

# TOYI-TOYING ON A TIGHTROPE: BALANCING RIGHTS TO PRIVACY AND DIGNITY, WITH FREEDOM OF EXPRESSION, IN THE SOUTH AFRICAN CONTEXT.

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## Introduction:

This paper deals with the controversy over the Sunday Times’ publishing of a story about the Health Minister, Manto Tshabalala Msimang (MTM). It is written in the context of a sequel to the publication of the story, which took the form of the SABC CEO, Dali Mpofu, deciding to cut financial support to the SA National Editors Forum which had come out in defence of the Sunday Times. Another sequel has been a police investigation into whether the paper should be charged for theft of MTM’s health records.

All this has generated numerous debates about the media. One has been whether there was a Public Interest rationale in acquiring the information in the health records, and the extent to which this information formed the basis of the MTM story. It has been argued that a person has been publicised as a former thief, by a media house that itself was party to theft (about other information on that person). This debate continues to burn, with a possible court case that will produce a legal decision on the alleged theft.

Another distinct debate concerns the Sunday Times’ apparent violation of the Minister’s constitutional right to privacy. Put another way, there has been debate controversy about whether it was legitimate for the paper’s constitutional right to free speech about the Minister to take prior place over her right to privacy. Further raised in debate has been whether the coverage violated a constitutional right to dignity, and if so then whether this was justifiable.

At the heart of these debates is whether Public Interest can be cited as a compelling reason to override some rights in favour of others.

What this paper argues is that there will inevitably be different views on these questions, but that they can each better make their case, and be assessed, if they break down the reasons as to the validity or invalidity of the Public Interest defence. This means going beyond the general or rhetorical level and that editors should engage in detailed public dialogue with each other, and with their audiences, in order to demonstrate their bona fides. This provides a basis for assessing claims of acting in Public Interest when venting certain information – or criticising each other for so doing. A particular template is proposed in this paper, whereby protagonists around whether Public Interest is served or not, could motivate their positions in terms of three fields: Values, Impacts anticipated, and Practical beneficiaries (VIP). This method would give everyone a clearer basis for deciding whether, and where, the MTM story (or parts of it) is – in their view – a genuine attempt to resolve cases of where rights are in conflict, in a way that corresponds to Public Interest. This approach represents a pragmatic one, as distinct from those that would be taken by either a bitter cynic or a pure idealist.

## 1. A cynical reading of the controversy:

In the contemporary climate, an argument can be made that elevated debate about Public Interest and the balancing of the constitution's competing rights, misses the real issue. The point is that this is not a disinterested theoretical issue separate from the politics and economics of the MTM story. It takes place in the South African context – where there are rough and real determinants about what gets published and when there is criticism in response to it. In this perspective, it is not a case of issue about media being free agents to assess through gentle and rational deliberation whether they are acting in the Public Interest or not. Instead, a cynic would actually expect them to be unwilling to change their stances that have already been expressed in favour of or against the MSM story. There are three reasons that give credence to the cynical view:

### *1.1. Deep-rooted perspectives are at work*

Editorial judgements are not purely in the realm of conscious actors. They are linked to race, class, gender, language, culture, all of which may predispose media professionals towards particular stances on the MSM story. For instance, some white journalists may well lean towards suspecting the worst of the Minister, some black journalists being more sympathetic. This is not to say that all black journalists take one position, of course. Rather, it is only to suggest that the particular backgrounds of many of the leadership at the Sunday Times, and that of their counterparts at the SABC, are probably factors in the way the former have lashed out in the MTM story, while the latter have sprung to her defence against such attack. The notion here is that socialisation produces people who incorrigibly take up certain positions, and that debate is not likely to change this.

Of course, the specific institution that media people are hired by, also has a fixed bearing on their positions: for instance, the Sunday Times would see itself squarely in the watchdog model of journalism, whereas SABC would probably highlight a guidedog role that avoids strong critique. So, the overall point here is that while there can be polite debate about rights and Public Interest, the reality is that there are subtle and subterranean influences on our journalism, which arise from how we ourselves are shaped and where we work, and which determine much of the course we follow and many of the stances we assume.

### *1.2. Vested interests are at stake*

Many people would look at the Sunday Times and speculate that business imperatives played a part in the paper's running the MTM story. In this view, a cynic will see media enterprises as buccaneers. Indeed, it is true that sensation sells. Without sales, there is no viable newspaper. On its side, SABC itself is also affected by commercialisation. Because it is financed mainly by advertisements, ratings-driven programming is at least a partial imperative. This means that some content can, for instance, be anti-dignity but nevertheless have this quality overlooked because it is popular in terms of audience appeal. Likewise, some advertising that arguably denigrates dignity maybe allowed because it pays the bills.

