



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT

Reportable

Case no: 686/2018

In the matter between:

JONATHAN DUBULA QWELANE

APPELLANT

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

FIRST RESPONDENT

MINISTER OF JUSTICE & CORRECTIONAL SERVICES

SECOND RESPONDENT

and

FREEDOM OF EXPRESSION INSITUTE

FIRST *AMICUS CURIAE*

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA

SECOND *AMICUS CURIAE*

**Neutral citation:** *Qwelane v SAHRC & others* (686/2018) [2019] ZASCA 167 (29 November 2019)

**Coram:** Navsa, Wallis, Dambuza and Van der Merwe JJA and Dolamo AJA

**Heard:** 19 August 2019

**Delivered:** 29 November 2019

**Summary:** Constitutional validity of s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – overbreadth and vagueness – freedom of expression and regulation of hate speech.

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**ORDER**

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**On appeal from:** Gauteng Local Division of the High Court, Johannesburg (Moshidi J sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of Moshidi J is set aside and substituted as follows:
  - (a.) Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is declared to be inconsistent with the provisions of s 16 of the Constitution and is therefore unconstitutional and invalid.
  - (b.) The complaint by the South African Human Rights Commission against Mr Qwelane in terms of s 10 of PEPUDA is dismissed.
  - (c.) Parliament is afforded a period of 18 (eighteen) months from 29 November 2019 to remedy the defect.
  - (d.) During the aforesaid period s 10 of PEPUDA shall read as follows:
    - “10(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.
    - 10(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the advocacy of hatred that is based on race, ethnicity, gender, religion or sexual orientation, and that constitutes incitement to cause harm, as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”
  - (e.) Section 10, in the form set out in para (d.), will fall away upon the coming into operation of a legislative amendment to s 10, or its repeal by a statute dealing with the regulation of hate speech. Should Parliament fail to effect such changes by the end of the period referred to in (c.) above, s 10 in the form set out in (d.) will become final.
  - (f.) This order is referred to the Constitutional Court in terms of s 172(2)(a) of the Constitution for confirmation of the order of constitutional invalidity.’

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## JUDGMENT

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Navsa JA (Wallis, Dambuza and Van der Merwe JJA and Dolamo AJA concurring):

### **Introduction, the principal issue and the background**

[1] ‘Hatred makes us all ugly’. This statement is uttered by a character in a novel by contemporary author, Laurell K. Hamilton.<sup>1</sup>

It can rightly be said that espousing and fostering hatred is the antithesis of our constitutional order. The preamble to the Constitution sets out the basis of our social compact. It records that we, as a nation, whilst recognising our painful past, ‘[b]elieve that South Africa belongs to all who live in it and that we are united in our diversity’. We also undertake to ‘[h]eal the divisions of our past and establish a society based on democratic values, social justice and fundamental human rights’.

[2] On the other hand, freedom of expression is vital to - and indeed the lifeblood of - a democratic society. Renowned author, George Orwell, who was preoccupied with government encroachment on individual liberties, political correctness and ‘thought police’, said the following:

‘If liberty means anything at all, it means the right to tell people what they do not want to hear.’<sup>2</sup>

Author, Mokokoma Mokhonoana is reported to have said about freedom of speech:

‘Freedom of speech gives us the right to offend others, whereas freedom of thought gives them the choice as to whether or not to be offended.’<sup>3</sup>

Hate speech, in constitutional terms, as the discussion later in this judgment will show, travels beyond mere offensiveness and is regulated in comparable constitutional democracies. Our Constitution guarantees freedom of expression with a qualification which, as will become apparent, is central to this appeal.

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<sup>1</sup> K. Hamilton *Burnt Offerings* (2002) 89.

<sup>2</sup> Original preface to G Orwell *Animal Farm*; as published in I R Willison *George Orwell: Some Materials for a Bibliography* (1953).

<sup>3</sup> Mokokoma Mokhonoana *good reads* <<https://www.goodreads.com/quotes/9560747-freedom-of-speech-gives-us-the-right-to-offend-others>> (accessed 25-09-2019).

[3] This appeal brings into focus the tension between hate speech and freedom of expression and is concerned, principally, with the constitutionality of the hate speech provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The details of the constitutional challenge are dealt with later. At this point it is necessary to set out the factual background culminating in the present appeal and the related legislative framework.

[4] On 20 July 2008, more than a decade ago, an admittedly offensive article directed against the gay community was published in the Sunday Sun, a national tabloid newspaper. It was penned by the appellant, Mr Jonathan Dubula Qwelane, a well-known anti-apartheid activist and journalist during National Party rule in South Africa. A short time after the article was written, Mr Qwelane was appointed South Africa's High Commissioner in Kampala, Uganda. His term of office ended in 2013. Mr Qwelane wrote the article as a columnist for the Sunday Sun. The article was captioned 'Call me names – but gay is NOT okay. . .'. The offensive part appears hereunder:

'The real problem, as I see it, is the rapid degradation of values and traditions by the so-called liberal influences of nowadays; you regularly see men kissing other men in public, walking holding hands and shamelessly flaunting what are misleadingly termed their "lifestyle" and "sexual preferences". There could be a few things I could take issue with Zimbabwean President Robert Mugabe, but his unflinching and unapologetic stance over homosexuals is definitely not among those. Why, only this month – you'd better believe this – a man, in a homosexual relationship with another man, gave birth to a child! At least the so-called husband in that relationship hit the jackpot, making me wonder what it is these people have against the natural order of things. And by the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views. . . . Homosexuals and their backers will call me names, printable and not, for stating as I have always done my serious reservations about their "lifestyle and sexual preferences", but quite frankly I don't give a damn: wrong is wrong! I do pray that some day a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the constitution of this country, to excise those sections which give licence to men "marrying" other men, and ditto women. Otherwise, at this rate, how soon before some idiot demands to "marry" an animal, and argues that this constitution "allows" it?'

[5] A cartoon appeared on the same page as the column, depicting a man on his knees alongside a goat, appearing in front of a priest to be married. The caption above the man and the goat reads: 'When human rights meet animal rights'. The text inside a speech balloon attaching to the priest reads: 'I now pronounce you, man and goat'. It is common cause that the appellant was not the author or creator of the cartoon, nor was it shown to him for approval before it was published.

[6] The publication was met with a huge public outcry, with expressions of outrage and disgust. The first respondent, the South African Human Rights Commission (the HRC), which, in terms of s 184 of the Constitution has, amongst others, the obligation to promote the protection, development and attainment of human rights, received 350 complaints concerning the article and cartoon. The press ombud also received complaints concerning the article and cartoon. He conducted an investigation against Mr Qwelane and Media24, a public company that owns the Sunday Sun.

[7] A common refrain in the complaints lodged with the press ombud and the HRC was that the article and the cartoon amounted to hate speech. It was contended that the hate speech complained of discriminated against the gay community based on sexual orientation and marital status. The article, so it was asserted, advocated hatred against a particular group of people, namely, homosexuals, was intended to be hurtful, harmful, incite harm, and promote or propagate hatred. It was said that the article infringed upon various constitutionally guaranteed human rights and freedoms of homosexuals; and sought to demoralise homosexuals by drawing a comparison between homosexuality and bestiality, and by implication, dehumanising and 'criminalising' homosexuals.

[8] The press ombud, after considering the complaint against the Sunday Sun, held that the newspaper was in breach of section 2.1 of the South African Press Code on three counts.<sup>4</sup> The press ombud considered that the newspaper had, to some degree, made amends by publishing a poster proclaiming that Mr Qwelane had taken a beating, together

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<sup>4</sup> The three counts were:

- (a) Publishing denigratory references to people's sexual orientation in the column by Qwelane;
- (b) Implying that homosexuals are a lower breed than heterosexuals; and
- (c) In the cartoon accompanying the column, which was also disparaging of homosexuals.

with a flag on its front page to the same effect, as well as publishing a page of letters from the public condemning the column. Consequently, the press ombud ruled that the Sunday Sun should 'complete the amends by publishing an appropriate apology' in the form provided by the Ombudsman's office. The apology was duly published. The press and media appeals panel refused the HRC leave to appeal.

[9] In terms of s 184(2) of the Constitution the HRC has additional powers and functions as prescribed by national legislation. Section 20(1)(f) of PEPUDA gives the HRC the power to institute proceedings in the equality court. Section 2(f) of PEPUDA provides that one of its objects is 'to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed'.

[10] The powers of the equality court, as set out in s 21 of PEPUDA, are extensive. The equality court has, inter alia, the power to make declaratory orders,<sup>5</sup> order the payment of compensation,<sup>6</sup> make orders concerning remedial steps to be taken by persons who have engaged in unfair discriminatory practices<sup>7</sup> and to direct that an unconditional apology be rendered.<sup>8</sup> The equality court also has the power to make an order 'directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation'.<sup>9</sup>

[11] The HRC instituted proceedings against Media24 and Mr Qwelane in the equality court, alleging that the article contravened s 10(1) of PEPUDA, the provisions of which read as follows:

'Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the *prohibited grounds*, against any person, that could reasonably be construed to demonstrate a clear intention to –

(a) be hurtful;

(b) be harmful or to incite harm;

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<sup>5</sup> Section 21(2)(b).

<sup>6</sup> Section 21(2)(d) and (e).

<sup>7</sup> Section 21(2)(f)-(i).

<sup>8</sup> Section 21(2)(j).

<sup>9</sup> Section 21(2)(n).

(c) promote or propagate hatred.<sup>10</sup>

Section 10(2) of PEPUDA provides as follows:

'Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.'

[12] The relevant part of s 1 of PEPUDA, which contains a definition of 'prohibited grounds', and the related provisions of s 12 are set out hereafter:

'1(1) In this Act, unless the context provides otherwise—

....

