FREEDOM OF EXPRESSION INSTITUTE

Annual Report (June 2006)

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C O N T E N T S

1. Executive Summary

The Freedom of Expression Institute has, over the past few years, noted and insisted that the struggle for freedom of expression in South Africa will take place mainly with regard to the struggle around socio-economic rights. This assertion has been proven correct by the events of the recent past and, for purposes of this report, during this reporting period when we have seen how closely linked are the denial of socio-economic rights with the denial of civil and political rights of people.

The FXI, having noted this trend, has been in a process of reorientating its work to cater for the challenges of free expression experienced by, particularly, poor communities and individuals who are most vulnerable from a socio-economic sense as well as from the perspective of freedom of expression. Currently, then, the work of the FXI could be said to include two broad areas: 1) the "classical" cases of censorship as the FXI has been dealing with over the past 12 years – related to denial of free expression to the media, journalists and other individuals in different arenas, and 2) the denial of free expression to poor communities and movements, committees and organisations representing the poor. The latter usually means protecting and defending the right to gather, protest, march, publish, etc.

As far the second of the two above areas of work is concerned, we have adopted a dual approach:

- Firstly, it is to defend these rights through advocacy, legal means, through the courts, etc. and,
- Secondly, it is to empower poor communities and organisations of the poor so that they might themselves be able to deal with these denials of free expression and with repression hat they might face.

The second approach is particularly important when we realise that the scale of such denials of free expression is huge and spread out across the country and that the FXI is not able to service all areas across the country adequately in terms of its legal and advocacy work. Furthermore, having someone within a social movement that is able to deal with legal issues ensures a quicker turnaround time. The extent of the problem is vast and includes the denial of people to march, gather and protest, torture, assaults, unlawful arrests, detentions, etc. And, in most cases, those people that are so treated are from disadvantaged and poor sections of our community. The FXI has worked tirelessly to develop relationship with various movements, organisations and committees that have faced repression in the recent past and to assist them within the bounds of our mandate.

This report covers both the above areas of work and will, in regard to the second area, also highlight the two approaches mentioned above for the period June 2006 to June 2007.

In terms of broad trends, it seems that the right to protest is still under pressure. Recent court victories highlight the argument repeatedly made by the FXI that the Regulations of Gatherings Act is being misapplied and being abused by local authorities across the country in a manner that is unconstitutional and illegal. Unless local authorities and the police begin implementing the Regulation of Gatherings Act in a manner different from the way it currently is, the constitutional right to freedom of expression (as well as other rights such as the right to free association and speech) will be severely compromised and the space for expressing dissent will rapidly be constrained. The result could easily be South Africa witnessing more deaths during protests and more sedition charges.

The cases of eThekwini and Johannesburg (as well as the earlier cases of Harrismith, Middelburg, Khutsong, etc) highlight the constitutional and legal dangers that exist with local authorities ignorant of the spirit and letter of the RGA being in positions where they can allow or deny basic civil and political rights. It highlights, too, the need for local authorities to be trained in what the RGA serves to achieve and how those objectives might be attained.

An issue that is becoming increasingly serious is the question of journalists' right to protect their sources. The issue was brought into sharp relief by the case of the Mail & Guardian and the civil and criminal cases brought against it as a result of its reportage on the "Oilgate" scandal. The FXI played and continues to play a critical role in supporting the Mail & Guardian with advice and legal costs and by being amicus curiae in the civil matter. The matter has not yet been resolved. But, whatever the outcome will be, it will have severe repercussions for the media in this country. Recently, there was also a threat by a politician in Outdshoorn to sue journalists if they did not reveal their sources regarding financial irregularities in the municipality. The FXI commented on that issue and is following developments around it. Considering the cases already mentioned together with the Mail & Guardian matter, there is a rather disturbing indication of the South African state becoming increasingly intolerant of dissent – whether on the streets or in the media. It is a trend that organisations like the FXI will have to pay very careful attention to.

The case(s) of South Africa's former Deputy President, Jacob Zuma, raised a number of issues that the FXI had to respond to. These included Zuma's

recent threats against the media and journalists (including a cartoonist), a pro-Zuma song being banned on an SABC radio station, the exposing of the identity of the rape complainant in the Zuma rape trial an, before that, the preventing of the media from attending a court appearance by Zuma. The FXI was inundated with calls for interviews, to appear on talk shows and, also, for guidance from a number of journalists.

The FXI has also dealt with a number of cases involving pre-publication censorship, where public and private figures have attempted to stop reports before they are published. Thankfully, the tide seems to be turning against this particular problem, with courts becoming increasingly wary of granting such interdicts.

The past year has also seen intense engagement by the FXI with issues related to the public broadcaster, the SABC, and censorship. Most of these will not be covered in this report as they fall within the work of the FXI's Media and ICTs programme. However, there were a few censorship related questions that the FXI dealt with as well.

The public broadcasting issue that attracted the most attention in the past six months was the SABC decision to halt the screening of the documentary on President Thabo Mbeki as part of the SABC's "Unauthorised" series. The FXI played a role in lobbying the SABC and having ongoing discussions with both the SABC and the producers, advising the producers and attempting to organise a meeting of independent producers to discuss, more broadly, the question of the relationship between the SABC and independent producers.

Another SABC-related issue the ACP has dealt with is the allegations of an SABC "blacklist" of analysts that should not be interviewed on the news and current affairs programmes. The fiasco around this matter (following closely on the heels of the Thabo Mbeki documentary controversy) created much embarrassment for the SABC. The SABC has set up a commission of enquiry to look into it, and responded in an inappropriate manner to its findings, precipitating a mass exodus from the broadcaster.

There were a number of matters of individuals that the FXI handled in the past six months, relating to the growing problem of freedom of expression in the public sector generally, and academic freedom specifically. These incidents point to the fact that academic freedom can no longer be taken for granted, and that there are increasing constraints on academics on the basis of what they say. The FXI has intervened in several disciplinary cases in universities in the past year.

Therefore the bulk of the FXI's work in the past year has related to threats to the right to protest, academic freedom, freedom of expression in the workplace and in public institutions, and the role of the public broadcaster.

2. Networking and Publicity

2.1 *Domestic Networking*

Since the FXI's inception, it has forged close bonds with other media groups working to ensure media freedom and diversity, including the South African National Editors Forum, the South African chapter of the Media Institute of Southern Africa and the Media Workers Association of South Africa. These organisations, led by the FXI, have on several occasions made joint *amicus curiae* submissions to court in precedent-setting media freedom cases.

The FXI receives frequent requests for assistance from the full range of print and online publications: from mainstream newspapers, such as the *Mail & Guardian*, through parody websites and t-shirt producers, to community newspapers who cannot afford legal representation to defend defamation and trademark-infringement cases.

In the past two years, the FXI has been approached by social movements such as the Landless Peoples Movement, the Anti Privatisation Forum and the Anti Evictions Campaign to assist with legal capacity in the form of legal advice and representation. Much of this work revolves around gatherings that have been prohibited by local authorities.

The FXI has actively cultivated links with similar public-interest law organisations on a mutually beneficial basis, including the Atlantic Philanthropies' Public Interest Law Clearing House; Legal Aid Board; the South African Human Rights Commission, pro bono units of law firms, the Legal Resources Centre, the South African Human Rights Commission, Lawyers for Human Rights, the Wits Law Clinic and other non-profit organisations and statutory bodies.

The FXI has also worked to establish constructive relationships with governmental actors. Particularly in regards to the Regulation of Gatherings Act (RGA) the FXI is engaging the authorities in various ways. We have met with the Gauteng Commissioner of Police, Perumal Naidoo, to discuss the matter. We have also met with other officials from SAPS in Gauteng, together with senior officers in Johannesburg Metro Police. We have also made attempts to meet with Minister of Safety and Security, Charles Nqakula, on the issue. Our appeal to Minister Nqakula will be to set national standards which

must be met in the implementation of the RGA and to ensure that proper training is provided both for metro police and for SAPS members on the provisions and spirit of the RGA.

As and when live examples of censorship and repression come up during the course of project implementation, whether or not it results in litigation or precedent-setting judgements and the FXI and the stakeholder organisations agree that publicity needs to be given to these cases to ensure redress, the FXI draws on its extensive contacts in the media to ensure publicity. In addition, the FXI also makes use of local level and community media to publicise issues of local interest and relevance.

2.2 *Regional, Continental and International Networking*

The FXI is a member of the Network of African Freedom of Expression Organisations (NAFEO), the International Freedom of Expression Exchange (IFEX) and the International Media Lawyers' Association (IMLA). Through these institutions the FXI is to share information, formulate joint lobbying strategies and publicise freedom of expression victories and violations internationally.

2.2.1 *Network of African Freedom of Expression Organisations (NAFEO)*

The FXI is a founding member of NAFEO and, in October 2005, we attended its launch. The conference included 42 participants from 33 organizations dedicated to freedom of expression and media freedom in Africa. The conference was hosted by the Media Foundation for West Africa (MFWA), in partnership with Media Rights Agenda (MRA), Media Institute of Southern Africa (MISA) and Journalists en Danger (JED). In addition to the formation of the network, it was agreed that the MFWA would host the network for the time being, and that funds will be sought from Unesco to employ a co-ordinator.

The conference agreed to establish a network that will seek fundamentally to change over the next decade the environment for freedom of expression in Africa. Already the network has intervened in the deteriorating free expression environment in Ethiopia following that country's highly contested elections. Interventions are also being discussed in relation to the media freedom situation in the Gambia and Eritrea.

A follow up planning meeting took place in February in Brussels. At this meeting, planning took place around the above-mentioned interventions, and the situation in the Democratic Republic of the Congo was added to the list. At this meeting a discussion ensued about the particularly strategic role of the

FXI in relation to the network. It was noted that South Africa has an influential role to play in conflict monitoring and peace building on the African continent, and that as a result, holds a lot of sway in the Southern African Development Community (SADC) and the African Union (AU). The FXI could therefore use its proximity to the South African government to prevail on it to use this influence to address the media freedom situations in these conflict zones.

Nafeo has since employed a co-ordinator, and has decided to focus on the following 'hotspots': Eritrea, Ethiopia, Gambia, Tunisia and Zimbabwe. A summary of key decisions is attached.

This work has seen the FXI becoming involved in more continental work, and has challenged the FXI to re-define its role to focus not simply on South African censorship issues, but on South Africa's contribution to reducing censorship on the continent. Meeting this challenge is a key focus area for the FXI in the coming years.

2.2.2 *International Freedom of Expression Exchange (IFEX)*

The FXI chairs the editorial committee of IFEX. The FXI has had a long-standing discussion with the IFEX Clearing House about its interpretation of freedom of expression, which, in the FXI's view, has been unconsciously biased towards media freedom. As a result, FXI Action Alerts that the Institute has attempted to circulate on the network have been rejected on the basis that they deal with the violation of the right to assembly, rather than the right to freedom of expression. For poor communities, more popular forms of expression, such as gatherings, are often used because as they constitute the most accessible forms of expression. It is, therefore, especially important to protect these rights as they are often the only forms of expression available to these communities. The FXI made these arguments to the Clearing House, leading to a decision to review the Editorial Guidelines of IFEX.

The Editorial Committee had a teleconference to discuss the matter, and agreed that a memo will accompany the Editorial Guidelines, to act as a guide for the Clearing House in deciding which Alerts to issue and which to reject. The memo makes it clear that where there are demonstrations that are prevented because of their expressive content, this should be considered a freedom of expression violation, and should therefore be circulated on the network. The FXI is pleased with this decision, as it has led to a situation where a broader interpretation of freedom of expression has been adopted, leading to FXI Alerts being circulated that cover violations of the right to demonstrate. This should mean that a more holistic picture can be built up of the freedom of expression situation in different countries. These changes

were put to the IFEX AGM in Brussels in February 2006, which the FXI attended. The AGM adopted the FXI's position and has, thus, redefined the understanding of freedom of expression within IFEX.

The FXI continues to serve on the Editorial Committee of IFEX, and has also been elected onto the IFEX Council. The Executive Director, Jane Duncan, also serves on a technical committee reviewing the relationship between IFEX and its host, the Canadian Journalists for Free Expression.

In the meantime, the FXI continues to contribute to the IFEX network, and its Alerts can be viewed at the following URL: http://www.ifex.org/en/content/view/full/74/

2.2.3 *International Media Lawyers' Association (IMLA)*

During 2006 the FXI's attorney attended the IMLA summer school on media law, as well as a specialized IMLA workshop on defamation and State advertising in the media, both in Oxford.

The primary objectives of the International Media Lawyers' Association are:

- To create a network of media lawyers that will facilitate the sharing of information, strategies and expertise on media law and media freedom defence work. The network, to be known as the International Media Lawyers' Association, will function as a forum for the exchange of information, ideas and strategies on critical issues in media law and policy, such as flawed criminal and civil defamation laws, freedom of broadcasting, and political and financial censorship.
- To develop a regional and international contacts-base that will enable its Members to draw on comparative experience and support each other in regional and national campaigns. The Association will provide the Members with professional support in addressing issues related to freedom of expression and information, and media law.
- To promote public interest-oriented work by lawyers with a specialization in media freedom issues, including media law and related areas.
- To assist the work of its Members in promoting the highest international standards on freedom of expression and information, including by raising awareness among media practitioners, the judiciary and the public at large.

The objectives of the Association are achieved through a range of activities to be carried out by its Membership and staff, including:

- Sharing of information about activities and experiences among media lawyers and activists. This shall be a core activity of the Association; the Membership shall make reasonable efforts to contribute to this exchange of experiences, including by contributing material to the Association's email lists, website and other pertinent forums. The Coordinator of the Association shall be responsible for overseeing and enhancing the flow of information among the Membership.
- Provision of expertise for training sessions and other activities organized for the professional advancement and education of media lawyers and policymakers. The Coordinator will assist Members in locating experts to participate in such events.
- Creation of a website that will serve as an additional forum for information sharing. The website will be continuously updated by the Coordinator and the Membership. The editorial policy of the website will be determined by the Steering Committee.

The exact procedures and criteria for membership shall be decided by the Steering Committee, provided that these criteria conform to the principle that the Association is open to all individuals working in relevant fields, either full or part time, and that they are committed to the goals of the Association. The Steering Committee may develop procedures for expelling Members whose activities are flagrantly in opposition to the professional and human rights goals of the Association.

2.2.4 *Other Organizations*

The FXI also met with Pansy Tlakula, the Special Rapporteur of Freedom of Expression in Africa for the African Commission on Human and Peoples Rights (ACHPR). The purpose of the meeting was two-fold. The first reason for the meeting was to get advice from and to lobby Ms Tlakula on the case of Kenyan journalist Clifford Otieno (see below). Secondly, the FXI discussed with the Special Rapporteur the possibility of her office and the FXI working together on developing a continent-wide programme on the regulation of gatherings in Africa. We felt that this was a serious problem on the continent and Ms Tlakula agreed. The FXI is currently looking at what kind of joint project could be entered into between itself and the office of the Special Rapporteur to ensure that the right to gather and protest is respected across the continent and to ensure that standards are set for the Africa-wide recognition of these rights.

2.3 *SAJA Report*

Introduction

This report comprises of the activities of the Southern African Journalists Association (SAJA) during the 2006 and 2007 periods.

The SAJA project commenced in 2006 supported by the Open Society Initiative for Southern Africa (OSISA) as a revival effort to re- build the regional body after it had collapsed in 2005. The revival project was organized into a twelve-month effort. The first six months (March to July 2006: the first reporting phase), focused on the appointment of a SAJA Coordinator to carry out the activities leading up to and including the organization of the Congress; the adoption of a SAJA constitution and the election of an executive committee for the revived SAJA.

The second phase (August 2006 to February 2007) sought to achieve the following objectives:

- The development of a SAJA institutional plan and programme of action in consultation with the executive committee;

- A formal elaboration of regional networking activities with like minded organizations at both regional and national levels; and

- An assessment of country union needs with a view to developing a national trade union plan for SAJA members.

All the project phases -first and second -were successfully completed.

The project has just commenced with the support of OSISA to roll out a regional development and action plan, which is a culmination of the above-mentioned phases. The implementation of the plan commenced last month.

Activities undertaken under the SAJA project 2006- 2007

An important milestone under the first and second phases of the project was the launch of the union through the holding of congress and most importantly, an assessment of country union needs and subsequent development of a programme of action for the regional body were crucial achievements. These culminated into the production of an institutional plan and programme of action for SAJA, forming the essence of what is called the SAJA Regional Trade Union Development and Action Plan. This plan also defines in detail the activities to be undertaken and outputs envisaged under it.

The project was also supported by the Freidrich Ebert Stiftung, which supported the holding of congress comprising of representatives from all SADC media and journalists unions and associations.

The project has started implementing a regional development plan developed and adopted during congress by the SAJA membership and subsequently the executive committee. The implementation process commenced in May 2007.

The implementation of the regional development plan envisages the achievement of the following objectives under the current OSISA contract:

- Launching of unions in Lesotho and Swaziland new region- wide programme of action and a national journalists' trade unions development plan has been adopted democratically;

- Development of campaign materials to publicise SAJA's programme of action in SADC;

- Development of a media strategy to respond to infractions of media freedom, the arrest of journalists and any conduct that compromises the work of the media in the region;

- A thorough and informed baseline report on the state of SAJA union members and their challenges;

- Capacity building of SAJA unions;

- Holding of training seminars for SAJA unions in Malawi, Swaziland, Botswana, Zambia and Namibia;

- Operationalizing and strengthening of SAJA and the establishment and co- ordination of existing networks in the region.

