REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT AND EQUALITY COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: EQ44/2009 (EQ13/2012)
CASE NO: 36314/2013

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED. ✓

18/8/2017 .... DATE .... SIGNATURE

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant
and	
QWELANE, DUBULA JONATHAN ("*JON*")	Respondent
and	
FREEDOM OF EXPRESSION INSTITUTE	First *Amicus Curiae*
PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Second *Amicus Curiae*

AND

JONATHAN DUBULA QWELANE	Applicant
and	
MINISTER FOR JUSTICE AND CORRECTIONAL SERVICES	First Respondent

SOUTH AFRICAN HUMAN RIGHTS COMMISSION Second Respondent

and

FREEDOM OF EXPRESSION INSTITUTE First *Amicus Curiae*

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA Second *Amicus Curiae*

SUMMARY

Equality legislation – hate speech – what constitutes *onus* of proof – defences thereto – sections 1, 10, 11 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) – the applicant uttering statements in Sunday Sun newspaper derogatory to homosexuals and members of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community – comparing their conduct to bestiality – applicant challenging constitutionality of provisions of Equality Act in regard to hate speech – based on the right to freedom of expression as enshrined *in* section 16 of the Constitution – however, right to freedom of speech is not limitless as envisaged in section 36(1) of Constitution – constitutional challenge dismissed as not having merit – appropriate remedy in equality legislation as envisaged in section 21 of the Equality Act.

JUDGMENT

MOSHIDI J:

INTRODUCTION

[1] This matter comes to me in the Equality Court, having its origin in the Johannesburg Magistrate's Court (sitting as an Equality Court), and where the complaint was initially instituted by the South African Human Rights Commission (the Commission) against Mr Dubula Jonathan Qwelane (Qwelane).

THE BACKGROUND

[2] The proceedings in the Johannesburg Magistrate's Court were in terms of the provisions of s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), (the Equality Court proceedings).

[3] Shortly prior to the Equality Court proceedings being heard, Qwelane, as applicant there, applied for the stay of the proceedings. The reason for the stay was in essence his challenge against the constitutionality of the provisions of s 10(1) read with ss 1, 11 and 12 of the Equality Act in the High Court (the constitutional challenge). For the sake of brevity, and in order to

arrive speedily at what is before me presently, the matter came before Van Oosten J of this local division during November 2014. This culminated in an order in the following terms:

"*The Equality Court proceedings and the constitutional challenge proceedings are consolidated for hearing before a single judge sitting as Equality Court and as High Court. The costs of the application for consolidation shall be the costs in the consolidated proceedings.*"[1] The matter is therefore properly before me.

THE PARTIES

[4] In these proceedings, and for convenience, I shall refer to Qwelane as (the applicant), the Minister of Justice and Constitutional Development (now Minister of Justice and Correctional Services) as (the first respondent); the Commission as (the second respondent); the Freedom of Expression Institute (as the first *amicus curiae*) and the Psychological Society of South Africa as (the second *amicus curiae*), respectively.

THE EQUALITY COURT PROCEEDINGS

[5] It is convenient to first deal with the second respondent's (the Commission's) complaint and equality proceedings against the applicant (Qwelane). This, for instant and proper context and content of the entire

[1] *Qwelane v Minister of Justice and Constitutional Development and Others* 2015 (2) SA 493 (GJ) para 11.

matter. The complaint is instituted in terms of the provisions of s 10(1) of the Equality Act, which provides that:

> "*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;*
>
> *(c) promote or propagate hatred.*"

Section 11 of the Act provides that "*no person may subject any person to harassment*". For the sake of completeness, s 12, in turn, provides that:

> "*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.*"

[6] In regard to the institution of proceedings, s 20(1) of the Equality Act provides that:

> "*(1) Proceedings under this Act may be instituted by –*
>
> *(a) any person acting in their own interest;*
>
> *(b) any person acting on behalf of another person who cannot act in their own name;*

> *(c) any person acting as a member of, or in the interests of, a group or class of persons;*
>
> *(d) any person acting in the public interest;*
>
> *(e) any association acting in the interest of its members;*
>
> *(f) the South African Human Rights Commission, or the Commission for Gender Equality."*

From this, it is clear that the second respondent has the requisite *locus standi* to institute the present proceedings. It is equally plain that access to the Equality Court does not have the traditional and restrictive procedural red tape. The procedure thereat is also aimed to be informal as mirrored by ss such as s 21(1) of the Equality Act which refers to an "*inquiry*". In my view, all of this point to the fulfilment of the right to access to courts, as enshrined in s 34 of the Constitution.

