of every edition to the Registrar of Books and Newspapers, at his or her own expense. In terms of section 10(4), failure to do so is an offence punishable by a fine, a period of imprisonment or both.
- Section 9 of the Books and Newspapers Act also requires the publisher of any book (note again that the definition includes a magazine) printed and published in Swaziland to deliver two copies (and such additional ones as may be requested up to a maximum of three) of the book, at his or her own expense, to the Registrar of Books and Newspapers. In terms of section 9(8), failure to do so is an offence punishable by a fine, a period of imprisonment or both.
- Note that the minister is empowered under section 8 of the Books and Newspapers Act to make rules to exempt compliance from the requirements of having to deposit copies of books and newspapers.
- Part IV of the Books and Newspaper Act deals with bonds. In brief, the publishers of every newspaper are to register and deliver to the Registrar of Books and Newspapers a bond as security towards the payment of monetary penalties imposed or libel damages awarded as a result of publication. Publishing a newspaper without a bond is an offence in terms of section 15 of the Books and Newspapers Act, and the penalty is a fine, a period of imprisonment or both.
- Section 16 requires the following to be printed legibly and in English on the first or last page of a book or newspaper printed in Swaziland: the name and address of the printer and publisher; and the name of place where it is printed and

published. Failure to comply is an offence, and the penalty is a fine, imprisonment or both. Note further that an additional penalty of forfeiture or destruction of all copies (held by the court or the defendant) can be imposed by a court.

### **3.3 Statutes governing the making and exhibition of films**

#### **3.3.1 The making of films and the taking of photographs**

There are a number of constraints on the making of films and even the taking of photographs in Swaziland – something that obviously affects both the print and broadcast media.

The key provision of the main piece of legislation governing film and photography, namely the Cinematograph Act, Act 31 of 1920, is section 3, which, without the prior written consent of the minister for public service and information, prohibits any person from:

- Making a film (or taking photographs for the purpose of making a film) that portrays gatherings of Africans or scenes of African life, or
- Taking a photograph on the dates and at the places of celebration listed. These include Incwala Day, the king's birthday, the Reed Dance and independence day.

Failure to comply with section 3 is an offence, and the penalty is a fine or, if the fine is unpaid, a period of imprisonment.

#### **3.3.2 Exhibition of objectionable pictures**

The Cinematograph Act also regulates the exhibition of films. Section 6(4) makes it an offence to exhibit an 'objectionable picture' (the definition of which includes any film). In terms of section 6, an objectionable picture is one that has been declared to be so by the minister for public service and information.

While the minister's powers are untrammelled in this regard (he or she can declare any picture to be objectionable – section 6(2)), the general grounds upon which he or she can make such a declaration are that the picture represents, in an offensive manner:

- Impersonation of the king
- Scenes holding up to ridicule and contempt any member of the naval, military or air forces

- Scenes tending to disparage public characters
- Scenes calculated to affect the religious convictions of any section of the public
- Scenes of debauchery, drunkenness, brawling or any other habit of life not in accordance with good morals or decency
- Successful crime or violence
- Scenes that are in any way prejudicial to the peace, order or good government of Swaziland.

The penalty for exhibiting a prohibited picture is a fine or a period of imprisonment. (These provisions are dealt with in greater detail elsewhere in this chapter.)

### **3.4 Statutes governing the broadcast media generally**

#### **3.4.1 Statutes that regulate broadcasting generally**

Broadcasting in Swaziland is regulated in terms of the Swaziland Television Authority Act, 1983.

#### **3.4.2 Establishment of the Swaziland Television Authority**

Section 3 of the Swaziland Television Authority Act establishes the Swaziland Television Authority (STA) as a body corporate, which means that it has its own legal identity. Section 4(2) provides that all that the STA is empowered to do shall be undertaken and carried out by the board of directors of the STA.

Section 5(1) provides that the board of directors of the STA consists of nine people:

- A chairman appointed by the minister responsible for television broadcasting.
- Four people representing the ministries responsible for:
  - Television and broadcasting
  - Education
  - Finance
  - Commerce, industry, mines and tourism
- Three persons, who are not public officers, appointed by the minister on the basis of their relevant qualifications, knowledge or experience.

- The general manager (who is appointed by the board of directors and who is responsible for the day to day activities of the STA, subject to the direction of the board – section 8) as an ex officio member.

Note that the minister appoints one member of the board to act as the deputy chairman. Section 5(2) provides that the term of office of members of the board is three years, and members are eligible for reappointment.

It is important to note that there is a second structure established within the STA, namely the STA Board of Control. It comprises five members appointed by the minister. As is the case with members of the board of directors, the term of office of members of the board of control is three years, and members are eligible for reappointment.

### 3.4.3 Main functions of the STA and the STA Board of Control

#### THE STA

In terms of section 4(1) of the STA Act, the STA's objects include:

- To establish, erect and operate television broadcasting stations in Swaziland, including maintaining and all related facilities
- Imposing and implementing controls regarding:
  - Renting, selling and dealing in television receivers and associated equipment
  - Technical quality of transmissions
  - Advertising
- Issuing and withdrawing licences

The following sections elaborate on the STA's key functions:

- Section 17 empowers the STA (but subject to the minister's approval) to grant a licence to any person to conduct a television service in Swaziland, upon such terms and conditions as the board may determine, including the annual fee therefor.
- Section 18 empowers the STA (but, again, subject to the minister's approval) to grant a licence to any person to deal with television receivers, recorders and other television equipment and accessories in Swaziland, upon such terms and conditions as the board may determine, including the annual fee therefor.

