



Botswana Media Defence Seminar Report

Legal Cases Against Journalists and Publications

31 October 2023

Grand Aria Hotel, Gaborone

Introduction

On October 31, 2023 Campaign for Free Expression (CFE) partnered with Botswana Editors' Forum (BEF) and INK Centre for Investigative Journalism to conduct a Media Defence Seminar in Gaborone, Botswana, with support from Media Defence London.

Journalists, social commentators, legal experts and other media practitioners from various publications and radio stations, gathered to analyze the environment of escalating legal cases against journalists, dissect the underlying causes, and propose strategies to foster regional collaboration to safeguard press freedom and protect journalists in Botswana and beyond.

Participants confirmed that several journalists and media houses, particularly in print media, are facing numerous defamation cases which are frivolous in nature - otherwise known as Strategic Litigation Against Public Participation (SLAPP). These include *The Gazette*, *Sunday Standard*, *The Patriot on Sunday*, *Mmegi*, *Botswana Guardian*, *Midweek Sun*, *Weekend Post*, *Business Weekly & Review* and *The Voice*.

Unpacking legal challenges faced by journalists and publications

Facilitator: Mrs. Emang Mutapati

Guest Speaker: Mr. Outsa Mokone

Emang Mutapati – the Chairperson of Botswana Editors Forum (BEF); and The Voice Editor-in-Chief delivered opening remarks and facilitated the first session, leading an experience-sharing engagement by participants. The discussion covered an examination of prominent legal cases, court decisions, and their implications for press freedom.

Outsa Mokone – the Sunday Standard Editor; and veteran journalist who has had numerous run-ins with previous administrations, at some point facing sedition charges by the state, gave his perspective about challenges faced by the media in general and journalists in particular. He expressed concern about what he termed the 'commodification' of legal representation in Botswana. The quality of legal representation in Botswana is low, which places a huge bearing on the outcome of SLAPP cases, he argued.

Of great concern, Mokone observed, is the latest trend of the rising quantum of damages awarded against the media/ journalists. He cited the example of half a million-pula (500 000) quantum awarded in three separate cases against Mmegi vs Vlatacom; The Gazette vs Vlatacom and The Voice vs Slumber Tsogwane. Contrary to the belief that there had been a rise in legal cases against journalists in recent years, Mokone was of the view that media houses have experienced a decline in lawsuits in recent years, despite the rising quantum of damages awarded by the courts. He noted that most cases that were ongoing dated about 5 or more years back. At the same time, he noted that letters of demand from rich and powerful individuals and big corporates, calculated to intimidate journalists continued to increase - leaving a chilling effect on the quality of journalism.

Other participants decried that litigants in SLAPP cases often abandon such defamation cases after dragging them in court for many years (over 4-5 years), draining the financial resources of already struggling media houses. In some instances, subjects of stories pursued by journalists (public figures, politicians) ignore inquiries/ questionnaires from journalists for a long time, only to turn around and sue the journalist/ media house for defamation despite being accorded the right of reply.

An independent media consultant, Thapelo Nldovu, emphasized the importance of collaborations between journalists and media houses to fend off attacks through SLAPP cases.

Attorney Chalebgwa Manyapedza advised media practitioners and journalists to initiate discussions with authorities to reach a common ground and promulgate laws that do not hinder their work. He implored the media to introspect and check if genuine conversations were being had with authorities about how to improve journalists' access to information that is held by public offices.

MISA Botswana, Chairman Thomas Nkhoma emphasized the need for research to appreciate the media landscape in Botswana to make informed contributions or decisions about media freedom and by extension, free expression in Botswana. Citing the South African Constitution as an example, he emphasized the importance of having laws in Botswana that explicitly protect journalists and journalism.

Tswana Times publisher, Sello Motseta raised the issue of monopolies in media saying such dominance by individuals or organisations/ companies threatens press freedom. He gave an example of the Mmegi group where four publications and a radio station are owned by Seyed Jamali- a very powerful businessman.

He observed that the absence of access to information laws in Botswana compromises the ability of local journalists to work freely and effectively.

Analysis of the political climate and its influence on press freedom

Presenter: Mr. Joel Konopo, INK Centre for Investigative Journalism

The Managing Partner at INK Centre for Investigative Journalism, Mr. Joel Konopo presented a comprehensive analysis of Botswana's political climate and its influence on press freedom. He said historically, Botswana private media has played its watchdog role, despite numerous challenges in the media landscape.

State media dominance

Konopo observed that there is no true public service media in Botswana. The dominance of state media, which operates as the mouthpiece of the ruling party politicians, poses a threat to freedom of information as there are no guarantees for divergent views. The Ombudsman, after receiving numerous complaints from opposition parties, conducted a survey and concluded that indeed there is disproportionate coverage in state media -skewed in favour of the ruling Botswana Democratic Party (BDP) politicians. Cabinet ministers were also found to have undue influence on the editorial content of state media. The status quo has existed from time immemorial. There have been no policy changes even under the current regime.

