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Several media freedom watchdogs have noted with concern what they perceive to be the declining state of media freedom in South Africa, although they acknowledge that the media are substantially free. South Africa ranks 44th out of 168 countries in Reporters Without Borders' (RSF's) latest index of press freedom - down from 31st position in the 2005 index, but still well within the top 50 countries said to have "genuine press freedom". According to Freedom House, South Africaôs political rights status declined from 1 to 2. In its country report, Freedom House stated the following: ôPress freedom in South Africa deteriorated in 2006, as the government continued to act on its sensitivity to criticism by restricting private media and compromising the editorial independence of the SABCô

According to the Media Institute of Southern Africa, ôThe year 2005 witnessed a marked increase in the number of incidents where the media was censored, either through gagging orders or granting of exorbitant damages in civil or criminal defamation suits. This development holds dire consequences for media freedom, diversity and pluralism. Most glaringly in South Africa, the Johannesburg High Court's banning of an article in the *Mail & Guardian* newspaper's coverage of the ôOilgate' scandal presented the genuine fear that the judgement may open the way for others seeking to prevent newspapers from publishing articles about their questionable or irregular conduct by enabling them to obtain legal censorship of the media through the courtsô

The findings of these watchdog organisations accord with the experiences of the FXI, which has been called on to deal with a growing number of media freedom cases. These are described in detail in our latest annual report (attached). These shifts mean that the Media and ICTôs Programme work needs to focus more on media freedom issues, in addition to its media capacity building work.

The FXI has attempted to address these growing pressures on media freedom. However, as has been noted in the past, the FXI has taken a strategic decision to prioritise the challenges of free expression experienced by, particularly, poor communities and individuals who are most vulnerable from a socio-economic sense as well as from the perspective of freedom of expression.

Currently, then, the work of the FXI could be said to include two broad areas: 1) the ñclassicalò cases of censorship as the FXI has been dealing with over the past 12 years ï related to denial of free expression to the media, journalists and other individuals in different arenas, and 2) the denial of free expression to poor communities and movements, committees and organisations representing the poor. The latter usually means protecting and defending the right to gather, protest, march, publish, etc.

As far the second of the two above areas of work is concerned, we have adopted a dual approach:

these rights through advocacy, legal means, and,

wer poor communities and organisations of the poor so that they might themselves be able to deal with these denials of free expression and with repression hat they might face.

The second approach is particularly important when we realise that the scale of such denials of free expression is huge and spread out across the country and that the FXI is not able to service all areas across the country adequately in terms of its legal and advocacy work. The FXI has worked tirelessly to develop relationship with various movements, organisations and committees that have faced repression in the recent past and to assist them within the bounds of our mandate.

This report covers both the above areas of work and will, in regard to the second area, also highlight the two approaches mentioned above for the period January 2007 to December 2007.

In terms of broad trends, and apart from the growing pressures on media freedom, it seems that the right to protest is still under pressure. Recent court victories highlight the argument repeatedly made by the FXI that the Regulations of Gatherings Act is being misapplied and being abused by local authorities across the country in a manner that is unconstitutional and illegal. Unless local authorities and the police begin implementing the Regulation of Gatherings Act in a manner different from the way it currently is, the constitutional right to freedom of expression (as well as other rights such as the right to free association and speech) will be severely compromised and the space for expressing dissent will rapidly be constrained. The result could easily be South Africa witnessing more deaths during protests and more sedition charges.

The cases of eThekwini and Johannesburg (as well as the earlier cases of Harrismith, Middelburg, Khutsong, etc) highlight the constitutional and legal dangers that exist with local authorities ignorant of the spirit and letter of the RGA being in positions where they can allow or deny basic civil and political rights. It highlights, too, the need for local authorities to be trained in what the RGA serves to achieve and how those objectives might be attained.

The FXI has also noted a growing trend around employees right to freedom of expression, and has intervened in a number of cases where employees have been disciplined or even dismissed for criticising their employers.

The past year has also seen intense engagement by the FXI with issues related to the public broadcaster, the SABC, and censorship. The public broadcasting issue that attracted the most attention in the past six months was the SABC decision to halt the screening of the documentary on President Thabo Mbeki as part of the SABCôs ñUnauthorisedò series. The FXI played a role in lobbying the SABC and having ongoing discussions with both the SABC and the producers, advising the producers and attempting to organise a

ucers to discuss, more broadly, the question of ABC and independent producers.

Another SABC-related issue the ACP has dealt with is the allegations of an SABC ñblacklistò of analysts that should not be interviewed on the news and current affairs programmes. The fiasco around this matter (following closely on the heels of the Thabo Mbeki documentary controversy) created much embarrassment for the SABC. The SABC has set up a commission of enquiry to look into it, and responded in an inappropriate manner to its findings, precipitating a mass exodus from the broadcaster. The FXI was also heavily involved in a campaign for a new SABC Board, given the failures of the old Board to address growing crises at the broadcaster.

Therefore the bulk of the FXIôs work in the past year has related to threats to the right to protest, academic freedom, freedom of expression in the workplace and in public institutions, and the role of the public broadcaster.

2. Networking and Publicity

2.1 *Domestic Networking*

Since the FXIôs inception, it has forged close bonds with other media groups working to ensure media freedom and diversity, including the South African National Editors Forum, the South African chapter of the Media Institute of Southern Africa and the Media Workers Association of South Africa. These organisations, led by the FXI, have on several occasions made joint *amicus curiae* submissions to court in precedent-setting media freedom cases.

The FXI receives frequent requests for assistance from the full range of print and online publications: from mainstream newspapers, such as the *Mail & Guardian*, through parody websites and t-shirt producers, to community newspapers who cannot afford legal representation to defend defamation and trademark-infringement cases.

In the past two years, the FXI has been approached by social movements such as the Landless Peoples Movement, the Anti Privatisation Forum and the Anti Evictions Campaign to assist with legal capacity in the form of legal advice and representation. Much of this work revolves around gatherings that have been prohibited by local authorities.

The FXI has actively cultivated links with similar public-interest law organisations on a mutually beneficial basis, including the Atlantic Philanthropiesô Public Interest Law Clearing House; Legal Aid Board; the South African Human Rights Commission, pro bono units of law firms, the Legal Resources Centre, the South African Human Rights Commission, Lawyers for Human Rights, the Wits Law Clinic and other non-profit organisations and statutory bodies.

The FXI has also worked to establish constructive relationships with governmental actors. Particularly in regards to the Regulation of Gatherings

g the authorities in various ways. We have met ner of Police, Perumal Naidoo, to discuss the other officials from SAPS in Gauteng, together with senior officers in Johannesburg Metro Police. We have also made attempts to meet with Minister of Safety and Security, Charles Nqakula, on the issue. Our appeal to Minister Nqakula will be to set national standards which must be met in the implementation of the RGA and to ensure that proper training is provided both for metro police and for SAPS members on the provisions and spirit of the RGA.

As and when live examples of censorship and repression come up during the course of project implementation, whether or not it results in litigation or precedent-setting judgements and the FXI and the stakeholder organisations agree that publicity needs to be given to these cases to ensure redress, the FXI draws on its extensive contacts in the media to ensure publicity. In addition, the FXI also makes use of local level and community media to publicise issues of local interest and relevance.

2.2 *Regional, Continental and International Networking*

The FXI is a member of the Network of African Freedom of Expression Organisations (NAFEO), the International Freedom of Expression Exchange (IFEX) and the International Media Lawyersô Association (IMLA). Through these institutions the FXI is to share information, formulate joint lobbying strategies and publicise freedom of expression victories and violations internationally.

2.2.1 *Network of African Freedom of Expression Organisations (NAFEO)*

The FXI is a founding member of NAFEO and, in October 2005, we attended its launch. The conference included 42 participants from 33 organizations dedicated to freedom of expression and media freedom in Africa. The conference was hosted by the Media Foundation for West Africa (MFWA), in partnership with Media Rights Agenda (MRA), Media Institute of Southern Africa (MISA) and Journalists en Danger (JED). In addition to the formation of the network, it was agreed that the MFWA would host the network for the time being, and that funds will be sought from Unesco to employ a co-ordinator.

The conference agreed to establish a network that will seek fundamentally to change over the next decade the environment for freedom of expression in Africa. Already the network has intervened in the deteriorating free expression environment in Ethiopia following that country's highly contested elections. Interventions are also being discussed in relation to the media freedom situation in the Gambia and Eritrea.

A follow up planning meeting took place in February in Brussels. At this meeting, planning took place around the above-mentioned interventions, and the situation in the Democratic Republic of the Congo was added to the list. At this meeting a discussion ensued about the particularly strategic role of the FXI in relation to the network. It was noted that South Africa has an influential

ng and peace building on the African continent, ot of sway in the Southern African Development frican Union (AU). The FXI could therefore use its proximity to the South African government to prevail on it to use this influence to address the media freedom situations in these conflict zones.

Nafeo has since employed a co-ordinator, and has decided to focus on the following 'hotspots': Eritrea, Ethiopia, Gambia, Tunisia and Zimbabwe. A summary of key decisions is attached.

Since then, Nafeo has been unable to meet again to review its work thus far, and funds need to be raised to enable it to do so.

2.2.2 *International Freedom of Expression Exchange (IFEX)*

The FXI continues to be an active member of IFEX, and its Executive Director, Jane Duncan, served on its Council for eighteen months until the middle of 2007, when she stepped down. As part of the IFERX Council, she was part of a team set up to review the hosting of IFEX by the Canadian Journalists for Free Expression and also assisted with the drafting of a Memorandum of Understanding between IFEX and the CJFE. She also participated in a strategic planning meeting in Toronto, Canada, in the buildup to IFEXôs General Meeting, to discuss the development of IFEXôs strategic plan.

The following action alerts were issued by the FXI through the IFEX Action Alert Network in 2007:

South Africa - 29 NOV 2007
Provincial government attempts to silence criticism of health services by legislative member

South Africa - 23 NOV 2007
Minister must follow due process to withhold information on "national security" grounds, says FXI

South Africa - 20 NOV 2007
Growing trend of employers silencing criticisms as three workers disciplined, one dismissed

South Africa - 10 OCT 2007
FXI, other organizations concerned over proposed board for public broadcaster, question group's "commitment to freedom of expression"

South Africa - 05 OCT 2007
FXI welcomes Constitutional Court judgment in "nose stud" case

South Africa - 24 AUG 2007
Prison doctor suspended, faces defamation suit for criticising government minister

South Africa - 15 AUG 2007
Hospital official suspended for speaking to media; "free speech in the public health system needs intensive care," says FXI

South Africa - 20 JUL 2007
Court gags media from publishing details of alleged corruption and abuse at public broadcaster

anning public events in Cape Town to prevent
eing expressed

South Africa - 08 JUN 2007
SABC withdraws controversial documentary for second time

South Africa - 07 JUN 2007
Following protests over apparent ban, SABC decides to screen edited version of controversial documentary

South Africa - 05 JUN 2007
FXI welcomes court ruling refusing Transport Department's request for pre-publication interdict against newspaper

South Africa - 04 JUN 2007
Revised Film and Publications Amendment Bill still problematic, says FXI

South Africa - 28 MAY 2007
Court dismisses state request for ban on reporting of sensitive nuclear-smuggling case

South Africa - 23 APR 2007
FXI protests state's attempt to close court from media during nuclear smuggling trial

South Africa/Zimbabwe - 05 APR 2007
South African response to Zimbabwe's freedom of expression crisis "grossly inadequate," says FXI

South Africa - 04 APR 2007
Court ruling protecting right to privacy in HIV-status case will have no chilling effect on freedom of expression, says FXI

South Africa - 02 APR 2007
Public broadcaster pressured into delaying television programme over content

South Africa - 23 MAR 2007
Professor suspended, faces disciplinary action, for criticising university's decisions

South Africa - 16 MAR 2007
Concerns over parliamentary processing of media bill without consultation with stakeholders

South Africa - 16 MAR 2007
Disciplinary hearing of critical academic creates climate of fear in university, warns FXI

South Africa - 22 FEB 2007
FXI argues before Constitutional Court on student's right to wear nose-stud as freedom of expression

South Africa - 22 FEB 2007
Court clears university professor of defamation; "a victory for increasingly threatened academic freedom", says FXI

South Africa - 22 FEB 2007
FXI lodges complaint over broadcasting corporation's inaction on blacklisting report

2.2.3 *International Media Lawyers' Association (IMLA)*

Clinic continued to participate in IMLA. The national Media Lawyers' Association are:

- To create a network of media lawyers that will facilitate the sharing of information, strategies and expertise on media law and media freedom defence work. The network, to be known as the International Media Lawyers' Association, will function as a forum for the exchange of information, ideas and strategies on critical issues in media law and policy, such as flawed criminal and civil defamation laws, freedom of broadcasting, and political and financial censorship.
- To develop a regional and international contacts-base that will enable its Members to draw on comparative experience and support each other in regional and national campaigns. The Association will provide the Members with professional support in addressing issues related to freedom of expression and information, and media law.
- To promote public interest-oriented work by lawyers with a specialization in media freedom issues, including media law and related areas.
- To assist the work of its Members in promoting the highest international standards on freedom of expression and information, including by raising awareness among media practitioners, the judiciary and the public at large.

2.3 *SAJA Report*

Introduction

This report comprises of the activities of the Southern African Journalists Association (SAJA) during the 2007 period.

The SAJA project commenced in 2006 supported by the Open Society Initiative for Southern Africa (OSISA) as a revival effort to re- build the regional body after it had collapsed in 2005. The revival project was organized into a twelve-month effort. The first six months (March to July 2006: the first reporting phase), focused on the appointment of a SAJA Coordinator to carry out the activities leading up to and including the organization of the Congress; the adoption of a SAJA constitution and the election of an executive committee for the revived SAJA.

The second phase (August 2006 to February 2007) sought to achieve the following objectives:

- The development of a SAJA institutional plan and programme of action in consultation with the executive committee;

- A formal elaboration of regional networking activities with like minded organizations at both regional and national levels; and

ntry union needs with a view to developing a
n for SAJA members.

All the project phases -first and second -were successfully completed.

The project has just commenced with the support of OSISA to roll out a regional development and action plan, which is a culmination of the above-mentioned phases. The implementation of the plan commenced last month.

Activities undertaken under the SAJA project 2007

An important milestone under the first and second phases of the project was the launch of the union through the holding of congress and most importantly, an assessment of country union needs and subsequent development of a programme of action for the regional body were crucial achievements. These culminated into the production of an institutional plan and programme of action for SAJA, forming the essence of what is called the SAJA Regional Trade Union Development and Action Plan. This plan also defines in detail the activities to be undertaken and outputs envisaged under it.

The project was also supported by the Freidrich Ebert Stiftung, which supported the holding of congress comprising of representatives from all SADC media and journalists unions and associations.

The project has started implementing a regional development plan developed and adopted during congress by the SAJA membership and subsequently the executive committee. The implementation process commenced in May 2007.

The implementation of the regional development plan envisages the achievement of the following objectives under the current OSISA contract:

- Launching of unions in Lesotho and Swaziland new region- wide programme of action and a national journalistsô trade unions development plan has been adopted democratically;
- Development of campaign materials to publicise SAJAôs programme of action in SADC;
- Development of a media strategy to respond to infractions of media freedom, the arrest of journalists and any conduct that compromises the work of the media in the region;
- A thorough and informed baseline report on the state of SAJA union members and their challenges;
- Capacity building of SAJA unions;
- Holding of training seminars for SAJA unions in Malawi, Swaziland, Botswana, Zambia and Namibia;

rengthening of SAJA and the establishment and
g networks in the region.

