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1985/09/19

Mrs Sue Joynt
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Dear Sue

MEDIA WORKSHOP : JUNE 1985

I enclose five copies of a summary of my talk to the workshop as requested by you. My apologies for the long delay in sending it to you.

Due to the strict laws of copyright and the regulations of the Law Society of the Cape of Good Hope, I must request you to ensure:

1. that the name of Findlay & Tait Incorporated does not appear on the paper, and that it is not connected with the paper in any other manner;

2. that copies of the paper are distributed to only the participants of the course; and

3. that the paper is not published or distributed in any other form.

I hope these provisos are not too onerous, but as you will readily appreciate, one has to be extremely careful in the area of publishing, particularly when the topic is as "sensitive" as the one discussed in the paper.

Yours sincerely

R C A GOGARTY

Encl. 5/.

SOME LEGAL CONSTRAINTS ON THE PRESS:

TALK TO MEDIA WORKSHOP
MARYLAND CENTRE
10 JUNE 1985

I have been asked to address you on the legal restraints affecting the press in South Africa, with particular reference to the Police Act and the type of proof one may need before reporting or publishing anything connected with the activities of the police. As you can imagine, the area of Newspaper Law is an enormous one. There are, for example, over 100 statutes in addition to the common law which affect the right of the press to publish what and how they please. These restraints range from matters deemed to be in the interest of State security, law and order to areas such as advertising, fund-raising, copy right infringement, defamation, invasions of privacy, immorality and obscenity. Obviously in the time we have available to us, it will not be possible to canvass all these areas comprehensively, but I think one ought to be aware that there are other facets, apart from those which may be referred to as political which restrict the press.

What is a newspaper. This is defined in the Newspaper and Imprint Act as "a periodical publication, published at intervals not exceeding one month and consisting wholly or for the greater part of political or other news, or of articles relating thereto, or to other current topics, with or without advertisements, and with or without illustrations, but excluding any publication which is not intended for public sale or dissemination." Section 2 of this Act prohibits the printing and publishing in South Africa of any Newspaper unless it is registered. One applies for registration by applying to the Director General for Internal Affairs, and he, together with the Minister of Justice, must decide whether the paper may, upon payment of a registration fee, be registered.

Most newspapers in South Africa are members of the Newspaper Press Union of South Africa (NPU). One of the more important implications of membership of NPU is that the terms of the Publications Act do not apply to such newspapers. All other publications, accordingly, are subject to the terms of the Publications Act. As you are aware, the Act provides that no person shall, inter alia:

1. produce an undesirable publication or object, or

2. distribute such publication or object if it has been declared undesirable by notice in the Government Gazette,

3. possess any publication or object if its possession or publication has been prohibited in the Government Gazette.

In practice it seems that what is considered undesirable is certain political material, particularly of communistic or radical nature. But the net is cast very wide and, for example, anything that is considered

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by the Publications Control Board to be harmful to relations between any section of South Africans or prejudicial to the safety of the State welfare or peace and good order in South Africa may be declared undesirable. Unlike the Publications Act, the Indecent or Obscene Photographic Matter Act applies with equal force to members of the NPU or otherwise.
However, it is important to note that there is a presumption in the Publications Act that specifies that it is conclusive proof of undesirability if a publication has been declared as such by notice in the Government Gazette. Clearly therefore, it is important to keep lists of such publications, because the publication, by way of quotation or reference to any undesirable literature, may well entail a criminal prosecution. One last point relating to the Publications Act is that in terms of the Act the name and address of the publisher must be printed in a prominent place on every publication produced in South Africa.

Of critical importance to the press in South Africa today are those areas of the law which relate to so-called matters of "State Security, Law and Order". I think it is fair to say that today in South Africa we are going through major political, social and economic upheavals. One thinks of the continued unrest in many black townships, the on-going debate in the U.S.A. and at home regarding economic sanctions against South Africa, the fact that our own economy is presently in a serious decline and the roles of the S.A. Police and Defence Force in our society. There are a host of laws affecting comment and publication in these areas and I propose to look at a number of statutes that relate directly to this area.

