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eSwatini

1 Introduction

The Kingdom of eSwatini¹ had its name changed from Swaziland, following the Declaration of Change of Swaziland Name Notice, 2018, in Legal Notice 80 of 2018. The name change was done under section 64(3) of the constitution which provides that, subject to the constitution, the King may exercise the executive authority conferred on him by section 64(1) of the constitution, either directly or through a Cabinet minister.² It should be noted that section 3 of the Declaration of Change of Swaziland Name Notice, provides that any reference in any written law, international agreement or legal document to 'Swaziland' shall be read and construed as a reference to 'eSwatini'. This chapter, therefore, uses 'eSwatini' in place of 'Swaziland'.

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 In response, the then-king of eSwatini, King Sobhuza II, issued a decree in 1973 in which he repealed the 1968 constitution and assumed supreme power, expressly taking all legislative, executive and judicial powers for himself.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

Despite the 2006 constitution coming in to force, eSwatini cannot be said to be a democratic country. Even though the constitution ostensibly guarantees freedom of expression, eSwatini's media environment is extremely difficult. According to a paper by Richard Rooney,³ the media in eSwatini is mostly government-controlled. Swazi TV and radio are effectively 'departments of the Swazi civil service'.⁴ Although there is a non-state television channel, Channel Swazi Television (CST), founded in 2001, CST is closely aligned with the monarchy and was created 'specifically to support King Mswati III'.⁵

eSwatini is a small landlocked country surrounded by South Africa and Mozambique. It has a sparse population of 1.6 million people.⁶ The electricity distribution network is well developed, with roughly 76.5% of the population having access to electricity⁷ and internet penetration at approximately 57.3% of the population. Some 22% of the population has a Facebook account.⁸ eSwatini has completed the switchover to digital terrestrial television having had its analogue switch-off date on 1 January 2016. eSwatini has opted for the DVB-T2 television standard in line with most SADC region countries.

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in eSwatini. 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 eSwatini. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in eSwatini, 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:

- ▷ definition of a constitution
- ▷ definition of constitutional supremacy
- ▷ definition of a limitations clause
- ▷ constitutional provisions that protect the media
- ▷ constitutional provisions that might require caution from the media or might conflict with media interests
- ▷ key institutions relevant to the media established under the eSwatini Constitution
- ▷ enforcing rights under the constitution
- ▷ the 'three branches of government' and 'separation of powers'
- ▷ weaknesses in the eSwatini Constitution that ought to be amended to protect the media

2.1 Definition of a constitution

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

The eSwatini Constitution came into force in 2006 and sets out the foundational rules for the Kingdom of eSwatini and contains the underlying principles and values of the Kingdom. An important constitutional chapter in this regard is Chapter V, Directive Principles of State Policy and Duties of Citizens. Section 58 sets out the political objectives of the country. In brief, these provide that:

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

Section 58 sets out some important statements of principle and admirable political objectives, which would seem to indicate that the rulers of eSwatini recognised a need to chart a new course away from the undemocratic and draconian practices of the past. It is important to note, however, that the provisions set out in section 58 are not capable of being enforced in any court, in terms of section 56(3) of the constitution.

2.2 Definition of constitutional supremacy

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

The eSwatini Constitution makes provision for constitutional supremacy. Section 2(1) specifically states that 'This Constitution is the supreme law of eSwatini and if any other law is inconsistent with the provisions of this Constitution that other law shall, to the extent of such inconsistency, be void'. Importantly, given the enormous power wielded by the king of eSwatini, section 2(2) specifically provides that the king, as well as: 'all citizens of eSwatini', have a duty 'to uphold and defend this Constitution'. Furthermore, section 2(3) provides that 'suspending, overthrowing or abrogating the constitution by violent or otherwise unlawful means constitutes treason.'

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.

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

The eSwatini Constitution makes provision for two types of legal limitations on the exercise and protection of rights, which are contained in Chapter III, Protection and Promotion of Fundamental Rights and Freedoms.

2.3.1 Internal limitations

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

2.3.2 Limitations arising from states of emergency

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

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

- ▶ eSwatini is at war or about to be at war with a foreign state;

- ▶ there is a natural disaster or threatened natural disaster in eSwatini; or
- ▶ action taken or threatened by a person or body of persons is of such a nature and scale as to be likely to endanger public safety or deprive the community of supplies or services that are essential to the life of the country.

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

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

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

2.4 Rights that protect the media

The eSwatini Constitution contains several important provisions in Chapter III, Protection and promotion of fundamental rights and freedoms, which purport to protect the media directly, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

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

- ▶ A person has a right to freedom of expression and opinion.
- ▶ A person shall not, except with the free consent of that person, be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say
 - ▶ freedom to hold opinions without interference
 - ▶ freedom to receive ideas and information without interference
 - ▶ freedom to communicate ideas and information without interference

(whether the communication be to the public generally or any person or class of persons)

- ▶ freedom from interference with the correspondence of that person.

This provision needs some explanation.

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

correspondence. This protection of correspondence (which would include letters, emails and telefaxes) is an important right for working journalists.

It is important to note that there is an internal limitation to the right to freedom of expression which is dealt with under the heading 'Constitutional Provisions that Require Caution from the Media', below.

2.4.2 Right to administrative justice

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

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

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

The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles them to written reasons for administrative action.

An administrative body is not necessarily a state body. 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 such bodies are administrative. The requirement of administrative justice is, therefore, powerful as it prevents or corrects unfair and unreasonable conduct on the part of administrative officials.

This constitutional right entrenches the right to judicial review, that is the right to approach a court in respect of an administrative decision.

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

2.4.3 Freedom of association

A third broad protection is provided for in section 25, Protection of Freedom of Assembly and Association. Section 25(1) grants a person 'the right to freedom of peaceful assembly and association'. Section 25(2) specifies that the right to association includes the right to 'associate freely with other persons for the promotion or protection of the interests of that person'. The effect of this is to guarantee the

rights of the press to form press associations, media houses and operations. It also guarantees the rights of, for example, civil society to form non-governmental organisations dedicated to media freedom.

It is important to note that there is an internal limitation to the right to freedom of association which is dealt with under the heading Constitutional Provisions that Require Caution from the Media, below.