2.4 *Publicity and Media Coverage*

A considerable amount of work has been done in this area and the Law Clinic has consequently become well established in the public domain. As a result, the Law Clinic is regularly called upon by the media to comment on matters that relate to freedom of expression and to make presentations in seminars, workshops and conferences.

The FXI has received coverage, on average, about ten times a week in the print and electronic media on a variety of subjects including hate speech, contentious news and information, popular forms of expression such as graffiti, new legislation affecting free expression, media freedom, the Muhammad cartoons and hate speech, etc.

Such media work is a cornerstone of the advocacy work of the FXI. Our participation in media interviews, talk shows, by writing op-eds for newspapers as well as advice to journalists on various issues has resulted in our being regarded as experts in a number of areas related to media and freedom of expression. Further, our media statements and media comments receive coverage not only in South Africa but also in media in other parts of the world.

In addition, the Law Clinic has been an active participant in seminars, workshops and conferences, both locally and internationally. Through these public events, the programme has articulated its standpoints on a wide array of issues such as limitations to freedom of expression, media and democracy, and the implications of the "war against terror" on freedom of expression.

3. Research

Much of the work of the Law Clinic requires a fair amount of research in order to:

- deepen and strengthen the analytical capacity and value of its interventions,
- lead to more informed lobbying and advocacy, including the investigation of alternative policy
- provide policymakers with viable alternatives and comprehensive policy positions and submission based on empirical evidence

3.1 *The Regulation of Gatherings Act*

In July 2005, the FXI released alarming research findings by the FXI indicting the Johannesburg Metropolitan Police Department (JMPD) in effectively banning certain social justice movements such as the Anti-Privatisation Forum (APF) and the Landless Peoples' Movement (LPM) from demonstrating at all. A summary of the FXI's research report entitled 'Establishing A Historical Record Of Violations Of The Regulation Of Gatherings Act & The Right To Freedom Of Assembly Amongst Social Movements in Johannesburg' is available on the FXI website at www.fxi.org.za.

The FXI noted that local authorities such as the JMPD appear to discriminate between social movements based on the content or viewpoint of the protest. Protests that challenge the status quo on land redistribution or privatisation of basic services are generally prohibited. Protests by members of the tripartite alliance, for example the Congress of South African Trade Unions (COSATU) regarding unfair labour practices, are generally allowed to go ahead. Prohibitions or restrictions based on the political viewpoint of the protester are patent and unjustifiable violations of the right to assemble.

In September 2006, the FXI published a nationwide research report revealing widespread violations of the right to demonstrate in South Africa. In a report entitled "A Critical Review of the Implementation of the Regulation of Gatherings Act No. 205 of 1993: A Local Government and Civil Society Perspective". The report is available on the FXI website at www.fxi.org.za. The FXI noted the gap between what the role-players perceive the Regulation of Gatherings Act to be providing for in certain instances and what the legislation actually says. This lack of understanding is compounded by the inconsistent application of the Act by under-resourced municipalities and

police. The report was informed by interviews with civil society and municipalities in the major metropolitan areas, as well as protest hot spots such as Harrismith, Khutsong and Middleburg.

The FXI noted with concern a disturbing pattern that emerges from the research: activists that oppose the government's macro-economic policies and their communities' slide into deeper poverty are finding themselves isolated and targeted by municipalities and their law enforcement machinery. In the process they are denied their constitutional rights to freedom of expression and assembly. Police officers are often ignorant of the Gatherings Act or, more worryingly, abuse the Act to prevent people from protesting and marching in public. Social justice movements in Johannesburg, such as the APF and in Durban, such as the *Abahlali base Mjondolo* (shack dwellers movement) are unfortunate examples where certain organizations are blacklisted and their gatherings are prohibited even before the due process provided in the Act takes place. Prohibitions or restrictions based on the political viewpoint of the protester are patent and unjustifiable violations of the right to protest.

Amongst various other recommendations, the FXI joined the call by COSATU for an exhaustive, top-level investigation into the conduct of the police both before and during protest marches. The FXI report strengthens the demand for a broader discussion between government, the South African Police Services (SAPS), the labour movement and civil society to review the policies and guidelines under which the police operate during political and industrial demonstrations, in order to make sure that police brutality and abuse of the right to march never happens again.

The FXI has, over the last few years, developed particular expertise around the Gatherings Act and has conducted various workshops around the country, training both protesters and police in the proper application of the Gatherings Act.

The right to protest is fundamental to a democratic society. While the State is mandated to maintain order and protect the public, restrictions on the right to protest creates a slippery slope of decreasing freedoms and increasing confrontation between citizen and State. Our democracy was hard won, and constant vigilance is required to keep our freedoms from sliding.

3.2 *Protection of Journalistic Sources*

Section 205, read with section 189 of the Criminal Procedure Act state that, in most cases, a journalist, is required to reveal her journalistic sources on pain

of imprisonment. The FXI's policy position is that firstly, to compel a journalist to reveal her confidential sources creates a situation in which the free flow of information and freedom of expression is inhibited not only to a from the journalist so compelled but within the profession generally; secondly, to compel a journalist to testify against participants in events that she was covering similarly inhibits the free flow of information and has the additional effect of placing the safety of journalists at risk; and thirdly, it is in the public interest that there is as free a flow of information as possible and that journalists are able to operate freely, especially in controversial, momentous areas like politics and crime where many informants speak only on condition of anonymity and where some journalists are tolerated only on condition that they are not potential witnesses.

The intends to undertake a research project to determine international best practice, together with drafting proposals as to how the Criminal Procedure Act can be amended. These proposals will then be presented, through SANEF, to the Minister of Justice and Constitutional Development.

3.3 *Threats to Freedom of Expression at South African Universities*

The FXI has been inundated with complaints from university students and staff who claim that university authorities are clamping down on freedom of speech and association, and academic freedom. The FXI intends to undertake a nationwide research project that will investigate the various codes of conduct, regulations and procedures at South Africa's tertiary institutions to determine whether they are consistent with the Constitution and the Bill of Rights. Such a study will provide the FXI -as well as other stakeholders -with an excellent picture of what is happening at South Africa's universities. Based on the findings, the FXI will consider facilitating a capacity building project for students and university administrations to help nurture and promote a democratic culture in universities. The FXI has made a submission to the CHE and appeared as an expert witness in several staff disciplinary hearings. These are discussed in detail below.

3.4 *The Intersection of Copyright and Freedom of Expression*

The Open Society Institute (Europe) commissioned a paper analysing the SABC/Broad Daylight Films case (discussed below), highlighting the legal and policy problems of the copyright regime in South Africa as applicable to broadcasters and producers and providing possible solutions.

The Broad Daylight case demonstrates acutely how, in the current legal environment, the SABC relies on the Copyright Act to deny content producers

ownership of their creations. The substance and interpretation of the Act is out of step with South Africa's new constitutional order and it is only a matter of time before the scope of the Copyright Act is limited by the Constitutional Court, as has been done in the case of the Trademarks Act, in the *Laugh It Off* case. The SABC's practice is also out of step with the evolution of the film and television industry in South Africa and with best practice internationally where creators' rights receive far better protection.

To this end, The South African Screen Federation (SASFED) and the SABC have set up a task team focussed on reviewing the current intellectual property landscape and in particular how it is manifested in contractual relationships between the SABC and content creators.

The prevailing scenario of the SABC acquiring all ownership rights for the vast majority of film commissions has restricted the ability of producers to develop and explore alternative sources of revenue.

The SABC houses an enormous library of content created over the years for which it holds all ownership rights and that it shows little intention of exploiting. If the best of this material was donated back to its creators or sold on to a distributor at a nominal price, this could provide a crucial source of revenue for the new owners that could breathe much-needed life into a small, stagnant local film industry.

The SABC would benefit substantially from a more pluralistic and diverse local production industry that has a secure and sustainable financial footing, in terms of development, variety, reliability and increased production value.

Moreover, there will soon be an increased demand for content across a variety of distribution channels, meaning that producers will need to be able to exercise control over the rights flowing from the creation of content. Broadcasters and producers alike need clarity on the definition and allocation of the rights flowing from such creation, in terms of distribution platforms, windows, holdback periods and territories.

The paper concludes that as long as the Copyright Act exists and the SABC is allowed to impose draconian conditions in its contracts, Broad Daylight Films and other producers of content for the SABC will continue to yield up their ownership rights in the copyright existing in the work they have created. The opportunities exist, however, for negotiations with the SABC, either directly or through lobby groups such as SASFED, in order to secure stronger ownership rights for creators. Ultimately, however, Parliament and/or the Constitutional Court may be called upon to intervene to amend the Copyright Act and

balance the competing rights of broadcasters and producers to property and free speech.

3.5 *FXI Legal Policy*

In striving to deepen and strengthen the analytical capacity and value of the FXI's legal interventions, the FXI attorney has started producing policy papers on various themes.

3.5.1 *Live broadcast of court proceedings*

The attitude of our courts to the live, delayed and 'highlights-packaged' broadcast, by radio and television, of courtroom proceedings, in trials and appeals respectively, was considered by the Constitutional Court (CC) in 2006. In the case of *South African Broadcasting Corporation Limited vs. The National Director of Public Prosecutions and 11 Others* (decided on 21 September 2006), the CC dismissed an appeal by the SABC to transmit the sound broadcasting of the appeals of Schabir Shaik and others in the Supreme Court of Appeal (SCA). In dismissing the appeal the CC found that the SCA had properly exercised its discretion in terms of section 173 of the Constitution, which gives the SCA the inherent power to regulate its own process. In properly balancing the relevant constitutional principles, the SCA had therefore made no "demonstrable blunder" in reaching its conclusion. An important consideration for the CC was that in other open democracies, such as Germany, the UK and USA, the right to freedom of expression does not include the right to televise court proceedings, let alone transmit sound broadcasts.

In the FXI's opinion, the CC did not attach sufficient weight to the importance of the media's right to free expression under section 16 of the Constitution, which includes the right to gather information, video footage and audio recordings for dissemination to the public.

The FXI considers the majority judgment of Langa CJ to be retrogressive for media freedom and open justice in South Africa. The FXI agrees with the minority judgments of Moseneke DCJ and Mokgoro J, who would have allowed the appeal and consider that the principle of open justice, which is well entrenched in our law, provides a powerful reason for allowing the broadcast of court proceedings, particularly in South Africa where the overwhelming majority of South Africans receive news and information by means of radio and television.

The FXI agrees with the progressive judgment in the 2005 Cape High Court case of *SABC vs. Thatcher,* that a more flexible approach is needed in dealing with the increase in litigation in which electronic media coverage is called for. The interests of justice are of paramount consideration in such applications and there was a heavy responsibility on the media to convey a fair, just and reasonable reflection of what the court proceedings were about and how litigants are progressing. The courts are entitled to co-operation from the media where there are restrictions in the coverage of court proceedings. What is therefore required is well co-coordinated teamwork from the media and legal profession with a view to satisfying the public's primary aim, which will remain, the achievement of justice for all. This is the substance in which the community's trust and confidence in the legal system and judiciary of any country is based. The South African public has the undeniable right to just to have justice done, but for justice to be seen (and heard) to be done.

3.5.2 *Sub Judice and Contempt of Court*

Although the sub judice rule has yet to be tested under South Africa's Constitution, subject to a limitations analysis under section 36 of the Constitution, the FXI believes that the rule does not pass constitutional muster. The first part of the test requires a determination that the rule limits freedom of expression. Clearly, the making of statements to which criminal sanction may attach is a disincentive to the exercise of right to freedom of expression, more particularly the freedom of the media and the freedom to impart information.

In the *Mamabolo* case, the Court acknowledged the importance of permitting public criticism of the courts, while the prerogative of preventing public confidence in the judiciary appears to have been taken care of effectively by the Court's proscription of conduct 'likely to damage the administration of justice'.

The limitations on freedom of expression imposed by the sub judice rule are not 'reasonable and justifiable' for the purposes of section 36 of the Constitution. It follows accordingly that the rule is unconstitutional and should be abandoned entirely.

The impact of the harm principle enunciated in the recent *Midi-TV* case has a potentially huge impact on the common law relating to contempt of court offences. While the *Mamabolo* test for scandalising the court places a heavy burden of proof on the State, strict liability, as enunciated in the pre-constitutional cases of *Harber* and V*an Niekerk*, still exists for offences under

the sub judice rule. *Midi-TV* has the potential to fundamentally alter the test for whether a publication breaches the sub judice rule.

The Court acknowledged that the right to freedom of the press has the potential to prejudice the administration of justice, however the Court arguably discards the existing sub judice test by implication: 'to the extent that the [decisions of *Harber* and *van Niekerk*] might suggest otherwise I do not think they are consistent with what is to be expected in contemporary democracies.' The court continued: 'Those principles [that a real risk of substantial harm be demonstrated] would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right.'

Whereas the current test for *sub judice* is whether the publication *tends to interfere* with the administration of justice, the *Midi-TV* test requires that a *real risk of substantial harm* be demonstrated. This test could logically be extended to other contempt of court offences, both in facie curiae and ex facie curiae, such as defeating or obstructing the course of justice.

4. Lobbying and Advocacy

4.1 *Film and Publications Amendment Bill*

Three of South Africa's media organisations which condemned a government proposal in 2006 to amend the country's entertainment censorship laws because it would result in the imposition of pre-publication censorship on the country's news media played a major role in the announcement by the cabinet that the Bill will be postponed to 2007.

The organisations, the SA National Editors' Forum (Sanef), the SA Chapter of the Media Institute of Southern Africa (Misa-SA) and the Freedom of Expression Institute (FXI) also welcomed Cabinet's reiteration of its commitment to the principle of media freedom as enshrined in the Constitution.

The FXI participated in the chorus of protest that it had received no notice of the intention to introduce the legislation. The FXI's major complaint was that the amendment removes the exemption from the classification, or censorship, and other provisions of the Films and Publications Act, which the print and broadcast media had had for more than 40 years. The removal meant that the media would be subject to Film and Publication Board pre-publication censorship. The FXI also complained that there had been no consultation in advance of the Bill being presented and severe time limits on making representations on the Bill.

On 3 May 2007, World Press Freedom Day, the FXI addressed the Parliamentary Portfolio Committee on Home Affairs, articulating the Institute's objections to the current draft of the Film and Publications Amendment Bill. The Institute's representatives, Simon Delaney and Na'eem Jeenah, were harangued by Committee chairperson, Patrick Chauke, who kept insisting that the FXI supported child pornography, despite the FXI's repeated clarification that it supported the criminalizing of child porn. The FXI's main thrust was that the exemption that exists in the current Film and Publications Act for print and electronic media must be maintained (the Bill removes the exemption) and a limitation be inserted which excludes child pornography from the exemption.

On 31 May 2007, Parliament issued an amended Bill, which reinserted the exemptions for the media into the controversial Film and Publications Amendment Bill. The FXI believes however, that there are still serious issues in the Bill, that impact negatively on freedom of expression beyond the media that still remain. The FXI hopes that these problems will be attended to during debates in the National Council of Provinces (NCOP).

The FXI is committed to continuing its advocacy work around the Film and Publications Amendment Bill, and will lobby actively in the NCOP. If this fails, the next step will be to appeal to President Thabo Mbeki not to sign the bill into law, thus preventing an unconstitutional bill passing into legislation.

4.2 *Cape Town By-law on "Prevention of Nuisances"*

In early 2006, the City of Cape Town passed a by-law called the "By-law relating to streets, public places and the prevention of nuisances". The by-law lists a number of "prohibited behaviours" in the city and seeks to regulate, *inter alia*, begging, gatherings, public bathing and urination, nudity, door-to-door collections, parking, excavations and processions. A number of the provisions are problematic and could be regarded as unconstitutional, in the opinion of the FXI. However, a primary concern for the FXI is that the by-law seeks to constrain gatherings and processions even more than the Regulation of Gatherings Act of 1993. In fact, the by-law contradicts and is in violation of the provisions of the Regulation of Gatherings Act. The FXI believes this is an extremely dangerous development where local authorities feel they have the power to pass by-laws that overrule legislation passed by parliament and, even, the country's constitution. The Law Clinic submitted a comprehensive objection to the by-laws in the form of an open letter to the Cape Town Mayor. In November 2006 the City's Safety and Security Portfolio Committee changed its position and recommended "that Section 11 of the by-law be deleted due to overlap with National Legislation: the Regulation of Gatherings Act". The chairperson of the committee, Councillor JP Smith, commented in a committee meeting that the FXI's submission was such that "we have been humiliated." He said that the FXI was correct in its submission and that the section on public gatherings (Section 11) should not have been inserted into the proposed by-law.

4.3 *Banned Gatherings in Cape Town*

Over the past few months, the FXI has received numerous complaints about the "banning", by Cape Town city authorities, of protests and gatherings. The most common excuse given to organisers of such gatherings is that the police force does not have enough human resources to deploy to protect the protestors.

Over the past few months, the following gatherings have been reported to the FXI as having been banned by the City:

- A march on Human Rights Day, 27 March 2007;
- The "Naked Bikers Ride" scheduled for early June;
- Protests planned by the organisation Animal Activist Network News, scheduled for June; and
- A proposed march of members of the ANC Youth League, also scheduled for June.