In other words, the right to commerce is seen as trumping considerations like dignity or privacy. This is the harsh reality of our existing economic arrangements and it is one that is more fundamental than the niceties of debating other rights.

### *1.3. Political stakes are high*

Another reality that appears to make a mockery of fine talk about how to balance constitutional rights, is the way that media nowadays is being seen as weapon in a wider contest, rather than as an independent institution.. Many politicians see newspapers as pawns or alternatively protagonists, in their present strife. Many in the media see their peers as prostitutes, or – almost as seriously – as partners (witting or unwitting) for political interests. Among the public, there are perceptions of SABC as President Thabo Mbeki’s docile newshound; counterposed by the Sunday Times being seen as baying for his blood. The approach of each side to the MTM story is that the whole controversy is not basically about rights balance, but about power interests.

In summing up this section as a whole, the three reasons elaborated above are seen by cynics as proving that publishing and broadcast decisions and stances are determined by backgrounds and perspectives; business motives, and especially political intrigue and culture. For instance, the reading would then be that the Sunday Times doesn’t even think about balance, but simply sacrifices rights in the interests of circulation and politically discrediting the President (who is, of course, the Health Minister’s principal); and that the SABC acts in the interests of the Presidency in objecting to SANEF and the Sunday Times. What is significant then, from the cynic’s point of view, is that the MTM debate is not a tea-party discussion where we can all safely assume that the participants share bona fides in finding an abstracted solution to the challenge of balancing rights in the Public Interest.

However, even if there are some truths in the cynical view, it does not mean that the media is entirely driven by its people’s historical backgrounds, or by economic and political agendas. It also does not follow that there is so much social conditioning, business imperative and politicking at play, that people are unable to reconsider and change. South African history shows that things are more dynamic.

### 2. Need for idealism

Our history also shows us something more honourable than money and Machiavellian politics. The point is that rights have a value in their own right. We should not lose sight of the higher values that our veteran journalists fought for in the dark days of 1977 when we lost three newspapers to bannings on October 19.

Among these “higher values” are the noble rights as set out in our democratic constitution. And this observation in turn directs us to taking seriously the challenge of discussing whether, and how, a claim to Public Interest, is an honest solution for balancing rights.

The problem is that everyone claims to have a Public (PI) Interest justification. The same claim of PI is mobilised for legitimising very different views and agendas. One side is saying: “It was in the PI to publish MTM.” The other states: “It wasn’t in PI to publish MTM.” To say who is right, we have to look at things more deeply.

A starting point is interrogating what we mean by the public. Mathatha Tsedu has asked whether we mean “(t)he vociferous, well-organised public who can push their own interests,... or the silent public who do not understand many of these issues and just hope the Lotto money will deliver?”.

In turn, this position has led to views which suggest that Public Interest must refer to the people as a whole. But the danger in this perspective is that when you start with seeing “Public interest as what the majority of citizens want”, you can easily end up with a conception of “Public interest as *anything which interests the public*”. The point is that Public Interest should be seen as something greater than a populist interest. In South Africa, some rights (eg. Gay marriage) may not even be supported by the majority. Further, the public may not always know what is in its interest; and indeed on some issues the public may not even be interested in the Public Interest.

An alternative, more idealistic, perspective therefore is to see Public Interest as an absolute standard that exists independently of what the citizens want. At the same time, one does not want to see a situation where Public Interest can be defined entirely regardless of what people want. A further complication is whether one is talking Public Interest (singular) or Interests (plural). For, there is no doubt that the public actually has multi-faceted interests in general, for instance, interests in BOTH dignity and free speech. Over given issues, some interests of the Public may compete with each other. So, it is then not enough to claim a Public Interest rationale and believe that is the end of the debate. It is still necessary to explain why one right rightly “trumps” another in terms of very specific public interest on that particular issue.

In trying to assess Public Interest claims which deal competing priorities, reference is sometimes made to jurisprudence. SABC CEO Dali Mpofu, for instance, opposes the MTM story on the basis of quoting former Constitutional Court President, Arthur Chaskalson, that the right to dignity (along with life) should be valued above all others. But up against such a heavyweight general standard is another one. This is the African Commission on Human and Peoples’ Rights which says that freedom of expression is “a cornerstone of democracy and a means of ensuring respect for all human rights and freedoms”. In other words, dignity – in this view – depends on priority being given to free speech. There is no way of really evaluating the merit of the diverse positions at this level. This is one reason why arguments seeking to establish a general hierarchy of rights have sometimes drawn on cultural claims to do so.