These activities have since been undertaken, and further funds have been raised from OSISA to continue the work of the SAJA, which will establish itself as a separate organisation from 2008 onwards. The FXI therefore considers its role in bringing SAJA into being as concluded.

2.4 *Publicity and Media Coverage*

A considerable amount of work has been done in this area. As a result, the FXI is regularly called upon by the media to comment on matters that relate to freedom of expression and to make presentations in seminars, workshops and conferences. On average, the FXI is called on to comment on matters relating to freedom of expression between five and twenty times per week.

Such media work is a cornerstone of the advocacy work of the FXI. Our participation in media interviews, talk shows, by writing op-eds for newspapers as well as advice to journalists on various issues has resulted in our being regarded as experts in a number of areas related to media and freedom of expression. Further, our media statements and media comments receive coverage not only in South Africa but also in media in other parts of the world.

In addition, the FXI has been an active participant in seminars, workshops and conferences, both locally and internationally. Through these public events, the programme has articulated its standpoints on a wide array of issues such as limitations to freedom of expression, media and democracy, and the implications of the "war against terror" on freedom of expression.

3. Research

Much of the work of the FXI requires a fair amount of research in order to:

- deepen and strengthen the analytical capacity and value of its interventions,
- lead to more informed lobbying and advocacy, including the investigation of alternative policy
- provide policymakers with viable alternatives and comprehensive policy positions and submission based on empirical evidence.

To this end, the FXI conducted various research projects during the course of 2007:

3.1 Accountability of the SABC Board

In 2007, the FXI commissioned Kate Skinner to undertake research on ôbest practiceô to be applied to the SABC Board, with respect to appointment procedures, composition, conflict of interest, roles and responsibilities, relationships to government, industry and civil society. The research will inform the advocacy work of the FXI around the SABCôs Board, and will result

ade to Parliament about ways of improving the ccountability. The SABCôs founding statute, the eviewed in Parliament next year, and our recommendations will be made in the context of that review to inform the drafting of the new SABC Act. The research is nearly completed, and has included interviews with the major political parties represented in Parliament, the Department of Communications and former SABC Board members, as well as media lawyers, and includes two international case studies.

3.2 Protection of Journalistic Sources

Section 205, read with section 189 of the Criminal Procedure Act state that, in most cases, a journalist, is required to reveal her journalistic sources on pain of imprisonment. The FXI's policy position is that firstly, to compel a journalist to reveal her confidential sources creates a situation in which the free flow of information and freedom of expression is inhibited not only to a from the journalist so compelled but within the profession generally; secondly, to compel a journalist to testify against participants in events that she was covering similarly inhibits the free flow of information and has the additional effect of placing the safety of journalists at risk; and thirdly, it is in the public interest that there is as free a flow of information as possible and that journalists are able to operate freely, especially in controversial, momentous areas like politics and crime where many informants speak only on condition of anonymity and where some journalists are tolerated only on condition that they are not potential witnesses.

The FXI has completed a research project to determine international best practice, together with drafting proposals as to how the Criminal Procedure Act can be amended. The research was conducted by an intern based at the FXIôs Law Clinic, Samantha Bigby. The research will now be used to lobby the Minister of Justice and Constitutional Development for amendments to the Criminal Procedure Act.

3.3 Threats to Freedom of Expression at South African Universities

The FXI has been inundated with complaints from university students and staff who claim that university authorities are clamping down on freedom of speech and association, and academic freedom. The FXI intends to undertake a nationwide research project that will investigate the various codes of conduct, regulations and procedures at South Africa's tertiary institutions to determine whether they are consistent with the Constitution and the Bill of Rights. Such a study will provide the FXI -as well as other stakeholders -with an excellent picture of what is happening at South Africa's universities. Based on the findings, the FXI will consider facilitating a capacity building project for students and university administrations to help nurture and promote a democratic culture in universities. The FXI has made a submission to the CHE and appeared as an expert witness in several staff disciplinary hearings. These are discussed in detail below.

3.4 FXI Legal Policy

ngthen the analytical capacity and value of the
XI attorney has started producing policy papers on various themes.

3.4.1 *Live broadcast of court proceedings*

The attitude of our courts to the live, delayed and õhighlights-packagedô broadcast, by radio and television, of courtroom proceedings, in trials and appeals respectively, was considered by the Constitutional Court (CC) in 2006. In the case of *South African Broadcasting Corporation Limited vs. The National Director of Public Prosecutions and 11 Others* (decided on 21 September 2006), the CC dismissed an appeal by the SABC to transmit the sound broadcasting of the appeals of Schabir Shaik and others in the Supreme Court of Appeal (SCA). In dismissing the appeal the CC found that the SCA had properly exercised its discretion in terms of section 173 of the Constitution, which gives the SCA the inherent power to regulate its own process. In properly balancing the relevant constitutional principles, the SCA had therefore made no ñdemonstrable blunderò in reaching its conclusion. An important consideration for the CC was that in other open democracies, such as Germany, the UK and USA, the right to freedom of expression does not include the right to televise court proceedings, let alone transmit sound broadcasts.

In the FXI's opinion, the CC did not attach sufficient weight to the importance of the media's right to free expression under section 16 of the Constitution, which includes the right to gather information, video footage and audio recordings for dissemination to the public.

The FXI considers the majority judgment of Langa CJ to be retrogressive for media freedom and open justice in South Africa. The FXI agrees with the minority judgments of Moseneke DCJ and Mokgoro J, who would have allowed the appeal and consider that the principle of open justice, which is well entrenched in our law, provides a powerful reason for allowing the broadcast of court proceedings, particularly in South Africa where the overwhelming majority of South Africans receive news and information by means of radio and television.

The FXI agrees with the progressive judgment in the 2005 Cape High Court case of *SABC vs. Thatcher,* that a more flexible approach is needed in dealing with the increase in litigation in which electronic media coverage is called for. The interests of justice are of paramount consideration in such applications and there was a heavy responsibility on the media to convey a fair, just and reasonable reflection of what the court proceedings were about and how litigants are progressing. The courts are entitled to co-operation from the media where there are restrictions in the coverage of court proceedings. What is therefore required is well co-coordinated teamwork from the media and legal profession with a view to satisfying the public's primary aim, which will remain, the achievement of justice for all. This is the substance in which the community's trust and confidence in the legal system and judiciary of any

African public has the undeniable right to just to ce to be seen (and heard) to be done.

3.4.2 *Sub Judice and Contempt of Court*

Although the sub judice rule has yet to be tested under South Africaôs Constitution, subject to a limitations analysis under section 36 of the Constitution, the FXI believes that the rule does not pass constitutional muster. The first part of the test requires a determination that the rule limits freedom of expression. Clearly, the making of statements to which criminal sanction may attach is a disincentive to the exercise of right to freedom of expression, more particularly the freedom of the media and the freedom to impart information.

In the *Mamabolo* case, the Court acknowledged the importance of permitting public criticism of the courts, while the prerogative of preventing public confidence in the judiciary appears to have been taken care of effectively by the Courtôs proscription of conduct ólikely to damage the administration of justiceô

The limitations on freedom of expression imposed by the sub judice rule are not óreasonable and justifiableô for the purposes of section 36 of the Constitution. It follows accordingly that the rule is unconstitutional and should be abandoned entirely.

The impact of the harm principle enunciated in the recent *Midi-TV* case has a potentially huge impact on the common law relating to contempt of court offences. While the *Mamabolo* test for scandalising the court places a heavy burden of proof on the State, strict liability, as enunciated in the pre-constitutional cases of *Harber* and V*an Niekerk*, still exists for offences under the sub judice rule. *Midi-TV* has the potential to fundamentally alter the test for whether a publication breaches the sub judice rule.

The Court acknowledged that the right to freedom of the press has the potential to prejudice the administration of justice, however the Court arguably discards the existing sub judice test by implication: ó*to the extent that the* [decisions of *Harber* and *van Niekerk*] might suggest otherwise I do not think they are consistent with what is to be expected in contemporary democracies.ô The court continued: ó*Those principles* [that a real risk of substantial harm be demonstrated] would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right.ô

Whereas the current test for *sub judice* is whether the publication *tends to interfere* with the administration of justice, the *Midi-TV* test requires that a *real risk of substantial harm* be demonstrated. This test could logically be extended to other contempt of court offences, both in facie curiae and ex facie curiae, such as defeating or obstructing the course of justice.

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4.1 Film and Publications Amendment Bill

Three of South Africa's media organisations which condemned a government proposal in 2006 to amend the country's entertainment censorship laws because it would result in the imposition of pre-publication censorship on the country's news media played a major role in the announcement by the cabinet that the Bill will be postponed to 2007.

The organisations, the SA National Editors' Forum (Sanef), the SA Chapter of the Media Institute of Southern Africa (Misa-SA) and the Freedom of Expression Institute (FXI) also welcomed Cabinet's reiteration of its commitment to the principle of media freedom as enshrined in the Constitution.

The FXI participated in the chorus of protest that it had received no notice of the intention to introduce the legislation. The FXI's major complaint was that the amendment removes the exemption from the classification, or censorship, and other provisions of the Films and Publications Act, which the print and broadcast media had had for more than 40 years. The removal meant that the media would be subject to Film and Publication Board pre-publication censorship. The FXI also complained that there had been no consultation in advance of the Bill being presented and severe time limits on making representations on the Bill.

On 3 May 2007, World Press Freedom Day, the FXI addressed the Parliamentary Portfolio Committee on Home Affairs, articulating the Institute's objections to the current draft of the Film and Publications Amendment Bill. The Institute's representatives, Simon Delaney and Na'eem Jeenah, were harangued by Committee chairperson, Patrick Chauke, who kept insisting that the FXI supported child pornography, despite the FXI's repeated clarification that it supported the criminalizing of child porn. The FXI's main thrust was that the exemption that exists in the current Film and Publications Act for print and electronic media must be maintained (the Bill removes the exemption) and a limitation be inserted which excludes child pornography from the exemption.

On 31 May 2007, Parliament issued an amended Bill, which reinserted the exemptions for the media into the controversial Film and Publications Amendment Bill. However, many problems with the Bill still remained. The FXI then lobbied the NCOP to amend the problematic provisions of the Bill, and to date, the Bill still remains with the NCOP.

4.2 Banned Gatherings in Cape Town

Over the past few months, the FXI has received numerous complaints about the ñbanningò by Cape Town city authorities, of protests and gatherings. The most common excuse given to organisers of such gatherings is that the police

n human resources to deploy to protect the

Over the past few months, the following gatherings have been reported to the FXI as having been banned by the City:

- A march on Human Rights Day, 27 March 2007;
- The ñNaked Bikers Rideòscheduled for early June;
- Protests planned by the organisation Animal Activist Network News, scheduled for June; and
- A proposed march of members of the ANC Youth League, also scheduled for June.

In our opinion, these bannings have been unconstitutional as well as being contrary to the Regulation of Gatherings Act. The Act does not allow the lack of police human resources to be used as an excuse for the banning of a gathering. The City then used the same excuse, arguing that the recent public sector strike was taking up its resources, to as for a moratorium on all gatherings in the City. In practice, however, the City was already applying such a moratorium.

The FXI has written to the office of the Cape Town City Manager as well as to the Mayor of Cape Town, Helen Zille, to advise them of the unconstitutionality of the actions of the City.

4.3 Access to Information Report

4.3.1 Introduction

This report comprises of activities of the access to information programme (ATI) for 2007. The programme aims to address practical problems in ensuring much greater usage of the right of access to information that is enshrined in most constitutions of countries in the Southern African Development Community (SADC) region; and intends to achieve this by focussing on access to information about the state of delivery of basic services, such as water and waster management, electricity, health and transport.

In 2007, with the support of OSISA, the ATI programme initiated access to information requests in four SADC countries. The project is meant to be a pilot review of the extent to which SADC countries are better- placed to roll out access to information requests on a much more larger scale.

4.3.2 Activities carried out under the programme: 2007

In 2007, a project focusing specifically on initiating access to information requests in four SADC was launched in January 2007. The programme set out on one day country missions to collect data on the current situation in the four pilot countries and this provided a rare opportunity to evaluate secondary information gathered mainly through desk- top research from articles, recent

reports by the United Nations Development wealth, and the Africa Peer Review Mechanism lividuals working at the coal face of access to information in their countries.

The country missions in Botswana, Lesotho, Mozambique and Malawi undertaken during January in addition to grounding the project firmly within the work of the partners also canvassed the partnersôopinions in the following areas:

- The effective strategies for initiating civil society engagement to ATI;
- Information requests to public authorities and private bodies that have to be formulated; and
- Effective methods of raising public critical awareness of the value of access to information amongst citizens can we use.

Most importantly, this information gathering phase also provided the opportunity for the programme to assess the capacity of our partners to effectively roll out the above- mentioned activities. It became apparent from the interviews that the challenges of the partners are interlaced. The urgent need for launching information requests was mooted by the partners as a strategic endeavour to build a body of knowledge in their countries to demonstrate that there is indeed a need for an access to information legislation. The development of an easy guide on where and how information can be accessed despite the dearth of access to information legislation in these countries was mooted.

It also became apparent from the information gathered that the current methodological approach employed by the OSJI monitoring tools is adverse to the peculiar challenges experienced by SADC countries and their institutional arrangements. Hence the need for a SADC OSJI monitoring tool as envisaged by this project.

Overall the country missions were a success. The programme, which ended in July 2007, has so far achieved the objectives it had set out in undertaking these trips, namely:

- To evaluate ongoing desk research on the current state of access to information in the region and specifically in the four pilot countries;
- To assess the capacity of our partners to roll out the activities envisaged under the project;
- To explore the strategies that civil society engagement and methods for raising public critical awareness of the value of access to information that the project can utilise; and
- To explore information requests to public authorities and private bodies that have to be formulated

The programme has not continued owing to a lack of funding, and the FXI is in the process of engaging with OSISA about future funding.

The Programme aims to increase pro-diversity and popular access to media, broadcasting and telecommunications in South Africa. The Programme is working closely with community-based organizations with a particular focus on capacitating grass root people with regard to their rights to media and information communication technologies. In order to achieve this objective the programme has developed two campaigns namely; Communication Rights & Media Rights campaigns, these campaigns assist in realizing the programmeôs broader objective. It is important to mention that not many activities were carried out in the communication rights campaign. The reason for this situation is because there have been a lot of developments that needed the programmesôattention regarding the media sector and the media rights campaign. This report will therefore elaborate on the activities taken up through these two campaigns and how those activities have managed to meet the programme's objective.

4.4.2 Activities carried by Media and ICTs: Year ending June 2007

4.4.2.1 Communications Rights Campaign

The Communication Rights Campaign aims at developing an environment where people even in very grass-root level can access and afford ICTôs. The work carried out through this campaign assist in sharing information around issues of how to access and afford ICTôs and how communities can use them for development. The campaign is working towards concretizing a demand for free basic telephone units especially for the poor. This demand should be clearly communicated to most communities and a huge meeting to be organized where the amount of units will be agreed upon and thus the launch of this specific campaign. Telkomôs failure to roll out the fixed line telephone poses a challenge to poor and ordinary people of this country not to be able to exercise their right to receive and impart information. The communication rights campaign has therefore built capacity amongst the affected people. This campaign has also raised an issue of affordability not only with Telkom but also the three mobile operators. The three operators being MTN, Vodacom and Cell C have been challenged through the campaign on issues of affordability and accessibility. Accessibility is always an issue in rural areas and remote areas where network problems become the daily experiences for people with cell phones.