1. THE INTERNAL SECURITY ACT

As you are no doubt aware, this was formerly called the Suppression of Communism Act, and it enables the State President to declare any organisation unlawful if he considers that it is furthering the aims of communism. There is a very wide definition of communism, including, inter alia, any doctrine or scheme which aims at bringing about any political industrial or socio-economic changes in the Republic in accordance with the directions of, or under the guidance of, or in co-operation with any foreign government or any foreign or international institution whose purpose, or one of whose purposes, is to promote the establishment within the Republic of any political, industrial or socio-economic system identical with or <u>similar to</u> any system in operation in any country which has adopted a system of government which is regarded as communist. Any publication which could be considered to further such interest is unlawful.The problem here in that the legitimate aims of many organisations are <u>similar</u> to those of communism.

Furthermore, in terms of the Act publication of a speech or statement by a banned person or a person who is prohibited from attending gatherings is prohibited unless Ministerial permission has first been obtained. This prohibition, however, does not extend to persons who have been confined to a particular area. One should also be aware of the fact that indirect quotations, for example via a banned person's spouse, may not be published. The

test here is what is being published. If the words are the actual thoughts or ideas of the banned person, they may not be published via a third person. However, once a person has been unbanned, he or she may be quoted at will, even as regards statements made by that person whilst banned. Publication of the words or statements of a deceased person whose name still appears on the "banned" list even though he is deceased is considered to be lawful by some lawyers.

One should also note that the Minister of Justice has the power in terms of the Act to prevent certain persons from communicating with each other or from receiving visitors, so it would certainly be an offence for a reporter to seek an interview with such a proscribed person as he would be inciting that person to commit a crime.

Recently, a number of newspaper editors have been brought before the Courts, in terms of the Act, for allowing a banned person to be quoted. Last year, for example, Harvey Tyson of the Star was charged for publishing a statement by Oliver Tambo which merely said that as he was banned he could not be quoted. Now, as you can imagine, enormous volumes of copy are processed daily in newspaper offices and it is of the utmost importance that proof reading is done zealously as slip-ups can be costly, as in Tyson's case. However, it seems that unless the editor or journalist was grossly negligent or intentionally published the comments of a banned person they will not be convicted individually, but their companies might well be convicted. In the Tyson case, the Argus Group was fined R100,00 on the grounds that such companies are held strictly and vicariously liable for offences committed by their members.

One further aspect relating to the Internal Security Act is that the Minister of Justice, if he suspects any publication ought to be prohibited, may appoint an official to investigate the newspaper.

This official has wide powers including the powers of search, seizure and questioning.

2. THE PRISONS ACT

In terms of this Act it is an offence to sketch, photograph or make a plan of any prison or prisoner, and to publish any false information, regarding the behaviour or experience of prisioners or ex-prisioners, or concerning the administration of prisioners, knowing it to be false or without taking reasonable steps to verify the truth of such publication. Note, here, that a prison includes a prison van and a prisoner includes a prisoner awaiting trial and a detainee. However, stories, photographs and the like, may be published with the permission of the Commissioner of Prisons, but if the article is one critical of the administration of prisons, it is unlikely that such permission will be obtained.

The meaning of the words "without taking reasonable steps to verify the truth", was considered by our Courts in the case of STATE vs S A A N.* /1970(1)SA 469(W)* Here, the Rand Daily Mail published a series of articles, regarding the conditions and experiences in

South African prisons, which had been obtained from first hand accounts by prisoners. The editor was advised before publication of the implications of Section 44F of the Prisons Act, namely that of publishing false information, and he had to satisfy himself that he had taken reasonable steps to verify the information he had obtained. Unfortunately the Act gives no guidance in this regard. The editor eventually caused each person to give their statement in the form of an Affidavit, in other words, on oath, and an attorney cross-examined the witnesses in an attempt to verify their stories. As the stories coroborated one another and the persons had little to gain by their statements, the editor felt that he could publish them and did so. However, the Court was not impressed by these steps and duly convicted the editor.However, the Court did list certain steps that it would consider in coming to the conclusion that reasonable steps to verify had been taken and I list some of them for your interest, though the list is not exclusive:

1. "The section does not envisage steps which must be completely successful so that only accurate and true information may be published...It is also unnecessary to take extravagent steps, such as virtually constituting and holding a court". (p 479A)

2. "Steps clearly reasonable in one case may well indicate excessive caution in another and be inadequate half measures in a third". (p 479E)