[7] Indeed, there are other relevant provisions of the Act in adjudicating complaints such as the one under discussion. However, for present purposes, ss 1 (the definitions) and 2 (the objects), come to the fore. Section 1 defines '*discrimination*' as

> *"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –*
>
> *(a) imposes burdens, obligations or disadvantage on; or*
>
> *(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."*

"*Equality*" is defined as including "*the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes*".

"*Harassment*", means

> "*unwarranted conduct which is persistent or serious and demeans, humiliates or creates hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –*
>
> *(a) sex, gender or sexual orientation, or*
>
> *(b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such groups.*"

On the other hand, and significantly relevant here, the '*prohibited grounds*', are:

> "(a) *race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or*
>
> *(c) 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).*"

I shall later below deal with the objects of the Equality Act, as well as the importance and significance of the right to dignity, and freedom of expression and other rights entrenched in the Bill of Rights. I shall also refer to other provisions of the Equality Act, where relevant and necessary.

THE INSTANT COMPLAINT

[8] Having sketched partially the legal framework, I revert to the instant complaint. The second respondent complains that the article written by the applicant, and published in the Sunday Sun newspaper on 20 July 2008 titled "*Call me names – but gay is not okay*" (the offending statements), contravene the provisions of s 10(1) of the Equality Act. At that stage, the applicant was a popular columnist of the Sunday Sun newspaper which isowned by Media24 Ltd (Media24).

THE OFFENDING STATEMENTS IN FULL

[9] It is appropriate for full and proper context, to reproduce the pertinent parts of the offending statements in full:

> *"… The real problem, as I see it, is 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 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! … 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 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?"*

On the same page of the offending statements, appeared a cartoon (the cartoon) depicting a couple, that is a man and a goat kneeling in front of a priest to be "*married*". Above the cartoon appears the caption: "***WHEN HUMAN RIGHTS MEET ANIMAL RIGHTS***", and "***I NOW PRONOUNCE YOU MAN AND GOAT***". It is common cause that the applicant was not the author or creator of the cartoon.

FURTHER COMMON CAUSE FACTS

[10] The following is equally common cause: pursuant to the publication of the offending statements, and the cartoon in the Sunday Sun newspaper on Sunday 20 July 2008, there was a huge public outcry expressing disapproval. In addition, the Commission according to the evidence led, in particular the evidence of Mr Pandelis Gregoriou (Gregoriou), the Commission's Head of Legal Services, received some 350 complaints from various people and sources relating to the publication of the offending statements and cartoon. Some of the complainants approached the Press Ombudsman which conducted its own investigations against the applicant and Media24. Indeed, the outcomes of these investigations are truly irrelevant for present purposes. It is, however, noteworthy that some of the complaints emanated from gay persons; a cross-section of community members, and organisations such as the Joint Working Group (JWG) – a national network representing twenty-four (24) Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) organisations across South Africa, and People Opposed to Women Abuse (POWA). The common tone and gist of the complaints came to this: that the offending

statements and accompanying cartoon amount to hate speech; are based on the prohibited grounds of discrimination based on sexual orientation and marital status; advocated hatred against a particular group of people, notably, homosexuals; are intended to be hurtful, harmful, incite harm, and promote or propagate hatred; infringe upon various constitutionally guaranteed human rights and freedoms of homosexuals; and seek to demoralise homosexuals by drawing a comparison between homosexuality and bestiality, and thereby violating their inherent right to human dignity, and by implication, dehumanising and '*criminalising*' homosexuals. The complaint indeed forms the subject matter of the present proceedings.