Again, Dali Mpofu has enjoined the debate here, arguing that the MTM story exhibits a journalism that is “foreign, frigid, and feelingless”. Instead, African values (especially in the context of black dehumanisation) mean that respecting the privacy and dignity of mothers (like the Health Minister) should be given preference over the right to free speech. What becomes unclear here, however, is to what extent the right to dignity being referred to is about individual dignity, or the dignity of black people in general.

Meanwhile, in opposition to this view, Sowetan editor Thabo Leshilo has argued that the African values around “Ubuntu” should not mean self-censorship or that African victims of racism are too primitive for robust democracy and free speech. In addition, the African Commission has argued that “customs that repress freedom of expression are a disservice to society”.

What all this shows is that while culture is not to be underestimated, it is a slippery concept, and on its own is not sufficient to conclusively prove that the MTM story is, or is not, in the Public Interest. It is

also a difficult issue, in a multi-cultural and dynamic society (with many hybrids), to use cultural claims to “trump” those compatriots who do not subscribe to that stated culture. The problem here is that no one can “win” an argument because values are based on beliefs rather than issues of logic. It is a simple case of accepting or rejecting the particular values at hand.

To conclude this subsection, given that in the South African context there is a Public Interest in *all* the rights, but that is troublesome to create any *a priori* balancing, it is necessary to go beyond pure idealism. This is especially if we are to make practical application/assessment in cases of public interest contestation such as around the MTM story. Indeed, idealism – while a necessary standard – can become a dogma (including one suited to political power play), unless its value basis is made clear and then the associated issues of intent, consequence and beneficiaries are interrogated (see below).

### 3. A pragmatic view

The notion of Public Interest in this third perspective recognises that the phrase is, in fact, a site of struggle, as distinct from something that can be forever fixed and defined in general terms of which rights are intrinsically supreme and which subordinate. The pragmatist looks to how an appeal to Public Interest can provide a basis for a way between cynicism that dismisses “public interest” as a charade, and over-abstracted idealism which reifies the notion – turning it into a thing.

Pursuing the pragmatic way starts with recognising that a claim of Public Interest does amount to saying that an action is in more than a sectional interest. That becomes something to begin to work with. What becomes important in interpreting this, however, is the wording “more than”. This phraseology implies that the general interest *can indeed overlap* with a sectional interest. The key difference is that it must *also be broader than* such interest. Thus, it cannot be only sectional Interests, but it can be these PLUS. For example, the MTM story may overlap with a newspaper sales agenda, or with one to criticise Thabo Mbeki, but these would not disqualify it from being in the Public Interest. The question then is whether the MTM coverage was in the broader Public Interest(s) – and, better, whether ALL of that story, and the WAY it was presented, were (also) in (which of) the broader Public Interest(s).

To answer these kinds of questions, it is necessary to leave the lofty heights of trying (in vain) to conclusively decide which rights are more important than others at an abstract level. A great many issues, and certainly not the MTM story, cannot be resolved with a priori criteria for what the best balance of rights should be.

Instead, you need to go into the particulars. And in so doing, it becomes clear that you can measure some specifics around SOME cases for Public Interests. An example in point is the expose about corruption leading to unsafe condoms being made available. Another example of particular conditions exists in the Press Ombudsman’s Code, which defines the following as constituting Public Interest: detecting or exposing crime or anti-social conduct, hypocrisy, falsehoods or double standards on the part of public figures; and protecting public health and safety. (Interestingly, the Code says nothing about personal addictions (such as to alcohol) being specific matters of public interest – so the case would need to be made for the relevance of publicising such information about an individual). There may be some instance where cultural sensitivity or religious tolerance are indeed clear and indisputable considerations in

balancing rights – yet, again, these considerations would not be a generally applicable principle but rather factors to be argued, for given the specific circumstances at play.

However, what needs saying is that for every defined case where most people could agree on Public Interest, there are also many more that are, intrinsically, not so clear-cut nor easily provable. These are in a grey and sometimes intangible or speculative area where things cannot be easily demonstrated as being obviously in Public Interest or not. Some of the MTM story, and indeed much of its presentation, might fall into this category. Of course, courts can decide on such areas as to what amounts to a Public Interest balance. But for media people, we also need to know how do we avoid getting tied up in knots in these cases. The answer is to come up with a pragmatic method, walking a tightrope between sheer cynicism and the dangers of idealist dogmatism.