The main strong hold of the campaign is in Soweto within the Soweto Concerned Residents (SCR). However the campaign has managed to involve other organizations that are in Soweto but not part of the SCR. These contacts were developed through the involvement of the programme within the Jozi FM saga. More organizations in Soweto that are part and parcel of Jozi FM have shown interest in the work done by the FXI in general.

been held within communities as a process of rganizations that have already been involved. ns are also used for the purposes of introducing the campaign to the new organizations. New organizations that have interest in the campaign are COSAS, Lungelo Womenõs Organisations, SANCO and Soweto Elderly and Disabled Association. For these organizations the campaign is still new and therefore a lot of capacity building is still needed.

The campaign also managed to move beyond Soweto to the Vaal and to Khutsong, Merafong. A series of community meetings are continuing to take place in and a capacity building workshop took place in Khutsong. This workshop will be followed by a mass meeting that will encompass issues from both the communication rights and media rights campaign.

The second aspect of the campaign is the issue of access to Internet especially by learners in schools. COSAS has an existing campaign on the matter however the meeting to consolidate the two campaigns is still to sit after school exams. The issue of the e-rate is also taken up through learner representatives especially in the schools found in Soweto.

4.4.2.2 Media Rights Campaign

4.4.2.2.1 Community radio

- *Inkonjane FM*

This is a community radio station in Lusikisiki in the Eastern Cape. This station was identified during the fieldwork conducted by both the organizer and the head of the programme. This is a newly formed station that valued building a relationship with the FXI. The station had a minor problem before they could go on air. The problem was that the chief and a high office bearer in one of the political parties wanted to be a member of the board of directors. It became a problem because the ICASA licensing conditions state it clear that it is not permissible to have an office bearer as part of the board. The organizer communicated the issue at ICASA and it was quickly clarified and Chief Nonkonyane is no longer part of the board of directors of the Inkonjane FM.

- *Duze FM*

This station is not on air since ICASA has refused to grant them a license. There are different statements from both ICASA and Duze FM team with regard to the reasons for refusal to grant the license. Duze FM has requested assistance from the FXI law clinic in taking the issue further. The attorney has requested that Duze FM submit some information that will enable him to take up the issue. The information has not reached the law clinic therefore the attorney is unable to work on the matter.

- *Jozi FM*

d problematic for over three years but no steps with the issues within the station. Various d and demonstrated against Jozi FM but there was never a break through. A number of community members have suspected that the station that is supposed to be a community radio station but a commercial radio station. This consists of more than 40 staff members that earn salaries that equivalent to those earned in the cooperate world. The community has complained about their favorite shows taken off air, shows like Vukamakhelwane were replaced with shows that were not talking to the community without any consultation. More than that the station is not accountable to the community instead there are allegations that the management is mismanaging funds. The station has not held a proper AGM for more than two years and the Board members are not effective while half of them have resigned. The opportunity for the community to know about these issues was opened by one of the presenters of Jozi FM who went on air and told the whole of Soweto that the station has failed to account for the missing 3 million rand. After that outbreak a series of meetings took place amongst the members of the community that discussed the situation in Jozi FM.

The Media & ICTôs programme played a very vital role in the whole process. Through the programmeôs intervention more meetings were conducted and information about the rights of the community was disseminated. Pamphlets and media statements were developed by the programme assisting the task team elected by the community of Soweto. This information assisted the community appointed task team to deal with the issues on licensing and monitoring of the community radio station. The meetings that took place at ICASA facilitated by the programme are producing better results as the Jozi FM AGM is bound to take place within 45 days as demanded by ICASA. The community is encouraged to fully participate in the upcoming AGM and be able to elect the board of directors that is accountable and answerable to the community.

The struggle to claim the Soweto community station back to the community became strong and effective as the Soweto members of the media & communication rights campaign constantly staged pickets at the station every day until ICASA took a stand on the issue.

4.4.2.2.1 SABC

- *Thabo Mbeki documentary*

In May 2006, SABC 2 was due to flight a documentary on President Thabo Mbeki as part of its ñUnauthorisedò series. The SABC had advertised the documentary a number of times before the screening date. However, at the time when the documentary was to be broadcast, another ñUnauthorisedò documentary was repeated. The producers ï an independent production company called ñBroad Daylight Productionsò ï were not informed that the documentary would not be shown. The withdrawal of the documentary caused a major hullabaloo around the country and the SABC came in for severe attacks from the other media and commentators. The FXI met with the

y, advised them on how to proceed and also nting on the SABCôs censorship and questioning w the documentary was politically motivated.

The FXI also participated in a media conference-cum-consultation called by the SABC to explain its position on the matter. In a strange twist, the Chief Executive Officer of the SABC, repeatedly referred to the FXI as ñright-wingersò for our position. The SABC also claimed that the decision to withdraw the documentary was because it was defamatory. The FXI is currently in the process of settling a legal opinion on a number of issues. Counsel has been requested to provide the FXI with an urgent opinion on the legal options available to Broad Daylight and the implications thereof, in the event that the SABC institutes legal proceedings for interdictory and / or declaratory relief in relation to the documentary production, or in the less likely event that it should become necessary for Broad Daylight to initiate legal proceedings. The legal opinion will also provide options for Broad Daylight in terms of copyright issues and what rights the producers have in terms of the documentary, being able to screen it publicly, etc. After some of the dust had settled, the SABC had agreed to meet with lawyers for the producers and find some way of moving forward on the issue.

On 6 June 2007, documentary producer Ben Cashdan advised that the programme would be aired on Sunday, June 10, at 21:00 on SABC 3. The next day, however, the SABC again changed its mind about screening the documentary and claimed that the scheduling of the documentary was only ótemporaryô The FXI said it was disturbed by the "now you see it, now you don't" approach the national broadcaster had towards the screening of the film and claimed further that the SABC's changing its mind about showing the film, once again, was yet another indication of chaos inside the broadcaster, where different units of the same organisation talk past one another, and then land up working against one another. The SABC responded that it would screen it when it was ready, but that it would be scheduled for ósometime in Julyô

In the meantime, Broad Daylight, the *Mail and Guardian* and the Harold Wolpe Memorial Trust organised a tour of the documentary, involving public screenings and debates. The FXIôs Virginia Magwaza-Setshedi spoke at the first screening, held at the Centre for Civil Society, University of KwaZulu/ Natal. On 17 July, the SABC sought an urgent court interdict to prevent further screenings, which was meant more specifically to prevent the *Mail and Guardian's* Johannesburg screening. A few hours before the screening was meant to take place, the SABC withdrew its application and agreed to participate in the panel discussion after the screening. The discussion included Ronald Suresh Roberts, Ben Cashdan, Redi Direko, Jane Duncan and Mvuso Mbebe. Other screenings went ahead as well, but the Wolpe Trust decided to pull out of the tour.

The SABC eventually screened the documentary on SABC 3 on October 3.

- *The SABC's 'blacklisting' report*

of the Thabo Mbeki documentary controversy in FXI dealt with: allegations of an SABC blacklist of analysts and commentators that should not be invited to comment on SABC news and current affairs programmes. Once the allegations emerged into the public domain, they caused tremendous embarrassment for the SABC. The FXI regarded the allegations of the existence of a blacklist as an extremely serious matter that could compromise the position of the SABC as public broadcaster. We lobbied the SABC on the matter, participated in a roundtable discussion about it and did a number of interviews regarding it. The roundtable discussion included a number of journalists, analysts and senior managers (including the CEO) from the SABC. The SABC set up a two-person commission of enquiry, which consists of Advocate Gilbert Marcus and Zwelakhe Sisulu, whose report is referred to above.

A related issue to the blacklist question was that of erstwhile SAfm current affairs anchor and talk show host John Perlman. In a strident interview with the SABC head of PR, Perlman claimed that such a blacklist did indeed exist. As a result of the interview, disciplinary action was taken against him. The FXI offered its assistance to Perlman, who in the meantime has resigned from the SABC. The FXI has also offered its assistance to any other SABC staffers that might want to use its services on this issue.

In order to voice its displeasure at the events surrounding the Mbeki documentary and the blacklisting incident, the FXI and its social movement partners staged a march in February on the Auckland Park head offices of the SABC, followed by a series of pickets outside the SABC offices in Cape Town, Polokwane, Johannesburg and Durban. The FXI also organised a picket outside the SABC offices on Perlmanôs last day.

The FXI also drafted a complaint to ICASA, a body that is required by the Constitution to regulate broadcasting in the public interest and to ensure a ñdiversity of viewsò ï words that speak directly to the blacklisting saga. Yet ICASA has been silent on the SABC debacle, which calls into question its own independence (Icasaôs independence has also been under considerable pressure of late). Yet, it is the organisation primarily responsible for acting as watchdog on the role of the public broadcaster and of ensuring its independence from the state.

Icasa has accepted the complaint and referred it to its Complaints and Compliance Committee (ñthe CCCò), which investigates failures by licensees to comply with legislation, regulations and licence conditions.

The SABC withdrew its initial response to the complaint, applied for a postponement to give it more time to produce a comprehensive response. The FXI has responded by arguing that Icasa should reject the application, as the SABC had five months to respond properly, and failed to do so. The request was granted by Icasa, and the FXI received the SABCôs revised response on 13 September 2007.

uestioned the findings of fact as made by the uestion the testimony given at the Commission. C had not accepted all the findings of the Commission, but failed to say which ones it had accepted and which it rejected, and why.

The FXI also co-ordinated a committee set up at the Goedgedaght Forum for Social Reflection on the 22 February 2007, to address concerns about the SABC. The Committee consisted of the following: Zubeida Jaffer, Pippa Green, Thabo Leshilo, John Matisson, Brett Davis and Jane Duncan. Amongst other things, the Committee spoke to the following individuals to provide witness statements for the FXIôs complaint: Jimi Matthews, John Perlman and Denzel Taylor. In the end, Green and Perlman submitted statements to Icasa, and Matthews supported Greenôs account of events.

On 25 October 2007, the Complaints and Compliance Committee (CCC) of Icasa reconvened for the hearing of the complaint. At the hearing, the FXI made the argument, that in order to deal with the issues raised by the SABC, the FXI needed to study the record of the proceedings of the Commission of Inquiry. Without this transcript, the FXI argued, it was unable to deal with the allegations made by the SABC. In any event the FXI was required to study the record to deal with the SABCôs response on the merits. The FXI submitted a formal application in terms of the ICASA Act for an order by ICASA to subpoena the transcript of the Commission. The SABC opposed the application.

The CCC dismissed the FXIôs application, and ruled that the Commissionôs findings were impermissible as evidence of any wrongdoing on the SABCôs part, as the findings were considered to be hearsay. The CCC ordered further that neither the FXI nor the SABC may refer to the record of proceedings at the Commission or the final report of the Commission. The CCC postponed the hearing of the FXI's complaint against the SABC to a date to be determined.

The FXI is now in the process of consulting with Adv. Sikhakhane to discuss the way forward. Advocate Wim Trengrove has also been briefed, and will be acting for the FXI in this matter. A review of the CCCôs decision is being considered.

The FXI expressed its disappointment at this decision, which it argued effectively denied the right of all South Africans to an explanation by the SABC as to what it has done to address the concerns of blacklisting and other abuses exposed in the damning findings of the Commission. The FXI also expressed shock that the SABC now rejects the recommendations of its own Commission of Inquiry and calls into question the substance and procedure of the Commission. This shock is amplified by the fact that in March, in a response to a Parliamentary question, Deputy Minister of Communications Roy Padayachee told Parliament that disciplinary action had been taken against Zikalala following the Commission. He said that Zikalala was warned

estion occur in future, stronger action would be
tates the following:

> ñ[Padayachee] said the board had decided that he should be given a verbal warning jointly by Dali Mpofu, the GCEO, and Eddie Funde, the chairperson of the board, in respect of some of the issues raised in the Sisulu Commission Report, *which were indeed serious and certainly unacceptable to the board* [emphasis mine], and that he be instructed to cooperate in the remedial steps that were recommended by the commission.

It is difficult to understand how the SABC could reject the findings of the report, when six months earlier it had clearly provided information for the Parliamentary question expressing their displeasure at Zikalalaôs unacceptable behaviour.

- *Lobbying the Minister of Communications and the Portfolio Committee on Communications on the SABC Act.*

The SABC Act will be considered by Parliament this year, and at the time of writing this report, the SABC Bill had not yet been released; hence there has not been much progress on this aspect of the contract.

In spite of this, the FXI has begun to plan ahead. On 2 November the FXI participated in a panel discussion at the Link Centre, Wits University, on the state of public service broadcasting in South Africa. The panel included Mimi Kuti from the Policy and Regulatory Department of the SABC, the Director of Broadcasting Policy at the Department of Communications, Dr. Mashilo Boloka, and Icasa Councillor Robert Nkuna. The FXIôs presentation is attached. In the panel discussion the FXI made the argument that the new SABC Bill should go through a Green Paper/ White Paper process to ensure maximum public consultation, and the Bill should also recognize the need of the SABC for administration, institution and financial independence (not just editorial independence, as is the case at the moment). Also the FXI argued for mechanisms of public access to the Board, and a Charter renewal process. The Department of Communications has since invited the FXI to meet to discuss making practical inputs to the Bill, and this meeting should be taking place shortly.

The FXI and the Wits Journalism School also jointly organized a seminar on the ANCôs media policy. The FXI participated in a panel discussion on the SABC with the Minister of Communications. Dr. Ivy Matsepe-Cassaburi, Dean of Humanities Professor Tawana Kupe and the CEO of the SABC, Adv. Dali Mpofu. In this discussion, it became clear that there was a great deal of concern within the ANC and the SABC, that no real progress had been made on securing funding from the government for the SABC, and this was identified as a priority. This seminar marked the first step in engaging with the ANC on its media policy, and specifically its policy regarding the SABC. Several members of the Portfolio Committee on Communications were present, and the FXI used the opportunity to have an informal discussion with

Vadi. Vadi agreed to set up a meeting with the other issues. This meeting will also take place

The intention behind the meetings with the Department and the Portfolio Committee is to lobby for changes to the SABCôs founding statute to upgrade the independence and accountability of the SABC, and for these changes to be taken into account as the Bill is being drafted.

- *SABC Board*

The original intention was for the FXI to run a series of public consultation meetings, to enable communities to develop their own lists of nominees after an educational process about the roles and responsibilities of the Board. However, the Portfolio Committee on Communications advertised for public nominations earlier than expected (in June 2007). This was in spite of the fact that in April the Portfolio Committee promised to send the FXI details about when the nomination process would start, to enable the FXI to plan these consultations.

The FXI released a statement expressing deep concern with the lack of transparency in the process. It noted that for a number of weeks prior to the advertisement, the FXI has tried to obtain information from the office of the Portfolio Committee with regard to the expiry date for the current Boardôs term of office, and were told that the information was not readily available but would be sent to us. It further noted that the FXI needed these details in order to prepare for a campaign to publicise the process and mobilize public opinion, to ensure that the best possible candidates would be nominated. It argued that the small advertisement did not give sufficient publicity to the issue and the Portfolio Committee should be much more vigorous in ensuring public participation in the nomination process, otherwise it risks becoming reduced to an elite process.

