“Media and the protection of confidential sources of information”

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Journalistic privilege and protection of journalists' sources – a critical discussion of section 205 of the South African Criminal Procedure Act[1]

1. Introduction

Section 205 of the Criminal Procedure Act is the legislation used in South Africa to compel, among others, journalists to reveal information relevant to criminal investigations.

It reads as follows:

(1) A judge of the High Court or a magistrate may, subject to the provisions of subsection 4, upon the request of an attorney –general ("AG") or a public prosecutor authorised thereto in writing by the AG, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the AG, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the AG or public prosecutor concerned prior to the date on which he is required to appear before a judge or magistrate, he shall be under no further obligation to appear before a judge or magistrate.

(4) Any person required in terms of subsection (1) to appear before a judge or magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in s189 unless the judge or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

[1] This paper was commissioned by the Freedom of Expression Institute as part of its campaign to defend and articulate media freedom in South and Southern Africa. It was researched and compiled by Benita Mandy Whitcher, an attorney based in Durban and currently lecturing in the department of law at the University of Natal.

Section 189, the contempt of court provision, is the sting in the tail. It makes possible the sentencing of a recalcitrant witness to imprisonment for contempt of Court (usually 14 days at a time) unless the person has a "just cause" for not answering the questions. In other words a person is not compelled to answer questions or give information in a section 205 inquiry if the presiding officer finds that he or she has a "just cause" for failing to do so.

No statutory privilege is afforded to communications between a journalist and his or her source as is the case, for instance, with attorneys and clients. Reporters have, from time to time, been required to provide evidentiary material for the prosecution, which they have generated in the course of following a story. Concerns have been raised by progressive journalists and media-watchers about the inhibitory effects of sections 189 and 205 on the ability of the media to practise their vocation and thus keep the public properly informed. These concerns have been far from theoretical. In recent times, a series of fairly high-handed invocations of section 205 have occurred at the instance of prosecuting authorities and it is with some degree of luck that no journalist has actually yet been thrown in jail.

2. A review of relevant law

Before expanding upon the above provisions, a review of local and international case law is apposite. This is important because there is no authoritative *locus classicus* in South Africa in the post-constitutional era available that is directly on point. Thus to get an idea of where the Constitutional Court may go if presented with such a case, some statutory interpretation and analysis of similar local and international cases is called for.

2.1. The Constitution

In terms of section 16(1)(a) of the Constitution, freedom of the press and other media is constitutionally guaranteed but this is as a subsection of the general right to freedom of expression.

(1) Everyone has the right to freedom of expression which includes:

(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

Notwithstanding the ringing tone with which rights are proclaimed in the Constitution, the structure and rationale of South Africa's constitution is such that the extent of every right is subject to possible limitations. Should these be imposed they have meet the requirements of section 36 of the Bill of Rights. Section 36(1) sets out the criteria for the limitation of rights.

The limitation must be by means of a 'law of general application' only and determining what is fair and reasonable is an exercise in proportionality, involving the weighing-up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society (Langa DP in *Islamic Unity Convention v IBA and others* 2002(5) BCLR 433 (CC) at 446).

Most commentators and academic writers on the constitution submit that:

(a) Section 16(1)(a) includes the right to gather and publish information on matters of topical or daily interest, ranging from political matters to entertainment; that is gather and publish news of public interest;

(b) The right is extended by section 16(1)(b), which relates to the freedom to receive and impart information and ideas. The right to receive and impart information gives scope and meaning to section 16(1)(a).

2.2. Legislation and Policy

In South Africa the protection of journalists' sources of information is not accorded specific protection in the Constitution or in any other legislation. There is only a record of understanding entered between editors and the state, which will be examined in more

details below. Moreover, local journalists' unions require their members to protect their sources of information.

There are also various international instruments, namely the Resolution on Journalistic Freedom and Human Rights – 4th European Ministerial Conference on mass media, 1994; Resolution on the Confidentiality of Journalistic Sources – European Parliament, 1994 cited with approval in *Goodwin* that are useful. However these are resolutions, ethical codes and understandings. Should matters come to Court, they are of persuasive value but are not 'law' binding on the State.

