13

South Africa

1 Introduction

The Republic of South Africa officially institutionalised a system of racial segregation, known as apartheid, in 1948, although racial segregation had always been a feature of colonial rule. The country's first democratic election was held in 1994 following the passage of the Interim Constitution, 1993, which was a negotiated constitution. In 1996 the first democratically elected parliament, acting as the Constitutional Assembly, enacted the final constitution. Both the interim and final constitutions protected fundamental civil rights, such as freedom of expression, but the final constitution is particularly noteworthy because it provides for independent regulation of the broadcasting sector.

A feature of the apartheid era was extensive state regulation and censorship of the media. The only broadcast media that was freely available in the country was the South African Broadcasting Corporation (SABC), which provided both radio and television services. The SABC was a state broadcaster, which was subject to government control and manipulation. The only other broadcast service that was allowed in South Africa was a subscription television service, M-Net, which was explicitly prohibited from broadcasting news. Some radio and television services did, however, transmit from the so-called independent states, particularly from Bophuthatswana and Ciskei, but their reach was limited.

The apartheid-era also saw the imposition of severe restrictions on the reporting of news and current affairs by the print media. This was particularly relevant during states of emergency, such as those which were in place during much of the 1980s.

The advent of democracy after 1994 brought about significant improvements in the media environment in South Africa. The broadcast media sector bourgeoned as commercial, and community sound and television broadcast media (including both free-to-air and subscription television broadcasters) were licensed by the independent regulator. The SABC was transformed into a public, as opposed to a state, broadcaster. In the print media sector, black economic empowerment imperatives have broadened print media ownership, and there are several commercial and community newspapers.

South Africa has recently seen some potential threats to the media. The public broadcaster has been in crisis for some years, and at one point there were clear signs that it was in danger of shifting back to the era of state, as opposed to public, broadcasting for the SABC. However, several important court and regulator rulings re-affirmed the importance of a public broadcaster independent of the government of the day. Nevertheless, there remains a level of risk as to whether or not the SABC will stay on course to being a genuine public broadcaster.

The government has battled to give effect to new policy; many bills have been withdrawn in the past couple of years due to constitutionality, and other concerns and the country has floundered in switching to Digital Terrestrial Television (DTT) which is now years behind the June 2015 deadline set by the International Telecommunications Union (ITU).

Access to the internet is increasing, thanks mostly to access to smartphones and the rollout of mobile internet access. The current internet penetration is 53%,[1] but there are glaring inequalities in such access. Poorer, more rural provinces have low rates (for example, 25% for the Eastern Cape and 26% for Mpumalanga) while the urban, more affluent provinces of Gauteng and the Western Cape have penetration rates of 54% and 75% respectively.[2]

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

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related case law

This chapter aims to equip the reader with an understanding of the main laws governing the media in South Africa. Significant weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in South Africa, to enable the media to fulfil its role of providing the public with relevant news and information better, 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
- ▷ how a limitations clause operates
- ▷ which constitutional provisions protect the media
- ▷ 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 South African Constitution
- how rights are enforced under the constitution
- what is meant by the three branches of government and separation of powers
- whether there are any weaknesses in the South African Constitution that ought to be strengthened 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. Constitutions such as these set out the rules by which members of the organisation agree to operate. Constitutions can also govern much larger entities, indeed, entire nations.

The South African Constitution sets out the foundational rules of the South African state. These are the rules on which the entire country operates. The constitution contains the underlying principles, values and laws of the Republic of South Africa. A key constitutional provision in this regard is section 1, which states:

> ***The Republic of South Africa is one sovereign, democratic state founded on the following values:***
>
> ***(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;***
>
> ***(b) Non-racialism and non-sexism;***
>
> ***(c) Supremacy of the constitution and the rule of law;***
>
> ***(d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.***

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 legislation could be challenged in a court of law and could be overturned on the ground that it is unconstitutional.

The South African Constitution makes provision for constitutional supremacy. Section 2 specifically states: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

2.3 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. Governments require the ability to limit rights 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 South Africa makes provision for three types of legal limitations on the exercise and protection of rights contained in Chapter 2, Bill of Rights.

2.3.1 Internal limitations

There are limitations that are right specific and contain limitations or qualifications to the particular right that is dealt with in a particular section of the Bill of Rights. As discussed later, the right to freedom of expression contains such an internal limitations clause.

2.3.2 Constitutional limitations

Section 36(2) of the constitution makes it clear that a law may limit any right entrenched in the Bill of Rights if this is allowed in terms of any provision of the constitution. See, for example, section 37 of the constitution, which deals with states of emergency. Section 37(4) specifically allows for emergency legislation to provide for derogations from the Bill of Rights in certain circumstances. These circumstances include where the derogation is strictly required by the emergency, and that certain rights cannot be derogated from, namely, the rights to dignity and life. Importantly, section 37 specifically allows for emergency legislation to provide for the derogation of rights laid down in the Bill of Rights (including all of the rights that are important to the media, such as the right to freedom of expression, privacy, access to information, administrative justice and so on), where this is strictly required by the emergency.

The process of declaring a state of emergency is set out in section 37(2)(b) of the constitution. It may be done only through an act of parliament and for no more than 21 days. It can be extended for no more than three months at a time with the first extension requiring a majority of the votes in parliament and any subsequent extension requiring a 60% majority of the votes in parliament.

Parliament has enacted the State of Emergency Act, Act 64 of 1997, to give effect to section 37 of the constitution.

2.3.3 General limitations

The last type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, provided this is done in accordance with the constitution. One can find the general limitations clause applicable to the South African Bill of Rights in section 36 of the South African Constitution, headed Limitations of Rights. Section 36(1) provides that the rights in the Bill of Rights may be limited only:

- in terms of a law of general application. This means that the law may not single out particular individuals and deny them their rights
- to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
  - the nature of the right;
  - the importance of the purpose of the limitation;
  - the nature and extent of the limitation;
  - the relation between the limitation and its purpose; and
  - less restrictive means to achieve the purpose.

These factors are important because they show that the limitation of a right has to be narrowly tailored and that its purpose must be interrogated by a court when deciding whether or not the limitation of the right is constitutionally sound.

It is not always clear why it is necessary to have internal limitations clauses if there is a general limitations clause as well. Sometimes, internal limitations clauses are indicators of rights which appear to be substantive but which are actually not very effective.

2.4 Constitutional provisions that protect the media

The South African Constitution contains several important provisions in Chapter 2, the Bill of Rights, that protect the media, including publishers, broadcasters, journalists, editors and producers. There are, however, provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest, and we include these in this section as well.

2.4.1 Rights that protect the media

Freedom of expression

The most important provision that protects the media is section 16(1), part of the section headed Freedom of Expression, which states:

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

This provision needs some detailed explanation.

- This freedom applies to everyone and not just to certain people, such as citizens.
- The freedom is not limited to speech (whether 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 16(1)(a) specifies that the right to freedom of expression includes 'freedom of the press and other media'. This is very important for two reasons.
  - It makes it clear that this right can apply to corporate entities such as media houses, newspapers or broadcasters, as well as to individuals.
  - It makes it clear that the right extends to both the press and other media. Thus, the section 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 16(2)(b) specifically enshrines the freedom 'to receive or impart information and ideas'. This right of everyone's 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 limited access to the media.

Right of access to information

Another critically important provision that protects the media is section 32, which

enshrines the right of access to information. Section 32(1) provides that everyone has the right to access to:

> *(a) any information held by the state; and*
>
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*

This right requires some explanation.

Section 32 essentially provides for two types of rights of access to information:

- The first is a general right of access to any information held by the state. There are no prerequisites for this right; everyone has the right to any information held by the state.
- The second right is, paradoxically, both broader and narrower. It is broader because it grants everyone the right to information 'held by any other person' other than the state that is. Essentially, this gives everyone the right to information held by all private persons, whether individuals or institutions. However, this right is more narrowly tailored as one has the right to information held by non-state persons only where access to the information is 'required for the exercise or protection of any rights'. Thus one needs to demonstrate that the information is required to protect or exercise a right.

The right of access to information is vital in the information age in which we live. When states wield enormous power, particularly with regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding government accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability by providing the public with information, having this right of access to information is critical to enable the media to perform its functions properly.

Importantly, section 32(2) provides that national legislation must be enacted to give effect to the right of access to information. This has been done by the Promotion of Access to Information Act, 2000, which is dealt with in more detail in the legislation section below.

Right to just administrative action

Another important provision that protects the media is section 33, Just Administrative Action. Section 33(1) provides that everyone 'has the right to administrative action that is lawful, reasonable and procedurally fair', and section 33(2) provides that everyone 'whose rights have been adversely affected by administrative action has the right to be given written reasons'.

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 journalists and the media to written reasons

when administrative action results in their rights being adversely affected.

An administrative body is not necessarily a state body; these bodies are often private or quasi-private institutions. These constitutional requirements would, therefore, apply to non-state bodies as well.

Many decisions taken by bodies are administrative in nature, and this requirement of administrative justice is a powerful one that prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

Importantly, section 33(3) provides that national legislation must be enacted to give effect to the right to just administrative action. This has been done in the Promotion of Administrative Justice Act, 2000.

Privacy

A fourth protection is contained in section 14, Privacy. Section 14 specifies that everyone has the right to privacy, which includes the right not to have their person, home or property searched, their possessions seized or the privacy of their communications infringed on. This protection of communications (including letters, emails, telefaxes and telephone conversations) is an important right for working journalists.

Freedom of religion, belief and opinion

A fifth protection is contained in section 15(1), which guarantees everyone the right to freedom of, among other things 'thought, belief and opinion'. Freedom of opinion is important for the media as it protects media commentary on public issues of importance.

Freedom of association

A sixth protection is provided for in section 18, which grants everyone the right to freedom of association, thereby guaranteeing the rights of the press to form press associations, but also to form media houses and conduct media operations.

Freedom of trade, occupation and profession

Section 22 guarantees everyone the right to choose their profession freely; however, this right is subject to the internal limitation that the practice of a profession, such as journalism, may be regulated by law.

This is not a suspect internal limitation, it merely allows for appropriate regulation to protect the public, such as ensuring against malpractice by members of the medical profession, or unethical behaviour by lawyers.

2.4.2 Other constitutional provisions that assist the media

It is important to note that there are provisions in the South African Constitution, apart from the Bill of Rights provisions, that are important and assist the media in performing its functions.

Provisions regarding the functioning of parliament

A number of provisions in the constitution regarding the functioning of parliament are important for the media, including the following:

- Sections 58 and 71, which specifically protect freedom of speech in the National Assembly or the National Council of Provinces (NCOP) of the president, Cabinet members, deputy minister and members of the National Assembly and delegates to the NCOP. They cannot be arrested, charged or sued either civilly or criminally in respect of speeches made or documents produced in the National Assembly or NCOP.

- Sections 59(1) and 72(1), which provide that the National Assembly and NCOP are required to conduct their business in an open manner and must hold their sittings as well as committee sittings in public, although reasonable measures may be taken to refuse entry to any person.

- Importantly, sections 59(2) and 72(1) specifically provide that the National Assembly and NCOP may not exclude the media from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

These provisions assist the media in two important ways. First, they ensure that the media has a great deal of access to the workings of parliament by being physically able to be in parliament. Second, they protect parliamentarians by allowing members of parliament (MPs) to speak freely and in front of the media, without facing arrest or charges for what they say.

Provisions regarding public administration

Section 195 is headed Basic Values and Principles Governing Public Administration. Section 195(1) provides that public administration must be governed by the democratic values and principles enshrined in the constitution, and includes several principles. Some of these have particular importance for the media, namely:

> *a) people's needs must be responded to, and the public must be encouraged to participate in policy-making;*
>
> *b) public administration must be accountable; and*
>
> *c) transparency must be fostered by providing the public with timely, accessible and accurate information.*

There can be little doubt that the media plays a crucial role in educating the

population, enabling citizens to participate meaningfully in a democracy. These provisions could, therefore, be interpreted as requiring media-friendly policies on the part of the state.

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 several these.

2.5.1 Right to human dignity

The right to human dignity is provided for in section 10, which states that 'everyone has inherent dignity and the right to have their dignity respected and protected'. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.2 Right to privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media, with the subjects of press attention asserting their rights not to be photographed, written about or followed in public and so on. The media has to be careful in this regard. The media should be aware that there are always boundaries in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office and the nature of the issue being dealt with by the media.

2.5.3 Internal limitation to the right to freedom of expression

It is important to note that the right to freedom of expression is one of the few rights in the Bill of Rights that is subject to an internal limitation. Section 16(1) sets out the content of the right to freedom of expression, and section 16(2) provides that the right to freedom of expression does not extend to three types of expression, namely propaganda for war, incitement to imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

It is important to understand the nature of the provisions of section 16(2). There is a misconception that the constitution outlaws or makes this kind of expression illegal. This is not correct. What the constitution does say is that these three types of expression do not fall within the right to freedom of expression. In other words, they are simply not constitutionally protected.

The effect of this is that the government may prohibit this kind of expression without needing to meet any of the requirements contained in the general limitations clause. As there is no right to make these three types of expression, there is no need to justify limitations on them. The danger in this, of course, is that the government is free to be heavy-handed and to legislate in a disproportionate manner when regulating such expression. A more thorny issue is that the government is tempted to regulate an issue dealt with in section 16(2), for example, hate speech, in an overbroad manner, that is defining hate speech more broadly than the constitution does in section 16(2)(c) when regulating it.

2.5.4 States of emergency provisions

These have been dealt with in paragraph 2.3.2 above.

2.5.5 The judiciary

In terms of section 165(1) of the South African Constitution, the judicial authority of the republic is vested in the courts. These are the Constitutional Court, the apex court in respect of constitutional matters; the Supreme Court of Appeal, the apex court in respect of non-constitutional matters; the High Courts, the magistrates' courts and any other court established in terms of an act of parliament.

The judiciary is an essential 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. The media is essential for building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the former from unlawful action by the state and unfair damages claims by litigants.

Section 165(2) specifically provides that the courts 'are independent and subject only to the Constitution and to the law, which they must apply impartially and without fear, favour or prejudice'. Judges are appointed by the president, acting on the recommendation of the Judicial Service Commission (JSC) and after consultation with the Chief Justice and leaders of all political parties represented in parliament. Judges are removed by the president, who must act on a finding by the JSC that the particular judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct. In addition, a resolution must be passed by two-thirds in the National Assembly calling for the judge to be removed.

2.5.6 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. Many would query why the JSC is relevant to the media. The answer is because of the JSC's critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 178, the JSC comprises the Chief Justice, the president of the Supreme Court of Appeal, one judge president designated by all the judge presidents, two practising advocates and two practising attorneys nominated by their respective professions, all of

whom are appointed by the president; one law teacher designated by the universities, six members of the National Assembly, three of whom represent opposition parties; four permanent delegates to the NCOP and four persons designated by the state president after consultation with the leaders of all political parties represented in the National Assembly. Also, when considering matters relating to a specific high court, both the judge president and the premier of that province are part of the JSC.

Unfortunately, it appears that the JSC is becoming increasingly politicised and its credibility among many legal practitioners, including some members of the judiciary, has been dented. An example is the generally slow pace of the JSC's misconduct enquiries which have been known to drag on for over a decade.[3]

2.5.7 The Public Protector

The Public Protector's Office is an important office for the media because it, too, is aimed at holding public power accountable. The Public Protector is established in terms of section 182 of the Constitution. It is part of Chapter 9 of the constitution, State Institutions Supporting Constitutional Democracy. The main power of the Public Protector is to investigate and, if necessary, act on any conduct in state affairs or the public administration in any sphere of government that is alleged or suspected to be improper, or to result in any impropriety or prejudice.

The Public Protector is governed by the Public Protector Act, Act 23 of 1994. In terms of section 1A(2) of this act, read with section 193 of the constitution, the Public Protector is appointed by the president on the recommendation of the National Assembly. Note that the Public Protector can be removed only on the grounds of misconduct, incapacity or incompetence, in terms of section 194 of the constitution.

At the time of writing, recent holders of the office have managed the position very differently. One has been recognised globally for her ground-breaking work in holding former President Zuma to account in respect of public monies having been lavished on his private homestead which she insisted must be paid back. The other, the present incumbent, has been sharply criticised by the courts regarding her lack of candour and competence. She has had many personal costs orders awarded against her, including by the Constitutional Court,[4] in respect of several of her investigations which have been set aside on review.

2.5.8 The Human Rights Commission of South Africa

The Human Rights Commission of South Africa is an important organisation in respect of the media. It is also a so-called Chapter 9 body, that is, a state institution supporting constitutional democracy. In terms of section 184 of the constitution, the brief of the Human Rights Commission is to promote respect for human rights, as well as to promote the protection, development and attainment of human rights, including monitoring and assessing the observance of human rights in South Africa.

The Human Rights Commission is governed by the Human Rights Commission Act, 2013. Members of the Human Rights Commission are appointed by the president on the recommendation of the National Assembly. As with the Public Protector, the commissioners can be removed only on the grounds of misconduct, incapacity or incompetence, in terms of section 194 of the constitution.

2.5.9 The independent authority to regulate broadcasting

Section 192 of the constitution is critically important for the broadcast media. It requires that national legislation be passed to establish an independent authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society. It is also a Chapter 9 body.