2.5 Other constitutional provisions that assist the media

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

2.5.1 Parliamentary privilege

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

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

2.5.2 Public access to courts

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

2.6 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. Journalists need to understand which provisions in the constitution can be used against the media. There are a number of these in the eSwatini Constitution.

2.6.1 Internal limitations on the rights to freedom of expression

Section 24(3) contains an internal limitation on the general rights to freedom of expression and opinion contained in sections 24(1) and (2). Section 24(3) provides that nothing contained in any law or done under the authority of that law shall

be held to be a contravention of the right to freedom of expression, as set out in section 24, provided that it:

- ▶ is reasonably required in the interests of defence, public safety, public order, public morality and public health
- ▶ is reasonably required for:
 - ▶ protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings
 - ▶ preventing the disclosure of confidential information
 - ▶ maintaining the independence and authority of the courts
 - ▶ regulating the technical administration or operation of telephony, broadcasting or any other medium of communication
- ▶ imposes reasonable restrictions on public officers.

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

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

2.6.2 Internal limitation on the right to freedom of association

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

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

- ▶ is reasonably required in the interests of defence, public safety, public order, public morality and public health
- ▶ imposes reasonable restrictions upon public officers.

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

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

Although there is an express limitation on the freedom of association of the press in eSwatini, the above restrictions could be used to limit the ability of journalists to work. This is particularly true of the provisions regarding registration or qualifications as this could be used to prevent journalists who did not meet any such qualification or registration requirements from working. While these internal limitations may, theoretically, be abused to limit the press's freedom of association, they are not out of step with international norms.

2.6.3 States of emergency provisions

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

2.7 Key institutions relevant to the media established under the constitution

The eSwatini Constitution establishes several important institutions concerning the media, namely, the judiciary, the Judicial Service Commission (JSC), and the Commission on Human Rights and Public Administration.

2.7.1 The judiciary

In terms of section 138 of the eSwatini Constitution 'Justice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this Constitution'. This important statement on the role of the judiciary is supported by section 140(1) of the constitution, which provides that 'The judicial power of eSwatini vests in the Judiciary. Accordingly, an organ or agency of the Crown shall not have or be conferred with final judicial power'.

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

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

In brief, these are the superior courts of Judicature, comprising the:

- ▶ **Supreme Court:**
 - ▶ The Supreme Court is the apex court, section 146.
 - ▶ The Supreme Court has jurisdiction to hear appeals from the High Court, section 146(2).
 - ▶ The Supreme Court consists of the Chief Justice and at least four other justices of the Supreme Court, section 145(1).
- ▶ **High Court:**
 - ▶ The High Court has unlimited original jurisdiction in civil and criminal matters, section 151(1)(a). Note that section 151(2) further specifies that the High Court has the jurisdiction to enforce the fundamental human rights and freedoms guaranteed by the constitution, and can determine any constitutional matter. It is important to note, however, the provisions of section 151(8), which specifically take decisions regarding certain traditional matters out of the jurisdiction of the High Court and reaffirms that these will continue to be governed by ‘Swazi law and Custom’.
 - ▶ The High Court consists of the Chief Justice, at least four justices of the High Court and such justices of the Superior Court of the Judicature as may be assigned to sit by the Chief Justice, in terms of section 150(1) of the constitution.
 - ▶ Specialised, subordinate and Swazi courts or tribunals exercising judicial functions, as established by law.

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

In eSwatini, the Chief Justice and other judges of the superior courts are appointed by the king on the advice of the Judicial Service Commission (JSC) (section 153(1)).

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

2.7.2 The Judicial Service Commission

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

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

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

2.7.3 The Commission on Human Rights and Public Administration

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

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

- ▶ Investigate complaints concerning:
 - ▶ alleged violations of fundamental human rights and freedoms
 - ▶ injustice, corruption, abuse of power and unfair treatment by public officers
 - ▶ the functioning of any public service or administrative organ of the state concerning:
 - › delivery
 - › equitable access
 - › fair administration
- ▶ take appropriate action for the remedying, correction or reversal of the above
- ▶ promote the rule of law and fair efficient and good governance in public affairs.

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

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

2.8 Enforcing rights under the constitution

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

Section 14(2) of the eSwatini Constitution provides that:

The fundamental rights and freedoms enshrined in this Chapter [being Chapter III] shall be respected and upheld by the Executive, the Legislature and Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in eSwatini and shall be enforceable by the courts as provided for in this Constitution.

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

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

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

2.9 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.

2.9.1 Branches of government

It is generally recognised that government exercises power by three branches of government, namely the executive, the legislature and the judiciary.

The executive

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

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

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

- ▶ The king appoints the prime minister from among members of the House of Assembly, on the recommendation of the King's Advisory Council.
- ▶ The king appoints ministers from both chambers of parliament, namely, the House of Assembly and the Senate, on the recommendation of the prime minister. Note that at least half of the ministers must be from among the elected members of the House of Assembly. Note further that, in terms of section 70, the king, after consultation with the prime minister, may assign responsibility for government business, including the administration of any government department, to the prime minister or any other minister.

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

- ▶ assenting to and signing bills
- ▶ summoning and dissolving parliament
- ▶ receiving foreign envoys and appointing diplomats
- ▶ issuing pardons, reprieves or commuting prison sentences
- ▶ declaring a state of emergency
- ▶ conferring honours
- ▶ establishing any commission or similar body
- ▶ ordering a referendum.

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

- ▶ keeping the king fully informed about the general conduct of government and providing the king with any information he may require regarding government;
- ▶ being collectively responsible to parliament for:
 - ▶ any advice given by it to the king
 - ▶ all things done by any minister in the execution of the office of minister
- ▶ formulating and implementing government policy in line with national development strategies or plans
- ▶ performing other functions conferred by the constitution or by any law.

The legislature

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

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

- ▶ ten senators (at least half of whom must be female) elected by members of the House of Assembly to represent a broad cross-section of Swazi society;
- ▶ 20 senators (at least eight of whom must be female) appointed by the king on the basis that they:
 - ▶ represent economic, social, cultural, traditional or marginalised interests not already adequately represented in parliament
 - ▶ can contribute to the good government and progressive development of eSwatini.

