

**Chilly winds are blowing around South African media. *Mail & Guardian*, 29 January, 2010.
Written by Dario Milo**

South Africa faces a challenging year as far as media freedom is concerned.

Important legislation that could drastically restrict media freedom is on the cards, including the Protection of Information Bill, which will regulate state secrets, and the Protection of Personal Information Bill, which does not adequately exempt the media from the obligation to process personal information in accordance with restrictive principles.

The idea of a statutory print media tribunal to replace the current system of self-regulation resurfaced at the end of last year. Some of Zapiro's incisive political cartoons remain the subject of defamation litigation by President Jacob Zuma.

Last week, the new National Director of Public Prosecutions gagged prosecutors from speaking to the media without authorisation. And just this week, e.tv was faced with the prospect of two of its journalists being sent to jail or fined for not revealing the identities of sources the broadcaster had interviewed for one of its news items (the case was postponed pending discussions between the parties).

Against this background, it is interesting to take note of some important developments in media law in the European Court of Human Rights and the Canadian Supreme Court, both of which were handed down in December last year.

The background to the European Court case was that Interbrew, the Belgian brewing company, had succeeded in the English courts in obtaining an order compelling various newspapers to return a document that had been leaked by a confidential source. The document revealed information relating to a possible takeover bid for South African Breweries then being contemplated by Interbrew.

The English courts ruled that the general rule that journalists are entitled to keep their sources secret should be overridden; the company needed the document to enable it to ascertain the identity of the source. The newspapers refused to comply with the court order; they asked the European Court to declare the order inconsistent with the right to freedom of expression.

The court reiterated that the protection of journalistic sources is one of the basic conditions for press freedom and that any departure from this protection had to be "convincingly established". Even though disclosing the leaked document might not directly lead to the identification of the source, "a chilling effect will arise whenever journalists are seen to assist in the identification of anonymous sources".

The court held that Interbrew's interests in obtaining damages for past breaches of confidence, and in eliminating future damage, were insufficient to outweigh the public interest in the protection of journalists' sources. The other significant international development in media law was the decision of the Canadian Supreme Court to adopt a defence of reasonable publication for actions against the media for defamation. The Toronto Star was sued by a property owner in regard to an article that quoted local residents who were critical of the owner's plans to expand his private golf course.

The Supreme Court ruled that a new defamation defence was required as a result of the constitutional protection of freedom of expression: the defence of responsible communication on matters of public interest. The court accepted that the defence of truth does not offer sufficient protection of the media.

In determining whether a publication was responsible, a number of factors must be taken into account, including the seriousness of the allegation, the reliability of the sources and whether the subject's side of the story was sought and accurately reported. The court sent the case back for a retrial to determine these issues.

This momentous development in Canadian law brings its defamation law in line with the law that applies in numerous other jurisdictions. Indeed, South Africa adopted the defence of reasonable publication more than a decade ago. Yet our experience shows that even with a media-friendly defence such as reasonable publication, public officials and figures are seldom deterred from turning to defamation law to claim millions of rands against the media. It is up to the media to ensure that the defence of reasonableness is allowed to percolate into every crevice of the newsroom so that these sorts of lawsuits will not prevail.