The FXI also expressed its concern at the Portfolio Committeeôs programme for public hearings of shortlisted candidates, which stated that the Committee members would be handed CVs of nominees on the 30 July. For the next two days, the Committee would shortlist candidates (31 July and 1 August). Incredibly, interviews for the shortlisted candidates were planned to begin the day after the completion of the shortlisting process (2 August). The FXI pointed out that this timeframe was unworkable, and may well lead to suspicions that candidates have already been earmarked. The FXI wrote to the Portfolio Committee to consider extending the closing date for the nominations, which was granted.

The FXI then called a meeting of various labour and civil society organizations to discuss organizing a slate of candidates. Out of this process, the Congress of South African Trade Unions (Cosatu), the National Council of Trade Unions (Nactu), the SA NGO Coalition (Sangoco), and the Media Workersô Association of South Africa, agreed to identify candidates for the slate. Cosatu forwarded Randall Howard; Nactu and Mwasa, Cunningham Ncgukana,

koma Lekalakala, Dumisa Ntsebeza, Mandla While Sanef did not want to put forward a its Secretary General Mary Pappaya indicated that she was willing to stand, so the FXI nominated her. However, at the eleventh hour, Cosatu indicated that they did not support Ngcukana. The FXI then decided to forward all the names in its own name. We did indicate though that the list was compiled with the assistance of the above organizations, but that not all these organisations necessarily supported all the nominees.

Details of the FXIôs nominees are as follows:

Advocate Dumisa Buhle Ntsebeza SC: An advocate of the High Court, Ntsebeza has also served as an Acting Judge, law lecturer and Commissioner of the Truth and Reconciliation Commission.

Lebohang Clyde Mandla Seleoane: He is a campus director of the Tshwane University of Technology and runs a labour relations consultancy. Seleoane has broad experience in student, political, community and labour organisations. He also served as Chairperson of the FXI.

Cunningham Thozamile Ngcukana: For the past two years, Ngcukana has worked for Investec Asset Management, investigating investment opportunities with unions. Previously, he was Deputy Director General in the Presidency, responsible for Nepad. Ncgukana is most well known as a trade unionist, having been the General Secretary of Nactu from 1988 to 2004.

Professor Adam Mahomed Habib: an academic, Habib has served as the head of the Centre for Civil Society at the University of Kwazulu-Natal and currently is the head of the Governance Programme at the Human Sciences Research Council. From September, he will take up a position as Deputy Vice-Chancellor: Research and Innovation at the University of Johannesburg. He is also a well-known political commentator.

Makoma Lekalakala : Is an activist with a number of organisations. She is the convenor of the Social Movements Indaba in Johannesburg, campaigner for Umzabalazo we Jubilee, Board member of Ceasefire and of the Khanya Womenôs Consortium.

Randall Howard: Is the General Secretary of the South African Transport and Allied WorkersôUnion. He has been a unionist since the 1980s and has also served as a member of the Management Committee and Executive Council of Nedlac, and a member of Cosatuôs Central Executive Committee.

Mary Bernadette Papayya: having been engaged in a number of media / journalism roles for the past 19 years, Papaya is currently working as Bureau Chief of the *Sowetan*. She is also General Secretary of the South African National Editors Forum (Sanef) and a board member of the Media Institute of Southern Africa. She has served as senior journalist, bureau chief, editor/news Manager in both print and radio.

ation, shortly after it went in, citing workload as
mmittee shortlisted three out of the FXIôs six
Habib, Seleoane and Howard. The FXI is made to understand that the ANC caucus of the Portfolio Committee shortlisted Howard, and the names were sent to ANCôs head office for consultation. The process apparently became horribly unstuck at this stage, as the head office rewrote the list sent by the caucus, allegedly to stack the Board with Mbeki sympathisers.

In an interview with a Sunday newspaper, Motlanthe described how he was misled into accepting an altered list of nominees for appointment to the SABC Board. The alterations included the removal of the Howard, while candidates who are considered to be Mbeki supporters, and who were not on the original list from the ANC MPôs (Gloria Serobe, who was nominated by a member of the Presidency, Christine Qunta and Andile Mbeki) were imposed on them by a sub-committee of the ANC National Executive Committee. A number of ANC MPôs also spoke out in protest. The Portfolio Committee eventually agreed on 8 of the 12 names, but could not agree on the rest (namely those candidates that had been imposed on the process).

The FXI and Cosatu then consulted with Advocate Gilbert Marcus and Advocate Matthew Chaskalson, about the prospects for a legal challenge. They advised that we write to the President and request him to turn the list back for reconsideration by Parliament, failing which we could consider taking the Presidentôs decision on review.

The FXI drafted a letter with the assistance of Marcus and Chaskalson, and canvassed it with Cosatu, Mwasa, Nactu, Misa-SA, Sangoco and the Treatment Action Campaign (TAC), who all agreed to sign.

In the letter, the organisations argued that, as representatives of the labour movement and civil society, we do not believe that the list of nominees fulfils the requirement of s.13(4) of the Broadcasting Act.

According to s.13(4)(a), the Board, when viewed collectively, should consist of persons who are suited to serve on the Board by virtue of their qualifications, expertise and experience in the fields of broadcasting policy and technology, broadcasting regulation, media law, frequency planning, business practice and finance, marketing, journalism, entertainment and education, and social and labour issues.

However, there is a clear bias in the list towards business figures: At least five of the nominees fall into this category (Andile Mbeki, Gloria Serobe, Desmond Golding, Bheki Khumalo and Peter Vundla). In contrast, there are no names on the list who could be said to have qualifications, expertise and experience in labour and social issues; this was in spite of the fact that nominees from the labour movement were forwarded for consideration.

Also, there is no-one on the list who is a practising journalist, or has been a practising journalist recently. While there is a fair spread of people who have

xperience in broadcasting policy and technology Khanyi Mkhonza), broadcasting regulation (such a Bulbulia) and law (Christine Qunta, Pansy Tlakula and Ashwin Trikamjee), this does not amount to fulfilling this requirement.

This means that the list does not have the collective qualifications, expertise and experience as required by the Act.

In addition, the organisations argued that the Board does not represent a broad cross-section of the population, as required by s. 13(4)(c) of the Act. There are clearly no working class representatives, nor are there any representatives from the communities of interest mentioned above (namely journalism and labour). The Board is obviously what President Mbeki would refer to as a ñfirst economyò Board; it does not represent the totality of the South African populace, and especially has no representation from South Africaôs poor and marginalized communities ï the òsecond economyò

Also, six members of the old SABC Board - namely Fadila Lagadien, Christine Qunta, Alison Gilwald, Ashwin Trikamjee, Andile Mbeki and Khanyisile Mkhonza - were included in the list and stood to be re-appointed to the new Board. In their capacities as members of the incumbent Board, they have failed to demonstrate that they are ñpersons who are committed to fairness, freedom of expression, the right of the public to be informed, and openness and accountabilityò, as required by s.13(4)(d) of the Act. We therefore believe that they have demonstrated that they are unfit for re-appointment to the SABC Board.

The incumbent Board - the organisations argued - has presided over unacceptable incidents of unfairness and censorship. More specifically, the Board has responded inappropriately to the findings of the Sisulu Commission of Enquiry into allegations of blacklisting of political commentators. The Commission found that a number of commentators were excluded on grounds that were not objectively defensible, in violation of the Boardôs own editorial policies.

In spite of the damning nature of the report, the Board expressed its full confidence in the person responsible for the exclusions, Managing Director of SABC News, Snuki Zikalala, while allegedly issuing the ñwhistleblowerò in the incident, SAFM news anchor John Perlman, with a warning in spite of the fact that he was vindicated by the Commission.

The SABC also attempted to interdict the *Mail and Guardian* newspaper to force it to take down a copy of the Commissionôs findings from its website. The Johannesburg High Court dismissed this attempt, noting that it was not acceptable to suppress information written in the report. These are not the actions of a group of people who are committed to fairness, freedom of expression and the right of the public to be informed.

t they were especially concerned about the eing appointed Chairperson of the Board. In her hairperson, she has presided over the problems mentioned above, and has defended the Boardôs actions publicly, including in her individual capacity in her interview with the Portfolio Committee on Communications.

Also, according to media reports, one of the people on the list, Gloria Serobe, wilfully lied to the Portfolio Committee on Communications. When interviewed by the Committee, she was allegedly asked whether she knew the person who had nominated her, a Mr Louis du Plooy. She allegedly replied that she did not know him but it was "sweet" of him to have done so. However, according to the *Sunday Times* (16 September 2007) Mr du Plooy ñrevealed [é] that he had discussed Serobe's nomination with her âas I had to get a CV from her to submit with the nomination formò. If these media reports are accurate, Serobe misled the Committee, thus demonstrating contempt for parliament and disqualifying her from being appointed to the Board on the basis that she has subverted the publicôs right to be informed.

The organisations also made reference to public controversies, where allegations were made of political manipulation in the process. They argued that, when taken together, all these factors were sufficient grounds for a review of the existing list.

Mbeki did appoint the Board after the ANCôs Polokwane conference, which created a great deal of controversy about whether this was a sign of his determination to flex his muscles in the light of the ótwo centres of powerô Significantly, in the ANCôs resolution on media adopted at the Polokwane congress, the conference resolved that the SABC Board should be broadly representative of the South African population, indicating concern in the party about the process.

Cosatu and the FXI are in the process of compiling documents to establish whether a legal review will have a reasonable prospect of success. To establish this, the organizations will commission a legal opinion.

- *Lobbying the Minister of Communications to amend the SABC's Articles of Association to upgrade the independence of the SABC Board, so that the new Board truly controls the affairs of the Corporation (which is not the case at the moment, as the Minister exercises significant levels of control over the Board).*

The FXI began the lobbying process by requesting a meeting with the SABC to present the contents of the FXIôs legal opinions to them, as we felt that it was procedural to at least inform the SABC that we would be taking up the matter. The FXI also intended to request the SABC to support and amendment to the Articles, and to raise the matter with the Minister. This meeting took place with Adv. Mpofu and other members of senior management on the 13 August. In the meeting, the FXIôs in house attorney presented the main findings of the two legal opinions to them. They noted the

the Minister of Communications could amend
the SABCôs Annual General Meeting, which is
, was taking place shortly and that the SABC would raise the FXIôs approach to them then.

The FXI wrote to the Minister on the 15th August, enclosing the two legal opinions and requesting the Minister to review the contents of the Articles of Association. The FXI also requested a meeting to discuss the matter. The Minister responded by stating that she had called for a review of all Articles of Association of the Departmentôs portfolio organizations, to assess their legality. The FXI is waiting for a response from this review, but will pursue the matter again in its meeting with the Department of Communications.

4.8 *Amendment to Section 205 of the Criminal Procedure Act*

As discussed above, the FXI is lobbying the Ministry of Justice and Constitutional Development for an amendment to section 205 of the Criminal Procedure Act to protect journalists and their sources.

4.9 *Submission to CHE on the State of Academic Freedom of Expression*

On 10 June 2007 the FXI made a submission to the Council on Higher Education (CHE) on the state of academic freedom of expression in South Africa. The FXI urged the CHE to pursue a two-fold proposal, namely an audit of all subsidiary legislation at tertiary institution level, encompassing conditions of service, rules governing student activities on campus and all rules and by-laws impacting on academic freedom on campus; and establish a unified campus freedom of expression code and a single ombudsman of academia, entrenching the basic principles of free speech and setting out the procedures for disciplining of staff and students based on a ôfor us, by usô form of self-regulation. This structure would adjudicate on violations of the code, and impose appropriate sanctions where necessary. Membership of this structure would be voluntary and open to membership from both public and private institutions.

5. Legal education and capacity building

5.1.1 *Booklets*

The Open Society Foundation provided funding in 2007 for the FXI to develop three handbooks: first, on the regulation of gatherings, to optimise the FXI's resources around freedom of expression, by bringing together a range of ad hoc materials the Institute has developed for capacity-building workshops, into user-friendly but comprehensive workbooks and making them available to targeted constituencies, including South African and SADC-wide civil society organizations, paralegals and Advice Offices, social movements, the police and local authorities, independent and community media., media censorship and electronic communications.

book for use by civil society organizations, es, social movements, the police and local authorities, the media (especially small independent and community media), to ensure that they have practical tools for advancing freedom of expression and countering censorship, and to ensure that the FXI's work reaches beyond where the Institute has a physical presence.

Third, on freedom of expression and electronic communications in South Africa, to consolidate the experiences gained by organisations like the FXI through the past 12 years in the development of electronic media in South Africa have been invaluable ï both for South Africans as well as for civil society groups in other countries that face similar kinds of issues, most notably other countries in Southern African region.

These handbooks have been completed, and their titles are as follows:

- The right to protest: a handbook for the police and protestors
- The media and the law handbook
- The broadcasting independence handbook.

They have been printed and distributed, and are available from the FXIõs website as well (www.fxi.org.za). The gatherings handbook has been distributed both to civil society organisations and the police, and is in ongoing use in capacity building workshops with social movements, held in the context of the nationwide Freedom of Expression Network (more on the Network below). The Media and the Law handbook has been distributed to community media organisations, and is also being workshopped with these organisations as and when they request. The third handbook has been distributed to the SADC parliamentary forum, Southern African civil society organisations and South African academic institutions.

5.2 *Capacity-Building*

Beyond basic knowledge provided to all activists, it has become clear that a cadre of well-trained legal workers is needed within the social movement groups. Following a model that has proved successful in several South African communities, the law clinic is coordinating with social movement groups to identify individuals with the interest and ability to act as legal workers within their individual communities.

These individuals are not lawyers, but well-trained lay-people capable of dealing with immediate legal needs as issues arise. They are able, for example, to arrange bail for activists, prepare legal permits for protests and marches, prepare motions for stays of eviction, take information from witnesses, etc. In addition, these individuals are developing the capacity to negotiate the confusing and specialized array of legal services that may be available from legal aid, outside NGOs, and other agencies.

Through a series of in-depth trainings and mentorships with the law clinic attorney, the skills of the social movement legal workers are being built up

e the costs associated with outside lawyers and
ovements to control their own legal needs and

5.3 *Legal Representation and Coordination*

With a better education community and on-the-ground legal workers, the need for direct representation will be reduced but far from eliminated. There will continue to be a dire need for lawyers to respond rapidly to requests for legal intervention from the social movements on matters such as those discussed above.

Social movements need a way to develop expertise about the specific legal issues they are facing and to coordinate the use of this expertise. Activists are increasingly facing coordinated efforts on the part of government and corporate officials to use the criminal and civil justice systems to systematically subvert the work of social movements. Relying only on reaction to legal problems through disconnected public and NGO legal resources is no longer an effective strategy for supporting social movement work.

A revolving bail fund is housed in the FXI and overseen by the Social Movements Indaba. The purpose of the bail fund is to counteract the direct intentions of the repressive apparatus of the State (police, intelligence arms) to either remove activists from the movements while they await trial if they cannot afford to pay, or tie up vast portions of movement resources in bail payments for lengthy periods as activists await the slow-churning wheels of justice to reach the conclusion of trumped up cases against them.

Bail costs for activists arrested in a single incident can easily run into tens of thousands of Rands, and currently the movements are forced to sacrifice other aspects of their struggles while these monies are tied up in the courts. The Revolving Bail Fund aims to provide a lump sum solution to this, on the basis that bail funds would be loaned out to movements, and returned at the conclusion of a case.

The fact that most charges against activists are routinely either dropped or dismissed during the proceedings, alongside the ongoing collective work of the movements and activists within them, means that the fund would be administered relatively easily, with prioritisation criteria to be agreed in the strategy committee, and funds to be paid out and collected by the same person in any particular case.

