



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

COMMENT

As the Freedom of Expression Institute (FXI) celebrates its 25th anniversary it is worth reflecting on the strides made in advancing the protection of the right to free expression. The disclosures presented almost daily at the commissions of inquiry into state capture and into tax administration and governance at the SA Revenue Service, compounded by a slew of reports and findings from other inquiries into private and other organisations,

reinforces the importance of protecting freedom of expression.

Furthermore, the allegations of hate speech brought before the Equality Court bring to bear the tension between the constitutional right to free speech and the expression of views and opinions and the individual's dignity. Indeed, the case of *Masuku v South African Human Rights Commission* is a case in point. The High court found that although speech can be "hurtful....., wounding, distasteful, politically inflammatory or offensive", it does not exclude it from protection. This matter is now before the Constitutional Court and it will be of great interest to observe the outcome as we determine the parameters of hate speech and freedom of expression. As the FXI it is our duty to ensure that the constitutional principles of free expression are safe-guarded.

Policy developments

New code of ethics for the media

As from 1 January 2019, the new code of ethics for print and online media adopted by the Press Council of South Africa and the Interactive Advertising Bureau of South Africa came into effect.

The code, which deals with media-generated content as well as that generated by users, sets a framework for journalists and the newsroom in order to maintain credibility striving for truth, avoiding unnecessary harm, reflecting on a variety of views in covering events. The media must maintain a balance between the right and duty to report and comment on all matters of legitimate public interest against the obligation not to publish material that amounts to the incitement of violence or advocating hatred based on race, religion, ethnicity or gender.

Several topics are covered in the code and these include: independence and conflict of interest; privacy, dignity and reputation; protection of personal information; discrimination and hate speech; and

payment for information; and protected comment.

The Protection of Personal Information

On 14 December 2018, the Information Regulator published the Regulations Relating to the Protection of Personal Information. The Protection of Personal Information Act of 2013, taking into account the constitutionally protected right to privacy, seeks to promote the protection of personal information processed by private and public bodies; establish a framework for processing personal information; provides for the rights of persons regarding unsolicited electronic communications and automated decision-making and established the office of the Information Regulator.

SA Communications Minister in Censorship Scuffle

On 9 February 2019 Communications Minister Stella Ndabeni-Abrahams prevented a South African Broadcasting Corporation (SABC) reporter from filming a protest at the ANC's manifesto launch in the province of the Eastern Cape. Ndabeni-Abrahams offered an apology in a statement posted on her official Twitter account and met with the South African National Editor's Forum. The incident is unfortunate in light of the upcoming elections and the duty on journalists to report on events without interference from government officials. Attempts to censor information in a constitutional democracy is not in the public interest.

Developments in the Courts

Gordhan v Malema and Another – hate speech.

The Johannesburg High Court will be called upon to consider the constitutionality of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 in the context of free speech as protected in section 16 of the Constitution and the

parameters of hate speech in the case of Mr Gordhan and Mr Malema.

Hate speech can be defined as the advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes the incitement to cause harm.

On 11 February 2019, the Magistrates' Court of Johannesburg sitting as an Equality Court ruled to transfer the matter to the Johannesburg High Court because it lacked jurisdiction to consider the constitutionality of legislation.

The FXI will be intervening as an *amicus curia*.

Mungadze v Mafologelo et al: censorship

On 25 January 2019, Mr Mungadze, a journalist, filed an application with the Constitutional Court of South Africa for leave to appeal the decision of the High Court. This follows a dismissal, without reasons, on 19 December 2018 by the Supreme Court of Appeal of the petition of Mr Mungadze for leave to appeal the judgment in High Court of 8 June 2018.

On 14 June 2018, the South Gauteng High Court upheld an application by SAMPADA Private Equity to interdict freelance journalist Samuel Mungadze from writing on their mismanagement of pension funds pending their defamation trial. The trial could take up to 3 years or more. Mr Mungadze had written a series of articles published between 29 April 2018 to 20 May 2018 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. The effect of the decision has placed a limitation on the constitutional right to freedom of expression and the right of the public to be informed on the use of public funds. An interdict of this nature has far-reaching implications as it amounts to 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.

