MEDIA & COMMUNICATIONS, TELECOMMUNICATIONS & BROADCASTING LAW

Dario Milo, Nozipho Mngomezulu and
Okyerebea Ampofo-Anti

2015 / 2016

WEBBER WENTZEL
in alliance with > Linklaters

MEDIA AND COMMUNICATIONS, TELECOMMUNICATIONS AND BROADCASTING LAW

Dario Milo, Nozipho Mngomezulu and Okyerebea Ampofo-Anti

Introduction

Broadly speaking, the communications industry in South Africa includes media, telecommunications, broadcasting and e-commerce.

The legislation and common law that regulates media is subject to the Constitution of the Republic of South Africa, 1996 (Constitution), and the rights it upholds. The most salient of these are the rights to freedom of expression, dignity and the right to privacy.

Telecommunications and broadcasting are regulated by the Electronic Communications Act, No. 36 of 2005 (ECA). Except for services that are exempted, no person may provide a broadcasting service, electronic communications service or electronic communications network service without a licence.

Media

Freedom of expression

The right to freedom of expression is contained in Section 16(1) of the Constitution. This provision states that everyone has the right to freedom of expression, which includes:

- freedom of the press and other media;
- freedom to receive or impart information or ideas;
- freedom of artistic creativity; and
- academic freedom and freedom of scientific research.

The Constitutional Court has acknowledged that freedom of expression protects and fosters a number of values, including the pursuit of truth, the functioning of democracy and individual self-fulfilment.

Moreover, the right to freedom of the media has been interpreted as protecting the "tools of the trade" that are integral to various forms of media. Thus, in one High Court case, a radio broadcaster was provided with the right to broadcast live evidence from the Hansie Cronjé match-fixing inquiry. A number of courts have recently adopted rules of procedure which permit broadcasting of court proceedings.

The Constitutional Court has also affirmed that the right of the media to report on court proceedings encompasses the right to have access to the documents filed in court by the parties to the proceedings.

Defamation

Defamation law is a branch of the law of delict (or tort) which protects a person's reputation. The law of defamation seeks to find a workable balance between two conflicting rights:

- the right to an unimpaired reputation (the right to dignity); and
- the right to freedom of expression.

The law of defamation protects the reputation of a person where "reputation" is defined as "the estimation or good opinion which an individual has in the eyes of society".

All natural persons are entitled to sue for defamation, as are trading and non-trading juristic persons. Political parties are also, at present, entitled to sue for defamation. However, Government as an entity is precluded from suing for defamation on the grounds that it would be a serious interference with freedom of expression if the wealth of the State, derived from the State's subjects, could be used to bring defamation actions against those subjects. This restriction is not applicable to public servants. The Supreme Court of Appeal has confirmed that a cabinet minister may also sue for defamation in circumstances where the criticism is directed at the minister as an individual, rather than at governmental policies or decisions.

The law allows a plaintiff to claim against a defendant if the plaintiff is able to prove three elements: that the defendant (a) published, (b) defamatory matter, (c) referring to the plaintiff. In respect of defamatory material published on the internet, the High Court has held that publication takes place where the material is accessed (ie where the content of the website is downloaded). On proof of the above three elements, the defendant is presumed to have published the matter wrongfully and with the intention of defaming the plaintiff.

It is then for the defendant to rebut either of these presumptions by relying on a defence. There are three traditional defences:

- truth in the public interest: to succeed with this defence, the defendant must establish that the material allegations contained in the defamatory statement are substantially true and were made in the public interest;
- fair comment: this defence is applicable when the defamatory statement amounted to fair comment on a matter of public interest (eg an editorial or a satirical cartoon); or
- qualified privilege: the defendant will escape liability on this basis if he or she is under a legal, moral or social duty to publish defamatory matter, and the recipient has a similar interest or duty in receiving it (eg an employment reference). This defence also extends to the fair and accurate reporting of the proceedings of Parliament, courts and certain other public bodies. The defence can be rebutted if the plaintiff proves that the publication was motivated by malice.

