



FREEDOM OF EXPRESSION INSTITUTE

NOVEMBER/DECEMBER ISSUE 2018

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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

The FXI welcomes efforts by the industry to establish an independent inquiry into the fall-out of the purportedly false stories published in the Sunday Times on the South African Revenue Services “rogue unit” and the Cato Manor rogue police units. The revelations emerged during testimony at the Nugent Commission of Inquiry in October 2018. The current Sunday Time’s editor, Bongani Siqoko, published a front-page

apology and concession allegedly under duress indicating that:

- it was evident that the newspaper's coverage of the so-called SARS "rogue unit" had not gotten everything right, nor had it gotten everything wrong.
- certain allegations had been presented as fact and that in certain cases, information that was published was incomplete.
- there were gaps in the newspaper's processes of news-gathering and production.

The apology and concessions were made in a statement distributed to the media and Mr Siqoko has reportedly not granted any interviews which would have allowed for an interrogation of the statement. This failure to engage anyone on the statement has left more questions than before. The editor distancing himself from his own journalists has raised some criticism given the role of an editor in the publication of any story and the responsibility on that editor in so doing.

Ray Hartley, the former Sunday Times editor has stood by the published story and thus has further complicated the matter. So too have the journalists that wrote the stories. The events at the Sunday Times cast a pall over the media industry. It has cast some doubt on journalism and ethics.

A comprehensive solution lies in an independent inquiry into the media. The FXI believes that the inquiry should be led by a legal practitioner with either media exposure or experience, supported by someone from an organisation of journalists as well as another organisation dealing with media and/or freedom of expression.

Policy developments

The State of the South African Broadcasting Corporation

In recent cabinet appointments, Stella Ndabeni-Abrahams was named as the second minister of communications since the departure of Faith Muthambi in 2017.

The new minister has expressed concerns at the SABC board recommendations to retrench staff to respond to the budget deficit facing the public broadcaster. Intervening in the decision of the SABC board would amount to interference which cannot be countenanced in the running of the affairs of the public broadcaster. The resignations in the first week of December 2018 of Krish Naidoo, Mathata Tsedu, John Mattison and Khanyisile Kweyama come as a shock and leave the board without a quorum and unable to take decisions.

The parliamentary committee on Communications is to shortlist and interview candidates for the vacancies in January 2019.

ICASA settles with network operators on data regulations

The Independent Communications Authority of South Africa (Icasa) reached a settlement with Cell C and MTN mobile service providers, over the implementation of the End-User and Subscriber Service Charter Regulations 2018. The settlement paves the way for the implementation of the regulation which will require mobile phone companies to allow data roll-over, transfer of data and prohibit service providers to charge out of bundle charges without the consumer consent. The regulations are hailed as a victory for millions of consumers who have for years been battling disappearing data and automatic out-of-bundle pricing. As part of the settlement, the End-User and Subscriber Service Charter Regulations 2018 will enter into force 28 February 2019.

Regulation of Gatherings Act Amendment Bill (B 47 – 2018)

On 27 November 2018, A de W Alberts, a member of parliament tabled a private member's bill where the object was to prohibit protests taking place outside

schools, early childhood development programme centres and child and youth care centres within a radius of 500 metres from the buildings. Permission to gather and demonstrate may be granted on application by the member of the executive council of a province.

Prevention and Combating of Hate Crimes and Hate Speech Bill (B9 – 2018)

The parliamentary committee on Justice and Correctional Services is inviting the public to make written submissions on the Prevention and Combating of Hate Crimes and Hate Speech Bill by 31 January 2019. The purpose of the bill is to give effect to South Africa's obligations under the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance and to make provision for the offence of hate crime and the offence of hate speech and the prosecution of persons found guilty of these offences.

Developments in the Courts

The right to protest: Charges against the Ga-Pila 9 are withdrawn

The Freedom of Expression Institute has been representing the nine community members from Ga Pila in Limpopo Province on charges of public violence and trespassing. They had protested due to the promises made by the Anglo Platinum Mine regarding their relocation not being addressed after many years of discussion.