The independent broadcasting authority required by section 192 of the constitution was established in terms of the Independent Communications Authority of South Africa Act, 2000. It is called the Independent Communications Authority of South Africa (Icasa) and is dealt with in more detail elsewhere in this chapter.

Section 192 clearly articulates constitutional values for the broadcasting sector, namely, that broadcasting is to be regulated in the public interest and that a diversity of views in the broadcasting sector is important.

Questions have been raised about the level of protection given to the independent broadcasting regulator because the provisions that deal with the general principles applicable to Chapter 9 and the appointment and removal of their members do not mention the broadcasting regulator. To date, no court has had the opportunity of considering the implications of this *lacuna* or gap in the constitutional provisions.

2.6 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 7(2) of the constitution requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. Section 8(1) of the constitution makes it clear that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. Furthermore, section 8(2) makes it clear that the Bill of Rights also binds a natural (individual) or juristic person (such as a company) if a particular right is applicable in the circumstances. What this means is that the Bill of Rights has horizontal (between individuals) as well as vertical (between the state and individuals) application.

Although rights are generally enforceable by the courts, the constitution itself also envisages the right of people, including the media, to approach a body such as the Public Protector or the Human Rights Commission to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the

constitution is by the provisions that entrench Chapter 2, the Bill of Rights. Section 74(2) of the constitution requires that a constitutional amendment to Chapter 2 be passed by two-thirds of the members of the National Assembly and by six of the nine provinces in the NCOP, thereby providing significant protection for the Bill of Rights provisions.

2.7 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.

2.7.1 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

In terms of section 85(1) of the constitution, executive power in South Africa is vested in the president. Executive power is exercised by the president, together with Cabinet, in terms of section 85(2) of the constitution. In terms of section 91(1) of the constitution, the Cabinet comprises the president, a deputy president and ministers appointed by the president, all but two of whom must be selected from the members of the National Assembly.

Section 85 sets out several functions of the president acting with members of the Cabinet. These include:

- implementing national legislation
- developing and implementing national policy
- coordinating functions of state departments and administrations
- preparing and initiating legislation
- performing any other executive function in terms of the Constitution or legislation.

Essentially, it can be said that the role of the executive is to administer or enforce laws, make government policy and propose new laws.

The legislature

In terms of section 43(a) of the constitution, legislative power in South Africa is vested in parliament. In terms of section 42(1) of the constitution, parliament consists of the National Assembly and the NCOP. In terms of section 44, this legislative

authority has the power to amend the constitution and pass and amend legislation. The National Assembly also fulfils other essential functions, including, in terms of section 55(2), holding the executive accountable for its operations. It does this by playing an oversight role in terms of the workings of the executive branch of government.

In terms of section 46, the National Assembly is made up of between 350 and 400 people, elected in terms of a common voters' roll and in accordance with national legislation. In terms of section 60, the NCOP comprises nine delegations of 10 people, one delegation from each of country's nine provinces.

The judiciary

As described above, judicial power is vested in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.7.2 Separation of powers

It is essential in a functioning democracy to divide government power between different organs of the state 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 is to separate the functions of the three branches of government, the executive, the legislature and the judiciary so that no single office can operate alone, assume complete state control and amass centralised power. Each branch performs many different functions, and also plays a watchdog role in respect of the other, helping to ensure that public power is exercised in a manner that is accountable to the general public and per the constitution.

2.8 Weaknesses in the constitution that ought to be strengthened to protect the media

There are some weaknesses in the South African Constitution. If these provisions were strengthened, there would be specific benefits for the South African media.

2.8.1 Remove internal constitutional limitation

The internal limitation contained in section 16(2) of the constitution and applicable to the right to freedom of expression ought to be repealed. These provisions are unnecessary because the provisions of the general limitations clause give the government the powers it needs to limit fundamental rights reasonably. Consequently, the legislature already has the power to pass legislation limiting hate speech and other kinds of expression, which is the subject of the internal qualifiers found in section 16(2).

2.8.2 Bolster independence of the broadcasting regulator

It is disappointing that the constitution does not provide the independent broadcasting regulator, established in terms of section 192, the same degree of

institutional protection against political and other interference that is offered to all other Chapter 9 bodies (state institutions supporting constitutional democracy). The broad provisions that protect the independence of Chapter 9 bodies generally should be amended so that they apply specifically to the broadcasting regulator, as well as to all the other Chapter 9 bodies. These provisions are:

- section 181 — Establishment and Governing Principles
- section 193 — Appointments
- section 194 — Removal from Office.

2.8.3 Constitutional protections for the public broadcaster

It has become clear that the public broadcaster, the SABC, is increasingly threatened by political interference. Most South Africans get their news and current affairs information from the SABC. The constitution should, therefore, specifically protect its independence and ensure that it operates in the public interest.

This is important to guarantee impartiality and to be sure that the South African public is exposed to a variety of views. Chapter 9 of the constitution ought to be amended specifically to include the SABC as a state institution supporting constitutional democracy.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the print media
- ▷ legislation governing the broadcasting media in general
- ▷ legislation governing the public broadcasting sector
- ▷ legislation governing broadcasting signal distribution
- ▷ legislation governing the internet
- ▷ legislation that threatens a journalist's duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information

- legislation that prohibits the interception of communication
- legislation that specifically assists the media in performing its functions

3.1 Legislation: an introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As discussed, legislative authority in South Africa is vested in parliament, which, in terms of the constitution, is made up of the National Assembly and the NCOP. Consequently, both houses of parliament are involved in passing legislation.

Detailed rules in sections 73 – 82 of the constitution set out the 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 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, there are four kinds of legislation, each of which has particular procedures or rules or both applicable to it. These are:

- legislation that amends the constitution, the procedures or applicable rules or both are set out in section 74 of the constitution
- legislation that does not deal with provincial-related issues, the procedures or applicable rules or both are set out in section 75 of the constitution
- legislation that deals with provincial issues, the procedures or applicable rules or both are set out in sections 76 and 78 of the constitution
- legislation that deals with taxation issues, the procedures or applicable rules or both are set out in section 77 of the constitution.

3.1.2 The difference between a bill and an act

A bill is a draft law that is debated and usually amended by parliament during the law-making process. 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 is sent to the president. Once it is signed by the president (signifying his assent to the bill), it becomes an act (in terms of section 81 of the constitution). An act must be published promptly and takes effect or comes into force when it is published or on a date specified in the act itself (in terms of section 81 of the constitution).

Besides the checks on legislation that are built into the system of having both houses of parliament consider and vote on a bill, the constitution provides for

other mechanisms of reviewing a bill passed by parliament before it becomes an act:

- Presidential review: If the president has reservations about the constitutionality of any bill passed by parliament, he or she may refer it back to the National Assembly for reconsideration, in terms of section 79 of the constitution. Note that the NCOP must also participate in such reconsideration if the president is concerned about a procedural matter involving the NCOP, or if the bill is one which amends the constitution or deals with provincial matters. After the reconsideration, the president must either accept the bill, that is, sign it such that it becomes an act, or it to the Constitutional Court for a ruling on its constitutionality. If the Constitutional Court rules that the bill is constitutional, section 79(5) requires the president to assent to and sign the bill.
- Review by the National Assembly: It is interesting that the constitution, in section 80, provides for a procedure to test the constitutionality of a recently enacted act of parliament by members of the National Assembly. In terms of section 80, members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an act of parliament is unconstitutional, provided that:
  - at least one-third of the members of the National Assembly support the application. The reason for this requirement is to prevent small minority parties (less than a third of the MPs) from disrupting the democratic process by challenging laws by unnecessary allegations of unconstitutionality
  - the act of parliament was assented to and signed by the president within the previous 30 days. The reason for this requirement is to try to discourage parliament from causing legal chaos by challenging its own legislation after the legislation has long been settled

3.2 Legislation governing the print media

Since the advent of democracy, South Africa's print media has enjoyed a level of media freedom that is unprecedented in its history. South Africa's print media environment is undoubtedly the freest, most robust and critical on the continent. There are very few limitations on the ability to operate as a print media publication. Most of the laws setting down specific obligations on the print media are reasonable and justifiable and do not impinge in any way on the public's right to know.

3.2.1 Imprint Act, Act 43 of 1993

There are certain crucial requirements laid down by the Imprint Act in respect of printed material, the definition of which would include a newspaper, newspaper poster, magazine or periodical:

- Section 2 requires printers of publications intended for public sale or distribution to put their full name and full address in one of the official languages on any such publication. Note that it is possible for a registered abbreviation to be used, in terms of section 3.

- Section 4 provides that no person may distribute any publication that is printed outside the country unless the name of the country of origin is affixed to the publication.
- In terms of section 7, failure to comply with sections 2 or 4 is an offence and, on conviction, a person would be liable to a fine or imprisonment not exceeding one year.

3.3 Legislation governing both print and broadcast media

3.3.1 Legal Deposit Act, Act 54 of 1997

The Legal Deposit Act aims to preserve South Africa's documentary heritage. Section 2, read with sections 3 and 4, requires a publisher, at its own cost, to supply up to five copies of each published document (which obviously includes newspapers, magazines and periodicals but is defined so broadly as to include sound and video broadcasts as well as material published online) to a prescribed place of legal deposit (these are large libraries based in the major cities), and to provide the State Library with prescribed information regarding that document within 14 days of publication. Failure to do so is an offence punishable by a fine. However, it seems that, in practice, the Legal Deposit Act is complied with only by print publications, that is, newspapers, magazines and periodicals and not by broadcast or online media.

3.3.2 The Media Development and Diversity Agency (MDDA) Act, Act 14 of 2002

The MDDA Act creates the Media Development and Diversity Agency as a juristic person, whose main objective is to promote development and diversity in the media throughout the country, in terms of section 3 of the MDDA Act. The main source of funding for the MDDA is by financial contributions made by broadcasters and print media outlets. This funding is used for a range of projects, including providing financial support to community and small commercial media. Note that support is given to both print and broadcast media. Important aspects of the MDDA Act are as follows:

Establishment of the MDDA

The MDDA Act establishes the MMA which operates through a board, in terms of 2.

Main functions of the MDDA

The MDDA Act, at section 3, provides that its main objective is to promote development and diversity in the South African media and for that purpose, among other things, to:

- encourage media ownership by historically disadvantaged communities

- encourage the channeling of resources to the community media and small commercial media sectors.

Section 17 sets out the nature of the support that the MDDA can give to the community and small commercial media. This includes:

- direct cash grants and emergency funding
- training and capacity building
- media research.

Appointment of MDDA board members

In terms of section 4 of the MDDA Act, the MDDA board is made up of nine members, all of whom are appointed by the president. However, of the nine members:

- six are appointed on the recommendation of the National Assembly. Section 4(1)(b) of the MDDA Act requires that the appointment process must include a public nominations process, be transparent and open, and include the publication of a shortlist of candidates.
- The president appoints three without the intervention of the National Assembly 'taking into account section 15', in terms of section 4(1)(c) of the MDDA Act. Section 15 deals with the funding of the MDDA, and this is a pointed reference to the fact that the majority of funding for the MDDA currently derives from voluntary contributions made by the media. Indeed, section 4(1)(c) specifies that one of the three purely presidential appointees must be from the commercial print media and another from the commercial broadcast media. Section 4(4) read with section 4(5) of the MDDA Act sets out criteria for appointment. These include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 5 of the MDDA Act sets out grounds for disqualification of MDDA board members, and these include being foreign, holding elective office, holding political party office and prior criminal convictions.

Funding of the MDDA

In terms of section 15 of the MDDA Act, the funds of the MDDA consist of money appropriated by parliament, that is, specifically set aside in the national budget for that purpose; money received in terms of voluntary agreements with any organisation (note that this includes several print and broadcast media entities); domestic and foreign grants, investment interest and sums of money lawfully obtained from any other source.

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes regulating broadcasting generally

Broadcasting in South Africa is regulated in terms of several different pieces of legislation.

- *Broadcasting Act, Act 4 of 1999:* The Broadcasting Act, apart from a few sections which are still generally applicable to all broadcasters, is essentially an act that regulates the public broadcaster, the SABC, as is dealt with in more detail below.
- *Independent Communications Authority of South Africa Act, Act 13 of 2000:* The Icasa Act establishes and empowers Icasa, which is the authority that regulates electronic communications, broadcasting and postal services in South Africa. Thus Icasa is the independent authority to regulate broadcasting as is constitutionally required in terms of section 192 of the constitution as is more fully dealt with above.
- *Electronic Communications Act, Act 36 of 2005 (ECA):* The ECA provides for several specific powers and functions of Icasa concerning the entire electronic communications and broadcasting sectors in South Africa. Chapter 9 of the ECA, Broadcasting Services, regulates the broadcasting industry in South Africa.

3.4.2 Establishment of Icasa

The Icasa Act establishes Icasa which operates via a council, in terms of section 3.

3.4.3 Main functions of Icasa

In terms of section 2 of the Icasa Act, Icasa is established to regulate electronic communications, postal matters and, importantly, in terms of section 2(a) 'to regulate broadcasting in the public interest to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the constitution'.

Section 4(1)(a) of the Icasa Act requires Icasa to exercise the powers and perform the duties conferred or imposed on it by the Icasa Act, but also by other relevant statutes, including the Broadcasting Act, the Postal Services Act[5] and the Electronic Communications Act. Consequently, the mandate and powers of Icasa derive from several different statutes.

If one looks at all the broadcasting-related statutes (the Icasa Act, the Broadcasting Act and the ECA), it is clear that the main functions of Icasa concerning broadcasting include licensing of various broadcasting services, in three tiers of broadcasting services commercial, community and public; spectrum management and licensing; regulation of ownership and control of broadcasting services and content regulation. These are dealt with in more detail below.

3.4.4 Appointment of Icasa councillors

In terms of section 5 of the Icasa Act, the Icasa Council consists of nine people, the chairperson and eight other councillors. They are all appointed by the Minister of Communications and Digital Technologies on the advice of the National Assembly.

Section 5(1) requires that the appointment procedure include a public nominations process, be transparent and open and include the publication of a shortlist of candidates. The process set out in section 5 requires the National Assembly to come up with a shortlist of suitable candidates of 30% more than the number of councillors to be appointed, and the minister must make his or her choice of councillors from that list. Note that in terms of section 5(1B), the National Assembly may request the minister to review his or her choice of councillors if it is not satisfied with the minister's proposed choices.

Section 5(3) of the Icasa Act sets out the criteria for appointment. Importantly, these include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 6(1) of the Icasa Act sets out grounds for disqualification of Icasa councillors, and these include being foreign, being a public servant, holding political office, conflicts of interest, being an unrehabilitated insolvent and prior criminal convictions.

The chairperson holds office for five years and can be reappointed for one additional term of five years only, in terms of section 7(1) of the Icasa Act. Other councillors hold office for four years and may be reappointed for one additional term of four years only in terms of section 7(2) and (5).

The grounds for removing an Icasa councillor are set out in section 8 of the Icasa Act. They are all objective, such as misconduct, inability to perform duties efficiently, conflicts of interest, and being absent without good cause. To remove a councillor requires a finding on the grounds of removal and a resolution adopted by the National Assembly calling for the councillor's removal from office. The minister has to remove a councillor in accordance with a National Assembly resolution.

3.4.5 Funding for Icasa

In terms of section 15 of the Icasa Act, Icasa is funded from money appropriated by parliament. In other words, funding for Icasa must be provided for in the national budget. Section 15(1A) also allows Icasa to be funded from other sources, as may be agreed between the Minister of Communications and Digital Technologies and the Minister of Finance, and as approved by Cabinet.

It is important to note that Icasa is not permitted to keep any licence or regulatory fees paid to it by the broadcasting, electronic communications or postal industries, and section 15(3) requires Icasa to pay such fees and other revenue into the National Revenue Fund within 30 days of receipt.

3.4.6 Making broadcasting regulations

Both the Icasa Act and the ECA empower Icasa to make regulations.

- Section 4(3)(j) of the Icasa Act provides that Icasa may make regulations on any matter consistent with the objects of the Icasa Act and the underlying statutes (that is the ECA, the Broadcasting Act and the Postal Services Act). Section 4(k) of the Icasa Act specifically empowers Icasa to make regulations on empowerment requirements to promote broad-based black economic empowerment (BBBEE).

- The ECA, at section 4, sets out a regulation-making process and procedure for Icasa. Again, Icasa is given wide powers to make regulations. When Icasa intends making a regulation, it must give the public at least 30 days' notice of such intention and a draft regulation must be published for public notice and comment. Importantly, section 4(5) of the ECA requires Icasa to notify the Minister of Communications and Digital Technologies in writing of its intention to make a regulation and provide the minister with a copy of the proposed regulation. Section 4(6) allows for Icasa to conduct public hearings concerning proposed regulations but does not require these.

3.4.7 Enforcement of compliance

The Complaints and Compliance Committee (CCC) is central to the enforcement of compliance with broadcasting-related laws, regulations and licence conditions. Section 17A of the Icasa Act deals with the establishment of the CC and provides that it is a committee of Icasa which made up of seven members, only one of whom is an Icasa councillor. The chairperson of the CCC is required to be a judge or experienced advocate, attorney or magistrate. There are eligibility requirements for the other five members who must all have relevant qualifications and experience and not be subject to any disqualifying criteria.

