IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 69/05

In the matter between :-

N M	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
THE FREEDOM OF EXPRESSION INSTITUTE	*Amicus Curiae*

AMICUS CURIAE'S HEADS OF ARGUMENT

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1. On Wednesday 3 May 2006, the FXI received the Directions issued by the Chief Justice dated 2 May 2006 instructing the FXI to file heads of argument in this matter by no later than Friday 5 May 2006.

2. Due to the short time available to us, our submissions are brief and address only the following two issues:

   2.1. The importance of freedom of expression and the constitutional protection provided to it; and

   2.2. The effect on freedom of expression of the Applicants' contention that the common law ought to be developed such that that negligence is sufficient to satisfy the fault requirement of the *actio iniuriarum,* even for individual defendants.

THE IMPORTANCE OF FREEDOM OF EXPRESSION AND THE CONSTITUTIONAL PROTECTION PROVIDED TO IT

3. This Court has repeatedly recognised the important role that is played in our constitutional dispensation by the right to freedom of expression. It would therefore, in most circumstances, not be necessary to deal with this point before this Court.

4. However, in our view, it is necessary for us to deal with the importance of the right to freedom of expression in this matter, because the Applicants appear not to recognise this principle at all in their

submissions. Indeed, the fact that freedom of expression is a fundamental right that must be taken into account in developing the common law is, for all practical intents and purposes, not even mentioned by the Applicants, let alone properly assessed and considered.

5. Section 16(1) of the Constitution provides:

> **"(1) Everyone has the right to freedom of expression which includes –**
>
> **(a) freedom of the press and other media;**
>
> **(b) freedom to receive or impart information or ideas;**
>
> **(c) freedom of artistic creativity; and**
>
> **(d) academic freedom and freedom of scientific research."**

6. Freedom of expression is critical to an open and democratic society based on freedom and equality. Without freedom of expression, openness is severely compromised, and freedom itself is diminished and endangered.

7. In its first judgment dealing with freedom of expression, this Court unanimously articulated the values underlying the guarantee of freedom of expression in the following way:

> **"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need**

to be able to hear, form and express opinions and views freely on a wide range of matters."

***South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at para 7**

8. This Court recognised (at para 8) that freedom of expression is one of a "**web of mutually supporting rights**" closely related to freedom of religion, belief and opinion, the right to dignity, the right to freedom of association, the right to vote and to stand for public office and the right to assembly:

> **"These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."**

9. This approach has been consistently followed by this Court.

***S v Mamabolo* 2001 (3) SA 409 (CC)**

***Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC)**

***Khumalo v Holomisa* 2002 (5) SA 401 (CC)**

***Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC)**

10. Most recently, this Court reasoned as follows:

> **"The importance of freedom of expression has been articulated and underscored by this and other Courts in this country and indeed in other open democracies and by its inclusion in international law instruments. Suffice it to repeat that freedom of expression is a vital incidence of dignity, equal worth and freedom. It carries its own inherent worth and serves a collection of other intertwined constitutional ends in an open and democratic society."**
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> ***Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) at para 44**

11. The Supreme Court of Appeal too has recognised the critical importance of freedom of expression. In ***National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1207J-1208C**, while recognising the importance of protecting reputation, the SCA unanimously held that:

> **"The freedom of expression is equally important. Professor van der Westhuizen (in Van Wyk et al: *Rights and Constitutionalism: The New South African Legal Order* at 264) describes it as essential in any attempt to build a democratic social and political order. Elsewhere it has been referred to as 'the matrix, the indispensable condition of nearly every other form of freedom' (*Palko v. State of Connecticut* 302 US 319 (1937) at 327); and in the majority judgment of the European Court of Human Rights in *Handyside v. United Kingdom* (1976) 1 EHRR 737 at 754 it was said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. That this was not an overstatement appears from McIntyre J's reminder in *Retail, Wholesale & Department Store Union, Local 580 et al v. Dolphin Delivery Limited* (1987) 33 DLR (4th) 174 (SCC) at 183 that**
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> > **'Freedom of expression ... is one of the fundamental concepts that has formed the basis for the historical**

development of the political, social and educational institutions of Western society.'"