On 22 November 2018 the nine accused appeared in the Mahwelereng Magistrate's Court in Mokopane before Magistrate Mashindi to have their matter formally withdrawn. The Senior Public Prosecutor decided to withdraw the charges after considering the representations made by counsel for the nine accused, Mandla Mkhathshwa from the Johannesburg Bar. Counsel believed that the matter at hand was not a protest issue but a long-standing land disposition issue between the mine and

the Ga-Pila community and that it had to be handled as such. Further, the excessive use of force by the police on the day of the protest was raised.

Constitutional Court ruling upholds the right to peace protest – Mlungwana and Others v Minister of Police and Others

On 19 November 2018, the Constitutional Court ruled that the failure to give notice of a protest shall not be made a criminal offence by declaring section 12(1) (a) of the Regulation of Gatherings Act, 205 of 1993 unconstitutional.

This legal battle began on 11 September 2013 when members of the Social Justice Coalition chained themselves to the railings of the staircase leading to one of the entrances to the Civic Centre in Cape Town in protest for better sanitation facilities for the people of Khayelithsa. The SJC had engaged with the City of Cape Town on numerous occasions since 2011 for the provision of clean and safe sanitation facilities for their residents.

In terms of the Gatherings Act, a group of fifteen or fewer people intent on protesting in a public place is defined as a "demonstration", while any group bigger than that is a "gathering". The members of the SJC limited themselves to just 15 protesters that day in September to avoid having to give notice about the protest action which would likely have delayed their protest significantly. As their protest started, other people joined them, and, in the eyes of the law, a "demonstration" quickly became a "gathering". While the protest continued peacefully, police confronted the protesters and requested them to disperse. When the protesters refused, they were arrested. The criminal charges brought against 21 of the protesters in the Magistrates' Court were that, in terms of section 12(1) (a) of the Gatherings Act, they were all presumed to be conveners of the gathering and had all failed to give notice of the gathering.

After this act of protest, the State prosecuted the applicants in the

Magistrates' Court on a charge of contravening section 12(1) (a) of the Act. This section provides that "any person who convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3 shall be guilty of an offence and on conviction liable". The Magistrate subsequently granted the applicants leave to appeal to the High Court in order to pursue their constitutional challenge to section 12(1)(a).

The Constitutional Court confirmed the ruling of the Western Cape High Court that section 12(1) (a) of the Act is unconstitutional. This judgment is a victory for social justice movements and communities that use protest action as their voice against injustice. The Constitutional Court observed that "progressive constitutional democracies, including our own, recognise that the right to freedom of assembly is central to constitutional democracy and that people who lack political and economic power have only protests as a tool to communicate their legitimate concerns." The fear of a criminal sanction will no longer stand in the way of exercising this fundamental right as entrenched in the Constitution.

The Supreme Court of Appeal upholds the right to free expression in Masuku v South African Human Rights Commission on behalf of the SAJBD

On 4 December 2018, the Supreme Court of Appeal ruled in favour of free speech. The court overturned a judgment of Moshidi J in the Gauteng Local Division sitting as the Equality Court and effectively dismissed the complaint of the South Africa Jewish Board of Deputies (SAJBD).

The complaint arose as a result of statements the appellant, Bongani Masuku, made on a blog on 6 February 2009 and at a student gathering at the University of the Witwatersrand on 5 March 2009. These statements were made in the context of the escalating conflict between Israel and Palestine

between December 2008 and January 2009 in which more than 700 people died. The SAJBD and the South Africa Zionist Federation expressed support for the Israeli action. Some 315 members of the South African Jewish community in an open letter distanced themselves from the SAJBD letter of support and condemned the disproportionate use of force by the Israeli military.

The Equality Court invoked section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 and found the statements to constitute hate speech.

The Supreme Court of Appeal cautioned that section 10 of the Equality Act may have the effect of unduly limiting free expression that is protected under section 16(1) of the Constitution.

The Supreme Court of Appeal observed that the fact that "particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive does not exclude it from protection. Public debate is noisy and there are many areas of dispute in our society that can provoke powerful emotions. The bounds of constitutional protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm."

The statements made by Mr Masuku were found not to have overstepped the protection in section 16(1) of the Constitution thereby dismissing the complaint of the SAJBD.

