LESOTHO CONSTITUTIONAL COURT REPEALS CRIMINAL DEFAMATION AND REAFFIRMS FREEDOM OF THE PRESS

By Carmel Rickard

FREEDOM of the press and other media, as well as the safety of journalists, were all given a boost this week with a major new decision by Lesotho’s constitutional court. Three judges sitting in the high court’s constitutional division – Moroke Mokhesi, ‘Maseforo Mahase and Teboho Moiloa – have found that criminal defamation, long used as a threat against journalists and the media, is unconstitutional. This decision adds Lesotho to the growing list of African jurisdictions where criminal defamation has been repealed.
WHEN award-winning journalist and media owner Basildon Peta wrote and published a story about the supposed power of the then-commander of Lesotho’s defence force to boss the cabinet around, no-one missed his point. Using the verbal equivalent of a political cartoon, he pictured the general, Tlali Kamoli, interrupting a cabinet meeting and ordering that the ministers strip to their bare chests and do press-ups in the grounds of State House.

But while Peta may have expected his audience to get the reference and laugh at this irreverent image of ministers exerting themselves on the say-so of the one-time general, he may well not have expected the two things that happened afterwards.

First, hardly a week after publication, he was arrested and charged with criminal defamation.

Second, following the charges, he has made new law. While his matter was still pending in the magistrate’s court, he brought a challenge to the basis of the charges against him and on Monday a full bench of Lesotho’s high court, sitting as a constitutional court, unanimously declared criminal defamation incompatible with Lesotho’s constitution. This is a major decision, one that affects not just Peta; with it, the media in Lesotho has moved into a new era.

Criminal defamation has long been a problem in Africa. In a recent report by the respected international writers’ and journalists’ association, PEN, the issue was highlighted and analysed, with calls for criminal defamation to be removed throughout the continent.

In that report, PEN pointed out that the continued existence of criminal defamation was a legal oddity in many countries where it was incompatible with a country’s constitution or with the international instruments signed by that country, or both.

Peta, who was supported in his application by the Southern African Litigation Centre (SALC), argued that the charges against him breached his freedom of expression rights, as enshrined in the constitution.

The judges agreed with him. They found that the court in Lesotho “has always recognized” that freedom of the press was constitutionally protected “as a subset of an all-encompassing freedom of expression guarantee” under the constitution. Free expression was one of the fundamental pillars of any democracy. Allowing the public to “share information and engage in public discourse” had a spin-off: it helped “expose misdemeanors and malpractices by public officials”. There was value to the whole of society to allow diversity of ideas and opinions, so freedom of expression applied not only to popular or inoffensive ideas “but also to those that offend, shock or disturb.”
Among the forms of expression that might “shock or disturb” was satire, used by Peta in his story about the general and the cabinet. Satire, too, was an artistic expression protected under the constitution. “In its robust interrogation of topical issues, the press is allowed latitude to employ some measure of exaggeration or provocation. … It can rightfully be sarcastic, ironic, humous and satirical in its commentary.”

Sometimes, as with the “former commander of the Lesotho Defence Force” in this case, the target of satire was a public figure. Such a “public figure” should display “a high degree of tolerance to criticism”. “Any person, by accepting public office, ‘inevitably and knowingly lays himself open to close scrutiny of his every word and deed’.”

What about the law that criminalises defamation? The court found it was over-broad and would for example allow someone to be charged even if the alleged defamation was only known to the person who was allegedly defamed, and no-one else. The law also said that publication of defamatory material was unlawful unless it was “true and for the public benefit”. The court said the concept of “public benefit” was not explained in the law and was too “elastic”.

A concept so vague had “a worrying potential of abuse by the political powers-that-be to silence legitimate criticism”. They could base their censorship on this phrase and in doing so “cover up their misdeeds”. “To limit such an important and fundamental freedom on the basis of such a vague and undefined concept seems wholly inconsistent with the intention of the constitution to entrench freedom of expression”.

“In my considered view,” wrote acting justice Moroka Mokhesi for the entire court, “a conviction will automatically flow from (a) decision to prosecute based on this concept, and this should not be countenanced. … The results of this vagueness, in my view, is the chilling of truth-searching and the concomitant undermining of the purposes of guaranteeing freedom of expression.” He further questioned whether it was necessary to retain the offence, since people who believed themselves defamed could sue for defamation in the civil courts.

The law also prohibited defamatory comments by way of remarks about people who had died, and the judges said this too illustrated over-reach. In its argument, the Lesotho government had pointed out that a similar law remained on the books in South Africa, but the court noted that a bill had been introduced to the SA parliament that would do away with criminal defamation. The explanatory note to this draft bill recognized the “chilling effect of criminal defamation on journalistic freedom of expression” and other harmful effects.

Finally, the court indicated that international law was on the side of removing criminal defamation provisions. The judges ordered that it should be struck down with immediate effect — in other words it cannot be used against Peta — and declared that “the crime of defamation has no place in our current constitutional dispensation”. Costs were also awarded against the government.

Asked for comment about the case, Anneke Meerkotter, litigation director of the SALC, praised the court for its “brave decision”, saying it made a significant contribution to freedom of expression jurisprudence in the region. Explaining why SALC became involved in the
case Meerkotter said, “We are concerned by the ongoing use of criminal defamation laws against journalists and human rights defenders in Africa and hope that this decision will also send a message to other governments to reform their laws.”

She said that though SA had indicated it would repeal its criminal defamation laws this had not yet happened, and SALC hoped the new judgment would prompt SA to do so.

“We are concerned by the use of offences such a criminal defamation, sedition, false news and insulting the president, as a way for government to stifle dissent and hinder activists and the media from holding government accountable.

“In Lesotho, journalists have been working under extremely difficult and dangerous conditions for a number of years. This case was initiated specifically to challenge the targeting of journalists who write critical pieces about government. It is an important step in fostering a culture of press freedom in (that) country.”

PEN Report [3]

Peta v Minister of Law, Constitutional Affairs and Human Rights and Others (CC 11/2016) [2018] LSHCONST 251 (18 May 2018) [5] (Full judgment on LesothoLII)

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