2.3. Case law

Although the Court in *Holomisa v Argus Newspapers* 1996 6 BCLR 836 (W) recognised the importance of media/press freedom in a democracy, Cameron J did not accept the concept of 'press exceptionalism'. In his view journalists should not enjoy constitutional immunity beyond that granted to ordinary citizens.

Further, as in most other countries, the protection of journalists' sources are not accorded specific protection in the Constitution or in any other legislation. Even in democratic societies and international courts, where there is explicit recognition of the importance for the freedom of expression in journalists not disclosing confidential information, the courts have refused to find that journalists have an absolute right to refuse to reveal their sources of information. Or even, that there can never be circumstances where journalists should be so compelled to reveal such sources.

In an English case, *British Steel Corporation v Granada Television LTD (1981) 1 ALL ER 417* the court held that there was no immunity based on public interest which protected journalists from the obligation to disclose their sources in a court of law, when such disclosure was necessary in the interests of justice. Of course, this displaces the enquiry into the murky, value-judgement laden realm in which the true 'interests of justice' or 'necessity' are debated, but, the law has actually always been making these kind of value-judgements whether openly or not.

In *Goodwin v United Kingdom (1996) 22 EHRR 123,* the majority of judges in the European Court of Human Rights held that a Court order requiring a journalist to reveal his or her source of information and the penalties imposed on him or her for refusing to do so violated the journalist's right to freedom of expression in the circumstances of that particular case.

Although the court came out strongly against disclosure and held that the protection of journalistic sources is one of the basic conditions of press freedom, it did not rule out disclosure completely and in all circumstances. Instead it imposed very strict conditions; based on 'necessity' and 'proportionality (i.e. the restriction must be proportionate to the legitimate aim pursued)' and held that limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.

Article 1 of Chapter 3, of the Swedish Freedom of the Press Law explicitly prohibits the investigation or disclosure of a journalist's sources, with certain limited exceptions. A journalist who reveals his or her source without consent is subject to criminal liability.

The responsible editor may be compelled by a court order to disclose the identity of a source which would otherwise be entitled to confidentiality in criminal cases where the published information could jeopardise state security or in which freedom of the press is not the central issue and the court finds that the disclosure of a source is justified by an overriding public or private interest.

In America, journalistic privilege is recognised under the First Amendment and American jurisprudence, but the privilege is not absolute. In other words journalists can be forced to reveal information in certain circumstances. The United States Supreme Court in *Brazenburg v Hayes 408 U.S 665 (1972)* held that the state must prove the following: -

(1) that there is reason to believe that the reporter has knowledge of relevant information to the case;
(2) that there is no other means of obtaining the information which would infringe on the freedom of the press to a lesser degree; and,

(3) that there is a compelling and overriding interest in the information.

It was also held that there should be a balancing of interests and there must be very compelling interests proved by the state for disclosure.

In the Zimbabwe of *Nathan Shamuyarira v Zimbabwe Newspapers t/a The Chronicle and Geoffrey Nyarota 1994 (1) ZLR 445 (H),* the court found that journalists do not have absolute immunity but in that case, it upheld the journalist's right to protect his sources of information, and laid down certain principles to be considered in weighing whether a journalist might be required to disclose his sources under certain circumstances.

The Zimbabwean Civil Evidence Act of 1992 is particular importance interesting. It provides that a court of law may declare any evidence to be privileged in the public interest if the court is satisfied that:

(a) it would be detrimental to the public interest for the evidence to be given; and
(b) such detriment would outweigh any prejudice to the parties or to the interests of justice that might be caused by non-disclosure of the evidence.

The Court weighed up the following considerations *against compelling disclosure* of a journalist's confidential source of information:

(a) whether it is in the public interest to preserve the liberty of the press;

(b) whether it is in the public interest that there should be a free flow of information;

(c) whether a promise of confidentiality may strongly support a countervailing public interest;

(d) whether there is a public interest in upholding the claim of the media to immunity from disclosing their sources.

