THE AGA KHAN UNIVERSITY
Graduate School of Media and Communications

AKU-12-0002.1

Public Service or Illegal Act?
The *Weekly Mail* and Bugging Staal Burger
Part B

In late August 1992, *Weekly Mail* Co----Editor Anton Harber decided to authorize bugging right----wing activist and Civil Cooperation Bureau (CCB) leader Staal Burger's office. The private investigator (PI) and his assistant accordingly set up to eavesdrop from the neighboring hotel room on the meeting they expected to take place as usual the following Monday, which was August 31. But at noon Monday, the PI called Harber. Matters had gone irretrievably wrong.

As planned, the PI's assistant had drilled a hole in the wall between the rented hotel room and the room Burger used as an office. Midway through his meeting, Burger had noticed the hole, and followed its trail to the next room where he caught the assistant red----handed. Burger was now holding the assistant at his office and insisting on knowing the client's name. The PI told Harber that his employee would not, as a matter of policy, reveal the name without the client's permission. He would not do so even with the police. But the PI hoped that Harber would give permission to name the *Weekly Mail.*

Harber put the PI on hold and called the newspaper's legal advisor, David Dison. He informed Dison that the surveillance had gone badly and that his immediate objective was to get the PI's assistant off the hook. Dison concurred but said that he, as the newspaper's lawyer, should reveal the name. He also said that he would do so on neutral ground, for example the police station, rather than at Burger's office. That was the only way to ensure that Burger would let the PI's assistant go. Harber told the PI to inform Burger that Dison would meet him at the police station. "Burger walked in a little after I went to the Brixton police station," recalls Dison.

> He was the most feared policeman in the city when he was part of the Brixton Murder and Robbery Squad. At 6'6", he cut an imposing figure and was surely not the kind I wanted to deal with. He knew me and he was hardly interested in me, but he looked at me for about five seconds with a sort of killer look. He then headed straight to the chair of the head of the police station and sat on it as a matter of right. Every cop in the station was soon fawning

> over him, saluting him, addressing him as colonel. I felt weird, seeing the role reversal of authority in a police station.[1]

Burger and his lawyer agreed to let the PI's assistant go, and press charges instead against the *Weekly Mail*.

Nothing on tape. On Tuesday, September 1, the PI gave Harber more bad news: the recording equipment was defective and there was no tape of the meeting. "It was appalling, the sheer inefficiency," says Harber. "It was a disappointment."[2]

Burger, however, was unaware that the tape had not worked. His apprehensions were evident when, within hours, Harber received an interdict (restraining order) on the publication of any information obtained by bugging. In an affidavit supporting the application, Burger complained that the *Weekly Mail* was "unrepentant" at having put him under surveillance.[3] The affidavit also referred to the longtime negative coverage of CCB activities by *Weekly Mail* reporters.

Harber was gratified by what the affidavit told him. "It struck me that we should never let anyone know that we had nothing on tape," says Harber. "There was something redeeming about putting Burger on tenterhooks and keeping him guessing. I thought we should hold on to it for as long as we could."

On September 4, Burger filed suit against the *Weekly Mail* in the magistrate's court in Johannesburg charging *crimen injuria* or "offense against dignity," an offense unique to South African common law. The premise was that, in bugging Burger, the newspaper had injured his dignity and violated his privacy. It would come up for a hearing soon.

How to plead?

On September 5, 1992, Harber scheduled a meeting with Dison to decide whether he should plead guilty or innocent. Also invited was Eric Dane, a barrister (trial lawyer) specializing in criminal law whom Dison had briefed to represent Harber in court. "The *Weekly Mail* has had several cases in various courts of law and litigation is nothing new; we would always, as a matter of routine, plead *not* guilty," says Harber. "But this seemed an exceptional situation."

First, past legal cases against the *Weekly Mail* concerned articles published in the newspaper. Here nothing had been printed; there was no reporting per se. Second, the *Weekly Mail* had never before willfully flouted provisions of law; it had instead found ways

---

[1] Author's interview with David Dison in Johannesburg on January 17, 2012. All further quotations from Dison, unless otherwise attributed, are from this interview.

[2] Author's interview with Anton Harber in Johannesburg on January 16, 2012. All further quotations from Harber, unless otherwise attributed, are from this interview.

[3] Editorial, "Other men's business?" Weekly Mail, September 4-10, 1992.

to circumvent them. Bugging Burger's office was clearly illegal. Third, the majority of previous lawsuits came under civil law, whereas *crimen injuria* was an offence under criminal law.

When the three men gathered, they considered the situation. The matter was more complicated than it seemed. True, the *Mail* had broken the law against eavesdropping; the evidence against it was overwhelming. But there was another element, more difficult to characterize. This case presented an opportunity to set a precedent for freedom of the press in the newly emerging, post----apartheid South Africa.

Press freedom. If the *Weekly Mail* pled guilty, the case would remain trivial—a petty instance of eavesdropping that was caught and punished. But if it decided to plead not guilty, that could strengthen two crucial press freedoms which, while not embedded in any particular statutes, were part of South African Common Law—but were little exercised. The first possible defense that a news organization could muster against bugging charges was that it was acting in the public interest. The second was that it had turned to eavesdropping only as a last resort in order to obtain information essential for the public to know.

South Africa was emerging from decades of press controls. Over 100 laws, both major and minor, restricted its ability to gather news independently. The laws were part of a bureaucratic structure designed to sustain apartheid. For example, the Internal Security Act made it an offence to publish anything said or written by persons banned under the Act—which included a large number of influential activists and leaders. The Prisons Act inhibited press coverage of events behind prison walls in a country with a high prison population.

In June 1986, a State of Emergency had brought further restrictions on the press. The emergency was lifted in February 1990, but the transition to democracy that followed took six years. In the meantime, the media found itself in a legal gray zone. There was general uncertainty, even among lawyers, about how the courts would interpret the media laws. If the *Weekly Mail* pleaded not guilty on the grounds that it was acting in the public interest, that would test the concept in the emerging legal system. If it won, the media's right to pursue the public interest, even where it meant skirting legal restrictions, would be reinforced.

Guilty or Not?

Harber, Dison and Dane reviewed the options. There were advantages and disadvantages on both sides. If the *Weekly Mail* pled guilty, there would be no cross----examination. "We wanted to avoid cross----examination of Harber by the prosecution," recalls Dane, because it would place the *Weekly Mail* on the defensive, diminishing its public image and stature.[4] *Crimen injuria* did not usually carry onerous sentences. But the mere sentencing, however light, would affect Harber's as well as the paper's reputation. A guilty

[4] Author's interview with Eric Dane in Johannesburg on January 19, 2012. All further quotations from Dane, unless otherwise attributed, are from this interview.

plea could also damage the credibility of the media in general during the critical period of transition to democracy.

Pleading not guilty seemed at the very least a strike for press freedom, an opportunity to stand proud on principle. It would also give Dane, as Harber's defense attorney, a chance to cross---examine Burger. "It could well be possible during cross examination," says Dane, "to elicit the proof that the *Weekly Mail* was after regarding the existence of the Third Force" [illegal right----wing paramilitary].

But the not----guilty plea suffered from a Don Quixote----like quality of tilting at windmills. The argument for public interest would be tough to make: there was no evidence that Burger had been planning anything illegal on the day the *Weekly Mail* bugged his office. Moreover, it would be time consuming. Judging from other cases, it could last as long as four years. Did Harber and his colleagues want to start down a lengthy and expensive legal path? Could the paper afford the distraction, not to mention the legal fees, just at the moment that the media would need all its resources to cover the emergence of a new era?