



FREEDOM OF EXPRESSION INSTITUTE

IN THIS ISSUE

NEWS

Featured Articles

Developments in the courts

- Qwelane v South Africa Human Rights Commission, Freedom of Expression Institute as amicus
- SOS Support Public Broadcasting Coalition, Freedom of Expression Institute, Media Monitoring Project v SABC
- Vicki Momberg – hate speech
- Velaphi Khumalo – hate speech

The right to protest

Policy Developments

In the region

Events

- FXI roundtable discussion on the parameters of hate speech
- World Press Freedom Day

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) 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

Developments in the courts

Qwelane v South Africa Human Rights Commission, Freedom of Expression Institute as amicus

In a judgment delivered on 20 April 2018, Judge Moshidi upheld the application for leave to appeal his judgment of 18 July 2017.

In 2009, after several complaints the SAHRC brought an application in the Equality Court challenging the statements Jon Qwelane made in an article published in the Sunday Sun entitled “Call me names but gay is not okay” on 20 July 2008. The article was accompanied by a cartoon of a man marrying a goat. The court heard that his column was harmful and

hurtful to the gay and lesbian community. Jon Qwelane was ordered to write an apology which must get the same reach as his initial comments.

The court found that on proper reflection of the judgment, it may have been incorrect in the construction and interpretation of provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 in so far as they limit the right to free expression enshrined in the section 16(1) of the Constitution. The court granted leave to appeal to the Supreme Court of Appeal.

SOS Support Public Broadcasting Coalition, Freedom of Expression Institute, Media Monitoring Project v SABC

On Friday 4 May 2018, in the matter of Freedom of Expression Institute, SOS Support Public Broadcasting Coalition, Media Monitoring Project v SABC and the Minister of Communications (Case numbers: 81056/14 and 76343/15), Judge Matojane granted an order to vary part of the judgement which was delivered 6 December 2017. The variation was for the acting Group Chief Executive Officer and Chief Financial Officer of the SABC to continue acting in the positions for eight months from December 2017 and not the four months as stated in the 6 December 2017 judgment.

The SABC has not yet been able to finalise the permanent appointment of a Group Chief Executive Officer and a Chief Financial Officer, and anticipates that this process will conclude at the end of July 2018. It seeks to keep on its current acting appointees until these permanent appointments are made.

Vicki Momberg – hate speech

On 18 April 2018, the Randburg Magistrates Court dismissed the application for leave to appeal the sentence and conviction of Vicki Momberg, a former estate agent who was sentenced to three years in prison, of which one year was suspended, on four counts of *crimen injuria*. In 2017, the court found Momberg guilty of *crimen iniuria* for her racist rant, against a police officer, David Mhlombo who came to her aid after a smash and grab incident using the K-word 48 times.

Velaphi Khumalo – hate speech

On 3 April 2018, the South Gauteng High Court heard a complaint by the South African Human Rights Commission brought against Vealaphi Khumalo concerning a Facebook posting in which he called for “white people to be subjected to what Hitler did to the Jews”.

Judgment has been reserved.

The right to protest

On 23 April, Taung in the North West province witnessed violent protests in which a teenager was killed. The FXI called on the police to exercise caution as residents express dissatisfaction with service delivery in the province. The Independent Police Directorate is

investigating the death of teenager and the conduct of the police. The use of force by the police in response to the residents exercising their right to protest continues to be a concern to the FXI.

Policy Developments

On 13 April 2018, the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9 – 2018] was tabled in Parliament. 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.

The Cybercrimes and Cybersecurity Bill was introduced to the National Assembly on 21 February 2017 and is currently under consideration. This Bill was introduced as a response to the increase of the international problem of Cyber Crime, people have been falling victim to hacking, cyber forgery, cyber extortion and the unlawful interception of data. Some of the regulations that the Bill puts in place include: the creation of offences and imposition of penalties which have a bearing on cybercrime; criminalising the distribution of data messages which are harmful and to provide for interim protection orders; to further regulate jurisdiction in respect of cybercrimes, to impose obligations on electronic service providers and to promote cybersecurity.

In the region

On 3 May 2018, the High Court of Tanzania placed an interdict on the enforcement of the provisions of the Electronic and Postal Communications (On-line Content) Regulation following an application lodged by several organisations including the Media Council of Tanzania, Tanzania Human Rights Defenders and the Tanzania Editors Forum paving the way for a judicial review of the regulations.

The On-line Content regulations, published in April 2018, seek to regulate the operations of bloggers; internet café owners; online content hosts; social media platforms; subscribers and users of online content.

An Authority that will keep a register of bloggers, online forums, online radio and television and will deal with complaints has been established.

They place obligations on online radio, television and bloggers and these include payment of fees and adherence to local content requirements.

Internet cafes or business centres will be required to put in place a mechanism to filter access to prohibited content; to install surveillance cameras to record and archive activities inside the internet café or business centre and to keep service user registers and ensure that every person using those services have a recognised identity card.

The regulations list a number of what constitutes prohibited content and this includes:

- Obscene content;
- Hate speech

- Explicit sex acts or pornography;
- Content that advocates hate propaganda or promotes genocide or hatred against an identifiable group;
- Disturbances in a specific part of the country

Events

FXI roundtable discussion on the parameters of hate speech

On 08 March 2018, the Freedom of Expression Institute held a roundtable discussion on the parameters of hate speech in response to the revised Prevention and Combatting of Hate Crimes and Hate Speech Bill approved by Cabinet. Issues discussed included the definition of hate speech; that the proposed legislation disadvantaged the vulnerable who could potentially be criminalised if their statements made in defence of bullying are considered to be violations of the bill.

World Press Freedom Day

The FXI, in a statement to mark World Press Freedom Day, called on government to take steps to remove the crime of defamation in line with the Midrand Declaration on Press Freedom in Africa of 2013; the African Union Declaration on Principles of Freedom of Expression in Africa, 2002 and Resolution 169 on Repealing Criminal Defamation Laws in Africa of 2010, obligations which are binding on South Africa. In addition, our civil law and Section 16 of the Constitution have proved to be adequate in dealing with instances where an individual's reputation has been harmed. The overhanging possibility that a journalist's report may result in a criminal record may cause undue restrictions and hinder the role of the media.

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