The FXI law clinic attorney devotes substantial time to the legal work of social movements. The duties of the attorney, with respect to the social movements, are firstly to assist members of the legal committee to assess requests for legal assistance by victims of State repression on matters of violations of socio-political rights; and secondly provide expert legal assistance to members of the social movements who fall victim to State repression. Such

not necessarily limited to, legal advice or legal
f law or other tribunals.

The FXI law clinic attorney has defended over 20 members of the social movements arrested on various charges, many of which relate to alleged violations of the Gatherings Act. The FXI also assisted in the contracting of an ón-callô specialist criminal law attorney for use by the APF.

5.4 *Development of the Freedom of Expression Network*

The above developments around capacity-building and legal empowerment have been part of the FXIôs attempt to develop, in partnership with the Social Movements Indaba, a national freedom of expression network. The idea for such a network came about as a result of the number of queries and requests for assistance that the FXI had been receiving from social movements, residents associations, etc. about the violations of their rights to free expression.

The Network seeks to link such groups across the country. Through the legal empowerment and capacity building processes mentioned above, members of these organisations will more easily be able themselves to deal with cases of repression and a denial of their free expression rights.

Furthermore, through linking these groups, a strong feeling of solidarity is developing between them, resulting in them viewing each otherôs experiences of repression as part of their own experiences. This solidarity is intended to be harnessed in a manner that will assist in reducing repression and expanding the free expression environment in South Africa.

A National Liaison Committee has already been formed by the movements and associations involved in the FX Network. It is very significant that the National Committee includes movements that, at other fora, are at vigorously opposed to each other. Thus, it includes representatives of the Social Movements Indaba as well as the Abahlali base Mjondolo and the Anti-Evictions Campaign. The latter two organisations have had heated confrontations with SMI members in the past, but regard their role in the FX Network as important to safeguarding their own as well as the general free expression rights of South Africans.

Provincial committees are in the process of being formed. So far, the following provincial committees have been formed:

- Eastern Cape
- Gauteng
- KwaZulu/ Natal
- Mpumalanga
- Western Cape

Once provincial committees are formed, then legal capacity building workshops are organised in these provinces. The intention of the workshops is to build legal capacity in social movements, and in time, legal committees

vements and their members should qualify as rights of appearance in court. The legal the following areas:

- Definition and meaning of freedom of expression;
- The FX challenges facing social movements and the importance of a culture of freedom of expression for organisations of the poor to be able to function effectively;
- The kinds of repression of free expression faced by social movements;
- The Regulation of Gatherings Act. This session examines the provisions of the Act, how social movements should protect their rights in terms of the Act, how to fill in the necessary forms of notification for gatherings and what is entailed in meetings between movements and authorities.
    - The session included a role-play where some participants played the parts of local authorities and others played the parts of marchers.
- How to deal with the police in various scenarios (facilitated by Simon Delaney)
- The question of compensation in the event of torture, death in detention, unlawful arrest, etc.
- The Promotion of Access to Information Act (PAIA), and how it can be used by social movements.

6. Litigation and legal interventions

6.1. *The Right to Protest*

There is increasing evidence that community activists critical of the current status quo are being denied their constitutional rights to freedom of expression and assembly. Police officers are often ignorant of the Regulation of Gatherings Act or, more worryingly, abuse the Act to prevent people from protesting and marching in public. The FXI continues to assist social justice movements with problems around the right to protest

6.1.1 Statistics on gatherings

Since the release of 2004 statistics, which stated that there were over 5800 gatherings in South Africa, no nationwide statistics have been released. In an attempt to address this information gap, the FXI asked Member of Parliament Patricia De Lille to ask a Parliamentary question on the number of gatherings in the country, and of these, how many were deemed to be illegal. The response from the Minister of Safety and Security was made available in November 2007.

The statistics point to a sharp increase in protest action since the release of the 2004/2005 figure of 5800 protests: in 2005/2006, an estimated 10 763 recorded protests took place, and in 2006/2007, an estimated 9 446 protests. The largest number of protests took place in KwaZulu/ Natal, with the province accounting for about one fifth of the recorded protests for 2005/6. According to the reply, gatherings are no longer classified as illegal or legal, and that they

peaceful and unrest related incidents. The regard are as follows:

2005 / 2006		**2006 / 2007**	
Peaceful	9,809	Peaceful	8,703
Unrest related	954	Unrest related	743
TOTAL	**10,763**	**TOTAL**	**9,446**

6.1.2 *Assistance to various social justice movements and researchers*

In June 2007, the Freedom of Expression Institute (FXI) wrote to the Mayor of Cape Town, Helen Zille, about the prohibition of gatherings in Cape Town during the public sector strike. Zille eventually replied by giving an assurance that the City will uphold the constitutional right to protest. The FXI also wrote to the City Manager's office to protest against the banning of the Cape Town leg of the 'World Naked Bike Ride'.

6.2 Balancing the Rights of Expression and Privacy

6.2.1 *NM and Others vs. Charlene Smith and Others (FXI intervening as amicus curiae)*

On 4 April 2007, the Constitutional Court handed down judgment in the case of *NM and Others v Smith and Others*, in which three HIV-positive women claimed that their right to privacy and dignity were violated by the publication of their names and HIV status in a biography of politician Patricia de Lille. The Court found in favour of the applicants, ordering the respondents to pay each applicant R35 000 in damages. In a majority judgment, Madala J held that the respondents were aware that the applicants had not given their express consent but had gone ahead and published their names, violating their privacy and dignity rights.

In light of the fact that the judgment did not extend the common law to include negligence in relation to the publication of private medical facts, there would be no chilling effect on freedom of expression and therefore the Court did not find it necessary to either agree or disagree with the FXI on this point. The FXI therefore welcomes this preservation of the common law status quo, which protects both media and individual defendants who unwittingly, but mistakenly, infringe the privacy of individuals in speech or in writing.

The FXI successfully applied to be admitted as *amicus curiae* in this case. The FXI argued that if the media were to be held liable for the negligent disclosure of private facts they would bear an intolerable burden that would unnecessarily and unjustifiably interfere with, and have a chilling effect on, the right to freedom of expression in South Africa. The FXI argued further it was neither necessary nor desirable for the common law to be developed to include negligence as a ground for fault in these situations, more especially because individual defendants would be particularly at risk for being held liable if this development took place, because they do not have the resources,

ke any proper judgment on what constitutes

6.2 *Balancing the Rights of Expression and Dignity: The Defamation Cases*

6.2.1 *Goitsedimo Ephraim Seleka / Paul Moola*

In September 2005 summons was served on Paul Moola in his capacity as editor of the Mafikeng community newspaper *North West On Sunday* for damages of R200 000. The FXIôs law clinic is acting as Moolaôs attorneys. The plaintiff is Goitsemodimo Ephraim Seleka, employed by the Central District Municipality. Seleka alleges that during May 2005 the newspaper published an article entitled ñDisgraced Celebrityò, which basically stated that Seleka was not qualified for his municipal job. Seleka claims that the article was wrongful and defamatory of Seleka because it implies that Seleka was corrupt and incompetent. Moolaôs defence is that the statements in the article are true and in the public interest, alternatively fair comment and reasonable. The case law and constitutional imperatives protecting freedom of expression ï especially where civil servants are concerned ï are in favour of Moola successfully defending the case. The trial was set down for hearing on 6 June 2007, but was withdrawn from the roll in the absence of discovery and various other documents necessary for trial.

This litigation, if successful, has the potential to positively impact on community newspapers around South Africa. The campaign of the rich and powerful, especially in small towns with ôkingpins ruling over a personal fiefdomô to silence outspoken community newspapers violates these rights and as long as this remains the case, so too will millions of South Africans be unable to access community media and enjoy the full spectrum of their fundamental human rights.

An observation that is being made, especially with regards to the practice of human rights in small towns in South Africa, such as Mafikeng, is that in most of these towns authorities seem to undermine the basic tenets of the Constitution and those aspects of the legislation that affirm human rights. This is arguably due to the physical distance between these towns and the major cities, in terms of which major cities are better monitored by the more vigilant civil society organisations. Defending the newspaper and its editor in this case will serve first as a deterrent against a seeming increase in the number of repressive measures adopted by authorities in small towns such as Mafikeng. Second, it will strengthen the community media sector, which is in fact the only available avenue for communities in these kinds of towns to express their views against the excesses of power.

One of the challenges faced in this matter was the slow pace at which the case was progressing, as a defendant we cannot force this, nor would it have been in the best interests Moola to do so as firstly, the reasonableness defence was problematic, and secondly, there were no witnesses were evidence to corroborate Moolaôs version. Witnesses are too intimidated to

ve also not received documents necessary to terestôdefence.

Seleka has failed to proceed with the matter and it appears as though he as abandoned same. This is in our view a positive sign and we have successfully fended off the action brought against Moola by Selaka.

6.2.2 *Angloplat vs. Richard Spoor*

This is a 'David and Goliath'-type defamation case involving renowned anti-apartheid lawyer Richard Spoor, a specialist in occupational injuries. This is also a crucially important case for the development of the common law of defamation in South Africa, especially as it applies to non-media defendants.

Spoor is being threatened with an interdict by Anglo Platinum, the biggest platinum mining company in the world, unless he retracts and does not repeat alleged defamatory statements against the company. Spoor has alleged that the mining giant's conduct in relation to indigenous landowners is racist, reactionary and offensive. More specifically, he has alleged that Angloplat's large-scale mining practices have displaced local communities, led to the destruction of environmental and political systems, in turn leading to an increase in a variety of social ills.

These communities have been using Spoor as a conduit to raise grievances, leading to him being targeted for defamation action. Spoor has also alleged that Angloplat had instructed police to violently remove communities that had been objecting to the company's encroachment on indigenous farming land in the Northern Province, and to harass traditional leaders. Spoor is being sued for allegations he made in an article he wrote in the Business Report, as well as for quotes in Business Report and Mail and Guardian and the internet website of 'Mines and Communities'. He has been asked to desist from making such statements and, if he does not, then Angloplat will apply for an urgent interdict against him.

In August 2006 summons and an application for an interdict was served on Spoor in the Transvaal Provincial Division of the High Court. The application for an urgent interim interdict against Spoor was dismissed by the High Court. The return day for the hearing of the application for a permanent interdict against Spoor has been set down for hearing on 15 February 2007. The FXI has applied for amicus status in this case and has received the consent of both parties.

In this amicus intervention, the FXI will seek to bring to the Courtôs attention issues such as the importance of freedom of expression in relation to marginalized and indigent communities, the doctrine of prior restraint and its impact on freedom of speech, the possibility of creating a new defence of reasonableness for non-media defendants and the appropriate standards to be applied to an evaluation of the reputation of corporate entities. South African law makes a distinction between media and non-media defendants, and accords more defences to the former. So media defendants can argue

le to escape liability, even if publication was not ir comment. This defence should be available to ll, given the crucial role that these defendants play in bringing controversial issues of public interest to light.

This amicus intervention, if successful, has the potential to positively impact on community activists and commentators around South Africa. The campaign of the rich and powerful, especially in small towns with ôkingpinsö ruling over a personal fiefdomô to silence outspoken community activists violates these rights and as long as this remains the case, so too will millions of South Africans be unable to raise critical voices and enjoy the full spectrum of their fundamental human rights.

This case raises issues of considerable public importance and which are new in our law. These issues relate to the right to freedom of expression as contained in the Constitution, in particular, with respect to the law of defamation. The FXI believes that it would be of assistance to the Court in advancing free expression arguments and in bringing to bear the comparable foreign case law and experience on these issues, particularly in those jurisdictions, which, like South Africa, protect freedom of expression through inclusion in a Bill of Rights. Furthermore the FXI would seek to bring to the Courtôs attention issues such as the importance of freedom of expression in relation to marginalized and indigent communities, the doctrine of prior restraint and its impact on freedom of speech, the possibility of creating a new defence of reasonableness for non-media defendants and the appropriate standards to be applied to an evaluation of the reputation of corporate entities.

We have observed that, especially with regards to the practice of human rights in small towns in South Africa, such as the areas of Limpopo province where Spoor is active, corporations seem to undermine the basic tenets of the Constitution and those aspects of the legislation that affirm human rights. This is arguably due to the physical distance between these towns and the major cities, in terms of which major cities are better monitored by more vigilant civil society organisations. Defending Spoor through our amicus intervention will serve first as a deterrent against a seeming increase in the number of repressive measures adopted by authorities in small towns. Second, it will strengthen the community media sector, which is the only available avenue for communities in such towns to express their views against the excesses of power

6.2.3 *Zuma's attack on the media*

On various occasions during the Zuma rape trial, his supporters and he had accused ï either blatantly or subtly ï the media of being biased against him. The charge was, in the opinion of the FXI, unjustified. The FXI issued statements defending the role of the media in the case and participated in a number of talk shows and interviews.

In 2006, Zuma issued summonses against a number of media that, he claimed, had defamed him. He was claiming damages for a total of R61

umaôs sights is: The Star, The Citizen, Sunday Independent, Sunday World and Rapport, from onist Jonathan Shapiro was also issued with a summons. The FXI responded to these accusations defending the media and individual concerned and defended their right to publish and not be sued by politicians. When the cases get closer to trial, the FXI will seek to intervene as amicus curiae.

Zuma has since reduced his claim against the media, and confined his action to defending his right to dignity, while abandoning his claim to defend his right to reputation.

6.3 *Access to Information: FXI & Harvey vs. Johannesburg Water & others*

Since April 2003, the FXI has joined researcher Ebrahim Harveyôs efforts to force Johannesburg Water (JW) to grant access to 16 documents, to enable him to complete a Master's Degree at the University of the Witwatersrand on the impact of Johannesburg's IGoli 2002 plan on the delivery of water (which led to the formation of JW as a corporate entity). The plan has been controversial as it fuelled the commercialisation of services such as water and electricity, leading to the disconnection of many poor residents when they could not afford the rising costs of these services.

The FXI and Harvey sued JW for the documents in terms of in terms of the Promotion of Access to Information Act. After bringing JW to the doors of court, JW agreed to grant access to 11 of the 16 documents. JW continues to refuse to release other documents relating to its activities. The case will be heard in court in June 2007 for judgment on the balance of the documents.

Harvey and the FXI have argued in their founding affidavit that if the court finds that any of the documents cannot be disclosed on any of the grounds referred to in the Act, then the Act's public interest override clause should be invoked. This clause requires the body concerned to disclose documents if two public interest requirements are met. The first requirement is that that the disclosure of the document(s) would reveal evidence of either a substantial contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk. The second requirement is that the public interest in the disclosure of the record clearly outweighs the harm resulting from the disclosure.

Harvey and the FXI have argued that this clause is unconstitutional. Rather the clause should ensure that only one of the requirements has to be met for documents to be disclosed in the public interest. The Act, by stating that both requirements must be met, does not strike an appropriate balance between disclosure and non-disclosure, as the grounds for mandatory refusal are broad and the override is too narrow. If this challenge is accepted by the High Court, it will have to be confirmed by the Constitutional Court; if not, then

n a position to appeal against the High Court Court.

Most of the documents requested explain the operational duties and evaluate the performance of JOWAM and JW. They will throw light on policies relating to disconnections, pricing, service priorities and plans to remove inequalities in service provision. Others will contain information regarding current inequalities in service consumption and the provision of infrastructure. Access to the documents will also allow an investigation of whether the transfer of responsibilities for water provision to contractors such as JOWAM may negatively impact on access to water, including through increases in prices for water, failures to remove inequities in service provision or through unjustified disconnections. Finally, access to the documents is necessary to investigate whether JW is fulfilling its constitutional obligation of providing access to water. In short, the transparency that will flow from disclosure of these documents is essential to ensure public accountability.