The role of the CCC is to investigate, hear and make a finding on matters referred to it by Icasa, complaints received and allegations of non-compliance with the Icasa Act or the underlying statutes. Problematically, the recommendations for remedial action that the CCC is required to make to Icasa and the remedial action that Icasa is entitled to take relate, in terms of the wording of sections 17D and 17E, only to action is to be taken 'against a licensee' which undermines the seemingly broad powers of the CCC to investigate any allegations of non-compliance including by non-licensees. The actions that Icasa is empowered to take against a licensee range from cease and desist orders, to the imposition of a fine to the suspension or even revocation of a licence.

The Icasa Act also provides for the appointment of inspectors to monitor compliance by licensees and the act grants inspectors broad powers of entry and search and seizure in the course of carrying out its responsibilities, sections 17F and 17G.

3.4.8 The licensing regime for broadcasters in South Africa

Categories of broadcasting services

Section 5(1) of the Broadcasting Act provides that there are three categories of broadcasting services:

- *Public:* These are the radio and television services provided by the public broadcaster, the South African Broadcasting Corporation (SABC).

- *Community:* These are radio or television services provided by non-profit entities in the interests of a community, either a geographic community or a community of interest (such as a religious broadcaster or a student radio station).

- *Commercial:* These are both radio and television services provided on a commercial basis, that is, operated for profit. Note that commercial broadcasters operate on a free-to-air basis (their revenue is derived from advertising alone) or on a subscription basis (their revenue is derived from subscription income and advertising). Note that only subscription television (as opposed to sound) broadcasters have been licensed to date.

Types of broadcasting licences

In terms of section 5 of the ECA, Icasa is empowered to grant licences for the different categories of broadcasting services. There are two types of broadcasting licences available:

- *Individual licences:* For commercial and public broadcasting services of national or provincial scope, section 5(3)(b). In terms of section 5(10) of the ECA, an individual licence may be granted for a period not exceeding 20 years and can be renewed. However, as a matter of practice, the licence periods have been prescribed to be shorter (see in the regulations section below).

- *Class licences:* For community broadcasting services or for low-power services (such as radio stations used by drive-in cinema operators), section 5(5)(b). In terms of section 19(1) of the ECA, a class licence has a term of validity not exceeding ten years and may be renewed. However, as a matter of practice, the licence periods have been prescribed to be shorter (see in the regulations section below).

Frequency spectrum licensing

Section 31(1) of the ECA provides that, as a general rule, any person who transmits a signal by radio must have a radio frequency spectrum licence granted by Icasa. As broadcasters in South Africa make use of radio frequencies to transmit their broadcasting signals, all broadcasters are required to have a frequency spectrum licence in addition to their broadcasting service licences (whether class or individual) in terms of section 31(2) of the ECA.

Digital broadcasting

As South Africa falls in Region 1 of the International Telecommunications Union (the ITU), it was to have migrated its analogue terrestrial television signal to digital terrestrial television (DTT) signal by 17 June 2015. The country failed to meet the ITU deadline and, although the dual illumination period began on 1 February

2016,[6] the migration to DTT has not progressed further, and a switch-off date for analogue terrestrial television signal has not been set.

For television, South Africa has adopted the DVB-T standard for DTT and the DVB-S standard for digital satellite television.[7] For sound, South Africa has adopted the DAB (including the DAB+) and DRM standards for digital sound broadcasting.[8] South Africa has made no plans to switch off the AM and FM analogue signals for sound broadcasting.

3.4.9 Responsibilities of broadcasters in South Africa

Adherence to licence conditions

Section 4(3)(d) of the Icasa Act specifically requires Icasa to develop and enforce licence conditions. In terms of section 8(1) of the ECA, Icasa must pass regulations setting out standard terms and conditions for individual and class licences and, in terms of section 8(3) of the ECA, may prescribe additional terms applicable to any individual or class licence. The prescribed standard terms are set out in the regulations section below.

Adherence to content requirements or restrictions

Although all broadcasters enjoy the constitutional right to freedom of expression, this right is not absolute, and broadcasters are subject to a range of content regulation concerning what they may or may not broadcast. These regulations include the following.

Adherence to a broadcasting code of conduct

In terms of section 54 of the ECA, Icasa must prescribe a code of conduct for broadcasting services. Broadcasters must comply either with the Icasa code or with the code of a self-regulatory body of which the broadcaster is a member, provided that Icasa has approved the code of that self-regulatory body. Almost all broadcasters (public, commercial or community) are members of the National Association of Broadcasters (NAB).

The NAB has established a self-regulatory mechanism in respect of broadcasting content, namely the Broadcasting Complaints Commission of South Africa (BCCSA), which has its own Icasa-approved codes of conduct for both free-to-air and subscription broadcasters. Most broadcasters are, therefore, governed by and adhere to the BCCSA's codes. The BCCSA's code of conduct for free-to-air broadcasters is very similar to that of Icasa.

The codes are dealt with in more detail in the regulations and self-regulation sections below.

Adherence to an advertising code

In terms of section 55 of the ECA, all broadcasting service licensees must adhere to the Code of Advertising Practice of the Advertising Standards Authority of South

Africa. Note that this body was recently liquidated and now the Code of Advertising Practice is generally administered by the Advertising Regulatory Board (ARB) which is in the process of revising the Code of Advertising Practice.[9] If a broadcaster is found to have breached the code (irrespective of whether that finding was made by the ARB, for member broadcasters, or by Icasa's Complaints and Compliance Committee (CCC) for non-ARB broadcast members), any punitive measures are to be imposed by the CCC in terms of section 55(3) of the Icasa Act. The code is dealt with in more detail in the self-regulation section below.

Adherence to local content quotas

Section 61 of the ECA deals with the preservation of South African programming, and empowers Icasa to make regulations and licence conditions on:

- local television content quotas for television broadcasting services
- independent television production quotas for television broadcasting services
- South African music quotas for sound broadcasting services.

The requirements of the local content regulations are set out in more detail in the regulations section below.

National sporting events

Section 60(1) of the ECA prohibits subscription broadcasting services from acquiring exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest by Icasa, after consultation with the ministers of communications and sports. The requirements of the sports broadcasting regulations are set out in more detail in the regulations section below.

Political broadcasting restrictions

Section 56 of the ECA prohibits the broadcasting of all party election broadcasts and political advertising except during an election period. During an election period, Icasa's elections-related broadcasting regulations apply. These are dealt with in the regulations section below and have been prescribed by Icasa in accordance with the following requirements of section 57 of the ECA:

- party election broadcasts cannot be broadcast within the 48-hour period prior to an election
- no commercial or community broadcaster is obliged to carry party election broadcasts, although the public broadcaster is so obliged
- Icasa is to determine the duration and scheduling of party election broadcasts, having regard to the principle that all parties are to be treated equitably. Note that equitable treatment does not mean that all parties are required to be given equal time for party election broadcasts.

Political advertising is governed by section 58 of the ECA, which provides that:

- political advertisements cannot be broadcast within the 48-hour period prior to an election
- no broadcaster (public, commercial or community) is obliged to carry political advertising, but if it chooses to do so it must afford all political parties an equal opportunity
- broadcasters may not discriminate against or give preference to any political party in respect of political advertising.

Section 59 of the ECA requires equitable treatment of political parties by broadcasters during an election period:

- all parties must be treated equitably, and there must be reasonable opportunities for the discussion of conflicting views
- there must be adherence to the principle of the right of reply to criticism of a political party.

Must Carry Requirements

Section 61(3) of the ECA requires Icasa to prescribe regulations regarding the extent to which subscription broadcasting services must carry, subject to commercially negotiable terms, the television programmes provided by the SABC. Icasa has prescribed 'must carry' regulations and these are dealt with in the regulations section below.

Keeping records of programmes broadcast

Section 53 of the ECA requires all broadcasters to keep a recording of every programme broadcast for 60 days from the date of broadcast and to produce a script or transcript of a programme on demand by Icasa's CCC after the broadcast thereof. Importantly, section 53(2) specifically provides that Icasa is not authorised to view programmes prior to their being broadcast.

Adherence to ownership and control requirements

Regulating ownership and control of broadcasting licences is an important part of Icasa's regulatory work. Ensuring diversity of ownership is an important part of guaranteeing that there is genuine diversity of views expressed over the airwaves. Section 66(5) of the ECA provides that a 20% shareholding in a commercial broadcasting service, television or sound, constitutes control of that service.

Icasa has six important areas of supervision concerning ownership and control:

Approval of transfers of licences or changes in ownership or control

Section 13(1) of the ECA provides that an individual licence (all commercial sound

and television licences are individual licences) may not be let, sub-let, assigned, ceded or in any way transferred, and control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of Icasa.

The process of obtaining Icasa's permission to the transferring of a licence or control thereof is subject to a public notice and comment procedure.

No party political broadcasters

Section 52 of the ECA prohibits any broadcasting licence to be given to any party, movement, organisation or like body which is of a party political nature.

Limitations on foreign ownership and control of commercial broadcasting services

Section 64 of the ECA prohibits:

- a foreign person from controlling a commercial broadcasting licensee
- a foreign person from having a financial interest or voting interest exceeding 20% in a commercial broadcasting licensee
- foreigners from constituting more than 20% of directors of a commercial broadcasting licensee.

Limitations on the number of commercial broadcasting services a single entity can control

Section 65 of the ECA sets limits on the number and type of commercial broadcasting services a single entity can control. In summary, the limitations are as follows:

- no person can control more than one commercial television service. Note that acting in terms of section 92(3) of the ECA, Icasa recommended that this provision not apply to subscription broadcasters, thus allowing a single entity to control more than one subscription television broadcasting service
- no person may control more than two FM sound broadcasting services or more than one in the same coverage area
- no person may control more than two AM sound broadcasting services or more than one in the same coverage area.

However, Icasa may grant exemptions from all of these requirements if good cause is shown. It is important to note that AM transmission is extremely unpopular for commercial services, and currently, there is only one licensed AM commercial broadcaster. Consequently, for practical purposes, a commercial sound broadcaster is essentially limited to two FM sound broadcasting services.

Limitation on cross-media control of commercial broadcasting services

Section 66 of the ECA sets limits on cross-media control. Cross-media ownership and control is an issue where a single entity owns or controls both print and broadcast media. In summary, section 66 prohibits:

- an entity from controlling a newspaper, a sound broadcasting service and a television broadcasting service, section 66(2).
- An entity which controls a newspaper from also controlling a sound or television broadcasting service if:
  - the newspaper has an ABC (Audit Bureau of Circulations, a print media industry body responsible for calculating circulation and readership figures accurately) circulation that is equal to 20% of the entire newspaper readership in the area; and
  - the circulation area of the newspaper substantially overlaps (by 50% or more) with the broadcast coverage area of the sound or television broadcasting service, section 66(3).

It is important to point out that section 66(3) is extremely poorly drafted as it confuses circulation and readership. At the time of writing, not a single newspaper in the country had a circulation equal to 20% of the entire newspaper readership in any area. So section 66(3) has no practical value as a means of preventing the concentration of print and broadcast media ownership.

Ownership and control of individual licences by persons from historically disadvantaged groups

There are no set requirements for ownership and control of licences by persons from historically disadvantaged groups in the ECA. However,

- Section 9(2)(b) of the ECA specifies that Icasa must set out the percentage of equity ownership required to be held by persons from historically disadvantaged groups whenever it issues an invitation to apply for an individual licence (public and commercial). Importantly, section 9(2)(b) stipulates that such percentage cannot be less than 30%.
- Icasa has also passed regulations in terms of which its approval of transfers of licences, including transfers of control in individual licences (public and commercial), is subject to the transferee meeting the 30% threshold of ownership by persons from historically disadvantaged groups. This is dealt with in the regulations section below.

3.4.10 Is Icasa an independent regulator?

Icasa has a huge advantage over many other broadcasting regulators in the southern African region, namely that its independence is constitutionally mandated in terms of section 192 of the South African Constitution.

Furthermore, the Icasa Act contains specific statements about Icasa's independence. Section 3(3) of the Icasa Act states that Icasa 'is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice'. Section 3(4) of the Icasa Act states specifically that Icasa 'must function without any political or commercial interference'.

Besides these important statements, Icasa does have substantive independence concerning its main regulatory functions, particularly concerning broadcasting:

- *Licensing:* Icasa is entitled to issue invitations to apply for individual broadcasting licences and to license such broadcasters on its own without any role being played by the executive. It is likewise entitled to issue class broadcasting licences on its own. In both cases, Icasa makes licence conditions without any role being played by the executive (see sections 5 and 9 of the ECA).

- *Regulation making:* Although Icasa is required to inform the minister of proposed regulations, the minister's consent to such regulations is not required (see section 4 of the ECA).

- *Ministerial policy directions:* Although the minister is entitled to make policy directions on any matter of national policy applicable to the information and communication technology sector, he or she may not do so if this will affect licensing, section (3)(3) of the ECA. Furthermore, Icasa is only required to consider such ministerial policy directions and is not required to act in accordance with them (see section 3(4) of the ECA).

However, there are certain regulatory functions that Icasa is not entirely free to regulate.

- *Frequency spectrum management:* Importantly, the ECA at section 34(2) provides for ministerial approval of the National Radio Frequency Spectrum Band Plan, which is to be developed by Icasa. The ECA is silent on what would occur if the minister did not approve the band plan, but it is clear that Icasa may proceed to publish the final band plan in the Government Gazette only once such approval has been obtained, see section 34(12) of the ECA.

- Concerning appointments, already mentioned above, Icasa's councillors are appointed by the minister on the recommendation of the National Assembly. It is important that the National Assembly is involved because this is a representative body comprising members of various political parties. However, concerns have been raised about the fact that the minister makes the final appointments. In the 2007 Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions,[10] the committee recommended to parliament that changes be made in this regard. The committee recommended that Icasa councillors be appointed by the president, rather than the minister, on the recommendation of the National Assembly. To date, however, the recommendations of the committee have not been implemented by parliament.

- Regarding performance management, section 6A of the Icasa Act was introduced in 2006 to provide for a performance management system to monitor

and evaluate the performance of Icasa council members. The performance management system is established by the minister in consultation with the National Assembly, in terms of section 6A(1) of the Icasa Act. In the 2007 Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, the committee recommended to parliament that changes be made in this regard. The committee bluntly recommended that the performance management system be revised to remove the role of the minister. To date, the recommendations of the committee have not been implemented by parliament. However, at the time of writing, the performance management system has also never been implemented, and so it remains to be seen what actual impact it will have on the independence of Icasa if any.

3.4.11 Amending the legislation to strengthen the broadcast media generally

There are two broad problems with the current and proposed legislative framework for the regulation of broadcasting generally.

- *Provisions that undermine the constitutionally required independence of Icasa:*
  - The Icasa Act ought to be amended to provide that:
    - › the president is the member of the executive who is the formal authority responsible for Icasa council appointments and removals and not the minister. This is because ministerial appointments lack credibility from an independence point of view;
    - › the National Assembly is responsible for developing and ensuring compliance with a performance management system in respect of Icasa councillors and not the minister.
  - The ECA ought to be amended to make it clear that Icasa can develop the national radio frequency band plan on its own, and this should not require the prior consent of the minister.

3.5 Legislation governing the public broadcasting sector

3.5.1 Introduction

The SABC is South Africa's public broadcaster. It has three free-to-air television services as well as Channel Africa, which is broadcast on a satellite platform. The SABC has 18 radio stations, some of which are regional and some national. The SABC has been in a state of severe crisis since 2007, although, at the time of writing, it now has a stable board and good executive management.

The main statute governing the affairs of the SABC is the Broadcasting Act, although there are also relevant provisions in the ECA.

3.5.2 Establishment of the SABC

The SABC was corporatised (that is converted from a statutory body into a public company incorporated in terms of the Companies Act, 1973, and having a share capital) in terms of section 8A(1) and (2) of the Broadcasting Act. In terms of section 8A(2), the state is the sole shareholder of the SABC. The Broadcasting Act provides, at section 9, that the SABC consists of two separate operating divisions, a public and a commercial service division. However, that separation into two operating divisions has never been effected in practice.

3.5.3 The mandate of the SABC

The exact mandate of the SABC is very unclear. Chapter IV of the Broadcasting Act is headed Public Broadcasting Service and Charter of the Corporation, but it contains several provisions that have nothing to do with the public broadcasting mandate. Indeed, the Broadcasting Act has been criticised for some time because the actual public mandate appears to consist of provisions found in many different sections of the Broadcasting Act, and it is difficult to say with any legal certainty precisely what the public mandate is.

It appears that the public mandate of the SABC is currently contained in several disparate provisions of the Broadcasting Act and the ECA, and includes the following.

- Taking into account the needs of language, cultural and religious groups as well as constituent regions and local communities, and the need for educational programming, section 2(u) of the ECA.
- Developing South African expression by providing a range of programming in official languages that reflect South African attitudes, opinions and values; displaying South African talent in education and entertainment programmes; offering a plurality of views and a variety of news, information and analysis from a South African point of view and advancing the national and public interest, section 6(4) of the Broadcasting Act.
- Providing radio and television programming that informs, educates and entertains, section 8(d) of the Broadcasting Act.
- Being responsive to audience needs, including the needs of the deaf and the blind, section 8(e) of the Broadcasting Act.
- Providing a public service that makes services available in all official languages; reflects both the unity and diverse cultural and multilingual nature of South Africa; strives to be of high quality; provides significant news and public affairs programming; includes significant amounts of educational programming; enriches South Africa's cultural heritage; commissions programming from within the corporation and from the independent production sector and includes national sports programming as well as developmental and minority sports, section 10(1) of the Broadcasting Act.
- Providing a commercial service that is subject to the same policy and regulatory

structures as outlined for commercial services; complies with the values of the public programming service; commissions from the independent production sector; subsidises the public service and is operated efficiently, section 11(1) of the Broadcasting Act.