THE PREAMBLE TO THE EQUALITY ACT

[11] In addition to the legal framework sketched above, it is instructive to refer to other provisions of the Equality Act at this stage as well as the Constitution. The preamble to the Equality Act provides, *inter alia*, that:

> *"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."*

Other significant parts of the preamble provide that:

> *"... Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy; the basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality,*

freedom and social justice in a united, non-racial and non-sexist society where all may flourish; South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination; section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality …" (emphasis added)[2]

In my view, from this, it is plain that: also in the sphere of equality legislation, much is still left to be done to redress past inequalities in our '*must be jealously guarded*' growing democracy; that the rights to dignity and to have such dignity respected and protected are critical;[3] that the rights to freedom and social justice in a non-sexist society must be allowed to flourish; that South Africa has international obligations under binding undertakings in the field of human rights and which promote equality and forbid unfair discrimination; and that s 9 of the Constitution makes provision for the enactment of national legislation to prevent or forbid unfair discrimination, and to achieve the objective of an equal society. I venture to suggest that, since the advent of the Equality Act, there was/is a clear mandate to our courts to be actively involved in the creation and advancement of the guiding jurisprudence on equality. Indeed, this is mirrored in the provisions of s 9 of the Constitution as well as the objects of the Equality Act, as dealt with immediately below.

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[2] The rest of the preamble to the Equality Act reads as follows:

> "*This implies the achievement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and continue to endure the consequences; this Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.*"

[3] See section 10 of the Constitution which provides that:

> "*Everyone has the inherent dignity and the right to have their dignity respected and protected.*"

THE PROVISIONS OF SECTION 9 OF THE CONSTITUTION

[12] Section 9 of the Constitution is of significant importance in the context of the present proceedings.[4] The Equality Act is clearly the '*national legislation*' envisaged in the section. The section unequivocally entrenches the right to equality where it guarantees everyone to the right of equality before the law, as well as the right to equal protection and benefit of the law. The court in *Minister of Home Affairs and Another v Fourie and Another (Doctors For Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others,*[5] said:

> *"A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of their human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not denials of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of*

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[4] See section 9 which provides that:

> *"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
>
> *(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
>
> *(4) 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.*
>
> *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

[5] *Minister of Home Affairs and Another v Fourie and Another (Doctors For Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

> *heterosexual exclusivity, a source of connection in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test for tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting.*" (footnotes omitted)[6]

[13] From the provisions of s 9 of the Constitution, it is plain once more that s 9(2) specifically makes provision for '*legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination*'. Section 9(4), which is more pertinent here, makes provision for the enactment of national legislation to prevent or

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[6] *Minister of Home Affairs and Another v Fourie and Another (Doctors For Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* supra para 60. Para 61 reads as follows:

> "As was said by this Court in Christian Education there are a number of constitional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in s18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm. The point was made in *Christian Education* that these provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. For present purposes it needs to be added that acknowledgment of the diversity that flows different forms of sexual orientation will provide an extra and distinctive thread to the national tapestry. The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect. In the words of the Preamble, South Africa belongs to all who live in it, united in diversity. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same sex couples are made to feel like outsiders who do not fully belong in the universe of equals." (footnotes omitted)

prohibit unfair discrimination. In this regard, Schedule 6 of the Constitution under item 23(1) provides that:

> "*National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.*"

As mentioned elsewhere, the Equality Act, which commenced on 16 June 2003, is part of such national legislation. This demonstrates the close relationship between the Constitution and the Equality Act. It is equally plain from the provisions of s 9 that all persons should not only be unfairly discriminated against, but should also be provided with protection against utterances which have a severe impact on the psychological well-being of vulnerable minorities, such as homosexuals in our society.

[14] The above provisions of the Constitution are mirrored in certain sections of the Equality Act, notably, s 2 of the Act, which provides as follows:

> "*The objects of the 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)(e) of the Constitution and section 12 of this Act; ...*
>
> *More relevant and pertinent here, sections 2(c), (d) and (f) of the Act makes provision for measures in order to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability; and provision for procedures for the determination of circumstances under which discrimination is unfair; provision of measures to educate the public and race public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment; and, the provision for remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed, respectively.*" (underlining added)[7]