In respect of media defendants, there is an additional defence of reasonable publication, which is also known as the Bogoshi defence. This defence is available to a media defendant who acted as a responsible journalist when publishing defamatory material and was not negligent in doing so. The defence is available even if the defamatory allegations later turn out to be false.

If the plaintiff succeeds in an action for defamation, he or she will be entitled to damages to compensate him or her for the infringement of reputation. In Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd, a case recently decided by the Supreme Court of Appeal, the court held that in order for a plaintiff to succeed with a claim for actual financial loss arising from a defamatory publication, the plaintiff must allege and prove that the allegations complained of were false.

Recent cases suggest that, as an alternative to damages, a court may award the plaintiff an apology or retraction. In one case, the court also made a declaration of falsity on application by a defamed plaintiff.

In certain limited circumstances, an interdict may also be granted prohibiting publication where the defamatory material has not yet been released, or is sought to be published on a continuous basis.

In respect of the media, specific considerations apply. Before 1998, a media defendant was strictly liable for defamation. This meant that a media defendant was liable in the absence of fault and could thus not escape liability on the basis that it lacked the intention to defame the plaintiff. A media defendant could only rely on the traditional defences negating the presumption of unlawfulness.

The Supreme Court of Appeal re-examined the law in respect of defamation actions against the media in National Media Limited and others v Bogoshi 1998 (4) SA 1 196 (SCA). In this case, the court rejected the test of strict liability for the media and held that the appropriate test for media liability is reasonableness. A media defendant will therefore not be liable for defamation if, in light of all the circumstances, it was reasonable to publish the relevant material in the particular way and at the particular time. This also amounts to a defence of absence of negligence on the part of the media defendant. The defence remains in an early stage of development.

A good example that illustrates the application of the reasonableness defence and the difficulty of predicting whether it will succeed, is the decision of the Supreme Court of Appeal in Mthembi-Mahanyele v Mail & Guardian Ltd 2004 (6) SA 329 (SCA). In this case, the Mail & Guardian newspaper succeeded in defending a claim brought by Sankie Mthembi-Mahanyele, the former Minister of Housing, in relation to a claim made by the Mail & Guardian that Mthembi-Mahanyele was corrupt. Although the Mail & Guardian did not argue that this statement was true, two of the judges in the Supreme Court of Appeal agreed that the newspaper had acted reasonably in making the allegation, as a result of the political nature and context of the speech and the steps taken by journalists to verify the allegation, among other factors. But two other judges disagreed with this approach. The newspaper ultimately succeeded because the remaining judge held that the allegation was not defamatory of Mthembi-Mahanyele in the first place.

It should also be noted that defamation is not only a delict in South Africa, but can also be a crime. In the criminal context, the State must prove all the elements of the offence beyond a reasonable doubt, including the fact that the defendant acted unlawfully and with the intention to defame.

The Films and Publications Act

The Publications Act, No. 42 of 1974 (the 1974 Act), gained notoriety as the tool with which the government of the day prevented the general public from viewing and reading any materials that were considered to be "undesirable". The 1974 Act included within its scope the power to ban items such as statues, models, films and newspapers on the basis that they were undesirable. The term "undesirable" was the subject of much debate.

The transition to a democracy based on freedom and tolerance brought about a radical rethink of the censorship regulations. The result of this process was the Films and Publications Act, No. 65 of 1996 (the 1996 Act), which came into force on 1 June 1998. The 1996 Act established two bodies known as the Film and Publication Board and the Film and Publication Review Board. The 1996 Act sets up a structure through which any films that are intended for distribution and exhibition, and any publication in respect of which complaints have been made, are required to pass. The 1996 Act provides for the classification of publications and films in accordance with the material that is contained therein. The schedules to the 1996 Act set out the criteria upon which such classifications are based. The criteria are specific and were designed to create greater clarity in the area of censorship. The two types of publications and films which are subject to the greatest restrictions are the XX and X18 ratings.