- Section 19 envisages that the STA will issue a television viewer's certificate or video cassette recorder's licence to any person who possesses a television receiver or recorder.

It is clearly envisioned in the legislation that the STA is both an operator and a regulator.

## THE STA BOARD OF CONTROL

In terms of section 10 of the STA Act, the STA Board of Control's sole function is to monitor the content of programmes and other transmissions to ensure that they conform to acceptable moral standards.

### 3.4.4 Appointment of board members

As set out above, in respect of the STA Board of Directors:

- The minister appoints the chairperson and the three people appointed on the basis of their expertise or experience
- Four ministries determine who their representatives are, but clearly these are executive appointments
- The general manager is an ex officio member of the board, appointed by the board.

As set out above, every member of the Board of Control is appointed by the minister. There is no public nominations process for appointments to the STA's Board of Directors or Board of Control, and Parliament is not involved in either body's appointments processes. In addition, there are no criteria for appointment.

However, section 7 does set out grounds upon which a director of the STA loses his or her office. These include insolvency, mental or physical incapacity, resignation, being absent without leave, corruption, being convicted of an offence or being suspended from public office.

### 3.4.5 Funding for the STA

Section 12(1) makes it clear that the assets of the STA are those assets acquired by the government in accordance with an agreement entered into in 1982 between it and Electronic Rentals Group PLC, and any other assets that the STA may acquire. This

is vague wording, but it seems clear that the STA's funding and asset base is derived from government. Note that in terms of section 21 of the STA Act, the STA is exempt from paying tax.

### 3.4.6 Broadcasting regulations

In terms of section 26 of the STA Act, the minister, acting in consultation with the STA's Board of Directors, makes regulations for the better carrying out of the provisions of the STA Act. Effectively, this means that the STA does have a veto power in respect of the making of regulations. The minister is therefore unable to make regulations without the STA's consent.

Note, however, that the kinds of issues that the STA Act envisages include:

- The appointment of television licence inspectors
- Forms of licences to be used under the STA Act
- Remunerations and allowances for members of the board of directors
- Fees for television receiver and television recorder licences
- The prohibition or restriction of the possession or use of video cassettes

### 3.4.7 Licensing regime for broadcasters in Swaziland

Section 22(3) of the STA Act prohibits any person from establishing or operating a television service in Swaziland, except in accordance with a licence issued by the STA. Section 23 makes doing so an offence, with a penalty of a fine, a period of imprisonment or both.

### 3.4.8 Is the STA an independent regulator?

The STA can in no way be said to be independent. Indeed, it is interesting to note that nowhere in the governing legislation is the STA even said to be independent.

The STA's independence is compromised in a number of important ways:

- The STA is conflicted by being both an operator of a television service and a regulator of television broadcasting.
- All members of the STA's boards of directors and control are appointed by the ministry or other members of the executive with no objective and clear criteria, no public nominations process and no involvement by Parliament.

- The minister is responsible for making broadcasting regulations, albeit in consultation with the STA Board of Directors.

The effect of these serious deficiencies is that the STA does not meet international best practice standards regarding the appointment requirements for independent bodies as well as institutional independence.

### 3.4.9 Amending the legislation to strengthen the broadcast media generally

There are a number of problems with the legislative framework for the regulation of broadcasting generally:

- The overriding problem is that the STA is not an independent body.
- The STA Act ought to be amended to deal with the following issues:
  - The STA ought to function as a regulator only. In other words, the function of operating a television service ought to be assigned to a different body (such as a public broadcaster) so that the STA does not act as operator in and regulator of the television broadcasting sector.
  - Objective criteria for membership to the STA's boards of directors and control ought to be provided for and ought to be based on experience, expertise and qualifications.
  - Public officers, party political office bearers and all members of government ought to be barred from serving on the STA's boards.
  - Members of the STA's boards of directors and control ought to be appointed by the king, acting on the advice of Parliament, after Parliament has drawn up a list of recommended appointees. As part of this process, the National Assembly should call for public nominations and should conduct public interviews.
  - The STA should be empowered to make its own regulations.
  - The STA's regulatory functions should be more clearly set out. The ability to grant licences does not constitute an appropriate regulatory framework. In this regard, at a bare minimum, the STA ought to have provisions dealing with broadcasting-related issues such as:
    - Categories of broadcast licences, for example, public, commercial and community
    - Advertising restrictions
    - Ownership requirements to ensure diversity of views, for example, limits on levels of foreign ownership on the number of broadcasting services a single person may control
    - A code of conduct for broadcasting content

### 3.5 Statutes that regulate the state broadcast media

The STA Act, which regulates television broadcasting generally, also regulates the functions of the STA as the provider of the state television service. Indeed, with the introduction of the STA Act, the STA took over the functions, employees and assets of the Swaziland Television Broadcasting Corporation and of Visionhire (Swaziland) Ltd.

The provisions of the STA Act are set out above.