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

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

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

The judiciary

The judicial power, as already discussed in this chapter, is vested in the courts.

2.9.2 Separation of powers

In a functioning democracy, it is important to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuses of that power. This is known as the separation of powers doctrine. The aim, as the eSwatini constitution has done, is to separate the functions of

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

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

There are several important aspects in which the eSwatini Constitution is weak. If these weaknesses were addressed, there would be specific benefits for the media in the country.

2.10.1 Access to information

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

2.10.2 Access by the public to parliamentary processes

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

2.10.3 Independent broadcasting regulator and a public broadcaster

It is disappointing that the eSwatini Constitution does not provide for an independent broadcasting regulator to ensure the regulation of public, commercial and community broadcasting in the public interest. Similarly, it is disappointing that the constitution does not provide for an independent public broadcaster to ensure access by the people of eSwatini to quality news, information and entertainment in the public interest.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the operations of the print media
- ▷ legislation governing the making and exhibition of films
- ▷ legislation governing the broadcasting media generally
- ▷ legislation governing the state broadcasting media
- ▷ legislation that threatens a journalist's duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information
- ▷ legislation that hinders the press from performing its reporting functions

3.1 Legislation: An introduction

3.1.1 What is legislation and how it comes into being

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

As a general rule, both parliament and the king are ordinarily involved in passing legislation. There are detailed rules in sections 49, 107, 108, 110 and 112–117 and in Chapter XVII of the constitution which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the eSwatini 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 five kinds of legislation, each of which has particular procedures or rules applicable to it. These are:

- ▶ legislation that amends the constitution, the procedures or applicable rules are set out in sections 107, 108(2) and Chapter XVII of the constitution

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

3.1.2 The difference between a bill and an act

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

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

3.2 Legislation governing the print media

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

- ▶ Section 4(1) prohibits any person from printing or publishing a newspaper (defined as any printed matter published at least monthly and intended for sale or distribution, which contains 'news, or intelligence, or reports of occurrences of interest to the public or any section thereof, or any views, comments or observations thereon') unless the editor is resident in eSwatini, and a certificate of registration has been issued. Failure to comply with these requirements is an offence, and the penalty is the payment of a fine or, in the event of non-payment, imprisonment.
- ▶ In terms of section 5, the newspaper registration requirements include the full and correct name of the newspaper and address at which it is to be published and the full names and addresses of the proprietor, printer, publisher, manager and editor of the newspaper. Section 7 also requires any changes of such

information to be provided to the Registrar of Books and Newspapers, who is appointed by the minister responsible for the administration of the Books and Newspapers Act. In terms of section 5(4) of the Books and Newspapers Act, making a false statement when giving particulars in respect of the registration of a newspaper is an offence that carries a fine as a penalty or, failing payment thereof, imprisonment.

- ▶ Section 10(1) requires the publisher of every newspaper printed in eSwatini to provide two copies of every edition to the Registrar of Books and Newspapers, at his or her own expense. In terms of section 10(4), failure to do so is an offence punishable by a fine, imprisonment or both.
- ▶ Section 9 of the Books and Newspapers Act also requires the publisher of any book (note again that the definition includes a magazine) printed and published in eSwatini to deliver two copies (and such additional ones as may be requested up to a maximum of three) of the book, at his or her own expense, to the Registrar of Books and Newspapers. In terms of section 9(8), failure to do so is an offence punishable by a fine, imprisonment or both.
- ▶ Note that the minister is empowered under section 8 of the Books and Newspapers Act to make rules to exempt compliance from the requirements of having to deposit copies of books and newspapers.
- ▶ Part IV of the Books and Newspaper Act deals with bonds. In brief, the publishers of every newspaper are to register and deliver to the Registrar of Books and Newspapers a bond as security for the payment of monetary penalties imposed or libel damages awarded as a result of publication. Publishing a newspaper without a bond is an offence in terms of section 15 of the Books and Newspapers Act, and the penalty is a fine, imprisonment or both.
- ▶ Section 16 requires the name and address of the printer and publisher and the name of the place where it is printed and published to be printed legibly and in English on the first or last page of a book or newspaper printed in eSwatini. Failure to comply is an offence, and the penalty is a fine, imprisonment or both. Note further that an additional penalty of forfeiture or destruction of all copies can be imposed by a court.

3.3 Legislation governing the making and exhibition of films

3.3.1 The making of films and the taking of photographs

There are several constraints on the making of films and even the taking of photographs in eSwatini, something that obviously affects both the print and broadcast media.

The foremost provision of the main piece of legislation governing film and photography, namely the Cinematograph Act, Act 31 of 1920, is section 3, which, without the prior written consent of the Minister for Public Service and Information, prohibits any person from:

- ▶ making a film (or taking photographs to make a film) that portrays gatherings of Africans or scenes of African life
- ▶ taking a photograph on the dates and at the places of celebration listed. These include Incwala Day, the king's birthday, the Reed Dance and Independence Day.

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

3.3.2 Exhibition of objectionable pictures

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

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

- ▶ impersonation of the king
- ▶ scenes holding any member of the naval, military or air forces up to ridicule and contempt
- ▶ scenes tending to disparage public characters
- ▶ scenes calculated to affect the religious convictions of any section of the public
- ▶ scenes of debauchery, drunkenness, brawling or any other habit of life not following good morals or decency
- ▶ successful crime or violence
- ▶ scenes that are in any way prejudicial to the peace, order or good government of eSwatini.

The penalty for exhibiting a prohibited picture is a fine or imprisonment.

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

No legislation in eSwatini relates specifically to broadcasting. Instead, broadcasting is currently governed by legislation that regulates the communications sector generally and is done so in terms of two different pieces of legislation:

- ▶ The Public Enterprises (Control and Monitoring) Act 1989 (the PE Act)
- ▶ The eSwatini Communications Commission Act, 2010 (the SCC Act)

The SCC Act establishes the eSwatini Communications Commission (the SCC) and transfers the regulatory powers and functions from the eSwatini Television Authority, provided for under the eSwatini Television Authority Act, 1983, to the SCC established in terms of section 3 of the SCC Act.