The FXI- Law Clinic is representing Mr Mungadze.

Lanxess Chrome Mining (Pty) Ltd v Minister of Police and Others: right to protest

Lanxess Chrome Mining launched an application for an interim interdict against members of the Mokhukhung Section community in Marikana who were protesting against the mine for closing the road to the village for mining purposes allegedly without consultation with members of the community.

The FXI-law clinic is representing the community in opposing the interdict. The matter is scheduled to be heard in the Mafikeng High Court on 11 March 2019.

Right to Protest

On 5 February 2019 a 3rd year Durban University of Technology student was shot and killed following a protest outside Durban campus. The student protests centred on registration by students owing fees from previous years and non-availability of student accommodation. The FXI called for a balance between the right of the institution to function and the

right to freedom of expression and the right to protest to avoid the erosion of rights.

In the region

Zimbabwe: Internet Shutdown during protests

On 16 January 2019, the Zimbabwean government ordered the shutdown of the internet in response to growing protests across the country following a drastic fuel price hike introduced on 12 January 2019. On 21 January 2019, following an application by the Media Institute of Southern Africa- Zimbabwe chapter, the Zimbabwe High Court ruled that the shutting down of the Internet was unlawful and ordered that Internet and social platform services be restored. The Internet shut-down is contrary to the UN Resolution A/HRC/32/L.20 which provides that people off-line must be protected on-line. The African Freedom of Expression network, of which the FXI is a member, condemns the draconian measures to censor the citizens of Zimbabwe limitation against the principles of the African Charter on Human and Peoples' Rights that are binding on Zimbabwe.

Democratic Republic of Congo: Internet Shutdown awaiting election results

Following presidential elections on 30 December 2018 and a two-week delay in the announcements of the results, the government shut the Internet down and placed a block on the mobile phone short messaging service connections. The authorities allegedly claimed that the Internet and text messaging services were shut down to prevent "fictitious results" being circulated on social media resulting in public disorder. The signal for *Radio France Internationale*, a news source that was tracking the election, was also shut down. The ban was lifted after the results were announced in which Felix Tshisekedi, son of veteran opposition leader Etienne Tshisekedi was declared winner and incoming president.

Events

Training in Kwa-Thema (Springs)

On 15 December 2018, the FXI conducted a training workshop in Kwa-Thema on human rights in general, the right to protest and access to information legislation as they were experiencing many frustrations with housing and required information. The community requested follow-up training in the first quarter of 2019.

A follow up workshop was held on the 9th of February 2019 where the Municipal System Act was covered.

FXI anti-bullying campaign in schools

The FXI has launched a campaign for young people in schools to encourage them to utilise their right to constitutionally protected right to free expression. This in response to bullying taking place in schools. The motto of the campaign is **#Raise you voice! Stop Bullying!** On 22 and 23 January 2019, FXI visited four schools in Tsakane, in the East Rand to get an overview of the problems of bullying there. These were Shadrack Mbambo Primary School, Tsakane Primary School, Lebone Primary School and Nchabeleng Primary School. The training will be rolled out from April 2019.

In response to a request from the community of Sebokeng through the Crisis Committee on Access to Information and the Right to Protest, the FXI conducted a training workshop on the 2 February 2019 in Sebokeng, south of Johannesburg.

Training workshop in Sebokeng

The community request followed numerous petitions initially to the Emfuleni municipality and later to the legislature about their concerns on poor service delivery, corruption, environmental issues and poor communication. To date, no

response was received from the two organs of state. The aim of the community's call for the workshop was to seek other avenues to raise their concerns. The purpose of the workshop was twofold:

- To capacitate the community and activists of Sebokeng on access to information proceedings, mechanisms and the practices and processes in place in terms Promotion of Access to Information Act (PAIA) at local government and private sectors for increased accountability.
- To build capacity on the Regulations of Gatherings Act and protests.

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