#### 3.5.1 STA: Public or state broadcaster?

It is clear that the STA is not a public broadcaster as the regulatory framework does not:

- Provide that the STA is an independent body acting in the public interest
- Contain any objects that deal with public broadcasting aims, such as providing the people of Swaziland with programming that is educational, informative and entertaining

There ought to be a separate act of Parliament dealing with public broadcasting. Such an act should provide that:

- Public broadcasting be carried out in the public interest and, more specifically, that public broadcasting is required to provide programming that is educational, informative and entertaining, and available in local languages
- The public mandate of the public broadcaster be set out in detail in the governing legislation
- Public broadcasting be operated by a legal entity that is independent of the executive of any political party, and that it be governed by a board or similar body whose mandate is to act in the public interest. In this regard, such public broadcasting legislation ought to provide:
  - For objective criteria for membership to the board of directors (or similar body) and membership ought to be based on experience, expertise and qualifications
  - That public officers, party political office bearers and all members of government be barred from serving on the board (or similar body) of the public broadcaster

- That members of the board of the public broadcaster be appointed by the king acting on the advice of Parliament, after Parliament has drawn up a list of recommended appointees. As part of this process, the National Assembly should call for public nominations and should conduct public interviews

### **3.6 Statutes that undermine a journalist's duty to protect his or her sources**

A journalist's sources are the life blood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers – inside sources who are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that without such protection, information that the public needs to know would not be given to journalists.

#### **3.6.1 Magistrates Courts Act, Act 66 of 1939**

Section 34 of the Magistrates Courts Act contains provisions that might be used to compel a journalist to reveal confidential sources. It provides that any person who has been subpoenaed to give evidence or to produce any documents and who fails to attend, or to give evidence, or to produce such documents may be sentenced by the court to a fine, and, if the fine is not paid, to a period of imprisonment. The court can also issue a warrant for the person's arrest so that he/she may be brought to court to give evidence.

#### **3.6.2 Parliamentary Privileges Act, 1968**

Although this act relates to the activities of Parliament under the old 1968 Constitution, it is important to note that the act has not been repealed and so continues to be in force. Section 18 of the Parliamentary Privileges Act empowers Parliament or any of its committees to order any person to attend before Parliament and to produce any book or document under his or her control. Section 11 makes it an offence not to comply, and the penalty is a fine or imprisonment or such lesser penalty as may be provided for in Parliament's Standing Orders.

#### **3.6.3 Public Accounts Committee Order, 1973**

Although this order related to the activities of the Public Accounts Committee under

the old 1968 Constitution, it is important to note that it has not been repealed and so continues to be in force. In terms of section 3(2), the duty of the Public Accounts Committee is to report to the legislature on accounts of the Government of Swaziland presented by the auditor-general.

Section 4(1) of the Public Accounts Committee Order empowers the committee to conduct enquiries, and it may summon any person to give evidence at an enquiry or to produce any relevant book or other document. Failure to appear before the committee, to answer any question or to produce the required book or document is an offence in terms of section 5, and the penalty is a fine, a period of imprisonment or both. Note, however, that section 22 allows Parliament to excuse a person from producing any book or document on the grounds that it is private and does not affect the subject of the Parliamentary enquiry.

### **3.6.4 Official Secrets Act, Act 30 of 1968**

Section 10 empowers the commissioner of police, whenever he is satisfied that an offence under the Official Secrets Act has been committed and a person is able to furnish information about it, to require such person to provide the necessary information. If the person fails to do so, he or she shall be guilty of an offence, and the penalty upon conviction is a fine, a period of imprisonment or both.

### **3.6.5 Control of Supplies Order, 1973**

The Control of Supplies Order empowers the minister for commerce to ‘regulate in such manner as he may think necessary in the interests of the public’ the supply of any goods mentioned in a Government Gazette notice. Section 5 empowers the principal secretary for the Ministry of Commerce, or anyone authorised by him, without prior notice, to enter any premises, make an examination and take samples of any goods found there for the purposes of obtaining any information or ascertaining the correctness of any information. Theoretically, this could be used to seize journalists’ computers or notebooks, thereby compromising journalists’ sources.

### **3.6.6 Aviation Act, 1968**

Section 10 of the Aviation Act empowers any accident enquiry board established by the minister responsible for aviation to investigate any air accident, to summon and examine witnesses, and to call for the production of any books and other documents. The section also provides that the laws and rules governing magistrates’ courts of Swaziland apply to procuring the attendance of witnesses and the production of, among other things, books and documents (see above).

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression depends on the particular circumstances in each case, particularly on whether or not the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

### **3.7 Statutes that prohibit the publication of certain kinds of information**

A number of statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information.