The Public Enterprises Act is relevant in respect of the appointment of board members of the SCC and its operations in respect of funding matters.

3.4.2 Establishment of the SCC

Section 3 of the SCC Act establishes the SCC as a body corporate, which means that it has its own legal identity and provides that the SCC shall be independent in the performance of its functions and not subject to the direction or control of any person or authority. Section 9 provides that all that the SCC is empowered to do shall be undertaken and carried out by the board of directors of the SCC.

3.4.3 Functions and powers of the SCC

The powers and functions of the SCC are contained in several different sections of the SCC Acts. Broadly it is a converged regulator, regulating broadcasting, electronic communications and postal services. Concerning broadcasting, its main powers and functions include licensing of various broadcasting services, spectrum management and licensing, regulating ownership and control and general competition issues and content regulation.

3.4.4 Appointment of SCC Board Members

Section 10 of the SCC Act provides that the board shall consist of seven members appointed in terms of section 6 of the PE Act, which provides that all members of the board, except the chief executive officer (CEO), must be appointed by the minister responsible for communications in consultation with the Cabinet Standing Committee on Public Enterprises (Standing Committee). In making the appointments, the minister must ensure the overall balance of technical, professional, commercial and financial skills is maintained on the governing body and shall endeavour to ensure that in the interest of continuity, not all the members of the governing body shall be retired at the same time.

Section 11 of the SCC Act sets out the grounds for disqualification from being appointed to, and the grounds upon which a board member can be removed, from the board. These include insolvency, criminal convictions, citizenship, conflicts of interest, including involvement in the sector, mental or physical incapacity, ongoing absences and the like.

Surprisingly, none of the statutes governing the SCC provides for the terms of office of board members.

The CEO, who is also a member of the board, is appointed via a different process although the CEO is also appointed (or dismissed) by the Minister responsible for communications in consultation with the standing committee, although the board nominates the CEO in terms of section 8(1) of the PE Act. The CEO must

have relevant experience in electronic communications, broadcasting, postal, commerce, finance, law or administration as provided by section 20(3) of the SCC Act. The CEO is appointed for three years and shall be eligible for re-appointment in terms of section 21 of the SCC Act.

3.4.5 Funding for the SCC

Section 49(1) and (2) of the SCC Act provide that the SCC will receive funding from:

- ▶ monies appropriated by parliament for the SCC
- ▶ fees imposed by the SCC for authorisations issued under the SCC Act
- ▶ fees or monies imposed or made by the SCC under the SCC Act
- ▶ grants or donations from any source and raised by way of loans or otherwise such monies as the SCC requires for the discharge of its functions, subject to the approval of the minister responsible for communications.

In terms of section 49(9) of the SCC Act, the minister responsible for communications may, on receipt of the SCC business plan and budget, by notice in the Gazette prescribe fees or levies and charges for authorisations, that is payable by a category of licensees or customers set out in the notice.

Section 49(10) of the SCC Act provides that any funds or revenue of the SCC that remains unused at the end of the financial year must be remitted into the Universal Service or Access Programme. Note that this programme is designed to support the roll-out of telecommunications infrastructure only, even although broadcasters may contribute to its funds.

3.4.6 Making broadcasting regulations

The SCC Act empowers the minister responsible for communications to make regulations.

3.4.7 Categories of broadcasting licences

The SCC Act defines the types of broadcasting services that can be offered in eSwatini; these include:

- ▶ any broadcasting service provided by the eSwatini Public Broadcasting Corporation
- ▶ a broadcasting service provided by any other statutory body
- ▶ a broadcasting service provided by a person who receives funding from the State.

Although these services appear in the definitions of the SCC Act, they are not dealt with anywhere else.

3.4.8 Licensing procedures, including transfers, amendments, revocations of licences

In terms of section 34(1) of the SCC Act, the SCC is empowered to establish the procedures to be followed by applicants wishing to apply for a licence. The procedures must prescribe the:

- ▶ format of the application
- ▶ full details to be provided by an applicant
- ▶ publication of the application
- ▶ invitation for objections to the application
- ▶ period for replies to objections.

Section 34(2) of the SCC Act empowers the SCC to establish its licensing procedures which are required to be objective, transparent and non-discriminatory. In cases where the number of licences is limited, the SCC must make use of a comparative or competitive selection procedure per section 34(3) of the SCC Act.

3.4.9 Complaints handling and enforcement powers of the SCC

In terms of section 36 of the SCC Act, the SCC is empowered to establish the procedures for the investigation of alleged contraventions by a licensee of any law or the terms and conditions of a licence which the SCC is entitled to administer. It should be noted that the SCC is only obliged to commence an investigation if it has evidence that the parties involved in a complaint made to the SCC have attempted to resolve the issue between themselves before referring the matter to the SCC.

The SCC may refuse to initiate an investigation into a matter referred to them in cases where the SCC is satisfied that alternate means of timeously resolving the matter exists between the relevant parties, or legal proceedings relating to the matter have been initiated by any of the parties involved in the complaint. In the event that the SCC chooses not to investigate a matter referred to them, they are required to inform the relevant parties, in writing, of their decision.

The SCC is required to issue a decision on any investigation it commences within six months of submission of the complaint. In determining the outcome of any investigation referred to it, the SCC may issue directives to a licensee that includes:

- ▶ the reimbursement of any funds received by the licensee
- ▶ compensation payments including the costs accrued in engaging a lawyer, technical advisor or both, concerning the complaint.

3.4.10 Reviews and appeals of decisions made by the SCC

Section 45 of the SCC Act establishes the Communications Appeals Board (CAB).

The CAB is independent in the performance of its function to hear appeals made against the actions and decisions of the SCC.

Members of the CAB are appointed by the minister responsible for communications. They consist of a chairperson, who must be a legal practitioner with at least ten years' experience, and two other members selected on a case by case basis by the chairperson of the CAB. The minister appoints members selected from people with experience in either commercial, technical or financial fields of electronic communications, postal services, broadcasting, electronic commerce and other areas falling under the remit of the SCC and in respect of which the CAB has jurisdiction. All members of the CAB are appointed for three years and are eligible for re-appointment.