In balancing the conflicting interests in the case before it, the court outlined a number of interests that weighed in favour of compelling the editor to disclose his source, as well as a number of interests against compelling him to do so:

Interests in favour of compelling disclosure:

(a) It would be in the interests of justice that Nyarota be ordered to identify his sources and it would be prejudicial to the minister's case (civil case of defamation) if the editor's sources were not identified;

(b) The editor had solicited the information surreptitiously and the police had shown him a confidential police list of suspects, which was in breach of the police code of conduct;

(c) The wrongs of the editor and police were connected;

(d) The editor had acted irresponsibly and thus forfeited his claim to protection of sources.

Interests against compelling disclosure:

(a) If the sources of the information were not identified, it would not prejudice the plaintiff (minister) but would effectively prejudice the editor, because his refusal to identify the sources which supported his evidence would increase the burden on him to prove the truth of the information;

(b) The purpose behind the giving of the information to the editor for publication was not one for financial gain or other personal benefit, but to expose corruption. Thus it was justifiable in the circumstances that the police source should perceive his proper duty to be in that direction and for the editor, as a journalist, to publish the information, because of the real danger that the information could be suppressed by powerful politicians;

(c) The serious nature of the information given to the editor by the police source counterbalanced the illegal manner in which the information was obtained.

The Court came to the conclusion that it had been in the public interest for the editor to expose the corruption taking place. Further the editor had been justified in giving his sources personal guarantees that their identities would not be revealed. The Court found that it was in the public interest that it should bend over backwards to protect journalists' sources, where the journalist had publicly uncovered corruption or some form of iniquity on the part of those in office.

A country which appears to be the exception, in terms of there being no absolute privilege for journalists, is Mozambique. Article 74(3) of the Mozambique Constitution states that freedom of the press includes the protection of professional independence and confidentiality. Article 30(1) of the Mozambique Press Law provides further that journalists enjoy the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment. Thus journalists appear to have an absolute right to protect their sources and material. However it could be argued that this right may be limited in certain circumstances by the limitation clause in their Constitution.

3. Could section 205 read with section 189 of the CPA be constitutionally challenged?

It is necessary to briefly glance down at the philosophical ground on which the South African Constitution stands because it is this ground that affects both its structure and the way political challenges such as the one at hand are received and logically processed by it. The Bill of Rights lists several rights and freedoms to which every citizen, at least, is entitled.

One would expect many of these rights, particularly those which cost nothing and do not demonstrably affect the rights of others, to be able to be claimed in a straightforward manner. For instance should a Judge sentence an accused to death, it would be but just a simple affair asserting the rights of that person on appeal.

However, none of the rights in the Bill of Rights are constructed in absolute terms, particularly those that can only be exerted at the expense of the rights of other individuals or the public at large. One patient claiming multimillion rand treatment at the expense of the fiscus for a rare terminal disease because of his right to life is unlikely to succeed in circumstances where it can be shown that this money would have to be extracted, say, from the Aids prevention budget. In the end, it is a question of balancing the exercise of any one given right that an individual may possess over the often competing rights of others.

Given the structure of the South African Constitution, it is not the end of the world for a lawyer representing the State to admit that her client has violated or sought to limit a fundamental right of a particular applicant. Such a violation or limitation may be justifiable because it is accomplished on behalf of rights, interests and purposes that far outweigh the harm caused by the limitation. The situation is different in the United States for example, where a lot of fancy rhetorical footwork often has to be done to deny that a particular act actually constitutes 'speech' or 'expression' or, at least, a class thereof as anticipated by the writers of the American Constitution.

This footwork is necessary to avoid the absolute protection that is then given to such acts once they are deemed to be protected since the American constitution has no limitation clause. Indeed, many laypersons and organisations wishing to design a legal strategy in support of their goals seem captive of the logic of the American system where everything goes into showing that a constitutional right has been infringed.