These statutes are targeted and prohibit the publication of certain kinds of information, including:

- Information relating to defence, public safety, order and security, official secrets or that otherwise undermines government's authority (such as sedition or subversion), protected or prohibited places
- Expression which constitutes intimidation
- Expression which is obtained from public officers and relates to corrupt practices
- Expression which is obscene or contrary to public morals
- Expression which is likely to offend religious convictions
- Information relating to voting
- Information provided in response to statistical questionnaires
- Information relating to identity documentation
- Expression which constitutes offensive impersonation of the king
- Expression which is offensive in its portrayal of executions, murders and the like
- Expression which constitutes contempt or ridicule
- Expression which is prejudicial or potentially prejudicial to public health

- Expression which induces a boycott
- Expression which constitutes advertisements relating to medicines and medical treatments
- Pictures which the minister declares to be ‘objectionable’

### 3.7.1 Prohibition on the publication of state security–related information

#### PROSCRIBED PUBLICATIONS ACT, ACT 17 OF 1968

Section 3 of the Proscribed Publications Act empowers the minister for public service and information to declare in the Government Gazette any publication or series of publications (the definition of which, in section 2, includes any newspaper, book, periodical, photograph or record) to be ‘proscribed’ if the publication is prejudicial or potentially prejudicial to the interests of, among other things, defence, public safety and public order. (See the case law below for a discussion of an important High Court case involving the Proscribed Publications Act.) Any person who distributes, prints, publishes or possesses a proscribed publication without the necessary licence given under the authority of the minister is guilty of an offence, in terms of section 4 of the Proscribed Publications Act. The penalty for such an offence is a fine, a period of imprisonment or both.

#### CINEMATOGRAPH ACT, ACT 31 OF 1920

The Cinematograph Act was enacted close on a century ago and many of its provisions are not in keeping with international norms regarding freedom of expression. Section 6, ‘Objectionable pictures’ and section 6(1) entitle the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner:

- Successful crime or violence
- Scenes that are in any way prejudicial to the peace, order or good government of Swaziland

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre which exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

## SEDITION AND SUBVERSIVE ACTIVITIES ACT, ACT 46 OF 1938

In terms of section 4 of the Sedition and Subversion Act, any person who prints, publishes, sells or distributes any seditious publication (or even possesses one without lawful excuse) is guilty of an offence and liable to a fine or a period of imprisonment and forfeiture of the publication. Section 3(1) of the Sedition and Subversion Act sets out a long list of seditious intentions with regard to publications. These include:

- Bringing the king or the government into hatred or contempt or to excite disaffection against them
- Exciting inhabitants of Swaziland to procure changes in Swaziland other than by lawful means
- Bringing the administration of justice into hatred or contempt or to excite disaffection against it
- Raising discontent or disaffection
- Promoting feelings of ill-will and hostility between different classes of the population

It is important to note, however, that section 3(2) specifically excludes those publications that:

- Show that the king has been misled or is mistaken
- Point out errors in the government or Constitution of Swaziland
- Advocate for lawful change
- Point out any matters producing ill-will and enmity between different classes of the population with a view to their removal

## OFFICIAL SECRETS ACT, ACT 30 OF 1968

The Official Secrets Act contains numerous provisions which inhibit the publication of types of information.

- Section 3 makes it an offence to:
  - Be in or in the neighbourhood of a prohibited place (defined as

including works of defence, places relating to munitions of war and any place declared by the minister to be a prohibited place)

- Make a sketch (defined as including a photographic representation) that is likely to be even indirectly useful to an enemy
- Publish a secret official code, password, sketch or any other information that is likely to be even indirectly useful to an enemy

The penalty for such an offence is a substantial period of imprisonment.

- Section 4(2) makes it an offence to publish or even communicate any information that relates to munitions of war or any other military or police matter in any manner or for a purpose prejudicial to the safety or interests of Swaziland. The penalty is a fine, a period of imprisonment or both.
- Importantly, section 9 deals with presumptions in relation to charges under the act. For example, although the wording is legalistic, section 9(b) states that if a person is charged with publishing or communicating information for a purpose prejudicial to the safety or interests of Swaziland, and that person was not acting under lawful authority, then there is a presumption that the purpose was prejudicial to the safety or interests of Swaziland. This greatly hinders the media because it sets up a presumption of guilt on the part of unauthorised persons, such as journalists, media houses, etc., when publishing such information.

### PUBLIC ORDER ACT, ACT 17 OF 1963

Section 6 of the Public Order Act deems a person to have committed the offence of incitement to public violence if, among other things, he published words, the natural consequence of which would be the commission of public violence by members of the public generally or by persons to whom the publication was addressed.

### PROTECTED PLACES AND AREAS ACT, ACT 13 OF 1966

While the Protected Places Act does not directly prohibit the publication of information, section 4 of the Protected Places Act makes it an offence for any unauthorised person (for example, a journalist) to be in a protected place (defined as a place which has been declared a protected place by the relevant Minister) without a permit.

The penalty is a fine, a period of imprisonment or both. Furthermore, the person can be ejected from the place. This provision clearly has implications for media personnel, making it more difficult to perform their reporting functions.

### **3.7.2 Prohibition on the publication of expression that constitutes intimidation**

Section 12 of the Public Order Act, Act 17 of 1963, makes it an offence to intimidate another person, and the penalty is a period of imprisonment. The intimidation can include threatening to cause unlawful injury to a person or to his reputation or property.

### **3.7.3 Prohibition on the publication of expression obtained from public officers and which relates to corrupt practices**

Section 17(3) of the Prevention of Corruption Order No. 19 of 1993, makes it an offence to publish or disclose any document or information that is in one's possession and which one has reason to believe has been disclosed by an officer of the Anti-Corruption Commission, without the written permission of the minister of justice. The penalty is a fine, a period of imprisonment or both.