The chairperson and members of the CAB may recuse themselves for the same reason that judges may, or are required to, recuse themselves. In the event of a recusal, another person from the people appointed by the minister responsible for communications will be selected to serve as chairperson or another member of the CAB.

Section 46 of the SCC Act provides that the CAB must act on the request of a party aggrieved by a decision of the SCC and is empowered to compel action by the SCC considered to be unlawfully withheld or unreasonably delayed, or otherwise not per the law, and to hold unlawful and set aside any decision found to be arbitrary, capricious, abusive or otherwise not per the law.

Section 47 of the SCC Act provides the procedure to be followed when appealing a decision made by the SCC, namely:

- ▶ appeals must be made by application and filed with the secretary of the CAB after thirty days, but before sixty days, from the date of publication of the decision made by the SCC
- ▶ notice of an application for appeal must be provided to the SCC
- ▶ the SCC must, not later than twenty days from the date of the notification, file a reply to the application, with the secretary of the CAB
- ▶ the CAB will then set a date for the hearing at the earliest possible opportunity and not later than 40 days after notifying the SCC.

In making its decision, the CAB must consider the merits of the appeal, and may in whole or part, confirm, vary or rescind a decision by the SCC. The CAB must give the reasons for its decision in writing and must communicate its decision to the public and the parties involved in the appeal.

The CAB must determine an appeal within one hundred and twenty days from the expiry of the period by when the SCC must file a reply to the notification of the appeal. The SCC shall deliver the final decision of the CAB not later than sixty days from the date when the parties declare that they have concluded their evidence and made their final submissions to the CAB.

The CAB may appoint independent and impartial experts to advise it on any issue that may be relevant to any appeal lodged before it and, may make both provisional and final orders in respect of the payment of the costs and fees of the experts by any of the parties to the appeal.

The minister responsible for communications may, subject to the SCC Act, prescribe the procedure to be followed before the CAB. Subject to that procedure and any other provision of the SCC Act, the CAB may regulate its own procedure.

The minister responsible for communications may, with the concurrence of the minister responsible for finance, by regulations prescribe any such fees as are considered to be necessary for any proceedings before the CAB.

Section 48 of the SCC Act provides that any person aggrieved by a decision made by the CAB may, on a question of law, appeal to the High Court within 30 days of the date of the decision of the CAB.

3.4.11 Enforcement powers of the SCC

In terms of section 39 of the SCC Act, the SCC may require a licensee or any other person to provide the SCC with any information, including financial information and programme schedules, which it considers necessary to ensure compliance with the SCC Act, with any other law which the SCC is entitled to administer or with any decision issued by the SCC. Any information required by the SCC under section 39 must be in accordance with the performance of the functions and obligations of the SCC and must be requested with the reasons for which the SCC requires the information.

Failure to provide information requested by the SCC, in the manner requested by the SCC, is an offence, the penalty on conviction, is a fine, imprisonment or both.

Section 40 of the SCC Act provides that, in situations which present difficulties and in exceptional circumstances, the SCC may:

- ▶ at any time enter any premises or other place which the SCC reasonably suspects to be connected with any activities regulated by the SCC and search and inspect those premises and any books, documents or records found on those premises
- ▶ require any person to produce for inspection and take extracts from any books, documents or records relating to any activities regulated by the SCC which are under the control of that person
- ▶ remove and retain any books, documents or records for further examination of those books, records or documents
- ▶ require any person to maintain the books, documents or records referred to above for any reasonable period determined by the SCC
- ▶ undertake tests and measurements of any machinery, apparatus, appliances and other equipment as the SCC may consider necessary.

Section 41 makes it an offence for any person to:

- ▶ obstruct, impede or assault an officer of the SCC or any other person duly authorised by the SCC to act on its behalf while that person is exercising the powers of the SCC
- ▶ fail or refuse to comply with a requirement from the SCC provided for by the SCC Act
- ▶ alter, suppress or destroy any books, documents or records which the person concerned has been required to produce, or may reasonably expect to be required to produce by the SCC
- ▶ impersonate an officer of the SCC or a person authorised by the SCC to act on behalf of the SCC.

The penalty for the above actions, on conviction, is a fine, imprisonment or both.

Section 42 provides that, without prejudice to any other provisions of the SCC Act or any other law which the SCC is entitled to enforce, the SCC may take the following measures in respect of the contravention of either the SCC Act, any other laws the SCC administers, or any contravention of a decision made by the SCC:

- ▶ the imposition of an administrative fine
- ▶ the withdrawal or suspension of any licence where the contraventions are very significant or committed repeatedly.

Before proceeding with any of the measures provided for by section 42, the SCC must give the licensee concerned 30 days written notice of the alleged contravention and provide details of the measures being contemplated against them, as well as the amount of the fine being considered, if any. The SCC must allow the licensee the opportunity to rectify the contravention or to make submissions giving valid reasons for the contravention in a time set by the SCC in the notice. Should the licensee fail to rectify the contravention, or not give any valid reasons to justify the contravention, the SCC shall proceed with the measures and fines the SCC feels is appropriate for the contravention.

In cases where the SCC has *prima facie* evidence that the contravention represents an immediate and serious threat to public safety, security or health, or creates, or may create, serious economic or operational problems for other licensees or other persons in the market, or for end-users, the SCC may take urgent interim measures to remedy the situation before reaching a final decision, including the imposition of administrative fines, or may shorten the period of the notice referred to above. The person against whom the urgent measures are being contemplated must be given reasonable opportunity to respond to the SCC and propose any remedies.

3.4.12 Is the SCC an independent regulator?

The SCC can in no way be said to be independent. Interestingly, section 3(2) of the

SCC Act specifically limits the independence of the SCC in accordance with the SCC Act or any other written law.

The SCC's independence is compromised in several important ways:

- ▶ all members of the SCC board are appointed by the minister responsible for communications in consultation with the standing committee; however there is no public nominations process
- ▶ The minister responsible for communications is responsible for making broadcasting regulations, albeit in consultation with the SCC board.