In our opinion, these bannings have been unconstitutional as well as being contrary to the Regulation of Gatherings Act. The Act does not allow the lack of police human resources to be used as an excuse for the banning of a gathering. The City then used the same excuse, arguing that the recent public sector strike was taking up its resources, to as for a moratorium on all gatherings in the City. In practice, however, the City was already applying such a moratorium.

The FXI has written to the office of the Cape Town City Manager as well as to the Mayor of Cape Town, Helen Zille, to advise them of the unconstitutionality of the actions of the City.

4.4 *Icasa Amendment Bill*

The FXI viewed the Icasa Amendment Bill, which was passed by the National Council of Provinces (NCOP) in December 2005, as seeking to make Icasa an extension of the minister and to bring the regulatory body under her political control. If this were to happen, it would not bode well for the independence of Icasa and would set a bad precedent for the independence of other constitutional bodies (Chapter 9 and others). The FXI did a massive amount of media work around the issue and wrote to President Thabo Mbeki, lobbying him not to sign the Bill into law. The FXI also consulted with and lobbied other organisations also to write to the president expressing the gravity of the Bill. The FXI impressed on the President that the Bill was unconstitutional and, thus, should not be signed into law. In April 2006, the president agreed with the position about the unconstitutionality of the Bill and sent it back to parliament to be redrafted. A new draft was prepared and the President signed it into law. The new law is not completely satisfactory and the FXI, therefore, obtained legal opinion on its constitutionality. The opinion was that the Act was probably constitutional and the FXI decided not to pursue the matter.

4.5 *Access to Information Report*

Introduction

This report comprises of activities of the access to information programme (ATI) for 2006 and 2007 respectively. The programme aims to address practical problems in ensuring much greater usage of the right of access to information that is enshrined in most constitutions of countries in the Southern African Development Community (SADC) region; and intends to achieve this by focussing on access to information about the state of delivery of basic services, such as water and waster management, electricity, health and transport.

In 2006 the programme undertook a regional access to information campaign that consisted of partner level assessments amongst socio- economic rights organisations in the region; publicity campaign on the importance of access to information in SADC; the development of a MISA-FXI and SADC ATI network whose members shall be grassroots and middle level organisations and individuals interested in freedom of expression and access to information. The Open Society Initiative of Southern Africa (OSISA) supported the campaign.

In 2007, with the support of OSISA, the ATI programme initiated access to information requests in four SADC countries. The project is meant to be a pilot review of the extent to which SADC countries are better- placed to roll out access to information requests on a much more larger scale.

Activities carried out under the programme: 2006 and 2007

Under the auspices of the ATI programme in 2006- the rolling out of the access to information for economic justice campaign took place against the backdrop of an increasing move towards the enactment of access to information legislation that is sweeping much of the southern Africa region. With the exception of Zimbabwe and South Africa- all SADC countries have bills awaiting passage in parliament- a situation that would not have been envisaged a year ago.

A partner level assessment of capacity building needs for the regional partners was undertaken at the commencement of the project. It became apparent that the challenges of the partners are interwoven. The urgent need for a model law was mooted by the partners in light of the ongoing efforts to lobby for the passage of access to information legislation in SADC. The development of a model law proved critical in ongoing efforts to ensure that access to information laws in the region reflect the overwhelming developmental challenges that SADC countries face. The model law that has been developed by the ATI programme at the FXI continues to serve as a basis for law reform in the area of access to information in SADC. Secondly,

partners alluded to the need better coordination of campaigns in the region. The ongoing challenge of raising awareness of the importance and relevance of access to information for ordinary people was also raised.

Pursuant to conducting partner level assessments, a regional meeting was held in Johannesburg, South Africa 5- 9 June 2006. Five days were set aside for the meeting because of the range of issues that had to be covered. The five- day meeting succeeded in fostering a sustainable regional network of economic justice organisation in the area of access to information. Most importantly a program of regional monitoring and evaluation for tracking indicators was finalised during the meeting.

Finally access to information requests in Zambia and Namibia were undertaken. A campaign for the repeal of Zimbabwe's PAIA was also launched.

In 2007- a project focusing specifically on initiating access to information requests in four SADC was launched in January 2007. The programme set out on one day country missions to collect data on the current situation in the four pilot countries and this provided a rare opportunity to evaluate secondary information gathered mainly through desk- top research from articles, recent academic writings, country reports by the United Nations Development Programme (UNDP), Commonwealth, and the Africa Peer Review Mechanism against the raw data from individuals working at the coal face of access to information in their countries.

The country missions in Botswana, Lesotho, Mozambique and Malawi undertaken during January in addition to grounding the project firmly within the work of the partners also canvassed the partners' opinions in the following areas:

- The effective strategies for initiating civil society engagement to ATI;
- Information requests to public authorities and private bodies that have to be formulated; and
- Effective methods of raising public critical awareness of the value of access to information amongst citizens can we use.

Most importantly, this information gathering phase also provided the opportunity for the programme to assess the capacity of our partners to effectively roll out the above- mentioned activities. It became apparent from the interviews that the challenges of the partners are interlaced. The urgent need for launching information requests was mooted by the partners as a strategic endeavour to build a body of knowledge in their countries to

demonstrate that there is indeed a need for an access to information legislation. The development of an easy guide on where and how information can be accessed despite the dearth of access to information legislation in these countries was mooted.

It also became apparent from the information gathered that the current methodological approach employed by the OSJI monitoring tools is adverse to the peculiar challenges experienced by SADC countries and their institutional arrangements. Hence the need for a SADC OSJI monitoring tool as envisaged by this project.

Overall the country missions were a success. The programme, which ends in July 2007, has so far achieved the objectives it had set out in undertaking these trips, namely:

- To evaluate ongoing desk research on the current state of access to information in the region and specifically in the four pilot countries;
- To assess the capacity of our partners to roll out the activities envisaged under the project;
- To explore the strategies that civil society engagement and methods for raising public critical awareness of the value of access to information that the project can utilise; and
- To explore information requests to public authorities and private bodies that have to be formulated

Currently an updated baseline report is being finalised and SADC based OSJI monitoring tools are being developed. Most importantly the project will deliver a consolidated report on the outcome of access to information requests in four SADC countries.

4.6 *Model Access to Information Law*

In 2006 the FXI circulated a first draft 'Access to Information Model Law', for Southern African countries to comment on and thereafter use to lobby for their own access to information laws. The drafting exercise has also been invaluable to audit South Africa's own Promotion of Access to Information Act (PAIA), 2000.

4.7 *Media and ICTs Report*

Introduction

It has been two full years since the Media and ICT Programme began its work. The Programme aims to increase pro-diversity and popular access to

media, broadcasting and telecommunications in South Africa. The Programme is working closely with community-based organizations with a particular focus on capacitating grass root people with regard to their rights to media and information communication technologies. In order to achieve this objective the programme has developed two campaigns namely; Communication Rights & Media Rights campaigns, these campaigns assist in realizing the programme's broader objective. It is important to mention that not many activities were carried out in the communication rights campaign. The reason for this situation is because there have been a lot of developments that needed the programmes' attention regarding the media sector and the media rights campaign. This report will therefore elaborate on the activities taken up through these two campaigns and how those activities have managed to meet the programme's objective.

Activities carried by Media and ICTs: Year ending June 2007

Communications Rights Campaign

The Communication Rights Campaign aims at developing an environment where people even in very grass-root level can access and afford ICT's. The work carried out through this campaign assist in sharing information around issues of how to access and afford ICT's and how communities can use them for development. Telkom's failure to roll out the fixed line telephone poses a challenge to poor and ordinary people of this country not to be able to exercise their right to receive and impart information. The communication rights campaign has therefore built capacity amongst the affected people. This campaign has also raised an issue of affordability not only with Telkom but also the three mobile operators. The three operators being MTN, Vodacom and Cell C have been challenged through the campaign on issues of affordability and accessibility. Accessibility is always an issue in rural areas and remote areas where network problems become the daily experiences for people with cell phones. Through engagement with the users it was highlighted that the fact people do not have clear access in terms of the network, it affects their ability to afford making calls. The cut on calls due to network failure forces users to make more calls and be charged more. These issues were raised at ICASA by the campaign members in the form of a submission during high mobile prices hearings early last year. The submission together with other that was made contributed to issues of ICASA's intervention on the issue of pricing and also interconnection costs. That resulted to some communities that were identified to be experiencing such problems to have problems dealt with. A living example is the community of Viljoenskroon, a small town within the Free State Province, the Vodacom

antenna was installed after the programme has identified and reported the problem to Vodacom.

The beginning of this year the programme has embarked on field trips to remote or rural areas. The aim of these field trips is to target communities that are in dire need of these services and have little knowledge of how to deal with issues of accessibility and affordability.

Four main pieces of research have been carried out under the programme supervision. This research was carried out by for different organizations within the media and communication sector who were evaluating the work by the four statutory bodies or institutions that are set to be providing services related to media and communications for the public. The main aim of the research was to monitor the work done by these institutions with an attempt to measure the impact of their work. The findings mainly demonstrated that there is still more to be done in order to confidently state that their work has impact for universal service and access as well as promoting development and diversity of the media.

Workshops on ICT4D have been conducted with the assistance from OSISA, Ungana Africa, Meraka Institute of Technology and CSIR. These workshops were aimed at disseminating information on the new developments within the ICT's sector. More especially the workshops are conducted for community organisations that are already in the struggle for development in their respective communities. ICT4D workshops therefore capacitate these organizations in knowing how ICT's can be of use in their developmental needs for the communities they live in.

Media Rights Campaign

The development in the media with regard to the Public Broadcaster and other media freedom related issues made the programme to focus on this particular campaign. Within this campaign there is a strong campaign against the SABC. This campaign became strong immediately after the canning of the "Thabo Mbeki Documentary and the blacklisting saga. More awareness took place within the communities through mass meetings, pickets at the SABC, media statements etc. There was a time when the campaign has gained the momentum as pickets were taking place twice in a week. Pickets spread to other provinces like KZN, Limpopo, Western Cape as well as Gauteng.

The programme was also involved in the debate around the documentary "Umthunzi We Ntaba" which caused a stir between the SABC and the traditional leaders. This the documentary around the initiation process and the

traditional leaders put pressure on the SABC to stop screening it because the documentary is giving their custom a bad name and according to their culture the custom should not be exposed to women and children. The SABC succumbed to the pressure and stopped the screening of the documentary. The head of the programme was subsequently interviewed in various media platforms debating the SABC's decision to stop the screening and the issue of the broadcaster's independence and mandate.

The programme also was involved in the issue around the Film and Publications Bill which became strong and needed attention not only from the programme but by the organization at large. The programme staff took part in the debates related to the Bill and was more interviewed by Nguni speaking radio stations. The programme together with UNESCO organized a seminar on the issue in Soweto where 60 people attended and good and vibrant debate resulted.

The 3rd of May was the International Press Freedom Day. The FXI did not have a statement as usual but because the submission on the Film and Publications Bill included issues of press freedom. Again the media covered the issue and the head of the programme was interviewed on SABC Africa and became part of the panel on African Perspective on the issue of press freedom. Many other media institutions ranging from newspapers to community radio stations covered the story on the Film and Publications Bill together with the "child pornography" argument that was raised to justify the Bill.

The field trips that have been embarked on by the programme have resulted to relationship building with community radio stations around the country. The trips taken by the programme tends not to cover only the programme issues but also those that are taken up by other programmes within the organization. For instance issues taken up by the law clinic or Access to Information programme get presented to communities as well as community radio stations. Such presentations and information sharing assist in giving the stations and community organizations to make use of the opportunities provided by the Freedom of Expression Institute. The advantages of the trips also enable the programme staff to advertise the FXI and make aware communities, community radio stations and other mainstream media houses of how they could benefit from the FXI programmes.

The programme head went to the DRC, Kinshasa and presented on the importance of the Public Broadcaster. The organization that invited FXI is known as JED- Journalists en Dangered has embarked on an initiative to transform the DRC's National or State broadcaster into a Public broadcaster.

4.8 *Amendment to Section 205 of the Criminal Procedure Act*

As discussed above, the FXI is lobbying the Ministry of Justice and Constitutional Development for an amendment to section 205 of the Criminal Procedure Act to protect journalists and their sources.

4.9 *Submission to CHE on the State of Academic Freedom of Expression*

On 10 June 2007 the FXI made a submission to the Council on Higher Education (CHE) on the state of academic freedom of expression in South Africa. The FXI urged the CHE to pursue a two-fold proposal, namely an audit of all subsidiary legislation at tertiary institution level, encompassing conditions of service, rules governing student activities on campus and all rules and by-laws impacting on academic freedom on campus; and establish a unified campus freedom of expression code and a single ombudsman of academia, entrenching the basic principles of free speech and setting out the procedures for disciplining of staff and students based on a 'for us, by us' form of self-regulation. This structure would adjudicate on violations of the code, and impose appropriate sanctions where necessary. Membership of this structure would be voluntary and open to membership from both public and private institutions.

4.10 *Clifford Otieno Case*

Clifford Derrick Otieno is an award-winning Kenyan journalist. Since the middle of last year, Otieno has been hiding out in South Africa, doing a course at a South African university in order not to have to return to his native Kenya. He fears that a return home could endanger his life. His fear of returning home stems from his attempt to bring charges against the Kenyan First Lady, Lucy Kibaki, for assault.

On the 2nd May 2005, the night before World Press Freedom Day, Lucy Kibaki visited the offices of the *Nation*, where Clifford worked as an investigative journalist. She wanted to complain about the portrayal of her family in the media. According to Clifford, she "confiscated all the reporters' notebooks, cell phones, still cameras, video cameras and wanted reporters to switch off their computers". Because Clifford's video camera was still rolling and because she recognised him as a reporter who had covered other stories about her (including her ordering a policeperson to intimidate a World Bank

official), she slapped him in front of a number of witnesses and damaged his camera.

Otieno initially simply wanted an apology from the First Lady for her attack and compensation for the camera. When she refused, he decided to lay charges against her. When, after three days, there was no follow up by the police, Otieno decided to proceed using the avenue of private prosecution. However, immediately after he applied to the Chief Magistrate for leave to pursue this course of action, the director of public prosecution took over the case and then terminated it. Ever since, he has had no joy through the justice system.

Worse, however, is that Clifford has been repeatedly threatened and harassed. Prominent personalities pressurised him to unconditionally drop the case, he received death threats, unknown persons surrounded his house and his neighbours witnessed attempts to break into his house. A cabinet minister tried to bribe him and police actively prevented him from working by not allowing him access to places he was supposed to report from – like a collapsed building, in one instance. With his life in danger, Clifford found funding to briefly study in South Africa. However, that has not made his life much easier. The threats were then transferred to members of his family.

Clifford's appeal to the constitutional court has not moved forward because of the state's refusal to proceed. The Chief Justice, Evan Gicheru, constantly interferes with the bench of judges that he instituted to hear the case. Initially, he double allocated one of the judges that was to hear Clifford's case. This caused the case to be postponed for four months. On the second occasion, the Chief Justice transferred one of the judges. The case had to be taken back to the Chief Justice for further direction.

A number of international media freedom organisations have expressed their support for Clifford. However, his matter received no support from human rights organisations in his country. This has resulted in Clifford's being concerned about his safety were he to return home.

The FXI gave publicity to Clifford's case and met with the Special Rapporteur on Freedom of Expression in Africa of the African Commission on Human and Peoples Rights to discuss the matter and decide what could be done about it.

4.11 *Jewish Reports Censoring of Ronnie Kasrils*

In November 2006, the South African Jewish Report published an article containing a number of questions directed at Minister of Intelligence Ronnie

Kasrils. The editor of the paper agreed to give Kasrils the right of reply. However, when the Minister submitted his reply, the editor decided not to publish it because, he said, his readers would feel offended by the sentiments contained therein.

The FXI was called for and gave a comment to the *Mail & Guardian.* The FXI said the newspaper was engaging in contradictory behaviour by publishing an opinion piece that poses questions and then denying the person to whom the questions were being put the right to answer them. We argued that editorial independence was premised on certain editorial standards. These standards give certainty to readers about how a publication is going to conduct itself in return for that editorial independence; these standards include the sacrosanct principle of the right of reply. No publication worth its salt, we said, would refuse somebody the right to reply to an article that mentions that person by name, and especially in an instance where the person is directly called on to answer questions. In refusing Kasrils the right of reply, we said, the Jewish Report has trashed the basic principle of fairness.

Subsequently, the story was picked up by the *Jerusalem Post*, which asked us to explain our comments. This was followed by a letter to the FXI by the South African Jewish Board of Deputies, accusing the FXI of being biased and of being anti-Israeli. This led to a communication between the FXI and the Board of Deputies.

5. Legal education and capacity building

During 2006 the Law Clinic invested much time in training and capacitating its own administrative staff, Pinky Magau and Gertrude Tsoku to become paralegal and legal secretary, respectively. These two staff members now work alongside the FXI's attorney, Simon Delaney, in all the activities of the Law Clinic. They have provided Simon with invaluable assistance and continue to learn and contribute to the Clinic's success.

