



FREEDOM OF EXPRESSION INSTITUTE

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NEWS

About the FXI

The Freedom of Expression Institute (FXI) is a non-profit organisation that was established on 27 January 1994. The aim of the organization is to protect and foster the right to freedom of expression as an enabler of access to civil, political and social, economic rights. The FXI derives its mandate from s16 (1) and s17 of the South African Constitution:

- Everyone has the right to freedom of expression, which includes –
- Freedom of the press and other media;
- Freedom to receive and impart information or ideas;
- Freedom of artistic creativity; and
- Academic freedom and freedom of scientific research.
- The right to demonstrate and protest to express views

Court Cases

Centre for Child Law & Others v Media 24 Limited & Others

On 28 September 2018 the Supreme Court of Appeal delivered a judgment concerning Section 154(3) of the Criminal Procedure Act 51 of 1977.

This application arises from the infamous case of Zephany Nurse who was abducted from the hospital two days after she was

born and discovered at the age of 17. Her case is ongoing and her identity will remain anonymous until all the appeals in her case have been exhausted.

The appellants in this matter sought to have this section declared unconstitutional and invalid because “it does not afford protection to child victims, and because it does not afford ongoing protection to children who are protected by the section, but who forfeit this on attaining the age of 18 years.”

In this matter, Judge Swain ruled that the section is constitutionally invalid in as far as it does not protect the identity of children as victims of crimes at criminal proceedings. The Judge stated that “the exclusion of child victims from the provisions of s 154(3) of the CPA, is irrational and in breach of s 9(1) of the Constitution, which guarantees the right to equal protection and benefit of the law to everyone. The denial of equal protection to child victims, who are equally vulnerable, cannot be justified.”

The court however dismissed the extension sought by the appellants for the protection of the children in criminal proceedings indefinitely into adulthood. The judge stated that “the proposed limitation on the right of the media to impart information is neither reasonable nor justifiable, in terms of s 36 of the Constitution.” The right to freedom of expression and the open justice principle would thus be unjustifiably affected by the proposed extension.

The court ruled that the section should read: “No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of 18 years, [or of a victim], or of a witness at criminal proceedings who is under the age of eighteen years: provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be

just and equitable and in the interest of any particular person.” The bracketed words above being read into the subsection. The court has given parliament two years to remedy this constitutional defect, failing which the above shall be deemed final.

The Centre for Child Law plans to appeal to the Constitutional Court as they believe that the protection should extend into adulthood in order to “prevent significant and life-long harm” of the individuals affected. The media respondents raised a number of instances in which the adult extension would encroach on their rights as entrenched in s 16 of the Constitution.

The right to assembly: Maphoto and Eight others.

The trial of Daniel Maphoto and eight others of the Ga-Pila community at the Mokopane Magistrates’ Court scheduled for 28 September 2018 was postponed due to the failure to furnish the FXI representing the community with the entire docket timeously. The charges are yet to be defined.

The trial is as a result of a peaceful demonstration and gathering that took place on 4 June 2018 at the gate of Mogalakwena Mine, owned by Anglo Platinum to consider a request for reasonable packages relating to the relocation which took place 18 years ago.

The police that were called in by the management of the mine asked the demonstrators to leave. As the demonstrators were peacefully moving away from the mine gate, it is alleged that the police started shooting rubber bullets and throwing tear gas canisters at the community members.

Nine community members were arrested and on the 16 June 2018 they were purportedly charged at the Mahwelereng

Police Station with public violence and trespassing. On 18 June 2018, they were granted bail of R500 each.

The trial has been postponed to 3 December 2018.

Update: Censorship – SAMPADA Private Equity (Pty) Ltd v Samuel Mungadze

On 20 August 2018, Judge Wepener dismissed the application for leave to appeal his judgment upholding an application by SAMPADA Private Equity to interdict freelance journalist Samuel Mungadze from publishing on the management of the pension funds pending their defamation trial. Mr Mungadze had written a series of articles published between 29 April 2018 to 20 May 2018 which appeared in the various publications including the *Sunday Independent* and the *Citizen* on alleging impropriety and mismanagement of pension funds held at the South African Local Authorities Pension Fund for the benefit of municipal employees.

The journalist correctly maintained that it was in the public interest to publish as the story concerned substantial amounts of money in the pension fund for the benefit of government employees. The Court disregarded the fact that applicants had been given a right of reply by being sent a list of questions before publication as well as an express invitation to a live interview with the journalist which they declined. Further, the Court failed to appreciate that it was the newspaper editor and the proprietors of the newspaper that caused the publication of the article and not the journalist.

The court made a factual finding on the truthfulness of the allegations in the article which, it is submitted, was not required in an application for an interdict. A ban on a publication is the last resort. Given that a

prospective plaintiff still has a defamation action if the publication cannot be defended, a ban ought almost never to be ordered. The court failed to appreciate that a journalist, by definition, has no first-hand knowledge of the allegations that he or she publishes because he or she is told of events by others.