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

3.4.13 Amending the legislation to strengthen the broadcast media generally

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

- ▶ the overriding problem is that the SCC is not an independent body
- ▶ the SCC Act ought to be amended to deal with the following issues:
 - ▶ public officers, party political office bearers and all members of the government ought to be barred from serving on the SCC's board
 - ▶ members of the SCC's board ought to be appointed by the king, acting on the advice of parliament, after parliament has drawn up a list of recommended appointees. As part of this process, the House of Assembly should call for public nominations and should conduct public interviews
 - ▶ the SCC should be empowered to make its own regulations
 - ▶ regulations specifically relating to broadcasting should be promulgated.

3.5 Legislation that regulates the state broadcast media

The eSwatini Television Authority Act, 1983 (STA Act), established the eSwatini Television Authority (STA) in terms of section 3. Section 4 of the STA Act regulates the functions of the STA as the provider of the state television service.

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

- ▶ a chairperson appointed by the minister responsible for television broadcasting
- ▶ four people representing the ministries responsible for:
 - ▶ television and broadcasting
 - ▶ education

- ▶ finance
- ▶ commerce, industry, mines and tourism
- ▶ three persons, who are not public officers, appointed by the minister based on their relevant qualifications, knowledge or experience
- ▶ the general manager (who is appointed by the board of directors and who is responsible for the day-to-day activities of the STA, subject to the direction of the board (section 8) as an *ex officio* member.

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

In terms of section 8 of the STA Act, it is the responsibility of the general manager to select the programming to be broadcast on the STA. Section 25 provides that the general manager has full editorial freedom for programming broadcast on the STA.

3.5.1 STA: Public or state broadcaster?

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

- ▶ provide that the STA is an independent body acting in the public interest
- ▶ contain any objects that deal with public broadcasting aims, such as providing the people of eSwatini with programming that is educational, informative and entertaining.

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

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

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

3.6 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 so-called whistleblowers, inside sources who can provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

3.6.1 Magistrates Courts Act, Act 66 of 1939

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

3.6.2 Parliamentary Privileges Act, 1968

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

3.6.3 Public Accounts Committee Order, 1973

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

Section 4(1) of the Public Accounts Committee Order empowers the committee to conduct enquiries, and it may summon any person to give evidence at an enquiry

or to produce any relevant book or other documents. Failure to appear before the committee, to answer any question or to produce the required book or document is an offence in terms of section 5, and the penalty is a fine, imprisonment or both. Note, however, that section 22 allows parliament to excuse a person from producing any book or document on the grounds that it is private and does not affect the subject of the parliamentary enquiry.

3.6.4 Official Secrets Act, Act 30 of 1968

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

3.6.5 Control of Supplies Order, 1973

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

3.6.6 Aviation Act, 1968

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

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

3.7 Legislation that prohibits the publication of certain kinds of information

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

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

- ▶ prohibition on the publication of state security-related information
- ▶ prohibition on the publication of information that constitutes intimidation
- ▶ prohibition on the publication of information from the SCC without authorisation
- ▶ prohibition on the publication of information obtained from public officers and which relates to corrupt practices
- ▶ prohibition on the publication of information that is obscene or contrary to public morals
- ▶ prohibition on the publication of information that is likely to offend religious convictions
- ▶ prohibition on the publication of information relating to voting
- ▶ prohibition on the publication of information provided in response to statistical questionnaires
- ▶ prohibition on the publication of information relating to identity documentation
- ▶ prohibition on the publication of information that constitutes offensive impersonation of the king
- ▶ prohibition on the publication of information that is offensive in its portrayal of executions, murders and the like
- ▶ prohibition on the publication of information which constitutes contempt or ridicule
- ▶ prohibition on the publication of information that is prejudicial or potentially prejudicial to public health
- ▶ prohibition on the publication of information that induces a boycott
- ▶ prohibition on the publication of information that constitutes advertisements relating to medicines and medical treatments
- ▶ prohibition on the publication of pictures that the minister declares to be objectionable.

3.7.1 Prohibition on the publication of state security-related information

Proscribed Publications Act, Act 17 of 1968

Section 3 of the Proscribed Publications Act empowers the Minister for Public Service and Information to declare in the Government Gazette any publication or

series of publications (the definition of which, in section 2, includes any newspaper, book, periodical, photograph or record) to be 'proscribed' if the publication is prejudicial or potentially prejudicial to the interests of, among other things, defence, public safety and public order. See the case-law below for a discussion of an important High Court case involving the Proscribed Publications Act.

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

Cinematograph Act, Act 31 of 1920

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

- ▶ crime or violence;
- ▶ scenes that are in any way prejudicial to the peace, order or good government of eSwatini.

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

Sedition and Subversive Activities Act, Act 46 of 1938

This pre-World War II-era statute is still in force.

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

- ▶ bringing the king or the government into hatred or contempt or to excite disaffection against them
- ▶ exciting the inhabitants of eSwatini to procure changes in eSwatini other than by lawful means
- ▶ bringing the administration of justice into hatred or contempt or to excite disaffection against it
- ▶ raising discontent or disaffection

- ▶ promoting feelings of ill-will and hostility between different classes of the population.

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

- ▶ show that the king has been misled or is mistaken
- ▶ point out errors in the government or eSwatini Constitution
- ▶ advocate lawful change
- ▶ point out any matters producing ill-will and enmity between different classes of the population with a view to their removal.

Official Secrets Act, Act 30 of 1968

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

- ▶ Section 3 makes it an offence to:
 - ▶ be in, or in the neighbourhood of, a prohibited place (defined as including works of defence, places relating to munitions of war and any place declared by the minister to be a prohibited place)
 - ▶ make a sketch (defined as including a photographic representation) that is likely to be even indirectly useful to an enemy
 - ▶ publish a secret official code, password, sketch or any other information that is likely to be even indirectly useful to an enemy.

The penalty for such an offence is imprisonment.

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

Public Order Act, Act 17 of 1963

Section 6 of the Public Order Act deems a person to have committed the offence

of incitement to public violence if, among other things, he or she published words where the natural consequence of them would be the commission of public violence by members of the public generally or by persons to whom the publication was addressed.

