



FREEDOM OF EXPRESSION INSTITUTE

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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

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

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 the management of the pension funds pending their defamation trial which could take up to 3 years or more publishing

anything on SAMPADA Private Equity (Pty) Ltd. Mr Mungadze wrote a series of articles published between 29 April 2018 to 20 May 2018 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. 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 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.

The FXI represented Samuel Mungadze in resisting the application.

Defamation: Munyai Nywasedza v Ngoho Newspaper

On 18 June 2018, the action brought by Ms Anna Munyai Nyawasedza, a Limpopo-based traditional healer against Ngoho News, a local community newspaper in

Limpopo for defamation in the High Court, Limpopo Local Division, Thohoyandou, was postponed.

In the 15-30 March 2012 edition of Ngoho News, a staff writer of wrote a story about the disappearance of Mr. Phillemon Makhese, written by Vincent Mthombeni of Ngoho News. The Ms Anna Munyai Nyawasedza believes that she is mentioned in an unfair and defamatory light in the article in that she is linked to muti murderers implicating Ms Anna Munyai Nyawasedza in the disappearance of Mr Phillekom Makhese. There was a subsequent article published in the 24-31 May 2012 edition of Ngoho New which Ms Anna Munyai Nyawasedza alleged that she was portrayed unfairly.

The FXI is representing Ngoho News and its editor Phumudzo Percy Makhamedzha.

Governance at the SABC: SOS/MMA AND FXI v the SABC and the Minister of Communications

On 18 June 2018, Judge Matojane dismissed with costs the application for leave to appeal his judgment of 17 October 2017 in which he criticised the undue influence of the Minister of Communications in the governance and management of the SABC. The order was granted owing to the failure by representatives for the minister to appear in the proceedings in court.

In September 2014 the Minister of Communications amended the memorandum of incorporation of the SABC, giving her the authority over the appointment, the terms and conditions of appointments, the suspension and the discipline of three executive directors of the SABC.

The FXI, together with the SOS and the Media Monitoring Africa challenged the

far-reaching powers of the Minister in the amended memorandum of incorporation as they effectively impinged on the independence of the SABC as a public broadcaster.

The ruling confirms the independence of the public broadcaster.

Freedom of speech in the workplace: Nzimande and Others v Xstrata Coal SA

On 6 June 2018, the Labour Court was called upon to consider whether or not the media statements were unlawful in the context of free speech as protected in section 16 of the Constitution.

Mr Nzimande, a machine operator at the Xstrata Coal in Witbank was dismissed for statements allegedly made on 28 September 2012 to the media on the working conditions at the Xstrata Coal which was contrary to the company policy as it brought disrepute to Xstrata. The radio interviews were conducted after a protest march to the employer to hand-over a memorandum of grievances. On 25 May 2014, the CCMA confirmed the dismissal of Mr Nzimande. The arbitration award was taken on review in the Labour Court.

Mr Nzimande argued that he was acting in the interests of the employees regarding grievances at the company and exercising his right to free expression. The company contended that the engagement with the media was contrary to the company policy.

The FXI is representing Mr Nzimande. Judgment has been reserved.

Hate speech in the workplace: Duncanmec v NUMSA obo D Mphahleni and Others

On 31 May 2018, the Constitutional Court was called upon to consider whether the singing of struggle songs to illustrate dissatisfaction during a strike was

justifiable. 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. The Labour Court upheld the decision of the arbitrator that dismissal was unfair.

The employer contends that the struggle songs constituted hated speech in that it was offensive, hurtful and threatening with racist connotations. The employees 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. The Constitutional Court reserved judgment.

Policy developments

ICASA Regulations on community radio and television

The Independent Communications Authority of South Africa (ICASA) published draft regulations on community radio and television in terms of section 4(3)(j) of the ICASA Act, 13 of 2000 and the Electronic Communications Act, 3 of 2005 for comments by 18 May 2018.

The regulations deal with management and programming aspects proposing that political party officials and government officials in three spheres of government should not hold office; that community participation must be enhanced in programming and ownership; and there should be evidence of community development and empowerment activities. The regulations further propose that content should be produced and sourced locally.

SABC Commission of Enquiry

On 31 May 2018, the acting chief executive officer of the SABC, Nomsa Philiso announced the establishment of two commissions of inquiry to investigate editorial interference and sexual harassment at the public broadcaster from 1 June to 31 July 2018. The commissions of inquiry will be presided over by independent panels.

In the region

Lesotho court rules criminal defamation violates constitution

The owner and publisher of the weekly Lesotho Times newspaper, Basildon Peta, was charged with defamation and *crimen injuria* over a satirical column published in the edition of 23 to 29 June 2016 concerning General Tlali Kamoli, who at that time was commander of the Lesotho Defence Forces. The satirical piece titled: "Flicker of Hope for my Beloved Kingdom" took a dig at Kamoli's assertion of authority and power by detailing how he ordered ministers and the then prime minister to remove their vests and shirts and perform 100 push-ups. Justice Mokhesi, writing for the court, held that the criminal defamation charge and Section 104 of the Penal Code Act, 6 of 2010 supporting it was unconstitutional in terms of section 14 of the Constitution of Lesotho of 1993.

The court held that "criminal defamation laws have a chilling effect on the freedom of expression, and that civil remedies for reputational encroachment are more suited to redressing such reputational harm."

This case is of particular significance for South Africa where, in spite of section 16 of the Constitution which enshrines the right to free expression, the crime of defamation is part of the common law.

Uganda imposes tax on the use of social media

Users of Whatsapp, Facebook, Skype and other social media users in Uganda will have to pay a daily tax from July 2018, according to a new law that rights activists have criticised as a bid to stifle free speech. Uganda's parliament passed a law imposing a tax of 200 shillings (five cents) a day on users of services which publish content bypassing traditional distributors. The new law did not spell out how the tax would be applied and collected. Finance minister David Bahati said the aim of the legislation was only to raise revenue for public services. However, the president, Yoweri Museveni, wrote to the finance ministry in March urging the introduction of the tax as a way to deal with the consequences of online "gossip". During the 2016 presidential elections access to social media was shut down, and in April, Uganda's communications regulator instructed internet service providers to suspend unlicensed online news websites. Digital advocacy group, the World Wide Web Foundation, says data costs in Africa are among the world's highest, a fact blamed for slow internet penetration and limited use for those connected.

Events

FXI Roundtable discussion on the Role of the Public Broadcaster

On 9 May 2018, the FXI held a roundtable on the public broadcaster to examine the importance and the changing role of the Public Broadcaster. It was stressed by the executive director of South African National Editors Forum, Kate Skinner that while the SABC might be one of many options for most middle class people, the less affluent segment of the population relied solely on the SABC1 and SABC2 as their sole supplier of news and entertainment. She noted that SABC 1 has

28 million viewers, while SABC 2 has 29 million viewers. SABC radio also had a very wide reach. It was recognised that the Public Broadcaster had a major role to play in a democratic South Africa in ensuring

access to information and impartial content particularly of news broadcasts.

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