3. Those steps must be taken "which a reasonable and prudent man in similar circumstances would have taken to make sure that the information was accurate". (p 479F)

4. One must consider the informant himself, "his character, his history, his views about the matters with which his information is concerned, whether he gave first-hand information and like factors". (p 479 G)

5. It is also necessary to take into account the nature of the information. It may be of the type which can easily be controlled by asking the informant a few simple questions; or it may be such as would require a great deal of enquiry to satisfy the reasonable man of its accuracy. (p 480 A)

6. It will not always be necessary to enquire of the particular authorities whether the information is accurate or not, but it may well be necessary in certain circumstances as it is considered reasonable to hear both sides of a story. (p 480 H)

7. "It is not in all cases necessary to try and find corroboration for the information, but it is also erroneous to say that it is never necessary". (p 481 D)

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These criteria hardly make for certainty and the result has been that newspapers rarely publish "prison stories" unless they are absolutely sure of their facts.

3. DEFENCE ACT

In terms of this act no person shall publish information relating to the composition, movement or dispositions of the S A Defence Force or their allies. Any statement, comment or rumour relating to the S A Defence Force or any activity of the SADF which is calculated to prejudice or embarass the government in its foreign relations or to alarm or depress members of the public is also forbidden. A veil of secrecy is drawn over the activities of the SADF and this was clearly seen when SA troops went into Angola in 1976. Many South African editors were aware that troops were in Angola, but they could not publish this fact in terms of the Defence Act until the matter was raised in Parliament.

It is also an offence to publish any secret or confidential information regarding the SADF; any information relating to the SADF is presumed to be secret or confidential and the onus of rebutting this presumption is on the accused. The test used in deciding what constitutes "causing alarm" is whether there is a reasonable probability that alarm is caused. I should imagine that what happened recently in Cabinda with reasonable probability caused alarm to members of the public, and, had the matter not been raised in Parliament, the press probably would not have been able to report it.

There are provisions in the Defence Act, similar to those in the Prisons Act relating to the taking of photographs, sketches and plans of buildings and installations.

It is also an offence for any person to induce another to neglect his duty or to refuse to report for military service. A distinction must be drawn here between debating contentious laws and the urging of someone to commit an offence. In this regard, attention should be paid to Section 2 of the Criminal Law Amendment Act of 1953 which makes it an offence for someone to, inter alia, advise, encourage or aid any person to commit an offence by way of protest against the law or in support of a campaign against any law. One thinks here of the present debate regarding conscription. Clearly the members of the End the Conscription Campaign commit an offence if they urge people to refuse to render national service. However, they are entitled to foster debate on the issue of conscription, as this is not unlawful. Note in this regard, that the Defence Act provides for a penalty of R5000,00 or 6 years imprisonment should one be found guilty of contravening a provision of the Act.

In order to facilitate reporting on the military, the SADF has established a Director of Public Relations, and duly accredited military correspondents are regularly briefed by the SADF on

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newsworthy items. The stated object of this Directorate is to release as much information to the press as possible, taking into account the country's security. However, the liason officer may refuse publication of any information that might have leaked out, and clearly the scope for investigative and independant reporting is very limited.

4. THE OFFICIAL SECRETS ACT

In terms of this Act it is an offence, inter alia: to make any sketch, plan, model or note which is likely to be useful to the enemy; to use any information obtained in any manner for any purpose which is prejudicial to the safety or interests of the Republic; to publish or communicate directly or indirectly any sketch, plan, documents or other information, relating to ammunitions of war or any military police or security matter to any person in any manner or for any purpose prejudicial to the safety or interests of the Republic. There is a maximum penalty of 15 years imprisonment for offences under this act, and journalists must accordingly be extremely careful when they have information which relates to so-called security matters.

It is important to note here that the newspaper man is faced with a presumption in terms of the act that the purpose of his report was prejudicial to the state. Thus, in a Court of Law, he bears the onus of proving that this was not his purpose.

5. THE TERRORISM ACT

This Act has been replaced by the Internal Security Act of 1982, except for Section 7.

Before turning to the Police Act, I mention in passing that there are numerous other statutory controls facing the press. It is beyond the confines of this paper to discuss them, but I refer you to Chapters 11 - 14 of Kelsey Stuart's "The Newspaperman's Guide to the Law", 3rd Edition.