3.5.4 Appointment of the SABC Board

The SABC is controlled by a board of 12 non-executive and three executive members (the group chief executive officer, the chief operations officer and the chief financial officer), in terms of section 12 of the Broadcasting Act.

The non-executive members are appointed by the president on the advice of the National Assembly, in terms of Section 13(1) of the Broadcasting Act. Furthermore, section 13(2) of the Broadcasting Act requires that the appointment process must include a public nominations process, be transparent and open and include the publication of a short-list of candidates.

Unfortunately, the Broadcasting Act is silent on who appoints the executive members of the board, the minister or the non-executive members of the board. This gap in the law has led to a great deal of conflict and litigation. However, it has now been determined by the High Court that 'the executive members of the Board are to be appointed solely by the non-executive members of the Board and without any requirement for approval by the Minister'.[11]

Section 13(4) of the Broadcasting Act sets out the criteria for board appointments. These include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 16(1) of the Broadcasting Act sets out grounds for disqualification of board members, and these include being foreign and having conflicts of interest or prior criminal convictions.

The appointment process of the SABC Board has come under intense public scrutiny over the past few years. A decade ago, parliament passed a Broadcasting Amendment Act[12] which resulted in several crucial changes to the Broadcasting Act. These changes include the introduction of section 15A of the Broadcasting Act, which allows for parliament to:

- recommend the dissolution of the entire board if it has failed to discharge its fiduciary duties or adhere to the charter
- recommend the appointment of an interim board to replace a dissolved board. This interim board consists of the three executive and five non-executive board members appointed by the president on the advice of the National Assembly. Note that there are no requirements in respect of public nominations or transparency or the development of a short-list *vis-à-vis* recommendations for interim board members.

Parliament has appointed an interim board on two occasions since then, in 2009 and again in 2017.

3.5.5 Funding for the SABC

The Broadcasting Act does not contain a single clear statement on how the SABC is funded. The SABC is required to keep separate accounts for its public services and public, commercial services divisions, in terms of section 9 of the Broadcasting Act. Its public services division is entitled to draw revenue from a range of sources, including advertising and sponsorships, grants and donations, licence fees and state grants, in terms of section 10(2) of the Broadcasting Act.

Unfortunately, the Broadcasting Act is silent on the sources of revenue for the public, commercial services division, although section 11(1)(d) does make it clear that it is to subsidise the public services division.

Section 27 of the Broadcasting Act provides for a television licence fee, to be determined by the minister. Television licence fees account for approximately 14% of the SABC's total revenue, and advertising and sponsorship make up the bulk of its revenue at 77% for the 2017/8 financial year.[13] The balance is made up of other sources of income with direct government funding accounting for approximately 2%.

3.5.6 SABC: public or state broadcaster?

There is no doubt that whether or not the SABC is a genuinely public, as opposed to a state, broadcaster has been under question for many years. From a legal point of view, the role of the minister has been particularly problematic concerning his or her development of company articles of association and memoranda of incorporation, as well as the appointment of executive management, leading to fears of ruling party deployment. However, this has now been settled in the High Court in favour of the independence of the SABC in a case brought by civil society groupings, strengthening its status as a public broadcaster. The case is dealt with under the case law section below.

However, the SABC remains vulnerable to political pressures.

3.5.7 Amending the legislation to strengthen the public broadcaster

The government has recognised that the current crises involving the SABC are at least partly as a result of legislative weaknesses. There are currently two main weaknesses in the existing Broadcasting Act, namely:

- The SABC's public mandate is not set out in a single, clear, coherent statement. Consequently, the board and senior management struggle to define their roles properly, and the public has little idea about what they should expect from the public broadcaster. This makes it extremely difficult to hold the SABC accountable for meeting its public mandate.

- The SABC has a range of programming obligations, including in all 11 official languages, yet its funding model appears to be unsustainable. The SABC is overwhelmingly dependent on commercial sources of funding, and there is insufficient public funding of the broadcaster's public mandate.

3.6 Legislation governing broadcasting signal distribution

Broadcasting signal distribution is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard, viewed by its intended audience. Two statutes are of particular relevance here, namely the ECA and the Sentech Act, Act 63 of 1996.

3.6.1 Licences required by broadcasting signal distribution providers

The ECA makes it clear that broadcasting signal distribution is a form of electronic communications network service (ECNS), which is defined, in its relevant part, in section 1 as:

> *a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise:*
>
> *(a) for that person's own use for the provision of … [a] broadcasting service;*
>
> *(b) to another person for that other's use in the provision of a … broadcasting service;*
>
> *or*
>
> *(c) for resale to a … broadcasting service licensee*

Consequently, all broadcasting signal distributors must have an ECNS licence to provide ECNS.

As is the case with broadcasting licences, there are two types of ECNS licences, individual and class licences. In terms of section 5(3) of the ECA, an ECNS of provincial and national scope operated for commercial purposes must hold an individual licence. In terms of section 5(5)(a) of the ECA, an ECNS of district municipality or local municipal scope operated for commercial purposes is required to hold only a class licence.

3.6.2 The regulatory framework for an ECNS

The ECA, at sections 62 and 63, sets out the regulatory framework for ECNSs that provide broadcasting signal distribution.

The main obligations upon an ECNS licensee that provides signal distribution are to:

- prioritise South African broadcasting channels, section 62(1)(a)
- provide all South Africans with universal access to broadcasting services, section 62(1)(b)
- ensure that it provides signal distribution only to licensed broadcasters, section 62(2)(b).

3.6.3 Types of broadcasting signal distribution ECNSs

It is important to note that the ECA distinguishes between types of signal distribution ECNSs, although it is not clear on this point. The lack of clarity is because the provisions of the ECA on this issue were not fully carried over from the previously applicable, and now repealed, Independent Broadcasting Authority (IBA) Act, 1993.

The ECA specifies two types of signal distribution ECNSs, but there is also a third:

- Section 62(3) of the ECA refers to a 'common carrier' ECNS, which is defined as an ECNS provider 'who is obliged to provide signal distribution for broadcasting services on a non-discriminatory and non-exclusive basis'. Sentech is the only common carrier ECNS.
- In section 63(1) of the ECA, reference is made to self-provisioning of broadcasting signal distribution. This means that a broadcaster is entitled to distribute its own signal provided it has an ECNS licence to do so. There are some community broadcasting services that have a class ECNS licence to provide their own signal distribution services.
- There is, in practice, a third type of ECNS signal distribution service that is neither a self-provider nor a common carrier. This is a commercial signal distributor, which can choose whether or not to provide signal distribution services to one or more broadcasting licensees. An example of this kind of ECNS licensee is Orbicom, the company that distributes the M-Net terrestrial signals and the terrestrial segment of DStv's subscription satellite broadcasting services signals.

3.6.4 Legal provisions governing Sentech

Sentech Limited is the only common carrier signal distributor in South Africa. It is a public company established in terms of the Sentech Act,[14] with the state as the sole shareholder, section 6(1). The Minister of Communications and Digital Technologies exercises the rights of the state in respect of the state's shares in Sentech, section 6(3). This includes appointing the board. Consequently, the executive effectively controls the activities of Sentech.

The Sentech Act provides, at section 5, that the main object and business of Sentech is to provide electronic communications services and ECNS in accordance with the ECA.

3.7 Legislation governing the internet

The ECA in section 1 specifies that broadcasting is a form of 'unidirectional electronic communications' in its definition of broadcasting. It also specifies in the definition of 'electronic communications' that this 'does not include a content service'. So where does that leave Over the Top (OTT) services? Icasa has developed a position paper on Internet Protocol Television (IP TV) and Video-On-Demand (VOD) Services in Notice 770 published in Government Gazette 33436 dated 3 August

2010 (the VOD Position Paper). Although the paper is now outdated, Icasa made several different determinations regarding OTT Services in it.

- Internet Protocol Television Services which provide 'scheduled television programming over a managed data network' are broadcasting services as determined by Icasa, requiring compliance with licensing, local content and other regulatory strictures applicable to all other broadcasting services (at paragraph 72.3). Consequently, the licensing provisions set out above for broadcasting apply.

- Push and Pull VOD Services and Pay-Per-View Services which are downloaded onto a person's electronic device allowing the user to select from a defined list of programming are Electronic Communications Services (at paragraph 72.4). Consequently, the licensing provisions set out above for telecommunications apply.

- OTT services provided over the public internet (such as a broadcaster live-streaming over the internet or Netflix providing internet-based services) are content services and are unregulated by Icasa.

Recently, an amendment to the Films and Publications Act, 1996 has been promulgated but, at the time of writing, is yet to come into operation. In brief, key provisions of amended provisions that relate to the internet include:

- The definition of 'film' is expanded to include 'any sequence of visual images ... capable of being seen as a moving picture and includes any picture intended for exhibition through any medium including the internet'.

- The definitions of 'distributor', 'distribute' and 'commercial distributor' are extremely broad and, in relation to film distributed online include: 'to stream content through the internet, social media or other electronic mediums' and 'to sell, hire out or offer [the film], including using the internet'.

- These definitions then significantly broadens the scope of the existing Act to cover films made available over the public internet and not only those distributed physically in cinemas or via DVD rental/sales outlets. Consequently, the provisions of the Films and Publications Act dealt with in paragraphs 3.9.4 and 3.9.5 regarding obscene or racist expression, and how such expression is regulated and by which structures, apply equally to films distributed over the internet.

- Section 18C introduces a new feature of the Films and Publications Act and that is that it allows commercial online distributors of film to be accredited to conduct self-classification of films distributed via the internet. However, the Film and Publications Board still requires its guidelines for classification to be used and for its logo to appear on the film. It remains to be seen whether or not such provisions will be able to be enforced on the large multi-national online film distributors such as Netflix, Amazon Prime, Google Play and the like once the Amendment Act is in force.

- Section 18D is also of use of online film distributors — it introduces another new feature of the Film and Publications Act and that is that it empowers the council approve the use of classification ratings of a foreign or international film classification body by an online film distributor.
- Section 24C contains several obligations applicable to persons providing child-oriented contact or content service, including internet chat-rooms, via mobile cellular telephones or the internet. These are not set out in detail, but they relate to:
  - displaying safety messages
  - moderating services to ensure that offences are not being committed against children through the use thereof
  - mechanisms for children to report suspicious behaviour
  - reporting obligations to the police.

Failure to comply with these is an offence with a fine, imprisonment, or both, as the penalty upon conviction.

3.8 Legislation that undermines a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood 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 whistleblowers, inside sources who are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often offer 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.

3.8.1 Criminal Procedure Act, Act 51 of 1977

Section 205 of the Criminal Procedure Act (CPA) empowers a presiding officer to call any person who is likely to give material or relevant information as to any alleged offence to come before him or her and to be examined by the public prosecutor, at the request of the director of public prosecutions or any public prosecutor so authorised by the director. Thus, if a public prosecutor suspects that a journalist knows something about a crime; such journalist might be ordered, in terms of section 205 of the CPA, to reveal his or her sources of information relating to that crime.

3.8.2 National Prosecuting Authority Act, Act 32 of 1998

Section 28, read with sections 1 and 7(1), empowers an investigating director in the

National Prosecuting Authority to conduct investigations into specific offences, as set out in a proclamation by the president. These are known as specified offences. Section 28(6) specifically empowers any investigating director who is looking into such specified offences to summon any person who it is believed can furnish any information on the subject of the investigation for questioning, or require such person to produce any book, document or object. It is an offence to refuse to appear before the investigating director or to provide the book, document or object.

It is, however, 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 will depend on the particular circumstances in each case, particularly whether or not the information is available from any other source. It is therefore extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

3.9 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, when examined 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:

- identities of minors in court proceedings
- certain kinds of information regarding legal proceedings
- information regarding defence, security, prisons and the administration of justice
- obscene materials
- racist expression
- election-related information
- information regarding state procurement
- financial intelligence information
- certain advertising restrictions.

It is often very difficult for journalists to find out how laws that would seem to have no direct relevance to the media can affect their work. Critical provisions of these kinds of laws are therefore set out below.

3.9.1 Prohibition on the publication of the identity of a minor in legal proceedings

Criminal Procedure Act, Act 51 of 1977

Section 154(3) of the CPA prohibits the publication of the identity of an accused person or a witness in criminal proceedings if that accused person or witness is under 18 years of age unless the court rules that such publication would be just and equitable.

In terms of section 154(5), such publication is an offence with a penalty of a fine or imprisonment of not more than five years or both.

Child Justice Act, Act 75 of 2008

Section 45 specifically makes the provisions of section 154 of the Criminal Procedure Act (set out immediately above) applicable to minors in preliminary inquiries, that is, before criminal proceedings even start.

Children's Act, Act 38 of 2005

Section 74 of the Children's Act prohibits the publication 'in any manner' of any information relating to the proceedings of a children's court (a court specifically established under the act), which may reveal the name or identity of a child who is a party or a witness to a proceeding, without the permission of the court.

Anyone contravening section 74 commits an offence in terms of section 305(1)(b) of the Children's Act and is liable to a fine, imprisonment or both, in terms of section 305(6) of the Children's Act.

3.9.2 Prohibition on the publication of certain information relating to legal proceedings

Criminal Procedure Act, Act 51 1977

The CPA, at section 154, read with section 153, sets out circumstances in which a court may direct that no information relating to certain criminal proceedings may be published. These circumstances include:

- in the interests of the security of the state or of good order, public morals or the administration of justice
- to protect the identity of witnesses in criminal proceedings
- to protect the identity of minors in criminal proceedings
- to protect the identity of a complainant in relation to a charge involving extortion or sexual offences.

In terms of section 154(5) of the CPA, any such publication is an offence with a

penalty of a fine or imprisonment of not more than one year or both. Importantly, section 154(6) read with section 300 of the CPA specifically allows the court to award civil compensation for such publication in the case of a complainant concerning a charge involving sexual offences. In other words, to also require damages to be paid to such a person whose identity is revealed.

Divorce Act, Act 70 of 1979 and Mediation In Certain Divorce Matters Act, Act 24 of 1987

Section 12(1) of the Divorce Act makes it an offence to 'publish for the information of the public' any particulars of a divorce action or any information which comes to light in the course of a divorce action other than the names of the parties to a divorce action or the judgment or order of the court. A person found guilty of such an offence is liable to a fine not exceeding R1 000 or to imprisonment not exceeding one year or both, in terms of section 12(4).

The provisions of section 12(1) of the Divorce Act (set out immediately above) also apply to any enquiry instituted by the Family Advocate in terms of the Mediation in Certain Divorce Matters Act and in terms of section 12(3) of the Divorce Act.

3.9.3 Prohibition on the publication of state security-related information and the administration of justice

Defence Act, Act 42 of 2002

Section 104(7) of the Defence Act makes it an offence to, without authority, disclose or publish any information (whether in the print or electronic media, verbally or by gesture) that has been classified in terms of the Defence Act. Any person found guilty of such an offence is liable to a fine or imprisonment not exceeding five years. Importantly, this provision is subject to the Promotion of Access to Information Act, Act 2 of 2000. However, as there are exceptions to the requirement of granting access to information based on national defence and security grounds in that Act, this may not be particularly helpful.

It is also important for journalists to be aware of the provisions of section 104(19)(1), which makes it an offence even to gain access to classified information from specific classified facilities, installations or instruments of the Department of Defence. Any person found guilty of such an offence is liable to a fine or imprisonment not exceeding 25 years. Note that there is no public interest override in relationship to this offence.

Protection Of Information Act, Act 84 of 1982

The Protection of Information Act at section 4 sets out several provisions relating to the disclosure of security-related information and essentially makes it an offence to publish a range of security-related information, such as official codes or passwords, or confidential information that has been entrusted to a person by the government. The penalty for such disclosure is a fine not exceeding R10 000 or imprisonment not exceeding ten years, or both. This Act is currently under review

and is to be repealed under the new legislation, but this has not yet come into force, and so we do not deal with its provisions here.

National Key Points Act, Act 102 of 1980

Section 2 of the National Key Points Act allows the minister of defence, whenever he or she thinks it necessary for the safety of South Africa or in the public interest, to declare any place a national key point. In terms of section 10(2) of the National Key Points Act, any person who provides any information relating to security measures about a national key point or to any incident that took place at such national key point without being legally obliged or entitled to do so, or without the authority of the minister of defence, is guilty of an offence. On conviction for such an offence, the person would be liable to a fine not exceeding R10 000, or to imprisonment not exceeding three years, or both.

Correctional Services Act, Act 111 of 1998

The Correctional Services Act contains restrictions on the publication of issues relating to prisons. Section 123(1) prohibits the publication of any account of prison life or of conditions that may identify a specific prisoner unless the prisoner concerned has granted permission for such publication.

Section 123(2) requires permission from the commissioner of correctional services to publish an account of an offence for which a prisoner or person who is subject to community corrections is serving a sentence unless the information is part of the official court record. Note that the commissioner may only refuse permission if, in his or her opinion, the objectives of the incarceration or community service would be undermined, in terms of section 123(3).

A person who contravenes these provisions is guilty of an offence and may be liable to a fine or imprisonment for up to two years, or both, in terms of section 123(6).