#### 4. Way ahead

The point being argued in this paper is that to claim for or against Public Interest, it is necessary to put assumptions and then supporting evidence on the table. A template to this effect can be used – going by the acronym VIP:

- “V” would require looking backwards – What were the VALUES underpinning the stand on supporting or opposing the MTM story. For instance, transparency, integrity, dignity, democracy, etc. This allows us to understand both intentions and which of many possibilities of balancing of rights was operative at the outset. In many cases, setting out the values would indicate whether agreement is possible or not. The same values can of course be interpreted differently in practice, but at least there is a common starting point. Where there are different values, the only solution is tolerance or an assertion of hegemony (that my values are inherently superior to yours).
- “I” is the body of detail that would deal with IMPACTS: what was the purpose of publishing in the sense of what effects were anticipated (for instance, triggering a commission of inquiry; weakening a president, causing personal distress; increasing sales; etc).
- “P” refers to the PRACTICAL BENEFITS that need to be spelt out, and for whom. In other words, this is the calculus of the impacts. It should address the benefits, which may of course include specific beneficiaries (eg. With the MTM story, the opponents of Thabo Mbeki), and in particular make a case to whether and why they are in the widest possible interests (i.e. the Public Interest).

In short, “Public Interest” in many grey-area instances should not be general claim, but a case made in process. VIP can – and probably should – be done before, during and after publishing material, or critiquing such. The VIP template needs to be completed if “Public Interest” is to serve as a useful guide to action or a standard of retrospective evaluation. What I am getting at is that Public Interest claims should be tested via an editor’s (and critic’s) elaboration according to the VIP formula. In the MTM case, the Sunday Times could set down their values, while Dali Mpofu would make clear if and where his starting point is different. Their arguments around how values follow in terms of impact and practical benefits could then be similarly discussed. But when the discourse does not go into this detail, it becomes very hard to give due weight to the position being taken. Of course, if the Sunday Times is really

motivated by a desire to be a king-maker, or if Dali Mpofu is moved to take his position ultimately because of political reasons, such would not be captured by VIP. But at least there would be much else on the table to dissect and draw conclusions about.

What could happen, therefore, is that all media sides could find common ground on a VIP method to assess Public Interest(s). The result might still be disagreement in the actual application to particular cases of journalism, or leave lingering suspicion that there is more than meets the eye. But in this way, debate can at least begin the long march towards superceding unnecessary division.

If VIP is to serve as a balancing pole for high-wire walking, there are some further implications of using this method. First, if a media house or journalist concedes that their Public Interest claims are unsustainable, they should be prepared to apologise and ensure redress. Second, it would be anathema to democracy if there was prior-censorship – i.e. repression of information in advance by pre-dismissal of Public Interest rationales. The Film and Publication Amendment Bill, however, goes in the different direction.

## 5. Conclusion

Across the board, media ought to continue to reflect Public Interest debates – in full. Even if some media elect to be contestants in the political battles, none should compromise the public's confidence that we all are genuinely trying to work in the Public Interest (even when this sometimes give different content to the VIP method). With hindsight, it would have been prudent for the Sunday Times to have taken readers into its confidence by explaining its position along the lines of the dimensions of VIP. A cynical view would say that this omission suits the paper, because it does not have to explain all aspects of its MTM story. Likewise, unless Dali Mpofu were to spell out a VIP position, the cynic would say that he is “off the hook” of having to indicate how his position goes wider than the sectional interests of the government. A less jaundiced view would suggest that to date it has been the lack of an agreed method, or template, that has meant that neither side has fully elaborated their reasoning.

It is my belief that if they were to elaborate, they would not necessarily reach general accord – but they could do on some specific points. In contrast, differences dealt with at the general level are not easily moved beyond. More significantly than the two protagonists' interchange, however, is the fact that an elaborated position on a VIP basis could enable everyone else to better assess the arguments as to the MTM story and the specific public interest components in its various elements.

Finally, we need to persuade political factions that, actually, they need an independent and free media. This is because if one side gets media caught up in its cause today, its rivals can do so tomorrow. The interest of all sides is in a media that is free to choose... and, especially, a media that is also frank about its choices. SABC as a Public Broadcasting Service is excepted from this freedom however: it may not take sides. However, the corporation itself could still consider doing VIPs – not only when critiquing other media stances, but also for its own decisions about to broadcast (or not) controversial information as per its own interpretation of Public Interest in a balancing of rights.

Most of all, huge public interest exists in the media demonstrably striving for journalistic idealism – and therefore in editors explaining convincingly how their coverage proves their bona fides for Public Interest

(even if their business or political interests included). The way to do this is to move from the position of cynic, via that of idealism, towards a grounded and reasoned pragmatism. That is a journey on a tightrope, but a VIP tightrope can turn the trip into a structured toyi-toyi which gives us a common project, rather than polarisation.