Schedule 1 sets out the criteria for an XX rating for publications: it contains a visual presentation, simulated or real, of explicit violent sexual conduct; bestiality, incest or rape; explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm; or the explicit infliction of, or explicit effect of extreme violence, which constitutes incitement to cause harm.

The 1996 Act prohibits the distribution of publications or films that have been classified as XX, as well as the advocacy in a publication or film of hatred based on race, gender or religion and that constitutes incitement to cause harm, except in the case of a publication or a film that, in good faith, is of a scientific, dramatic, documentary or artistic nature (this exception does not apply to child pornography).

In addition, a person commits an offence if he or she is in possession of, creates, produces, broadcasts or distributes a publication that contains child pornography (this is defined very broadly as covering any image, whether real or simulated, of a person who is, or who is depicted as being, under the age of 18 years, engaged in sexual conduct; participating in or assisting any another person to participate in sexual conduct; or showing or describing the body or parts of the body of such a person in a manner or in circumstances which amount to sexual exploitation).

In order to be found guilty of the 1996 Act's criminal prohibitions, the person accused of contravening the 1996 Act must have done so knowing that the publication or film is prohibited.

The constitutionality of the provisions of the 1996 Act relating to the possession and distribution of child pornography was challenged in *De Reuck v Director of Public Prosecutions*, Witwatersrand Local Division and others 2004 (1) SA 406 (CC). The Constitutional Court unanimously held that, while the criminalisation of, among other things, the possession and distribution of child pornography amounts to a limitation of the rights to freedom of expression and privacy, the infringement of these rights is reasonable and justifiable. The constitutionality of these provisions of the 1996 Act was therefore affirmed.

It should be noted that, while the possession of child pornography is prohibited, the prohibition on possession does not apply to the other XX publications or films. This was a radical departure from the approach of the 1974 Act, which contained wide search and seizure provisions to enforce the anti-possession provisions.

The Films and Publications Act was amended in 2010 by a controversial new Films and Publications Amendment Act, No. 3 of 2009 (the Amendment Act). The provisions of the Amendment Act required that publications, excluding newspapers who subscribe to the South African Press Code, be classified by the Board before they are published if they contain sexual conduct.

The Amendment Act was heavily criticised by the media on the basis that it had the potential to reintroduce censorship. Print Media South Africa and the South African National Editors' Forum launched a legal challenge to the Amendment Act. They argued that the provisions arbitrarily excluded magazines from the exemption granted to newspapers; that the provisions should not apply to publications aimed at educating the public; and that they were otherwise unconstitutional in that they amounted to a prior restraint on publication. In a judgment handed down on 28 September 2012 in *Print Media South Africa v Minister of Home Affairs 2012 (6) SA 443 (CC)*, the Constitutional Court held that certain provisions of the Amendment Act were unconstitutional. The court held that the requirement for material to be submitted for classification prior to publishing limited the right to freedom of expression, and that this limitation was not justifiable as it did not achieve its purpose in a proportionate manner. The Court also held that the unequal treatment of magazines compared to newspapers offended the right to equality and the legality principle without justification.

The judgment represents a positive development in our law as it once again reaffirms the principle that pre-publication censorship is a serious infringement on the right to freedom of expression, and an infringement that will rarely be constitutionally justifiable.

Promotion of Access to Information Act

The Promotion of Access to Information Act, No. 2 of 2000 (the Information Act), gives effect to the constitutionally enshrined right of access to information, contained in Section 32(1) of the Constitution. The Information Act allows for access to information held by public bodies and information held by private bodies and persons which is required for the exercise or protection of rights. The media are entitled to rely on the Information Act to request information, and also need to know how to use the legislation to resist claims for disclosure of its working papers and sources.

Where a request is made of a public body, it must generally respond to the request within 30 days. The presumption is that the documentation must be provided and the public body can only refuse to provide the documents if a recognised ground of refusal applies, such as that the documents contain confidential information or issues of national security. If a request were made of a private body (such as a media company), the requester must first prove that the document is required for the exercise and protection of its rights.