Protected Places and Areas Act, Act 13 of 1966

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

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

3.7.2 Prohibition on the publication of information that constitutes intimidation

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

3.7.3 Prohibition on the publication of information from the SCC without authorisation

Section 4(1) and 4(2) of the Schedule to the SCC Act, makes it an offence to publish, or cause to be published, any information obtained during the performance of one's duties for the SCC board without written consent from the SCC board. The penalty is a fine, imprisonment or both.

It should be noted that section 4(3) of the Schedule provides that any person who is in receipt of any information disclosed to them, and that person is aware the information was disclosed to them without the written authorisation of the SCC board, and that person causes the information to be published, commits an offence the penalty for which is a fine, imprisonment or both. This is important as it means that a journalist commits an offence if he or she publishes information he or she has received knowing that it was provided without the authorisation of the SCC board.

Section 30 of the SCC Act makes it an offence for any person to knowingly disclose information obtained by a person in the performance of his or her duties for the SCC to any unauthorised person, unless that person has been authorised to do so, the penalty for disclosure is a fine, imprisonment or both.

3.7.4 Prohibition on the publication of information obtained from public officers and which relates to corrupt practices

Section 17(3) of the Prevention of Corruption Order No 19 of 1993, makes it an offence to publish or disclose any document or information that is in one's

possession and which one has reason to believe has been disclosed by an officer of the Anti-Corruption Commission, without the written permission of the Minister of Justice. The penalty is a fine, imprisonment or both.

3.7.5 Prohibition on the publication of information that is obscene or contrary to public morals

Obscene Publications Act, Act 20 of 1927

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

Proscribed Publications Act, Act 17 of 1968

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

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

Cinematograph Act, Act 31 of 1920

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

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

- ▶ suggestive of immorality or indecency
- ▶ of debauchery, drunkenness, brawling, or any other habit of life not following good morals and decency.

Notice of the declaration of a picture being objectionable must be given in writing to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

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

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

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

3.7.7 Prohibition on the publication of information relating to voting

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

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

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

3.7.8 Prohibition on the publication of information provided in response to statistical questionnaires

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

- ▶ individual return made in terms of the Statistics Act;
- ▶ answer given to a question put in terms of the Statistics Act;
- ▶ report or other document containing particulars comprising such returns or answers, which enable the identification of such particulars with any person or business,

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

3.7.9 Prohibition on the publication of information relating to identity documentation

The Identification Order, Kings Order in Council No 4 of 1998, deals with eSwatini's population registry and the issuing of identity documents. Section 15(1) of the

Identification Order prohibits any person from publishing any information which he knows has been communicated to him in contravention of the provisions of section 15. This means that should a journalist be given information by a civil servant employed to implement the Identification Order regarding information or the contents of documents about another person which the employee is under a secrecy obligation not to have disclosed; the journalist is prohibited from publishing the information. In terms of section 16(1)(h), such publication is an offence, and in terms of section 16(2), the penalty is a fine or imprisonment.

3.7.10 Prohibition on the publication of information that constitutes offensive impersonation of the king

Section 6(1)(a) of the Cinematograph Act, Act 31 of 1920, entitles the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner 'impersonation of the King'. Notice of the declaration of a picture being objectionable must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

3.7.11 Prohibition on the publication of information that is offensive in its portrayal of executions, murders and the like

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

3.7.12 Prohibition on the publication of information which constitutes contempt or ridicule

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

- ▶ holding up to ridicule or contempt any member of His Majesty's naval, military or air forces
- ▶ tending to disparage public characters.

Notice of the declaration of a picture being objectionable must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph

films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

3.7.13 Prohibition on the publication of information that is prejudicial or potentially prejudicial to public health

Any person, who, among other things, distributes, prints, publishes or even possesses a proscribed publication without the necessary licence from the Minister for Public Service and Information is guilty of an offence in terms of section 4 of the Proscribed Publications Act, Act 17 of 1968. The penalty for such an offence is a fine, imprisonment or both.

3.7.14 Prohibition on the publication of information that induces a boycott

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

3.7.15 Prohibition on the publication of information that constitutes advertisements relating to medicines and medical treatments

There are several sections in the Regulation of Advertisements Act, Act 62 of 1953, which prohibit certain advertisements:

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

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

3.7.16 Prohibition on the publication of pictures that the minister declares to be objectionable

Section 6(2) of the Cinematograph Act, Act 31 of 1920, extraordinarily entitles the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable. There are no grounds listed in this section, which means that

the minister has unfettered discretion to determine whether or not a picture is objectionable.

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

3.8 Legislation that hinders the press in performing its reporting functions on the Senate

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

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

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

4 Regulations affecting the media

In this section, you will learn:

- ▷ definition of regulations
- ▷ broadcasting-related regulations

4.1 Definition of regulations

Regulations are types of subordinate legislation. They are legal rules that are made in terms of a statute. In eSwatini, broadcasting regulations are legal mechanisms that allow the minister responsible for communications or the SCC to make legally binding rules governing the broadcasting sector, without needing parliament to pass a specific statute.

4.2 Broadcasting-related regulations

One of the greatest problems facing the media in eSwatini is the lack of legislation that concerns broadcasting. This includes legislation relating to broadcasting licences. The SCC Act empowers the minister responsible for communications to make regulations concerning the licencing of broadcasting; however, no regulation has yet been passed in the House of Assembly. The lack of regulations concerning broadcasting licences has effectively halted any possibility for private broadcasting in eSwatini as, without the regulations, potential broadcasters are unable to get licences to operate, this means that the state broadcaster maintains a monopoly on broadcasting in eSwatini.

The eSwatini Broadcasting Bill, No 19, 2013 that would have addressed issues relating to broadcasting has not been passed in the House of Assembly.

5 Media self-regulation

One of the greatest problems facing the media in eSwatini is the lack of self-regulatory mechanisms for content dispute resolution.

The media has failed to develop industry-wide associations capable of developing and enforcing self-regulatory provisions for attaining appropriate professional standards for the media. This lack of self-regulation has led to disputes involving the media having to be settled in the courts or by the SCC.