An interdict of this nature has far-reaching implications as it amounts to the censorship of the media and this is in contradiction to the provisions of free expression and press/media freedom enshrined in Section 16 of the Constitution of the Republic.

On 28 September 2018, the FXI, on behalf of Samuel Mungadze, petitioned the Supreme Court of Appeal for leave to appeal the decision of Judge Wepener.

Update: S.O.S. Coalition and Others v South African Broadcasting Corporation, MultiChoice and Another

The Constitutional Court judgment delivered on 28 September 2018 has paved the way for the Competition Commission to investigate the Commercial and Master Channel Distribution Agreement between the SABC and Multi-Choice concerning programming.

The matter, which was argued in the Constitutional Court on 23 November 2017, was an appeal launched by the S.O.S Coalition and the Competition Commission against the decision of the Competition Appeal Court regarding the powers and functions of the Competition Commission.

At issue was whether the agreement between the SABC and MultiChoice, which was concluded on 3 July 2013, constitutes a merger as contemplated under the Competition Act and whether the Competition Commission had authority to investigate the nature of the agreement. Under the agreement entered into between

the SABC and Multi-Choice where Multi-Choice would pay the SABC fees of more than R500 million over five years in exchange for the SABC allowing the Multi-Choice to broadcast SABC's entertainment channel - largely archive programming on the Multi-Choice platform. The SABC would produce entertainment programming for MultiChoice for which MultiChoice would have exclusive distribution and marketing rights. The SABC would transmit its free-to-air channels on its digital terrestrial television platform in respect of which Multi-Choice would not have exclusive rights to distribution and marketing.

The Constitutional Court held that it was in the public interest that the Competition Commission should be permitted to conduct an investigation into the agreement between the SABC and Multi-Choice to determine whether it constituted a merger. The ruling means that the investigation the Competition Commission had begun will now resume and that it may include interviewing the relevant SABC board members on the negotiations around the agreement with Multi-Choice.

Update: Hate speech in the workplace – Duncanmec v National Union of Metal Workers of South Africa (NUMSA) obo D Mphahleni and Others

On 13 September 2018, the Constitutional Court in its unanimous judgment *per* Justice Jafta upheld the right to free speech in the singing of struggle song during a strike dismissing the appeal the employer, Duncanmec, launched arguing that the struggle songs constituted hate speech.

On 31 May 2018, the Constitutional Court had to decide whether the decision of the arbitrator at the CCMA was reasonable in finding that the singing of struggle songs during a strike to demand worker's rights

did not constitute a dismissible offence. The employer, Duncanmec sought to appeal the decision of the Labour Court with leave to appeal having been dismissed by the Labour Appeal Court which found that the dismissal of employees for singing struggle songs during an unprotected strike was unfair thereby confirming the decision of the arbitrator at the CCMA. The Labour Court upheld the decision of the arbitrator that dismissal was unfair. Whilst the arbitrator at the CCMA found that the singing of struggle songs was inappropriate and could be offensive, the singing of the song, which was sung in isiZulu did not constitute racism.

The employer contended that the struggle song constituted hate speech in that it was offensive, hurtful and threatening with racist connotations and as such the decision of the commissioner at the CCMA was unreasonable. On behalf of NUMSA it was submitted that the issue of hate speech did not arise in the context of whether or not the employees were found guilty of misconduct justifying dismissal. NUMSA did not challenge the finding of the CCMA arbitrator that the struggle song was inappropriate and could be racially offensive. The Constitutional Court proceeded on the basis that the struggle song was racially offensive. It found that the singing of struggle songs was not prohibited in the disciplinary code of Duncanmec. The Constitutional Court found that the decision of the arbitrator was reasonable.

Update: Mlungwana and others v The State and others

On 20 August 2018, the Constitutional Court was called upon to consider the constitutionality of section 12(1)(a) of the Regulation of Gatherings Act which makes it a criminal offence to convene a gathering of more than 15 people without the

convener giving prior notice to the local authority. The High Court in the Western Cape held that the provision was unconstitutional in that it limited the right to assemble and gather as protected under section 17 of the Constitution. The criminal sanction under section 12(1) (a) constituted a limitation in the exercise of the right to free assembly as enshrines under section 17 of the Constitution.

The Minister of Police, that is challenging the finding of the High Court, argued that it was constitutional to criminalise the conduct of a convener failing to give notice to a local authority when convening a gathering of more than 15 persons. Consequently, there was no limitation to section 17 of the Constitution and if there was the limitation is reasonable and justifiable.

The Constitutional Court has reserved judgment.

