

WEBBER WENTZEL BOWENS
LEGAL JOURNALIST OF THE YEAR AWARD
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I am informed that the criteria set for the award are that the journalists should have shown a high quality of reporting by demonstrating and understanding of legal issues, interpreting these and communicating them in a balanced and objective manner to readers or viewers.

For more than fifty years I have known hundreds of legal journalists. Most of them men and women who possessed these qualities to report and comment on the injustice done to the vast majority of the people of South Africa. For forty of these years another quality was necessary, courage to face the consequences to which they were exposed for writing what they believed to be the truth.

Much of the work done by legal journalists relates to what happens in the courtroom. The Independence of the judiciary and freedom of expression are inexplicably interwoven.

They were both limited to a large extent by oppressive legislation enacted by a sovereign parliament which often ousted the court's jurisdiction and gave the executive the power to ban publications and prohibit them from quoting persons who were banned. The security of the State was the highest law. Even the equitable provisions of the Roman Dutch Common Law were abrogated. A list of apartheid's discriminatory laws was produced during the course of CODESA for the purpose of repealing acts of parliament, provincial statues, presidential and

ministerial proclamations and municipal by-laws. The titles were typed on one hundred and fifty pages in single spacing.

Practically all magistrates' and most judges of the Provincial Supreme Courts and the Court of Appeal had no qualms in applying them. Those of us in the legal profession, who represented those taking part in the struggle against apartheid, were criticized by those in authority and their supporters - as at least lacking in patriotism and by some of the most vociferous opponents of the regime as doing nothing more than lending legitimacy to an illegitimate regime. Our answer to the latter was that we would continue doing it for as long as we were asked by the families of those who were detained without trial, those who denied that what they had done constituted an offence, those who wanted to show that they did nothing more than exercise their democratic rights, and those who admitted having transgressed the laws of the apartheid state. They wanted to articulate their grievances in the hope that their knocking on the door of the deaf for so long they might be heard if they committed acts of violence against symbols of apartheid.

The courtroom is the last forum in which the oppressed can speak freely. In the absence of the media, the words of an accused would be lost as they are in some totalitarian states. Although some of the proceedings in South African courts were conducted behind closed doors, the media were often not excluded, but enjoined not to report certain matters such as the protection of the identity of witnesses called by the State.

The accused was free to speak of the torture he or she endured, accuse the accuser of being responsible for his or her conduct, to accuse the security forces of their excesses in support of the maintenance of political economic and social powers for the few and the oppression of the many.

With a notable exception of the public broadcaster, the media including some who were supporting the government's policies gave wide publicity to what emerged during cross-examination of police witnesses and what the accused and his witnesses had to say. The foreign media sent some of their most senior reporters to cover the high profile trials. South African resident "stringers" wrote articles for them. Television crews and radio reporters interviewed relatives and public figures.

These activities did not please the government. They refused visas and followed those who came - to keep them out altogether would have put paid to their propaganda they were democrats, that apartheid was not a crime against humanity but what was described by the apostle of apartheid, Dr Hendrik Verwoerd, that it was a policy of "good neighbourliness". Trials were conducted in small towns far away from the homes of the accused, in the hope that journalists would not hear about them. They underestimated the efficiency of the network amongst the activists involved in the struggle.

The journalists covered not only high profile cases. During the defiance campaign in the early fifties, poignant stories appeared of how volunteers black and white would defiantly contravene apartheid regulations; the angry response of policemen, prosecutors and magistrates; the quandary of the magistrate who was informed that the accused refused to pay the small fine he imposed. But they did not know what to do with them because the jail was full.

Comment [Z1]:

They reported the cases arising out of the burning of the passes by the Baffarutsi and Sekhukhune women. The public violence and murder cases that arose out of the conflict between supporters and opponents of the introduction of Bantu Authorities in various rural areas. A case of one hundred pedestrians boycotting the buses from Alexandra to the city of Johannesburg arrested for crossing a deserted intersection against a red light at 4 o'clock in the morning. The *habeas corpus* applications that were brought to free the pass offenders who were not

brought to court but were kept on farm prisons on the Eastern Transvaal. The cases against teachers teaching without a permit under trees or in garages to children who had been excluded from all schools because they stayed away on the first day when Bantu education was introduced.