12. In stressing the importance of the right to freedom of expression, we do not wish to be understood to be suggesting that that it is an absolute right, nor that it out-ranks all other rights in the Bill of Rights. This is not the case.

> ***S v Mamabolo* 2001 (3) SA 409 (CC) at para 41**
>
> ***Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) at para 45**

13. However, the right to freedom of expression is and remains a fundamental right that is critical to our democracy.

14. It is therefore inappropriate for the Applicants to give it no weight at all when they propose developing the common law relating to the *actio iniuriarum.* Any development of the *actio iniuriarum* has the potential to have a profound effect on the right to freedom of expression and how it is exercised on a daily basis by the media and by individuals. As such, the right to freedom of expression must be considered and given real weight in determining whether to develop the common law and, if so, in what manner.

THE FAULT REQUIREMENT OF THE *ACTIO INIURIARUM* WITH REGARD TO INDIVIDUAL DEFENDANTS

15. A core component of the Applicant's case is that the common law regarding the *actio iniuriarum* ought to be developed by this Court to allow defendants to be held liable on the basis of negligence, rather than only when the required *animus inuiriandi* is present.

16. In making these submissions, the Applicants in no way limit them to media defendants. Instead, their proposed development appears to apply to media defendants and to individual defendants alike.

17. In the FXI's submission, 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 would, we submit, unjustifiably limit the ambit of the expression right and significantly chill freedom of expression in South Africa. These concerns apply in the context of both media defendants and individual defendants.

18. The Respondents have addressed at length the appropriate position in relation to media defendants. Thus, mindful of the limited role of an amicus curiae, in these submissions we focus largely on the effect of the Applicants' proposed development on individual defendants.

19. In this regard, it is important to bear in mind that the Applicants do not limit their proposed development of the common law to actions for breach of privacy. Rather, the effect of their approach seems to be that

in all actions relying on the *actio iniuriarum,* negligence should be sufficient to satisfy the fault requirement. The Applicant's proposed development thus goes far beyond the boundaries of this case and questions of privacy. It is our submission that if the Applicants' argument is adopted, it would also have a fundamental effect on our law of defamation.

20. We turn now to deal with the current common law position. In 1982, the decision of the Appellate Division in ***Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A)** made clear that media defendants in an action for defamation could not escape liability on the grounds that the publication in question was not intentionally injurious. This meant that media defendants were subject to strict liability for the publication of defamatory matter.

21. The decision in ***Pakendorf*** has, of course, since been overturned by the decision of the Supreme Court of Appeal in ***National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA)**. There, the SCA rejected the strict liability approach for media defendants and also introduced a reasonableness defence for such defendants.

22. However, both ***Pakendorf*** and ***Bogoshi*** concerned only media defendants and their reasoning explicitly addresses itself to the position and effect of media defendants – not individual defendants. They therefore left unchanged the position that <u>individual</u> defendants who do not have the requisite *animus iniuriandi* are not liable for defamation.

Therefore, for individual defendants, as our law stands, negligence is insufficient to satisfy the fault requirement of the *actio iniuriarum.*

> ***Maisel v Van Naeren*** **1960 (4) SA 836 (C)**
>
> ***Suid-Afrikaanse Uitsaaikorporasie v O'Malley*** **1977 (3) SA 394 (A)**

23. The position is the same in respect of actions based on the *actio iniuriarum* for breaches of privacy rather than defamation. The following principle is conveniently summarised from the relevant cases by Neethling et al:

> **"Apart from the wrongfulness of the infringement of privacy, intent or *animus iniuriandi* is also required before liability can be established. This means that the perpetrator must have directed his will to violating the privacy of the prejudiced party (direction of the will), knowing that such violation would (possibly) be wrongful (consciousness of wrongfulness). In the absence of any of these elements, there is no question of intent. Where, for example, a person *bona fide* but incorrectly believes that she is entering her own hotel room, the intent to infringe privacy is certainly lacking and she should go free.**
>
> **Just as in the case with infringement of dignity, *animus iniuriandi* is presumed as soon as the wrongful infringement of privacy has been proved. The defendant must then rebut the presumption."**
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> **<u>Neethlings' Law of Personality</u> (1996) pp. 276-7**

24. That the requirement of animus iniuriandi continues to apply to actions for breach of privacy against individual defendants is made clear by the decision of the Appellate Division in ***Jansen van Vuuren and Another NNO v Kruger*** **1993 (4) SA 842 (A) at 849C-G, 856H-857F.**

25. We submit therefore that it is clear that the Applicants' contentions relating to the fault requirement of the *actio iniuriarum* requires a substantial and far-reaching change to the existing common law position.