Harvey and the FXI have also noted that there is a particularly compelling public interest reason for disclosing documents relating to the activities of JOWAM, a joint venture of subsidiaries of the international water company Suez, in view of Suezôincreasingly dubious track record internationally. Suez and at least some of its international subsidiaries have recently been accused of corruption, dishonesty and a lack of accountability, and these accusations are sufficiently cogent to warrant careful scrutiny of the way in which water and wastewater services are being managed in Johannesburg. The affidavit also points out that in Grenoble, France, the City Council terminated its relationship with Suez after a former mayor and government Minister, and certain senior executives of Suez received prison sentences for accepting and giving bribes. In France, Suez has also been the subject of a recent investigation into a scandal around 'an agreed system of misappropriation of public funds'.

The FXI is awaiting instructions from Harvey before deciding how to proceed. It is likely that this matter may be settled out of court.

6.4 *Protection of the Confidentiality of Journalists' Sources of Information*

There is no absolute privilege afforded to communications between informant and journalist such as may be said to apply between attorney and client. Almost no jurisdiction in the world provides such a privilege to journalists. In South Africa a journalist may thus be compelled to reveal her sources on pain of imprisonment although no such sentence has been handed down since the adoption of the Constitution. Nevertheless, there is, emerging from case law, and an interpretation of the Constitution and the term ñjust excuseò in section 189 of the Criminal Procedure Act, a suggestion that communications between source and reporter may enjoy a partial or qualified privilege under

an agreement exists that purports to restrain the 205 but these restraints are purely procedural.

The FXI's policy position is that firstly, to compel a journalist to reveal her confidential sources creates a situation in which the free flow of information and freedom of expression is inhibited not only to a from the journalist so compelled but within the profession generally; secondly, to compel a journalist to testify against participants in events that she was covering similarly inhibits the free flow of information and has the additional effect of placing the safety of journalists at risk; and thirdly, it is in the public interest that there is as free a flow of information as possible and that journalists are able to operate freely, especially in controversial, momentous areas like politics and crime where many informants speak only on condition of anonymity and where some journalists are tolerated only on condition that they are not potential witnesses.

6.4.1 *Gasant Abarder vs. County Fair – use of journalists as witnesses*

This case involves *The Daily Voice's* News Editor, Gasant Abarder, who has taken an ethical stand not to testify in the civil defamation case involving the County Fair poultry chain. Abarder refused to testify about a public meeting he had reported on, where Grant Twigg of the Associated Trade Union of South Africa is alleged to have made defamatory statements about the circumstances in which one of County Fair's employees died after having an asthma attack. On Friday, 3 November 2006, the Court confirmed a magistrate's order compelling Abarder to testify.

The FXI feels that Abarder has a 'just excuse' not to testify. The 'just excuse' is that journalists such as Abarder can refuse to testify lawfully so as not create the impression that they are extensions of the evidence-gathering process in court proceedings; this is precisely what Abrader will become if he is compelled to testify. Journalists may also find it more difficult to fulfil their newsgathering role in such situations and may even be harassed at such meetings or barred from attending them as participants will regard journalists as potentially the eyes and ears of the authorities if they are compelled to testify.

Furthermore, it is not the role of journalists to help litigants prove defamation cases, merely to report statements in the public interest, even if they are defamatory. The right of journalists to report in an unhindered way is more important than the ability of one litigant to win a defamation case, and in this case the freedom of expression must take precedence over the right to dignity and reputation of County Fair. If it does not, then all journalists may be affected.

County Fair has subpoenaed Abarder to testify about the alleged defamatory statements at the meeting, where over 100 other people were also present. This means that Abarder is not a witness of last resort. The FXI therefore wishes to use this case to make the argument regarding journalists being witnesses of last resort.

sed its interest in making an *amicus curiae* r was referred to the Constitutional Court. However, County Fair has since withdrawn the action against Abarder, thus making an intervention as *amicus curiae* impossible.

6.5 *The Right of Employees to Freedom of Expression*

6.5.1 *Vusi Sibeko*

Vusi Sibeko was a chief shop steward at Royal Ascot Super Spar supermarket in Milnerton, Cape Town. He was suspended on the 8 November 2005, pending a disciplinary hearing set for the 10 November 2005 and was charged with gross misconduct over an article that he had written for *Izwi la Basebenzi*¸ a periodical published by the Democratic Socialist Movement. Sibeko had, in the article, accused Super Spar Milnerton of bad labour practices and of not paying workers the minimum wage as determined by the Department of Labour. The majority of the workers joined a union after Sibekoôs intervention to prevent a workerös arbitrary dismissal. Sibeko appeared before a conciliation hearing of the Commission for Conciliation Mediation and Arbitration on the 23 January 2006. Super Spar, however, was not present. The matter went to arbitration at the end of February 2006.

The FXI Law Clinic provided legal advice to Sibeko, wrote to Super Spar to present legal perspectives on the dismissal, and gave a number of interviews on the matter. Simon Delaney, the Head of the FXI's Law Clinic, also appeared as an expert witness when the matter went to arbitration and his testimony was key to the final judgment of the arbitration, which reinstated Sibeko into his position at Spar.

Spar has indicated that it is appealing the decision in the Labour Court, but Spar and Sibeko have since decided to settle the matter.

6.5.2 *Thoko Mkhwanazi-Xaluva*

Thoko Mkhwanazi-Xaluva is a former director in the Office of the Rights of the Child (ORC), based in the presidency and reporting to Minister Essop Pahad. In June 2003, Mkhwanazi-Xaluva was dismissed by the Presidency for, she claims, having blown the whistle on sexual harassment by a consultant to the ORC who, she says, was a friend of Pahad. The matter we referred to the General Public Service Sectoral Bargaining Council, which reinstated her in November 2003. She was dismissed again for interviews she had given to the media regarding her initial dismissal. The FXI got involved because this was a case of censorship of an employee and because we believe that she should be protected as a whistleblower and not disadvantaged because of it. The Law Clinic assisted Mkhwanazi-Xaluva with advice on how she might proceed with the matter. The matter went before the General Public Service Sectoral Bargaining Council in February 2006. Mkhwanazi-Xaluva won the case in the Bargaining Council. The Presidency has since appealed to the Labour Court and the FXI is intending to file an amicus application.

In December 2005, Durban academic and activist, Ashwin Desai, was prevented from taking up a position at the University of Kwazulu Natal by the Vice-Chancellor, Prof Malegopuru Makgoba. The problem dates back to 1996 when, on the eve of the merger of the University of Durban-Westville ï where Desai was an academic ï and the University of Natal to become the UKZN, he led a bitter struggle unifying staff, students and workers at the university against retrenchments and fee increases. Desai apparently agreed to an out-of-court settlement at the time with the then vice-chancellor, excluding him from the University of Durban-Westville campus in return for charges relating to his activities being withdrawn against him.

The next vice-chancellor, Saths Cooper, overturned the settlement and reinstated Desai. After the merger, Desai worked at the UKZNôs Centre for Civil Society. On Desaiôs application for the new position, Makgoba ruled Desai out of the running on the basis that the ban was still in place, but that the council could rescind the ban if Desai made written representations to it.

Public opinion and academics from around the world mobilised behind Desai and a bitter struggle developed in the media around the case. Desai was subsequently made an offer by Rhodes University, which he took up. On the 12th May 2006, a faculty board at Howard College deliberated on the matter of Desaiôs application to be an honorary research fellow at the Centre for Civil Society. Despite the vice-chancellorôs interventions with the committee, it selected him as a research fellow. The university research committee ratified this decision on 1 August 2006, and the ban still remains in force.

6.5.4 *UKZN and freedom of expression*

While much public attention regarding UKZN was focused on the Desai matter, the constraining of academic freedom and freedom of expression in general at that university goes beyond that issue and will have to be addressed much more comprehensively. Other academics from UKZN, such as Richard Pithouse and Fazel Khan, have also been under pressure from the university administration. What one infers from a close reading of events regarding these academics ï who also have reputations as activists, as well as several on-the-record statements, is that these scholars are under attack for challenging power both inside and outside the university.

While the university community was still dealing with the Desai case, unions decided to hold a march on campus for a number of labour-related reasons. Unions were told that a march they were planning to have on the Westville and Howard College Campuses would be limited to small sections of the campuses. All academics were then sent letters by the university administration, informing them that if they were to strike, they needed to inform their ñline managersò. The FXI assisted the academics and unions with legal and other advice and issued a number of statements expressing concern about the constraining of free expression at UKZN.

cting Director of ICT sent letters to academics ning them of a new ñElectronic Communications h would apply (retrospectively) to all staff and students. Staff were asked to sign their acceptance of the new policy, in terms of which all staff and student electronic correspondence, internet browsing and other internet activity would be monitored. Further, the policy explained that all documents residing on staff and student computers would be subject to being accessed by the universityøs IT department whenever the administration felt it necessary to do so. Also troubling was the letterøs instructing staff and students that the university would not allow any correspondence or documents on their computers that was regarded as ñillegal contentò (including material that was ñpornographic, oppressive, racist, sexist, defamatoryò). This poses a clear threat to academic freedom, freedom of research and freedom of expression and is an obvious obstacle to the ability of academics and students to have access to the widest possible material for research. The FXI is currently writing a response to the new policy and will circulate that response widely. Our concern is not simply for the UKZN but for academic freedom in South Africa more generally. We are concerned that the UKZN example might become one that is used as a precedent by other university administrations with political or other agendas and who want to make academic freedom subservient to those agendas. It is a matter the FXI will continue tracking throughout the country.

6.5.5 *Fazel Kahn*

Fazel Khan is a lecturer in Sociology and Social Studies on the Howard College campus of UKZN. Khan gave interviews to certain media that had approached him regarding the publication of an article in the latest issue of *ukzndaba* (Vol. 3, No. 6/7, June/ July 2006), the newsletter published by the UKZN Public Affairs and Corporate Communications Department. The article is about a film that Khan co-directed, but the article makes no mention of him or his involvement in the film, while mentioning his co-director as the director. A picture showing Khan's co-director accompanied the article. The original picture had included Khan but he was cropped out in the version that appeared in the newsletter. As a result of his being excluded in this manner, an aggrieved Khan, when approached to comment by a few newspapers, was quite critical of the newsletter. These criticisms (detailed in the charge sheet presented to him by UKZN and supplied to us by one of the staff unions) were used against Khan in a disciplinary hearing where he faces possible dismissal.

The FXIøs Simon Delaney appeared as an expert witness in the disciplinary hearing of Fazel Kahn in December 2006. Simon pointed out to the commissioner that:

The FXI finds the action of the university in hauling this academic before a disciplinary hearing in such a manner ï and for such comments ï to be appalling. Only in the most authoritarian societies do universities prevent academics from speaking to the media about their work, their research and their opinions and criticisms on the development of society and of their own

nately, is not such a society, though one might re to base oneôs understanding on the state of

From the charge sheet and from examining the newspaper articles referred to, the FXI is convinced that Khan simply acted on the basis of his constitutional right to free expression and was neither ódishonestô nor órecklessô in the statements he made ï as the charge sheet alleges. In our opinion any disciplinary action taken against Khan would constitute an unreasonable limitation on Khanôs right to freedom of expression and thus unconstitutional.

Khan would moreover have the right to review any disciplinary action taken by UKZN in any competent court. Our courts have consistently upheld the right of workers to engage in speech critical of their employers, most famously in the 1999 Constitutional Court case of *SANDF Union vs. Minister of Defence*. In the 2006 case of *Costa Gazidis vs. The Minister of Public Service and Administration*, the Pretoria High Court found that Dr Gazidisô criticism of governmentôs policy in the media, including his utterance about the Minister of Health, did not amount or constitute prejudice to the administration of the department. Dr Gazidis was therefore reinstated.

In April 2007 Khan was found guilty and dismissed. Bizarrely, in the finding of the disciplinary hearing, insufficient consideration was given to whether Khanôs statements were reasonable and in the public interest, even if he could not prove their factual accuracy. When asked about whether the current climate at the University had pressured Giles to crop Khan out of the photograph the Universityôs main witness, Professor Dasarath Chetty, stated: ó I fail to understand how the climate can pressurise an individual to airbrush another party from a photographô When the initiator, Professor Eitleburg, asked Chetty whether such a climate existed at the University, he responded ónoô[1] This shows that Chetty failed to acknowledge the significance of the context in which Khanôs exclusion had taken place; the University may have paid lip service to them, but they have not taken them into account as crucial mitigating factors. Presumably, this is because the University has implied that there was a conspiracy between Giles and Khan to bring the University into disrepute. Unless the University has evidence that was not led in the disciplinary, it is difficult to see on the basis of the disciplinary hearing how this conclusion could be arrived at.

Giles's explanation for failing to acknowledge Khan in the article was that it focused on the contribution of the technical staff of the film; an implausible argument since this focus should not have precluded his being mentioned or pictured. Also, this explanation does not address the more substantial question of why Giles decided on a story angle that effectively denied Khan his intellectual property, as the film's researcher.

The argument made in the hearing was that the UKZNdaba staff did not know about Khan's involvement in the film, is difficult to believe, given that his

[1] Testimony of Dasarath Chetty. Transcript of disciplinary hearing: Mr. Fazel Khan held on 19 October 2006 in the RMS committee room, Howard College Campus. 60.

cized on campus. As Giles herself said in the at Fazel was part of the whole deal'.

The judgement does not speak to some crucial evidence presented in the disciplinary. In response to a question put by Khanôs representative, Richard Pithouse, about whether the author of the article, Bhekani Dlamini knew about the involvement of Khan in the documentary, Giles responded ôPeople knew that Fazel was part of the whole dealô This was not taken into account. Then later on, when Pithouse asked Giles why she decided to crop Khan out of the picture, she stated that the article focussed on the contribution of the technical staff, and that the cropped photograph was visually more appealing.

This explanation is implausible. Why would Khan be left out of an article entirely if the film was a co-production? This is the primary injustice in the situation: denying someone their intellectual property. A focus on the technical staff does not require him to be completely effaced from the article; there are less drastic measures to achieve the same aim.

Further on, Pithouse asked Dlamani whether he had spoken to Khan; she responded that she did not know. Yet, as Pithouse commented under cross-examination, how did she know to leave him out of the picture, if she did not know whether he was going to be included in the article? Also, earlier on when Giles was asked how the decision was arrived at the focus on the technical staff she stated that ó I think it was a bit of a mutual discussion between Bhekani and myselfô, which clashed with Dlaminiôs testimony that Giles decided on the focus. Yet, later, she stated that it was up to Dlamini to decide whether to focus on the technical staff by leaving Khan out entirely.[2] Yet, Dlamini testified that he had no knowledge of Khanôs involvement in the film, and that he became aware of this involvement only when the airbrushing story came out. This was in spite of the fact that Khanôs involvement in the film was, reportedly, widely publicised on campus. Something does not hang together.

Then there is another crucial piece of evidence, the significance of which was ignored. Apparently a second article was written on the film, and was submitted by a freelance journalist for UKZNdaba. This journalist interviewed Khan, which suggested that he had a reasonable expectation that he would appear in the newsletter. Giles sent the photographs with Khan in to the journalist.