"prohibited grounds" are—

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or

(b) any other ground where discrimination based on that other ground—

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

12. No person may—

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice,

*that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.*<sup>11</sup>

[13] Both Mr Qwelane and Media24 subsequently launched an application in the high court seeking to have s 10(1), read with ss 12 and 1, and s 11 of PEPUDA declared unconstitutional, on the basis that it was inconsistent with the provisions of s 16 of the

<sup>10</sup> (My emphasis.)

<sup>11</sup> (My emphasis.)

Constitution. Section 11 of PEPUDA states that 'no person may subject any person to harassment'. The HRC thereafter withdrew the proceedings in the equality court against Media24, after a settlement was reached, in terms of which Media24 withdrew *its* application and an arrangement was arrived at in respect of costs. The equality court proceedings against Mr Qwelane continued.

[14] The proceedings in the high court and in the equality court were consolidated.<sup>12</sup> Moshidi J, sitting both as the equality court and the high court, adjudicated the complaint by the HRC and the application by Mr Qwelane to have the provisions of PEPUDA referred to above declared unconstitutional. Because of the constitutional challenge, the second respondent, the Minister of Justice and Correctional Services, was cited and participated in the proceedings. The Freedom of Expression Institute, which has as its object the promotion of efforts to protect the public's right to receive and impart information ideas and opinions; to defend freedom of expression; to oppose censorship; and to fight for the right of access to information, participated as an *amicus*, as did the Psychological Society of South Africa (the Society). More about the Society later.

[15] In relation to the complaint by the HRC, extensive evidence was led before Moshidi J. The head of legal services of the HRC, Mr Pandelis Gregoriou, testified and explained that, even before the offensive publication appeared, the HRC had received numerous complaints by members of the LGBTI community in relation to how they were treated by persons who discriminated against them based on their sexual orientation. There had been many complaints by an organisation called People Opposing Women Abuse (POWA). POWA tended to victims from previously disadvantaged communities. That organisation provided details about horrific acts of violence perpetrated against black lesbians and transgender individuals. Mr Gregoriou's evidence in the equality court, that it was difficult to have complaints by members of the LGBTI community investigated by the South African Police Service (the SAPS), and that certain police officers demonstrated

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<sup>12</sup> See *Minister of Environmental Affairs and Tourism v George* [2006] ZASCA 57; 2007 (3) SA 62 (SCA) para 19; *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape & another (No 1)* [2009] ZASCA 59; 2009 (6) SA 574 (SCA) paras 30-31; *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape & others (No 2)* [2009] ZASCA 50; 2009 (6) SA 589 (SCA) paras 54 and 57 and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being & another* [2015] ZACC 35; 2016 (2) SA 1 (CC) paras 55-58.



an anti-LGBTI disposition, was uncontested. He testified that members of the LGBTI community complained of being denied access to essential services and were repeatedly exposed to abuse by way of expletives and hostile speech. In his view, Mr Qwelane's alignment with the sentiments of Mr Robert Mugabe – that homosexuals were worse than animals – was particularly offensive. He also considered it an aggravation that Mr Qwelane was unrepentant about his bigotry and strident in relation thereto.

[16] The HRC also led the evidence of Ms Nonhlanhla Mokoena, the executive director of POWA, which provides support, counselling and shelter to female survivors of domestic violence in previously disadvantaged communities, particularly to lesbians. Ms Mokoena echoed those parts of the evidence of Mr Gregoriou about how members of the LGBTI community were treated. She reported an instance where police officers refused to open a case of rape because the complainant was a lesbian and, according to the officers, 'boys cannot be raped'. In this regard a number of complaints were lodged with the HRC. The incidents testified to by Ms Mokoena were horrific. So, for example, a former woman's national soccer team member had been gang-raped and brutally murdered by five men. Another incident involved the stoning to death of a lesbian in KwaZulu-Natal. Yet another involved the rape and murder of both a member of a support group for women living with HIV/AIDS and her 2-year old daughter.

[17] A further witness called by the HRC, a black lesbian, testified about how she was barred from the use of toilet facilities, had been attacked verbally and physically because of her sexual orientation and had lost her job because of it. She testified about her reaction to the offensive article by Mr Qwelane. She considered it to be an attack on her dignity and her right to equality. She took the view that the law did not protect people like her and had a sense of 'having passed on'.

[18] Mr Ben Viljoen, a deputy editor of the Sunday Sun at the time of the publishing of the article, testified in support of Mr Qwelane. At the time of publication, Mr Viljoen was the production editor, which meant that he drove the whole process before publication. It involved making certain that everybody submitted content on time and that it was produced in line with the style of the newspaper. Mr Qwelane's article fell under the

'conversation pages'. That part of the newspaper, was intended to deal with current events and promote debate about the issues raised. The success of the page could be measured by responses, positive or negative. Articles like Mr Qwelane's were submitted directly to the publisher for his or her ultimate authority to publish. Occasionally, the publisher would discuss the content. If he or she was satisfied with the content, grammar would be corrected and it would then be ready for publication. In the case of the Sunday Sun, the publisher took on the role of the editor. Mr Qwelane did not provide the headline to his article. A copy sub-editor read the article and then put a headline into the space above it. Headline writing for a tabloid newspaper such as the Sunday Sun is a very specific exercise. Headlines are required to be 'punchy'. Mr Qwelane had no say in the headline. As stated above, Mr Qwelane had no say in the cartoon either, and would not have seen it prior to publication. Cartoons are not always related to the content that they neighbour. A contributor, like Mr Qwelane, would not necessarily expect a cartoon to accompany the column or their contribution.

[19] Mr Viljoen testified that a week after the article appeared a headline banner for the newspaper indicated that Mr Qwelane had taken a beating. This related to a report in the newspaper that Mr Qwelane's article had caused an uproar. The Sunday Sun also published a full page of complaints. This was the only time that this had occurred. The complainants were adamant that Mr Qwelane was guilty of hate speech and called for action to be taken against him.

[20] It is uncontested that the readership of the Sunday Sun is 99 per cent black. In Mr Viljoen's view, the complaints did not emanate from the Sunday Sun's regular subscribers. It does not appear that the Sunday Sun took any disciplinary action against Mr Qwelane. Mr Viljoen was not aware of an unqualified apology by the Sunday Sun. An apology by the publisher, Mr Du Plessis, was diluted. He stated that no wrong had been committed but he apologised anyway.

[21] Mr Viljoen's response to a question about whether he had found the article offensive was that he thought it was 'reprehensible'. He took the view that the article should not have been published, but was adamant that the drivel it contained should not

be considered illegal. Under cross-examination, Mr Viljoen agreed that members of the LGBTI community would find the article offensive but testified that Mr Qwelane's views reflected those of a large proportion of the Sunday Sun's readers.

[22] The Society adduced the evidence of Professor Nel, a research professor at the University of South Africa. Professor Nel is a former president of the Society. He testified with reference to articles he had co-authored and research that had been conducted. The first article he referred to is entitled 'Exploring Homophobic Victimization in Gauteng, South Africa: Issues, Impacts and Responses'.<sup>13</sup> A report he compiled, along with others, is entitled 'Factors Affecting Vulnerability to depression among gay men and lesbian women in Gauteng, South Africa'.<sup>14</sup>

[23] The Society's membership comprises eminent psychologists who have made valuable contributions in the field of psychology, both nationally and internationally. It has approximately 2000 members. At the time that he testified, Professor Nel was a practising clinical psychologist. He had been involved for a considerable period of time in leading psychological services in the SAPS. It was within the Police Service that Professor Nel's activism around human rights and LGBTI related work started unfolding. He is a gay man himself, and testified also of his own experience of exclusion and the discrimination that he faced.

[24] Professor Nel was adamant that the plight of the LGBTI community was to be seen in light of the fact that they constitute sexual and gender minorities and that they are a vulnerable grouping within our largely hetero-normative society. The LGBTI community is often considered abnormal and are not only discriminated against, but also victimised. He compared the position of the LGBTI community with groupings who faced the brunt of racism and sexism.

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<sup>13</sup> J A Nel & M Judge 'Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses' 21 (2008) 1 *Acta Criminologica* 19-36.

<sup>14</sup> L A Polders, J A Nel, P Kruger & H L Wells 'Factors affecting vulnerability to depression among gay men and lesbian women in Gauteng, South Africa' (2008) 38 *South African Journal of Psychology* 673-687.

[25] In relation to hate crimes, Professor Nel testified about his involvement in dealing with the phenomenon. He described his work with the Crimes Working Group, which is a national network of civil society organisations that endeavours to address the vulnerability of a range of protected groupings, in accordance with the Constitution and within the applicable legislative framework. Professor Nel also leads a psychotherapy support group for gay men and has published in that area of work.

[26] Professor Nel testified that feelings of shame, guilt, internalised conflict and self-suppression within the LGBTI community emanate from being on the margins of society and being a minority. The context for the LGBTI community is characterised by fears of exclusion, rejection, being shamed and being deprived of fundamental rights. It is that psychological trauma to which they are exposed.

[27] In his evidence, Professor Nel described the fear related to gender non-conformity. He testified that some gender non-conforming people are unable to walk to the shops in the communities where they live. They are not free to enter public spaces after dark or make use of public transport. People opposed to the LGBTI community are often led to violent actions. They regularly want to 'correct' what they consider to be aberrant behaviour. This attitude has an emotional impact and on occasion leads to physical harm being inflicted. Hate speech, according to Professor Nel, is what leads to such behaviour and has a severe impact on members of the LGBTI community.

[28] Professor Nel testified extensively about the vast body of international literature that reflects on the vulnerability to depression of lesbian and gay people. This comes about because of the sustained taunting and hate-victimisation that lesbians and gays are subjected to. They are subjected to verbal and physical abuse.

[29] In his testimony, Professor Nel described the pronounced vulnerability of the LGBTI community in townships and informal settlements. According to him, research shows that it is where the highest degree of verbal victimisation is experienced. He took the view that Mr Qwelane's article sought to exploit that situation. Topically, Professor Nel compared the vulnerability of the LGBTI community to the vulnerability of foreign nationals

in a xenophobic atmosphere. Research showed a high degree of hate-speech victimisation in South Africa.

