IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 69/05

In the matter between :-

NM	First Applicant
SM	Second Applicant
LH	Third Applicant

and

CHARLENE SMITH	First Respondent
PATRICIA DE LILLE	Second Respondent
NEW AFRICA BOOKS (PTY) LTD	Third Respondent

In the *ex parte* application to be admitted as an *amicus curiae:*

THE FREEDOM OF EXPRESSION INSTITUTE	Applicant

FOUNDING AFFIDAVIT

I, the undersigned

JANE DUNCAN

do hereby make oath and say that:

1. I am the Executive Director of the Freedom of Expression Institute ("FXI"). I am duly authorised to depose to this affidavit and to bring this application on behalf of the FXI, to be admitted as an *amicus curiae*.

2. The facts stated herein are within my personal knowledge unless the contrary appears either expressly or by necessary implication, and are true and correct.

3. The FXI is a not for profit non-governmental organisation which is capable of suing and of being sued and which has its principal offices at 21st Floor, Sable Centre, 41 de Korte Street, Braamfontein, Johannesburg.

4. In terms of its Constitution, the FXI has as its principal object the promotion of freedom of expression in South Africa and the opposing of censorship. A copy of its Constitution is attached marked "**JD1**" hereto. The FXI has a number of objects subsidiary to this including:

   4.1. Opposing any limitations imposed on the freedom of expression, be they at the instance of the State, private sector or civil society, that in the opinion of the FXI constitutes censorship;

   4.2. The promotion of public debate and discourse around the limits of freedom of expression;

4.3. The defence, support and extension of solidarity to the victims of censorship; and

4.4. The development of South African law in respect of the rights to freedom of expression.

5. The FXI has been admitted as an *amicus curiae* by various courts, including this Court, in cases involving freedom of expression. The cases in which it has been admitted as an amicus curiae include:

5.1 *Laugh-It-Off Promotions cc v South African Breweries International (Finance) B.V. t/a Sabmark International* in both the Constitutional Court (2005 (8) BCLR 743 (CC)) and the Supreme Court of Appeal (2005 (2) SA 46 (SCA)); and

5.2 *Munusamy v Hefer NO and Others* 2004 (5) SA 112 (O).

6. The purpose of this application is to seek the leave of this Court to be admitted as *amicus curiae* in the above matter.

7. In accordance with the Rule 10 of this Court, the FXI wrote to the attorneys of both the Applicants and the Respondents in this matter on 13 April 2006, requesting their consent to FXI's intervention as *amicus curiae*. The attorneys for the Respondents have indicated that they consent to the FXI's intervention as *amicus curiae* while the attorneys for the Applicants have refused to consent to the FXI's intervention. I attach copies of the relevant letters marked "**JD2**" - "**JD5**" respectively.

8. It is respectfully submitted that the FXI has an interest in the issues arising in these proceedings due to the nature and objects of the organisation and the fact that this case raises issues of considerable public importance which may have an impact far beyond the present litigants.

POSITION TO BE ADOPTED BY THE FXI AND SUBMISSIONS TO BE ADVANCED

9. The FXI has had the opportunity of reading the heads of argument submitted by the parties in this matter as well as the judgment of Schwartzman J in the High Court.

10. It is submitted that the FXI will be of assistance to this Court in advancing free expression arguments and bringing to bear comparable foreign case law and experience on these issues. In this regard the FXI seeks to provide argument on those issues which are not raised adequately or at all by the parties.

11. The FXI is of the view that the dispute between the parties in this matter raises fundamental questions which are new in South African law regarding the ambit of the constitutional right to freedom of expression and, in particular, its effect on the development of our law regarding breach of privacy and defamation.

12. The Applicants' case is that the common law is inconsistent with the Constitution insofar as it does not recognise negligence as being sufficient to satisfy the fault requirement of the *actio iniuriarum*.

13. If admitted, the FXI will adopt the position that it is neither necessary nor desirable for the common law to be developed to include negligence as a ground of fault for the *actio iniuriarum.* Such an approach, it will be submitted, will unjustifiably limit the ambit of the expression right and will have a significant chilling effect on freedom of expression in South Africa.

14. The FXI is particularly concerned about the effect that holding defendants liable on grounds of negligence would have on individual defendants, as opposed to media defendants. As is set out more fully below, individual defendants would be particularly at risk for being held liable if this development took place, because they do not have the resources, skills or wherewithal to make any proper judgment on what constitutes negligence.