The media reported fully the hundred and fifty-six arrests on a charge of treason in the beginning of December 1956 until June 1961 when there was an acquittal. The trial gave an opportunity to Chief Albert Luthuli, Nelson Mandela, Professor ZK Matthews and many others to tell the world that the Freedom Charter was not a communist inspired document. The journalists' reports of the cross examination by the leading members of the Bar: Isie Maisels, Bram Fischer, Vernon Berrangé and Sydney Kentridge who showed up the real purpose of the trial, to suppress democratic opposition to their regime. The reports of Nelson Mandela's defence in the trial became known as "A Black Man in a White Mans Court", it questioned the legitimacy of the administration of justice in South Africa.

The full text of the "I Am Prepared To Die" speech, made by Nelson Mandela at the Rivonia Trial was printed in full by a Johannesburg daily despite suggestions that it may have been unlawful to do so. Copies were produced as exhibits in a number of trials after the seventy-six Soweto Uprising - found by the police under the brown paper folders on their student exercise books.

The evidence of Walter Sisulu, Govan Mbeki, Ahmed Kathrada, Alan Paton and others about the grievances of the black people in South Africa which were ignored by the government made nonsense of the apartheid regime's propaganda that the African National Congress was a terrorist organisation.

The trials of the student leaders in SASO, NUSAS and the leaders of the students from Soweto were fully covered. The numerous other trials during the seventies and early eighties together with the UDF treason trials in

Pietermaritzburg and Delmas conveyed to the people of South Africa and the international community that the struggle for liberation was just.

The inquests of among others Ahmed Timol, Steve Biko and Neil Aggett made headline news describing in detail the inhuman torture that was inflicted on them by the security police. They were almost invariably exculpated by the magistrates, but they were convicted by the world juries who read the reports that captured the drama of the courtrooms.

Leading journalists who reported the excesses during the period of detention without trial and the appalling conditions under which prisoners were held were charged and convicted of Contravening the Police and Prisons Acts. They were threatened by the then Minister of Justice that they would soon personally experience what was happening in police stations and prisons.

Statements from the dock inspired by those delivered by Nelson Mandela and Bram Fischer were made by most members of Umkonto Wezizwe giving their reasons why they joined the armed struggle and by those who admitted that they had participated in the activities of unlawful organisations. Appeals by the government to the press not to publish them were not heeded. The *APOLOGIAS* of Raymond Suttner and Anthony Holiday were too much to bear. The Criminal Procedure Act was amended to deprive the accused of the right to make a statement from the dock.

Judge Fritz Stein presiding over the trial of student leader Linda Mohali was obviously upset by the detailed reports in the press relating to the torture used by the security police to procure no less than eleven confessions to a crime that was alleged to have been committed by four Soweto students.

The Judge chose a late Friday afternoon to rule that henceforth no allegations of police ill-treatment were to be published until he had made a finding on their

veracity at the end of the trial. He knew that no reporter was present. He must have been very surprised to see his ruling published on the first page of the Saturday morning daily newspaper. The Sunday newspaper phoned the Judge. It published his denial that he had made such a statement.

The most senior reporter of the daily was there early on Monday morning to ask the woman operating the recording machine to play back the last part of the Friday afternoon. She informed him that the Judge had directed her not to do that at any one's request. The reporter asked the Judge's clerk to take him to the Judge's chambers. The Judge admitted to the reporter that he had made the ruling. The press ignored it.

He admitted Mohali's confession as evidence holding that it was freely and voluntarily made despite evidence that two of his front teeth were broken in an attempt to pull them out with a pair of pliers during his interrogation.

The Court of Appeal held that Mohali had discharged the onus on a balance of probabilities that his confession was false and not freely and voluntarily made but the product of torture.

The importance of reporting evidence given in court was illustrated in the trial of a professional photographer charged with terrorism. The main state witness gave damning evidence against him which was fully reported in the afternoon newspaper. Late at night a group of students who had personal knowledge and exhibits to prove that the witness was lying telephoned the accused's representative in the middle of the night to say that they had been warned by the security police, that if they went anywhere near the defence team, they would be detained. They defied them. In the interest of justice they could not remain silent. The information given by them was used in cross-examination to discredit the witness completely. The accused was acquitted. The witness had been detained under the Terrorism Act and was obviously counselled to make a false

statement implicating the accused. It was not the only case in which the press helped justice to be done.

Presumptions in the Police and Prisons Acts were invoked to prove the guilt of journalists. The provisions of the Criminal Procedure Act were used to compel them to disclose their resources or face imprisonment. The Publications Act and the appointment of commissions to interrogate the functions of the press were used as swords of Damocles against the press.

