

**A year of good, bad and downright ugly. *Sunday Times* (South Africa), 27 December, 2009.
Written by Dario Milo and Pamela Stein.**

As the year draws to a close, it is important to take stock of legal developments in the area of media freedom.

It has been a mixed bag. We begin with the good. The South Gauteng High Court has, in a number of cases, acquitted itself as a great defender of media freedom.

The most significant examples were the media's two urgent applications to have access to the Judicial Service Commission's (JSC) hearings into the complaints by the Constitutional Court against the Judge President of the Western Cape, John Hlophe, and Judge Hlophe's counter-complaint against those judges.

In April, the JSC resolved to hold in secret its long-awaited hearing into the complaints. This prompted an urgent application to the High Court by five media groups and others and resulted in a famous victory for open justice. Judge Nigel Willis held that the JSC had fallen foul of its own rules, which require that formal hearings be open to the public unless good cause is shown otherwise.

Then, in July, after Judge Hlophe was successful in declaring aspects of the April hearing unlawful, the JSC did an about-turn and appointed a three-member sub-committee to investigate the complaints, in secret. Again the media challenged this decision in court in an urgent application. Judge Frans Malan found in their favour, ruling that the JSC, as an organ of state, was bound to give effect to the principle that justice must be dispensed in the open.

In May the SABC took the *Sunday Times* to court, demanding the return of an internal report which had been leaked to a journalist by a confidential source. The report documented numerous irregularities that had taken place in the SABC's programme acquisition division. A limited number of copies of the report were distributed to specific individuals at the SABC on condition of strict confidentiality. The report had formed the basis of a front-page *Sunday Times* article.

The *Sunday Times* feared that returning the report to the SABC would lead to the uncovering of the source's identity because the copy had unique features.

Judge Nigel Willis found that the SABC had failed to establish any right obliging the *Sunday Times* to return to it a copy of the internal report, and queried whether the SABC, as an organ of state, could sue for a breach of its privacy. The judge also recognised the importance of preserving the confidentiality of journalists' sources in an open and democratic society.

Although this recognition was not essential to Judge Willis's ruling, it is a significant development in the battle by the media to ensure that their confidential sources are recognised by courts and tribunals.

Now for the bad. In a staggering judgment in March, the Constitutional Court ruled in a case brought by the *Sunday Times* concerning the constitutionality of Section 12 of the Divorce Act, which prevents the publication of any particulars of a divorce action, save for the names of the parties and the divorce order granted by the court. While the Constitutional Court accepted that section 12 limits freedom of expression and struck the provision down, it then took it upon itself to adopt an approach that had not been argued for by any of the parties: it ordered that, unless permission is granted by a court in exceptional circumstances, no person may henceforth publish the identity of, or any information revealing, the identity of "any party or child in any divorce case before any court".

The court failed dismally to appreciate that it is often in the public interest to know the identity of the divorcing parties. While protecting the identities of children involved in divorce cases makes sense, the order was disproportionate and pays lip service to media freedom.

In August this year, after months of considerable controversy, the Films and Publications Amendment Act was passed by parliament. Its most controversial section relates to pre-publication censorship.

Now every publication that is not regulated by the Press Ombudsman - including material that is published on the web - must be submitted to the Film and Publications Board for classification prior to publication, if the publication contains references to degrading sexual conduct, incitement to cause harm, promotion of propaganda for war, incitement of violence or the advocating of hatred based on any identifiable group characteristic.

A publisher who fails to submit a publication for classification containing any of these references may be punished by a five-year jail sentence or a fine or both. These provisions infringe upon the constitutional right to freedom of expression.

The Protection of Personal Information Bill, which places substantial restrictions on the "processing" of personal information, was also published this year.

And finally to the ugly. In a welcome development, ANC spokesman Jessie Duarte was reported as saying that it was neither the time nor the place for a statutory print media tribunal, which had been mooted by the ruling party at its Polokwane conference two years ago.

But the idea was then resurrected in a joint statement by the Media Development and Diversity Agency, the Commission for Gender Equality, the SABC, the SA Human Rights Commission and the Independent Communications Authority. Such a tribunal would place media freedom and editorial integrity in grave danger and threatens to reverse some of the significant gains made for media freedom since our country became a constitutional state.

Milo and Stein are partners at Webber Wentzel attorneys