Privacy

Section 14 of the Constitution provides that "everyone has a right to privacy". The term "everyone", includes corporate entities and natural persons. Although the right to privacy is entrenched in the Constitution, there is currently no privacy or data-protection-specific legislation in South Africa and the courts rely on the common law to deal with privacy law related issues.

The right to privacy may be defined as the reasonable or legitimate expectation of an individual to have their personal information kept confidential. Privacy is not an absolute right and, in certain cases, an infringement of the right may be justified if it involves the protection of another more important right or is for a legitimate cause (such as freedom of expression).

There are two types of common law invasions of privacy. These include:

- the intrusion into a person's private space by the collection or compilation of information about an individual; and
- the publication of a person's private facts.

In respect of the latter type of intrusion, an invasion of the right to privacy may be allowed if there is public interest in the facts sought to be published. In a case involving the Financial Mail, the court found that there was no public interest in the information sought to be published (confidential business discussions), but had there been public interest, publication of the information would be allowed even though such information was obtained unlawfully.

For a plaintiff to prove that his or her right to privacy has been infringed by the publication of his or her private facts, he or she must show that there was a reasonable expectation of privacy. A plaintiff's chance of success in a matter involving the invasion of the plaintiff's right to privacy is dependant on the circumstances of each case and the plaintiff's status. Persons who are in the public eye or are considered to be public figures enjoy less protection of their rights to privacy. On the other hand, it must be borne in mind that even where a person is a public figure, there are circumstances where the information sought to be published about such a person is considered by the court to not be of public interest as the information may go to the core of privacy. There are three main defences which a defendant in an invasion of privacy right case can rely upon to justify such invasion.

The defendant has to show that:

- there is truth in the public interest;
- the plaintiff consented to the publication of the information; or
- the information was published on a qualified privileged instance.

In a case involving South Africa's former Minister of Health, Manto Tshabala-Msimang, the Sunday Times newspaper sought to publish information contained in the Health Minister's medical records. The Health Minister (and Medi-Clinic) sued principally for the return of the copies of the records and requested the court to interdict the Sunday Times from further commenting on the matter. The Court decided that the Sunday Times had to return the medical records to Medi-Clinic and pay the Health Minister's legal costs. The Sunday Times could, however, continue to comment on the information in the medical records as there was public interest value in such information. "There was a pressing need for the public to be informed about the information contained in the medical records."

Contempt of court

The media is restricted from commenting on judicial decisions in pending or on-going criminal or civil trials. In certain instances the media is restricted from reporting on judicial proceedings by various exceptions to the open justice principle (for instance, where minors are involved or in divorce cases).

Contempt of court law impacts negatively on freedom of expression, but as is the case in respect of the right to privacy, the right to freedom of expression is not absolute and an infringement of such right may be justified if there are overriding considerations which call for the infringement. There are two areas within the law pertaining to contempt of court which are of relevance to the media law:

- the crime known as scandalising the court; and
- the *sub judice* rule.

The act of scandalising the court consists of the publication of a statement that undermines the dignity, repute or authority of the courts generally or in relation to a particular judicial officer. The test for whether an act of scandalising the court has taken place is set out in a 2001 Constitutional Court case, *S v Mamabolo 2001 (3) SA 409 (CC)*. In this case an official in the department of correctional services was convicted of contempt of court for making the statement that "Judge Johan Els erroneously granted bail". The test applied by the court was "whether the offending conduct, viewed contextually, really was likely to damage the administration of justice". The court took into account a number of factors including, but not limited to, what was said, what meaning was likely to be understood from what was said, what the motives were, the effect it had on the audience, and the likely consequences.

The second form of contempt of court , the sub judice rule, applies when a particular statement or document serves to prejudice or interfere with the administration of justice in pending proceedings. In this case, the rights which need to be balanced involve the administration of justice and the right to free speech. In prosecuting a person for contravening the sub judice rule, the State has to prove:

- that the prohibited act was committed by the accused (*actus reas*); and
- fault on the part of the accused (*mens rea*).