The past two years have seen the legal demands on the social movements grow to include both individual and group legal defences against the erosion of access rights (from evictions to disconnections); the support of legal and constitutional challenges; the defence of freedom of expression rights when activists are arrested while exercising these rights; the defence of activists targeted for arrest on trumped-up 'criminal' charges aimed at undermining movement activities, as well as the still unmet requirements to challenge the

harassment meted out by state intelligence agencies against the movements, among others.

In 2005, a joint legal committee was created, comprising Gauteng's foremost social justice movements the Anti-Privatisation Forum (APF), the Landless People's Movement (LPM), together with the FXI law clinic.

During the course of 2005 and 2006, the law clinic engaged in three major activities on behalf of the social movements: community education, legal capacity-building within social movement groups, including the administration of a revolving bail fund and direct legal representation.

5.1 *Community Education*

There is an urgent unmet need to provide basic legal information to grassroots community activists engaged in daily struggle. Several social movement groups have themselves recently held sessions on basic legal, but have found that the need and questions of communities far outstrip existing resources and expertise.

As such, the law clinic has coordinated workshops in various communities in different parts of the country on basic legal rights. Issues identified by communities include: arrests, criminal charges, protests, freedom of expression, evictions, service cut offs, access to information and other topics identified by the communities themselves. These workshops serve to build the capacity of social movements to defend their rights in situations where basic knowledge of the law is needed to do so, such as the Regulation of Gatherings Act.

In addition, in order to make printed material on basic rights available to social movements, the law clinic has conducted a national scan of existing public education materials. The law clinic will then re-print materials currently unavailable to communities and developing new, accessible materials to fill the significant gaps that currently exist.

Activists have repeatedly expressed a desire for such education in their communities and directly related to their work. As a project of the social movement groups themselves, the law clinic is uniquely positioned to respond to both basic education needs and on-going issues as they arise.

The FXI has responded to a request from communities clamouring for a national freedom of expression network in South Africa. As part of the

activities towards the setting up of the network, the FXI held a series of workshops in different parts of the country during 2006.

5.1.1 *Harrismith Workshop*

One of the areas identified for the holding of a workshop during the early phase of network activity was Harrismith, a small town in the Free State whose main claim to fame is that it lies on the N3 Highway that connects Johannesburg and Durban. Harrismith, and Intabazwe in particular, were chosen to be one of the early entrants into the FX Network following protests that took place there the year before. Intabazwe became a symbol of protest against the lack of service delivery after 17-year-old Teboho Mkhonza was shot by police during the protest. Teboho later died of the gunshot wounds. Thirteen people were also arrested and charged with sedition. Their trial began earlier this year, but the sedition charge was withdrawn and only charges of public violence remain. In addition, three policemen are currently in court over the murder of Teboho.

The workshop in March 2006 in Harrismith was targeted at a group of activists from Intabazwe and a group from Viljoenskroon. The former group was organised under the banner of the Greater Harrismith Concerned Residents Association and the latter group under the Rammolotsi Rehatammoho Crisis Committee from the town of Viljoenskroon. In addition, one person from the leadership of the Durban shack dwellers' movement, Abahlali Base Mjondolo, would be invited to speak and participate in the workshop. The FXI also invited a number of state structures to speak at and attend the workshop. The South African Police Services in Harrismith, the Harrismith Town Council, the Independent Complaints Directorate (the police watchdog), the South African Human Rights Commission and the Department of Provincial and Local Government were invited to share *their* experiences of the Gatherings Act.

The aims of the workshop were:

- Following on the recommendation of a workshop in December 2006, to provide participants with a good understanding of the Regulation of Gatherings Act 205 of 1993 (Gatherings Act) so that they might be empowered with the Act when having to organise gatherings, deal with the police, etc. The Gatherings Act is the legislation that governs the holding of demonstrations, protests, marches and other gatherings.
- To assist in facilitating the formation of the freedom of expression network that could assist communities that face a tough battle in realising their rights to free expression because of intransigence, repression, etc by the local authorities, including the police.

The workshop was a great success, in giving participants a good sense of their own rights and responsibilities as activists vis-à-vis the Gatherings Act and a sense of how their networking with each other as well as with the resources available through the FXI could help their struggles.

5.1.2 *National Workshop*

Following on from the success of the Free State workshop, the FXI decided to hold a national workshop. The workshop was in Johannesburg in April 2006. The workshop was held over three days and was split into two parts. The entire first day was devoted to a strategy planning session to debate the Freedom of Expression Network, what it meant, its modalities, what purpose it could serve, how it should operate, etc. The subsequent two days were devoted to a capacity building workshop to empower participants on legal issues that have faced social movements in their work and their attempts to exercise their rights to free expression.

A number of organisations from around the country participated. Most are either members of or have links with the SMI. Others were invited on the basis of their previous partnerships with the FXI. In all, about 60 people attended the workshop for the three days. Resource persons for the various sessions included staff members of the FXI, as well as other specialists in their fields, e.g. an academic from the University of the Witwatersrand and the Wits Law Clinic and two staff members of the South African History Archive (SAHA).

The first day of the workshop focussed on strategic issues. It included presentations by members of social movements who have been affected, in different ways, by the repression of and denial of rights by the state. The bulk of the day, however, was a facilitated discussion (facilitated by FXI's Anti-Censorship Programme Head, Na'eem Jeenah) that aimed towards concretising the FX Network.

The discussion flowed around the following thematic areas:

- Definition and meaning of freedom of expression;
- The FX challenges facing social movements and the importance of a culture of freedom of expression for organisations of the poor to be able to function effectively;
- The kinds of repression of free expression faced by social movements;
- Whether a national network of social movements, focussing on freedom of expression, was important and necessary;
- The form / structure that such a network could take.

The second day began with a recap of the previous day's sessions and then launched into the law. Legal issues covered on the second day were:

- The Regulation of Gatherings Act (facilitated by the head of the FXI's law clinic, Simon Delaney)
    - This session examined the provisions of the Act, how social movements should protect their rights in terms of the Act, how to fill in the necessary forms of notification for gatherings and what is entailed in meetings between movements and authorities.
    - The session included a role-play where some participants played the parts of local authorities and others played the parts of marchers.
- How to deal with the police in various scenarios (facilitated by Simon Delaney)
- The question of compensation in the event of torture, death in detention, unlawful arrest, etc.
    - This session included presentations by members of the Landless Peoples Movement who have been tortured in detention.
    - It also included an interactive presentation by Professor Peter Jordi of the Law School at the University of the Witwatersrand. Professor Jordi has handled numerous claims of compensation from the police.

The third day included a single session on the law, dealing with a piece of legislation that is crucial to the work of social movements but one which is not quite understood and which is not sufficiently used by activists – the Promotion of Access to Information Act (PAIA). The Coordinator of the Freedom of Information Programme of the South African History Archive (SAHA), Kate Allan, facilitated this session.

This "Right to know" session was followed by a recap of the legal-empowerment part of the workshop. Thereafter, the workshop picked up on the outstanding issue from the first day: the most appropriate structure for a national FX network. After this, the SMI's Mondli Hlatshwayo facilitated a session on the SMI where a number of questions and issues were raised about the work of the SMI, how organisations of the SMI could work more effectively, the status of the SMI's legal defence fund (housed at the FXI), etc.

5.1.3 *Durban Workshop*

In November 2006, a workshop was held in Durban, in part a follow up to earlier workshops, but also a response to the growing crisis in Durban around the denial of the right to protest. Several groups, including the shack dweller's

movement (Abahlali BaseMjondolo) have been consistently banned from marching by the eThekwini Municipality. Metro police have severely assaulted marchers and there has been widespread harassment and intimidation of local activists.

The aims of the workshop were:

- To provide participants with a good understanding of the Regulation of Gatherings Act 205 of 1993 (Gatherings Act) so that they might be empowered with the Act when having to organise gatherings, deal with the police, etc. The Gatherings Act is the legislation that governs the holding of demonstrations, protests, marches and other gatherings.
- To provide tools in using the Promotion of Access to Information Act (PAIA).

The workshop was a great success, in giving participants a good sense of their own rights and responsibilities as activists vis-à-vis the Gatherings Act and PAIA and a sense of how their networking with each other as well as with the resources available through the FXI could help their struggles.

5.1.4 *Booklets*

The Open Society Foundation has commissioned the FXI to develop three handbooks: first, on the regulation of gatherings, to optimise the FXI's resources around freedom of expression, by bringing together a range of ad hoc materials the Institute has developed for capacity-building workshops, into user-friendly but comprehensive workbooks and making them available to targeted constituencies, including South African and SADC-wide civil society organizations, paralegals and Advice Offices, social movements, the police and local authorities, independent and community media., media censorship and electronic communications.

Second, a censorship handbook for use by civil society organizations, paralegals and advice offices, social movements, the police and local authorities, the media (especially small independent and community media), to ensure that they have practical tools for advancing freedom of expression and countering censorship, and to ensure that the FXI's work reaches beyond where the Institute has a physical presence.

Third, on freedom of expression and electronic communications in South Africa, to consolidate the experiences gained by organisations like the FXI through the past 12 years in the development of electronic media in South Africa have been invaluable – both for South Africans as well as for civil

society groups in other countries that face similar kinds of issues, most notably other countries in Southern African region.

5.2 *Capacity-Building*

Beyond basic knowledge provided to all activists, it has become clear that a cadre of well-trained legal workers is needed within the social movement groups. Following a model that has proved successful in several South African communities, the law clinic is coordinating with social movement groups to identify individuals with the interest and ability to act as legal workers within their individual communities.

These individuals are not lawyers, but well-trained lay-people capable of dealing with immediate legal needs as issues arise. They are able, for example, to arrange bail for activists, prepare legal permits for protests and marches, prepare motions for stays of eviction, take information from witnesses, etc. In addition, these individuals are developing the capacity to negotiate the confusing and specialized array of legal services that may be available from legal aid, outside NGOs, and other agencies.

Through a series of in-depth trainings and mentorships with the law clinic attorney, the skills of the social movement legal workers are being built up steadily. This will both decrease the costs associated with outside lawyers and increase the ability of social movements to control their own legal needs and strategy.

5.3 *Legal Representation and Coordination*

With a better education community and on-the-ground legal workers, the need for direct representation will be reduced but far from eliminated. There will continue to be a dire need for lawyers to respond rapidly to requests for legal intervention from the social movements on matters such as those discussed above.

Social movements need a way to develop expertise about the specific legal issues they are facing and to coordinate the use of this expertise. Activists are increasingly facing coordinated efforts on the part of government and corporate officials to use the criminal and civil justice systems to systematically subvert the work of social movements. Relying only on reaction to legal problems through disconnected public and NGO legal

resources is no longer an effective strategy for supporting social movement work.

A revolving bail fund is housed in the FXI and overseen by the Social Movements Indaba. The purpose of the bail fund is to counteract the direct intentions of the repressive apparatus of the State (police, intelligence arms) to either remove activists from the movements while they await trial if they cannot afford to pay, or tie up vast portions of movement resources in bail payments for lengthy periods as activists await the slow-churning wheels of justice to reach the conclusion of trumped up cases against them.

Bail costs for activists arrested in a single incident can easily run into tens of thousands of Rands, and currently the movements are forced to sacrifice other aspects of their struggles while these monies are tied up in the courts. The Revolving Bail Fund aims to provide a lump sum solution to this, on the basis that bail funds would be loaned out to movements, and returned at the conclusion of a case.

The fact that most charges against activists are routinely either dropped or dismissed during the proceedings, alongside the ongoing collective work of the movements and activists within them, means that the fund would be administered relatively easily, with prioritisation criteria to be agreed in the strategy committee, and funds to be paid out and collected by the same person in any particular case.

The FXI law clinic attorney devotes substantial time to the legal work of social movements. The duties of the attorney, with respect to the social movements, are firstly to assist members of the legal committee to assess requests for legal assistance by victims of State repression on matters of violations of socio-political rights; and secondly provide expert legal assistance to members of the social movements who fall victim to State repression. Such assistance may include, but is not necessarily limited to, legal advice or legal representation before courts of law or other tribunals.

The FXI law clinic attorney has defended over 20 members of the social movements arrested on various charges, many of which relate to alleged violations of the Gatherings Act. The FXI also assisted in the contracting of an ‘on-call’ specialist criminal law attorney for use by the APF.

5.4 *Development of the Freedom of Expression Network*

The above developments around capacity-building and legal empowerment have been part of the FXI’s attempt to develop, in partnership with the Social

Movements Indaba, a national freedom of expression network. The idea for such a network came about as a result of the number of queries and requests for assistance that the FXI had been receiving from social movements, residents associations, etc. about the violations of their rights to free expression.

The Network seeks to link such groups across the country. Through the legal empowerment and capacity building processes mentioned above, members of these organisations will more easily be able themselves to deal with cases of repression and a denial of their free expression rights.

Furthermore, through linking these groups, a strong feeling of solidarity is developing between them, resulting in them viewing each other's experiences of repression as part of their own experiences. This solidarity is intended to be harnessed in a manner that will assist in reducing repression and expanding the free expression environment in South Africa.

A National Liaison Committee has already been formed by the movements and associations involved in the FX Network. Provincial committees are in the process of being formed. It is very significant that the National Committee includes movements that, at other fora, are at vigorously opposed to each other. Thus, it includes representatives of the Social Movements Indaba as well as the Abahlali base Mjondolo and the Anti-Evictions Campaign. The latter two organisations have had heated confrontations with SMI members in the past, but regard their role in the FX Network as important to safeguarding their own as well as the general free expression rights of South Africans.

6. Litigation and legal interventions

6.1. *The Right to Protest*

5085 protests were officially recorded during the 2004/05 financial year, 881 of which were deemed illegal (Citizen, 13.10.05). There is increasing evidence that community activists critical of the current status quo are being denied their constitutional rights to freedom of expression and assembly. Police officers are often ignorant of the Regulation of Gatherings Act or, more worryingly, abuse the Act to prevent people from protesting and marching in public.

6.1.1 *The Acquittal of Moeketsi & Jacobs*

In February 2005, the APF gave the JMPD two weeks' notice of its intention to hold a peaceful and unarmed march against pre-paid water meters in Orlando. One day before the march, a letter from the JMPD prohibiting the march was allegedly hand-delivered to Kanapy Moeketsi & Peter Jacobs, the march organisers. Moeketsi & Jacobs denied that they received any such letter. The march proceeded peacefully and unarmed and no arrests were made. A week after the march, Moeketsi & Jacobs were arrested and charged with 'illegal gathering' under the Regulation of Gatherings Act. Together with their defence lawyer, the FXI's Simon Delaney, they attended court 9 times, with the trial being postponed each time because the State wasn't ready. In March 2006, Moeketsi & Jacobs were found not guilty of the charge of illegal gathering.

The FXI believes that the court ruling is significant in that the Johannesburg Metropolitan Police Department (JMPD) will now no longer be able to ban marches with impunity and expect that people who march nevertheless will be convicted. The judgement is a victory for freedom of expression of poor communities in particular, for whom taking to the streets is the only form of expression available to them. In the FXI's opinion, this case was a futile and vexatious witch-hunt against the leaders of the APF, designed to intimidate activists and drain their time, resources and commitment to the struggle for basic services.

After hearing only the State's evidence of Inspector Make, Head of Special Events, JMPD and Captain Nemalale of the South African Police Services (SAPS), respectively, Magistrate Mia ordered the acquittal of the accused Moeketsi and Jacobs, without even taking the usual step of hearing the Defence's version. Magistrate Mia reiterated the preamble to the Regulation of Gatherings Act, 1993, which paraphrases the constitutional right to demonstrate and holds that "…every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so." Magistrate Mia emphasised that the purpose of the Gatherings Act was not to *prevent* gatherings, but rather to *facilitate* gatherings. The Act requires the police to consult and negotiate extensively with the convenors of a march and impose conditions on a march where appropriate. None of this happened in this case.

6.1.2 *Election Day torture allegations by LPM members*

In the run-up to the 2004 national elections, the Landless People's Movement (LPM) initiated its "No Land, No Vote" campaign. On Election Day, 14 April 2004, LPM held a legal protest in Thembalihle. When LPM members gathered for the protest, police violently arrested and detained them overnight. The Law

FXI hired a lawyer, who assisted with the release of the members. They were later charged with holding a political activity on Election Day contrary to section 108(a) of the Electoral Act.

Four LPM members – Ann Eveleth, Maureen Mnisi, Samantha Hargreaves and Moses Mayekiso – claimed that members of the Crime Intelligence Services (CIS) physically tortured Eveleth and Hargreaves and used violence, harassment and intimidation against Mnisi and Mayekiso. The four laid charges with the Independent Complaints Directorate (ICD). In January 2005, the ICD recommended that CI Unit Head Superintendent Simangaliso Patrick Simelane, be charged with assault with intent to cause grievous bodily harm. His trial was in August 2005 but the case was dismissed for lack of evidence. The prosecutor has indicated his intention to appeal the judgement but there is not movement yet in that process. At the same time, the four LPM members are determined to pursue a civil case against Simelane. The FXI continues providing legal assistance and advice to the activists.

Meanwhile, the state pursued its case against the LPM members and the FXI has been providing them with media support, publicity and international solidarity to ensure that their plight receives as much attention as possible. This case began in October 2005. The court has already heard both the state's and defence's arguments. The defence's application for the dismissal of the charges (because of a lack of evidence) was rejected by the magistrate. The case resumed in March 2006 and was repeatedly adjourned until June. The defence asked for the magistrate to recuse herself because the defence believed she was biased. She subsequently did recuse herself and in August 2006 the prosecution withdrew all charges.