In the region

Tanzania

On 7 November 2018, Angela Quintal, the co-ordinator of the Committee to Protect

Journalists (CPJ and her Kenyan colleague Muthoki Mumo were detained and interrogated in Dar-es-Salaam, Tanzania for five hours while on a work visit before being released. According to Quintal, in a Daily Maverick article, the Tanzanian government had said that the two journalists had entered on visitors' visas. However, Quintal has denied this saying they applied to the Media Council of Tanzania and indicated they were there for work purposes. They were on a general fact finding mission on the state of the media there and found there were strong anti-press laws, such as the Cyber-Crimes Act, and a heavy registration fee for bloggers. They further heard about the disappearance of a journalist, Azory Gwanda who was investigating extra-judicial killings in Kibiti. This is an indication of a broad general, clampdown of the media and free expression in that country, which is contrary to a vibrant and diverse media in a thriving democracy.

Mauritius

On 6 November 2018, the government of Mauritius adopted amendments to the Information and Communication Technologies Act to regulate and curtail harmful and illegal content and activities perpetrated through any information and communication service, including telecommunication services. Under the amendments, anyone sending a message via the Internet that causes or could cause something as harmless as an inconvenience could end up being sentenced to up to ten years in prison.

Facebook is launching fake news checking in South Africa and Kenya

On 4th October 2019, Facebook has announced its latest effort to crack down on false news stories posted user streams. The social network will be partnering with fact-checking organisation Africa Check and French news agency *Agence France Presse* to assess the accuracy of news stories posted on the site. The fact-checking program was launched in Kenya and in South Africa in early October 2018. Under

this initiative, if a story is found to be “fake news” (or as Facebook seems to be rebranding it, “false news”), Facebook will demote it in its news feed and issue a warning to any users posting the story again. Facebook group admins will also be warned if their users post false news in their group. Further, Facebook will share a fact-check on the story below any story flagged as false news as well as related stories, compiled by its partners. The social media site has faced criticism for acquiescing to the spread of misinformation through its platforms. Facebook plans to launch this new fake news check worldwide.

International Day to End Impunity for Crimes against Journalists

On 2 November 2018, the world commemorated the International Day to End Impunity for Crimes against Journalists. The UN General Assembly Resolution 68/163 recognises those journalists that lost their lives and suffered attacks in the exercise of their profession. All UN member states have a duty to fulfil their obligations to protect freedom of expression and the safety of journalists by providing an enabling legal environment, and by taking threats against journalists seriously and by vigorously prosecuting actual attacks.

Events

Roundtable commemorating Black Wednesday

On 19 October 2018, FXI together with the Institute for the Advancement of Journalism (IAJ) hosted a roundtable discussion on the topic **Black Wednesday 1977: The price we paid for our freedom: Where are we now?**

Black Wednesday marks the events in South Africa on the 19 October 1977 soon after the death of Steve Bantu Biko the black consciousness leader when the World and Weekend World newspapers, largely

black newspapers, were banned by the government at the time. In addition to the 18 organisation being banned, a number of journalists, including Joe Thloloe and Mathata Tsedu, were also detained.

The panel discussion was chaired by Franz Kruger, head of the department of Journalism, University of the Witwatersrand. The panel members were: Joe Thloloe, the former press Ombud and veteran journalist and editor; Jovial Rantao, former editor and James Ngcobo, creative director, Market Theatre.

The panel reflected on the strides made in South Africa since the blanket banning in 1977 in creating a climate of free expression including a free media. The participants recognised that with a free media comes the responsibility on editors to ensure that their stories are correct given the inherent limitations of sources and ethical reporting.

African Freedom of Exchange (AFEX) meeting in Ghana

On 7 and 8 November 2018, the FXI attended the AFEX Annual General Meeting in Accra, Ghana.

The meeting focused on the protection of journalists in Africa and developing mechanisms to strengthen such protection particularly in the African human rights system comprising the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. Each of the 12 African country representatives made presentations on the situation in their respective countries. Two representatives from Article 19 based in Brazil and Mexico & Central America made presentations from their respective countries and to draw on

lessons from the Inter-American Human Rights system.

Discussions were also held on the development of a national mechanism for the protection of journalists which would be presented to the African Union for adoption and strengthening the regional African human rights protection mechanisms.

As we approach the summer holidays and festivities, we send you season's greetings. The office will close from 20 December to 7 January 2019.

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