Then there is a famous complicity argument. When Chetty was cross-examined by Pithouse, he noted that it was probably the original intention of the University to resolve the matter amicably, but that the possibility of complicity between Giles and Khan in the airbrushing incident needed to be investigated. This is one of the most troubling incidents in the whole airbrushing episode, and what actually transpired is murky. He later repeated the allegation that Khan was complicit in the airbrushing. When he was asked what he meant by complicity, he stated that Giles had stated that Khan had

aph on her computer. When she said that she for publication, he reportedly laughed. He even ve instigated the airbrushing.

Giles testified that she had told Khan that the photo was going to be submitted, but did not know whether it was going to be published or not, and did not even know whether it would go into the UKZNdaba. She also testified that she did not request his permission to publish the photograph. Khan testified that while he may have laughed, it masked his deep unhappiness with his excision from the photograph. He did not raise the matter, but just left. For his part, Khan admitted to having seen the photograph, but claimed that he did not know that it was going to be published in UKZNdaba, and that - in any event - he did not give explicit permission for it to be published.

As Khan did not raise the matter, no evidence was canvassed in the hearing about whether he thought that Giles had removed him of her own volition. Yet the finding states that Khan knew before speaking to the M&G that Giles alone was responsible for the alteration: a deduction that is not supported by the testimony. Also, Khan testified that he and Giles had a good relationship. Therefore it was not rational for her the airbrush Khan out of her own volition, and rational for him to assume that there was an instruction. His having seen the photograph does not necessarily amount to complicity or even consent: this is a leap in logic that should not be made.

In the light of these events, it was reasonable for Khan to have assumed that 'there was a clear decision that [he] shouldn't be in the UKZNdaba and this is a dirty revenge for [his] actions during the strike', as he is quoted as saying in the M&G, and that management had a hand in this decision. He may have been unable to prove the factual accuracy of these statements, but they were reasonable.

Also, Chetty admitted under cross-examination that it might have been rational for Khan to believe that the airbrushing was a result of pressure from above: a concession that was not taken into account in the judgement. Khan may have jumped to conclusions, and been unstrategic in the statements he made; but this hardly makes him a liar. In fact, under the circumstances, he was allowed to have the perception that he was being targeted.

False statements are constitutionally protected; admittedly, they do not receive as much protection as true statements, and may be more easily overridden by countervailing interests.. But if false statements made in good faith were not constitutionally protected, we would be returning to the dark apartheid-era days of strict liability, where people would self-censor their speech for fear of reprisals for making mistakes. The protection of false speech should not be seen as an endorsement of such speech; it is not a licence for all and sundry to go out and lie, and then cry freedom of expression when they are held accountable for their false statements.

The fact is that no academic wants to make false statements deliberately; those who do will ruin their reputations in the long run. But even academics make unstrategic statements they are later unable to prove. This does not make them liars. To deny academics the same space to make false but

he post-apartheid media enjoy *is* an academic
ot seem to understand the difference between
nade in good faith and lies.
In any event, in view of the fact that management has failed to come up with a plausible explanation for his exclusion, and did not address the fact that (self) censorship had taken place, Khan's suspicion of the official position was understandable, as the official position was clearly deficient.

6.5.6 *Dieter Welz*

In June 2007 Fort Hare law lecturer Dieter Welz was summoned before a disciplinary hearing for criticizing management in his law lectures, at conferences, in private conversations, in e-mails and in the media. These charges follow a spate of bad press about the management and administration of the University. Bizarrely, one charge accuses him of inciting the campus law student leadership in private conversations with them: a truly sinister precedent that encourages óspy on your neighbourô type behaviour, where individuals testify against one another for what they say in private. Like Fazel Khan, he is also accused of making false statements to the media.

He was charged according to a 1971 conditions of service document promulgated in terms of the 1969 Fort Hare Act, which has since been repealed. The document still categorises staff in terms of marital status, race and gender, and states that black women will be appointed to permanent positions only once they are married. It is therefore hardly surprising that Welz is being charged with ï amongst other things ï the apartheid era charge of incitement.

The Fort Hare conditions of service define misconduct as follows:
'An officer shall be guilty of misconduct [if he] fails to comply with any provisions thereof with which it is his duty to comply, or
(b) does or causes or permits to be done, or connives at, any act which is prejudicial to the administration, discipline or efficiency of the University;
(f) publicly comments on the administration of the University;
(g) makes use of his position in the University to promote or to prejudice the interests of a political party; or
(h) attempts to secure intervention from political or outside sources in relation to his position and conditions of employment in the Universityé or
(i) conducts himself in a disgraceful, improper or unbecoming manneré or
(m) without first having obtained the permission of the rector discloses, otherwise than in the discharge of his official duties, information gained by or conveyed to him through his employment in the University or uses such information for any purpose other than for the discharge of his official duties, whether or not he discloses such information'.

The University has insisted that it has not used any of the 'outdated and reactionary' clauses of the Fort Hare disciplinary code, as reported in the *Daily Dispatch*, and that references to the code had been struck out at the start of the disciplinary. However, in spite of the fact that the charge sheet was amended to remove references to the Disciplinary code, the charges

. This response to the criticisms of the code is a step the politically-loaded issue raised by Welz, know about a rule or standard, which are also required to be reasonable, for a misconduct to occur. The methods used to gather information for disciplinary action should also be legal, which rules out the sorts of practices that have seen staff being fingerprinted at Fort Hare, as management attempted to establish who was responsible for circulating an internal document revealing vast salary discrepancies amongst staff.

What sets Welzôs case apart from the disciplinaries in other Universities, is that the University is taking issue with the content of his lectures and conference presentations. It is significant that he is not been charged with bad lecturing or poor performance at conferences, which one would expect if he used these platforms for transmitting ideas that bore no relation to their topics. When asked why he turned his administrative law lectures into a platform to criticise the University, his response was credible; he argued that - given its huge administrative problems ï he used the University as an example of how not to practice administrative law.

Unwittingly, management has confirmed the relevance of these criticisms in his lectures, by levelling a charge that he ó[described] the UFH management as incompetent and as a management that engages in unplanned financial expenditureô in some lectures; practices that no University would want to engage in as custodians of public funds. As one commentator on the case noted, he is being disciplined for doing his job.

In a conference presentation delivered at a Fort Hare conference on law and transformative justice in October 2006, Welz prepared a PowerPoint presentation entitled 'Without fear, favour or prejudice: a note on judicial independence and academic freedom in times of transition'. In it, Welz drew parallels between recent events in the judiciary and in academia, and identified the concentration of power as a problem threatening both the independence of the courts and the independence of Universities. Both sectors are being subjected to increased government steering - on the basis of transformative justice and transformative education - as government attempts to correct the inequities of the past.

He went on to argue that the University should rather be entrenching a form of 'self-organised' collective control, grounded in collegiality and based on the notion of a community of scholars. He further argued that 'disciplinary values and cultures are critical for any effective steering of the University' [clarify what he means by this]. In conclusion, he argued for a shift in both the judiciary and academia 'from a culture of compliance to a culture of constitutionality', which ócentrenches the notion of separation of powers and independence for both sectors'.

He then identified Fort Hare as an example of a situation where false managerialism has taken root, and where crude, oversimplified notions of accountability that are hardly appropriate to academic work, are imposed. Rather than enhancing organizational effectiveness, the new managerialism is

aucracy, and a constitutionally problematic

It can be inferred that this comment stating that disciplinary leadership is preferable to false managerialism, irked Fort Hare management especially, and led to the charge against Welz of undermining the Executive Dean of Law, Professor Patrick Osode, by making disparaging remarks. The charge accuses Welz of ó maligning the University and its management by making disparaging remarks about the University and its management in the course of the presentation at the Law and Transformative Justice conference on 4 October 2006ô Interestingly enough, Osode was not even in the room when Welz made the presentation, but was present only during question time and reportedly did not say anything to indicate his unhappiness.

Far from Welz having brought the University into disrepute, the University management is bringing itself into disrepute by acting in such a petty and intolerant manner. As was said in one of the pieces of correspondence that Welz is being disciplined for distributing, such behaviour represents ó the prevalence of authority over argumentô

The charge about distributing e-mails that were defamatory of the Dean of Law relates partly to a letter written by another Professor, Winston Nagan, on the 18 December 2006. Apparently, no action has been taken against Nagan for his supposedly defamatory statements. As Mandla Seleoane has argued, if the Dean had the courage of its convictions, he would pursue the defamation claim in open court, using his own money, rather than pursuing this allegation through a disciplinary, where the standard of proof will undoubtedly be lower.

On 31 May 2007 Welz was found guilty of defamation of the Dean and making false media reports, and dismissed. The matter has since gone to the CCMA, and the FXI has offered its assistance as an expert witness.

6.5.7 *Evan Mantzaris*

UKZN sociology Professor Evan Mantzaris has been suspended pending a disciplinary hearing into allegations of poor performance and misconduct. Two of the four charges brought against him relate to his freedom of expression, as he is changed with being 'engaged in a concerted campaign to bring adverse publicity to the Universityé with respect to the unbanning of Dr. Ashwin Desai' This charge presumably relates to his vocal campaign for the reinstatement of controversial academic Ashwin Desai, who was excluded from the University on dubious grounds. Mantzaris is also charged - in his capacity as an employee and as the Chairperson of Comsa - with defamation of the Vice Chancellor, Prof. Malegapuru Makgoba.

These charges follow the Gautshi Commission of Enquiry, established to investigate ï amongst other things ï the causes of negative publicity. This Commission marked a new, more confrontational management approach to staff involved in the February 2006 strike at the University, contrast to the more conciliatory approach reflected in the Senate Sub-Committee report. As

nior management's approach has become dom

A trademark UKZN attack against critics of management, Charge 2 alleges that Mantzaris "engaged in a concerted campaign to bring adverse publicity to the University and / or some members of staff, with respect to the 'unbanning' of Dr Ashwin Desai". The letter also claims Mantzaris conducted this alleged campaign "with other members of the University from the University premises and using University equipment". While the letter does not specify what the elements of the campaign were and how exactly Mantzaris is supposed to have caused "adverse publicity", apparently this refers to Mantzaris' vocal support of Desai - mainly through media statements - and arguments against the stance taken by the University that Desai was banned from working at UKZN. If academics are not allowed to support each other in terms of their right to conduct academic work and if their support - as in this case - is subject to disciplinary action, then this violates academic freedom and, by inference, freedom of expression.

The third charge against Mantzaris accuses him of having "produced and published defamatory letters about the Vice-Chancellor (VC) and other members of staff". The "defamatory letters" refer to letters criticising Makgoba that were published in local newspapers. Makgoba accuses Mantzaris of being the secret author of the letters, even though they do not bear the latter's name. The University also cites correspondence sent by Mantzaris to Professor Makgoba, in which he accuses the VC of "conspiring to get rid of [him]". This, the initiator concludes, is proof that Mantzaris "engaged, and continue[s] to engage in, a campaign to discredit the Vice-Chancellor in your capacity as an employee and Chairperson of COMSA." Mantzaris's disciplinary hearing is underway.

6.5.8 *Jimi Adesina*

One of the most controversial actions the University has engaged in involves support for the defamation case of Professor Chetty against Professor Adesina. The case follows a series of emails last year, just before UKZN staff went on strike. Before the strike began, Chetty's office issued an email requesting, "all staff who receive any media query related to the impending industrial action refer these calls" to his staff. In response, Adesina sent an open letter to Chetty, accusing him of attempting to gag academics and of being an instrument of authoritarianism at the University. He also claimed Chetty had brought sociologists into disrepute. Chetty then sued Adesina for defamation.

In passionate testimony, Adesina argued that the issue was really about academic freedom. He said Chetty's actions were typical of the beginning of the end for academic freedom on University campuses in other parts of Africa, and expressed concern that academic freedom and freedom of expression were under threat in South Africa, too.

The magistrate found that, given the prevailing circumstances at the University, Chetty's letter "could very well be understood" as a gagging order.

istrate said, showed no malice and were about spite of the fact that Chetty clearly did not have his finding to the High Court, which upheld the Magistrates Court ruling.

6.5.9 Other employee freedom of expression cases

- Director of Performance Management in the City of Cape Town, Themba Jack, was disciplined for serious misconduct, insubordination and bringing the City into disrepute, for writing a letter to the MEC for Local Government and Housing in November 2006. In the letter, Jack complained about what he had alleged to be the City's disregard for proper and fair labour processes. Jack is a member of the South African Municipal Workers' Union (Samwu). What the City seems to be most aggrieved by is that Jack cast its management in a bad light with the MEC, by complaining about what the City termed an ñinternal matterò Jackôs disciplinary hearing commences on Thursday 22 November. The FXI went to Cape Town to appear as an expert witness in his case, but the City withdrew the case on the morning of the hearing.

- In another case involving a SAMWU member, Eastern Cape SAMWU Provincial Chairperson, David Toyis, has been suspended by the Nelson Mandela Bay municipality, pending a disciplinary hearing into misconduct. He is being charged with several offences relating to a meeting of workers he addressed in Port Elizabeth.

  One charge states that he is guilty of misconduct for merely supporting statements critical of the Municipality by organisations such as the South African Communist Party (SACP). Some of the statements he is accused of supporting include 'power, power, down with the Municipality', and 'we say if the local government does not satisfy the needs of the people it must go.' In other statements, he accuses the City management of racism.

  Toyis has since been dismissed, and the FXI will consider appearing in his CCMA case as an expert witness.

- In February 2007, the Metsimaholo municipality instituted disciplinary proceedings against municipal employee and Cosatu chairperson for the Free State, Patrick Seshea, for - amongst other things - criticising the Municipality in the media. He was dismissed in May 2007. Seshea's arbitration hearing is being conducted by the Local Government Bargaining Council, and the FXI has offered itself as an expert witness.

  The disciplinary proceedings were instituted in terms of a Municipal Managerôs instruction, issued in November 2002, and ordering employees to refrain from communicating with the media about the Municipalityôs affairs. This instruction does not seem to be reasonable and justifiable, and, in any event, if the Municipality intended to protect

, there were less restrictive means to achieve
nning all contact with the media.

- A member of the General Industries Workers Union of South Africa (Giwusa), Bongani Ntuli, is being disciplined by his employer, Capacity Outsourcing, for distributing a pamphlet at a picket outside Johnnic Communications, which the company claims contains ôinformation that is derogatory and offensive to the good name of the companyô The company is a labour broker supplying labour services to Independent Newspapers and Johnnic Communications, and is accused in the pamphlet of engaging in exploitative employment practices. The FXI made a written submission to his disciplinary hearing, and on the basis of the submission, the Chairperson found him not guilty on that particular charge.

The FXI continues to advise employees of their freedom of expression rights, and this remains one of the most active aspects of the FXIôs work.

6.6 *The Right to Religious Expression: Kwa-Zulu Natal MEC of Education (and others) vs. Navaneethum Pillay (FXI intervening as amicus curiae)*

On 20 and 21 February 2007, the Constitutional Court heard the appeal by the Kwa-Zulu Natal MEC of Education (and others) against the High court decision in favour of Navaneethum Pillayôs daughterôs right to wear a nose-stud to school. The FXI was admitted as an amicus curiae and presented both written and oral argument.

The FXI believes that the decision of the third and fourth applicants (ñthe schoolò) to prohibit Sunali Pillay from wearing her nose-stud raises questions of considerable public importance, which are new in our law.

The decision of the school plainly impacts on the rights to equality, freedom of religion and freedom of culture, as enshrined in the Constitution. However it is the FXIôs contention that it is not only these rights that are implicated by the schoolôs decision. Rather, the right to freedom of expression is also implicated by the schoolôs decision. It is on the right to freedom of expression that the FXI will focus its submissions.