[30] Professor Nel testified about members of the LGBTI community being subjected to secondary victimisation, for example, when they present complaints at police stations. A high percentage of the LGBTI community took the view that the criminal justice system did not serve them which often resulted in a failure to report crimes to the police. In Professor Nel's view, the connection between hate speech and hate crime was undeniable. In this regard, he referred to Nazi Germany and ethnic strife in Rwanda. In Professor Nel's view, words matter. An utterance such as 'we will show you that you are a woman' is an example of verbal victimisation which later translated into physical assaults.

[31] Turning to deal specifically with Mr Qwelane's article, Professor Nel stated that it had created shock waves within the LGBTI community and was met with great indignation. Complaints were speedily laid with the press ombudsman, the HRC and the Commission for Gender Equality. In his view, the greatest impact of the article was on the human dignity of members of the community. In relation to the reference to former Zimbabwean President, Robert Mugabe, Professor Nel emphasised that it should be borne in mind that President Mugabe had referred to homosexuals as being lower than pigs and dogs and that this statement had been made a few months before Mr Qwelane's article was published. It was degrading and dehumanising.

[32] Significantly, Professor Nel said that the teachings of churches were hurtful, particularly when they tied in with the hurtful stereotype that same-sex orientation equated with bestiality. The sinfulness of same-sex relationships was repeatedly referred to. The threat of undoing of constitutional protection for vulnerable groups was directed at the LGBTI community, which affected their psyche. The article, even without the cartoon, was offensive. The statements in the article, so Professor Nel said, have to be seen against Mr Qwelane's status as a celebrity with struggle credentials. In his view, what one could take from the article is that homosexuality is wrong and sinful and that it justifies victimisation, whether in speech or in action. In Professor Nel's view, the outrage that the

article caused is in itself an indication of the hurt and harm caused to the LGBTI community. Mr Qwelane was someone with stature who contrived a call to conscience, seeking others to follow his convictions. In relation to an apology being demanded, Professor Nel was emphatic that the value of an apology should never be underestimated. It led to healing.

[33] What is set out above is the essence of the evidence adduced in the court below and it is against that evidence that the complaint by the HRC was adjudicated. No evidence was presented to show a link between the article and any subsequent physical or verbal attacks on members of the LGBTI community. Moshidi J upheld the complaint against Mr Qwelane. The court declared that the offending statements against homosexuals were hurtful, incited harm and propagated hatred; and that they thus amounted to hate speech, as envisaged in s 10(1) of PEPUDA.

[34] Moshidi J dismissed Mr Qwelane's application to have the impugned sections of PEPUDA declared unconstitutional. He rejected the contention on behalf of Mr Qwelane that the provisions of s 10(1) of PEPUDA were vague. Having regard to the 'first words' of s 10(1), it was said that they could be clearly understood as postulating an objective test. The learned judge held that the proviso to s 12 was not unclear and that, in any event, no facts were placed before him in order for Mr Qwelane to claim the benefit thereof. Moshidi J held that the provisions of s 10(1)(a)-(c) had to be read conjunctively and, if that was done, the section would be consonant with s 16 of the Constitution. He rejected the overbreadth challenge on behalf of Mr Qwelane. The full range of the orders made, both in relation to the complaint and the opposition by Mr Qwelane, are as follows:

- (i) The complaint by the Commission as contained in the referral against the applicant (Mr Qwelane) succeeds with costs.
- (ii) The offending statements (made against the LGBTI community) are declared to be hurtful; harmful, incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000.
- (iii) The applicant (Mr Qwelane) is ordered to tender to the LGBTI community (in particular the homosexuals) an unconditional written apology within thirty (30) days of this order, or within such other period as the parties may agree pursuant to negotiation and settlement of the contents of such apology. The apology shall be published in one edition of a national Sunday newspaper of

the same or equal circulation as the Sunday Sun newspaper, in order to receive the same publicity as the offending statements. Thereafter proof of the publication of such written apology shall be furnished to this Court immediately.

(iv) The Registrar of this Court is ordered to have the proceedings of this matter transcribed immediately and forwarded, with a copy of the revised judgment, to the Commissioner of the South African Police Service for further investigation as envisaged in section 21(4) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

(v) The constitutional challenge of the applicant is dismissed with costs.

(vi) The applicant (Mr Qwelane) is ordered to pay the costs of these proceedings. Such costs shall include the costs occasioned by the postponement of the matter previously, and the costs of senior counsel.'

It is against these orders that the present appeal, with the leave of Moshidi J, is directed.

### **The constitutional challenge**

[35] As indicated at the commencement of this judgment, the starting point in determining this appeal is the constitutionality of the impugned sections of PEPUDA. It is under those provisions, more particularly s 10(1) read with ss 1 and 12 of PEPUDA, that the complaint against Mr Qwelane was brought and in relation to which the findings by Moshidi J, referred to in the preceding paragraphs, were made. Section 10(1) of PEPUDA has properly been described as the primary vehicle in PEPUDA for regulating hate speech.<sup>15</sup> A decision in relation to the constitutionality of s 10(1) is foundational to the outcome of this appeal.

[36] Before us it was contended that the provisions of s 10(1) of PEPUDA were unconstitutional because they unjustifiably limit the constitutionally guaranteed right to freedom of expression in s 16 of the Constitution, which reads as follows:

'(1) Everyone has the right to freedom of expression, which includes -

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

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<sup>15</sup> S Teichner 'The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, The Bad and The Ugly' (2003) 19 SAJHR 349 at 353, 372.

(2) The right in subsection (1) does not extend to -

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

In short, it was submitted that the provisions of PEPUDA in terms of which Mr Qwelane was charged in the equality court, in limiting freedom of expression, impermissibly extended far beyond the speech that is excluded from protection by s 16(2) of the Constitution. It was also contended that the relevant provisions were overbroad and vague and accordingly did not pass constitutional muster.

[37] Section 16(2) of the Constitution is a provision that explains what is not encompassed under freedom of expression, or what it does not extend to. It is known, colloquially, as the 'hate speech qualification', although only one of its three components, namely, s 16(2)(c), deals with hate speech.<sup>16</sup> As pointed out by Currie and De Waal, legal restrictions of speech falling within one of the three listed categories are not limitations of freedom of expression and will require no justification. The manner in which hate speech regulation is to be tested for constitutionality is best illustrated by a decision of the Constitutional Court, a detailed discussion of which follows hereafter. It is a decision that is directly relevant and generally instructive.

### **The decision in *Islamic Unity Convention***

[38] In *Islamic Unity Convention v Independent Broadcasting Authority & others*<sup>17</sup> the Constitutional Court was called upon to adjudicate whether clause 2(a) of the Code of Conduct for Broadcasting Services (the Code), contained in Schedule 1 to the Independent Broadcasting Authority Act 153 of 1993, passed constitutional muster. Clause 2(a) of the Code provided:

'Broadcasting licensees shall . . . not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a

<sup>16</sup> For a useful discussion, see I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) at 354-361.

<sup>17</sup> *Islamic Unity Convention v Independent Broadcasting Authority & others* [2002] ZACC 3; 2002 (4) SA 294 (CC).



population or likely to prejudice the safety of the State or the public order or relations between sections of the population.'

[39] The South African Jewish Board of Deputies had lodged a complaint with the Independent Broadcasting Authority about a radio programme broadcast by the applicant in that case. An individual being interviewed by the radio station, amongst other things, questioned the legitimacy of the State of Israel and Zionism as a political ideology, asserted that Jewish people had not been gassed in concentration camps during the Second World War but had, instead, died of infectious diseases, particularly typhus, and that only a million Jews had died. In response to the complaint, the applicant applied for an order declaring s 2(a) of the Code unconstitutional and therefore invalid, because of its inconsistency with the right to freedom of expression in s 16 of the Constitution.

[40] The Constitutional Court considered the applicant's contention, that clause 2(a) was unconstitutional, largely on the grounds of vagueness and overbreadth. In the final analysis the challenge was, however, restricted to that part of the clause which prohibited material that is 'likely to prejudice relations between sections of the population'. The Constitutional Court proceeded to consider whether this was a constitutionally permissible limitation of the right to freedom of expression.

[41] In addressing that question, the Constitutional Court referred to the importance and relevance of freedom of expression in a democratic state. The court referred to two of its prior decisions. First, *South African National Defence Union v Minister of Defence & another*<sup>18</sup> where, at para 8, the following was stated:

'[F]reedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.'

And at para 7, where it pointed out that freedom of expression:

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<sup>18</sup> *South African National Defence Union v Minister of Defence & another* 1999 (4) SA 469 (CC).

lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.' (Citations omitted.)

Second, it referred to what was said in *S v Mamabolo (E TV and others intervening)*:<sup>19</sup>

'Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.'

[42] The Constitutional Court noted that South Africa was not alone in its recognition of the right to freedom of expression and its importance to a democratic society. It recorded that the right is protected in almost every international human rights instrument. In this regard it referred to what the European Court of Human Rights said in *Handyside v The United Kingdom*:<sup>20</sup>

'[the right to freedom of expression is] applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".'

[43] The very next two paragraphs deal with necessary limitations to freedom of expression:

<sup>19</sup> *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 (CC), para 37.

<sup>20</sup> *Handyside v The United Kingdom* (1976) 1 EHRR 737 at 754. See also *United States v Schwimmer* 279 US 644 (1929) where Holmes J stated:

'If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate.'

'The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms". Thus, open and democratic societies permit *reasonable proscription of activities and expressions that pose a real and substantial threat to such values and to the constitutional order itself*. Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an *inflammatory or unduly abusive kind* may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.

