

The Right to Write

The Sunday World recently published an article entitled *Mohlala 'Silenced'* where it revealed that municipal speaker, Jimmy Mohlala, was in the process of laying charges of fraud against the company Lefika, before he was assassinated in front of his son.

Bobby Motaung, the manager of Kaiser Chiefs and director of Lefika, took immediate action against the newspaper in an attempt to prevent them from publishing a follow up article. He contended that the first article implied that he was involved in the assassination of Mohlala.

Motaung sought an interim interdict that would prevent *The Sunday World* from publishing any material that could be construed as defaming him. In order to obtain this gag order, he had to prove that he had a *prima facie* right to the order, that he was in danger of suffering injury and that he had no alternative remedy. Furthermore he had to convince the court that the balance of convenience favored granting the interdict.

Motaung argued that he would be placed in danger by friends of Mohlala, who may take the law into their own hands and murder him in an act of vengeance. Granting the interdict would save his life and the newspaper would only suffer the mild inconvenience of temporarily not being able to report on the issue.

Matthew Welz argued convincingly on behalf of the newspaper, that Motaung's concerns were little more than baseless speculation. There was no indication that anyone would resort to taking vigilante action against Motaung after reading the first article, which meant that there was no reason to think that a follow up article would have such an effect either. More importantly he argued that granting Motaung an interim interdict would have the effect of permanently silencing the newspaper. Given that the reporting of news is extremely time sensitive, a temporary gag order would have the effect of killing the story for good. Furthermore Motaung would have the alternative remedy of suing the newspaper for defamation.

After considering the arguments of both parties, the court refused to grant the gag order and held that a reasonable reader would not come to the conclusion that the first article implied that

Motaung was involved in Mohlala's assassination. The court quoted the case of *Midi Television* which states that:

"Mere Conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making this evaluation it is not only the interests of those associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information."

In an ironic twist Mzilikazi Wa Afrika, the author of the first article, states that he had no intention of writing a follow up article, but Motaung's efforts to silence him have prompted him to research the matter further.

The case brings to light issues of immense constitutional importance. At its heart lies the conflict between the right to reputation and freedom of expression. Shakespeare expresses the value of reputation with his immortal words "he that filches from me my good name/ Robs me of that which not enriches him/ And makes me poor indeed." While it is undoubtedly the case that a good reputation is to be cherished, it cannot be afforded protection at all costs. Freedom of expression lies at the foundation of our constitutional democracy and it must be fiercely guarded to ensure progress and stability.

If Motaung's gag order was granted it would have amounted to prior restraint of the media. Instead of allowing the truth to be settled in the marketplace of ideas, it would have been barred from seeing the light of day. When different points of view are stifled we lose the opportunity to challenge, reconsider and perhaps reaffirm our own ideas. However, when people are exposed to a range of conflicting opinions on a subject they are given the opportunity to exercise their rational faculties, weigh up the arguments on both sides and come to form their own beliefs on the matter.

Dario Milo of Webber Wentzel, who acted for *The Sunday World*, states that the gag order sought by Motaung was outrageous. "The gag as originally sought would have prevented the newspaper from writing anything defamatory about Motaung and his company in the future. This relief was clearly outrageous. It is particularly pleasing that the Court applied some of the prior restraint jurisprudence that clearly favours the right of the media to publish first and be damned, if

necessary, thereafter."

Newspapers and other broadcasters are often faced with attacks by those that would prefer to keep them quiet. The impending threat of litigation creates a chilling effect that encourages them to refrain from ruffling the feathers of those with power and resources. It is imperative that our legal system serves to facilitate the media's role as watchdog, instead of forcing it to become a lapdog. In the *Sunday Times* case the court held that:

The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators.

Given our unfortunate history of state sanctioned censorship, we must take heed of Judge Kriegler's dictum that "we should be particularly astute to outlaw any form of thought-control, however respectably dressed." Banning a text after it has been written is bad enough, but preventing it from being written is unconscionable.