6.1.3 *Harrismith protests*

On 30 August 2005, 17-year-old student Teboho Mkhonza died shortly after police fired into a crowd of protesters in Intabazwe Township near Harrismith. The demonstrators, who were unarmed, were protesting at the municipal council's failure to provide basic services to the impoverished community. According to film, witness and forensic evidence, the police opened fire with birdshot, prohibited for use in controlling crowds. The police gave no warning and fired as people fled. Thirteen demonstrators were arrested and were charged with sedition – the first time since 1994 that such a charge has been used – and with public violence.

The FXI assisted the accused with legal and other advice and held a workshop in Harrismith for the accused. The FXI also gave a number of media interviews on the issue. In particular, the FXI highlighted the danger of using the very serious charge of sedition in the context of a public protest. The charge is reserved for people that are intent on overthrowing the state and to use it against protestors (many of whom belonged to the ruling party) set a bad precedent by which the state could deal with dissent, the FXI argued.

In December 2004, the ICD recommended prosecution of three officers for murder and attempted murder and disciplinary action against the officers for a breach of standing orders on the use of force and firearms. The police officers were tried and found not guilty.

In January 2006, the 13 appeared before the court in Harrismith. However, before the case began, the prosecutor informed them that the charge of sedition had been dropped. The case has since been repeatedly postponed for trial.

6.1.4 *Abahlali Base Mjondolo*

The FXI supported the Durban Shack Dwellers Movement, Abahlali Base Mjondolo, in November 2005, when the eThekwini Municipality banned a march that was due to take place by the Foreman Road shack dwellers, protesting against a lack of housing and service delivery. The banning was in violation of the Constitution as well being in violation of the Regulation of Gatherings Act. The FXI issued media statements on the matter, wrote to the Municipality expressing our position and made legal assistance available to the shack dwellers if they needed it. The march did take place and was put down by police, allegedly firing live ammunition at protestors.

In February 2006, Abahlali and its problems with the eThekwini Municipality again came to our attention. The municipality had again denied approval fro an Abahlali march to take place in the Durban City Centre. The denial was clearly in violation of the constitution and of the Regulation of Gatherings Act. The FXI got very involved in the matter. We attempted to mediate between Abahlali, the municipal manager and the metro police. We also wrote letters to the municipal manager and issued media releases pointing out the illegality of the city's actions. All of this was to no avail and, as the date of the march approached, Abahlali was repeatedly stonewalled by the city. We finally advised Abahlali that the march was legal, that they should plan to go ahead with it and if they feared police intervention, to apply for an interdict against the police. The movement applied for and was granted an interdict on the morning of the march. The Durban High Court, in the interdict, instructed the police and the city not to interfere with the march and the judge ruled that the

march had never been illegal. The FXI's letters and statements which explained the constitutional right and legal position regarding marches and protests formed key arguments in Abahlali's case and helped convince the judge in favour of the movement.

The FXI has since then issued several more media statements on subsequent denials of the right to protest in and around Durban. The FXI has consistently been advising on the Gatherings Act and writing open letters condemning illegal police actions. We also assisted Abahlali with negotiations with municipal officials in the movement's attempts to have its right to march recognised by the city authorities.

6.1.5 *Assistance to various social justice movements and researchers*

Other social movements such as Jubilee South Africa and the Ivorian-South African community have also been grateful to the FXI for assisting in overturning prohibitions of gatherings and countering police harassment.

For example, in June 2007, the Freedom of Expression Institute (FXI) wrote to the Mayor of Cape Town, Helen Zille, about the prohibition of gatherings in Cape Town during the public sector strike. The FXI also wrote to the City Manager's office to protest against the banning of the Cape Town leg of the 'World Naked Bike Ride'.

The FXI gave substantive input to S Woolmer 'Freedom of Assembly' in Woolmer, S et al (eds.) *Constitutional Law of South Africa* (1996 2nd Edition 2006). Substantive input was also provided to Bond & Whitcher, 'A Consideration of the Law as both an Objective and Subjective Force in Shaping Recent Community Movement Struggles in South Africa' (2005).

6.2 Balancing the Rights of Expression and Privacy

6.2.1 *NM and Others vs. Charlene Smith and Others (FXI intervening as amicus curiae)*

On 4 April 2007, the Constitutional Court handed down judgment in the case of *NM and Others v Smith and Others*, in which three HIV-positive women claimed that their right to privacy and dignity were violated by the publication of their names and HIV status in a biography of politician Patricia de Lille. The Court found in favour of the applicants, ordering the respondents to pay each

applicant R35 000 in damages. In a majority judgment, Madala J held that the respondents were aware that the applicants had not given their express consent but had gone ahead and published their names, violating their privacy and dignity rights.

In light of the fact that the judgment did not extend the common law to include negligence in relation to the publication of private medical facts, there would be no chilling effect on freedom of expression and therefore the Court did not find it necessary to either agree or disagree with the FXI on this point. The FXI therefore welcomes this preservation of the common law status quo, which protects both media and individual defendants who unwittingly, but mistakenly, infringe the privacy of individuals in speech or in writing.

The FXI successfully applied to be admitted as *amicus curiae* in this case. The FXI argued that if the media were to be held liable for the negligent disclosure of private facts they would bear an intolerable burden that would unnecessarily and unjustifiably interfere with, and have a chilling effect on, the right to freedom of expression in South Africa. The FXI argued further it was neither necessary nor desirable for the common law to be developed to include negligence as a ground for fault in these situations, more especially because individual defendants would be particularly at risk for being held liable if this development took place, because they do not have the resources, skills or wherewithal to make any proper judgment on what constitutes negligence.

6.2.2 *Exposing the name of a rape complainant*

During the course of the Jacob Zuma rape trial in 2006, Zuma supporters publicly revealed the name of the rape complainant of placards and burnt an effigy of her. Some also stoned a woman they suspected was the complainant. The FXI responded to these incidents, pointing out that the revealing of the name of a rape complainant in that manner was illegal under the Criminal Procedures Act. Also, the FXI argued, the effect of such exposure could easily be the silencing of the voices of future rape victims – already marginalized and traumatised. Thus, the FXI argued, those revealing the complainant's name should be charged.

6.3 ***Independence of the SABC***

The FXI is pursuing several courses of action with respect to the SABC in an attempt to salvage the independence of the public broadcaster.

6.3.1 *SABC's Articles of Association*

In 1998, it was decided to incorporate the SABC, leading to this intention being included in the Broadcasting Act No. 4 of 1999. However, it was only in 2003 that the SABC was incorporated as a public company, with the South African government, in the person of the Minister of Communications, being the sole shareholder of the company. The SABC, as a company, is now governed by its Articles of Association, which require, inter alia, editorial independence.

Recently, the SABC has been embroiled in a number of controversies about its independence. Some of these are:

- The non-screening of an advertised interview with the former Deputy President Jacob Zuma and the pulling off-air of a popular of a song calling for his reinstatement;
- The withdrawal of a documentary on President Thabo Mbeki at the last minute, and without explanation. The documentary has still not been shown and the SABC took three weeks to give an explanation as to why it was withdrawn: an explanation that is still not entirely satisfactory. By now they should have 'cured' any problems with the documentary, and screened it.
- Findings by the Sisulu-Marcus Commission that a blacklist existed of commentators on news and current affairs programmes. The Commission found that the blacklisting of certain individuals was not objectively defensible, and identified one incident where a 'Special Assignment' programme was shown to the Presidency before it was screened, leading to alterations. Yet the SABC refused to release the report publicly, deciding instead to release a highly inaccurate summary of the report.
- The SABC then attempted to interdict the *Mail and Guardian* newspaper to force it to take a copy of the report down from its website. The SABC lost this case.
- The SABC has subsequently issued verbal warnings to Zikalala and Perlman, who has since resigned, together with several others from the newsroom.

These incidents have resulted in public confidence in the SABC, which is being seen in many circles as simply an extension of the ruling African National Congress, reaching an all-time low. They also point to the extent of the erosion of the SABC's independence and its reversion to being a state broadcaster.

The law clinic is seeking legal opinion on the extent to which the SABC's own Articles of Association protect and foster its independence.

6.3.2 *Complaint on SABC's non-compliance with licence conditions and the law*

The FXI has made a complaint to ICASA, a body that is required by the Constitution to regulate broadcasting in the public interest and to ensure a "diversity of views" – words that speak directly to the blacklisting saga. Yet ICASA has been silent on the SABC debacle, which calls into question its own independence (Icasa's independence has also been under considerable pressure of late). Yet, it is the organisation primarily responsible for acting as watchdog on the role of the public broadcaster and of ensuring its independence from the state.

Icasa has accepted the complaint and referred it to its Complaints and Compliance Committee ("the CCC"), which investigates failures by licensees to comply with legislation, regulations and licence conditions.

Our complaint lodged with the CCC concerns the SABC's failure to comply with, among others, its public broadcasting mandate set out in the Broadcasting Act. The CCC will, in turn, invite a response from the SABC, whereafter the matter will be argued. Hopefully this process will allow ICASA to regain a measure of public trust in its ability to fulfil its Constitutional role, by regulating firmly to ensure that the SABC is a public broadcaster and does not descend along the path of becoming a state broadcaster.

Once Icasa deals with the complaint, the FXI may refer the matter to the legislative branch of Government, through the Parliamentary Portfolio Committee on Communications. Here the FXI would have the opportunity to argue for the impeachment of the SABC Board on the grounds of non-compliance with the Broadcasting Act. This is the Parliamentary Committee responsible for the appointment of the non-executive members of the SABC Board, those whose statutory function is to ensure that the SABC is a public and not a state broadcaster. That this Committee is continuing to fail to do its job is manifest by its failure immediately to investigate the state of the public broadcaster following the finalization of the Sisulu/Marcus Report and the on-going Blacklisting debacle. This Committee too, must be held to account by challenging it to act.

The third step is the courts, particularly the Constitutional Court, should Parliament and/or ICASA fail to act in accordance with their Constitutional mandates. Effective oversight of the Executive and the SABC, and guarantor

of public broadcasting, particularly with regard to news and information programming, the courts must step in to ensure that Parliament, ICASA and the SABC itself, complies with the laws of the land, including the Constitution. The precise nature of the litigation is impossible to define now, as it depends on how Icasa and the Portfolio Committee respond.

6.3.3 *Thabo Mbeki Documentary*

In May 2006, SABC 2 was due to flight a documentary on President Thabo Mbeki as part of its "Unauthorised" series. The SABC had advertised the documentary a number of times before the screening date. However, at the time when the documentary was to be broadcast, another "Unauthorised" documentary was repeated. The producers – an independent production company called "Broad Daylight Productions" – were not informed that the documentary would not be shown. The withdrawal of the documentary caused a major hullabaloo around the country and the SABC came in for severe attacks from the other media and commentators. The FXI met with the producers of the documentary, advised them on how to proceed and also issued media releases commenting on the SABC's censorship and questioning whether the decision to withdraw the documentary was politically motivated.

The FXI also participated in a media conference-cum-consultation called by the SABC to explain its position on the matter. In a strange twist, the Chief Executive Officer of the SABC, repeatedly referred to the FXI as "right-wingers" for our position. The SABC also claimed that the decision to withdraw the documentary was because it was defamatory. The FXI is currently in the process of settling a legal opinion on a number of issues. Counsel has been requested to provide the FXI with an urgent opinion on the legal options available to Broad Daylight and the implications thereof, in the event that the SABC institutes legal proceedings for interdictory and / or declaratory relief in relation to the documentary production, or in the less likely event that it should become necessary for Broad Daylight to initiate legal proceedings. The legal opinion will also provide options for Broad Daylight in terms of copyright issues and what rights the producers have in terms of the documentary, being able to screen it publicly, etc. After some of the dust had settled, the SABC had agreed to meet with lawyers for the producers and find some way of moving forward on the issue.

On 6 June 2007, documentary producer Ben Cashdan advised that the programme would be aired on Sunday, June 10, at 21:00 on SABC 3. The next day, however, the SABC again changed its mind about screening the documentary and claimed that the scheduling of the documentary was only

‘temporary’. The FXI said it was disturbed by the "now you see it, now you don't" approach the national broadcaster had towards the screening of the film and claimed further that the SABC's changing its mind about showing the film, once again, was yet another indication of chaos inside the broadcaster, where different units of the same organisation talk past one another, and then land up working against one another.

6.3.4 *SABC "Blacklist"*

Following closely on the heels of the Thabo Mbeki documentary controversy was another matter the Law Clinic dealt with: allegations of an SABC blacklist of analysts and commentators that should not be invited to comment on SABC news and current affairs programmes. Once the allegations emerged into the public domain, they caused tremendous embarrassment for the SABC. The FXI regarded the allegations of the existence of a blacklist as an extremely serious matter that could compromise the position of the SABC as public broadcaster. We lobbied the SABC on the matter, participated in a roundtable discussion about it and did a number of interviews regarding it. The roundtable discussion included a number of journalists, analysts and senior managers (including the CEO) from the SABC. The SABC set up a two-person commission of enquiry, which consists of Advocate Gilbert Marcus and Zwelakhe Sisulu, whose report is referred to above.

A related issue to the blacklist question was that of erstwhile SAfm current affairs anchor and talk show host John Perlman. In a strident interview with the SABC head of PR, Perlman claimed that such a blacklist did indeed exist. As a result of the interview, disciplinary action was taken against him. The FXI offered its assistance to Perlman, who in the meantime has resigned from the SABC. The FXI has also offered its assistance to any other SABC staffers that might want to use its services on this issue.

6.3.5 *Tuesday Night Live*

A group of LGBTI activists in Johannesburg had approached the SABC with the proposal that they could produce a radio programme addressing issues of gay rights. They were referred to Radio 2000, which gave them a slot on Tuesday evenings. The programme was called “Tuesday Night” and began broadcasting in November 2004. Tuesday Night was asked to pay for the airtime, which they did. In August 2005, Radio 2000 decided to increase the charge for the show by 100% to move the show to a later time slot. This did not suit Tuesday Night and they subsequently went off-air. FXI was then approached to assist with getting the show back on air. FXI advised the group on how they could take forward the discussion with SABC. The FXI assisted

them with 1) developing a better understanding of public broadcasting and the mandate of the SABC; and 2) advice on lobbying the SABC so that they could get another slot, preferably on SAfm. Given the levels of homophobia in South Africa, the FXI felt that the SABC should welcome such a programme and should offer it free-of-cost. The FXI also issued a media release on the matter. In November 2005, the group met with Dali Mpofu, Group Chief Executive Officer of the SABC to address their concerns. He promised to get back to them with a proposal but no such proposal has been forthcoming. During 2006 the FXI continued to consult with Tuesday Night Live and is attempting to help resume the discussions between their team and the SABC.

6.4 *Balancing the Rights of Expression and Dignity: The Defamation Cases*

6.4.1 *Goitsedimo Ephraim Seleka / Paul Moola*

In September 2005 summons was served on Paul Moola in his capacity as editor of the Mafikeng community newspaper *North West On Sunday* for damages of R200 000. The FXI's law clinic is acting as Moola's attorneys. The plaintiff is Goitsemodimo Ephraim Seleka, employed by the Central District Municipality. Seleka alleges that during May 2005 the newspaper published an article entitled "Disgraced Celebrity", which basically stated that Seleka was not qualified for his municipal job. Seleka claims that the article was wrongful and defamatory of Seleka because it implies that Seleka was corrupt and incompetent. Moola's defence is that the statements in the article are true and in the public interest, alternatively fair comment and reasonable. The case law and constitutional imperatives protecting freedom of expression – especially where civil servants are concerned – are in favour of Moola successfully defending the case. The trial was set down for hearing on 6 June 2007, but was withdrawn from the roll in the absence of discovery and various other documents necessary for trial.

This litigation, if successful, has the potential to positively impact on community newspapers around South Africa. The campaign of the rich and powerful, especially in small towns with 'kingpins ruling over a personal fiefdom' to silence outspoken community newspapers violates these rights and as long as this remains the case, so too will millions of South Africans be unable to access community media and enjoy the full spectrum of their fundamental human rights.

An observation that is being made, especially with regards to the practice of human rights in small towns in South Africa, such as Mafikeng, is that in most of these towns authorities seem to undermine the basic tenets of the

Constitution and those aspects of the legislation that affirm human rights. This is arguably due to the physical distance between these towns and the major cities, in terms of which major cities are better monitored by the more vigilant civil society organisations. Defending the newspaper and its editor in this case will serve first as a deterrent against a seeming increase in the number of repressive measures adopted by authorities in small towns such as Mafikeng. Second, it will strengthen the community media sector, which is in fact the only available avenue for communities in these kinds of towns to express their views against the excesses of power.

6.4.2 *Erick Chauke vs. Editor of The Developer and others*

In January 2005 summons was served on Cheche Selepe in his capacity as editor of the Sowetan community newspaper *The Developer* for damages of R100 000. The FXI's law clinic is acting as Selepe's attorneys. Chauke alleges that Selepe published an article in *The Developer* containing a number of defamatory statements, including that "the Plaintiff (Chauke) is a crook, a thief, stole chickens on Christmas Day, is well known to be poor, is normally making bricks, the Plaintiff's wife is selling meat, the Plaintiff's wife has become rich overnight". The various defences to defamation are available to Selepe, who has not yet been called upon to deliver his plea.

