

Workplace free speech

A right under attack

South Africa's Constitution protects the right to freedom of expression and yet, as **Jane Duncan** writes, free speech is under constant attack by employers of all kinds.

“Historically, this country's democracy was born, among others, such as our schools, also in the workplace. It was the workers who fought discrimination, authoritarianism and oppression. They contributed much to the labour laws as we know it today. And for this, they used the workplace as a forum. It is the place where the culture of apartheid was crushed, and consequently many lost their lives or their livelihoods. It was the place where workers aspired towards democracy although it was never granted to them. Why now, would the freedom of expression in the workplace, be denied after democracy may have been obtained?” (Commissioner Soewyba Flowers, Commission for Conciliation, Mediation and Arbitration, Cape Town office, decided on 9 May 2006.)

These words are taken from a

highly progressive judgment on freedom of expression in the workplace. The case involved Royal Ascot Superspar employee and member of the Congress of South African Workers' Unions (Cosawu), Vusi Sibeko, who was dismissed for gross misconduct over an article that he had written for *Izwi la Basebenzi*, published by the Democratic Socialist Movement. Sibeko had accused Superspar of bad labour practices and of not paying workers the minimum wage as determined by the Department of Labour. Superspar argued that the article defamed the company and instilled a negative attitude in workers towards it.

He was suspended on 8 November 2005, and subsequently dismissed. Sibeko appeared before a conciliation hearing of the CCMA on 23 January 2006, which Superspar failed to attend. At the arbitration on 27 February 2006 the CCMA found Sibeko's dismissal unfair as it violated his constitutional right to freedom of expression. Unfortunately, Superspar has decided to appeal to the Labour Court. In the meantime, the case has become celebrated internationally as a victory for workers' freedom of expression.

SILENCING EMPLOYEES

In spite of the CCMA judgment and other court judgments protecting the right to freedom of expression in the workplace, a growing number of employers are using

apartheid-style tactics to silence their employees' critical voices in a bid to protect their public reputations.

The rise of workplace censorship could be linked to what Sakhela Buhlungu and Eddie Webster refer to as “the new workplace authoritarianism”, where core workers are shifted into the non-core zone, casting them out of the formal economy. In the process, working conditions have declined for many workers.

It is telling that some of the criticisms that employers attempt to stifle involve declining work conditions flowing from the restructuring of workplaces. Casualisation of labour has made the control of workers' voices easier as workers may be forced to practice self-censorship fearing that their contracts may not be renewed. But there are those who speak out, in the process facing the wrath of their employers. Non-unionised workers and members of trade unions operating outside of established federations are especially vulnerable to attack.

More and more companies are also accusing unions and employees of defamation. Some employers claim that the contract of employment requires the employee to honour a fiduciary duty to the employer, which includes a duty to be loyal to the company and to protect the integrity of its brand and renounce the right to criticise the employer. Employers who make this argument are, in effect, arguing

that the employment contract allows them to contract the employee out of their constitutional rights. This is wrong in law as no one can contract out of a constitutional right; all contracts of employment are subject to the Constitution.

Employers also seem to be oblivious that our law accords political speech a high degree of protection. Speech about working conditions all too often crosses into the terrain of political speech. Yet such speech is also under threat. With respect to freedom of expression, the conditions of service of many companies dates back to apartheid, thereby binding employees to archaic definitions of misconduct that are not in step with the new democratic order.

In the public service, a specific set of considerations applies. In spite it legally being almost impossible to defame state institutions, a growing number of employees are disciplined for criticising state institutions they work for. Management is often conflated with the institution itself; so criticism of the management is, by definition, an expression of disloyalty to the institution. In reality, criticism of management could be an expression of profound loyalty to the notion of public service, in that workers are willing to risk disciplinary action to raise a debate about the state of the public service.

Many of these criticisms revolve around cutbacks and impact on service delivery of the commercialisation or corporatisation of these services. This change in the nature of public services is leading to them becoming 'brands', like private companies: hence workers who criticise these services, especially in the media, are accused of damaging

the brand. The application of managerial practices in the public service centralises power in the hands of a few managers, which also creates a hostile climate for free expression at the workplace.

SOME POSITIVE JUDGMENTS

But there is some light for workers who are disciplined for what they say. If employers attack the free expression of their employees unjustifiably, they can expect an uphill legal battle. Thankfully, South African democracy-era courts have upheld the right of workers to engage in speech critical of their employers.