26. We submit further that such a change would pose a real threat to the right to freedom of expression, particularly regarding individual defendants.

27. If the Applicants' contentions are accepted, individual defendants would be particularly at risk for being held liable for defamation and breach of privacy and would be particularly likely to engage in self-censorship in order to avoid this liability. This is because they generally do not have the resources, skills or wherewithal to make any proper judgment on what constitutes negligence and what constitutes an unlawful act in this context.

28. The quote above from Neethling et al demonstrates that *animus iniuriandi* has two components: direction of the will and consciousness of unlawfulness. It is crucial to understand that in most cases where *animus iniuriandi* is disputed, it will be the second of these elements – consciousness of unlawfulness – that is at stake. Normally it will not be in dispute that X's actions were directed at Y. The real question will be whether X knew that his or actions were unlawful.

29. 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. It will require a detailed and nuanced understanding of the relevant legal principles involved.

30. For example, an individual can easily and legitimately be expected to recognise when it is unlawful for him or her to damage another's property or person. 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 under what circumstances legitimate robust criticism crosses the line and becomes unlawful defamation.

31. This is because our law relating to unlawful breach of privacy and defamation is complicated and nuanced. In particular, debates over when particular defences such as qualified privilege might be available are complex and sophisticated. Indeed, issues of unlawfulness in this area are often the subject of lengthy debate between legal practitioners before our courts and even between courts. This case demonstrates precisely the difficulties in drawing the lines in this regard.

32. What this means, in practical terms, is that the Applicants' proposals are likely to lead to individuals engaging in self-censorship, deciding not to speak even in circumstances when, objectively considered after the fact, it might have been reasonable and lawful for them to do so. In ***Bogoshi,*** Hefer JA dealt with the chilling effect as follows:

> **"Much has been written about the 'chilling' effect of defamation actions but nothing can be more chilling than**

the prospect of being mulcted in damages for even the slightest error."

***Bogoshi* (supra) at 1210H-I**

33. Hefer JA was, of course, speaking about the effect of strict liability for media defendants. But the Applicants' proposals raise precisely the same fear – a chilling effect on speech where lawful speech is prevented because of an ordinary individual fears the consequences if he or she makes an incorrect judgment call.

34. Freedom of expression needs "**breathing space to survive**". It is for this reason that the US Supreme Court has recognised that, in the context of factual errors by media defendants, "**punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press**".

***N.A.A.C.P. v Button* 371 U.S. 415, 433 (1963)**
***Gertz v Robert Welch Inc* 418 U.S. 323, 340 (1974)**

35. We therefore submit that it can never be appropriate to hold individuals liable on the grounds of negligence where they made incorrect value judgments and assessments. If they did not intend to act unlawfully by breaching privacy or engaging 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.

36. If the Applicants' proposed development of the common law is accepted, this case will have ramifications for individuals far beyond the scope of the present case and the present litigants. It is respectfully submitted that such a development is unnecessary and would have a seriously detrimental effect on the exercise of freedom of expression.

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5 May 2006

TABLE OF CASES

1. *Gertz v Robert Welch Inc* 418 U.S. 323, 340 (1974)
2. *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC)
3. *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A)
4. *Khumalo v Holomisa* 2002 (5) SA 401 (CC)
5. *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC)
6. *Maisel v Van Naeren* 1960 (4) SA 836 (C)
7. *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1207J-1208C,
8. *N.A.A.C.P. v Button* 371 U.S. 415, 433 (1963)
9. *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A)
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11. *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC)
12. *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A)

AUTHORITIES

Neethling et al "Neethlings Law of Personality" (1996)