

FREEDOM OF EXPRESSION INSTITUTE

LAUNCH OF THE FXI LAW CLINIC

23 AUGUST 2006

In its first major decision dealing with the constitutional guarantee of freedom of expression the Constitutional Court stated:

“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
1999 (4) SA 469 (CC) at para 7

The Court went on to state (at para 8) that freedom of expression –

“ ... is one of a web of mutually supporting rights in the Constitution. It is closely related to freedom of religion, belief and opinion (Section 15), the right to dignity (Section 10), as well as the right to freedom of association (Section 18), the right to vote and to stand for public office (Section 19) and the right to assembly (Section 17). 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 opinion. 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 to 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.”

The context in which these observations were made was unusual. The case was not concerned with the kind of issue that conventionally arises when freedom of expression is engaged. It involved a challenge to a prohibition in the Defence Act 44 of 1957 on membership of trade unions by members of the permanent force. It also entailed an attack upon another provision of the Defence Act which precluded members of the Defence Force from engaging in acts of public protest which was widely defined to preclude members of the Defence Force from forming, airing and hearing opinions on matters of public interest and concern. In the result, the Constitutional Court declared both provisions to be in conflict with the guarantee of freedom of expression. Since this decision, the Constitutional Court has not departed from this approach. If anything, it has been strengthened.

This background poses the inevitable question: why do we need a Freedom of Expression Institute at all if our Constitution and the Constitutional Court have laid down such an impressive foundation for the protection of freedom of expression? I think there are four reasons why the Freedom of Expression Institute is as important now as it has ever been.

First, there is a disjuncture between the legal protection of free expression and the practice of free expression. While South Africa enjoys the greatest legal protection of free expression in its history, we are a long way from a society which truly fosters and respects open debate. There is an unfortunate tendency within our society to denigrate one's opponent or attribute to one's opponents an ulterior purpose instead of engaging with the merits of the debate. Politicians are adept at this but it occurs frequently in civil society as well.

Second, it would be naïve to believe that simply because our Constitution protects freedom of expression there are no threats to free expression. Recent legislative proposals to amend the Telecommunications Act and the current proposals to amend the Films and Publications Act are surely timely reminders that freedom of expression is not safe from legislative encroachment.

Third, the parameters of free expression remain highly contested. This is well illustrated by the divergence of opinion in the courts concerning the intersection between trade mark protection and freedom of expression (*Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae)* 2006

(1) SA 144 (CC)). There are still many battles to be fought around freedom of expression and it is important that these cases be contested.

Fourth, it would be foolish to be complacent about the undoubted gains that have been achieved in our country. South Africa under apartheid was a society devastated by censorship. This occurred not simply by the crude banning of films and publications but in the form of silencing individuals and entire organisations and outlawing ideologies. The victory of democracy requires protection and nurturing. It is critical that hard won victories be protected.

The Freedom of Expression Institute has played an important role in establishing the foundational principles articulated by the Constitutional Court. It has intervened in a number of matters as a friend of the Court in ways which I believe have been vitally important. The establishment of a law clinic by the Freedom of Expression Institute to advance and strengthen rights to freedom of expression and access to information is an important and welcome development. I have no doubt that in years to come, its importance will be felt particularly in the relatively new area of access to information. I wish the FXI and their attorney, Simon Delaney, every success in this venture.

G. J. MARCUS SC

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