For instance, in 1994, the Constitutional Court found that the prohibition of members of the South African National Defence Force's (SANDF) right to engage in public protest was unconstitutional as it violated their right to free speech. This prohibition was contained in the SANDF's Military Discipline Code. The Court argued that "... a culture of constitutionality can hardly succeed if the Constitution is not applied daily in our Courts, from the highest to the lowest, as well as at the workplace."

In 1999, Dr Costa Gazidis was dismissed by the Ministry of Public Service and Administration, for criticising the government's HIV/AIDS policy in the media. He was reinstated after a long legal battle. In its judgment, the Pretoria High Court found that his criticisms did not prejudice the administration of the department.

Yet in spite of these positive precedents, there is mounting

evidence of abuse of employee's freedom of expression.



Vusi Sibeko

MORE WORKPLACE CASES

Apart from the Sibeko case, there are other recent cases of free speech infringements in the private sector. For instance, Faizel Katkodia, an employee 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 was charged with using the bank's internet in violation of bank policy of not bringing it into disrepute.

The problem has gone up to the highest office in South Africa. 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 for, she claims, blowing the whistle on sexual harassment by an ORC consultant who was a friend of Minister Pahad.

The matter was referred to the General Public Service Sectoral Bargaining Council (EPSSBC), which reinstated her in November 2003. She was dismissed again for interviews she gave to the media regarding her initial dismissal. Once again, the matter went to the GPSSBC in February 2006. Mkhwanazi-Xaluva won the case in the Bargaining Council. The Presidency has since appealed to the Labour Court, and Pahad has argued in papers that her statements about him are defamatory, and that she should be disallowed from working for the state ever again.

Universities too have become the flashpoint for freedom of expression. Fazel Khan was a lecturer in

Sociology and Social Studies at the University of KwaZulu-Natal (UKZN), and the media officer of the Combined Staff Association of South Africa (Comsa). Khan

gave interviews to the media that approached him regarding the publication of an article in an university publication. The article was about a film that Khan co-directed, but it makes no mention of him, while mentioning his co-director as the director. The article was accompanied by a picture showing Khan's co-director. The original picture had included Khan but he was cropped out in the version that appeared in the newsletter.

As a result of this exclusion, an aggrieved Khan, when approached to comment by newspapers, was critical of the newsletter and the university management. These criticisms were used against Khan in a disciplinary hearing where he faces possible dismissal. According to the charge sheet, Khan acted dishonestly in making these statements, and he brought the university into disrepute. Khan was issued with a final written warning on this charge, but was dismissed for ostensibly leaking a confidential document to the media.

Since then, 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. He is charged 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



Professor Dieter Welz

his vocal campaign for the reinstatement of academic Ashwin Desai, who was excluded from the university on controversial 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. This charge raises serious questions about the freedom of association and expression rights of employees who speak to the media in their union capacity. Both academics have also been vocal critics of the corporatisation of the UKZN, and its impact on the social mission of the university.

University of Fort Hare Law Professor Dieter Welz was suspended in January 2007 for criticising the university administration in lectures, internal emails and to the media. The university alleges that Prof Welz's criticisms constitute a contravention of the "Conditions of Service of Staff Employed by the University of Fort Hare" - regulations which were promulgated under the University of Fort Hare Act of 1969, apartheid legislation which has since been repealed. Even if these Conditions of Service exist legally, they are unconstitutional, with archaic, overbroad and oppressive definitions of misconduct. Prof Welz may well be protected as a 'whistleblower' under the Protected Disclosures Act and may also be protected by the Constitution which specifically protects academic freedom.

Freedom of expression is under pressure even in the media, where

one would expect respect for this right. Possibly the most widely publicised incident of disciplinary action against an employee involved SAfm anchor John Perlman, who got a verbal warning for bringing the South African Broadcasting Corporation (SABC) into disrepute. Perlman clashed with the SABC spokesperson Kaizer Kganyago on air by confirming the existence of a blacklist of political commentators, despite the SABC's protestations to the contrary.

It remains to be seen how these cases will be settled, but they are a growing indication that freedom of expression in the workplace cannot

be taken for granted. It has to be fought for.

Employees cannot be denied their constitutional right to free expression simply because of an employment contract. If they are, then they must fight back, because this is a fight that the employer cannot win.

Any employees who are disciplined for exercising their freedom of expression rights can contact the Freedom of Expression Institute at (011) 403-8403. The FXI is a registered Law Clinic, and employs a full-time attorney who appears in disciplinary hearings and CCMA hearings and defamation trials as an expert witness on free expression cases. The FXI has intervened in many of the above cases on behalf of the employee.

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Fazel Khan – SALB is happy to print his photo