There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other state interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests. Thus in *Mamabolo*, the following was said in the context of the hierarchical relationship between the rights to dignity and freedom of expression:

"With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law."<sup>21</sup>

[44] The Constitutional Court analysed the two parts of s 16 of the Constitution and said the following:

'Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right.

How is s 16(2) to be interpreted? The words "(t)he right in subsection (1) does not extend to . . ." imply that the categories of expression enumerated in s 16(2) are not to be regarded as constitutionally protected speech. Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgement that certain expression does not deserve

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<sup>21</sup> Paras 29 and 30. (My emphasis; footnotes omitted.)

constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.<sup>22</sup>

[45] The following dicta in paras 33 and 34 are particularly important:

'Section 16(2)(c) is directed at what is commonly referred to as hate speech. What is not protected by the Constitution is expression or speech that amounts to "advocacy of hatred" that is based on one or other of the listed grounds, namely, race, ethnicity, gender or religion and which amounts to "incitement to cause harm". There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation that prohibits such expression. Any regulation of expression that falls within the categories enumerated in s 16(2) would not be a limitation of the right in s 16.

Where the State extends the scope of regulation beyond expression envisaged in s 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in s 36(1) of the Constitution.'

[46] In dealing with the regulation of hate speech by the respondent in *Islamic Unity*, by way of clause 2(a) of the Code, the Constitutional Court took into account that the respondent's responsibility for the regulation of broadcasting in South Africa was founded in s 192 of the Constitution.<sup>23</sup> However, in fulfilling that function, the broadcasting authority was bound to respect the provisions of the Bill of Rights. At para 37, the Court said the following:

'In the context of broadcasting, freedom of expression will have special relevance. It is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas. It is also in the public interest that reasonable limitations be applied, provided that they are consistent with the Constitution.'

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<sup>22</sup> Paras 31 and 32.

<sup>23</sup> Section 192 of the Constitution provides:

'National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.'

[47] As in the present case, clause 2(a) of the Code in *Islamic Unity*, as stated above, was attacked on the basis of vagueness and overbreadth. The Constitutional Court held that the prohibition in that case, self-evidently limited the right to freedom of expression as provided for in s 16(1) of the Constitution.<sup>24</sup> It found that the phrase 'section of the population' in the relevant part of clause 2(a) of the Code was less specific than 'race, ethnicity, gender or religion' as spelt out in s 16(2)(c) and, therefore, travelled beyond the enumerated categories of unprotected expression. Furthermore, it did not require that what was prohibited should amount to advocacy of hatred, 'least of all hatred based on race, ethnicity, gender or religion'. It also did not require that it should have any 'potential to cause harm'.<sup>25</sup> The Constitutional Court pointed out that whilst each of the forms of expression listed in s 16(2) of the Constitution would be 'likely to prejudice relations between sections of the population', as set out in the relevant part of the Code, the converse was not true. Not every expression of speech that is likely to prejudice relations between sections of the population would be 'propaganda for war', or 'incitement of imminent violence' or 'advocacy of hatred' which also constitutes 'incitement to cause harm'. The Constitutional Court noted that there might well be instances where the prohibition there in question coincided with what is excluded from the protection of the right. The Constitutional Court posed the question to be addressed in that case: 'whether the clause, in prohibiting that which is not excluded from the protection of s 16(1), does so in a manner which is constitutionally impermissible'. To answer that question, it turned its attention to the justification enquiry in terms of s 36(1) of the Constitution.<sup>26</sup>

[48] The court noted that no ground for justification of the limitation to the right to freedom of expression, in terms of s 36(1) of the Constitution, was provided by either the respondent in that case or the Minister of Communications. On behalf of the board of the respondent it was submitted that the relevant part of clause 2(a) should be interpreted to

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<sup>24</sup> Para 35.

<sup>25</sup> Para 35.

<sup>26</sup> In para 38 of *Islamic Unity*, the court said the following:

'Section 36(1) of the Constitution sets out the criteria for the limitation of rights. The limitation must be by means of a law of general application and determining what is fair and reasonable is an exercise in proportionality, involving the weighing up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom.'

mean that only broadcasts which would probably cause material damage to relations between readily identifiable sections of the population were hit by the proscription. 'Sections of the population' should be understood to refer to such sections as were identifiable on the basis of race, ethnicity, gender and religion. According to the argument, 'relations' was used in the context of there being a target victim group on the one hand, and a defined perpetrator group on the other, whose expression moved other defined groups, to demonise or stereotype the victim group, and the victim group must, in turn, have blamed the perpetrator group for this.<sup>27</sup>

[49] Paras 43 and 44 are instructive. They read as follows:

'It is obvious that the interpretation contended for would entail a complicated exercise of interpreting the very wide language of the relevant part of clause 2(a) in the light of the very concise and specific provisions of s 16(2)(c). Whilst this process might assist in determining whether particular expression can be regarded as hate speech, *I fail to see how its meaning can coincide with that of the impugned clause on any reasonable interpretation without being unduly strained*. This segment of the clause is accordingly not reasonably capable of being unduly strained. *This segment of the clause is accordingly not reasonably capable of being read to give the meaning which is favoured by the Board*.

The next question to be considered is whether the provision is nevertheless justifiable despite its inability to be read in the way that the Board suggests. The prohibition against the broadcasting of any material which is "likely to prejudice relations between sections of the population" is cast in absolute terms; no material that fits the description may be broadcast. The prohibition is so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. *No intelligible standard* has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects. *The wide ambit of this prohibition may also impinge on other rights, such as the exercise and enjoyment of the right to freedom of religion, belief and opinion guaranteed in s 15 of the Constitution.*<sup>28</sup>

[50] The ultimate finding of the court is at para 51:

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<sup>27</sup> See para 42 of *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

<sup>28</sup> (My emphasis.)

'There is no doubt that the inroads on the right to freedom of expression made by the prohibition on which the complaint is based are far too extensive and outweigh the factors considered by the Board as ameliorating their impact. As already stated, no grounds of justification have been advanced by the IBA and the Minister for such a serious infringement of the right guaranteed by s 16(1) of the Constitution. It has also not been shown that the very real need to protect dignity, equality and the development of national unity could not be adequately served by the enactment of a provision *which is appropriately tailored and more narrowly focussed*. I find therefore that the relevant portion of clause 2(a) impermissibly limits the right to freedom of expression and is accordingly unconstitutional.'<sup>29</sup>

I will, in due course, deal with the remedy crafted by the Constitutional Court in *Islamic Unity*.

[51] The effect of this is that all expression is protected save anything that falls within s 16(2)(c). Moseneke J summarised this in *Laugh It Off*<sup>30</sup> in saying that 'unless an expressive act is excluded by s 16(2) it is protected expression'. Legislation may be passed that limits otherwise protected freedom of expression, but it must then be justified in terms of s 36 of the Constitution. This does not mean that s 16(2)(c) is irrelevant to the justification analysis. It provides a baseline against which to measure the extent of any limitation so that the greater the intrusion into freedom of expression and the further the departure from that baseline the stricter the scrutiny that is required.<sup>31</sup>

### **Section 10(1) of PEPUDA – a closer look**

[52] The provisions of s 10(1) of PEPUDA self-evidently restrict the right of freedom of expression provided for in s 16(1) of the Constitution. This was not in contestation. What was in dispute is whether they extend beyond the provisions of s 16(2)(c) of the Constitution and, if so, whether they were justifiable. At the outset, it is necessary to record that the Minister's response to Mr Qwelane's application to have relevant sections

<sup>29</sup> (My emphasis.)

<sup>30</sup> *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7; 2006 (1) SA 144 (CC) para 47.

<sup>31</sup> Our courts have accepted that the publication of child pornography (*De Reuck v Director of Public Prosecutions* [2003] ZACC19; 2004 (1) SA 406 (CC) paras 48-50); commercial speech (*City of Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733 (C) at 748) and nude dancing (*Phillips & another v Director of Public Prosecutions, Witwatersrand Local Division & others* [2003] ZACC 1; 2003 (3) SA 345 (CC) are all capable of protection under s 16(1).

of PEPUDA declared unconstitutional was, at best, sparse, both literally and figuratively. It encompassed four pages. In respect of content, it was even more limited. The stance adopted by the Minister was that the facts of any case should be considered to determine whether or not the expression complained of is protected by s 16 of the Constitution and that a constitutional issue beyond that would not arise. An inconsistency between s 10(1) of PEPUDA and s 16 of the Constitution was denied. The Minister was of the view that the inclusion of 'sexual orientation' as one of the prohibited grounds beyond the grounds set out in s 16(2) of the Constitution was legitimate, serving to extend equality, in line with s 39 of the Constitution. The Minister postulated that the civil and criminal sanctions provided for in s 10(2)<sup>32</sup> read with s 21(2)(n) of PEPUDA, were founded on the common law or applicable legislation and that 'the Equality Act does not create the aforesaid sanctions'. There was a general unsubstantiated assertion by the Minister, that s 10(1) is justifiable under s 36 of the Constitution. That, then, in essence, was the sum total of the purported opposition to the application and the 'justification' for the limitation, by way of s 10(1) of PEPUDA, of the right to freedom of expression.

[53] Does s 10(1) of PEPUDA, in limiting freedom of expression, extend beyond the provisions of s 16(2)(c) of the Constitution? The short answer is yes. The first manifestation is that s 16(2)(c) of the Constitution does not exclude from constitutional protection under s 16(1) the advocacy of hatred that constitutes incitement to cause harm beyond the four stated grounds of race, ethnicity, gender or religion. Section 10(1) of PEPUDA, on the other hand, purports to extend those bases to include all of the categories set out under prohibited grounds in s 1 of the definition, which the reader will be reminded, are as follows:

**'prohibited grounds'** are –

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
- (b) any other ground where discrimination based on that other ground –

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<sup>32</sup> Section 10(2) provides:

'Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with s 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.'



- (i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).'

