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COMMUNICATIONS LAW

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I have read *Communications Law* with admiration for its comprehensive nature. Once again, the importance of freedom of expression as a fundamental right and the right to information have struck me with nothing less than awe – awe for the potential of misunderstanding its very essence and its being a core element of our new democracy. Except for chapter 18 of part III, which was written in regard to the social media by De Beer and Sadleir, the book is that of Burns – who can justifiably be referred to as our most eminent author in this field. As a professor in media law at UNISA she kept this subject more than alive when the torch was handed to her by the eminent Prof SA Strauss, who sadly passed away in 2016.

I – unwittingly – became involved in freedom of expression in 1975, when I was appointed by the state president as deputy chair of the newly formed publications and films appeal board and from 1980-1990 as its chair. Thereafter I have remained involved in different forms of media bodies – for newspapers, for broadcasting, electronic communications and in 1994-1996 chairing the Buthelezi Commission, which drafted the Films and Publications Act 1996. The latter protects children and protects the rights of adults – except in the case of child pornography and so-called hard pornography. I might mention that the recent decision of the films and publications appeal board that the film *The*

Wound be classified as pornography is clearly wrong and in conflict with the intention of the legislature to permit adults to freely attend movies that do not amount to pornography. In early March 2018 the high court already set aside the classification as pornography, pending the outcome of a review by the court. I trust that by the time this discussion is read, the high court would have set it aside and re-instated the 16 (LNS) classification.

In *Publications Control Board v William Heinemann Ltd* 1965 4 SA 137 (A), Rumpff JA made the following statement in his often-quoted minority judgment on Wilbur Smith's *Where the Lion Feeds* – the banning of which was confirmed by the majority of the appellate division of the supreme court (Rumpff JA dissenting):

> "The freedom of speech — which includes the freedom to print — is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a Court of law is called upon to decide whether liberty should be repressed — in this case the freedom to publish a story — it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost" (160E-F).

Sadly, in its first five years, the films and publications appeal board banned *A Sparrow Falls* by the same author, basing its judgment on one page which described, in mild detail, a scene which led to intimacy. However, the worst indiscretion – to put it mildly – was the banning of the best satire ever written in Afrikaans – Etienne Leroux's 1977 *Magersfontein, O Magersfontein!* The Afrikaans Academy, two years later, awarded it most prestigious prize to the author for the book ….

All I need say is that from 1980-1990 all the novels which came before the appeal board were unbanned – including André Brink's *Kennis van die Aand,* which had been banned by the high court in 1974 and *Magersfontein….* And, even within the apartheid-dominated society, *The Freedom Charter* was unbanned in 1983 and the film *Cry Freedom!* in July 1988. I need not say more, except that the security police, the next day, confiscated the 32 copies of the film, while it was being screened in theatres…. Small bombs went off in the theatres – conceded to have been planted there by security police, who requested amnesty for these offences at the Tutu Commission in the nineties. No one has yet come forward for setting our house alight in October 1988….

Getting back to the book under discussion. The mere fact that *Communications Law* has 683 pages is evidence of the width and importance of this facet of the law. It deals with the laws and legal structures involved, the scope and content of the constitutional right to freedom of expression and rights which complement freedom of expression, such as the right to freedom of religion, thought and opinion, freedom of association and assembly, the right to language and culture, the right to access information and limitations to freedom of expression – such as hate speech, propaganda for war and incitement to imminent violence.

I have decided not to discuss the multiple facets of *Communications Law*. Given the complexity of the subject matter, a choice of certain subjects would be more fitting.

Burns, justifiably, supports the constitutional court judgment in *Print Media SA v Minister of Home Affairs* (2012 6 SA 443 (CC)) that publications which explicitly described sexual conduct had to be pre-cleared by the board, was not in accord with the constitution. (A correction of par 4 on 162 is necessary in the light of the constitutional court judgment in *PMSA v Minister of Home Affairs* 2013 6 SA 443 (CC). In fact the matter is correctly dealt with on 169-170.) It is, indeed, surprising for the author hereof that this 2009 amendment to the act had taken place. This was indeed part of the apartheid censorship which the 1994 task group, which I chaired, advised to be impermissible and was accepted by parliament. In fact, except in the case of the definition of child pornography, parliament accepted the bill as prepared by the task group.

While referring to child pornography, it is of interest to note that the constitutional court in *De Reuck v Director of Public Prosecutions* (2004 1 SA 405 (CC) at par 20) gave effect to the task group's proposal that child pornography should not include art. Burns, indeed, refers to this judgment at 162. What is significant about this judgment is that films and publications which predominantly give rise to an aesthetic reaction according to the reasonable person, are not regarded as pornographic. It is indeed disappointing that this binding decision that child pornography excludes art has explicitly been ignored in the definition of child pornography in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In fact the introduction to the definition of child pornography provides as follows:

> "'child pornography' means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, *whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not*, including any such image or description of such person."