South African Police Service Act, Act 68 of 1995

In terms of section 69(2) of the Police Service Act, any person who, without the permission of the national or provincial police commissioner, publishes a photograph or sketch of a person, including on television, who is in police custody and:

- who is suspected of having committed an offence and a decision on prosecution is pending;
- the commencement of criminal proceedings at which he or she is an accused is pending; or
- who is a witness in criminal proceedings, pending the commencement of his or her testimony in those proceedings,

commits an offence, and on conviction is liable to a fine or imprisonment not exceeding 12 months, in terms of section 69(3).

National Prosecuting Authority Act, Act 32 of 1998

Section 41(6) read with section 28(1) makes it an offence to disclose the record of any investigation into any specified offence as gazetted by the president without the permission of the national director of public prosecutions.

On conviction, a person would be liable to a fine, imprisonment not exceeding 15 years, or both.

3.9.4 Prohibition on the publication of obscene materials

The Films and Publications Act, Act 65 of 1996 is a post-constitutional piece of legislation that is the main mechanism for regulating obscene materials in South Africa. Recently, a Films and Publications Amendment Act, Act 11 of 2019, was enacted, but the president has yet to publish the date of its commencement, and so it is not yet in force. Nevertheless, we include reference to key aspects to the amendments as, the Amendment Act is likely to have a significant impact on the media landscape, once it is in force, as it contains several provisions regarding internet content.

Materials not regulated under the Films And Publications Act

The Films and Publications Act appears to regulate a wide range of materials, including films, most publications, games and certain services provided over the internet or on mobile telephones.

While it seems that the Films and Publications Act has an enormous impact on, and relevance to, the media, this is not necessarily the case because it has two important exceptions to its application:

- *Publications:* Section 16(1) of the Films and Publications Act specifically exempts all publications published by a member of the Press Council and there are indications that audio-visual content produced by a member of the Press Council might likewise be exempted in practice.
- *Broadcasters:* Section 18(6) of the Films and Publications Act exempts broadcasters regulated by Icasa from the obligation of applying for classifications for films broadcast or from being subject to film classifications made in terms of the act, except in respect of a film that is subject to an XX or X18 classification, or which has been refused classification by the Film and Publication Board.

In dealing with the Films and Publications Act, we generally focus only on those provisions affecting publications and films (note this includes films distributed over the internet as is more fully set out in paragraph 3.7 above) and in this section we focus on obscene materials as the provisions regarding hate speech are dealt with in paragraph 3.9.5 below.

Bodies established under the act, appointment of members and functions

The Films and Publications Act establishes four important bodies in section 3:

- *The Film and Publication Board,* in terms of section 9A:
  - The board consists of the chief executive officer and such number of officers as determined by the council.
  - The functions of the board are to:
    - appoint classification committees to classify films or publications submitted by the board
    - determine applications for exemptions in respect of any film or publication
    - determine applications for registration as a distributor or exhibitor of films or publications
    - accredit commercial online distributors to conduct classifications of its own films.
- *The Council:*
  - In terms of section 4, the council consists of a chairperson and deputy chairperson appointed by the minister responsible for the administration of the act (being the Minister of Communications and Digital Technologies at the time of writing) and such other members, not exceeding seven, as the minister may appoint, having regard to the need to ensure that the South African community of relevant stakeholders is represented, as well as the chief executive officer appointed by the council in consultation with the minister.
  - In terms of section 6, the minister is to consult with Cabinet before making such appointments.
  - In terms of section 4A, the council issues directives of general application, including classification guidelines and approving foreign classification systems, reviews the functioning of the board and appoints the enforcement committee.
- *The Enforcement Committee:*
  - In terms of section 6A, the enforcement committee consists of four members plus a chairperson who must be a retired judge of the High Court, appointed by the council.
  - The role of the enforcement committee is, in terms of section 6B, to investigate and adjudicate cases referred to it by the board in respect of non-compliance with the act (subject to certain exceptions). It may impose a fine and may refer cases to the law enforcement authorities for prosecution.
- *The Appeal Tribunal:*
  - In terms of sections 5 and 6, the appeal tribunal consists of a chairperson and eight other members appointed by the minister after consultation with Cabinet.

- In terms of section 20, the role of the appeal tribunal is to hear appeals in respect of classification-related decisions taken by the board.

Classification of publications

There are two mechanisms for classifying publications:

- *Request mechanism:* Any person may request that a publication (other than an exempted publication) be classified — section 16(1).
- *Prior classification:* Publications (other than an exempted publication) that are required to undergo pre-distribution classification are, in terms of section 16(2) publications that constitute propaganda for war, incitement of imminent violence and advocacy of hatred based on group characteristics, which constitutes incitement to cause harm. Note that these particular provisions appear to have been tailored to meet the requirements of unprotected expression, as laid down in section 16(2) (the internal limitation to the right to freedom of expression) of the Bill of Rights in the Constitution.

Section 16(4) contains the following types of publication classifications or rulings by the Film and Publication Board's Classification Committee:

- *Refused classification:* Those publications involving child pornography. There are no exemptions in respect of child pornography.
- *XX classification:* This generally relates to publications containing explicit and degrading adult sexual conduct or extreme violence. Note that *bona fide* documentaries or publications of scientific, literary or artistic merit, or which are on a matter of public interest will be entitled to an X18 classification or other condition, ensuring that children do not have access to the publication.
- *X18 classification:* This relates to explicit adult sexual conduct that is not degrading and does not contain extreme violence. Note that *bona fide* documentaries or publications of scientific, literary or artistic merit, or which are on a matter of public interest will not be classified as X18, but instead will be subject to other conditions, ensuring that children do not have access to the publication.
- Publications that do not fall within the above categories may still be subject to conditions, ensuring that children do not have access to them.

With regard to any publication that contains child pornography, the matter will be handed over to the police for investigation and prosecution. Notice must be given in the Government Gazette of all publications that have been classified as refused classification, XX or X18.

How are films classified?

Section 18(1) of the act provides that any person who intends to exhibit or distribute any film, including to be distributed online, (other than broadcasters or, it

seems, members of the Press Council, as discussed above) must submit the film to the board for classification, unless accredited to self-classify or to use a foreign classification system.

Section 18(3) contains the following types of film classifications by the Board's Classification Committee:

- *Refused classification:* Those films involving child pornography. There are no exceptions to this classification in respect of child pornography.
- *XX classification:* This generally relates to films containing explicit and degrading adult sexual conduct or extreme violence. Note that *bona fide* documentaries or films of scientific, dramatic or artistic merit will not be classified XX but will be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.
- *X18 classification:* This relates to explicit adult sexual conduct. Note that *bona fide* documentaries or films or games of scientific, dramatic or artistic merit will not be classified X18 but be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.
- Films that do not fall within the above categories may still be subject to conditions, ensuring that children do not have access to them.

With regard to any film that contains child pornography, the matter will be handed over to the police for investigation and prosecution. Notice must be given in the Government Gazette of all films that have been classified as refused classification, XX or X18.

Penalties for contravening the provisions of the legislation

The offences and enforcement provisions in the Films and Publications Act are found in sections 24A – 30B of the act. The following offences carry various penalties ranging from the imposition of a fine to imprisonment or both:

- distributing: XX classified publications and films, X18 publications and films (unless the distributor is licensed adult premises), publications or films not in accordance with conditions of distribution, unclassified films, films without being a registered distributor
- possessing, creating or importing child pornography
- producing a film or photograph depicting scenes of sexual assault or violence against children
- advertising films without indicating the classification, age restriction or other consumer advice, or showing a trailer of a film with a more restrictive classification

- knowingly distributing a film or publication classified as X18 or which contains explicit sexual conduct which would have justified an X18 classification, to a person who is under the age of 18
- failing to report suspected child pornography offences to the South African Police Service
- facilitating financial transactions relating to child pornography.

3.9.5 Prohibition on the publication of racist expression

Promotion of Equality and Prevention of Unfair Discrimination, Act 4 of 2000

The Equality Act is a piece of legislation that is required to have been passed in terms of the right to equality provisions in the Bill of Rights. Most of the provisions in the Equality Act relate to unfair discrimination. However, several provisions also relate to hate speech and directly prohibit the publication of certain types of expression:

- Section 10 of the Equality Act prohibits the publication, propagation, advocacy or communication of words based on one or more of the prohibited grounds (these are defined in section 1 as being race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, or indeed any other ground that undermines human dignity and causes or perpetuates systemic disadvantage), which could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm, or promote or propagate hatred.
- Section 12(1) of the Equality Act prohibits the dissemination or broadcast of any information or the publication or display of any advertisement or notice that could reasonably be understood as demonstrating a clear intention to unfairly discriminate (on the prohibited grounds set out immediately above) against any person.

Both sections 10 and 12(1) are subject to the exceptions contained in section 12(2), namely:

- *bona fide* engagement in artistic creativity, academic or scientific enquiry
- publication of any information, advertisement or notice in accordance with section 16 of the constitution
- fair and accurate reporting in the public interest.

The provisions of the Equality Act are enforced by specialised equality courts established in terms of the act. Such courts can impose damages awards, including in respect of impairment of dignity, pain and suffering, or emotional and psychological suffering (section 21(2)(d)). In respect of hate speech, the matter may also be sent to the director of public prosecutions for the institution of criminal proceedings under the common law or other legislation (section 10).

Note that a particular weakness of the Equality Act is that its hate speech provisions are not tailored to match the type of hate speech referred to in 16(2)(c) of the constitution. This means that the prohibitions contained in sections 10 and 12(1) of the Equality Act extend far beyond the unprotected hate speech provided for in section 16(2)(c) of the constitution.

This is a problem because some of the speech or expression prohibited under the Equality Act is actually protected expression under the constitution and will require a decision by the courts as to whether or not prohibitions meet the standards of the limitations clause contained in the constitution. This would not be necessary if the hate speech prohibitions in the Equality Act matched the wording of the constitutionally unprotected hate speech provisions found in section 16(2)(c) of the constitution. These provisions are the subject of a Constitutional Court case but, at the time of writing, judgment had yet to be handed down.

Films And Publications Act, Act 65 of 1996

Section 16(4) of the Films and Publications Act (which is dealt with in more detail in paragraph 3.9.4 above regarding its structures and processes, so please refer to that paragraph) provides that the Film and Publication Board's Classification Committee may give a 'refused classification' classification to publications containing advocacy of hatred based on any identifiable group characteristics,[15] which constitute an incitement to cause harm. There are exceptions to the 'refused classification' category of publications, namely if the publication is a *bona fide* documentary or is a publication of scientific, literary or artistic merit, or is on a matter of public interest. In such case, the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.

Similarly, section 18(3) of the Films and Publications Act provides that the Film and Publication Board's Classification Committee may give a 'refused' classification to those films constituting propaganda for war, incitement of violence, or the advocacy of hatred based on group characteristics, which constitute an incitement to cause harm. There are exceptions to this category of films, namely if the film is a *bona fide* documentary or is a film of scientific, literary or artistic merit, or is on a matter of public interest. In such case, the film shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age inappropriate materials.

Note that a particular weakness of the Films and Publications Act is that its hate speech provisions are not tailored to match the type of hate speech referred to in 16(2)(c) of the constitution. This means that the prohibitions on classifying publications and films contained in sections 16(4) and 18(3) of the Films and Publications Act extend significantly beyond unprotected hate speech provided for in section 16(2)(c) of the constitution by including many more group characteristics than is provided for in the hate speech provisions in the constitution.

This is a problem because some of the publications and films effectively prohibited under the Films and Publications Act may contain expression which is protected

under the constitution and will require a decision by the courts as to whether or not the act's prohibitions meet the standards of the general limitations clause contained in the constitution. This would not be necessary if the hate speech prohibitions in the Film and Publications Act matched the wording of the constitutionally unprotected hate speech provisions found in section 16(2)(c) of the constitution.

Distributing a 'refused' classification publication or film is an offence in terms of section 24A(2) of the Film and Publications Act and the penalty, on conviction, is a fine, imprisonment or both.

3.9.6 Prohibition on the publication of election-related information

Section 89(2) read with section 98(a) of the Electoral Act, Act 73 of 1998, makes it an offence to publish any false information with the intention of disrupting or preventing an election; creating fear or hostility to influence the conduct or outcome of an election, or influencing the conduct or outcome of an election. The penalty, on conviction, is a fine or imprisonment for up to 10 years.

Section 90(2) read with section 98(a) makes it an offence to disclose any information about voting or the counting of votes except as permitted in terms of the act. The penalty, on conviction, is a fine or imprisonment for up to ten years.

Section 109 read with section 98(b) specifically makes it an offence to publish exit polls during the prescribed hours for an election, that is, while voting is actually taking place. The penalty, on conviction, is a fine or imprisonment for up to five years.

Note that this prohibition applies in addition to the broadcasting-related election coverage provisions set out above in the sections relating specifically to broadcasting legislation.

3.9.7 Prohibition on the publication of state procurement-related information

The National Supplies Procurement Act, Act 89 of 1970, is an old apartheid-era statute. Sections 2 and 3(1) of the act are extremely broad, all-encompassing provisions, which give the Minister of Trade and Industry vast powers to bypass tender and procurement board procedures, and to insist on delivery of goods or services if the minister 'deems it necessary or expedient for the security of the Republic'.

Furthermore, section 8A prohibits the disclosure of any information relating to any such goods or service without the permission of the Minister of Trade and Industry or a controller acting in accordance with the minister's directions.

Much more generally, section 8B also empowers the Minister of Trade and Industry to issue a notice in the Government Gazette prohibiting the disclosure of any information concerning any goods or service. Any contravention of the above provisions is an offence and, on conviction, the penalty is a fine, imprisonment or both. Several of the provisions of the National Supplies Procurement Act are unlikely to withstand constitutional scrutiny.

3.9.8 Prohibition on the disclosure of financial intelligence centre information

Section 41 read with section 60(1) of the Financial Intelligence Centre Act, Act 38 of 2001, makes it an offence to disclose confidential information held by or obtained from the Financial Intelligence Centre (established in terms of the act to counter money laundering activities) without the permission of the centre, unless empowered to do so in terms of the act.

Section 60(2) of the Financial Intelligence Centre Act makes it an offence to disclose any information that is likely to prejudice an investigation being conducted by the Financial Intelligence Centre.

Section 68(1) provides that the penalty for the offences set out above is imprisonment or a fine.

3.9.9 Prohibition on roadside advertising

The provisions of the Advertising on Roads and Ribbon Development Act, Act 21 of 1940, are probably of more interest to media owners than media practitioners. Still, it is important to note that this Act allows for local government to regulate certain forms of advertising on roadsides, such as billboards.

3.10 Legislation prohibiting the interception of communication

The legality of monitoring, recording and intercepting communications by and of the media has been heard in South Africa's court cases. This issue is governed by the Regulation of Interception of Communications and Provision of Communication-related Information Act, Act 70 of 2002.

Section 2 of the Interception Act prohibits the intentional interception of a communication in the course of its transmission subject to specific exceptions, particularly for law enforcement purposes. For the purposes of the Interception Act, interception is defined in section 1 as acquiring the content of any communication to make it available to a person other than the sender and recipient of the communication. Interception includes monitoring, recording or viewing the content or diverting it away from its intended destination.

There are certain important exceptions to the general prohibition in section 2, of which journalists need to be aware. Section 4 specifically allows a person to intercept (note the definition of this includes recording the content thereof) communication if he or she is a party to the communication (unless the purpose of the interception is to commit an offence). In this regard, it is important to note that a party to communication means a person:

- actually participating in the communication

- in whose immediate presence the communication occurs and is audible to the person concerned, whether or not the communication is specifically directed to him or her
- in relation to indirect communication (making use of a telecommunications system such as a telephone or email), any person who is in the immediate presence of the sender or recipient of the indirect communication.

The effect of these exemptions is that if, for example, a journalist is in the office of a news source and the source is a party to a conversation that takes place over a speakerphone in the office, the journalist may record the conversation and make use of the contents thereof without this being an offence under the Interception Act, even though the other party to the conversation is not aware of the journalist's presence and has not consented to the recording or to the publication or broadcasting thereof.

Several of the provisions of the Interception Act have been declared unconstitutional as is dealt with more fully in the Cases section below.

3.11 Legislation that protects personal information

The media needs to be aware of the provisions of the Protection of Personal Information Act, Act 4 of 2013, (POPIA) most of which came into force by 1 July 2020. It contains several detailed provisions regarding how personal information is to be collected, stored and used.

Importantly for the media's purposes, section 7 of POPIA specifically grants an exemption from compliance with the provisions of POPIA for journalistic, literary or artistic purposes. Section 7(1) specifically provides, in its relevant part, that POPIA 'does not apply to the processing of personal information for exclusively journalistic … expression to the extent that such exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression'.

This exemption is cemented by a further exemption for journalists; section 7(2) of POPIA provides that:

> ***Where a responsible party who processes personal information for exclusively journalistic purposes is, by virtue of office, employment or profession, subject to a code of ethics that provides adequate safeguards for the protection of personal information, such code will apply to the processing concerned to the exclusion of this Act and any alleged interference with the protection of the personal information of a data subject that may arise as a result of such processing must be adjudicated as provided for in terms of that code.***

This is significant because organisations such as the Press Council, which is governed by a self-regulatory code that includes safeguards to protect personal information, may then adjudicate on allegations of non-compliance with their code

instead of being subject to the adjudicatory procedures provided for in POPIA.