6. THE POLICE ACT

The activities of journalists and photographers are strictly controlled by this Act and access to information from the police is limited to journalists who possess press cards. The reason for this is that the NPU and the Commissioner of Police have agreed that certain journalists will be issued with press cards and that no journalist who is not in possession of a valid press card shall have any claim to any information from the police. These accredited journalists will have access to the Commissioner or any officer designated by him, to discuss confidential or sensitive information. Information relating to the police may accordingly be published provided that the provisions of an Act are not

contravened and it does not hamper either the police in the execution of their duty or the administration of justice. With the permission of the police the holder of any valid press card may enter and remain in an area which is under police control and from which the general public is excluded. However, if the presence or conduct of the press card holder in any way hinders or obstructs the police in this area the holder may be ordered to leave. The holder of such a card and/or his photographer may appeal to a Senior Officer against such an order given by a lower ranking policeman. Each holder of a press card undertakes not to publish any information about crime or national security which he has obtained independantly of the police before he has consulted the Senior Officer in the area. The police may request that any publication be not published.

A further method of controlling publications about the Police is Section 205 of the Criminal Procedure Act which empowers the police to subpoena a witness to attend before a Magistrate to answer questions relating to a suspected offence. Failure to answer any question renders the witness liable to arrest and punishment. An affidavit answering the information required is usually sufficient to have the subpoena withdrawn. At the hearing the witness has no right of representation by Counsel or attorney, but it seems to be the policy of the magistrates courts that such representation is allowed. Normally the hearing is conducted in private and members of the public, including the press, are excluded. Only a reason which constitutes a just excuse in law enables a witness to refuse to answer questions. A number of newspaper men have been imprisioned for refusing to answer questions concerning the identity of their informants on the grounds that this would breach their code of ethics as journalists. Reporters often rely on informants who usually only provide information on the understanding that their identities will remain secret. However, protecting such an informant by non-disclosure of his name is not regarded as a just excuse in law, and a journalist refusing to answer questions on this ground will invariably be convicted. However, note that it is important that the magistrate, when he issues the subpoena, properly applies his mind to considering whether the examination of the witness is justified in all the circumstances of the case. In other words, the magistrate is not merely a rubber stamp for the SAP, and he must consider the matter fully before exercising his discretion. Upon the application of the witness the Supreme Court could set aside a Section 205 subpoena as having been improperly issued if it were shown that the witness was in fact totally unable to be of any assistance in furnishing any information regarding the alleged offence.

Section 27 (A) and(B) of the Police Act No 7 of 1958 are of the utmost importance to journalists.

Section 27 (A) makes it an offence for any person without the written authority of the Commissioner of Police, to -

a) Sketch or photograph any person who, with a view to criminal proceedings, is detained in lawful custody or who is a fugitive after he has escaped from such custody; or

b) in any manner publish or cause to be published any such sketch or photograph or any person referred to in (a), before :

1. the trial of such person if he is an accused, or, if he is a witness, the trial of the accused concerned in respect of the offence to which such person's detention relates, has been commenced with or

2. such person has been released from such custody in the case where he is neither the accused not a witness. Similar provisions are contained in Section 45 (7) of the South African Transport Services Act No 65 of 1981.

Section 27 (B) reads as follows:

27 (B) (1)

Any person who publishes any untrue matter in relation to any action by the force or any part of the force or any members of the force in relation to the performance of his functions as such a member, without having reasonable grounds (the onus of proof of which shall rest on such person) for believing that that statement is true, shall be guilty of an offence, and on conviction, liable to a find not exceeding R10 000,00 or to imprisonment for a period not exceeding 5 years, or to both such fine and such imprisonment.

The term "member of the force" includes any commissioned officer, warrant officer, non-commissioned officer or constable serving in the South African Police, including, in certain circumstances, reservists.

Section 27(C) of the Police Act which relates to publication of the constitution, movements, deployment or methods of the police in combating terroristic activities was repealed in 1982.

Unfortunately, this paper can only sketch brief outlines of the constraints facing the press in South Africa today and the area is exceptionally complex and journalists would be advised, if they are in doubt, to consult an experienced journalist, editor or even an attorney when they are dealing with sensitive political matters.

R C A GOGARTY