6.4.3 *Angloplat vs. Richard Spoor*

This is a 'David and Goliath'-type defamation case involving renowned anti-apartheid lawyer Richard Spoor, a specialist in occupational injuries. This is also a crucially important case for the development of the common law of defamation in South Africa, especially as it applies to non-media defendants.

Spoor is being threatened with an interdict by Anglo Platinum, the biggest platinum mining company in the world, unless he retracts and does not repeat alleged defamatory statements against the company. Spoor has alleged that the mining giant's conduct in relation to indigenous landowners is racist, reactionary and offensive. More specifically, he has alleged that Angloplat's large-scale mining practices have displaced local communities, led to the destruction of environmental and political systems, in turn leading to an increase in a variety of social ills.

These communities have been using Spoor as a conduit to raise grievances, leading to him being targeted for defamation action. Spoor has also alleged that Angloplat had instructed police to violently remove communities that had been objecting to the company's encroachment on indigenous farming land in the Northern Province, and to harass traditional leaders. Spoor is being sued

for allegations he made in an article he wrote in the Business Report, as well as for quotes in Business Report and Mail and Guardian and the internet website of 'Mines and Communities'. He has been asked to desist from making such statements and, if he does not, then Angloplat will apply for an urgent interdict against him.

In August 2006 summons and an application for an interdict was served on Spoor in the Transvaal Provincial Division of the High Court. The application for an urgent interim interdict against Spoor was dismissed by the High Court. The return day for the hearing of the application for a permanent interdict against Spoor has been set down for hearing on 15 February 2007. The FXI has applied for amicus status in this case and has received the consent of both parties.

In this amicus intervention, the FXI will seek to bring to the Court's attention issues such as the importance of freedom of expression in relation to marginalized and indigent communities, the doctrine of prior restraint and its impact on freedom of speech, the possibility of creating a new defence of reasonableness for non-media defendants and the appropriate standards to be applied to an evaluation of the reputation of corporate entities. South African law makes a distinction between media and non-media defendants, and accords more defences to the former. So media defendants can argue that publication was reasonable to escape liability, even if publication was not true, in the public interest or fair comment. This defence should be available to non-media defendants as well, given the crucial role that these defendants play in bringing controversial issues of public interest to light.

This amicus intervention, if successful, has the potential to positively impact on community activists and commentators around South Africa. The campaign of the rich and powerful, especially in small towns with 'kingpins ruling over a personal fiefdom' to silence outspoken community activists violates these rights and as long as this remains the case, so too will millions of South Africans be unable to raise critical voices and enjoy the full spectrum of their fundamental human rights.

This case raises issues of considerable public importance and which are new in our law. These issues relate to the right to freedom of expression as contained in the Constitution, in particular, with respect to the law of defamation. The FXI believes that it would be of assistance to the Court in advancing free expression arguments and in bringing to bear the comparable foreign case law and experience on these issues, particularly in those jurisdictions, which, like South Africa, protect freedom of expression through inclusion in a Bill of Rights. Furthermore the FXI would seek to bring to the

Court's attention issues such as the importance of freedom of expression in relation to marginalized and indigent communities, the doctrine of prior restraint and its impact on freedom of speech, the possibility of creating a new defence of reasonableness for non-media defendants and the appropriate standards to be applied to an evaluation of the reputation of corporate entities.

We have observed that, especially with regards to the practice of human rights in small towns in South Africa, such as the areas of Limpopo province where Spoor is active, corporations seem to undermine the basic tenets of the Constitution and those aspects of the legislation that affirm human rights. This is arguably due to the physical distance between these towns and the major cities, in terms of which major cities are better monitored by more vigilant civil society organisations. Defending Spoor through our amicus intervention will serve first as a deterrent against a seeming increase in the number of repressive measures adopted by authorities in small towns. Second, it will strengthen the community media sector, which is the only available avenue for communities in such towns to express their views against the excesses of power

6.4.4 *Daily Sun vs. Leseding News*

Leseding News cc runs a small community newspaper, *Leseding News*, which was defendant in a suit brought against it by the *Daily Sun*, a newspaper of the large Media 24 media group. Simon Delaney, the Head of the FXI's Law Clinic, served as instructing attorney in this case.

The *Daily Sun* alleged that *Leseding* published an article entitled "Daily Sun Lied" that was "wrongful and defamatory of the plaintiff". *Leseding* had published the story "*Daily Sun* Lied" on the 16 October 2006. The story was about a court case where a man had been charged with keeping a woman as a sex slave. The man had been acquitted. The article was authored by Rickey Dire and approved for publication by *Leseding*'s editor, Levy Mokwele.

The *Leseding* article referred to an article about the sex slave issue that had been published by the *Daily Sun.* Leseding's article claimed that the *Sun* had lied in its report by its statement of the facts of the case, which were disproved by testimony in the court case. The *Daily Sun* subsequently issued a summons, requiring the respondents to pay an amount of R2 million in damages.

The FXI brokered an amicable settlement of the case in terms of which Leseding News published an apology and retraction of the article in exchange for a cessation of court action.

6.4.5 *Zuma's attack on the media*

On various occasions during the Zuma rape trial, his supporters and he had accused – either blatantly or subtly – the media of being biased against him. The charge was, in the opinion of the FXI, unjustified. The FXI issued statements defending the role of the media in the case and participated in a number of talk shows and interviews.

In 2006, Zuma issued summonses against a number of media that, he claimed, had defamed him. He was claiming damages for a total of R61 million. The list of media in Zuma's sights is: The Star, The Citizen, Sunday Sun, Sunday Times, Sunday Independent, Sunday World and Rapport, from radio Highveld Stereo. Cartoonist Jonathan Shapiro was also issued with a summons. The FXI responded to these accusations defending the media and individual concerned and defended their right to publish and not be sued by politicians. When the cases get closer to trial, the FXI will seek to intervene as amicus curiae.

6.4.6 *Health-e News*

Matthias Rath, the controversial German doctor who is also an AIDS dissident, sued Health-e News Service, two of its employees and a freelancer for defamation because of a series of stories broadcast by Health-e about the Rath Foundation. The FXI issued statements defending Health-e's publication and pointing out that the defamation argument was both weak in this case and that the story by Health-e was in the public interest. Rath ultimately withdrew the case and the FXI welcomed that decision.

6.4.7 *The cartoons*

In February 2006, the Muhammad cartoon controversy hit South Africa's shores. In 2005, a right-wing Danish newspaper had published caricatures of the Islamic Prophet Muhammad, showing him as a terrorist and in various other ways that were offensive to the Muslim community. There were protests in various parts of the Muslim world and in other countries as well. Numerous newspapers and websites subsequently republished the cartoons, inflaming passions further.

In February 2006, some South African media covered the controversy and the protests that were taking place. The *Mail & Guardian* published on of the cartoons as part of a story explaining the reasons for the protests. No other South African newspaper had published them. Subsequently, the Jamiatul

Ulama Transvaal (a Johannesburg-based Muslim clergy organisation) applied for and were granted an urgent interdict against a number of newspapers preventing them from publishing the cartoons. The FXI was inundated with calls for comment on the issue. We participated in more than two dozen interviews, talk shows, etc in this period and wrote two op-eds as well. The FXI position was that editorial control needs to remain in the hands of editors, and cannot be relegated to the hands to the courts. We therefore criticised the granting of the interdict and argued that editors should have been allowed to make their own decisions regarding publication of the cartoons.

The FXI also attempted to play a mediating role between the *Sunday Times* and the Muslim groups that had applied for the interdict against various newspapers, at the time when the emotions within the Muslim community we particularly strong and the *Sunday Times* was being boycotted by sections of the community

6.5 *Access to Information: FXI & Harvey vs. Johannesburg Water & others*

Since April 2003, the FXI has joined researcher Ebrahim Harvey's efforts to force Johannesburg Water (JW) to grant access to 16 documents, to enable him to complete a Master's Degree at the University of the Witwatersrand on the impact of Johannesburg's IGoli 2002 plan on the delivery of water (which led to the formation of JW as a corporate entity). The plan has been controversial as it fuelled the commercialisation of services such as water and electricity, leading to the disconnection of many poor residents when they could not afford the rising costs of these services.

The FXI and Harvey sued JW for the documents in terms of in terms of the Promotion of Access to Information Act. After bringing JW to the doors of court, JW agreed to grant access to 11 of the 16 documents. JW continues to refuse to release other documents relating to its activities. The case will be heard in court in June 2007 for judgment on the balance of the documents.

Harvey and the FXI have argued in their founding affidavit that if the court finds that any of the documents cannot be disclosed on any of the grounds referred to in the Act, then the Act's public interest override clause should be invoked. This clause requires the body concerned to disclose documents if two public interest requirements are met. The first requirement is that that the disclosure of the document(s) would reveal evidence of either a substantial contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk. The second requirement is that the public interest in the disclosure of the record clearly outweighs the harm resulting from the disclosure.

Harvey and the FXI have argued that this clause is unconstitutional. Rather the clause should ensure that only one of the requirements has to be met for documents to be disclosed in the public interest. The Act, by stating that both requirements must be met, does not strike an appropriate balance between disclosure and non-disclosure, as the grounds for mandatory refusal are broad and the override is too narrow. If this challenge is accepted by the High Court, it will have to be confirmed by the Constitutional Court; if not, then Harvey and the FXI will be in a position to appeal against the High Court judgment in the Constitutional Court.

Most of the documents requested explain the operational duties and evaluate the performance of JOWAM and JW. They will throw light on policies relating to disconnections, pricing, service priorities and plans to remove inequalities in service provision. Others will contain information regarding current inequalities in service consumption and the provision of infrastructure. Access to the documents will also allow an investigation of whether the transfer of responsibilities for water provision to contractors such as JOWAM may negatively impact on access to water, including through increases in prices for water, failures to remove inequities in service provision or through unjustified disconnections. Finally, access to the documents is necessary to investigate whether JW is fulfilling its constitutional obligation of providing access to water. In short, the transparency that will flow from disclosure of these documents is essential to ensure public accountability.

Harvey and the FXI have also noted that there is a particularly compelling public interest reason for disclosing documents relating to the activities of JOWAM, a joint venture of subsidiaries of the international water company Suez, in view of Suez' increasingly dubious track record internationally. Suez and at least some of its international subsidiaries have recently been accused of corruption, dishonesty and a lack of accountability, and these accusations are sufficiently cogent to warrant careful scrutiny of the way in which water and wastewater services are being managed in Johannesburg. The affidavit also points out that in Grenoble, France, the City Council terminated its relationship with Suez after a former mayor and government Minister, and certain senior executives of Suez received prison sentences for accepting and giving bribes. In France, Suez has also been the subject of a recent investigation into a scandal around 'an agreed system of misappropriation of public funds'.

6.6 *Protection of the Confidentiality of Journalists' Sources of Information*

There is no absolute privilege afforded to communications between informant and journalist such as may be said to apply between attorney and client.

Almost no jurisdiction in the world provides such a privilege to journalists. In South Africa a journalist may thus be compelled to reveal her sources on pain of imprisonment although no such sentence has been handed down since the adoption of the Constitution. Nevertheless, there is, emerging from case law, and an interpretation of the Constitution and the term “just excuse” in section 189 of the Criminal Procedure Act, a suggestion that communications between source and reporter may enjoy a partial or qualified privilege under South African law. Presently, an agreement exists that purports to restrain the state in making use of section 205 but these restraints are purely procedural.

The FXI's policy position is that firstly, to compel a journalist to reveal her confidential sources creates a situation in which the free flow of information and freedom of expression is inhibited not only to a from the journalist so compelled but within the profession generally; secondly, to compel a journalist to testify against participants in events that she was covering similarly inhibits the free flow of information and has the additional effect of placing the safety of journalists at risk; and thirdly, it is in the public interest that there is as free a flow of information as possible and that journalists are able to operate freely, especially in controversial, momentous areas like politics and crime where many informants speak only on condition of anonymity and where some journalists are tolerated only on condition that they are not potential witnesses.

A landmark case on protection of journalistic sources has recently been brought to the Johannesburg High Court that presents the FXI with the opportunity of making important policy contributions:

6.6.1 *Imvume Management (Pty) Ltd vs. M & G Media Ltd (FXI intervening as amicus curiae)*

A Johannesburg-based small independent newspaper called the *Mail & Guardian* recently ran a series of articles detailing how the ruling ANC party has been funded to the tune of R11 million in its election campaign by a private company called 'Imvume', using public funds that should have been used to buy oil.

The so-called 'Oilgate' saga has now resulted in litigation, with Imvume suing the Mail & Guardian for, amongst other things, an order forcing the paper to reveal the sources of its journalist's information.

The FXI, together with the South African National Editors Forum, the South African Chapter of the Media Institute of Southern Africa and the Media

Workers Association of South Africa has been admitted as *amici curiae* and, at the court hearing, will submit policy and legal arguments in support of the principle of protection of sources, specifically on the implications of journalists being forced to disclose their confidential sources.

The amicus applicants intend advancing the following submissions if they are admitted as amici curiae: Firstly, journalists' use of confidential sources is an essential component of the right to freedom of expression and freedom of the press, contained in section 16 of the Constitution. Secondly, forcing journalists to reveal their confidential sources would severely undermine the media and would diminish the media's ability to play their constitutionally protected role. In particular:

a) It would deter other sources from confiding in journalists for fear of being exposed and thus have a 'chilling effect' on journalists' ability to develop other sources and gather news;
b) It would result in a perceived loss of independence for the media because the public may perceive the media as an investigative tool of the litigants instead of a neutral entity. This undermines public confidence in the media and restricts journalists' newsgathering ability;
c) It would place a burden on the time and resources available to media organisations by bogging down reporters and editors in dealing with court challenges, thus affecting the ability of the news organisation to carry out their prime function of gathering and disseminating news efficiently. This is particularly the case for small, independent media organisations who have minimal resources;
d) It would amount to an intrusion into the editorial process of the media because the prospect of a subpoena may inhibit the media from newsgathering or disseminating news. Rather than risk being subpoenaed to reveal source, a journalist or newspaper may decide not to publish information; and
e) It may, in certain circumstances, threaten the safety and well being of journalists and their sources. In particular, sources who provide information on condition of confidentiality may face harassment, prejudice or retaliation or even threats to their lives if their identity is disclosed.

6.6.2 *Gasant Abarder vs. County Fair – use of journalists as witnesses*

This case involves *The Daily Voice's* News Editor, Gasant Abarder, who has taken an ethical stand not to testify in the civil defamation case involving the County Fair poultry chain. Abarder refused to testify about a public meeting he had reported on, where Grant Twigg of the Associated Trade Union of South

Africa is alleged to have made defamatory statements about the circumstances in which one of County Fair's employees died after having an asthma attack. On Friday, 3 November 2006, the Court confirmed a magistrate's order compelling Abarder to testify.

The FXI feels that Abarder has a 'just excuse' not to testify. The 'just excuse' is that journalists such as Abarder can refuse to testify lawfully so as not create the impression that they are extensions of the evidence-gathering process in court proceedings; this is precisely what Abrader will become if he is compelled to testify. Journalists may also find it more difficult to fulfil their newsgathering role in such situations and may even be harassed at such meetings or barred from attending them as participants will regard journalists as potentially the eyes and ears of the authorities if they are compelled to testify.

Furthermore, it is not the role of journalists to help litigants prove defamation cases, merely to report statements in the public interest, even if they are defamatory. The right of journalists to report in an unhindered way is more important than the ability of one litigant to win a defamation case, and in this case the freedom of expression must take precedence over the right to dignity and reputation of County Fair. If it does not, then all journalists may be affected.

County Fair has subpoenaed Abarder to testify about the alleged defamatory statements at the meeting, where over 100 other people were also present. This means that Abarder is not a witness of last resort. The FXI therefore wishes to use this case to make the argument regarding journalists being witnesses of last resort.

To this end, the FXI has expressed its interest in making an *amicus curiae* intervention once the matter is referred to the Constitutional Court.

6.6.3 *Ex-Sowetan journalists Bokala and Molakeng*

In June, the state issued subpoenas to ex-Sowetan journalists Willie Bokala and Saint Molakeng. They were called to testify in the fraud trial of reflexologist Hilda Khoza. Molakeng interviewed Khoza about her assertions in 2001 for an article published in the Sowetan in 2001. Bokala was the Sowetan's Assignments Editor at the time. The article concerned assertions by Khoza at the time that Nkosi Johnson, who was dying of Aids, was not critically ill, but was in fact merely suffering from constipation. Johnson died the next day. The FXI issued media releases about the matter, arguing that both journalists had the right to protect their sources and should not be called

to testify in the case. Earlier this month, he state prosecutor informed the two journalists that the subpoena had been withdrawn because the NPA did not believe in “calling recalcitrant witnesses unless absolutely necessary”. We hope that this will be a trend with the NPA and that journalists will not, in future, be called to testify and reveal their sources if they refused to do so.