[54] The first question therefore is whether the extension of 'prohibited grounds' to include sexual orientation is constitutionally permissible. In relation to the extension of 'prohibited' grounds beyond those stated in s 16(2), it is necessary to have regard to s 9 of the Constitution, which is the equality provision. Section 9(4) obliged the State to enact legislation to prevent or prohibit unfair discrimination. Item 23(1) of Schedule 6 of the Constitution provided a timeline of three years, within which such legislation should be enacted. The long title of PEPUDA is in line with those commendable ends. It reads as follows:

'To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.'

[55] The objects of PEPUDA are set out in s 2 of that legislation as follows:

'The objects of this Act are –

- (a) to enact legislation required by section 9 of the Constitution;
- (b) to give effect to the letter and spirit of the Constitution, in particular –
  - (i) the equal enjoyment of all rights and freedoms by every person;
  - (ii) the promotion of equality;
  - (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
  - (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
  - (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;
- (c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;
- (d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

- (e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;
- (f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;
- (g) to set out measures to advance persons disadvantaged by unfair discrimination;
- (h) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination against Women.'

[56] Section 3 of PEPUDA, which deals with its interpretation, provides, inter alia, that any person interpreting this Act may be mindful of international law, particularly the international agreements referred to in s 2 and customary international law, as well as comparable foreign law.<sup>33</sup> I shall, in due course, when considering whether s 10(1) of PEPUDA, in its comprehensive form, is a justifiable limitation of the right to freedom of expression, deal with relevant foreign case law.

[57] International treaties and covenants to which we are signatories provide for protection against discrimination and also the regulation of hate speech.<sup>34</sup> The Universal Declaration of Human Rights (UDHR)<sup>35</sup> recognises the inherent dignity and equality amongst the human family<sup>36</sup> and states that individual liberties such as freedom of expression may be limited to secure 'due recognition and respect for the rights and freedoms of others and of meeting just requirements of morality, public order and general welfare in a democratic society'.<sup>37</sup> The UDHR also provides that all people are entitled to equal protection against any discrimination and against any incitement to such discrimination.<sup>38</sup>

<sup>33</sup> See s 3(2)(b) and (c) of PEPUDA. Section 2(h) states that one of the objects of PEPUDA is to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>34</sup> For a useful discussion on international regulation of hate speech, see T J Webb 'Verbal Poison – Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System'(2011) 50 *Washburn LJ* at 445.

<sup>35</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

<sup>36</sup> Preamble, Art 1.

<sup>37</sup> Article 29.

<sup>38</sup> Article 7.

[58] Article 19 of the International Covenant on Civil and Political Rights (the ICCPR)<sup>39</sup> provides for the right to freedom of expression, but restricts that right when necessary. Article 20 limits expression if it is hate speech. It provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. Article 2(2) of the ICCPR calls upon state parties to adopt legislation to enforce those provisions. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF),<sup>40</sup> applicable to the European Union, confirms the dangers of hate speech and requires ratifying states to ensure its prevention and punishment.

[59] Thus, the State has a legitimate interest in promoting equality and prohibiting hate speech that impinges on equality. There can be no doubt that the State has an interest in extending the protection against discrimination, to include protection against discrimination based on sexual orientation.<sup>41</sup> In the present case it is that category with which we are concerned and it is in relation thereto that extensive evidence was led. Moreover, the State has an obligation to promote and protect the right to human dignity of members of the LGBTI community, as provided for in the Constitution,<sup>42</sup> which it purported to do by way of s 10 of PEPUDA, read with associated provisions.

[60] In light of what is set out above and the clear evidence of the discrimination directed at members of the LGBTI community there is clearly no merit to the contention on behalf of Mr Qwelane, that the extension of protection to include protection against discrimination based on sexual orientation and against hate speech in relation thereto, is constitutionally impermissible. I pause to record that the other prohibited grounds provided for in s 1 of PEPUDA, beyond those set out in s 16(2) of the Constitution, were not in issue before us and no evidence was directed to them. The problems, however, in

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<sup>39</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>40</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

<sup>41</sup> In this regard see para 33 of *Islamic Unity*.

<sup>42</sup> Section 10 of the Constitution reads as follows:

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

relation to the constitutionality of s 10(1) of PEPUDA, with regard to the regulation of hate speech, read with the associated sections of PEPUDA, go much deeper. In addressing those, I will continue to bear in mind the duty resting on a court, in terms of s 39 of the Constitution, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. A court must also have regard to international law and may consider foreign law.<sup>43</sup>

[61] I turn to address the problems alluded to in the preceding paragraph. First, s 16(2)(c) of the Constitution provides that the right to freedom of expression does not extend to *advocacy of hatred* that is based on 'race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. Section 10(1) of PEPUDA, on the other hand, states that no person may *publish, propagate, advocate or communicate* words based on one or more of the prohibited grounds 'against any person, that *could reasonably be construed to demonstrate a clear intention* to (a) be hurtful, (b) be harmful or to incite harm, (c) promote or propagate hatred'. As will be shown, these are two distinct standards.

[62] The constitutional standard involves an objective test – a primary assessment of whether the expression complained of comprises advocacy of hatred based on one of the prohibited grounds and then a further assessment of whether the advocacy of hatred constitutes incitement to cause harm. This ties in with the international jurisprudential basis for regulating freedom of expression, namely, the preservation of public order and the general welfare of society. The 'advocacy of hatred' and 'incitement to cause harm' are inextricably linked.

[63] In relation to the exercise envisaged by s 10(1) of PEPUDA, one commences by considering whether a person *published, propagated, advocated or communicated words* based on one or more of the prohibited grounds against any person and then looks to see

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<sup>43</sup> Section 39(2) and (3) of the Constitution read as follows:

(2) When interpreting legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

whether the words complained of could '*reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, promote or propagate hatred*' – as provided for in subsections (a), (b) and (c) of s 10(1) of PEPUDA.

[64] It is necessary to record that, in oral argument before us, the HRC, the Minister and the Society all conceded that ss 10(1)(a), (b) and (c) of PEPUDA must be read disjunctively. Commentators have interpreted the provisions in that manner.<sup>44</sup> The concessions and the commentary are warranted. Section 10(1) is structured in that way. Each of the three subsections appear after the long dash, following on the introductory words and each of the first two subsections ends with a semicolon. The subsections are not connected with the word 'and', which one would have expected, if it was intended for the sections to be construed conjunctively. The reason for providing alternatives within subsections (b) and (c) by use of the word 'or' is not readily apparent. The alternatives could just as easily have been added as further subsections (d) and (e). This is another factor that supports the disjunctive reading of the subsections. The formulation of the subsections as alternatives decouples the constitutional requirements of advocating hatred and incitement to cause harm, so that one or neither of these may lead to a finding of hate speech. That is also an extensive infringement of the right.<sup>45</sup>

[65] The words 'publish, propagate, advocate or communicate', in the lead-in part of s 10 of PEPUDA, are all also disjunctively placed. Any one of those forms of expression that can reasonably be construed to demonstrate a clear intention, to have any of the results in subsections (a), (b) and (c), can lead to liability. In terms of s 10(1)(a), mere 'communication' of words based on prohibited grounds, which could reasonably be construed to demonstrate a clear intention to be 'hurtful' is sufficient for liability to attach and for sanction to follow. It is not necessary for the potential of harm or actual harm to be shown. Moreover, advocacy of hatred is not a necessary requirement for liability to

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<sup>44</sup> See Teichner at 354-355. See also C Albertyn, B Goldblat and C Roedere *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* ed (2001) at 94. See also Pierre de Vos 'Why the hate speech provisions might be unconstitutional' (2010) *Constitutionally Speaking*, <<https://constitutionallyspeaking.co.za/why-the-hate-speech-provisions-may-be-unconstitutional/>> (accessed 25-09-2019).

<sup>45</sup> The finding in *South African Human Rights Commission v Khumalo* [2018] ZAGPJHC 528; 2019 (1) SA 289 (GJ), that the subsections are to be read conjunctively, at para 82, is therefore wrong.

attach.<sup>46</sup> Counsel on behalf of the Minister conceded that in terms of s 10 of PEPUDA any one of the forms of expression that might not necessarily constitute advocacy of hatred nor incitement to harm are prohibited. This is another respect in which the section limits the right in s 16(1).

[66] In relation to the words being 'reasonably construed' to demonstrate a clear intention to have any of the results set out in ss 10(1)(a)-(c), Albertyn *et al* postulate that the test is not strictly one of actual intention. They say the following at 93:

'It does not require that a reasonable person *would* interpret the conduct in such a way, only that it is possible that he might construe it in this way.'<sup>47</sup>

I agree with that view. The result is to depart significantly from the objective constitutional test and replace it with the subjective opinion of a reasonable person hearing the words. This is an extensive infringement on the right of freedom of expression.

[67] A purposive and contextual approach to the interpretation of s 10 of PEPUDA leads to the compelling conclusion that the legislature sought to provide protection as broadly as possible, by imposing liability for expressions in any of the forms set out in the lead-in part of s 10(1) that can reasonably be construed to have *any one* of the results set out in subsections (a), (b) and (c). C Albertyn, B Goldblat and C Roedere *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* ed (2001), describe PEPUDA as an 'obvious attempt by the legislature to widen the cover of hate speech'. I pause to observe that the provisions of s 10(1) are more restricted in one limited sense, namely, that it prohibits the publishing, propagation, advocacy or communication of 'words', which is a narrower limitation than the constitutional limitation on 'expression' which extends beyond words. One might rightly ask why that distinction is drawn.

[68] The difficulty in dealing with the standard set in s 10(1) of PEPUDA in relation to the constitutional standard provided by s 16(2)(c) is that the former is barely intelligible. Albertyn *et al* cannot be faulted for stating that s 10 of PEPUDA as well as other sections

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<sup>46</sup> See Albertyn *et al*, fn 44 above, at 92 and 95-96.