It is, of course, an important first step to establish that a right has been limited by, in this case, a piece of legislation also in the South African context. But there is no magic in this. The final question is, in the balance, was the limitation justifiable in 'an open and democratic society' (see section 36 of the Constitution). In other words, because of the structure and logic of the South African constitution, advocacy work that seeks to show simply that an infringement has occurred is naïve and inadequate. Effective advocates on the other hand will, more often than not, find themselves grappling with the altogether more slippery forms of argument and value-judgement proper to the balancing act required in terms of section 36 of the Constitution.

It is unlikely that the actual provisions of the Criminal Procedure Act could be successfully challenged, that is, set aside as unconstitutional or an order made that legislation be enacted that provides privilege to journalists. It seems to be accepted that forcing a journalist to reveal the confidential source of a story or otherwise testify at a trial for the State would create a situation where that journalist and the profession in general would be viewed with suspicion, hostility and distrust in the future by other sources as well as people participating in events covered by the press.

The further logical step also seems beyond question. This is that causing the aforementioned hostility and distrust would interfere with the freedom of the press and, indeed, the freedom of society at large to receive information and generate expression of their own. But because there are instances where the limitation to the right to freedom of expression is, for all right-thinking persons perfectly justifiable, the fact that the possibility of compulsion exists is not enough to kill section 205. Only the implementation of section 205 and 189 is open to attack first in the ordinary courts and as a last resort at the Constitutional Court.

For good or for bad, this will, initially, probably be on a case-by-case basis. Depending on the facts of each case, only the conduct of the relevant judge or magistrate in sentencing a journalist could conceivably be challenged. In other words the judge or magistrate's interpretation of s205, s189 within a constitutional context and his or her exercise of discretion within the meaning (interpretation) of the provisions could be reviewed.

To illustrate this point reference can be made to case which, although it did not deal with s205/s189, is relevant to the question in hand.

In *Bernstein v Bester* (1996) 2 SA 751 (CC) the applicant challenged, in the Constitutional Court, certain the provisions of the Companies Act, namely s417 and 418 on the basis that provisions infringed his right to personal privacy, freedom of expression and private communications. S418 provides that a person who, having been duly summoned under s417 or 418 of the Act to an examination (a statutory hearing into the conduct of a business),

> ‘Fails, **without sufficient cause…**to answer fully and satisfactorily any question lawfully put to him in terms of s417 (2) or this section…shall be guilty of an offence’.

The Court rejected the challenge to the provisions on the following basis:

That nothing in the challenged provisions compelled the presiding officer of the hearing to infringe any fundamental rights. A form of ‘reading down’ or section 39(2) (of the Constitution) interpretation of the provisions were possible and could be invoked by the applicant and the presiding officer to avoid any infringement of fundamental rights. The Court stated that the mechanism created by s417 and 418 of the Companies Act arguably permitted an invasion of privacy, but did not compel such an invasion.

A door was introduced by section 418(5) of the Act, which stated that it was only an offence if the examinee (the applicant) failed to answer, without sufficient cause, any question lawfully put to him or her. A question which would unconstitutionally infringe the examinee’s right to privacy will not be ‘lawfully’ put and the examinee will have ‘sufficient cause’ to refuse to answer such a question.

Insofar as the presiding officer did infringe upon any of the applicant’s rights and or ‘did not read’ down the provisions, the proper remedy was to seek a review of the commissioner’s or presiding officer’s conduct/judgment. Only if a provision is not capable of being ‘read down’, will the Court be able to strike it down as unconstitutional.

What is meant by a reading down a provision? Section 39(2) of the Constitution places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation (provisions in an Act). Further in terms of s39(2), where legislation is capable of being read in two ways – as a violation of fundamental rights or, if read more restrictively, as not a violation of rights – the latter reading was to be preferred.

If the court’s ruling in *Bernstein is* applied *to* s205 and s189, it could be argued by the state that there is no constitutional defect in these provisions; that is, they are not inconsistent with the Constitution because they provide a mechanism of ‘just cause’ to

escape the encroaching & punitive effects of the provisions. One may go a step further to say that, read down properly, these clauses provide qualified privilege against disclosure and they give a discretion to the judge or magistrate to compel disclosure through imprisonment or not. The judge or magistrate has a duty to exercise his discretion fairly and in a way that does not infringe the journalist's constitutional rights.

