

It is in the courts that press freedom still has a champion, *The Sunday Independent* (South Africa), 18 December 2011. Written by Dario Milo and Pamela Stein.

There can be no doubt that media freedom suffered some major blows in 2011, not least by the National Assembly's passing of the Protection of State Information Bill, known in some quarters as the "secrecy bill". Much has been written about that draft legislation, and it suffices to say that if it is passed in its current form, it will have a chilling effect on media freedom and access to information.

But while the legislature has come under fire, in the area of defamation our courts have in general handed down important rulings in favour of freedom of the media.

The most significant decision was that of the Constitutional Court in April, in the case of Robert McBride v The Citizen.

The court's decision reaffirmed the central role the defence of fair comment plays in our law which allows robust, even extreme criticism of public figures, provided the data on which the criticism is based are true.

When McBride was suggested for appointment as Ekurhuleni Police Chief, The Citizen ran a number of articles and editorials over a period of seven weeks attacking the decision to appoint him and labeling him as one of the "three most notorious non-governmental killers of the late-apartheid period"; "a wicked coward"; "evil" and "human scum".

When McBride threatened to sue the paper, it responded with a headline: "Bomber McBride to sue The Citizen". The Citizen lost the case in the High Court and Supreme Court of Appeal. But on appeal to the Constitutional Court, the newspaper succeeded in defending the commentary.

As the court reminded us, under the fair comment defence, "criticism is protected, even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly held opinion, without malice, on a matter of public interest on facts that are true".

The court found that The Citizen was entitled to express its "unrelentingly harsh and unforgiving" views on McBride's suitability for the post.

Then in July, the Supreme Court of Appeal dealt with the issue of whether a corporation could sue for reputational damage and what a corporation would have to prove to claim lost profits or income flowing from a defamatory publication.

In the case of SA Taxi v Media 24, City Press had to defend an article which criticised the manner in which the plaintiff corporation, which finances the purchase and lease of taxis, conducted its business. The corporation sued for R250 000 in reputational damages, and R2 million in lost profits.

The court upheld the right of a corporation to sue for reputational damage, despite a compelling minority judgement of Judge Robert Nugent (who argued that awarding reputational damages to corporations effectively amounted to awarding punitive damages).

But the court also held that a defamation plaintiff suing for lost profits bore the onus of showing that a publication was false.

This is a speech-protective approach: it shifts the usual burden from the publisher to the person suing, because if a court is in doubt as to whether the publication is true or false, it must find for the publisher.

The court also suggested that where a plaintiff claims loss of profits arising from a defamatory publication, the plaintiff must prove that the publisher knew the defamatory allegations were false.

Although the court did not have to decide the issue definitively in this case, the court noted that this "limitation will serve to curb the excesses of claims for loss of profits by major corporations which intimidate newspapers by their sheer magnitude".

This decision means that corporations and others will think twice before suing for massive amounts of lost profits, and investigative journalists - particularly those working in financial journalism - will be less inclined to self-censor because of the threat of a crippling defamation claim.

Also in July, Julius Malema, the embattled president of the ANC Youth League, unsuccessfully sought to interdict a Sunday newspaper from publishing a story which alleged that various payments had been made into his family trust as a reward for facilitating tenders.

Judge Colin Lamont (who was later in the year to hand down a decision against Malema in the "Shoot the Boer" hate speech case brought by Afriforum) held that although the allegations concerned an aspect of Malema's private life, it was in the public interest for the allegations to be made, given that they concerned attempts to cast light upon claimed hypocrisy in Malema's lifestyle.

As Judge Lamont put it, "the public is entitled in general terms to have full disclosures concerning persons who stand in a public position and who are high profile personalities, who invite comment about themselves",

Moreover, the publication met the reasonableness test, in that it was based on reliable sources.

In October, the Supreme Court of Appeal, in *Modiri v Minister of Safety and Security*, made an important pronouncement on the right to identify suspects of crime. The Daily Sun had published a statement asking readers to help the police catch the plaintiff, who, the newspaper claimed, "is allegedly involved in drug dealing, cash in transit heists and car theft". Although there were some inaccuracies in the article, the court nevertheless found that it was true, emphasising the trite rule of defamation law that only the gist of a statement that is published must be proved to be true, not its every detail. Then the court dealt with whether the publication of the name of the plaintiff was in the public interest. Reinterpreting an earlier decision of the Supreme Court of Appeal which arguably compelled the opposite result, the court stated that the issue of whether it is in the public interest to identify suspects will always turn on the specific facts.

On the facts here, "this was not an instance of suspicion derived from information by a nosy neighbour or based on flimsy grounds" and the newspaper's decision to name the suspect was vindicated.

As 2012 approaches, with all its uncertainties, not least in the area of media law, we can be assured that at least in one area of media law, the courts have been developing a solid jurisprudence that properly gives effect to the media's watchdog role in society.