6 Case law and the media

In this section, you will learn:

- ▷ the definition of common law
- ▷ defamation
- ▷ judicial review:
 - › the difference between a review and an appeal
 - › the various grounds for judicial review
 - › prohibition of publications
- ▷ contempt of court

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 that of eSwatini, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed unless they were clearly wrongly decided. Legal rules and principles are, therefore, decided on an incremental, case-by-case basis.

6.2 Defamation

6.2.1 Defamation and the defences to an action for defamation

Defamation is part of the common law of eSwatini. Like many southern African countries, eSwatini is influenced by South African law and the law of defamation is no exception.

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

that the reason for the dismissal was that Mr Mtetwa had reached retirement age.

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

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

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

The person looking to defend 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:

- ▶ truth in the public interest
- ▶ absolute privilege, for example, a member of the House of 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 certain public bodies
- ▶ fair comment on facts and which are matters of public interest
- ▶ self-defence (to defend one’s character, reputation or conduct)
- ▶ consent.

An important case concerning these defences for working journalists is *Dlamini v The Swazi Observer* (Civ Case 631/99), which was heard in the eSwatini High Court. In the course of his judgment, the judge pointed out that, while the media does enjoy a defence of privilege concerning the publication of matters heard in court, this is limited to statements made in open court. The reporter, in this case, had based his report (which was, in any event, erroneous) on documents filed in the registrar’s office in a case that had yet to be heard. The court held:

While litigants ... may, subject to limitations, make defamatory allegations relating to the cause of action in their pleadings, the media may not repeat the defamatory matter until those proceedings enter the public domain when the matter is heard in open court.

6.2.3 Remedies for defamation

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

- ▶ publication of a retraction and an apology by the media organisation concerned
- ▶ an action for damages
- ▶ an action for prior restraint.

An important case on damages for defamation is the eSwatini High Court case of *Mamba and Another v Ginindza and Others* (Civ Case No 1354/2000). This case involved the publication of highly defamatory and untrue allegations concerning an attorney (the plaintiff). It was alleged that the attorney and government lawyers had reached a settlement agreement in a case which had the effect of defrauding the government. In fact, the plaintiff did not know that government lawyers had acted illegally in entering into the settlement agreement. In deciding on the amount of damages to be awarded to the plaintiff, the court took account of the following factors.

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

irregularity concerning the signing of the settlement agreement.

- ▶ *Retraction or apology:* The court noted that the defendants offered to publish an apology only a year after the initial publications.
- ▶ *Comparable awards and the declining value of money:* The court took into account other damages awards as well as the effect of inflation.

6.3 Judicial review

6.3.1 The difference between a review and an appeal

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

6.3.2 Grounds for judicial review

There is no absolute, closed list of grounds for reviewing and setting aside an administrative decision. Some grounds for judicial review include:

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

- ▶ *Failing to take relevant considerations into account.* This is where a decision-maker does not take account of considerations which he or she is empowered and required to take account of.

6.3.3 Prohibited publications

In an important High Court of eSwatini decision, *Swaziland Independent Publishers (Pty) Ltd T/A The Nation Magazine v the Minister of Public Service and Information* (Case 1155/01), the court was asked to review and set aside a 2001 notice issued by the Minister of Public Service and Information in terms of the Proscribed Publications Act, 1968 (the provisions of which are dealt with in some detail elsewhere in this chapter), which declared both the Guardian newspaper and The Nation magazine to be proscribed publications.

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

6.4 Contempt of court

In an important Supreme Court of eSwatini decision, *Thulani Maseko, The Nation Magazine, Bheki Makhubu and Swaziland Independent Publishers vs Rex* (Case SZSC 03) the court was asked to review and set aside the 2014 judgment by the High Court for contempt of Court for unlawfully and intentionally violating and undermining the dignity, repute and authority of the High Court of eSwatini due to the publication of malicious and contemptuous statements about a pending case.

In the appeal against the High Court judgment, the Supreme Court was asked to consider:

- ▶ if the publication had the potential of influencing the outcome of the pending trial about which the comments were written
- ▶ if The Nation Magazine was a legal person with a right to freedom of expression

- ▶ if the sentence was too harsh to discourage critical and vibrant journalism in the country
- ▶ if the trial court judge was entitled to take judicial notice of his peculiar private knowledge as Judicial Officer
- ▶ why the trial judge failed to recuse himself as a potential witness
- ▶ if the trial judge displayed of hostility towards the defence and partiality in favour of prosecution
- ▶ if the trial judge simply rejected the evidence and misconstrued submissions
- ▶ if sentence and whether the was motivated by anger and emotion.

The Crown conceded material irregularities in the trial and did not support the conviction and sentence. After considering the above, the judge found sufficient reason to uphold the appeal and as the appeal was successful. The court did not find it necessary to analyse and decide each of the grounds of appeal.

The court did find that the judgment by the High Court was a travesty of justice and the need to balance freedom of expression of the press with the protection of fair hearing and authority of the courts was not properly handled. In the judgment, the judge stated that the importance of freedom of expression in promoting democracy and good governance could not be overemphasized and it is equally important to strengthen and promote the independence and accountability of the judiciary. The judge said it was for these reasons that the Supreme Court allowed the appeal and set aside the convictions and sentences against the appellants. The judge ordered the immediate release of the appellants in prison, and the refund of any fines paid.

Notes

- 1 The new name is used throughout even with reference to times prior to the name change
- 2 The name change was announced by the king on 19 April 2018 and the legal change was brought about by the Declaration of Change of Swaziland Name Notice, 2018 Legal Notice No 80 of 2018 published on 11 May 2018 and it deemed that the name change came into force on 19 April 2018.
- 3 Richard Rooney, the new Swaziland Constitution and its impact on media freedom, *Global Media Journal Africa Edition*, 2(1), 2008. Available at <http://globalmedia.journals.ac.za/pub/article/view/34/0> [Last accessed 17 June 2020].
- 4 Ibid.
- 5 Ibid.
- 6 <https://www.worldometers.info/world-population/swaziland-population/> Last accessed on 7 June 2020]
- 7 <https://tradingeconomics.com/swaziland/access-to-electricity-percent-of-population-wb-data.html> [Last accessed on 7 June 2020]
- 8 <https://www.internetworldstats.com/africa.htm#sz> [Last accessed on 7 June 2020]