Section 7(3) of POPIA sets out the criteria that must inform an assessment of whether or not a journalistic code provides adequate safeguards for the protection of personal information. These are:

- the special importance of the public interest in freedom of expression
- domestic and international standards balancing the public interest in:
  - allowing for the free flow of information to the public
  - the safeguarding the protection of personal information of data subjects
- the need to secure the integrity of personal information
- domestic and international standards of professional integrity for journalists
- the nature and ambit of self-regulatory forms of supervision provided by the profession.

Chapter 7 of POPIA has the heading Codes of Conduct, and it empowers the Information Regulator established in terms of POPIA (the Regulator) to, among other things, issue codes of conduct and develop written guidelines for assisting bodies to develop their codes of conduct. The provisions of the Press Council's code of conduct are dealt with in the Self-Regulation section below.

3.12 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes the accountability and transparency of public and private institutions. Such statutes, while not specifically designed for use by the media, can be, and often are used by the media to uncover and publicise information in the public interest. South Africa has passed three important pieces of legislation of this kind.

3.12.1 Promotion of Access to Information Act, Act 2 of 2000

The Promotion of Access to Information Act (PAIA) was passed in accordance with the requirements of section 32 of the constitution, to facilitate and give effect to the right of access to information provision in the Bill of Rights. It has been amended numerous times.

Section 3 of PAIA stipulates that the act extends to records of both:

- Public bodies — note that this includes:
  - government departments (national, provincial or local)
  - functionaries and institutions exercising public powers, such as parastatals

or statutory bodies such as Icasa and the SABC.

- private bodies — that is, individuals or juristic persons such as a company.

Section 11 of PAIA provides that any person requesting information from a public body must be given access to the records of such body, provided:

- the requester has complied with the relevant procedural requirements
- access to the record is not refused on a ground of refusal recognised by PAIA.

Importantly, section 11(3) specifically provides that the reason for requesting information from a public body is irrelevant to a consideration of whether or not there is a right of access to the information requested.

Section 50 of PAIA provides that any person requesting information from a private body must be given access to the records of such body, provided:

- the record is required for the exercise or protection of any rights
- the requester has complied with the relevant procedural requirements
- access to the record is not refused on a ground of refusal recognised by the act.

Section 33 of PAIA makes it clear that there are grounds for refusing access which is mandatory (access must be denied), and grounds for refusing access which is discretionary (access may be denied):

- *Mandatory grounds for refusing access to information applicable to both public and private bodies:*
  - protection of privacy of a third party who is a natural person, where the access would result in unreasonable disclosure of personal information about an individual, sections 34 (public bodies) and 63 (private bodies)
  - protection of commercial information of third parties, sections 36 (public bodies) and 64 (private bodies)
  - protection of confidential information of third parties, sections 37 (public bodies) and 65 (private bodies)
  - protection of the safety of individuals and property, sections 38 (public bodies) and 66 (private bodies)
  - protection of legally privileged information, sections 40 (public bodies) and 67 (private bodies)
  - protection of research information of third parties and of public or private bodies, sections 43 (public bodies) and 69 (private bodies).
- *Mandatory grounds for refusing access to information applicable to public bodies only:*

- protection of certain records of the South African Revenue Service, section 35
- protection of police dockets and law enforcement and legal proceedings, section 39.

- *Discretionary grounds for refusing access to information applicable to public bodies only:*
  - protection of defence, security and international relations, section 41
  - economic interests and financial welfare of South Africa, section 42
  - operations of public bodies with respect to pre-decision policy formulation and deliberative processes, section 44
  - manifestly frivolous or vexatious requests, section 45.
- Discretionary ground for refusing access to information applicable to private bodies only: Commercial activities of private bodies, section 68.

Note that there are no discretionary grounds for refusing access that are applicable to both public and private bodies.

Two similar and important provisions in PAIA are sections 46 (in relation to public bodies) and 70 (in relation to private bodies), which require even mandatory grounds of refusal to be overridden when the public interest demands this, and where the record would reveal evidence of a substantial contravention of the law or would reveal any imminent and serious public safety or environmental risk.

In terms of section 90, any person who, while trying to deny a right of access destroys, damages, alters, conceals or falsifies a record, commits an offence. On conviction, the person is liable to a fine or imprisonment for a period not exceeding two years.

PAIA is critically important for the media. If used properly, particularly in respect of ongoing investigative journalism, it can provide access to extremely valuable information. Much of what the public knows about South Africa's notorious arms deal has come to light as a result of access to information held by public bodies, particularly documents obtained from the Auditor General's office under PAIA.

3.12.2 Protected Disclosures Act, Act 26 of 2000

The Protected Disclosures Act (PDA) makes provision for procedures for both private and public sector employees to disclose information regarding unlawful or irregular conduct by their employers, or indeed other employees, and to be protected concerning such disclosures.

Section 3 is at the heart of the PDA. It provides that no employee or worker (whether of a public body or private person or body) may be subjected to any occupational detriment for having made a protected disclosure.

- Occupational detriment includes among other things, any disciplinary action, being dismissed, suspended, demoted, intimidated, transferred unwillingly or refused promotion or appointment and being subjected to any civil claim for a breach of a duty of confidentiality arising out of the disclosure of a criminal offence or information which shows a substantial contravention of the law, section 1.

- A protected disclosure is a disclosure made in good faith to the Public Protector, the SAHRC, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Public Services Commission or to a person prescribed for the purposes of making protected disclosures to or to any other person (including the media) if exceptionally serious, sections 1, 8 and 9.

- Section 1 defines 'disclosure' as the disclosure of information regarding the conduct of an employer or another employee or worker, which shows or tends to show that:
  - a criminal offence has been committed or is likely to be committed
  - a legal obligation has not been complied with
  - a miscarriage of justice is happening
  - the health and safety of an individual is endangered
  - the environment is being damaged
  - unfair discrimination
  - any of the above is being concealed.

The effect of the PDA is that in serious cases it will be competent for an employee to make a protected disclosure to the media if bodies that are supposed to address such issues (such as the Public Protector) have failed to act in the past. This legislation assists the media in working with whistleblowers both in government and the private sector to make information regarding corruption and other illegal or damaging conduct public.

3.12.3 Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, Act 4 of 2004

The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (Powers Act) confirms and adds to the privileges and immunities that are given to parliament and provincial legislatures by the constitution. As the preamble to the Powers Act provides, furthering privileges and immunities is essential 'in order to protect the authority, independence and dignity of the legislatures and their members'.

- Section 6 of the Powers Act extends the constitutional privilege of free speech to the president, members of the National Assembly and delegates to the NCOP, as well as to joint sittings of the National Assembly and the NCOP.

- Section 18 of the Powers Act is critical for the press because it provides that no person (including, of course, the media) is liable to civil or criminal proceedings in respect of the publication of any report, paper or minutes that have been submitted to parliament, including committees thereof. However, section 19 prohibits the willful publication of documents that have been prohibited in parliament or which falsely purport to have been published under the authority of parliament or to be a verbatim account of proceedings.
- Section 21 allows for the broadcasting of parliamentary proceedings only with the permission of the authority of the body (for example, a committee chair) concerned. Once authority is granted, no person is liable to civil or criminal proceedings in respect of such broadcast.
- All of the above provisions apply to provincial legislatures equally (section 28) with the notable exception of section 6, which is an astonishing omission as that is the crux of the act.

3.12.4 Protection from Harassment Act, Act 27 of 2011

The Protection from Harassment Act (the PFHA) is a useful statute for journalists to be aware of in the age of stalking and violent threats made against journalists online, particularly on social media platforms such as Twitter and Facebook. This is particularly so of female journalists who have been subjected to death threats and threats of assault, including sexual assault, on social media platforms.

In brief, it makes it an offence to engage in harassment. The definition of harassment in section 1(a)(ii) of the PFHA includes 'engaging in conduct that the respondent knows or ought to know causes harm or inspires the reasonable belief that harm may be caused to the complainant … by unreasonably engaging in electronic communication aimed at the complainant.'

The PFHA makes provision for someone who is subjected to online harassment to apply to the courts for a protection order in terms of section 10. Anyone who violates a protection order can be sentenced, on conviction, to a fine or imprisonment in terms of section 18(1).

3.12.5 Electoral Act, Act 73 of 1998

The Electoral Act is a useful statute for journalists, during election periods which are always politically charged. Section 97 and 98, read with section 94 of the Electoral Act makes it an offence, punishable by a fine or imprisonment, for a person or party bound by the Electoral Code to fail to comply with its provisions.

The Electoral Code is set out in Schedule 2 to the Electoral Act, and its purpose is to 'promote conditions for free and fair elections'. Section 8 of the Electoral Code is headed Role of the Media, and it requires every registered party and every candidate to:

- respect the role of the media before, during and after an election

- not prevent access by members of the media to public political meetings, marches, demonstrations and rallies
- take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.

Consequently, political parties, candidates or both, who fail to take reasonable steps to prevent their supporters from harassing or intimidating journalists during election periods are committing a criminal offence.

4 Regulations affecting the media

In this section, you will learn:

- ▷ what regulations are
- ▷ key regulations governing broadcasting content
- ▷ other key aspects of broadcasting-related regulations

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Regulations are a legal mechanism for allowing ministers or organisations such as Icasa to make legally binding rules governing an industry or sector, without requiring parliament to pass a specific statute thereon.

The statute will empower a minister or a body such as Icasa to make regulations on particular matters within the scope of the functions and powers of that minister or body.

4.2 Key regulations governing broadcasting content

4.2.1 Regulation setting out the Code of Conduct for Broadcasters

The Code of Conduct for Broadcasters — Notice 958 published in Government Gazette 32381 dated 6 July 2009, applies to all broadcasters except those governed by an Icasa-approved code of conduct enforced by a self-regulatory body (see the section below on self-regulatory codes).

The Code of Conduct for Broadcasters:

- Prohibits the broadcasting of:
  - unnecessary or explicit extreme violence or explicit infliction of domestic violence
  - propaganda for war
  - incitement of imminent violence
  - advocacy of hate speech based on race, ethnicity, religion or gender and which constitutes incitement to cause harm
  - certain types of sexual conduct, child pornography, bestiality, sexual conduct which advocates hatred based on gender that constitutes incitement to cause harm; explicit sexual conduct.

  Note that there are exceptions for *bona fide* scientific, documentary, dramatic, artistic or religious broadcasts, which amount to a discussion, argument or opinion about religion, belief or conscience, or on a matter of public interest. There are also exceptions for material broadcast during the watershed period (between 21h00 and 05h00 for free-to-air broadcasters, and between 20h00 and 05h00 for subscription broadcasters), with relevant warnings.
- Requires particular care when children are likely to be part of the audience. There are specific requirements for children's programming, including in respect of the portrayal of violence, safety matters and issues which could threaten a sense of security such as death, domestic conflict, the use of drugs or alcohol, and so on and the use of offensive language.
- Provides that programming which contains scenes of explicit violence, sexual conduct or nudity, or offensive language may be broadcast only during the watershed period.
- Specifies that television broadcasting licensees must provide advisory assistance, including age guidelines, where broadcasts contain violence, sex, nudity or offensive language.
- Requires that news be truthful, accurate and fair without intentional or negligent departure from the facts:
  - where a report is based on opinion, rumours or allegations, this must be clearly presented
  - where there is reason to doubt the correctness of a report, verification should take place
  - when a broadcast report is known to have been incorrect, this must be rectified quickly and fairly
  - the identity of rape victims and other victims of sexual violence must not be divulged without their consent
  - there must be warnings for reports involving graphic violence or sexual assault.

- Requires that comment be honest, clearly presented and based on facts.
- Requires that when presenting programming in which controversial issues of public importance are discussed, reasonable efforts must be made to present opposing views and to ensure a right of reply.
- Requires that broadcasters exercise exceptional care in matters involving the privacy, dignity and reputation of individuals (particularly in respect of people who are bereaved and children, the aged and the disabled), subject to a legitimate public interest.
- Requires, when audiences are invited to react to a programme or competition, that broadcasters broadcast:
  - the full cost of the telephone call or SMS, and must specify what percentage thereof is intended for a charitable cause if any
  - the rules of any competition, including the closing date and the manner in which the winner is determined.

4.2.2 Must Carry regulations — subscription broadcasters' obligation to carry SABC channels

The regulations on the extent to which subscription broadcasting services must carry the television programmes provided by the public broadcasting service licensee (Must Carry), notice 1271 published in Government Gazette 31500 dated 10 October 2008, oblige certain subscription television broadcasters to carry SABC television channels.

The obligations are as follows:

- Only subscription broadcasters providing 30 or more television channels are obliged to carry SABC channels.
- Every 20th channel above the minimum threshold of 30 channels must be a public broadcasting service channel. This means that channels 30, 50, 70, 90 and so on, will be public channels.
- The channels provided by the public services division (as opposed to the public, commercial services division) of the SABC must be prioritised for carriage.

Failure to comply with the must-carry regulations carries a fine not exceeding R1 million.

A significant problem with the Must Carry regulations is that section 6(1) thereof requires the SABC to offer its television programmes 'at no cost' to the subscription broadcaster on request. This is *ultra vires* or at odds with the relevant provisions of the ECA which requires Must Carry to be subject to 'commercially negotiable terms'. The current Must Carry Regulations effectively allow the subscription broadcaster with significant market power, DStv, to access the SABC's television channels free, to the public broadcaster's financial disadvantage.

4.2.3 Local content and independent commissioning regulations

The Local Content Regulations, Notices 344 and 346 published in Government Gazette 39844 dated 23 March 2016, set out South African programming and independent television production requirements for radio and television licensees, respectively, in three licence categories, public, commercial (both free to air and subscription) and community.

Local content requirements are important because they ensure that South African television content (including independently produced content) and music is produced and broadcast when it is often cheaper and easier to import poor quality foreign content. It is also important to note that the Local Content Regulations represent a floor and not a ceiling in respect of local content; the local content requirements may well be higher for specific broadcasters depending on their licence conditions. The regulations are, in places, extremely technical, particularly in respect of applying format factors for genres, language, repeats and so on. It is also possible, in terms of section 4 of the Local Content Music Regulations, to apply to Icasa for an exemption from complying with the regulations and applicants must submit proof that there is a limited local music content supply in its defined format. Below is a summary of the basic local content requirements.

Television

Nature of television service	Local television content to be broadcast as a percentage of programming	Percentage of local content to be independently produced
Public services	Overall total and primetime percentage required: 65%, and of this: ▸ 35% drama ▸ 80% current affairs ▸ 50% documentary ▸ 50% informal knowledge building ▸ 60% educational programming ▸ 55% children's programming	40% and of this, 50% of the independent production budget is to be spent on previously marginalised African languages and/or programmes commissioned from regions outside Durban, Cape Town and the Johannesburg Metropolitan cities.

Nature of television service	Local television content to be broadcast as a percentage of programming	Percentage of local content to be independently produced
Commercial and public commercial services	45% of programming broadcast during the South African performance period (05h00 to 23h00 daily) and of this: ▸ 20% drama ▸ 50% current affairs ▸ 30% documentary ▸ 30% informal knowledge building ▸ 25% children's programming	40% and of this, 50% of the independent production budget is to be spent on previously marginalised African languages and/or programmes commissioned from regions outside Durban, Cape Town and the Johannesburg Metropolitan cities.
Community services	65% of programming broadcast spread evenly over the South African performance period (05h00 to 23h00 daily) and during prime time and of this 50% of the quota must be produced within the licensee's coverage area	40%
Satellite subscription services	At least 15% of the annual content acquisition budget is to be spent local television content. At least 15% of the total annual channel acquisition budget is to be spent on channels with local television content that are compiled and uplinked from South Africa. Note that carrying the channels of existing television licensees does not count towards meeting local content requirements.	40% and of this, 50% of the independent production budget is to be spent on previously marginalised African languages and/or programmes commissioned from regions outside Durban, Cape Town and the Johannesburg Metropolitan cities.

Radio

Nature of the radio/sound service	South African music requirement as a percentage of total music broadcast spread evenly throughout the performance period (05h00 to 11h00 daily)
Public sound services	70%
Commercial and public commercial sound services	35%
Community sound services	80%
Subscription sound services	30% of the bouquet is to consist of channels made up of South African music content.

Icasa has also prescribed Independent Commissioning Regulations in Notice 1598 published in Government Gazette 32767 dated 1 December 2007 (the Independent Commissioning Regulations) which requires all television broadcasters to compile commissioning protocols for independently produced South African programming, section 3.

The Independent Commissioning Regulations, at section 4, also require television licensees to submit an annual report setting out its procurement activities from independent producers.

Section 2 of the Independent Commissioning Regulations requires commissioning practices to be, among other things, fair, transparent and non-discriminatory and not to hamper independent producers' control.

4.2.4 Sports broadcasting rights regulations

The current Sports Broadcasting Rights Regulations — Notice 275 published in Government Gazette 33079 dated 7 April 2010, contain a list of specified national sporting events to which subscription broadcasters who have acquired the rights thereto are required to invite free-to-air broadcasters to tender. They can be broadcast live, delayed live or delayed by a free-to-air television broadcaster. The regulations are problematic in that they clearly envisage that free-to-air and subscription broadcasters are to enter into commercial agreements regarding the broadcasting of national sporting events.