<sup>47</sup> (Emphasis in original.)

of that legislation, 'are exceptionally difficult to understand'.<sup>48</sup> The authors go on to state that it is doubtful that the average person 'will be able to use the Act to guide his or her conduct clearly'. They contend, in my view correctly, that in addition to the vagueness that attends the sections generally, there are certain provisions that are particularly vague. In this regard, the authors point to the difficulty of determining what 'hurtful' in s 10(1)(a) of PEPUDA was meant to capture. I cannot agree more. 'Hurtful' is defined in the *Concise Oxford English Dictionary*<sup>49</sup> as 'causing distress; upsetting'. It involves an attack on a person's feelings or emotions as in 'that was a very hurtful remark'. The *Shorter Oxford English Dictionary*<sup>50</sup> makes it clear that injury to feelings is the primary consequence of words that are hurtful. It gives 'causing hurt; harmful; detrimental; wounding to feelings' as its definition. The *Cambridge Dictionary* defines it as 'causing emotional pain. The *Merriam-Webster Dictionary* gives the definition as 'causing injury, detriment or suffering'. The *Collins English Dictionary* explains that 'if someone's comments or actions are hurtful, you mean that they are unkind or upsetting'. The common feature of all these definitions is that they are concerned with a person's subjective emotions and feelings in response to the actions of a third party. This does not equate with causing harm or incitement to harm.

[69] The reader will recall that Professor Nel considered repeated pronouncements by churches, that homosexuality is a sin, as hurtful. One could say that pronouncements by agnostics and atheists, that the clergy and people of faith believe in fairy tales and could rightly be condemned for being irrational and that they have no place in an evolved society, would be equally hurtful to those targeted. Of course, it does not mean that pronouncements by any of the constituencies referred to above, might not, depending on their nature and what is being advocated, in addition to statements of belief or conviction, enter upon territory that might bring them within the limitation contemplated by s 16(2)(c) of the Constitution or, indeed, that it might not attract criminal sanction depending on what is being advocated or expressed. However, besides the question of how control could be exercised jurisprudentially in respect of hurtful words, daily human interaction produces

<sup>48</sup> Albertyn *et al*, fn 44 above, at 96.

<sup>49</sup> A Stevenson & M Waite *Concise Oxford English Dictionary* 12ed (2011).

<sup>50</sup> *Shorter Oxford English Dictionary on Historical Principles* 6 ed A-M (2007).

a multitude of instances where hurtful words are uttered<sup>51</sup> and thus, to prohibit words that have that effect, is going too far. So, too, a host of jokes might be hurtful to those who bear the brunt of them. Are we to entertain complaints that extend to jokes that are not within the limitations of s 16(2)(c) of the Constitution? In the Canadian case of *Lund v Boisson*, 2012 ABCA 300, the following was said:

'Language which is offensive and hurtful to others does not necessarily qualify as hateful or contemptuous speech.'<sup>52</sup>

Professor Pierre de Vos, in dealing with hurtfulness as a concept and in contending that everyday conversation in South Africa would, in terms of s 10(1)(a) be prohibited, says the following:

'This is so absurdly broad that it is difficult to see how . . . the hate speech provision is nevertheless justifiable in terms of the limitation clause.'<sup>53</sup>

He goes on to state:

'The current provision is also bad on policy grounds. In a vibrant democracy which respects difference and diversity – also diversity of opinion – it would be dangerous to ban all speech that could be construed as intending to be hurtful to another person merely because of that person's race, sex, sexual orientation, religion, language, ethnicity, culture or age. Some of us remember all too well how the apartheid government tried to censor our thoughts and our speech. Do we really want to go back to a situation where we are so scared to express our deeply and sincerely held and honest opinions that we shut up because we fear we might be found guilty of hate speech?'

[70] I accept unreservedly that harm envisaged in s 16 of the Constitution and contemplated in the provisions of s 10(1) of PEPUDA, need not necessarily be physical harm, but can be related to psychological impact. However, the impact has to be more than just hurtful in the dictionary sense. What is clear is that s 10, as best as can possibly be discerned, travels far beyond the limitation envisaged by s 16(2)(c) of the Constitution. One must be careful not to stifle the views of those who speak out of genuine conviction and who do not fall within the limitation set by s 16(2)(c) and where there is no justification

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<sup>51</sup> In this regard see *Albertyn et al*, fn 44 above, at 96.

<sup>52</sup> Para 60.

<sup>53</sup> See De Vos, fn 44 above.



for such limitation in an open and democratic society based on human rights, dignity, equality and freedom.

[71] In an attempt to overcome the difficulties described above, it was submitted on the Minister's behalf that the complaint lodged in the equality court was lodged, both in terms of ss 10 and 11 of PEPUDA as well as in terms of s 16 of the Constitution. That submission is fallacious. First, the founding affidavit by the HRC is adamant that the application was brought in terms of s 20(1)(f) of PEPUDA, which reads as follows:

'(1) Proceedings under this Act may be instituted by –

...

(f) the South African Human Rights Commission, or the Commission for Gender Equality.'

Proceedings in the equality court are instituted in terms of s 20 of PEPUDA and are conducted within that legislative framework. Orders are issued in terms of s 21. It is thus to the provisions of PEPUDA, primarily s 10(1), read with associated sections, that one must turn one's attention.

[72] Second, the founding affidavit by the HRC makes it clear that the complaint was based squarely on the prohibition of hate speech in terms of s 10 of PEPUDA. In this regard, the relevant part of para 21 of the affidavit is pertinent. It reads as follows:

'[T]he contents of the article and cartoon amount to hate speech as contemplated in section 10 of PEPUDA, read with section 9(4) of the Constitution, which provides as follows:

#### 21.1.1 Section 10 of PEPUDA

"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibition grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred."

#### 21.1.2 Section 9(4) of the Constitution

"No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

[73] Third, the HRC made no reference to s 11 of PEPUDA in its founding affidavit. Section 11 of PEPUDA provides:

'No person may subject any person to harassment.'

The proceedings in the equality court were conducted on the basis of an enquiry in relation to s 10 of PEPUDA, read with the necessarily associated provisions. Section 11 is dealt with summarily in the judgment of Moshidi J and the issue of harassment was referred to the SAPS for possible prosecution in terms of the Harassment Act 17 of 2011. There was no finding by the equality court that Mr Qwelane was guilty of harassment. Mr Qwelane's attack on s 11 in his application to have it declared unconstitutional must be seen in light of the afore-going. It is thus understandable that, before us, no attention in oral argument was paid to the provisions of s 11 by any of the parties or the *amici*.

[74] Fourth, in relation to the Minister's reliance on s 16, it must be pointed out that there is no such thing in the equality court as a complaint or enquiry in terms of s 16 of the Constitution. In the present case s 16 was raised because of the challenge to the constitutionality of the provisions of s 10(1) read with s 1 of PEPUDA. In any event, the submission on behalf of the Minister offends against the principle of subsidiarity. The Constitutional Court has repeatedly held that where legislation has been enacted to give effect to a right, litigants should rely on that legislation in order to give effect to the right or, alternatively, challenge the legislation as being inconsistent with the Constitution.<sup>54</sup> In the present case, the HRC and the LGBTI community sought relief in terms of the provisions of PEPUDA. It is under that legislation that the proceedings in the equality court were instituted and it is in terms of provisions of PEPUDA that Moshidi J made certain findings. The challenge to PEPUDA by Mr Qwelane was that it was unconstitutional in that it was inconsistent with the provisions of s 16 of the Constitution. That is the principal issue in this appeal. It is now necessary to consider whether the proviso in s 12 of PEPUDA narrows the ambit of s 10(1) of PEPUDA so as to render it constitutionally permissible.

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<sup>54</sup> See *Mazibuko & others v City of Johannesburg & others* [2009] ZACC 28; 2010 (4) SA 1 (CC). See also the discussion in C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 132-133 and the authorities there cited.

### The proviso in s 12 of PEPUDA

[75] It has been suggested that the proviso in s 12 of PEPUDA might assist in narrowing the limitation on freedom of expression by s 10 of PEPUDA.<sup>55</sup> Section 10 is said to be subject to 'the proviso' in s 12. For convenience, I once again set out the proviso:

'Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.'

The proviso, by its nature and content is clearly an exclusionary enactment. It excludes from the limitation of freedom of expression the engagement in or promotion of any of the stipulated activities.<sup>56</sup>

[76] It will be recalled that Moshidi J held that it was plain that Mr Qwelane did not publish the offending article in order to engage in or promote any of the activities envisaged in the proviso to s 12 of PEPUDA. It is fair to say that this conclusion cannot be faulted. Mr Qwelane gave vent to his bigotry, was strident, provocative and unapologetic about it. The article had nothing to do with the proviso. That having been said, it must be noted that Albertyn *et al* are also correct in stating that s 12 is difficult to interpret. That is especially so with the concluding part of the proviso, namely, publication of any information, advertisement or notice *in accordance* with s 16 of the Constitution. It is difficult to discern what that means. For present purposes it is not necessary to explore this aspect any further.

[77] It is clear from the preceding paragraphs that s 10(1) of PEPUDA cannot on any reasonable interpretation be equated with the provisions of s 16(2) of the Constitution. It extends far beyond the limitations on freedom of expression provided for in the Constitution and in many respects is unclear.

### Justification

<sup>55</sup> See Albertyn *et al*, fn 44 above, at 93-94.

<sup>56</sup> In Albertyn *et al* the following is stated at 93:

'Thus, the proviso limits the scope of the definition of "hate speech" under the Act and allows certain expression, that would otherwise be prohibited by s 10, to be protected.'