Political interference

There have been cases of political interference unfolding openly, especially among radio stations during election time, where state organs like Botswana Communication Regulatory Authority (BOCRA), Directorate of Intelligence and Security Services (DIS), and Directorate on Corruption and Economic Crime (DCEC) operate in a partisan manner protecting the interests of the ruling elite.

Access to Information

Botswana is not doing well in comparisons to her neighbours. The 2022 Media Practitioners Association Bill, although a slight improvement over the 2008 version, is compromised by the absence of Access to Information laws that guarantee citizens' right to access information. This lack of access to information, compounded by government employees sworn to secrecy, forces journalists to end up speculating in desperation.

State sponsored attacks

It seems a silent declaration among senior government officials in Botswana, cabinet ministers and corruption watchdog - Directorate on Corruption and Economic Crime (DCEC), that private media is a nuisance and should be silenced. The precedence was set when in 2013, the then President Ian Khama announced that government would start using public funds to sponsor defamation lawsuits by cabinet ministers and senior public officers.

Carrot and stick

The state often uses advertising to punish critical private media. The Khama administration prepared a 'hitlist' of media houses to be starved of advertising revenue. During an engagement with BEF soon after he came into office, President Masisi denied knowledge of the savingram. His administration, refused to publicly reverse the order to starve some media houses of advertising from government departments and state-owned entities (parastatals), or to stop state media from competing against private media for advertising revenue.

Climate of fear

The DIS' harassment and digital surveillance, and detention of journalists, which was more pronounced during the Khama era (2008-2018) but continues to date, is calculated to send a chilling effect on the media in general.

Lack of sustainability

High staff turnover leaves inexperienced newcomers thus reducing quality of journalism.

High quantum of damages

Each media house suffers exposure of around P10 million on average. Ongoing SLAPP suits against one publication - Sunday Standard exceed P40 million just from Turnstar Holdings a private entity.

The legal landscape: Examination of legal provisions relating to freedom of the press

Presenter: Tachilisa Balule, University of Botswana, School of Law

Balule spoke on the legal provisions relating to freedom of the press. He largely expressed dissatisfaction with the legislative terrain's suitability to promote and protect freedom of expression.

He noted that although press freedom is guaranteed by the Constitution of Botswana, there is no law that expressly makes provision for the right. In principle, media freedom is implicitly guaranteed, and that guarantee covers both content that is favourably received and that which shocks or offends the majority or a section of the public. The state is required to not unduly interfere with the right and to put measures in place for its protection. This includes by promoting and sustaining media diversity, and enacting laws that ensure that journalists operate in safe and secure environments. The state must prevent attacks on journalists, arbitrary arrests and detention, intimidation, threats and unlawful surveillance and allow for the protection of journalistic sources and other materials held for journalistic purposes. However, Botswana falls short on these obligations, Batulule purported.

He bemoaned the growing trend in the country where law enforcement authorities are easily granted interception warrants to monitor communications of journalists and confiscate journalists' electronic communication gadgets, usually under the guise of defending national security. This creates a challenge for journalists to protect their sources or to operate freely and safely. It is largely enabled by laws that confer excessive power on the executive and whose definition of terms are too wide or loose, leaving room for multiple interpretations - allowing for political abuse.

Batulule named several statutes in Botswana which restrict media freedom, many whose provisions are a colonial legacy. Some of the offences covered in these provisions include those said to be against the public order and authority of the state such as: i) Alarming publications – Section 59 of the Penal Code ii) Sedition - Sections 50 and 51 of the Penal Code iii) Prohibited publications – Section 47 of the Penal Code, and iv) Insults relating to Botswana - Section 93 of the Penal Code. He stressed that all these provisions fail the constitutionality test because they use vague concepts, create speculative offences and also give very wide discretionary powers to those who enforce the provisions. “They are overbroad in their application such that it cannot be said they are reasonably justifiable in a democratic society”, said Batulule.

Pertaining to the law of defamation in Botswana, Batulule held the view that it inhibited freedom of expression. He argued that damages should not be punitive or exemplary, but should be designed to provide proper solacium, so as to fully compensate the injured party for the hurt and damage he has suffered. He added that excessive damages encourage intolerance and self-censorship.

To guard against state abuse or being targeted by law enforcements agents or big corporates and business individuals, Batulule urged journalists to always practice responsible journalism – which entails self-regulation. He stressed that journalists ought to provide accurate and reliable information and should be “subject to the same accountability that they demand of those who exercise power in society,” echoing the South African National Editors’ Forum (SANEF).