In the past, if the publication could influence the court's decision in respect of particular proceedings before the court, were the facts to be accepted by the court, the publication would be regarded as sub judice. This test has now been effectively altered by the judgment of the Supreme Court of Appeal in *Midi Television (Pty) Ltd v Director of Public Prosecutions 2007 (5) SA 540 (SCA)*. In that case e-tv sought to broadcast interviews with various people who claimed to be witnesses in the Baby Jordan murder case, before evidence in this regard had been given in court. In giving judgment in favour of e-tv, the Court applied a different test to determine whether the broadcast would offend the administration of justice: whether the prejudice that the publication may cause "is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place".

The decision of the court in the Midi TV case implies that the courts will be hesitant in future in granting interdicts against the publication or broadcasting of information relating to pending court proceedings.

Data protection

The traditional South African common law principles of protecting individual privacy and identity appear to be inadequate in circumstances where a person's personal particulars (data) are being processed (collected, stored, used and communicated) by another person or institution. Such collections take place on a daily basis and are facilitated by advancements in technology. For instance, companies often maintain detailed databases of their employees and customers.

The South African Law Reform Commission (SALRC) published a Discussion Paper in October 2005 with a view to addressing the current legislative dearth in South Africa regarding data protection. The SALRC noted in the Discussion Paper that, despite numerous international developments in regard to the protection of privacy and more specifically data protection, South Africa lacks comprehensive legislation dealing with these issues. The SALRC's recommendations resulted in the publication of the Protection of Personal Information Bill (the Bill) which has been drafted as a result of the need to keep South Africa in line with international developments and to protect the privacy of South African data subjects.

The Bill aims to give effect to each person's right to privacy by introducing measures to ensure that the personal information of an individual is safeguarded. The Bill regulates the collection, dissemination, use and retention of personal information by responsible parties. The Bill defines a "responsible party" as a public or private body or any other person which determines the method for processing personal information. The Bill envisages the establishment of a regulator with extensive powers and responsible parties that do not comply with the legislation will face hefty financial penalties. Interim data protection provisions are contained in the Information Act and the ECA.

Telecommunication and Broadcasting Services in South Africa

Telecommunications and broadcasting services in South Africa are regulated by the ECA. The ECA came into force on 19 July 2006. It repeals the Telecommunications Act, No. 103 of 1996 (the Telecommunications Act), and the Independent Broadcasting Authority Act, No. 153 of 1993 (the IBA Act), and amends the Broadcasting Act, No. 4 of 1999 (the Broadcasting Act).

Licensing under the ECA

The ECA makes provision for the licensing of three categories of services:

- Electronic Communications Network Service (ECNS) licences, which authorise the holder to roll out and operate an electronic communications network, as well as provide electronic communications network services;
- Electronic Communications Service (ECS) licences, which allow the holder to provide electronic communications services to customers over its own, or somebody else's network; and
- Broadcasting service licences, which authorise the holder to provide broadcasting services.

The ECA substantially altered the licensing framework and regulatory regime in South Africa by requiring all persons who provide a service in terms of the ECA, to do so pursuant a licence. Section 7 provides that, except for services that are exempted, no person may provide a broadcasting service, electronic communications service or electronic communications network service without a licence.

The term "electronic communications" was previously referred to as "telecommunications".

Two types of licences may be issued within these categories of services, namely individual licences and class licences. Electronic communications network services, electronic communications services and broadcasting services that require individual licences include:

- electronic communications networks of a provincial and national scope and that are operated for commercial purposes;
- electronic communications services consisting of voice telephony that require numbers from the national numbering plan;
- commercial broadcasting and public broadcasting services of national or regional scope; and
- any of the above services where a State entity holds an ownership interest (either directly or indirectly) of more than 25% of the share capital of the person providing that service.