If ever there was a definition which is unconstitutional, then the words accentuated in the above text qualify. They are in direct conflict with the *De Reuck* judgment. This might be worthwhile to add in the next edition of the work.

It is also of special interest that the films and publications appeal board has expressly, in at least three judgments, acknowledged the importance of dramatic context. The judgments rejected the categorical approach of the board in regard to child pornography. The judgments in *XXY* and *Of Good Report* justifiably require a contextual approach – an approach which was also required in the *De Reuck* matter. (See Pretorius (ed) *Essays in Honour of Frans Malan* (2014) 352.)

In *Her Majesty the Queen v Sharpe* (2001 SCC 2 par 60), the Canadian supreme court also held that art should be interpreted widely and not be equated with what the ordinary person regards as art. On a previous occasion, the Ontario court had already held that a work of art that included images of nude children did not amount to child pornography (*Ontario (Attorney General) v Langer* (1995) 123 DLR (4th) 289 (Ont ct) (gen div)).

Art was also the subject of an important judgment of the German constitutional court. Strauss, minister president of Bavaria (1978-1988), was a favourite amongst cartoonists. Not only was he outspoken on issues such as immigration and religion, but his somewhat coarse features and bulky physique made him an ideal subject for cartoonists. In a matter which reached the German constitutional court, it was held that cartoons featuring his facial features in an image of two pigs having sex were not protected by section 5 of the German constitution. The rights to artistic freedom had to be weighed against his right to dignity. The court stated that, even if it is accepted that exaggeration is a feature of caricature, and that public figures should accept that they may be targets for cartoonists, the portrayals far exceeded the limits of what is acceptable (BVerfGE 75, 3679 1 BvR 313/85). Although I support this finding, the German constitution, on the face of it, guarantees art unconditionally. The judgment, however, demonstrates that no right is absolute.

Burns also, justifiably, refers to judgments of the European court of human rights in Strasbourg. This court has contributed immensely to widening the scope of freedom of expression. It might be worthwhile to add more detail in this regard in the next edition. Burns does, *inter alia*, refer to *Jersild v Denmark* (15890/89, 23-09-1994) where the court set aside a conviction based on hate speech by a Danish court. Jersild had produced a two-minute news item that was condensed from a longer interview. The interviewees had, in the broadcast, used racially derogatory language with regard to immigrants from Africa, and had boasted about their criminal activities directed at such groups. The European court, rejecting the approach of the Denmark court, stated:

> "The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. … Whilst the press must not overstep the bounds set, inter alia, in the interest of 'the protection of the reputation or rights of others', it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'. … Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media."

The court has also dealt with other limitations of member states on media coverage of trials. In its *Sunday Times* judgment (*The Sunday Times v United Kingdom* 26-04-1979, series A no 30, 14 EHRR 229), the court held that articles in the English press, dealing with thalidomide damage to unborn babies, in spite of pending litigation on the matter, did not justify an injunction against their publication. Some more recent judgments of the Strasbourg court also demonstrate an accent on freedom of expression. Thus, it set aside an award of damages against an Austrian newspaper publisher for having disclosed the name of a bank manager whose name was mentioned as a suspect in a fraud investigation. The court held that although the manager was not a public official, there had been sufficient reason to mention persons involved, including persons in the financial and political fields. It would have been difficult, according to the court, not to have mentioned his name (*Standard Verlags v Austria* (ECHR 10-01-2012)). *Axel Springer AG v Germany* (ECHR 39954/08 (7-02-2012)) related to the coverage by the newspaper *Bild* of the arrest and conviction of a famous TV actor found in possession of drugs. The actor had acted the part of a police superintendent as the hero of a popular television series on German TV, with a viewership of between three and five million. The actor successfully applied for an injunction against the further publication of two articles: one on his arrest for possession of cocaine and the other for the publication of his conviction. The Strasbourg court, however, set aside these injunctions on the basis that it was in the public interest and that the injunctions were not necessary in a democratic society. The public interest increased as a result of his involvement as a (fictional) law enforcement officer in the series on television. Furthermore, he had been arrested in a public place (a beer hall) and all the facts published were correct. Similarly the court held that the conviction for defamation of an Italian editor, reporting on matters concerning the "war" between judges, prosecutors and the police in the context of combating the Mafia, was in conflict with the guarantee of freedom expression in article 10 (*Belpietro v Italy*

(ECHR) 43612/10 (24-09-2013)). Also relevant is a recent judgment of the German *Bundesgerichtshof* (vi. *Zivilrechtssenat*, AZ 93 of 2 012). Except for the constitutional court, the *Bundesgerichtshof* is the highest court in Germany which held that the media was entitled to publish intimate details of the life of a weather anchor on television. The facts, according to the court, became public when revealed during the arrest hearing of the anchor. The fact that he was exonerated on the charge of rape did not assist. The decision of the *Oberlandesgericht* in his favour was set aside. (I might mention that the absolutist approach in *S v Harber* 1988 3 SA 396 (A), where a newspaper editor's conviction of contempt was confirmed by the appeal court, was rejected in *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 5 SA 540 (SCA).)