In *Nel v Le Roux* 1996 (3) SA 562 (CC), the Constitutional Court examined the provisions of s205 but not in relation to journalistic sources. It concluded that the provisions, for reasons similar to those described above, were not unconstitutional.

4. The present position of journalists in South Africa in respect of s205 hearings and 'just cause'

It must be remembered that the decided cases, which involved an attempt to compel journalists to disclose their sources or material in terms of s205, were decided before the present Constitution. Significantly where disclosure was ordered and the matter was taken on appeal or review, the disclosure orders and sentences were overturned on the basis that the relevant magistrates had not properly exercised their discretion (eg *Cornelissen v Zeelie & others* 1994 (SACR) 41 (W).

In *Cornelissen* the court found, amongst other things, that "the potential public advantage to be gained from subjecting him to questioning did not outweigh the potential public prejudice caused thereby, namely prejudice to press freedom and the journalist's trust relationship with the community".

Of further comfort is that these cases do not reflect the post-constitutional position. In terms thereof s39 of the Constitution will now require that s205 be construed by all courts (including the magistrates courts) by having due regard to the spirit, purport and objects of the Constitution and more specifically s16 (1)(a). In other words in any section 205 hearing, s205 and 189 will have to be construed in a way that does not infringe or threaten s16(1)(a) and the objects of the Constitution in general (a similar approach was suggested by the Constitutional Court in *Nel v Le Roux*).

Therefore in future s205 hearings the journalist now has greater scope to obtain protection and qualified privilege under “just cause”. The journalist would be able to invoke s16 of the Constitution and now strongly contend that the compulsion infringes or threatens to infringe the journalist’s (and perhaps the public’s) right to freedom of expression and freedom of the press.

4.1. Further grounds for establishing privilege

The famous author Wigmore, on evidence, argues that:

Four fundamental conditions are recognised as necessary to the establishment of a privilege against the disclosure of communications:

(a) The communications must originate in a confidence that they will not be disclosed.
(b) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
(c) The relationship must be one, which in the opinion of the community ought to be actively fostered.
(d) The injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

It could be strongly argued that these considerations apply in the field of journalism as it is now trite that an integral part of and a longstanding practice of gathering news involves and is dependent on confidential sources. Therefore, it is arguable that a journalist can begin with the rebuttable presumption that the interaction between journalist and informer is cultivated in the public interest.

When the court seeks to compel a journalist to reveal his or her sources of information, such journalist must assert and show that he or she received the relevant information in confidence, that the guarantee was necessary to assure that the relationship with the source was sustained and that the relationship would be substantially harmed by the disclosure.

What the state must show to rebut this is the following:

(a) that the identity of the informant is relevant evidence;

(b) that the evidence is highly probative to certain key issues;

(c) that no alternative sources of information are available or that any available sources have been exhausted without such information being obtained; and

(d) that the balancing of public interests is required in the interests of the administration of justice in all the circumstances.

The first three criteria are well-recognised minimum requirements in American, Commonwealth and Canadian jurisprudence. The fourth factor permits flexibility for the courts in individual cases to assess the weight of the public interests being guarded.

Further because South Africa has a Bill of Rights, the courts, when exercising their discretion, are now obliged to consider arguments against disclosure set out in the jurisprudence and cases described above, namely *Goodwin, Brazenburg, Nyarota and Cornelissen,* and to also consider international instruments and resolutions on the protection of sources.

Commenting about the view of Cameron J in the *Holomisa* case during a speech made to the Webber Wentzel Bowens 2002 Legal Journalists of the year Awards in November 2002, South African Constitutional law expert Wim Trengrove (S C) argued that:

“This view (Cameroon’s) no longer holds true under our Constitution, which not only recognises the special role of the media but protects its freedom to perform that role. It does so in Section 16(1)...I emphasize three features of the way in which this section protects freedom of expression.

