

WEBBER WENTZEL NEWS

NEWS FROM THE MEDIA PRACTICE GROUP

UK COURT HANDS DOWN LANDMARK RULING ON INTERNET PUBLICATIONS

Important lessons for the South African media

The English courts have recently held that a newspaper will be liable for defamation if it continues to make a defamatory story available via its website after the person defamed in the story has been cleared of wrongdoing.

In **Flood v Times Newspapers Ltd [2009] EWHC 2375 (QB)** *The Times* was faced with a defamation claim from a police officer, Gary Flood, over allegations that he had been involved in corrupt activities. In June 2006 *The Times* published an article in its print edition in which it alleged that Flood, who at the time was a member of the Extradition Unit, was being investigated for having taken bribes from some of Russia's wealthiest and most wanted criminals (who were living in England) to provide them with intelligence from Scotland Yard about attempts by the Russian Government to have them extradited to face criminal charges in Russia. The article was also posted on the newspaper's website, as is common practice.

In December 2006 Flood was cleared of the corruption charges by the Directorate of Professional Standards ("**DPS investigation**") and this finding was made public in September 2007; Flood also contacted *The Times* at that stage to advise the paper that he had been cleared.

Flood then launched his defamation case against *The Times*, which was based on the publication of the article in both the print edition of the newspaper and the website edition. The newspaper's main defence was that of responsible journalism. This defence, which is also available under South African law in terms of the *Bogoshi* defence, is designed to assist the media in circumstances where allegations have been published on a matter of public interest and the truth of the allegations cannot be conclusively proved, or it later emerges that the allegations were false. The defence of responsible journalism recognises the important role played by the media as a watchdog for the public. **Cont on page 2...**



INTRODUCING THE NEW MEDIA TEAM UPDATE

The media team update is our way of keeping you up to date and informed of important developments in the media law field which have the potential to impact directly on the way you do business. We will be sending out the update on a regular basis. If you have any comments or queries on the update, would like to be removed from our mailing list or have any other queries please contact [Dario Milo](#)

Recent articles by the team include:

[A Year of Good, Bad and Downright Ugly](#)

Pamela Stein and Dario Milo,
Sunday Times, 26 December 2009

[Court must balance equal interests](#)

Dario Milo, *City Press*, 24 January 2010

[Chilly Winds are blowing around South African Media](#)

Dario Milo, *Mail & Guardian*, 29 January 2010

The courts have held that requiring journalists to prove the truth of defamatory allegations that are made in the public interest has a chilling effect on media freedom and consequently the media is given a certain degree of leeway to publish material in the absence of conclusive proof, as long as publication of the allegations accords with the tenets of responsible journalism as laid down by the courts.

In the Flood case the court was willing to accept the defence of responsible journalism for the original publications because the paper had accurately reported that Flood was being investigated, however, the court, importantly distinguished between the print edition and the website publication, which continued to be "published" every time someone accessed it.

The court held that after Flood had been cleared by the DPS investigation, there was no justification for *The Times* continuing to make the article available on its website in its original form. The court cautioned that given the nature of the internet, publication of defamatory material on-line could permanently damage a person's reputation. This is not acceptable in circumstances where the defamatory allegations have subsequently been found to be without substance. The court held that *The Times'* failure to either remove the article from its website *or* attach to the article a suitable qualification which would indicate to readers that Flood had been cleared of the charges, did not constitute responsible journalism. The court therefore refused to accept the defence of responsible journalism in respect of

the period for which the website publication remained available after the completion of the DPS investigation.

The South African courts have not yet been faced with a similar case regarding material on the internet, but it is likely that the approach applied by the English courts will find favour with our courts should such a case arise. The Flood case requires editors to be vigilant concerning material published on-line and to ensure that when such material no longer reflects the true state of affairs, it is promptly amended or removed.

We believe that what is important, however, is that *The Times* did not update its website – either by removing the article or, more appropriately from a freedom of expression perspective, providing a qualification or update of the original article – once it had received knowledge of the developments.

We do not believe that newspapers will be compelled by courts as a result of this case to constantly monitor stories for developments; this would be disproportionate. But where developments which are uncontested are brought to their attention, we would advise our clients to update their website accordingly.

The other point about website publication which is of interest is that the prescription period (three years) effectively never ends provided the article remains accessible on the publisher's archives. Publishers ought to be aware of this.

Pre-publication Review

The media team offers a pre-publication review service which includes vetting of articles to check that they comply with the requirements of responsible journalism. We are also on call 24 hours a day to manage applications for urgent interdicts. To make use of this service, contact [Dario Milo](#) or [Pamela Stein](#). You can also contact us on our dedicated media line **08604 MEDIA** (63342)

Recent work

The team made representations to FIFA on behalf of various media houses in relation the terms and conditions for media accreditation for the FIFA World Cup. As a result, the Secretary General of FIFA confirmed in a letter to our clients that FIFA will not use the accreditation terms and conditions for journalists to control editorial reporting of the 2010 World Cup or to stifle media freedom.

News from the Team



[Pamela Stein](#) was ranked in the top Band (Band 1) in *Chambers Global* 2009 as a leading individual in the field of media law. Pamela was also ranked as a media law expert in the *Experts Guide to the World's Leading Technology, Media & Telecommunications Lawyers 2009*

[Dario Milo](#)

was ranked in the top Band (Band 1) in *Chambers Global* 2009 as a leading individual in the field of media law. Dario was also ranked as a media law expert in the *Experts Guide to the World's Leading Technology, Media & Telecommunications Lawyers 2009* and *Best of the Best 2009*. Dario has been appointed as a visiting associate professor in media law at the University of the Witwatersrand with effect from 1 January 2010.



[Portia Mngomezulu](#), a Senior Associate in the team, has recently returned from secondment at a major telecommunications client.

[Keneilwe Matidze](#) has been promoted to Senior Associate with effect from 1 February 2010.



[Okyerebea Ampofo-Anti](#) was invited to act as a judge in the first annual World Human Rights Moot Court Competition which formed part of the international celebration of World Human Rights Day on 10 December 2009.



[Emma Sadleir](#) completed her articles in January 2010 and has been appointed as an associate in the team.