[78] As shown above, the affidavit opposing the application by Mr Qwelane, to have the impugned provisions declared unconstitutional, provided virtually no justification by the Minister for the present form of s 10(1) of PEPUDA and the associated provisions. It was submitted on behalf of the Minister that what has to be borne in mind, in considering whether there was indeed justification in terms of s 36 of the Constitution, are the repeated violations of the rights of members of the LGBTI community and the repeated efforts to marginalise and dehumanise the community. The provisions of s 10(1) of PEPUDA are opaque and as best as can be discerned, travel far beyond the reach of the prohibition in s 16 of the Constitution and cannot be construed in the manner favoured by the HRC and the Society, namely, that it does approximate the provisions of s 16 or that it is narrowed by application of the proviso in s 12. I intend to consider whether, on an examination of comparable constitutional regimes, limitations that are akin to or come close to the provisions of s 10 of PEPUDA can be found elsewhere.

[79] T J Webb 'Verbal Poison – Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System',<sup>57</sup> as stated earlier, is a useful guide to international instruments dealing with hate speech and to comparable foreign law. At the outset, the author recognises that the regulation of hate speech poses a complex constitutional problem because it conflicts with freedom of expression. The author wrote principally in relation to the United States of America (the USA), and noted that the emphasis that the country places on free speech is unique. The first amendment provides that congress shall make no law abridging the freedom of speech, or of the press, and recognises that free speech is the cornerstone of American society. That, notwithstanding, the constitutional protection of free speech in the USA does not encompass all forms of expression. Certain categories of speech may be regulated. Categories that are exempt from limitations on the government's power to regulate speech, include fighting words, advocacy of crime, defamation, obscenity, matters of national security and commercial speech. In *Beauharnais v Illinois* 343 U.S. 250 (1952), the U.S. Supreme Court upheld a man's conviction for violating an Illinois statute, forbidding the publication of material that would expose 'any race, color, creed or religion

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<sup>57</sup> T J Webb 'Verbal Poison – Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System' (2011) 50 *Washburn LJ* 445-482.

to contempt, derision, or obloquy or which is productive of breach of the peace or riots'. Additionally, such presentation must be 'made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented'.

[80] In *Virginia v Black* 538 U.S. 343, the court heard a consolidated case of two individuals convicted under a Virginia statute making it 'unlawful for any person . . . with the intent of intimidating any person or group of persons, to burn or cause to be burned, a cross on the property of another, a highway or other public place'. The court held that the government may possibly regulate such actions, because of the harm resulting from intimidation. The court's decision emphasized the importance of establishing a *mens rea* connection. Specifically, it must be proven that the actor had the actual intent to intimidate.

[81] The cases referred to in the preceding two paragraphs involve regulation of hate speech by way of establishing a criminal offence and providing a sanction. Establishing *mens rea* must be seen in that context and it is far removed from the reasonably construed intention of s 10 of PEPUDA. By opting for regulation of hate speech by way of PEPUDA, our legislature has up to now not followed the United States example of regulation of hate expression by way of specific criminal offences with concomitant sanction. This might well be because incitement to cause physical or significant psychological harm could be met in South Africa by existing criminal law such as the Intimidation Act 72 of 1982.<sup>58</sup> There is currently for consideration before Parliament the Prevention and Combating of Hate Crimes and Hate Speech Bill, which no doubt Parliament will take time to ensure is tailored to be within constitutionally permissible parameters. The enactment of PEPUDA appears to have been motivated more by the drive to promote equality than to prevent hate speech. The hate speech provision appears to be tagged onto PEPUDA, which is concerned principally with promoting equality and preventing discrimination with the emphasis on remedial action.

[82] Webb points to Canada as a country that offers 'the most balanced and developed examples of hate speech regulation'. Like most, if not all democratic systems, Canada

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<sup>58</sup> See ss 1 and 2 thereof.

accepts that freedom of expression is a critical feature of democracy, but takes the approach that freedom of expression is not absolute. Hate speech is criminalised and regulated within the criminal justice system. In Canada, unlike the USA, where the right to freedom of expression has a unique position, greater emphasis is placed on the right to equality and the value of diversity and multiculturalism. Hate speech is thus more rigorously regulated in Canada. In this regard see *R v Keegstra* [1990] 3 R.C.S at 697. However, the following is also stated at 771:

'The criminal nature of the impugned provision, involving the associated risks of prejudice through prosecution, conviction and the imposition of up to two years' imprisonment, indicates that the means embodied in hate propaganda legislation *should be carefully tailored so as to minimize impairment of the freedom of expression*. It therefore must be shown that s. 319(2) is a measured and appropriate response to the phenomenon of hate propaganda, and that it does not overly circumscribe the s. 2(b) guarantee.' (My emphasis.)

The tailoring envisaged in the dictum is in line with what is set out in para 51 of *Islamic Unity* and referred to in para 50 above. It is also worth mentioning that we do not have a hierarchy of rights with one trumping another.<sup>59</sup> When rights come into conflict, the constitutional standard is one of proportionality as envisaged in s 36 of the Constitution.

[83] Webb also deals with the regulation of hate speech in Germany. German law rejects free speech protection when there is an attack on human dignity. Its hate law provisions protect against insult, defamation and other forms of verbal assault. It must of course be remembered that regulation in Germany must be seen in the context of atrocities orchestrated historically under the Nazi regime. Section 130(1) of the German criminal code makes it unlawful to 'in a manner capable of disturbing the peace . . . incite hatred against segments of the population or call for violent or arbitrary measures against them; or . . . assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population . . . .' Other provisions prohibit disseminating, displaying, supplying, producing, or facilitating the use of written materials that incite hatred. There, too, there is regulation by way of criminal prosecution and sanction.

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<sup>59</sup> In this regards, see, amongst others, *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae)* [2005] ZACC 7; 2006 (1) SA 144 (CC) para 47.

[84] In relation to South Africa, Webb remarks that we followed the international movement to regulate speech by adopting s 16(2) of the Constitution. In this regard, he asserts that our historical racial divisions must have played a prominent role in adopting hate speech regulation. He correctly notes that human dignity is emphasised in our constitution. In relation to the limitation clause, he had regard to the provisions of PEPUDA and, more particularly, s 10(1). He accepts that it sets 'a low threshold for violation' and that speech need only be reasonably construed as being intended to have certain consequences. I have already dealt at length with that threshold. Although it is unclear, he appears to suggest that a constitutional amendment entrenching the lower threshold might be an option to be considered.<sup>60</sup>

[85] None of the democracies referred to by Webb have regulation in a form that is akin to or that even comes close to s 10(1) of PEPUDA. Before us, unsurprisingly, no counsel could point to any decision or regulation in any comparable democratic system which equates with, or even comes close to, the lower threshold contained in s 10(1) even assuming that it is intelligible. We can all agree that it is important to protect the dignity of all our citizens. Equally, we must agree, given our history, that freedom of expression must also be prized. That does not mean that hate speech beyond the provisions of s 16 cannot be proscribed. It must, however, be tailored so as to comply with constitutional precepts and it must survive a justification analysis.

[86] The interpretation of legislation in conformity with the Constitution, often called 'reading-down', is to avoid inconsistency between the law and the Constitution. It is important to bear in mind that this exercise is limited to what the text is reasonably capable of meaning. It is to be distinguished from the 'reading-in' of missing words from a statutory provision. In this regard, see the decision of the Constitutional Court in *Moyo & another v Minister of Police & others*; *Sonti & another v Minister of Police & others*.<sup>61</sup> At para 57, the court said the following:

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<sup>60</sup> Webb, fn 57 above, 463-464.

<sup>61</sup> *Moyo & another v Minister of Police & others*; *Sonti & another v Minister of Police & others* [2019] ZACC 40 para 56.

‘When attempting to interpret legislation by “reading-down” a section in order to bring it into conformity with the Constitution, care should be taken to stay within the boundaries of a reasonable and plausible construction that does not rewrite the text. To overstep this mark would be tantamount to the actual “reading-in” of words into the statute. To do so would be a clear breach of the separation of powers. So much was said in *Abahlali*,<sup>62</sup> where an approach that sought to add at least six qualifications to the text was held to be “an intrusive interpretation” that “offends requirements of the rule of law and the separation of powers”.

[87] In the present case, in interpreting the legislation in question, one should be aware that one is dealing with competing constitutional rights and with the Legislature’s understandable concern that hate speech should not be allowed to threaten the constitutional project. It is clear, as observed by commentators, that it wanted to regulate hate speech as broadly as possible. Unfortunately, it did not do so with the necessary precision and within constitutional bounds. Bearing in mind the Legislature’s purpose, one should not, however, lose sight of other significant factors, which I allude to hereafter. The powers of an Equality Court adjudicating a complaint as provided for in s 21 of PEPUDA are extensive. If a complaint is held to be justified, the court may, after an enquiry, *inter alia*, make an order for payment of damages. Furthermore, it may grant interdictory and/or mandatory relief. An Equality Court may order an audit of policies of practices implicated by an enquiry. Significantly, an Equality Court may, in terms of s 21(4) of PEPUDA, direct the clerk of the court to refer the matter before it to the Director of Public Prosecutions for the possible institution of criminal proceedings in terms of the common law or relevant legislation.

[88] To sum up, mindful of the provisions of s 39 of the Constitution, the provisions of s 10 of PEPUDA cannot be saved by an interpretive exercise. The problems set out above in relation thereto are too extensive and s 10(1) of PEPUDA cannot be interpreted so as to render it consistent with, rather than inimical, to the Constitution. What was said in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*<sup>63</sup> in

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<sup>62</sup> *Abahlali baseMjondolo Movement SA & another v Premier of the Province of Kwazulu-Natal & others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC).

<sup>63</sup> 1996 (1) SACR 587 (CC).



relation to the overbroad statutory definition there in question, might well be said of the proscription in s 10(1) of PEPUDA. The following appears at para 77:

'The overbreadth of the definition with which we are here concerned can scarcely be described as marginal. It is not as if we are confronted merely with a peripheral excess in scope, surrounding an identifiable proscriptive core that targets constitutionally unprotected material. Rather, the virtually unlimited range of unconstitutional potential application of the Act overwhelms whatever permissible proscription might be identified.'