### **3.7.4 Prohibition on the publication of expression that is obscene or contrary to public morals**

#### **OBSCENE PUBLICATIONS ACT, ACT 20 OF 1927**

The Obscene Publications Act regulates the sale and exhibition of obscene publications, books, pictures and the like. Sections 3 and 4 of the act make it an offence to import, produce, sell or distribute any indecent or obscene (note that these terms are not defined) publication (the definition of which includes a newspaper and a magazine). The penalty is a fine or, failing payment thereof, a period of imprisonment.

#### **PROSCRIBED PUBLICATIONS ACT, ACT 17 OF 1968**

Section 3 of the Proscribed Publications Act empowers the minister for public service and information to give notice in the Government Gazette declaring any publication or series of publications (the definition of which in section 2 includes any newspaper, book, periodical, photograph or record) to be a 'proscribed publication' if the publication is prejudicial or potentially prejudicial to the interests of, among other things, public morality.

Any person who, among other things, distributes, prints, publishes or even possesses a proscribed publication without the necessary licence given under the authority of the minister is guilty of an offence, in terms of section 4 of the Proscribed Publications Act. The penalty for such an offence is a fine, a period of imprisonment or both.

## CINEMATOGRAPH ACT, ACT 31 OF 1920

The Cinematograph Act was enacted close on a century ago and many of its provisions are not in keeping with international norms regarding freedom of expression.

Section 6(1) entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner scenes:

- Suggestive of immorality or indecency
- Of debauchery, drunkenness, brawling, or of any other habit of life not in accordance with good morals and decency

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

### 3.7.5 Prohibition on the publication of expression that is likely to offend religious convictions

Section 6(1)(d) of the Cinematograph Act, Act 31 of 1920, entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner ‘scenes calculated to affect the religious convictions or feelings of any section of the public’.

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

### 3.7.6 Prohibition on the publication of information relating to voting

Section 86(2) of the Electoral Act, Act 4 of 1971, affects the media’s ability to conduct political polls during an election in order to report on voting trends:

- Section 86(2)(a) makes it an offence to obtain information as to which candidate a voter intends to vote for or has voted for.

- Section 86(2)(d) makes it an offence to disclose any information that one may have obtained regarding a candidate for whom a voter intends to or has voted.

The penalty for either of these offences is a fine, a period of imprisonment or both.

### **3.7.7 Prohibition on the publication of information provided in response to statistical questionnaires**

Section 8 of the Statistics Act, Act 14 of 1967, prohibits the publication of any:

- Individual return made in terms of the Statistics Act
- Answer given to a question put in terms of the Statistics Act
- Report or other document containing particulars comprising such returns or answers, which enable the identification of such particulars with any person or business,

unless the person making the return or answering the question has previously consented to the publication in writing. The penalty is a fine or a period of imprisonment, in terms of section 12(4) of the Statistics Act.

### **3.7.8 Prohibition on the publication of information relating to identity documentation**

The Identification Order, Kings Order in Council No. 4 of 1998, deals with Swaziland's population registry and the issuing of identity documents. Section 15(1) of the Identification Order prohibits any person from publishing any information which he knows has been communicated to him in contravention of the provisions of section 15. This means that should a journalist be given information by a civil servant employed to implement the Identification Order regarding information or the contents of documents about another person which the employee is under a secrecy obligation not to have disclosed, the journalist is prohibited from publishing the information. In terms of section 16(1)(h), such publication is an offence, and in terms of section 16(2), the penalty is a fine or a period of imprisonment.

### **3.7.9 Prohibition on the publication of expression that constitutes offensive impersonation of the king**

Section 6(1)(a) of the Cinematograph Act, Act 31 of 1920, entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he

is satisfied that, among other grounds, the picture represents in an objectionable manner ‘impersonation of the King’. Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

### **3.7.10 Prohibition on the publication of expression that is offensive in its portrayal of executions, murders and the like**

Section 6(1)(e) of the Cinematograph Act, Act 31 of 1920, entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner ‘executions, murders or other revolting scenes’. Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

### **3.7.11 Prohibition on the publication of expression which constitutes contempt or ridicule**

Subsections 6(1)(b) and (c) of the Cinematograph Act, Act 31 of 1920, entitle the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner scenes:

- Holding up to ridicule or contempt any member of His Majesty’s naval, military or air forces
- Tending to disparage public characters

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

### **3.7.12 Prohibition on the publication of expression that is prejudicial or potentially prejudicial to public health**

Any person who, among other things, distributes, prints, publishes or even possesses a proscribed publication without the necessary licence given under the authority of

the minister for public service and information is guilty of an offence in terms of section 4 of the Proscribed Publications Act, Act 17 of 1968. The penalty for such an offence is a fine, a period of imprisonment or both.

### **3.7.13 Prohibition on the publication of expression that induces a boycott**

Section 13(3) of the Public Order Act, Act 17 of 1963, makes it an offence to, among other things, attempt to persuade any person to take any action which has been specified in relation to a boycott designated as such by the minister. The penalty is a period of imprisonment.

### **3.7.14 Prohibition on the publication of expression that constitutes advertisements relating to medicines and medical treatments**

There are a number of sections in the Regulation of Advertisements Act, Act 62 of 1953, which prohibit certain advertisements.