“The first is that it vests the right to freedom of expression in ‘everyone’. The second is that the freedom of expression that it protects is not limited to the right to speak freely. It also includes the freedom to receive information and ideas from others and to convey

information and ideas to them. The third is that this right, vested in everyone, includes the right to 'freedom of the press and other media.

"The protection of the freedom of the media to act as the 'eyes and ears of society' requires that journalists be given greater access to information on public affairs and greater protection of their reports than they now enjoy. The Constitutional Court has said, for instance: 'It could actually be contended with much force that the public interest in the open marketplace of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way'.

"This role of the media also deserves special protection. The Constitutional Court recently endorsed the statement by his lordship Mr Justice Joffe in the *Sunday Times* case that 'it is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators'. The protection of this role of the media requires that its sources be protected. It must, moreover be borne in mind that the freedom of the media is not limited to its publication or broadcast of information and ideas that we regard as responsible, tasteful and inoffensive. It includes the freedom to publish information and ideas that offend, shock and disturb" (abridged version).

Further considerations for journalistic privilege:

(a) In relevant circumstances, a journalist can rely on the defence that disclosure of an informant's source may tend to incriminate him or her. In *Parbhoo and Others v Gerts NO and Another* 1997 (4) SA 1095 (CC), the Constitutional Court confirmed the right not to be compelled to give self-incriminating evidence as entrenched in s35 of the Constitution;

(b) Those who for good reason disclose corruption or other iniquity are fully protected against discovery (in other words discovery of documents, including videos, films etc as part of the legal proceedings which might reveal the source of information) – the iniquity rule (Burns, Communications Law, p297).

5. Record of Understanding between SANEF and the SA government

On 19 February 1999 the Minister of Justice, the Minister of Safety and Security and the South African Editors' Forum signed a Record of Understanding about the implementation of existing laws that relate to the duty to testify and the protection of journalists' sources of information. It was accepted that there was "a need to balance the interests of the maintenance of law and order and the administration of justice on the one hand with the right of freedom of expression and specifically freedom of the press and other media on the other".

The parties agreed to investigate the possibility of amending s205 in order to accommodate the concerns of the representatives of the press. This process has unfortunately stalled and that it is unlikely that the State will agree to dispense with its s205 powers. In any event, it is questionable whether editors are necessarily the best class of media-workers to be relied upon to wring concessions from the establishment.

The Record of Understanding creates certain interim, special procedural obstacles should a prosecutor wish to compel a journalist to give evidence. The record of understanding principally displaces to the national office of the Directorate of Public Prosecutions the level at which decisions are taken regarding subpoenaing journalists and allows for representations to be made by SANEF before a final decision is taken.

If the state wants to subpoena a member of the press in order to give evidence or to deliver documents, the matter may be referred to the National Director of Public Prosecutions for consideration. After hearing the interested parties the Director undertakes to make a determination with regard to the issuing of the subpoena by weighing the need to uphold the maintenance of law and order and the administration of justice against the right to freedom of expression and freedom of the press and other media.

What this means is that the state has to abide by the existing laws interpreted within the current constitutional context. No new rights or privileges are afforded to journalists by the record of understanding and should the State really wish to lay its hands on

confidential information, the National Director has, subject to what the Court may say regarding relevance and "just cause" the final say-so.

6. Facing the challenge

It is unlikely that section 205 read with section 189 of the CPA can be successfully challenged in court on grounds of its unconstitutionality, whether by calling for it to be struck down or asking for an order allowing the inclusion of special rights for journalists. However, recent developments in South Africa's constitutional law jurisprudence post the Benny Gool case, and the proper reception of foreign cases dealing with the revealing of sources now makes it possible for one to argue that there is a sort of journalistic privilege and/or protection of sources and information within the currently applicable discourse of 'just cause'.

It can further be suggested that this real, if indirect, legal protection should be strengthened by journalists and editors positioning themselves as a strong lobby or collective bargaining force and by embarking on a vigorous public education campaign.