6.7 *The Right of Employees to Freedom of Expression*

6.7.1 *Vusi Sibeko*

Vusi Sibeko was a chief shop steward at Royal Ascot Super Spar supermarket in Milnerton, Cape Town. He was suspended on the 8 November 2005, pending a disciplinary hearing set for the 10 November 2005 and was charged with gross misconduct over an article that he had written for *Izwi la Basebenzi*¸ a periodical published by the Democratic Socialist Movement. Sibeko had, in the article, accused Super Spar Milnerton of bad labour practices and of not paying workers the minimum wage as determined by the Department of Labour. The majority of the workers joined a union after Sibeko’s intervention to prevent a worker’s arbitrary dismissal. Sibeko appeared before a conciliation hearing of the Commission for Conciliation Mediation and Arbitration on the 23 January 2006. Super Spar, however, was not present. The matter went to arbitration at the end of February 2006.

The FXI Law Clinic provided legal advice to Sibeko, wrote to Super Spar to present legal perspectives on the dismissal, and gave a number of interviews on the matter. Simon Delaney, the Head of the FXI's Law Clinic, also appeared as an expert witness when the matter went to arbitration and his testimony was key to the final judgment of the arbitration, which reinstated Sibeko into his position at Spar.

Spar has indicated that it is appealing the decision in the Labour Court, and the FXI intends to make an amicus curiae intervention in that court.

6.7.2 *Thoko Mkhwanazi-Xaluva*

Thoko Mkhwanazi-Xaluva is a former director in the Office of the Rights of the Child (ORC), based in the presidency and reporting to Minister Essop Pahad. In June 2003, Mkhwanazi-Xaluva was dismissed by the Presidency for, she claims, having blown the whistle on sexual harassment by a consultant to the ORC who, she says, was a friend of Pahad. The matter we referred to the General Public Service Sectoral Bargaining Council, which reinstated her in November 2003. She was dismissed again for interviews she had given to the media regarding her initial dismissal. The FXI got involved because this was a

case of censorship of an employee and because we believe that she should be protected as a whistleblower and not disadvantaged because of it. The Law Clinic assisted Mkhwanazi-Xaluva with advice on how she might proceed with the matter. The matter went before the General Public Service Sectoral Bargaining Council in February 2006. Mkhwanazi-Xaluva won the case in the Bargaining Council. The Presidency has since appealed to the Labour Court and the FXI is waiting for Mkhwanazi-Xaluva to file her answering papers before filing an amicus application.

6.7.3 *Ban on Ashwin Desai*

In December 2005, Durban academic and activist, Ashwin Desai, was prevented from taking up a position at the University of Kwazulu Natal by the Vice-Chancellor, Prof Malegopuru Makgoba. The problem dates back to 1996 when, on the eve of the merger of the University of Durban-Westville – where Desai was an academic – and the University of Natal to become the UKZN, he led a bitter struggle unifying staff, students and workers at the university against retrenchments and fee increases. Desai apparently agreed to an out-of-court settlement at the time with the then vice-chancellor, excluding him from the University of Durban-Westville campus in return for charges relating to his activities being withdrawn against him.

The next vice-chancellor, Saths Cooper, overturned the settlement and reinstated Desai. After the merger, Desai worked at the UKZN's Centre for Civil Society. On Desai's application for the new position, Makgoba ruled Desai out of the running on the basis that the ban was still in place, but that the council could rescind the ban if Desai made written representations to it.

Public opinion and academics from around the world mobilised behind Desai and a bitter struggle developed in the media around the case. Desai was subsequently made an offer by Rhodes University, which he took up. On the 12th May 2006, a faculty board at Howard College deliberated on the matter of Desai's application to be an honorary research fellow at the Centre for Civil Society. Despite the vice-chancellor's interventions with the committee, it selected him as a research fellow. The university research committee ratified this decision on 1 August 2006.

6.7.4 *UKZN and freedom of expression*

While much public attention regarding UKZN was focused on the Desai matter, the constraining of academic freedom and freedom of expression in general at that university goes beyond that issue and will have to be addressed much more comprehensively. Other academics from UKZN, such as Richard Pithouse and Fazel Khan, have also been under pressure from the

university administration. What one infers from a close reading of events regarding these academics – who also have reputations as activists, as well as several on-the-record statements, is that these scholars are under attack for challenging power both inside and outside the university.

While the university community was still dealing with the Desai case, unions decided to hold a march on campus for a number of labour-related reasons. Unions were told that a march they were planning to have on the Westville and Howard College Campuses would be limited to small sections of the campuses. All academics were then sent letters by the university administration, informing them that if they were to strike, they needed to inform their "line managers". The FXI assisted the academics and unions with legal and other advice and issued a number of statements expressing concern about the constraining of free expression at UKZN.

In April 2006, the UKZN's Acting Director of ICT sent letters to academics and, it seems, students informing them of a new "Electronic Communications Policy" by the university which would apply (retrospectively) to all staff and students. Staff were asked to sign their acceptance of the new policy, in terms of which all staff and student electronic correspondence, internet browsing and other internet activity would be monitored. Further, the policy explained that all documents residing on staff and student computers would be subject to being accessed by the university's IT department whenever the administration felt it necessary to do so. Also troubling was the letter's instructing staff and students that the university would not allow any correspondence or documents on their computers that was regarded as "illegal content" (including material that was "pornographic, oppressive, racist, sexist, defamatory"). This poses a clear threat to academic freedom, freedom of research and freedom of expression and is an obvious obstacle to the ability of academics and students to have access to the widest possible material for research. The FXI is currently writing a response to the new policy and will circulate that response widely. Our concern is not simply for the UKZN but for academic freedom in South Africa more generally. We are concerned that the UKZN example might become one that is used as a precedent by other university administrations with political or other agendas and who want to make academic freedom subservient to those agendas. It is a matter the FXI will continue tracking throughout the country.

6.7.5 *Fazel Kahn*

Fazel Khan is a lecturer in Sociology and Social Studies on the Howard College campus of UKZN. Khan gave interviews to certain media that had approached him regarding the publication of an article in the latest issue of

ukzndaba (Vol. 3, No. 6/7, June/ July 2006), the newsletter published by the UKZN Public Affairs and Corporate Communications Department. The article is about a film that Khan co-directed, but the article makes no mention of him or his involvement in the film, while mentioning his co-director as the director. A picture showing Khan's co-director accompanied the article. The original picture had included Khan but he was cropped out in the version that appeared in the newsletter. As a result of his being excluded in this manner, an aggrieved Khan, when approached to comment by a few newspapers, was quite critical of the newsletter. These criticisms (detailed in the charge sheet presented to him by UKZN and supplied to us by one of the staff unions) were used against Khan in a disciplinary hearing where he faces possible dismissal.

The FXI's Simon Delaney appeared as an expert witness in the disciplinary hearing of Fazel Kahn in December 2006. Simon pointed out to the commissioner that:

The FXI finds the action of the university in hauling this academic before a disciplinary hearing in such a manner – and for such comments – to be appalling. Only in the most authoritarian societies do universities prevent academics from speaking to the media about their work, their research and their opinions and criticisms on the development of society and of their own institutions. South Africa, fortunately, is not such a society, though one might not realise that fact if one were to base one's understanding on the state of free expression at UKZN.

From the charge sheet and from examining the newspaper articles referred to, the FXI is convinced that Khan simply acted on the basis of his constitutional right to free expression and was neither 'dishonest' nor 'reckless' in the statements he made – as the charge sheet alleges. In our opinion any disciplinary action taken against Khan would constitute an unreasonable limitation on Khan's right to freedom of expression and thus unconstitutional.

Khan would moreover have the right to review any disciplinary action taken by UKZN in any competent court. Our courts have consistently upheld the right of workers to engage in speech critical of their employers, most famously in the 1999 Constitutional Court case of *SANDF Union vs. Minister of Defence*. In the 2006 case of *Costa Gazidis vs. The Minister of Public Service and Administration*, the Pretoria High Court found that Dr Gazidis' criticism of government's policy in the media, including his utterance about the Minister of Health, did not amount or constitute prejudice to the administration of the department. Dr Gazidis was therefore reinstated.

In April 2007 Khan was found guilty and dismissed. Bizarrely, in the finding of the disciplinary hearing, insufficient consideration was given to whether Khan's statements were reasonable and in the public interest, even if he could not prove their factual accuracy. When asked about whether the current climate at the University had pressured Giles to crop Khan out of the photograph the University's main witness, Professor Dasarath Chetty, stated: 'I fail to understand how the climate can pressurise an individual to airbrush another party from a photograph'. When the initiator, Professor Eitleburg, asked Chetty whether such a climate existed at the University, he responded 'no'.[1] This shows that Chetty failed to acknowledge the significance of the context in which Khan's exclusion had taken place; the University may have paid lip service to them, but they have not taken them into account as crucial mitigating factors. Presumably, this is because the University has implied that there was a conspiracy between Giles and Khan to bring the University into disrepute. Unless the University has evidence that was not led in the disciplinary, it is difficult to see on the basis of the disciplinary hearing how this conclusion could be arrived at.

Giles's explanation for failing to acknowledge Khan in the article was that it focused on the contribution of the technical staff of the film; an implausible argument since this focus should not have precluded his being mentioned or pictured. Also, this explanation does not address the more substantial question of why Giles decided on a story angle that effectively denied Khan his intellectual property, as the film's researcher.

The argument made in the hearing was that the UKZNdaba staff did not know about Khan's involvement in the film, is difficult to believe, given that his involvement was widely publicized on campus. As Giles herself said in the disciplinary, 'everyone knew that Fazel was part of the whole deal'.

The judgement does not speak to some crucial evidence presented in the disciplinary. In response to a question put by Khan's representative, Richard Pithouse, about whether the author of the article, Bhekani Dlamini knew about the involvement of Khan in the documentary, Giles responded 'People knew that Fazel was part of the whole deal'. This was not taken into account. Then later on, when Pithouse asked Giles why she decided to crop Khan out of the picture, she stated that the article focussed on the contribution of the technical staff, and that the cropped photograph was visually more appealing.

This explanation is implausible. Why would Khan be left out of an article entirely if the film was a co-production? This is the primary injustice in the

[1] Testimony of Dasarath Chetty. Transcript of disciplinary hearing: Mr. Fazel Khan held on 19 October 2006 in the RMS committee room, Howard College Campus. 60.

situation: denying someone their intellectual property. A focus on the technical staff does not require him to be completely effaced from the article; there are less drastic measures to achieve the same aim.

Further on, Pithouse asked Dlamani whether he had spoken to Khan; she responded that she did not know. Yet, as Pithouse commented under cross-examination, how did she know to leave him out of the picture, if she did not know whether he was going to be included in the article? Also, earlier on when Giles was asked how the decision was arrived at the focus on the technical staff she stated that '…I think it was a bit of a mutual discussion between Bhekani and myself', which clashed with Dlamini's testimony that Giles decided on the focus. Yet, later, she stated that it was up to Dlamini to decide whether to focus on the technical staff by leaving Khan out entirely.[2] Yet, Dlamini testified that he had no knowledge of Khan's involvement in the film, and that he became aware of this involvement only when the airbrushing story came out. This was in spite of the fact that Khan's involvement in the film was, reportedly, widely publicised on campus. Something does not hang together.

Then there is another crucial piece of evidence, the significance of which was ignored. Apparently a second article was written on the film, and was submitted by a freelance journalist for UKZNdaba. This journalist interviewed Khan, which suggested that he had a reasonable expectation that he would appear in the newsletter. Giles sent the photographs with Khan in to the journalist.

Then there is a famous complicity argument. When Chetty was cross-examined by Pithouse, he noted that it was probably the original intention of the University to resolve the matter amicably, but that the possibility of complicity between Giles and Khan in the airbrushing incident needed to be investigated. This is one of the most troubling incidents in the whole airbrushing episode, and what actually transpired is murky. He later repeated the allegation that Khan was complicit in the airbrushing. When he was asked what he meant by complicity, he stated that Giles had stated that Khan had seen the airbrushed photograph on her computer. When she said that she was going to send the picture for publication, he reportedly laughed. He even suggested that Khan might have instigated the airbrushing.

Giles testified that she had told Khan that the photo was going to be submitted, but did not know whether it was going to be published or not, and did not even know whether it would go into the UKZNdaba. She also testified

that she did not request his permission to publish the photograph. Khan testified that while he may have laughed, it masked his deep unhappiness with his excision from the photograph. He did not raise the matter, but just left. For his part, Khan admitted to having seen the photograph, but claimed that he did not know that it was going to be published in UKZNdaba, and that - in any event - he did not give explicit permission for it to be published.

As Khan did not raise the matter, no evidence was canvassed in the hearing about whether he thought that Giles had removed him of her own volition. Yet the finding states that Khan knew before speaking to the M&G that Giles alone was responsible for the alteration: a deduction that is not supported by the testimony. Also, Khan testified that he and Giles had a good relationship. Therefore it was not rational for her the airbrush Khan out of her own volition, and rational for him to assume that there was an instruction. His having seen the photograph does not necessarily amount to complicity or even consent: this is a leap in logic that should not be made.

In the light of these events, it was reasonable for Khan to have assumed that 'there was a clear decision that [he] shouldn't be in the UKZNdaba and this is a dirty revenge for [his] actions during the strike', as he is quoted as saying in the M&G, and that management had a hand in this decision. He may have been unable to prove the factual accuracy of these statements, but they were reasonable.

Also, Chetty admitted under cross-examination that it might have been rational for Khan to believe that the airbrushing was a result of pressure from above: a concession that was not taken into account in the judgement. Khan may have jumped to conclusions, and been unstrategic in the statements he made; but this hardly makes him a liar. In fact, under the circumstances, he was allowed to have the perception that he was being targeted.

False statements are constitutionally protected; admittedly, they do not receive as much protection as true statements, and may be more easily overridden by countervailing interests.. But if false statements made in good faith were not constitutionally protected, we would be returning to the dark apartheid-era days of strict liability, where people would self-censor their speech for fear of reprisals for making mistakes. The protection of false speech should not be seen as an endorsement of such speech; it is not a licence for all and sundry to go out and lie, and then cry freedom of expression when they are held accountable for their false statements.

The fact is that no academic wants to make false statements deliberately; those who do will ruin their reputations in the long run. But even academics make unstrategic statements they are later unable to prove. This does not make them liars. To deny academics the same space to make false but reasonable statements that the post-apartheid media enjoy *is* an academic

freedom issue. Chetty does not seem to understand the difference between incorrect statements made in good faith and lies.
In any event, in view of the fact that management has failed to come up with a plausible explanation for his exclusion, and did not address the fact that (self) censorship had taken place, Khan's suspicion of the official position was understandable, as the official position was clearly deficient.

6.7.6 *Dieter Welz*

In June 2007 Fort Hare law lecturer Dieter Welz was summoned before a disciplinary hearing for criticizing management in his law lectures, at conferences, in private conversations, in e-mails and in the media. These charges follow a spate of bad press about the management and administration of the University. Bizarrely, one charge accuses him of inciting the campus law student leadership in private conversations with them: a truly sinister precedent that encourages 'spy on your neighbour' type behaviour, where individuals testify against one another for what they say in private. Like Fazel Khan, he is also accused of making false statements to the media.

He was charged according to a 1971 conditions of service document promulgated in terms of the 1969 Fort Hare Act, which has since been repealed. The document still categorises staff in terms of marital status, race and gender, and states that black women will be appointed to permanent positions only once they are married. It is therefore hardly surprising that Welz is being charged with – amongst other things – the apartheid era charge of incitement.

The Fort Hare conditions of service define misconduct as follows:
'An officer shall be guilty of misconduct [if he] fails to comply with any provisions thereof with which it is his duty to comply, or
(b) does or causes or permits to be done, or connives at, any act which is prejudicial to the administration, discipline or efficiency of the University;
(f) publicly comments on the administration of the University;
(g) makes use of his position in the University to promote or to prejudice the interests of a political party; or
(h) attempts to secure intervention from political or outside sources in relation to his position and conditions of employment in the University…or
(i) conducts himself in a disgraceful, improper or unbecoming manner…or
(m) without first having obtained the permission of the rector discloses, otherwise than in the discharge of his official duties, information gained by or conveyed to him through his employment in the University or uses such information for any purpose other than for the discharge of his official duties, whether or not he discloses such information'.

The University has insisted that it has not used any of the 'outdated and reactionary' clauses of the Fort Hare disciplinary code, as reported in the *Daily Dispatch*, and that references to the code had been struck out at the start of the disciplinary. However, in spite of the fact that the charge sheet was amended to remove references to the Disciplinary code, the charges remained essentially the same. This response to the criticisms of the code is a highly dubious attempt to sidestep the politically-loaded issue raised by Welz, as employees are required to know about a rule or standard, which are also required to be reasonable, for a misconduct to occur. The methods used to gather information for disciplinary action should also be legal, which rules out the sorts of practices that have seen staff being fingerprinted at Fort Hare, as management attempted to establish who was responsible for circulating an internal document revealing vast salary discrepancies amongst staff.

What sets Welz's case apart from the disciplinaries in other Universities, is that the University is taking issue with the content of his lectures and conference presentations. It is significant that he is not been charged with bad lecturing or poor performance at conferences, which one would expect if he used these platforms for transmitting ideas that bore no relation to their topics. When asked why he turned his administrative law lectures into a platform to criticise the University, his response was credible; he argued that - given its huge administrative problems – he used the University as an example of how not to practice administrative law.