- Section 3 of the Advertisements Act makes it an offence to publish any ‘prohibited advertisement’ without a lawful defence. The definition of ‘prohibited advertisements’ deals with advertisements that claim to be effective in curing a range of conditions, including venereal diseases, cancer, tuberculosis, epilepsy, paralysis, pneumonia, blindness and sterility. The lawful defences include that the advertisement appeared only in a technical publication intended for circulation among duly registered medical practitioners, chemists and hospital managers, or that publication was required as part of an application for a patent.
- Section 4 of the Advertisements Act makes it an offence to publish advertisements relating to abortions.

Any publication in contravention of sections 3 or 4 of the Advertisements Act carries the penalty of a fine or, failing payment thereof, a period of imprisonment, in terms of section 5 of the act.

### **3.7.15 Prohibition on the publication of pictures that the minister declares to be ‘objectionable’**

Section 6(2) of the Cinematograph Act, Act 31 of 1920, extraordinarily entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable. There are no grounds listed in this section, which means that the minister has unfettered discretion to determine whether or not a picture is objectionable.

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre which exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

### **3.8 Legislation that hinders the press in performing its reporting functions**

Although Standing Orders of the Senate Relating to Public Business, 1968, relate to the Senate under the old 1968 Constitution, it is important to note that these orders have not been repealed and so continue to regulate the procedures for the Senate. There are a number of provisions that are relevant to the media and which can be used to hinder the media in reporting on matters arising before Senate.

- Section 133 of the Senate Standing Orders prohibits ‘strangers’ from being present during deliberations of select committees.
- Furthermore, while section 208 of the Senate Standing Orders envisages that ‘strangers’ may be present in the Senate chamber, section 210 empowers the chairman of any proceedings to order the withdrawal of strangers ‘whenever he thinks fit’.

Public access, including by the media, to legislative proceedings, such as those conducted by the Senate, is critically important to foster transparency and good governance. Consequently, it is disappointing that the Senate Standing Orders do not entrench the rights of the media specifically to cover the operations of the Senate and its committees. While there will always be grounds for holding certain hearings ‘in camera’, the general principle of open government ought to be clearly provided for.

### **3.9 Swaziland’s stalled media reform initiatives**

It is clear that Swaziland’s existing statutes are out of step with the commitment to freedom of expression and, particularly, to freedom of the press, both of which are enshrined in the Constitution of Swaziland. Immediately after the Constitution came into force in 2006, there was a great push to make sweeping changes to Swaziland’s media regulatory landscape with the publication of numerous draft bills that would have heralded a sea change in Swaziland’s media law had they been enacted. However, none of these draft bills has been enacted (or even introduced), and the passage of four years since their publication does not bode well for media freedom in Swaziland.

This section does not cover all of the proposed draft bills nor does it set out in detail

provisions of the draft bills selected for discussion, given that they have not been enacted and will probably not be enacted any time in the near future. Nevertheless, it is important for journalists to be aware of the trends in media law-making that were evidenced by the original publication of the draft bills, many of which would have been largely in line with internationally accepted standards for media regulation had they been passed.

### **3.9.1 Freedom of Information and Protection of Privacy Draft Bill, 2007**

In countries that are committed to democracy, governments pass legislation that specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest. Unfortunately, Swaziland has yet to enact access to information or whistleblower protection legislation. In 2007, an Access to Information and Protection of Privacy Draft Bill was developed. It proposed, among other things, to:

- Provide a right of access to information held by public bodies
- Provide a right of access to information held by private bodies, where such access is required for the exercise or protection of the right to freedom of expression
- Provide for reasonable and justifiable limitations on the right to access to information held by public or private bodies in accordance with the right to freedom of expression in section 24 of the Constitution
- Repeal the 1968 Official Secrets Act, the media-related provisions of which are set out above

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

### **3.9.2 Swaziland Broadcasting Draft Bill, 2007**

Swaziland's broadcasting regulatory environment is entirely out of step with internationally accepted standards. Indeed, the broadcasting regulatory environment is such that it simply does not accord with the right to freedom of expression as guaranteed by the Swaziland Constitution. It was therefore not surprising that one of the most important of the draft bills published in 2007 was the Swaziland Broadcasting Draft Bill, 2007. This draft bill proposed, among other things, to:

- Recognise the establishment of the Swaziland Communications Commission (which was to have been formally established in terms of a telecommunications act) to:
  - Regulate broadcasting services, including granting, transferring and revoking licences and setting licence conditions
  - Adjudicate complaints
  - Set standards for programming content and advertising
- Provide for various types of broadcasting licensees: community, commercial, public and subscription; and for diffusion services
- Provide for programming content and advertising guidelines
- Establish a broadcasting complaints procedure
- Give the king wide-ranging powers in the event of a public emergency
- Establish a code of conduct for broadcasting services

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

### **3.9.3 Swaziland Public Broadcasting Corporation Draft Bill, 2007**

One way in which Swaziland's broadcasting regulatory environment is problematic is that the STA operates the state broadcasting service while acting as the regulator of the television sector as a whole. The Swaziland Public Broadcasting Corporation Draft Bill, 2007, was meant to resolve this and proposed, among other things, to:

- Transform the existing STA into the Swaziland Public Broadcasting Corporation
- Set out a list of objects and functions for the Swaziland Public Broadcasting Corporation, including:
  - Providing both sound and television services
  - Aiming to provide programming 'of information, education and entertainment'
  - Providing both a public and a commercial service
- Ensure that the Swaziland Public Broadcasting Corporation had an independent editorial policy 'free from any external interference or influence'

- Provide for a much more independent board of directors, the appointment of which was to have been subject to parliamentary ratification and the involvement of a technical committee
- Repeal the Swaziland Television Authority Act, 1983

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

### **3.9.4 National Film Draft Bill, 2007**

As is clear from other sections in this chapter, the regulation of films (both the making and exhibition thereof) is shockingly out of date in Swaziland, given that governing legislation dates back to the 1920s. Consequently, it was not surprising that the 2007 National Film Draft Bill proposed, among other things, to:

- Establish the National Film Authority and the National Film Board
- Encourage the development and distribution of Swazi film and video products
- Create a new system of certifying films
- Repeal the Cinematograph Act of 1920

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

### **3.9.5 Swaziland Media Commission Draft Bill, 2007**

The Swaziland Media Commission Draft Bill is among the most controversial of the 2007 media-related bills. While some of its proposals would be uncontroversial and even laudable, others are problematic and are not in keeping with internationally accepted standards for media regulation. The Swaziland Media Commission Draft Bill proposed, among other things, to:

- Establish the Media Commission of Swaziland to be appointed by the minister responsible for information, subject to parliamentary ratification and the involvement of a technical committee
- Set out various powers and functions of the media commission, including:
  - To promote and preserve freedom of the press
  - To promote and maintain a free and pluralistic media

- Controversially, to protect the interests of the public against exploitation or abuse by media institutions
- Prescribe a code of ethics for journalists
- Establish a complaints procedure to deal with alleged violations of the code of ethics

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

## 4 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- The defences to and remedies for an action of defamation
- What is meant by judicial review, and in particular:
  - The difference between a review and an appeal
  - The various grounds for judicial review
  - What the High Court of Swaziland held in a case involving the judicial review of the minister for public service and information's decision to declare certain publications to be proscribed

### 4.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Swaziland's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed, unless they were clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

### 4.2 Defamation

#### 4.2.1 Defamation and the defences to an action for defamation

Defamation is part of the common law of Swaziland. Like many Southern African

countries, Swaziland is influenced by South African law and the law of defamation is no exception. Refer, therefore, to the provisions in the South African chapter for a more detailed discussion of that country's defamation laws.

In brief, defamation is the unlawful publication of a statement about a person, which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. There is sometimes uncertainty about whether defamation has even happened; the mere fact that a person is aggrieved at something published about them does not mean that defamation has in fact taken place. In *Metetwa vs Dlamini and Others* (Civ. Case No. 1717/1998), a defamation case heard by the Swaziland High Court, the court found that there had not been defamation. The case involved a headline 'T.V. Mtetwa is dismissed from Tisuka'; however, the High Court held that regard must be had to the content of the article as a whole, which clearly stated that the reason for the dismissal was that Mr Mtetwa had reached retirement age.

Consequently, the court held that '[n]o one who reads the article in its entirety could reasonably be induced to think ill of the Plaintiff. The article ascribes no misconduct to him. There is not the slightest hint of impropriety on his part' and that 'reading the article as a whole I cannot find that the Plaintiff has been defamed'. The action for damages was therefore dismissed with costs.

Once it is proved that a defamatory statement has been published, two legal presumptions arise, namely that the:

- Publication was unlawful. This is an objective test which determines the lawfulness of a harmful act based on considerations of fairness, morality, policy and by the court's perception of the legal convictions of the community
- Person publishing same had the intention to defame

The person looking to defend against a claim of defamation must then raise a defence against the claim.

#### 4.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation, namely:

- Truth in the public interest
- Absolute privilege – for example, a member of the National Assembly speaking in Parliament

- Statements made in the discharge of a duty – for example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person, etc.
- Statements made in judicial or quasi-judicial proceedings
- Reporting on proceedings of a court, parliament or certain public bodies
- Fair comment on true facts and which are matters of public interest
- Self-defence (to defend one’s character, reputation or conduct)
- Consent

An important case concerning these defences for working journalists is *Dlamini v The Swazi Observer* (Civ. Case 631/99), which was heard in the Swaziland High Court. In the course of his judgment, the judge pointed out that while the media does enjoy a defence of privilege with regard to the publication of matters heard in court, this is limited to statements made in ‘open court’. The reporter in this case had based his report (which was, in any event, erroneous) on documents filed in the registrar’s office in a case that had yet to be heard. The court held: ‘While litigants ... may, subject to limitations, make defamatory allegations relating to the cause of action in their pleadings, the media may not repeat the defamatory matter until those proceedings enter the public domain when the matter is heard in open court.’