Electronic communications network services, electronic communications services and broadcasting services that require a class licence include:

- electronic communications networks of district municipality or local municipal scope operated for commercial purposes;
- community broadcasting and low power services whether provided free-to-air or by subscription; or
- any other services that the Independent Communications Authority of South Africa (ICASA) finds not to have significant impact on socio-economic development.

The ECA provides that individual licences may be issued for a period not exceeding 20 years and class licences must be issued for a period not exceeding 10 years.

The ECA also makes provision for the issuing of radio frequency spectrum licences. In this regard, the ECA provides that a radio frequency spectrum licence is required in addition to any service licence where the provision of such service entails the use of radio frequency spectrum.

In terms of the ECA, ICASA may prescribe the types of electronic communications services and electronic communications network services that may be provided without a licence, or electronic communications networks that may be operated without a licence, or radio frequency spectrum that may be used without a licence.

In this regard, the ECA provides that services that may be provided, or networks that may be operated, without a licence include, but are not limited to:

- electronic communications services that are provided on a non-profit basis;
- electronic communications services that are provided by re-sellers; and
- private electronic communications networks that are used principally for, or integrally related to, the internal operations of the network owner.

However, ICASA may prescribe terms and conditions of any resale where the network owner resells spare capacity on a private electronic communications network. ICASA retains the power to regulate electronic communications and broadcasting services in South Africa under the ECA.

Broadcasting services

Although the IBA Act has been repealed, most of its provisions are retained in the ECA. Accordingly, the regulation of broadcasting under the ECA remains somewhat unchanged.

The ECA contemplates three broad categories of broadcasting services, namely public broadcasting, commercial broadcasting and community broadcasting. As indicated above, depending on the scope of the service, persons who provide a broadcasting service may either be issued with an individual licence or a class licence.

The ECA requires all service licensees who make use of radio frequency spectrum to be in possession of a radio frequency spectrum licence. The consequence of this provision is that all persons who provide a broadcasting service will need to be in possession of two licences – an electronic communications service licence and a radio frequency spectrum licence. Under the previous regulatory dispensation, a broadcasting licensee only required one licence for the purposes of providing the broadcasting service; a broadcasting signal distribution licence was required by those persons who provided broadcasting signal distribution services.

The ECA amends certain sections of the Broadcasting Act. The amendments deal with matters pertaining to the South African Broadcasting Corporation (SABC), South Africa's public broadcaster, and have resulted in the Broadcasting Act effectively being an "SABC" Act.

The ECA imposes an obligation on persons who provide a broadcasting service to contribute towards the Universal Service and Access Fund (USAF). The funds in the USAF must be used for the payment of subsidies to, for example, public schools to provide access to electronic communications.

Electronic communications services

The most significant feature of the ECA in relation to telecommunications services is that the different categories of telecommunications services under the Telecommunications Act have been removed and all such services fall under the umbrella of electronic communications services. Accordingly, there is no longer a distinction between services such as public switched telecommunication services, mobile cellular telecommunication services, national long-distance telecommunication services or value-added network services. The rationale for eradicating the categories of services is to promote competition in the electronic communications sector.

There is still an obligation on electronic communications network service providers to lease electronic communications facilities to any person licensed in terms of the ECA or to persons who provide a service pursuant to a licence exemption. There is also an obligation on all licensees licensed in terms of the ECA to interconnect with any other licensee or with persons who provide a service pursuant to a licence exemption.

Competition matters

The ECA grants ICASA more powers to deal with competition matters in the electronic communications sector than it previously had under the Telecommunications Act.

While a memorandum of agreement was signed between ICASA and the Competition Commission (the Commission) in 2002 to regulate the relationship between the regulatory authorities, the ECA gives ICASA the authority to consider and adjudicate competition matters without the assistance of the Commission. In this regard, the ECA provides that ICASA has the discretion to request assistance from the Commission when such matters are before it.

Regulations

The ECA provides that all regulations that were made in terms of the Telecommunications Act or the IBA Act shall remain valid until they are repealed by ICASA.