Unwittingly, management has confirmed the relevance of these criticisms in his lectures, by levelling a charge that he '[described] the UFH management as incompetent and as a management that engages in unplanned financial expenditure' in some lectures; practices that no University would want to engage in as custodians of public funds. As one commentator on the case noted, he is being disciplined for doing his job.

In a conference presentation delivered at a Fort Hare conference on law and transformative justice in October 2006, Welz prepared a PowerPoint presentation entitled 'Without fear, favour or prejudice: a note on judicial independence and academic freedom in times of transition'. In it, Welz drew parallels between recent events in the judiciary and in academia, and identified the concentration of power as a problem threatening both the independence of the courts and the independence of Universities. Both sectors are being subjected to increased government steering - on the basis of transformative justice and transformative education - as government attempts to correct the inequities of the past.

He went on to argue that the University should rather be entrenching a form of 'self-organised' collective control, grounded in collegiality and based on the notion of a community of scholars. He further argued that 'disciplinary values and cultures are critical for any effective steering of the University' [clarify what he means by this]. In conclusion, he argued for a shift in both the judiciary and academia 'from a culture of compliance to a culture of constitutionality', which 'entrenches the notion of separation of powers and independence for both sectors'.

He then identified Fort Hare as an example of a situation where false managerialism has taken root, and where crude, oversimplified notions of accountability that are hardly appropriate to academic work, are imposed. Rather than enhancing organizational effectiveness, the new managerialism is leading to a bloated bureaucracy, and a constitutionally problematic concentration of power.

It can be inferred that this comment stating that disciplinary leadership is preferable to false managerialism, irked Fort Hare management especially, and led to the charge against Welz of undermining the Executive Dean of Law, Professor Patrick Osode, by making disparaging remarks. The charge accuses Welz of '…maligning the University and its management by making disparaging remarks about the University and its management in the course of the presentation at the Law and Transformative Justice conference on 4 October 2006'. Interestingly enough, Osode was not even in the room when Welz made the presentation, but was present only during question time and reportedly did not say anything to indicate his unhappiness.

Far from Welz having brought the University into disrepute, the University management is bringing itself into disrepute by acting in such a petty and intolerant manner. As was said in one of the pieces of correspondence that Welz is being disciplined for distributing, such behaviour represents 'the prevalence of authority over argument'.

The charge about distributing e-mails that were defamatory of the Dean of Law relates partly to a letter written by another Professor, Winston Nagan, on the 18 December 2006. Apparently, no action has been taken against Nagan for his supposedly defamatory statements. As Mandla Seleoane has argued, if the Dean had the courage of its convictions, he would pursue the defamation claim in open court, using his own money, rather than pursuing this allegation through a disciplinary, where the standard of proof will undoubtedly be lower.

On 31 May 2007 Welz was found guilty of defamation of the Dean and making false media reports.

6.7.7 *Evan Mantzaris*

UKZN sociology Professor Evan Mantzaris has been suspended pending a disciplinary hearing into allegations of poor performance and misconduct. Two of the four charges brought against him relate to his freedom of expression, as he is changed with being 'engaged in a concerted campaign to bring adverse publicity to the University…with respect to the unbanning of Dr. Ashwin Desai' This charge presumably relates to his vocal campaign for the reinstatement of controversial academic Ashwin Desai, who was excluded from the University on dubious grounds. Mantzaris is also charged - in his capacity as an employee and as the Chairperson of Comsa - with defamation of the Vice Chancellor, Prof. Malegapuru Makgoba.

These charges follow the Gautshi Commission of Enquiry, established to investigate – amongst other things – the causes of negative publicity. This Commission marked a new, more confrontational management approach to staff involved in the February 2006 strike at the University, contrast to the more conciliatory approach reflected in the Senate Sub-Committee report. As Adesina has commented, senior management's approach has become 'I'm coming after you'.

A trademark UKZN attack against critics of management, Charge 2 alleges that Mantzaris "engaged in a concerted campaign to bring adverse publicity to the University and / or some members of staff, with respect to the 'unbanning' of Dr Ashwin Desai". The letter also claims Mantzaris conducted this alleged campaign "with other members of the University from the University premises and using University equipment". While the letter does not specify what the elements of the campaign were and how exactly Mantzaris is supposed to have caused "adverse publicity", apparently this refers to Mantzaris' vocal support of Desai - mainly through media statements - and arguments against the stance taken by the University that Desai was banned from working at UKZN. If academics are not allowed to support each other in terms of their right to conduct academic work and if their support - as in this case - is subject to disciplinary action, then this violates academic freedom and, by inference, freedom of expression.

The third charge against Mantzaris accuses him of having "produced and published defamatory letters about the Vice-Chancellor (VC) and other members of staff". The "defamatory letters" refer to letters criticising Makgoba that were published in local newspapers. Makgoba accuses Mantzaris of being the secret author of the letters, even though they do not bear the latter's name. The University also cites correspondence sent by Mantzaris to Professor Makgoba, in which he accuses the VC of "conspiring to get rid of

[him]". This, the initiator concludes, is proof that Mantzaris "engaged, and continue[s] to engage in, a campaign to discredit the Vice-Chancellor in your capacity as an employee and Chairperson of COMSA."

6.7.8 *Jimi Adesina*

One of the most controversial actions the University has engaged in involves support for the defamation case of Professor Chetty against Professor Adesina. The case follows a series of emails last year, just before UKZN staff went on strike. Before the strike began, Chetty's office issued an email requesting, "all staff who receive any media query related to the impending industrial action refer these calls" to his staff. In response, Adesina sent an open letter to Chetty, accusing him of attempting to gag academics and of being an instrument of authoritarianism at the University. He also claimed Chetty had brought sociologists into disrepute. Chetty then sued Adesina for defamation.

In passionate testimony, Adesina argued that the issue was really about academic freedom. He said Chetty's actions were typical of the beginning of the end for academic freedom on University campuses in other parts of Africa, and expressed concern that academic freedom and freedom of expression were under threat in South Africa, too.

The magistrate found that, given the prevailing circumstances at the University, Chetty's letter "could very well be understood" as a gagging order. Adesina's comments, the Magistrate said, showed no malice and were about "matters of public interest". In spite of the fact that Chetty clearly did not have a case, he is reportedly appealing: an unjustifiable use of public funds.

6.8 *The Right to Religious Expression: Kwa-Zulu Natal MEC of Education (and others) vs. Navaneethum Pillay (FXI intervening as amicus curiae)*

On 20 and 21 February 2007, the Constitutional Court heard the appeal by the Kwa-Zulu Natal MEC of Education (and others) against the High court decision in favour of Navaneethum Pillay’s daughter’s right to wear a nose-stud to school. The FXI was admitted as an amicus curiae and presented both written and oral argument.

The FXI believes that the decision of the third and fourth applicants (“the school”) to prohibit Sunali Pillay from wearing her nose-stud raises questions of considerable public importance, which are new in our law.

The decision of the school plainly impacts on the rights to equality, freedom of religion and freedom of culture, as enshrined in the Constitution. However it is the FXI's contention that it is not only these rights that are implicated by the school's decision. Rather, the right to freedom of expression is also implicated by the school's decision. It is on the right to freedom of expression that the FXI will focus its submissions.

The FXI submitted that the decision by Sunali Pillay to wear the nose-stud constituted an exercise of her freedom of expression. This right to freedom of expression flows directly from section 16(1) of the Constitution.

However equally, and perhaps most critically, the right to freedom of expression also flows directly from the provisions of the two sets of regulations issued by the Minister of Education in terms of the South African Schools Act 84 of 1996. Both of these sets of regulations are plainly relevant to any determination of this matter and both suggest that Sunali Pillay's right to freedom of expression has been implicated by the decision of the school. In light of this, the FXI will submit that it is plain that Sunali Pillay's decision to wear the nose-stud fell within freedom of expression as defined in the regulations. Of course, under both sets of regulations, Sunali Pillay's right to freedom of expression was not absolute. However, again under both sets of regulations, it would only be appropriate to prohibit her from wearing the nose-stud essentially where this would lead to the "substantial" "disruption" of school activities.

The FXI submitted that, on the evidence led in this matter, there was clearly no danger of the wearing of the nose-stud resulting in the substantial disruption of school activities. As such, the decision to prohibit the nose-stud was in conflict with Sunali Pillay's right to freedom of expression contained in the regulations.

In light of the above, the FXI therefore submitted to the Court that the case involves the intersection of four fundamental rights:

- the right to equality;
- the right to freedom of religion;
- the right to freedom of culture; and
- the right to freedom of expression;

It is for this reason that the limitation on freedom of expression occasioned by the school's conduct is particularly severe. It involves expression that is aimed at exercising other fundamental rights in the Bill of Rights – namely the right to freedom of religion and the right to freedom of culture.

The FXI therefore contends that this matter ought properly not to be decided without reference to Sunali Pillay's right to freedom of expression. This is notwithstanding the fact that the original claim brought by the respondent (a layperson without legal assistance) was under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act").

The FXI submitted that if courts were precluded from taking into account freedom of expression in appropriate cases under the Equality Act, this would place an intolerable and unnecessary burden on the litigants that the Equality Act is meant to persist. The Equality Act was, after all, enacted for the purpose of making litigation with regards to issues of equality easier, rather than more cumbersome. Yet many issues of equality will involve other fundamental rights including dignity, expression, privacy and others. It could surely not have been the intention of the drafters to preclude litigants and courts from having regard to such rights merely because a case began as a matter under the Equality Act.

6.9 *The Principle of Open Justice: M&G and others v The State*

On 25 May 2007 in the Pretoria High Court Judge Joop Labuschagne ruled in favour of the *Mail & Guardian*, FXI, MISA-SA and SANEF in dismissing the State's application to gag a vital nuclear smuggling case in which two individuals and a linked company are charged with smuggling components to an international syndicate.

The court ruled that it was in the public interest to have an open court hearing. Open justice, the judge said, is the starting point and a principle fundamental to our law. If sensitive material will be exposed during the trial and it appears that it is in the interest of good order or the administration of justice that the court is closed, then the State may reapply and the court will reconsider the issue.

Daniel Geiges, Garhard Wisser and Krisch Engineering are alleged to be part of an international nuclear smuggling network (the so-called 'AQ Khan network'), whose activities were exposed in 2003 while attempting to smuggle components for uranium enrichment to Libya. According to the *Mail & Guardian*, the arrest of Geiges and Wisser was a product of close collaboration between the NIA, MI5 and the CIA.

At the court hearing on 2 May 2007, the National Prosecuting Authority applied for virtually the entire trial to be held *in camera* and for a prohibition of publication of information related to the trial. The State argued that nuclear technology could fall into rogue hands if the information was made public and

that the SA government was obliged to maintain strict control and secrecy on the development and manufacture of weapons of mass destruction in terms of international and African treaties, as well as South Africa's Criminal Procedure Act, the Nuclear Energy Act and the Non-Proliferation of Weapons of Mass Destruction Act.

The *Mail & Guardian*, FXI, MISA-SA and SANEF accepted that while there may well be parts of the hearing that would have to be heard in camera, the State's application was over-broad, vague and an unprecedented request for a secret trial, which other courts described as a 'menace to liberty'. Deviations from the principal of open justice should be made in the least restrictive way possible. The State's application was so wide that even relatives of the accused could not attend the trial without the judge's permission. This would have amounted to an effective gag.

Both established international law and recent South African law stress the importance of open justice and freedom of expression. The Constitutional Court has said that 'Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.'

The case is clearly a matter of considerable public interest, given that it involves the prosecution of individuals for allegedly smuggling nuclear material, in contravention of South Africa's non-proliferation undertakings. Production of nuclear weapons is a matter of huge public interest internationally currently. Today's judgement reinforces our right to know about the smuggling and development of technology that has such a huge bearing on human well being.

The Supreme Court of Appeal recently found in favour of eTV's right to broadcast a documentary without first submitting it to the State for 'pre-screening.' The court said that the Directorate of Public Prosecutions (DPP) 'must expect that freedom will not be abused until [the DPP] has adequate grounds for believing the contrary. But [the DPP] may not require the press to demonstrate that it will act lawfully as a precondition to the exercise of the freedom to publish in the absence of a valid law that accords him that right.'

Similarly in this case the media raised concerns about the State's attitude that the media, generally, cannot be trusted or relied upon to be careful and selective in handling and publishing sensitive information. The judgement therefore holds up the rights of the media and entrusts it with the responsibility to deal professionally with the sensitive information likely to come up in the course of the trial.

6.10 *Water Rights*

Since March 2004, thousands of residents from Phiri, Soweto have had their water completely cut-off by Johannesburg Water, while others have been persuaded to accept pre-paid water meters as the 'only' option available besides total disconnection. All of these residents had previously been supplied with unlimited water for which a flat-rate charge was levied. Financial assistance has previously been granted by FHR for instructing attorneys and senior counsel to pursue an urgent interdict against Johannesburg Water (Pty) Ltd (JW) to restore interim access to water to those residents whose water was completely cut-off.

JW tendered access to water to those residents who were completely cut-off by means of pre-paid water meters or standpipes. The effect of this tender was to prevent the possibility of launching an urgent application for an interdict against JW to restore interim access to water. Nevertheless, a cause of action still remains against JW for a challenge to the legality of the pre-paid water meters themselves, as well as the basic water supply of 6000 litres per household per month. The action will allow for an airing of the underlying constitutional issues, namely the unconstitutionality of the form of water disconnection made possible by the pre-paid meters. If the Coalition is successful in this action, it should have a persuasive effect on other divisions where the rollout of the pre-payment system is being contemplated.

A class action application has been launched, on behalf of all the residents of Phiri, Soweto, asking the court to order that the following decisions of JW and the City of Johannesburg, are unconstitutional and be set aside: the decision to limit free basic water supply to 6 kilolitres per household per month; the decision to discontinue in Phiri, Soweto a full-pressure, unmetered, uncontrolled volume water supply for which a fixed charge is levied and to install a controlled volume water supply system operated by means of a prepayment water meter.

This action is being vigorously pursued by the Coalition against Water Privatisation, of which the FXI is a principal member. The Centre for Applied Legal Studies (CALS) has recently taken over from FXI's Simon Delaney, attorney for the Coalition for 3 years. The date for hearing of the case in court depends on variables that our partly not within our control, such as court rolls and the availability of counsel and judges. The application was served and filed in July 2006.

Affidavits have been signed by affected residents, international and local experts and the applicant's attorney, covering the history of the case, the rationale for and inadequacies of the free basic water policy, the problems of pre-paid water meters and the extent of the suffering caused by their installation. JW and the City have filed a record of the decisions made in respect of the meters and free basic water policy (two lever arch files in all, containing JW business plans, City minutes etc), which we have attached to a supplementary affidavit detailing the various points in the record favourable to our case.

We have further filed a reply to JW/City's Notice to Produce, containing a full lever-arch file of documents supplementing our founding affidavit. We were served with the respondent's answering affidavit in January 2007. A replying affidavit has subsequently been filed. The case will now be set down for hearing, probably towards the end of 2007.

6.11 *Miscellaneous interventions*

- The FXI assisted ANC members in the Buffalo City Municipality who were interdicted by the council for a march they had held and for a petition which threatened to make the municipality "ungovernable" and complained about the manner in which ANC councillors were chosen. The FXI also supported the ANC members' application to the Foundation for Human Rights for legal funds to defend themselves.
- The FXI responded to the proposal by Sports and Recreation Ministry advisor, Gideon Boshoff, that the old South African flag be banned from all Soccer World Cup matches in 2010. Our argument was that this would effectively proscribe the freedom of expression of a certain section of a population and could have the effect of suppressing a particular viewpoint – even if it is odious – without dealing with the viewpoint and its causes.
- Faizel Katkodia, a manager at Standard Bank, was called to a disciplinary hearing for sending out emails critical of the state of Israel to his private mailing list using the bank's internet resources. He has been charged of using the bank's internet resources in violation of bank policy and of bringing the bank into disrepute. The FXI has been advising Katkodia on this matter and will consider further assistance depending on the outcome of the third hearing, which is scheduled for August.
- The South Africa Ports Authority has decided to invoke the National Key Points Act and attempt to have ports in South Africa declared as national key points. The FXI has responded to this by pointing out the dangers to freedom of expression, freedom to protest and access to information of the National Key Points Act generally and how the

declaration of ports as national key points will constrain various forms of expression around the ports. The FXI is watching the matter closely.

- Wardah Hartley is an SABC journalist who was hauled before a disciplinary committee for allegedly bringing the SABC into disrepute. After the SABC's radio station 5FM played a song that many Muslims would find objectionable – the song had the Muslim call to prayer, the *adhan*, in the background, Hartley sent out an email to a number of Muslim friends asking them to send letters of complaint to the SABC. The corporation felt slighted and decided to take action against her. Hartley's union representative approached the FXI for advice on how to approach the matter in the hearing and was assisted by the FXI's legal unit.

7. Finance and Administration

A Sustainability Plan report that was undertaken for FXI by an independent evaluator made recommendations for a shift to separate the Finance and Administration unit. In the past year FXI has seen the Administration department taking control of all administrative functions and challenges. With assistance and support from the Executive Director the department has grown, and has managed to present Administrative reports in accordance with required formats. The department has also become more active in substantive support for all the various research, advocacy and legal programmes that the FXI undertakes.

Funding difficulties in the FXI remains a challenge for the administration department to meet some of its goals. However, the high level of commitment continues to ensure that work is done according to the mission, objectives and policies of the FXI.