The effect of this is that there is no guarantee of the public having access to premium sports content where the rights are held by subscription broadcasters if they cannot reach an agreement with a free-to-air broadcaster on the commercial terms. Although these Sports Broadcasting Regulations are in the process of being reviewed, this process has yet to be finalised. It is clear that the Sports Broadcasting Rights Regulations have not resulted in all national sporting events being broadcast on free-to-air television and free-to-air broadcasters, particularly

the SABC, have battled to afford the rising cost of premium sports content.

4.2.5 Advertising, infomercials and programme sponsorships

Icasa has passed the regulations relating to the Definition of Advertising, and the Regulation of Infomercials and Programme Sponsorship in respect of Broadcasting Activities are contained in Notice 426 published in government Gazette 19922 dated 1 April 1999 (the Advertising Regulations). In brief, important aspects include:

- infomercials may not be broadcast during primetime children's programming
- infomercials must be presented such that it will be clear to the audience that infomercials do not constitute programme material
- no television channel (unless it is a dedicated infomercial channel) may transmit infomercials for more than 2 hours during the performance period (05h00 to 11h00) per day
- where a broadcaster derives benefit from a programme sponsorship, it must retain editorial control and control over the scheduling of the sponsored programme
- television news and current affairs programming may not be sponsored however, this prohibition does not apply to radio news and current affairs. No product placement is permitted during news and current affairs programming
- product placements in programming must be subordinate to the content of the programme material
- in all cases of programme sponsorship, the broadcaster must state the nature of the sponsors association with the relevant sponsored programme clearly before and after the transmission of the sponsored programme.

4.3 Other important broadcasting-related regulations

Icasa has passed dozens of regulations governing different non-content aspects of broadcasting, signal distribution and radio frequency spectrum management, including in respect of licence fees, administrative procedures and record-keeping. We set out below particularly important ones.

4.3.1 Standard Terms and Conditions Regulations

Icasa has prescribed Regulations on Standard Terms and Conditions for both class licences, namely community broadcasting licences (Notice 525 published in Government Gazette 33296 dated 14 June 2010, as amended) and for individual licences, including public and commercial broadcasting licences, (Notice 523 published in Government Gazette 33294 dated 14 June 2010, as amended).

In brief, both sets of Standard Terms Regulations deal with several critical issues such as:

- licence terms:
  - fifteen years for all public and commercial television licences, whether free to air or subscription
  - ten years for all public and commercial sound licences
  - seven years for community television licences
  - five years for community sound and all low-power licences
  - forty-five days for special event licences.
- When broadcasting services must commence after being licensed:
  - twenty-four months for public and commercial television licensees
  - twelve months for community licensees and public and commercial sound broadcasting services.
- hours of operation are 24 hours a day for all broadcasting licensees
- logs must be kept and information provided by a licensee to Icasa upon request.

Furthermore, the standard terms for individual licences (commercial and public broadcasters) provide for a maximum of 20% syndicated programming to be broadcast during the performance period, that is, between the hours of 05h00 and 23h00 daily.

4.3.2 Licensing Processes and Procedures Regulations

Icasa has prescribed Regulations on Licensing Processes and Procedures for both class licences, namely community broadcasting licences (Notice 526 published in Government Gazette 33297 dated 14 June 2010, as amended) and individual licences, including public and commercial broadcasting licences, (Notice 522 published in Government Gazette 33293 dated 14 June 2010, as amended).

In brief, both sets of regulations deal with several important issues such as prescribing forms for the application, amendment, renewal, surrender or transfer (including the transfer of control) of a licence, the notification of changes in information relating to the licensee and the number of copies required. There are also forms for test and low-power licences.

In the Licensing Processes Regulations for individual licences, section 12(1)(c) read with section 12(2) specifies that an application to transfer a licence or control thereof will be refused if less than 30% of the ownership of transferee is held by historically disadvantaged persons unless there are management and control by black persons of at least 60% or the transferee has the status of 'facilitator' of Broad-based Black Economic Empowerment.

4.3.3 Community Broadcasting Regulations

Icasa prescribed the Community Broadcasting Services Regulations in Notice 439 published in Government Gazette 42323 dated 22 March 2019 (the Community Regulations).

The purposes of the Community Regulations are set out in section 3, and essentially these are to provide for:

- the framework under which community broadcasting licensees will operate
- requirements for the registration, renewal, transfer and amendment of community broadcasting licences
- governance and management structure requirements
- basic principles of community participation.

Section 4 of the Community Regulations set out detailed requirements for those entities wishing to apply to register as a community broadcasting service licensee, including:

- having been registered as a non-profit entity for at least two years
- demonstrating community development and empowerment.

Section 5 deals with the Icasa requirements for governance and management of community broadcasters, and these include:

- defining distinct roles for management and the board
- ensuring that the board excludes immediate family members.

Section 9 deals with prohibited office bearers and tries to ensure that political parties (and their allies or youth or women's organisation affiliates) do not endeavour to control community broadcasting services by holding office on the board, management or staff of a community broadcasting service.

Section 10 deals with programming and includes requirements on local origination, limiting programme syndication or programme sharing to 20% and requiring policies on language and format as well as on mechanisms for community participation.

Section 11 requires all surplus funds to be utilised in the community for community development and for reports on this to be submitted annually.

To combat the phenomenon of community broadcasters being managed by commercial entities, section 12 deals with management contracts and contains several restrictions on management contracts involving community broadcasters to ensure that editorial control remains in the hands of the community broadcaster.

Section 13 contains requirements for community participation which is to be involved in management and programming selection, including by community participation committees.

4.3.4 Subscription broadcasting

Icasa prescribed Subscription Broadcasting Service Regulations in Notice 152 published in Government Gazette 48452 dated 31 January 2006 (the Subscription Regulations).

An important issue dealt with in these regulations is the process for channel authorisations which are provided for in section 3.

4.3.5 Record-keeping and reporting

There are several different types of record-keeping and reporting requirements. The most comprehensive is the Compliance Procedure Manual Regulations prescribed by Icasa in Notice 902 published in Government Gazette 34363 dated 15 December 2011 (the Compliance Manual Regulations).

The Compliance Manual Regulations contain several forms which have to be submitted, including financial information as well as ownership and control reporting and programming reporting, including, news, programming and local content and music logs.

4.3.6 Fees payable

Icasa has prescribed the Licence Fees Regulations for broadcasting licence fees as well as for administrative fees (for applications, transfers, amendments and the like) in Notice 299 published in Government Gazette 36323 dated 28 March 2013 (the Licence Fees Regulations).

Section 4 of the Licensee Fees Regulations exempts community and public broadcasters from paying annual licence fees. For commercial broadcasters, the annual licence fee is a percentage of revenue on a sliding scale from 0.15% to 0.35%, Schedule 2 to the Licence Fees Regulations.

Further, Icasa has prescribed the Regulations for the Annual Contributions to the Universal Service and Access Fund in Notice 93 published in Government Gazette 34010 dated 10 February 2011 (the USAF Regulations).

All broadcasting licences (except for community licences which are exempt from making USAF contributions in terms of section 89 of the ECA) are required to contribute 0.2% of annual turnover to the USAF, in terms of section 3 of the USAF Regulations. However, if broadcasters have contributed to the MDDA in terms of the MDDA Act (dealt with in section 3 above), then that contribution can be set off against the required contributions to the USAF.

4.3.7 Election regulations

Icasa has prescribed regulations on Party Election Broadcasts, Political Advertisements and the Equitable Treatment of Political Parties by Broadcasting Licensees in Notice 101 published in Government Gazette 37350 dated 17 February 2014, as amended (the Elections Regulations).

The Elections Regulations apply to election periods and prescribe a framework and guidelines under which party election broadcasts and political advertisements are to be carried by broadcasting licensees during national and provincial elections. The guidelines (contained in Annexure B) essentially summarise the elections-related provisions of the ECA which have been dealt with in the statutory section above.

Party election broadcasts are dealt with in section 4 of the Elections Regulations. Only a public broadcasting service is required to carry party election broadcasts. Commercial and community broadcasters may, but are not required, to do so. Party election broadcasts must not exceed 50 seconds in duration and must be broadcast in a sequence and timing determined by Icasa on the allocation of time slots to the broadcaster in terms of Annexure A to the Election Regulations.

Political advertisements are dealt with in section 6 of the Election Regulations. No broadcaster is required to broadcast political advertising, but if they do choose to do so, they must comply with the Election Regulations' provisions on political advertisements.

Section 7 of the Elections Regulations provides for a complaints procedure (complaints are to be made to the Icasa CCC), and a failure to comply with the Election Regulations is sanctioned by the imposition of a significant fine.

4.3.8 People with disabilities

Icasa has prescribed regulations on a Code on People with Disabilities — Notice 1613 published in Government Gazette 30441 dated 7 November 2007. Note these are due to be amended by this has yet to be finalised.

The Disability Code requires all broadcasters to report annually on their progress in implementing the following:

- All broadcasting licensees must ensure that their services are available and accessible to people with disabilities, including by:
  - the use of sign language and sub-titles
  - programme support such as fact sheets
  - websites that offer a range of formats, such as audiotape
  - the use of spoken languages, where materials such as weather forecasts or economic indicators are shown on screen.
- Broadcasting licensees must have surveys and contact with disability organisations regarding their services.
- Broadcasting licensees must ensure that their programming does not stereotype disabled people or disability, and must involve disabled people as part of a studio audience and in-programming storylines.

5 Media self-regulation

Four principal self-regulatory codes affect the media in South Africa

- The Code of Advertising Practice governs advertising; it was developed by the Advertising Standards Authority which has since ceased to exist and has been replaced by the Advertising Regulatory Board (the ARB). The ARB is in the process of revising and updating the Code of Advertising Practice but, at the time of writing, this process had not been completed, and so we refer to provisions in the current Code.
- The Broadcasting Complaints Commission of South Africa (BCCSA) has two Codes of Conduct for Broadcasters, one for free-to-air broadcasters and one for subscription broadcasters.
- The Press Code of Ethics and Conduct for South African Print and Online Media (the Press Code), which was developed by the Press Council of South Africa and the Interactive Advertising Bureau of South Africa for their members, is enforced by the Press Ombudsman and the South African Press Appeals Panel.

5.1 The Code of Advertising Practice

The essence of the Code of Advertising Practice is that advertising should be legal, decent, honest and truthful and have a sense of responsibility to the consumer. Some key topics that the code addresses are the following:

- no offensive advertising
- advertisements must not abuse the trust of the consumer
- no unacceptable advertisements containing the following:
  - fear
  - violence
  - illegality
  - discrimination
  - gender stereotyping
- advertisements must be truthful
- advertisements must not be misleading
- no comparative advertising unless these are factual comparisons
- no imitation of an existing advertisement
- no advertisement may refer to a living person unless their express prior permission has been obtained

- advertisements must be clearly recognisable as such and must be distinguishable from news, editorial or programme matter
- no advertising that is harmful to children or that exploits or portrays them in a sexually provocative manner
- no animals may be harmed in advertisements
- there are particular provisions regarding the advertising of prices.

5.2 The BCCSA Code of Conduct for Free-to-Air Broadcasters

The BCCSA Code for Free-to-Air Broadcasters is very similar to the Icasa Code of Conduct set out under the regulations section above.

The BCCSA Code of Conduct for Free-to-Air Broadcasters:

- prohibits the broadcasting of the following:
  - unnecessary violence, particularly concerning violence against women
  - propaganda for war
  - incitement of imminent violence
  - advocacy of hate speech based on race, ethnicity, religion or gender and which constitutes incitement to cause harm
  - certain kinds of sexual conduct, child pornography, bestiality, sexual conduct which advocates hatred based on gender and which constitutes incitement to cause harm, explicit sexual conduct.

  Note that there are exceptions for *bona fide* scientific, documentary, dramatic, artistic or religious broadcasts, or which amounts to a discussion, argument or opinion about religion, belief or conscience, or on a matter of public interest. There are also exceptions for material broadcast during the watershed period (between 21h00 and 05h00 for free-to-air broadcasters) with relevant warnings.
- requires particular care when children are likely to be part of the audience. There are specific requirements for children's programming, including in respect of the portrayal of violence, safety matters, issues which could threaten a sense of security, such as death, domestic conflict, the use of drugs or alcohol and the use of offensive language
- provides that programming which contains scenes of explicit violence, sexual conduct, nudity or grossly offensive language may be broadcast only during the watershed period (between 21h00 and 05h00)
- specifies that television broadcasting licensees must provide advisory assistance, including age guidelines, where broadcasts contain violence, sex, nudity or offensive language

- requires that news be truthful, accurate and fair without intentional or negligent departures from the facts. In this regard:
  - where a report is based on opinion, rumour or allegation, this must be clearly presented
  - where there is reason to doubt the correctness of a report, verification should take place
  - when a broadcast report is known to have been incorrect, this must be rectified quickly and fairly
  - the identity of rape victims and other victims of sexual violence must not be divulged without consent
  - there must be warnings for reports involving graphic violence or sexual assault.
- requires that comment be honest, presented clearly as comment and must be based on facts
- requires that when presenting programming in which controversial issues of public importance are discussed, a reasonable effort must be made to present opposing views and to ensure a right of reply
- requires that broadcasters exercise exceptional care in matters involving the privacy and dignity of individuals (particularly, children, the aged and the disabled), subject to a legitimate public interest
- contains specific provisions regarding competitions, including regarding the publication of the costs of participating via SMS or calls and that the public must be made aware of the rules of the competition on air.

5.3 The BCCSA Code of Conduct for Subscription Broadcasters

The BCCSA Code of Conduct for Subscription Broadcasters is virtually identical to the Code of Conduct for Free-to-Air Broadcasters set out above. There are, however, some small differences:

- there are no special provisions regarding children and children's programming, undoubtedly due to the parental control mechanisms which are to be in place
- subscription broadcasters are under an obligation to, where practical, implement parental control mechanisms to enable a subscriber to block a programme based on its classification and to provide its subscribers with a parental control guide and a call centre facility
- the watershed period is an hour longer, and is from 20h00 to 05h00.

5.4 The Press Code

The Press Code[16] governs both print and online media published by members of the Press Council and of the Interactive Advertising Bureau of South Africa. It states as part of its preamble that:

> ***The media exist to serve society. Their freedom provides the independent scrutiny of the forces that shape society,and is essential to realising the promise of democracy. It enables citizens to make informed judgements on the issues of the day, a role whose centrality is recognised in the South African Constitution.***

Below are some key topics that the code addresses:

- Gathering and reporting of news must be:
  - truthful, accurate and fair
  - contextual and balanced with no departure from the facts
  - only what is reasonably true may be presented as fact
  - opinions, allegations and rumours to be clearly indicated as such
  - verification of accuracy if possible
  - seek the views of the subject of critical reporting where possible
  - publish retractions and apologies for inaccuracies promptly
  - identities of victims of sexual violence not to be published without consent
  - no publication of news obtained by dishonest or unfair means
  - respect privacy, unless there is an overriding public interest
  - avoid content which depicts violent crime or other violence or explicit sex unless the public interest dictates otherwise and, if so, provide warnings.
- Independence:
  - No commercial, political, personal or other non-professional considerations to influence reporting.
  - Indicate clearly when an outside organisation has contributed to the cost of newsgathering.
  - Keep editorial material distinct from advertising and sponsored events.
- Protect personal information under the media's control from misuse, loss and unauthorised access.
- Discrimination and hate speech:
  - The press must avoid discriminatory or derogatory references.
  - The press should not refer to a person's race, colour, ethnicity, gender, sexual orientation or physical or mental illness in a prejudicial or pejorative

context, except where strictly relevant to the story.

- The press must not publish material amounting to hate speech.

- Advocacy, a publication may strongly advocate its views provided it:
  - distinguishes between fact and opinion
  - does not misrepresent facts.
- Comment:
  - must be made fairly and honestly
  - must clearly appear as commentary and be based on facts
  - must be an honest expression of opinion.
- Headlines, posters, pictures and captions:
  - must be reasonably reflective of the contents of the report or picture in question
  - posters and pictures must not be misleading.
- Children:
  - the media must exercise exceptional care and consideration when reporting on children
  - no child pornography
- Protect confidential sources of information and avoid the use of anonymous sources as far as possible.
- Avoid payments for information, particularly to criminals, except in the public interest.
- User-Generated Content (UGC) (this is particularly relevant to online publications and for engagements through social media platforms). The media:
  - is not obliged to moderate all UGC
  - must develop a UGC policy which is publicly available online and which deals with:
    - › authorisation processes, if any
    - › prohibited content (incitement of violence, propaganda for war and hate speech)
    - › encouraging the reporting of policy-violating content
    - › complaints procedures.
  - may remove any UGC in accordance with their policy and note that if the media does not remove any UGC in response to a complaint, it then becomes liable for the content of such UGC before the Press Council.

6 Case law and the media

In this section, you will learn:

- common law
- defamation
- contempt of court
- other media-related court rulings on:
  - broadcast of legal and parliamentary proceedings
  - the statutory crime of intimidation
  - the independence of the SABC
  - the technical standards for DTT
  - the unlawful surveillance of journalists
  - political parties' responsibilities regarding the harassment of journalists during elections

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies).

In common law legal systems such as South Africa's, judges are bound by the decisions of higher courts and also by the rules of precedent, which require rules laid down by the court in previous cases to be followed unless they were obviously wrongly decided. Legal rules and principles are, therefore decided on an incremental, case-by-case basis.

This section focuses on three areas of common law which are of particular relevance to the media, namely, defamation, contempt of court and the broadcasting of legal proceedings.

The section also focuses on important cases which have clarified the proper interpretation of several statutory provisions that are relevant to journalists and the media.