Batulule urged the media to have functional self-regulating bodies. He mentioned the Press Council of Botswana, a voluntary self-regulatory body established in 2004 which he said now exists only in name. He also pointed out that the Media Practitioners Association which was established under the Media Practitioners Association Act (MPAA) of 2022 is not functional because the Act has not yet been enforced. He speculated that the lack of self-regulation in the Botswana media industry could be the reason behind some observers alleging that the media in Botswana lacks credibility and have been captured by commercial and political interests. Linking this to the poor success rate of the defence of reasonable publication where

it has been raised, Batulule said it risks giving the observers’ allegations some form of credibility.

Media Defence London

Presenter: Ms. Hanna Uihlein

Hannah Uihlein introduced the organisation, Media Defence London, whose support for the event was part of its project to provide legal help to journalists, citizen journalists and independent media around the world who are under threat for their reporting.

In a virtual presentation titled “Defending Journalists Around the World”, Uihlein discussed the work done by Media Defence London to safeguard the work of journalists who play a crucial function as watchdogs, and as enablers on issues of public interest.

“Without them, governments become unaccountable, human rights violations go unreported and we lose fundamental sources of information and ideas. And if citizens are denied access to information, they are less able to affect decisions their government make,” she observed.

Ms Uihlein explained that Media Defence works through four (4) main pillars, being;



She went on to describe the finding criteria as follows:

Description	Criteria
Beneficiaries	Independent media outlets, journalists, bloggers, broadcasters, photojournalists, cartoonists and fact checkers.
Supported cases	Cases on civil defamation/ libel, criminal defamation/ libel, insult, arbitrary detention, false news, protection of sources, access to information, closure of a media outlet, physical reporting restrictions and sedition.
Excluded	Labour law cases, cases brought by a journalist against another journalist or media outlet, relocation/ asylum requests, closed

	cases (judgment handed down), cases not related to a journalistic activity, general support/ equipment/ health expenses etc.
--	--

Procedure

Ms Uihlein explained that the amount awarded, averages between GBP 1, 000 and GBP 2,500, and varies according to the country, the type of case, the court etc. She outlined the application procedure, grant assessment, review by Media Defence in-house lawyers (up to two weeks), the approval process and eventually the stages for the release of the funds in two instalments (half when the case is approved and the offer letter signed, and the balance on receipt of a copy of the judgment).

Fighting SLAPPS: Taking on the new form of censorship: Lawfare

Presenter: Professor Anton Harber, Campaign for Free Expression

Harber defined SLAPPs as “baseless legal actions increasingly being used by governments and large corporates to intimidate and harass those who speak out against them – including activists and journalists.” He added that SLAPPs destroy free expression and are a threat to democracy. He highlighted key strategies for journalists and media houses to counter SLAPP suits among them:

- Organising a concerted response to the growing threat caused by SLAPPs to media freedom.
- Gathering and sharing information about SLAPP cases.
- Drawing on international support and precedent in organising such a response.
- Introducing the notion of SLAPP in courts and in human rights discourse; ensuring that lawyers and judges are aware of and make use of the growing precedents to stop SLAPPs.
- Pushing for anti-SLAPP legislation or court procedures. This could be done at the continental level (AU), the regional level (SADC) or in each country.

Discussions

The topic about Media Regulation was a burning issue that divided the house, with attorney Chalebgwa Manyapedza questioning whether journalists hated conforming to the law or the law compromised their work? Although he conceded that the law is not perfect, Outsa Mokone said the 2022 MPAA was endorsed by BEF and Media Institute for Southern Africa (MISA) because it created a platform for dispute resolution to avoid the court route. Adamant that it is a bad law that will compromise journalistic work, Sello Motseta said the biggest problem with the new media law is the requirement for registration of journalists. Prof Tachilisa Balule echoed that the law is not meant to control media operations but to facilitate

the media to be more professional. However, he agreed with Motseta and expressed discomfort with the requirement for journalists to register.

Recommendations

Through the discussions, Attorney Chalebgwa Manyapedza advised media practitioners and journalists to initiate discussions with authorities to reach a common ground and promulgate laws that do not hinder their work. He implored the media to introspect and check if genuine conversations were being had with authorities about how to improve journalists' access to information that is held by public offices.

MISA Botswana, Chairman Thomas Nkhoma emphasized the need for research to appreciate the media landscape in Botswana to make informed contributions or decisions about media freedom and by extension, free expression in Botswana.

Prof. Anton Harber emphasized the importance of collaboration between journalists and media houses to fend off SLAPP cases.

In summation and closure, CFE Executive Director, Anton Harber applauded the participants for their valuable contribution that led to a successful engagement. The first ever media seminar against SLAPP was a precursor to the inauguration of an annual Freedom of Expression Summit that CFE and its partners seek to establish, starting next year in 2024 to contribute to the preparation of a level electoral playing field.

ENDS