Policy developments

Review of the public broadcasting policy

On 12 June 2018, the department of Communications issued a public notice calling for submissions on the public broadcaster. The themes to be covered under review include the following:

- The mandate of the public broadcaster;
- The size and scope of the public broadcaster;
- Appropriate funding model
- Governance framework
- Accountability measures

The department of Communications intends to publish a draft broadcasting policy by the end 2018.

Electronic Communication Amendment Bill

On 19 September 2018, Parliament tabled the Electronic Communications Amendment Bill which is an amendment on several substantive provisions of the Electronic Communications Act, 36 of 2005. The amendment seeks to:

- Provide a new framework for rapid deployment of electronic communications facilities;
- Provide new approaches on scarce resources such as spectrum;
- Create a new framework for open access;
- Provide for the regulation of international roaming, including SADC roaming to ensure regulated roaming costs, quality of service and transparency thus making roaming costs affordable;
- Reduce infrastructure duplications and encourage service-based competition through wireless open access network services; and
- Provide for consumer protection of different types of end-users and subscribers.

A call for submissions is yet to be made.

National and Provincial Party Elections Broadcasts and Political Advertisements Amendment Regulations

In preparation for the national elections in 2019, the Independent Communications Authority of South Africa, on 31 August 2018, published an amendment to the regulation on National and Provincial Party Elections Broadcasts and Political Advertisements for comment by 29 September 2018. The proposed amendment seeks to regulate political electoral broadcasts to ensure fairness and equitable treatment of registered political

parties. Broadcasting licensees are to increase the number of slot allocations per day available for political election broadcasts.

In the region

Mozambique

On 23 July 2018 and ahead of the municipal elections scheduled for October and presidential elections in 2019, government introduced new fees for foreign media and local media including community radio. In terms of Decree No 40 of 2018 accreditation for foreign journalist which was free previously will now cost approximately US\$ 500 each year. A resident foreign correspondent will have to pay approximately US\$ 8,300 as an annual fee, whilst a local freelance journalist working for a foreign news outlet will pay an annual fee of \$2,500. Over the past four years, Mozambique has been sliding down the World Press Freedom Index to 99th place out of 180 countries.

Organisations including the Mozambique branch of Media Institute of Southern Africa; Committee for the Protection of Journalists and the FXI have raised their concerns that the introduction of these fees will have an adverse effect on press freedom, restrict the media's ability to simply do its work and limit access to information.

The new fee structure came into effect at the end of August 2018.

Events

Ga-Pila community training

On the 8th August 2018, FXI undertook an intervention in the community of Ga-Pila. Given the circumstances of the arrest of Daniel Maphoto and 8 others, it was

essential for FXI to understand their grievances in detail and to provide training on Freedom of Expression (s16) and Access to Information (s32). The grievances go way back from when they were first removed from the premises on which the mine is based. The community feels short-changed by the transaction as they are deeply unhappy in their new premises, claiming that their housing is not what was promised to them, amongst other things. Understanding the legal provisions available to them, as well as the use of other tools, such as the Promotion of Access to Information (PAIA) forms, requesting information was important and useful. Ongoing communication with the community is taking place until their trial of the 3rd December 2018.

FXI Roundtable discussion on Freedom of expression and Social media

On the 19th August 2018, FXI hosted a roundtable discussion on "*The Intersection between Freedom of Expression and Social Media*". The event was chaired by Sarah Findlay of Media Monitoring Africa (MMA) and guest speakers were Khutso Tsikene, Digital Co-ordinator at Media Democracy and Development Agency (MDDA) and Okyerebea Ampofo-Anti, partner at Webber Wentzel Attorneys. The well attended event reflected on a number of major issues related to the topic concerned. This included the following:

- Social media platforms offer huge opportunities in terms of growth, business and information sharing with far greater reach than ever before.
- With greater reach comes huge contestation around offensive content and hate speech and the challenge is how to manage these in

a global environment such as the internet.

- Fake accounts are very active where people with pseudonyms say things they wouldn't ordinarily say. The development of "bots" also play a role where a lot of information automate the creation of accounts that can be synchronised and all shoot out the same method at the same time.
- The impact of algorithms must also be borne in mind. This is automated decision making where platforms are not neutral and are tailored to one's preferences in order to keep people active on the network.
- Social media has not only become a fertile soil for the spread of hateful ideas but also a motivation for real life action. A study in Germany found a link between the level of face-book posts and hate crimes taking place.

- A distinction must be made between the jurisdiction of a country's laws on hate speech on social media and on the wider international platform such as Facebook. Facebook has its own method of blocking offensive content and various country's may have their own legislation regarding Facebook. For example, in Germany, Facebook is held accountable if hate speech content is not taken down within 48 hours or else they could be sued.
- With social media, we are trying to establish a new set of ground rules and people are still trying to figure out the legal aspects of it.

Caution should be made that although freedom of expression should be used as is stated in our Constitution s16 (1), we need to be mindful of s16 (2) as well as s36 which stipulates the limitations on freedom of expression in general and in terms of social media.

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