Burns includes several references to judgments of the broadcasting complaints commission of South Africa. The commission has, per 1995 authority of the Independent Communications Authority of South Africa (at the time called the Independent Broadcasting Authority), jurisdiction in regard to broadcasts by broadcasters which belong to the National Association of Broadcasters and has been functioning since 1993, with official recognition in 1995. Except for a number of community broadcasters all local broadcasters have elected the jurisdiction of the BCCSA. The recognition of the BCCSA is, of course, democratically justified, since it excludes the state from control over the content of broadcasters. Of course, there is no pre-clearance for broadcasting, in any case – see section 53(2) of the Electronic Communications Act. More than 500 judgments of the BCCSA have been published in the Lexis Nexis Law reports. The author, at 501, refers to a judgment where the BCCSA tribunal held that where, in an impromptu TV show, the director instructed the actors to mimic persons who are afflicted with Tourette's Syndrome. A fine of R30 000 was imposed – especially since the broadcaster promised the complainant that they would not repeat this. Unfortunately it was repeated – but as a result of the fact that the show had already been produced before the promise. What is not mentioned in the text is that this decision was set aside on appeal by the BCCSA appeal tribunal. In a footnote, there is, however, a reference to the appeal judgment, without stating that the decision was set aside. Personally, I am inclined to believe that the sad fate of persons suffering from Tourette's is not a subject for impromptu slapstick. Fortunately, the BCCSA had, at least, insofar as children in a school for paraplegics was concerned, decided in favour of the children when a presenter in an unguarded moment, for which he sincerely apologized afterwards, made a derogatory remark concerning the intelligence of learners at school.

The Independent Communications Authority of South Africa is also dealt with, especially as to its task in ensuring that broadcasting remains independent. To this task was added the electronic communications sphere by 2005. In so far as broadcasting content is concerned the main task is undertaken by the BCCSA. However, the Electronic Communications Act 2005 contains a few sections which require balanced broadcasting during general and municipal elections. Complaints in this regard are dealt with by the Complaints and Compliance Committee at ICASA. Although it is true, as pointed out by the author at page 497, that the BCCSA Free-to-air Code for Broadcasting Service Licensees 2011 replaced the 1994 Broadcasting Code, which was in the IBA Act 1993, it should be borne in mind that the Code had to be approved by the Independent Communications Authority. The BCCSA, however, accepted the ICASA Code – having, in any case, through the National Association of Broadcasters, made inputs when the ICASA Council called for comment on the proposed Code in 2009. The Complaints and Compliance Committee at ICASA – which was recognised by the constitutional court in *Islamic Unity Convention v Minister of Telecommunications* (2008 3 SA 383 (CC)) as an independent administrative tribunal – applies the same Code where a broadcaster has not consented to the BCCSA jurisdiction. The CCC, however, also has jurisdiction in regard to regulations which govern licences – not only in the broadcasting sphere, but also in regard to the duties of electronic communications licensees. Jurisdiction also exists in regard to decisions by the SABC, insofar as policy is concerned. Thus, the CCC advised the council of ICASA that the SABC's decision to ban the broadcasting of the images of the setting alight of public buildings as a protest against government should be set aside (*MMM, SOS and FXI v SABC* (case 195/2016) available on the website of ICASA). Council accepted this advice. Another piece of advice was that the amended 2014 editorial policy of the SABC be set aside for lack of proper public consultation. Once again, council followed the advice of the CCC (*SOS & Media Monitoring Africa v SABC* (case 214 /2016), available on the website of ICASA).