15. In their heads of argument, the parties have failed to give any or adequate attention to these issues:

    15.1. The Applicants fail to deal at all with the relative value to be given to freedom of expression in developing the common law. The Applicants also do not discuss the distinction between media defendants and individual defendants and certainly do

not limit their submissions on the development of the common law to media defendants.

15.2. Save to indicate that the *Pakendorf v De Flamingh* 1982 (3) SA 146 (AD) and *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA*)* judgments were concerned only with media defendants, the Respondents also appear not to make any submissions on the distinction between individuals and media defendants.

16. The FXI advises and represents both individual and media litigants and is of the view that the Applicants' argument has potential ramifications beyond the scope of this case. If accepted, it will have a particularly adverse effect on the ability of individuals to exercise their freedom of expression.

THE POSITION OF INDIVIDUAL DEFENDANTS

17. It is submitted that individual defendants are in a particularly vulnerable position as regards the effect that the Applicants' contentions would have on their freedom of expression.

18. This vulnerability flows mainly from the difficulty that individuals will have in determining what kinds of speech they may lawfully engage in.

19. An action under the *actio iniuriarum* is different to other delictual claims in that the lawfulness or unlawfulness of a particular action will not

always be obvious to an individual and requires a detailed and nuanced understanding of the relevant legal principles involved.

20. For example, an individual can easily and legitimately be expected to recognise that it is unlawful for him or her to damage another's property. However, it is much more difficult for that individual to realise precisely when and under what circumstances it is unlawful for him or her speak of another person's information or robustly criticise another person.

21. This is because our law relating to unlawful breach of privacy and defamation is complicated and nuanced. Indeed, these issues are often the subject of lengthy debate between legal practitioners before our courts and even between courts.

22. In light of this, the FXI submits that it can never be appropriate to hold individuals liable on grounds of negligence where they have made incorrect value judgments and assessments. If they did not intend to to breach privacy or engage in defamation, they should not be held liable at all. This is particularly so where their statements and/or conduct might involve relatively spur-of-the-moment decisions without forethought or consideration of the impact of those statements.

23. It is submitted that it is for this reason that the common law requires intention rather than negligence as the element of fault of the *actio iniuriarum.* It is notable that none of the above issues have been dealt with by the parties to this application.

THE NATURE AND ROLE OF FREEDOM OF EXPRESSION GENERALLY

24. This case raises significant issues of freedom of expression and neither party has dealt with the nature and content of freedom of expression or, indeed, the right to privacy in any substantive way.

25. Freedom of expression is a central tenet of democracy in South Africa and is recognised in both foreign and international law as one of the essential foundations of a democratic society. Our courts have adopted a broad approach to freedom of expression and have embraced the notion that expression lies at the heart of democracy.

26. I am advised that this Court has also accepted that freedom of expression is part of a web of mutually supporting rights in the Constitution and that these rights taken together *inter alia* protect the right of individuals to form and express opinions.

27. This approach is reflected in the jurisprudence of the several other countries including the United States, England, India and Canada.

28. South African Courts are obliged, under the Constitution, to develop and interpret the fundamental rights protected in the Constitution in a manner that is particular to our own society. However, the FXI will submit that in developing an analysis of freedom of expression under the Constitution, and in delineating the scope of this right with respect to both individuals as well as the media, the analyses and approaches adopted by foreign courts are of great assistance.

29. Our Courts are enjoined under section 39 of the Constitution to consider foreign law. Notably, neither of the parties in this application have provided any substantive analysis of the position taken in foreign jurisdictions with respect to freedom of expression.

30. The FXI therefore believe that it would be of assistance to the Court in advancing free expression arguments generally, and in bringing to bear the comparable foreign case law and experience on the issues.

CONCLUSION

31. It is therefore submitted that the FXI will be of assistance to this Court in making submissions on the impact of the Applicants' argument on freedom of expression generally and, in particular, the effects on individual defendants.

32. If the Applicants' argument is accepted, this case will have ramifications for individuals and media defendants far beyond the scope of the present case and the present litigants. It is respectfully submitted that the FXI is well positioned to provide this Court with assistance in addressing the broader impact of the case.

33. The FXI will require no more than 30 minutes at the hearing of this matter to make their submissions. The FXI will not seek to adduce any evidence. The FXI requests that it be allowed to submit written

argument in advance of the hearing, in accordance with such time limits as may be imposed by this Court.

34. In these circumstances I pray that this Court grants an order in terms of the notice of motion to which this founding affidavit is annexed.

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Deponent

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this 20th day of April 2006 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

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COMMISSIONER OF OATHS