The FXI submitted that the decision by Sunali Pillay to wear the nose-stud constituted an exercise of her freedom of expression. This right to freedom of expression flows directly from section 16(1) of the Constitution.

However equally, and perhaps most critically, the right to freedom of expression also flows directly from the provisions of the two sets of regulations issued by the Minister of Education in terms of the South African Schools Act 84 of 1996. Both of these sets of regulations are plainly relevant to any determination of this matter and both suggest that Sunali Pillayôs right to freedom of expression has been implicated by the decision of the school. In light of this, the FXI will submit that it is plain that Sunali Pillayôs decision to

in freedom of expression as defined in the both sets of regulations, Sunali Pillayôs right to ot absolute. However, again under both sets of regulations, it would only be appropriate to prohibit her from wearing the nose-stud essentially where this would lead to the ñsubstantialò ñdisruptionò of school activities.

The FXI submitted that, on the evidence led in this matter, there was clearly no danger of the wearing of the nose-stud resulting in the substantial disruption of school activities. As such, the decision to prohibit the nose-stud was in conflict with Sunali Pillayôs right to freedom of expression contained in the regulations.

In light of the above, the FXI therefore submitted to the Court that the case involves the intersection of four fundamental rights:

- the right to equality;
- the right to freedom of religion;
- the right to freedom of culture; and
- the right to freedom of expression;

It is for this reason that the limitation on freedom of expression occasioned by the schoolôs conduct is particularly severe. It involves expression that is aimed at exercising other fundamental rights in the Bill of Rights ï namely the right to freedom of religion and the right to freedom of culture.

The FXI therefore contends that this matter ought properly not to be decided without reference to Sunali Pillayôs right to freedom of expression. This is notwithstanding the fact that the original claim brought by the respondent (a layperson without legal assistance) was under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (ñthe Equality Actò).

The FXI submitted that if courts were precluded from taking into account freedom of expression in appropriate cases under the Equality Act, this would place an intolerable and unnecessary burden on the litigants that the Equality Act is meant to persist. The Equality Act was, after all, enacted for the purpose of making litigation with regards to issues of equality easier, rather than more cumbersome. Yet many issues of equality will involve other fundamental rights including dignity, expression, privacy and others. It could surely not have been the intention of the drafters to preclude litigants and courts from having regard to such rights merely because a case began as a matter under the Equality Act.

In October, the court found in favour of Pillay, and in the process accepted many of the arguments made by the FXI in its amicus intervention.

6.7 *The Principle of Open Justice: M&G and others v The State*

On 25 May 2007 in the Pretoria High Court Judge Joop Labuschagne ruled in favour of the *Mail & Guardian*, FXI, MISA-SA and SANEF in dismissing the Stateôs application to gag a vital nuclear smuggling case in which two

any are charged with smuggling components to

The court ruled that it was in the public interest to have an open court hearing. Open justice, the judge said, is the starting point and a principle fundamental to our law. If sensitive material will be exposed during the trial and it appears that it is in the interest of good order or the administration of justice that the court is closed, then the State may reapply and the court will reconsider the issue.

Daniel Geiges, Garhard Wisser and Krisch Engineering are alleged to be part of an international nuclear smuggling network (the so-called 'AQ Khan network'), whose activities were exposed in 2003 while attempting to smuggle components for uranium enrichment to Libya. According to the *Mail & Guardian*, the arrest of Geiges and Wisser was a product of close collaboration between the NIA, MI5 and the CIA.

At the court hearing on 2 May 2007, the National Prosecuting Authority applied for virtually the entire trial to be held *in camera* and for a prohibition of publication of information related to the trial. The State argued that nuclear technology could fall into rogue hands if the information was made public and that the SA government was obliged to maintain strict control and secrecy on the development and manufacture of weapons of mass destruction in terms of international and African treaties, as well as South Africaôs Criminal Procedure Act, the Nuclear Energy Act and the Non-Proliferation of Weapons of Mass Destruction Act.

The *Mail & Guardian*, FXI, MISA-SA and SANEF accepted that while there may well be parts of the hearing that would have to be heard in camera, the State's application was over-broad, vague and an unprecedented request for a secret trial, which other courts described as a ómenace to libertyô Deviations from the principal of open justice should be made in the least restrictive way possible. The State's application was so wide that even relatives of the accused could not attend the trial without the judge's permission. This would have amounted to an effective gag.

Both established international law and recent South African law stress the importance of open justice and freedom of expression. The Constitutional Court has said that ó[C]losed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.ô

The case is clearly a matter of considerable public interest, given that it involves the prosecution of individuals for allegedly smuggling nuclear material, in contravention of South Africa's non-proliferation undertakings. Production of nuclear weapons is a matter of huge public interest internationally currently. Todayôs judgement reinforces our right to know about the smuggling and development of technology that has such a huge bearing on human well being.

eal recently found in favour of eTVõs right to thout first submitting it to the State for ópre-t the Directorate of Public Prosecutions (DPP) ómust expect that freedom will not be abused until [the DPP] has adequate grounds for believing the contrary. But [the DPP] may not require the press to demonstrate that it will act lawfully as a precondition to the exercise of the freedom to publish in the absence of a valid law that accords him that right.ô

Similarly in this case the media raised concerns about the Stateõs attitude that the media, generally, cannot be trusted or relied upon to be careful and selective in handling and publishing sensitive information. The judgement therefore holds up the rights of the media and entrusts it with the responsibility to deal professionally with the sensitive information likely to come up in the course of the trial.

6.8 Litigation to challenge the constitutionality of, alternatively the application of legislation which violates media freedom:

For some years the FXI and SANEF have been negotiating with government on other laws which impact on media freedom, yet government has made little progress in amending or repealing these laws. The following laws were pinpointed by the FXI as requiring amendment or to be repealed.

6.8.1 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Equality Act):

The Equality Act aims, inter alia, to prevent hate speech. The FXI objects to the formulation in the Equality Act on the grounds that extending the concept of óharmôto non-physical forms of harm, e.g. psychological harm, will lead to the parameters of hate speech becoming too wide and therefore lead to gross and unwarranted violation of the right to freedom of expression. óHarmôshould be limited to physical harm only so that there can be a temporal basis upon which the harm can be determined to have been so imminent as to give it a realistic possibility of occurring. Moreover, the Act prohibits speech where the communicator has no subjective intention to discriminate on one of the prohibited grounds, namely race, ethnicity, gender and religion.

The danger for journalists is in reporting provocative statements by people that are construed as offending against the Equality Act. Both journalists and editors may engage in self-censorship out of fear of transgressing the law, yet also preventing the public from knowing what views, albeit controversial, some people hold.

6.8.2 National Key Points Act, 1980 (NKPA):

The NKPA, is one of the most restrictive laws in terms of the ability of the media to report on issues of national importance. Many important establishments such as the country's airports and telecommunications facilities are classified as national key points and gatherings and demonstrations in or around their vicinity are severely restricted. This

ed to protect strategic facilities from being
her liberation movements.

The *National Key Points Act* makes the provisions of the *Protection of Information Act, 1982* applicable to national key points. There is no doubt that this Act is in conflict with the *Promotion of Access to Information Act, 2000* and it is disturbing that the first two Acts continue to remain on the statute books.

The Act does not state how, when or where the minister is to make the declaration and how members of the public are expected to know whether a key point has been declared. The media could readily transgress this law by reporting on what happens at a key point. This danger is exacerbated because government has never identified the national key points and journalists only discover that they have acted illegally when they report on an activity at a key point and the authorities invoke the Act.

6.8.3 Protection of Constitutional Democracy Against Terrorism and Related Activities Act, 2004, (Anti-terrorism Act):

This Act poses particular dangers to journalists. The Act provides that any person who suspects another of intending to commit or of having committed a terrorist act must report that knowledge or suspicion to the police and failure to do so is an offence. For journalists who often interview such ósuspiciousô people in the course of their investigative duties, this requirement places an onerous duty on them and lays them open to prosecution for failing to report their suspicions to the police. The FXIôs objective in this regard is to lobby for the repeal or amendment of statutory law that violates media freedom.

The FXI wished to take test cases to court on these laws to challenge their constitutionality, or, to the extent that such a óhead-onôassault is inappropriate, to ensure that the laws are correctly applied, with due regard for freedom of expression and with the least possible impact on media freedom. The FXI is also lobby vigorously against any censorious bills before Parliament. The FXI has created tremendous public awareness created about the ópre-publication censorship effectô of the films and Publications Amendment Bill, and has prepared and submitted written and oral submissions to Parliamentary Portfolio committee on the Bill which has subsequently been redrafted.

The FXI has also made written and oral submissions to the Department of Safety and Security on the National Key Points Amendment Bill, the outcome of which is still awaited. The aforementioned submissions did however result in a media storm against the resurrected apartheid-style National Key Points Amendment Bill.

We are also currently in the process of analysing a new Bill, the Protection of Information Bill, and its impact on freedom of expression, the free flow of information, and the affect that this Bill if passed will have on the mediaôs ability to effectively carry out its investigative and reporting function. We have already had informal discussions with the drafting team and will be making

ortly. Suitable test cases have unfortunately not
st the constitutionality of the Anti-Terrorism Act
ns of the Equality Act.

6.9 Litigation to challenge the constitutionality of, alternatively the application of common-law actions and offences which violate media freedom

Since the inception of the constitutional guarantee of freedom of expression, the FXI has been seeking optimal cases to challenge the constitutionality of common-law actions and offences in civil and criminal law and that restrict media freedom. The FXI intended and still does intend taking test cases to court on these laws to challenge their constitutionality, or, to the extent that such a ôhead-onô assault is inappropriate, to ensure that the laws are correctly applied, with due regard for freedom of expression and with the least possible impact on media freedom.

The law of criminal defamation in South Africa is ripe for constitutional review; as is the law of civil defamation, which is resorted to increasingly by public figures increasingly concerned about protecting their reputations, at the expense of the mainstream media. The law of civil defamation needs to be developed in the following areas: onus of proof with respect to defamation actions by public figures and officials; 'David and Goliath' jurisprudence; reassessment of the proper standard of dignity and reputation where plaintiff is a corporation; expansion of the public interest defence, especially where a public official's private life raises public interest issues; definition of 'media', to include bloggers, etc; reassessment of the doctrine of prior restraint/interdicts, possibility of exception for free speech issues; introduction of remedy of apology as a complete defence, as an alternative to settlement/damages, in order to vindicate reputation.

In April 2007, the Constitutional Court ruled in *NM and Others v Smith and Others* that the right to privacy and dignity of three HIV-positive women had been violated by the publication of their names and HIV status in a biography. The FXI, successfully admitted as *amicus curiae*, argued that if the media were to be held liable for the negligent disclosure of private facts they would bear an intolerable burden that have a chilling effect on media freedom.

In the recent case if *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions*, involving private broadcaster *e-TV* the law changed regarding prior restraints, adopting a standard that requires an applicant to demonstrate that the harmful effects on freedom of expression are outweighed by the need for such a restraint.

The common law status quo has been retained, protecting both media and individual defendants who unwittingly, but mistakenly, infringe the privacy of individuals in speech or in writing. Whereas the current test for *sub judice* is whether the publication *tends to interfere* with the administration of justice, the *e-TV* test requires that a *real risk of substantial harm* be demonstrated makes it clear that the 'tendency to interfere with the administration of justice' test is

l appropriately when the next sub judice case test cases have arisen for the FXI to test the defamation, the sub judice rule and the offence of blasphemy.

6.10 Pre-publication litigation and advice to stave off interdicts preventing media from publishing

The law clinic has provided much pre-publication legal advice to small and large media outlets, through advice on laws that affect the media such as defamation, protection of sources and state advertising in the media and civil procedure. We would like to highlight a few of the matters in respect of which the Law clinic provided advice:

- Advised *Gecko Publishers* on potentially defamatory material contained in an autobiography;
- Advised Mattblack Publishers on the publication of a South African Graffiti book regarding confidential sources;
- Advised Bush Radio on a potentially defamatory comments made in an interview conducted with Mr Terry Crawford-Browne regarding the Minister of Finance's involvement in the "Arms Deal";
- Advised Wits Student's *PSC Committee* on material they wished to publish and posters they wished to put up on campus which risked infringing certain intellectual property rights;
- The law clinic provided the Stellenboch University with advice on whether or not the distribution of a transcript of an interview conducted by Carte Blanche, and posted on their website, to the students attending a journalism class for purposes of education, research and discussion would constitute a copyright infringement.
- The FXI presented two workshops on "The Constitution and the Media" and on "Preventing Pre-publication Litigation" Workshop.

Through these training sessions and the advice provided, both journalists and editors have been taught particular techniques that will enable them to successfully rely on at least one of the established defences against defamation, namely, truth and public benefit, fair comment and reasonableness; to avoid litigation and make better pre-publication decisions. Demand for pre-publication advice and general-purpose training far outstrips capacity of the law clinic to deal with these matters which currently is budgeted at 10 – 15 hours per week.

6.11 *Miscellaneous interventions*

- The FXI assisted ANC members in the Buffalo City Municipality who were interdicted by the council for a march they had held and for a petition which threatened to make the municipality "ungovernable" and complained about the manner in which ANC councillors were chosen. The FXI also supported the ANC members' application to the Foundation for Human Rights for legal funds to defend themselves.
- The FXI responded to the proposal by Sports and Recreation Ministry advisor, Gideon Boshoff, that the old South African flag be banned from

matches in 2010. Our argument was that this ribe the freedom of expression of a certain and could have the effect of suppressing a particular viewpoint ï even if it is odious ï without dealing with the viewpoint and its causes.

- Faizel Katkodia, a manager at Standard Bank, was called to a disciplinary hearing for sending out emails critical of the state of Israel to his private mailing list using the bankôs internet resources. He has been charged of using the bankôs internet resources in violation of bank policy and of bringing the bank into disrepute. The FXI has been advising Katkodia on this matter and will consider further assistance depending on the outcome of the third hearing, which is scheduled for August.
- The South Africa Ports Authority has decided to invoke the National Key Points Act and attempt to have ports in South Africa declared as national key points. The FXI has responded to this by pointing out the dangers to freedom of expression, freedom to protest and access to information of the National Key Points Act generally and how the declaration of ports as national key points will constrain various forms of expression around the ports. The FXI is watching the matter closely.
- Wardah Hartley is an SABC journalist who was hauled before a disciplinary committee for allegedly bringing the SABC into disrepute. After the SABCôs radio station 5FM played a song that many Muslims would find objectionable ï the song had the Muslim call to prayer, the *adhan*, in the background, Hartley sent out an email to a number of Muslim friends asking them to send letters of complaint to the SABC. The corporation felt slighted and decided to take action against her. Hartleyôs union representative approached the FXI for advice on how to approach the matter in the hearing and was assisted by the FXIôs legal unit.

7. Finance and Administration

A Sustainability Plan report that was undertaken for FXI by an independent evaluator made recommendations for a shift to separate the Finance and Administration unit. In the past year FXI has seen the Administration department taking control of all administrative functions and challenges. With assistance and support from the Executive Director the department has grown, and has managed to present Administrative reports in accordance with required formats. The department has also become more active in substantive support for all the various research, advocacy and legal programmes that the FXI undertakes.

Funding difficulties in the FXI remains a challenge for the administration department to meet some of its goals. However, the high level of commitment continues to ensure that work is done according to the mission, objectives and policies of the FXI.