One does not know beforehand what conduct is prohibited and citizens cannot be expected to know what is required of them. As noted in *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others*:<sup>64</sup>

'[T]he Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.'<sup>65</sup>

For all the reasons set out above, s 10(1) of PEPUDA, in its present form is unconstitutional.

## Remedy

[89] In light of the conclusion reached in the preceding paragraph, s 172(1) of the Constitution looms large. That section of the Constitution reads as follows:

'(1) When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including -

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[90] In *Islamic Unity*, the Constitutional Court taught that various considerations come into play in deciding on an appropriate order. It said the following at para 54:

'On the one hand, there is recognition of the importance of regulation in the public interest. The implications of striking down the impugned provision for government and for the public interest

<sup>64</sup> 2001 (1) SA 545 (CC) para 24. (Citations omitted.)

<sup>65</sup> See also *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs; Thomas & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC) paras 47-48.

must be assessed, as well as the time it will take for Parliament to come up with new legislation. On the other hand, there is the need for this Court to fulfil a judicial and not a legislative role, while at the same time ensuring that as far as possible the relief protects freedom of expression as enshrined in the Constitution.'

[91] In that case the Constitutional Court considered various forms of relief, including severance, notional severance and the striking down of the relevant portion of clause 2(a) of the Code, with nothing in its place. It also had regard to the suggestion of a declaration of invalidity for a specific period to enable Parliament to enact appropriate legislation. The court was concerned that if the clause was struck down in its entirety, with nothing to replace it, a dangerous gap would result and held that it was not in the public interest to do so. In that case it urged the government to attend to the matter with some urgency, in order for it to fulfil its constitutional mandate. At para 57 of *Islamic Unity*, Langa DCJ said the following:

'I consider that an order which is just and equitable would be a notional severance formulated so as to ensure that the relevant part of clause 2(a) is rendered ineffective in its application to protected expression, but that a prohibition is left in place to prevent the broadcasting of unprotected expression as referred to in s 16(2) of the Constitution. Such an approach would meet the concerns of the applicant, address the legitimate concerns raised by the Board about protecting people's dignity and the values of equality and national unity, while at the same time ensuring that the requirements of the Constitution are met. It will be open to the Legislature to decide to keep regulation at this minimal level or to regulate further subject to the provisions of s 36(1).'

What follows is the relevant part of the order in that case:

'3. The decision of the Witwatersrand High Court declining to consider the issue of the constitutionality of clause 2(a) of the Code of Conduct for Broadcasting Services as contained in Schedule 1 to the Independent Broadcasting Authority Act 153 of 1993 is hereby set aside.

4. Clause 2(a) of the said Code of Conduct for Broadcasting Services is declared to be inconsistent with s 16 of the Constitution and invalid to the extent that it prohibits the broadcasting of material that is "likely to prejudice relations between sections of the population"; provided that this order does not apply to (i) propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

[92] In engaging in severance and/or reading-in the court must be astute to ensure that the result is sufficiently precise so as to 'impair the legislative purpose as little as possible while removing the constitutional complaint'.<sup>66</sup> In the present case it appears to me to be desirable to keep in place a form of redress through the informal, less costly, process of proceedings in the equality court for vulnerable groups,<sup>67</sup> whilst staying within the constraints of the Constitution. This will involve not only severance in relation to provisions of s 10(1) of PEPUDA, but also a reading-in of provisions in line with s 16(2)(c) of the Constitution. So, too, the consequent s 10(2) of PEPUDA requires concomitant retailoring. One can hardly argue that the legislature was not intent on ensuring at least the minimum protection by way of limitation of free expression in the terms set out in s 16(2)(c) and that would be in keeping with the framework of PEPUDA the object of which is to promote equality and regulate hate speech.

[93] As stated earlier, it is clear that the legislature intended widening the protection against hate speech, even though it did so in constitutionally impermissible terms. It should be afforded an opportunity to broaden the protection in terms consonant with the Constitution. It appears to me to be necessary to provide for an interim measure pending the finalisation of the legislative process, which already appears by way of the Bill referred to above to have commenced, or by way of an amendment to s 10(1) of PEPUDA.<sup>68</sup>

[94] I am not unmindful of the threat to life, limb and psyche that members of the LGBTI community face. I will take care in crafting a remedy to ensure that they are not left without

<sup>66</sup> See D W Freedman, R M Robinson and E S Pugsley 'Constitutional Law: Bill of Rights' *Lawsa* 2 ed (2012) 5(4), para 56 and the cases there cited, including *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) para 56; *S v Manamela & another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 56; *Dawood & another v Minister of Home Affairs & others*; *Shalabi & another v Minister of Home Affairs & others*; *Thomas & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC) para 62; *S v Niemand* 2002 (1) SA 21 (CC) para 32; *Zondi v MEC for Traditional and Local Government Affairs & others* [2004] ZACC 19; 2005 (3) SA 589 (CC), *South African Liquor Traders' Association & others v Chairperson, Gauteng Liquor Board & others* [2006] ZACC 7; 2009 (1) SA 565 (CC) paras 29-34; and *Gory v Kolver NO & others (Starke and others Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC).

<sup>67</sup> See *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, & others (No 2)* [2009] ZASCA 50; 2009 (6) 589 (SCA) paras 52-53

<sup>68</sup> See the order crafted by the Constitutional Court in *Minister of Justice & others v Prince & others* [2019] ZACC 30; 2018 (6) SA 393 (CC) para 128.

recourse. It must be emphasised that in crafting a remedy that will protect vulnerable groupings against the dreadful consequences of hate speech, care must be taken to ensure that it is tailored to meet constitutional prescripts.

[95] The effect of crafting an interim order pending the legislative process must mean that the finding of the equality court falls to be set aside and that the HRC and the LGBTI community have to make further choices in relation to dealing with the decade long complaint against Mr Qwelane. The exercise of reading-in so as to provide an interim measure cannot, in terms of the fundamentals of the rule of law, have retrospective effect. A statutory proscription is in place.<sup>69</sup> It was not in that form when the article was published or the complaint adjudicated. In the Criminal Law sphere the rule against retrospectivity is given effect to by the maxim, *nullum crimen sine lege*, which is an expression of the principle of legality, an incident of the rule of law. It also implicates the rule against retrospectivity.<sup>70</sup> We were informed by counsel on Mr Qwelane's behalf that he was ailing. He had iconic status and fought hard against the divisions of the past. He might well want to consider that it is worth preserving that legacy by seeking rapprochement, even now. I urge him to do so. We have to, in our beloved country, find a way in which to relate to each other more graciously. Even the most fleeting exposure to news items reveals how particularly in public discourse we disagree in the most disagreeable manner. Differences of opinion are often laced with vitriol. We should be allowed to be firm in our convictions and to differ on the basis of conscience. What we are not free to do is to infringe the rights of others and we certainly are not free to inflict physical or psychological harm on others.

[96] The following order is made:

- 1 The appeal is upheld with costs.
- 2 The order of Moshidi J is set aside and substituted as follows:

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<sup>69</sup> See *Phaahla v Minister of Justice and Correctional Services & another* [2019] ZACC 18; 2019 (2) SACR 88 (CC) para 85 and *Savoi & others v National Director of Public Prosecutions & another* [2014] ZACC 5; 2014 (5) SA 317 (CC) paras 74-76. See also an interesting discussion on the formal and substantive aspects of the rule of law in Lord Bingham 'The Rule of Law' (2007) 66 *Cambridge LJ* 67-85.

<sup>70</sup> See J M Burchell (ed) *South African Criminal Law and Procedure* (1997) at 28-30.

(a.) Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is declared to be inconsistent with the provisions of s 16 of the Constitution and is therefore unconstitutional and invalid.

(b.) The complaint by the South African Human Rights Commission against Mr Qwelane in terms of s 10 of PEPUDA is dismissed.

(c.) Parliament is afforded a period of 18 (eighteen) months from 29 November 2019 to remedy the defect.

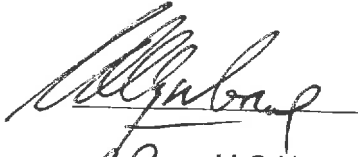
(d.) During the aforesaid period s 10 of PEPUDA shall read as follows:

“10(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.

10(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the advocacy of hatred that is based on race, ethnicity, gender, religion or sexual orientation, and that constitutes incitement to cause harm, as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”

(e.) Section 10, in the form set out in para (d.), will fall away upon the coming into operation of a legislative amendment to s 10, or its repeal by a statute dealing with the regulation of hate speech. Should Parliament fail to effect such changes by the end of the period referred to in (c.) above, s 10 in the form set out in (d.) will become final.

(f.) This order is referred to the Constitutional Court in terms of s 172(2)(a) of the Constitution for confirmation of the order of constitutional invalidity.”

  
M S Navsa  
Judge of Appeal

## APPEARANCES

- For Appellant: M Oppenheimer
- Instructed by:  
Jurgens Bekker Attorneys, Bedfordview  
Rossouws Attorneys, Bloemfontein
- For First Respondent: T Ngcukaitobi (with him O Mokgotho and T Ramogale)  
Instructed by:  
Bowman Gilfillan Attorneys, Sandton  
Honey Attorneys, Bloemfontein
- For Second Respondent: K D Mhango (with her D Gondo)
- Instructed by:  
The State Attorney, Johannesburg  
The State Attorney, Bloemfontein
- For First *Amicus*: S L Shangisa (with him M M Ka-Siboto)
- Instructed by:  
Freedom of Expression Institute, Richmond  
SMO Seobe Attorneys, Bloemfontein
- For Second *Amicus*: K Hofmeyr (with her C Steinberg, D Smit and H Cassim)
- Instructed by:  
Webber Wentzel Attorneys, Sandton  
Webbers Attorneys, Bloemfontein