Digital migration

Currently, terrestrial television in South Africa is broadcast in an analogue format. The country is, however, in the process of planning and implementing migration from analogue to digital terrestrial television. Digital terrestrial television refers to the terrestrial broadcasting of television in a digital format.

Digital broadcasting promises the following benefits to viewers:

- better quality sound and pictures;
- more channels (additional content);
- access to radio; and
- enhanced viewer experience through for instance: Electronic Programme Guide, sub-titling, additional language options, and interactive services such as weather and news reports.

It is anticipated that the service roll-out to the public will commence towards the end of 2015. Tests and trials of the relevant technology are, however, underway in preparation for the launch to the public.

ICT Charter

The Information Communications Technology (ICT) Sector Code for Black Economic Empowerment (the ICT Charter) was gazetted by the Department of Trade and Industry on 1 April 2012. The ICT Charter is likely to have a material impact on ICT companies in South Africa as it applies to all persons, organisations and entities operating in the ICT sector in South Africa.

The primary object of the ICT Charter is to enable the meaningful participation of black people in the ICT sector. In order to achieve this, the ICT Charter has set a black ownership target of 30% to be achieved by entities in the sector.

The ICT Charter has also set targets in respect of management and control, human resource development, procurement, enterprise development, corporate social investment and access to ICT. It has also set a target of 1.5% of net profit after tax to be spent on socio-economic development initiatives to improve lives of communities and a target of 5% of net profit after tax to be spent on enterprise development initiatives that are aimed at growing and developing black-owned ICT enterprises.

Other Relevant Legislation

Electronic Communications and Transactions Act

The Electronic Communications and Transactions Act, No. 25 of 2002 (ECTA), came into effect in August 2002. Amongst other things, ECTA states that its purpose is to:

- promote understanding, acceptance and growth of e-commerce;
- promote legal certainty in respect of e-transactions;
- ensure that e-commerce in South Africa conforms to the best international practice; and
- develop a safe, secure and effective environment for consumers and businesses to use e-commerce.

Based largely on similar legislation in other jurisdictions and on the United Nations Commission on International Trade Law Model, ECTA is essentially divided into the following parts and addresses the following issues:

- legal requirements for data messages;
- communication of data messages;
- registration of cryptography providers and authentication service providers;
- consumer protection;
- protection of critical databases;
- e-government;
- domain name authority;
- cyber inspectors; and
- computer crime.

While ECTA governs electronic commerce in the general sense, many of the provisions of ECTA empower the legislature to enact specific regulations to provide further impetus to the substance and application of ECTA.

The Regulation of Interception of Communications and Provision of Communication-Related Information Act

The Regulation of Interception of Communications and Provision of Communication-Related Information Act, No. 70 of 2002 (RICA) has repealed the Interception and Monitoring Prohibition Act, No. 127 of 1992 (the Monitoring Prohibition Act), save for Sections 2 and 3 of that Act. Sections 2 and 3 of the Monitoring Prohibition Act prohibit the intentional interception of communication and make provision for the issuing of a direction that would allow one to intercept communication.

RICA seeks to regulate the interception of certain communications and radio frequency spectrums and the provision of certain communication-related information. In terms of RICA, no person may intentionally intercept or attempt to intercept, or authorise another to intercept, any communication in the course of its transmission and occurrence within South Africa.

The objects of RICA include the:

- regulation of, the making of applications for, and the issuing of, directions authorising the interception of communications under certain circumstances;
- prohibition of the provision of telecommunication services that do not have the capability to be intercepted;
- provision of costs to be borne by telecommunications service providers;
- establishment of interception centres, the Office for Interception Centres and the Internet Service Providers Assistance Fund; and
- prohibition of the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment.

Conclusion

Of great importance to the media and communications, and telecommunications and broadcasting industries are the laws that regulate the freedom of expression and privacy of individuals, public bodies and private bodies.

In addition, various legislative measures have been put in place to regulate the licensing of telecommunications and broadcasting services, the safe practice of e-commerce and the advancement of meaningful black participation in the Information Communications Technology sector.