The adoption of the Constitution and the Bill of Rights has removed most if not all the impediments on journalists in the performance of their work.

Justices of the Constitutional Court and leaders of the legal profession have delivered the Webber Wentzel Bowens lecture in the last six years. They have dealt with the constitutional and legislative provisions and the development of the common law to ensure that we have a free press necessary for the protection and advancement of our democracy. They have also explained the limitations necessary to protect the rights of privacy and dignity which may be infringed by injurious allegations made against plaintiffs who bring defamation actions for damages. They are not satisfied with the fourth defence now available to them. It is not enough they say that they should only be protected if they acted reasonably in publishing wrong information. They yearn for the adoption by our courts of the law as enunciated by the United States Supreme Court in *New York Times vs Sullivan*. They want the law to be that they are immune to actions for defamation unless the Plaintiff proves that the defamatory matter, although it may be false, was made with express malice. They do not want to have an onus to prove that they were not negligently mistaken. The press also is highly critical of judges who occasionally grant pre-publication interdicts. The facts in the cases of Lutheran Bisop Manas Buthelezi and Land Bank head Helena Donly whose facts are in the public domain show that the limitations in our law are necessary to protect the good name, dignity and reputation of the individual and that the

claims of the media for even greater protection than provided at present are not justified.

The decision of the *New York Times* case was no doubt prompted by the facts (did it really matter that Martin Luther King had not been arrested seven times as alleged but only four times?), where the other partly wrongly stated facts so serious that the plaintiff was awarded the five hundred thousand US dollars, the full amount claimed, mostly as punitive damages by a racist jury and the courts could not interfere with their award?

Fourteen other plaintiffs were awaiting the final decision in *Sullivan's* case to claim similar amounts. The court was mindful of the intention of the plaintiffs to use a strategy to deter newspapers from reporting unlawful or unbecoming conduct by police officers and politicians in the southern states of America. Our courts would have been able to deal with problem differently in terms of our law and practice. In Pienaar's case in which a leading Johannesburg evening paper was found to have defamed the dozens of would be "enlarged Senators" that had queued up for appointment in order to enhance the majority to deprive the coloured people of their right to vote. The court ordered that, since such a large number of people had been defamed "the sting became diffused among them" and only one hundred pounds should be paid in damages to each of the two plaintiffs – an amount which the newspaper publisher could well afford. The court also took the view that "by this decision [the] honour [of the other potential plaintiffs], together with that of the two plaintiffs, has been vindicated" and that (since the primary object of the proceedings was clearly the vindication of honour, and not the recovery of damages), if they proceeded to sue they would "run a very grave risk" in relation to a costs.

There may well be a windfall for the media in the recent judgment in the House of Lords in the case of *Jameel v Wall Street Journal* a decision welcomed by the Guardian. The Guardian and the New York Times editor said this would "lead to

a greater robustness and willingness to tackle serious stories, which is what the judges said they wanted. Until now stories were not getting in the paper or were been muted by clever lawyers who knew how to play the game.” As welcome as this may be for the press, it may lead to a reduction in the income of lawyers. I must say, with some patriotic pride, that it appears to me that rather than following the American *Sullivan* case, the House of Lords has actually held on the coat tails of the South African Supreme Court of Appeal judgment in *Bogoshi*.

I want to conclude by what one of our senior colleagues said on the subject when delivering this lecture four years ago.

“It must be moreover be borne in mind that the freedom of the media to perform these functions, is not limited to their publication of information and ideas that we regard as responsible, in good taste and inoffensive. It includes the freedom to publish information and ideas that offend, shock or disturb. As we have seen, the Appellate Division decried the tendency of the press to revel in salacious triviality. I would like to conclude in the way that Karl Marx did in his paper on the freedom of the press written in 1842. The advocates of press censorship had argued that it was necessary to protect the sober voice of a good press and to avoid “*the siren song of the bad press*”. Marx concluded his counter-attack in support of the freedom of the press, by urging us to “*allow the sirens to sing*”.

I find it strange that MARX said this and that our colleague concurred. I must assume in fairness to both of them that because they had an education different to mine, they did not know that the purpose of the sirens song was to attract unfortunate sailors to their shores to be destroyed. I am sure that both of them and all us will not be lured by the *sirens*.

LIST OF AUTHORITIES

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