The 2016 Code of the Press Council was not yet published when the book under discussion was published. It should be mentioned that newspapers that fall under the jurisdiction of the press ombudsman are excluded by section 16 of the Films and Publications Act 1996 from the films and publications board's jurisdiction. The press ombudsman was set up by the Newspaper Press Union and has been in function under different names since 1961. In 2010 the ANC, at its annual December conference, stated that it was planning to set up a statutory appeal tribunal against decisions of the press ombudsman. In reaction to this Print Media South Africa in 2011 set up an independent committee to inquire into this possibility. The committee was chaired by previous chief justice Langa and the eight committee

members consisted of independent members of the public, including the archbishop of the Anglican Church of South Africa, the chairs of the councils of the Universities of Pretoria and Port Elizabeth and experts in journalism and broadcasting and law. Representatives of the committee consulted in India, Tanzania, Denmark and England and also considered press codes in Europe, Australia and New Zealand. It concluded that if the press code were to be amended to be more protective of the public and the press council would have equal representation from the public and the press, there was no reason for government to intervene. The ANC accepted the proposal in principle. The 2016 press code which followed upon the report of the committee is, essentially, in accordance with the advice of the Langa committee. It protects the public against defamation, *iniuria* and unjustifiable invasion of privacy and, generally, requires substantiated reporting.

There is, however, one aspect which remains questionable. The 2016 press code provides as follows:

> "1.8. The media shall seek the views of the subject of critical reportage in advance of publication; *provided that this need not be done where the institution has reasonable grounds for believing that by doing so it would be prevented from reporting*; where evidence might be destroyed or sources intimidated; or because it would be impracticable to do so in the circumstances of the publication. Reasonable time should be afforded the subject for a response. If the media are unable to obtain such comment, this shall be reported."

In spite of the fact that the press freedom commission advised against the phrase in italics, the words are repeated in the 2016 Code. (*Cf* the Report of the Commission as published inter alia on the internet under Press Freedom Commission and where the above-quoted clause is proposed to read as follows: A publication shall seek the views of the subject of serious critical reportage in advance of publication … (no limit is proposed).) The words "prevented from reporting" can only mean that a court could be approached by the person involved and that a court would then prohibit publication – usually until the matter is fully argued – when a final judgment would be issued. The implication is that the material to be published is *prima facie* untrue or biased and that the right to respond is excluded for the very subject of the article as printed. It should, with respect, be taken into account that courts would intervene before publication only in very exceptional circumstances. In *Print Media South Africa v Minister of Home Affairs*, after reviewing various authorities the constitutional court held: "The case law recognises that an effective ban or restriction on a publication by a court order even *before* it has 'seen the light of day' is something to be approached with circumspection and should be permitted in narrow circumstances only" (2012 6 SA 443 (CC) par 44).

Thus, if reasonable grounds do exist for a court order against publishing, it is, with respect, not acceptable in law for the 2016 Code to (as in the past) permit a newspaper to publish where it has reasonable grounds for believing that by requesting the view of the subject of critical reporting it would be prevented from publishing by a court. That, with respect, amounts to evading the courts.

The last chapters of the book, which deal with social media, were written by De Beer and Sadleir. A splendid overview is provided of, *inter alia*, legislation and policy which promotes the development of individuals to take part in professions such as the production of films, acting and the state's role in this respect. The use of the internet and websites has also led to questions concerning legal responsibility for what is placed on the internet. The role of the human rights commission in this field is also discussed. Data protection has, naturally, also become a field for legal research and protection by law.

Judgments where defamation was found to have taken place on the internet are also discussed.

On a lighter note, Satchwell J, whose judgment on the identification of an internet author is referred to, states as follows:

> "The old saying 'if it looks like a duck, quacks like a duck and waddles like a duck, then it probably is a duck', certainly applies in this case. This Facebook page is announced as that of GDWM, it is only concerned with GDWM affairs, and has comments from GDWM. It is more than likely the Facebook page of GDWM. To my mind the GDWM denial of responsibility for or control over this Facebook page is not credible" (*Dutch Reformed Church Vergesig Johannesburg Congregation v Sooknunan t/a Glory Divine World Ministries* 2012 6 SA 201 (GSJ) 209C).

Satchwell, as an attorney, often appeared before me in urgent applications (subject: security paragraph of the Publications Act) at the publications appeal board – and was successful in all of them.

The quote, which is unique for our law reports, demonstrates the judge's sense of humour.

In 1984 my wife, Martha, and I were guests of the information service of the United States of America. The invitation was probably directed at providing me, as chair of the publications appeal board, with a vision of what freedom of speech under the American bill of rights truly means. It, indeed, did, with positive results for freedom of expression – then still under stringent apartheid laws. (In 1988 we passed *Cry Freedom* – an anti-apartheid film.) At Disney Studios, we had lunch with the chief executive and Duckie, who had been the voice of Donald Duck from his creation by Walt Disney. Duckie would have loved the quack quote of Satchwell J! Duckie constantly spoke like Donald Duck

and I still ponder whether he could speak ordinary American! Of course, he was *indeed* Donald Duck's voice.

I close: *Communications Law* is an obligatory read for all South Africans and a splendid source for lawyers.

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