7. Possible campaign for alternative remedies or legislation in South Africa

As suggested above, there are little prospects of success to a constitutional challenge of the actual provisions of section 205. A law of evidence amendment act similar in substance to section 201 of the CPA providing attorney-client privilege and similar in substance to section 3 the Law of Evidence Amendment Act of 1998, dealing with an open-ended list of suggested exceptions to the exclusion of hearsay evidence may be called for.

There is also nothing stopping journalists as an organised social or labour force from lobbying to enact separate legislation to provide an express privilege against handing over of material. Indeed some commentators have expressed doubts about whether being compelled to confirm the authenticity of documents such as photographs already published is of the same negative weight as compelling the disclosure of a source. It could be argued that the situation could have been different had Benny Gool been subpoenaed to reveal who had told him that the march would take place at what time on

Rashaad Staggie's home as opposed to his being asked to confirm that published photographs were taken by him.

Nevertheless, the perception that the press had sided with the State would linger in either case, causing exactly the same breakdown in freedom of expression complained of above. If legislative amendments are going to be called for, this aspect must be covered in the same breath as the disclosure of sources.
Calls for legislative amendment would not be a ludicrous or unreasonable demand in the context of South Africa. For example, labour or employment law in the country is primarily legislative and extremely protective of workers rights. These legislative gains came about through mass shopfloor organisation, protest action and collective bargaining. Their formula, through organisations like the National Labour and Development Council (Nedlac), could be examined for guidance.

Possible legislative enactments could be based on the Mozambican and Swedish Press Law. The European Court of Appeals has endorsed such an approach.

It is suggested that, even if there is no legislative amendment, negotiations could include expanding on the Record of Understanding to include these provisions. It will not be law but it will be of significant persuasive value in a s205 hearing. This could be the compromise between the state and the media.

However, in law, less is sometimes more. As matters stand at the moment a Judge considering whether to invoke the section 189 to compel a journalist to testify has to interpret the term 'just cause' in line with the spirit and purport of the Constitution. There are those who take a very narrow view which will have administrative convenience, party political advantage and law and order as just enough cause to force disclosure.

There are others for whom the longer-term entrenching of a transparent, accountable and fully informed democracy, *inter alia*, through a free and uninhibited press is far more important than an individual conviction here or there of a gangster or vigilante. Working simply with wide notions of "just cause" in section 189 of the CPA (which, as the law presently stands, covers even non-journalists) and 'open and democratic society' in

section 36 of the Constitution might give a lawyer far more argumentative scope than a narrow list of pre-ordained exemptions.

While this battle can be fought with charm and erudition by counsel in the courts as cases may come up, it really has to be won in the profession and academy but also in the wider public terrain. A campaign against the improper use of section 205 should not be confined to the legal realm alone.

The campaign should, in essence, generate support for the ideas that lie behind privileging freedom of expression over notions of administration of justice or the so-called 'national interest'. This may involve making use of legal arguments and examples for time to time. But there is no ducking the politics of the binary opposition that is set up by the powers-that-be, between various freedoms (such as expression and assembly) and law and order. The role of any campaign will be to foster the realisation that those who seek to enhance the freedom of expression do so on behalf of the public at large.

There has been a parting of ways between editors and journalists in campaigns on behalf of a radical vision of freedom of expression. While many editors have stood by their journalists quite adequately, there are indications that the sense among some editors about what kind of information should remain confidential is shrinking in inverse proportion to their sense of what is in the national interest. In other words, editors are increasingly viewed as part of the political establishment.

An idea that is being flighted is the drafting, debating, circulation and finally, signing of a public pledge by all journalists and progressive media workers committing themselves, amongst other things and notwithstanding the state of the law, to maintaining the confidentiality of sources even in the face of imprisonment. Such a pro-active, hard-hitting and unambiguous public campaign by journalists would stipulate why confidentiality is important thus popularising the fairly sophisticated arguments that lay behind, say, Benny Gool's refusal to testify.

Moreover, if well supported by journalists, the State may get the sense that it will be met with resolve and unity to subpoena journalists again. While such a campaign may well not provoke legislative change, the sense of power it generates and the intellectual

battle it takes to those who wish to use section 205 will stand the media profession in good stead.

Thank you.

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