6.2 Defamation

6.2.1 Definition of defamation

Defamation is part of the common law of South Africa. It 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. An action for defamation 'seeks to protect one of the personal rights to which every person is entitled, that is, the right to a good name, unimpaired reputation and esteem by others'.[17] Once it is proved that a defamatory statement has been published, two legal presumptions arise:

- 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
- that the 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.

6.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation, namely:[18]

- 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, and so on
- statements made in judicial or quasi-judicial proceedings
- reporting on proceedings of a court, parliament or of certain public bodies
- fair comment on actual facts and which are matters of public interest
- self-defence (to defend one's character, reputation or conduct)
- consent.

The most relevant here is the defence of truth in the public interest. Truth in the public interest is where an action for damages is defended by asserting that the defamatory statement was true and, furthermore, that it is in the public interest to publicise the information. It is important to note that public interest does not mean what is interesting to the public, but rather what contributes to the greater public good. Therefore, it may be in the public interest to publish true, albeit defamatory, material about public representatives. This is due to the importance of the public having accurate information to engage in democratic practices, such as voting, effectively.

Before South Africa transitioned to democracy and a new constitutional order, the media (publishers, printers, editors, newspaper owners and broadcasting companies) were strictly liable for the publication of defamatory material. This meant that in the absence of one of the recognised defences set out above (for example, truth in the public interest), the media was not entitled to raise a lack of intention, or absence of negligence, argument. In other words, the courts were not required to find fault on the part of the media in the publication of a defamatory statement.[19] In the groundbreaking case of *National Media Ltd and Others v Bogoshi* [1998] 4 All SA 347 (A), the Appellate Division (as it was then called) overruled its earlier *Pakendorf* decision as being clearly wrong and adopted the approach taken in England, Australia and the Netherlands.

The new legal principle is stated at pages 361–362 of the *Bogoshi* judgment:

> ***The publication in the press of false, defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication, account must obviously be taken of the nature, extent and tone of the allegations. We know that greater latitude is usually allowed in respect of political discussion … and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.***

The effect of the *Bogoshi* judgment is to make it possible for the media to escape liability for the publication of false, defamatory statements if the media acted reasonably in the publication of the false statements. As is stated in the judgment, the main factors in determining whether the media's conduct is reasonable will include:

- the nature and tone of the allegations
- the nature of the information on which the allegations were based, for example, if the information is related to an important political issue or not
- the reliability of the source of the allegations
- steps taken to verify the allegations
- the general standard of care adopted by the media in the particular circumstances.

In a critically important case, the High Court has held that the reasonableness test set out above is applicable, not only to the media but to ordinary people in relation to defamatory statements made on Twitter about others, *Manuel v EFF and Others*.[20]

6.2.3 Remedies for defamation

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

- *The publication of a retraction and an apology by the media organisation concerned:* Where it has published a false, defamatory statement, a newspaper or broadcaster will often publish a retraction of a story or allegation in a story, together with an apology. Whether or not this satisfies the person who has been defamed will depend on several factors, including the seriousness of the defamation, how quickly the retraction and apology are published and the prominence given to the retraction and apology (this is a combination of the size of the retraction, but also the position in the paper).

- *An action for damages:* This is where a person who has been defamed sues for monetary compensation. This takes place after publication. Damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The amount to be paid in compensation will depend on several factors, including whether or not an apology or retraction was published, as well as the standing or position in society of the person being defamed.

- *An action for prior restraint:* This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the public (such as readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are seen as being a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter by damages claims, in other words, using 'after publication' remedies.

6.2.4 The crime of defamation

In South Africa defamation is usually dealt with as a civil matter, that is, as a dispute between two parties (see above). However, criminal defamation is also a feature of South African law.

In *Hoho v S*,[21] the Supreme Court of Appeal confirmed that the common law: 'crime of defamation consists of the unlawful and intentional publication of matter concerning another which tends to injure his reputation'.[22] The court confirmed that the crime of defamation still existed under South African law[23] and that it was not inconsistent with the Constitution.[24]

6.3 Contempt of court

In general terms, the common law crime of contempt of court is made up of two distinct types of contempt, namely the *sub judice* rule and the rule against scandalising the court.

6.3.1 The *sub judice* rule

The *sub judice* rule guards against people trying to influence the outcome of court proceedings while legal proceedings are underway: 'It is contempt of court to publish information or comment regarding a case which is pending and which may tend to prejudice the outcome of the case'.[25]

6.3.2 Scandalising the court

The reason why scandalising the court is criminalised is to protect the institution of the judiciary. The point is to prevent the public from undermining the dignity of the courts. In *S v Mamabolo (eTV, Business Day and the Freedom of Expression Institute Intervening)*,[26] the Constitutional Court held at paragraph 19 that:

> ***Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.***

The court held that the test is 'that the offending conduct, viewed contextually, really was likely to damage the administration of justice' [at paragraph 50].

6.4 Court rulings on the broadcasting of court and parliamentary proceedings

6.4.1 Court proceedings

South Africa is not the only country in Africa that has allowed the broadcasting of legal proceedings, but it undoubtedly has the most developed case law on the subject. Given the importance of the broadcast media in ensuring that news and information, particularly concerning legal matters, is disseminated to the public, the issue of broadcasting court proceedings is extremely important. While our courts have long held that broadcasting of non-criminal proceedings is uncontroversial, the broadcasting of criminal proceedings has remained subject to conflicting concerns regarding the requirements of justice for the accused. The latest case to deal with the issue is *Van Breda v Media 24 Ltd and Others and NDPP v Media 24 Ltd and Others*[27] in which the Supreme Court of Appeal unanimously held that:

> ***The default position has to be that there can be no objection in principle to the media recording broadcasting counsel's address and***

> ***all rulings and judgment (in respect to both conviction and sentence) delivered in open court. When a witness objects to coverage of his or her testimony, such witness shall be required to assert such objection before the trial judge, specifying the grounds before and the effects he or she asserts such coverage would have upon his or her testimony … Under this approach, cameras are permitted to film or televise all non-objecting witnesses …***
>
> ***If the judge determines that the witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness' fears …***
>
> ***The courts will not restrict the nature and scope of the broadcast unless the prejudice is demonstrable, and there is a real risk that such prejudice will occur. Mere conjecture was speculation that prejudice might occur or to not to be enough.***[28]

This case represents a significant step in securing open justice by ensuring that even criminal proceedings are broadcast unless there is a real risk of demonstrable prejudice occurring.

6.4.2 Parliamentary proceedings

In *Primedia Broadcasting and Others v the Speaker of the National Assembly and Others*,[29] a case which concerned the non-broadcasting of the violent disruption of the then president's State of the Nation address to parliament and the jamming of journalists' cell phones to prevent them reporting on the proceedings, the Supreme Court of Appeal unanimously declared, among other things:

- Clause 8.3.3.2 of Parliament's Policy on Broadcasting and Rule 2 of Parliament's Television Broadcasting Rules of Coverage unconstitutional and unlawful for violating the right to an open parliament (they prohibited the broadcast of scenes of 'disorder on the floor of the house')
- The manner in which the State of the Nation proceedings was broadcast (where the broadcast showed only the speaker's face and none of the violence/disorder that was actually taking place in the chamber) was unconstitutional and unlawful.
- The use of a jamming device in parliament (such that journalists were unable to use their cell phones to report on proceedings) was unlawful.

This case is an important case on ensuring public access to what is happening in parliament by outlawing the censorship of disorderliness in the chamber and protecting journalists' rights not to have their cell phone signals jammed while covering parliament.

6.5 Court rulings on the statutory crime of intimidation

Section 1(1)(b) of the Intimidation Act, Act 72 of 1982, made it an offence to publish words

> ***that have the effect … that a person receiving the … publication fears for his own safety or the safety of his property or the security of his livelihood, or the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person.***

The punishment, on conviction, was a fine or imprisonment or both. However, this provision was ruled unconstitutional and invalid in the case of *General Alfred Moyo and Another v Minister of Police and Others*.[30] The reason for the ruling of the Constitutional Court was that the absence of wording in section 1(1)(b) confining the intimidation to incitement of imminent violence, criminalised protected free speech.[31]

6.6 Court rulings on the independence of the SABC

The SABC's independence has been the source of much conflict between the government and civil society for over a decade. However, the High Court has now ruled on several crucial issues regarding the relationship between the SABC and the executive branch of government in two cases *SOS Support Public Broadcasting Coalition and Others v the SABC and Others*.[32] In brief, the court's main findings in these cases include:

- Because the SABC is the medium that should allow the free flow of ideas that is necessary for our democracy to function, the state must ensure that it has the necessary structural and operational independence. The SABC will only have such independence if there are entrenched mechanisms to ensure that it provides accurate, neutral and pluralistic content. — at paragraph [52].
- The effect of section 13(11) [of the Broadcasting Act] therefore is to confer on the Board the exclusive power to control the affairs of the SABC. The Minister is accordingly precluded from exercising any powers by which she may control the directors in how they control the affairs of the SABC:
  - The executive members of the board to be appointed solely by their non-executive members of the board and without any requirement of approval by the Minister — at paragraphs [127] and [146].
  - Sections 15 and 15A of the Broadcasting Act ensure that there is a level of oversight in the removal of an SABC director, neither the Minister nor the Board can remove a director unilaterally. Removal requires an enquiry and must be based on specified, objective grounds for removal and where the National Assembly recommends removal, the president has no discretion and must remove the director from office.

    The threat of removal without any oversight, on any ground, and without

undue enquiry, would render Board members not likely to express views not aligned with that of the government or the majority Board members — at paragraphs [139] and [143].

This case has been ground-breaking in its protection of the independence of the public broadcaster and in thwarting attempts by the executive branch of government to interfere directly in the operations of the SABC both at the board and senior management level.

6.7 Court rulings on the minister's powers to change technical standards of her digital migration policy

In a split decision (5-4) of the Constitutional Court, in *Electronic Media Network Ltd and Others v eTV (Pty) Ltd and Others*[33] the majority upheld the Minister of Communications and Digital Technologies' right to amend her Digital Migration Policy without having to subject her proposed amendments to a public notice and comments procedure or to consult with other bodies such as Icasa. The effect of the ruling is that the minister's change in policy which ruled out decryption capabilities as an integral part of government-supplied set-top boxes for DTT was upheld.

6.8 Court rulings on the unlawful surveillance of journalists

In *Amabhungane Centre for Investigative Journalism NPC and Another v Minister for Correctional Services and Others*,[34] the High Court held that several provisions of the Regulation of Interception of Communications and Provision of Communication Related Information Act (RICA) were unconstitutional in that they violated the rights to privacy, freedom of expression, access to court and to a fair trial. The case involved the surveillance of a well-known investigative journalist. In coming to its decision on the unconstitutionality of several provisions of RICA (the reasons for which were not all media-related), the court noted 'it is hypocritical to both laud the press and ignore their special needs to be an effective prop of the democratic process'.[35] In brief, the court made the following orders:

- The provisions of RICA that fail to prescribe a procedure for notifying the subject of interception unconstitutional and invalid.
- The provisions of RICA that failed to prescribe an appointment mechanism and terms for the 'designated judge' (to grant interception orders) as defined in section 1 which ensure the designated judge's independence are unconstitutional and invalid.
- The provisions of RICA that fail to provide adequately for a system and appropriate safeguards to deal with the fact that interception orders granted *ex parte* [that is, without the subject being party to the proceedings], are unconstitutional and invalid.
- The provisions of RICA that fail to prescribe proper procedures to be followed when state officials are examining, copying, sharing, sorting through, using,

destroying or storing the data obtained from interceptions, are unconstitutional and invalid.

- The provisions of RICA that fail to address the circumstances where a subject of surveillance is either a practising lawyer or a journalist are unconstitutional and invalid.
- Bulk surveillance activities and foreign signals interception undertaken by the National Communications Centre is unlawful and invalid.

In respect of several of the above orders, the court gave the legislature time to correct the relevant defect.

6.9 Court rulings on political parties' responsibilities regarding the harassment of journalists

The case of *Brown v Economic Freedom Fighters and Others*[36] is a precedent-setting ruling of the High Court concerning the obligations of political parties and their leaders under the Electoral Code of Conduct. Ms Brown, who hosts a television show on the free-to-air commercial TV station, erroneously sent a WhatsApp message to the Economic Freedom Fighters (EFF) WhatsApp group instead of to a group of colleagues asking them to keep a watching brief on the EFF. In response, the EFF published her cell phone number and Tweeted that she was 'sending moles to EFF events'. It was undisputed that Ms Brown was then subject to 'a barrage of anonymous threatening phone calls and written threats on Twitter and WhatsApp from self-professed EFF supporters. These included deplorable insults and threats of rape, violence and death'.[37]

In finding that the EFF had violated the Electoral Code during the 2019 General Elections, the court referred to sections of the Electoral Code which require every registered party to, among other things, instruct its supporters to comply with the code, respect the right of women to communicate freely with parties and candidates and take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.[38] The court found that the EFF and its leader, Mr Malema, ignored requests to intervene and instruct their followers on Twitter to stop their harassment of Ms Brown[39] and therefore failed to comply with their obligations under the Electoral Code.[40] The court issued a formal warning to the respondents which:

> ***would serve as a guideline … for their obligations and future conduct. It would also serve as an effective deterrent against any future transgressions as in any future proceedings the existence of a prior sanction to infringement would be taken into account in imposing any appropriate sanction.***

While the above case demonstrates that there are effective remedies to prevent the harassment and abuse of journalists by political parties and their members

and supporters in an election period, harassment and abuse of journalists outside an election period remains an ongoing problem.

In the case of the *South African National Editors' Forum and Others v The Economic Freedom Fighters and Others*,[41] the Equality Court was faced with an attempt by Sanef and some journalists to prevent the harassment and hate being meted out to them by the EFF and its supporters by arguing that such conduct constituted hate speech under the Promotion of Equality and Protection against Unfair Discrimination Act (the Equality Act). Sanef and the journalists were unsuccessful. The Equality Court held that the hate speech prohibition in section 10 of the Equality Act applies only to prohibited grounds as defined in the Equality Act or grounds analogous to it. The court found that journalism:

> ***is a profession and not a characteristic comparable to the grants listed in section 10 of the Equality Act … is not based on attributes which have the potential to impair their fundamental dignity as human beings or affect them adversely … journalism is not an inherent and immutable quality. It is a career choice for which an individual opts [and it does not] constitute a protectable interest'.***[42]

Consequently, Sanef's application was dismissed.

Notes

1 https://www.internetworldstats.com/africa.htm#za [accessed 3 May 2019]

2 Provincial figures are from 2017. See: https://techcentral.co.za/internet-access-sa-rural-areas-falling-far-behind/75789/ [accessed 3 May 2019]

3 https://www.businesslive.co.za/bd/national/2018-11-26-mogoeng-mogoeng--warns-john-hlophes-misconduct-matter-will-take-very-long/ [accessed 3 May 2019] and https://www.news24.com/SouthAfrica/News/jsc-finds-motata-guilty-of-misconduct-fines-him-more-than-r1m-20191010 [accessed 25 October 2019

4 Public Protector v South African Reserve Bank [2019] ZACC 29. Available at: http://www.saflii.org/za/cases/ZACC/2019/29.html [accessed 25 October 2019]

5 Act 124 of 1998.

6 Notice 87 published in Government Gazette 39642 dated 1 February 2016.

7 Notice 958 in Government Gazette 31408 dated 8 September 2008 (as amended).

8 Notice 164 in Government Gazette 42337 dated 29 March 2019.

9 http://arb.org.za [accessed 4 May 2019]

10 https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf [accessed 4 May 2019]

11 *SOS and Others v SABC and Others* Case No 81056/14 at paragraph [146] of the judgment. http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf [accessed 4 May 2019]

12 Act 4 of 2009.

13 https://www.dailymaverick.co.za/article/2018-09-26-sabcs-rescue-plan-a-lithe-and-lean-revenue-generating-peoples-machine/ [accessed 4 May 2019]

14 Act 63 of 1996.

15 Defined in section 1 as: '…a characteristic that identifies an individual as a member of a group identified by race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and nationality'.

16 The latest version came into effect on 1 January 2020.

17 See FDJ Brand, Defamation, *LAWSA*, 2nd ed, Volume 7, para 232 citing *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 23D-I.

18 Ibid, paras 245ff.

19 See *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A).

20 [2019] ZAGPJHC 157, at paragraph [67].

21 [2008] SASCA 98.

22 Ibid at paragraph [23].

23 Ibid at paragraph [15].

24 Ibid at paragraph [36].

25 See generally, *LAWSA*, 2nd ed, Volume 6, para 199.

26 2001 (5) BCLR 449 (CC).

27 [2017] ZASCA 97.

28 Ibid at paragraphs [72] to [75].

29 [2016] ZASCA 142.

30 CCT 174/18 available at: http://www.saflii.org/za/cases/ZACC/2019/40.html [accessed 8 December 2020]

31 Ibid at paragraph [69].

32 [2017] ZAGPJHC 289.

33 [2017] ZACC 17.

34 [2019] ZAGPPHC 341.

35 At paragraph [131].

36 [2019] ZAGPJHC 166.

37 Ibid at paragraph [8].

38 Ibid at paragraph [44].

39 Ibid at paragraph [76].

40 Ibid at paragraph [82].

41 Case No 90405/18.

42 Ibid at paragraphs [43] and [44].