### 4.2.3 Remedies for defamation

There are three main remedies in respect of defamation in the absence of a defence:

- Publication of a retraction and an apology by the media organisation concerned
- An action for damages
- An action for prior restraint

An important case on damages for defamation is the Swaziland High Court case of *Mamba and Another v Ginindza and Others* (Civ. Case No. 1354/2000). This case involved the publication of highly defamatory and untrue allegations concerning an attorney (the plaintiff). It was alleged that the attorney and government lawyers had reached a settlement agreement in a case which had the effect of defrauding the government. In fact, the plaintiff had no knowledge that government lawyers had acted illegally in entering into the settlement agreement. In deciding upon the amount of damages to be awarded to the plaintiff, the court took account of the following factors:

- *Character, status and regard of the plaintiff:* The court found that the plaintiff was an attorney and a partner at a law firm, and that he had an untarnished reputation with no fraudulent, unethical or unprofessional behaviour having been ascribed to him. He had high standing in the legal profession and was well-regarded by the High Court itself.
- *Nature and extent of the publication:* The court found that prominently headlined articles repeating the defamatory allegations were published on three occasions in newspapers that are widely distributed and read.
- *Nature of the imputation (serious or not):* The court found that the articles implied that the plaintiff was dishonest, unethical, unprofessional, incompetent and inclined to mislead the court, and that these imputations could ruin his career.
- *Probable consequences of the imputation:* The court found that the consequences could be disastrous for the plaintiff's career. His professional reputation could be destroyed and this could have a serious impact on his personal life. He could lose credibility and the respect of his colleagues and the bench (of judges), and could ultimately face financial ruin.
- *Partial justification:* The court found that while the public did have an interest in knowing that government officials had acted irregularly, this had nothing to do with the plaintiff as nothing indicated that he was even aware of any irregularity with regard to the signing of the settlement agreement.
- *Retraction or apology:* The court noted that the defendants offered to publish an apology only a year after the initial publications.
- *Comparable awards and the declining value of money:* The court took into account other damages awards as well as the effect of inflation.

## 4.3 Judicial review

### 4.3.1 The difference between a review and an appeal

When a court hears an application for judicial review of an administrative decision, this is not the same as hearing an appeal from a lower court. In an appeal, the court considers the facts and the law, and essentially asks if the lower court came to the *correct* decision. In an application for judicial review, the court considers the facts and the law, but it asks a different question – namely, whether the *process* by which the decision-maker arrived at the decision being reviewed was flawed or not.

### 4.3.2 Grounds for judicial review

There is no absolute, closed list of grounds for reviewing and setting aside an administrative decision (see, for example, the Malawi chapter). Some grounds for judicial review include:

- Where a decision is *ultra vires* – that is, where the decision-maker goes beyond his/her or its legal authority or mandate to act when taking a decision
- Where a decision was taken in a manner that did not observe the principles of natural justice (that is, a duty to act fairly). In most common law jurisdictions this is distilled into at least two duties, namely, to:
  - Ensure that the decision-maker is not biased
  - Give persons affected by a decision a hearing
- Errors that undermine the process
- Unreasonable decisions
- Ulterior purpose – where a decision is taken ostensibly for one reason but is in fact taken for another, illegitimate, reason
- Failure to apply mind – this is a broad ground of review that is usually evidenced by one or more of the following instances of failure to apply mind:
  - Taking direction – this is where a decision-maker who is empowered to act does so, but at the instruction of a person or authority who or which is not empowered to take the decision
  - Taking irrelevant considerations into account – this is where a decision-maker takes account of considerations which he or she is not empowered or required to take account of
  - Failing to take relevant considerations into account – this is where a decision-maker does not take account of considerations which he or she is empowered and required to take account of

### 4.4 High Court ruling in *Swaziland Independent Publishers (Pty) Ltd T/A The Nation Magazine v the Minister of Public Service and Information*

In an important High Court of Swaziland decision, *Swaziland Independent Publishers (Pty) Ltd T/A The Nation Magazine v the Minister of Public Service and Information* (Case 1155/01), the court was asked to review and set aside a 2001 notice issued by the minister of public service and information in terms of the Proscribed Publications

Act, 1968 (the provisions of which are dealt with in some detail elsewhere in this chapter), which declared both the *Guardian* newspaper and *The Nation* magazine ‘proscribed publications’.

The case involved an application to the High Court to review and set aside the notice. The case turned upon the fact that section 3 of the Proscribed Publications Act empowers the minister to proscribe a publication if the publication is prejudicial or potentially prejudicial to the interests of defence, public safety, public order, public morality or public health. However, the minister did not give any reasons for declaring the publications to be ‘proscribed’, either in the notice or indeed in the various affidavits filed in the court pleadings (court papers). The court held that these ‘jurisdictional facts’ – that is, that the publications were, or were potentially, prejudicial to the interests of defence, public safety, public order, public morality or public health – had to exist before the minister was entitled to act, in terms of section 3 of the Proscribed Publications Act. The court found that by not stating in the notice that such jurisdictional facts exist and what they are, and by refusing to disclose his reasons in his affidavits, the minister had ‘precluded himself from establishing the jurisdictional facts which are the essential basis for the Ministerial act’. This means that the minister acted beyond the powers given to him by the statute. Consequently, the court declared the notice ‘invalid and of no force and effect’.

## NOTES

- 1 Richard Rooney, The new Swaziland constitution and its impact on media freedom, *Global Media Journal Africa Edition*, 2(1), 2008. Available at <http://globalmedia.journals.ac.za/pub/article/view/34/0> [accessed 13 February 2012].
- 2 Ibid.
- 3 Ibid.
- 4 Ibid.