Indeed, these objectives are rather profound and significant in the adjudication of matters such as the instant proceedings. This is so especially when regard is had to the powers and functions of the Equality Court in terms of s 21(1) of the Act, which provides, *inter alia*, that the Equality Court before which proceedings are instituted in terms of or under this Act, must hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged. In doing so, the Equality Court, must bear in mind the burden of proof as set out in s 13 of the Act, which loosely paraphrased provides that, the complainant (in this case, the Commission) must make out a *prima facie* case of discrimination, in which event, the respondent (in this case Qwelane), must prove, on the facts before the court, that the discrimination did not take place as alleged, or that the respondent must prove that the conduct is not based on one or more of the prohibited grounds. Alternatively, if the discrimination occurred, within the purview of the prohibited grounds, that ought to be classified as being unfair, unless the respondent is able to prove that such discrimination is fair, or the discrimination causes or perpetuates systemic

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[7] See entire section 2.

disadvantage; or undermines human dignity; or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground such as sexual orientation (as in this case), then it is unfair, unless the respondent succeeds in proving that the discrimination is fair.[8] It appears to me that it would be the proper approach, when in adopting the interpretational approach as envisaged in s 3 of the Equality Act, as well as the burden of proof in s 3, the status and profile of the offender are irrelevant for present purposes. In regard to the *onus* of proof, it is now settled in our law that the Commission in this case must make out its case on a balance of probabilities. The *locus classicus* in our law is *Pillay v Krishna and Another*,[9] and as discussed in subsequent cases like *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.[10] These require no elaboration for present purposes.

[15] It is significant to observe that in regard to the complaint in terms of the Equality Act, the applicant (Qwelane) baldly disputes that the offending statements and cartoon are hurtful or cause harm to the Lesbian, Gay, Bisexual, Transgender and Intersex ("LGBTI") community. He however, claims entitlement to the publication of the offending statements and cartoon, with exemption based on his right to freedom of expression as entrenched in s 16 of the Constitution. He, in essence, is contending that the offending statements and cartoon are protected under the Constitution, and therefore do not amount to hate speech, and he cannot therefore be held accountable

[8] See the rest of section 13 of the Equality Act.
[9] *Pillay v Krishna and Another* 1946 AD 946 at 951.
[10] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

under the equality legislation. Incidentally, the applicant also denies any involvement in the composition of the cartoon which accompanied the publication of the statements.

[16] Section 16 of the Constitution provides that:

> *"(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.*
>
> *(2) The right in subsection (1) does not extend to –*
>
> *(a) propaganda for war;*
>
> *(b) incitement of imminent violence; or*
>
> *(c) advocacy for hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

[17] It is so that much has been written both in our country and internationally about the potential tension between the constitutionally entrenched right to freedom of expression and local national legislation or regulation. It is equally accepted generally that the right to freedom of expression, although indispensable in a democratic society, especially a developing democracy like ours, is however, not limitless.[11] As shown later below, it will always depend on the particular circumstances of each case, and having due regard to other entrenched rights, such as the critical rights to

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[11] See section 36(1) of the Constitution.

human dignity and equality before the law, and the local or national legislation concerned, as well as the interpretational instruments applicable thereto.

[18] In our country, and context, on a proper construction of s 16(2) of the Constitution, the following emerge: the Commission's complaint is that the applicant's offending statements, strengthened by the accompanying cartoon, amount to hate speech targeted at homosexuals in particular, as envisaged in the national legislation, namely s 10(1) of the Equality Act. However, the question of hate speech is properly addressed in, in my view, in s 16(2) of the Constitution. The section stipulates that the right to freedom of expression, guaranteed in s 16(1), does not in fact extend to the conduct set out in s 16(2). It therefore means that such conduct is excluded from the purview of the constitutional protection but is otherwise afforded to expressive conduct. For in *Islamic Unity Convention v Independent Broadcasting Authority,*[12] our Constitutional Court said:

> "*Section 16 is in two parts. 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 ss (subsection 1) does not extend ...' 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 acknowledgment that certain speech does not deserve 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.*"[13]

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[12] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).
[13] *Islamic Unity Convention v Independent Broadcasting Authority supra* para 31

The court proceeded to state as follows:

> *"Three categories of expression are enumerated in s 16(2). They are expressed in specific and defined terms. Section 16(2)(a) and (b) are respectively concerned with 'propaganda for war' and 'incitement of imminent violence'. Section 16(2)(c) is directed at what is commonly referred to as hate speech. What is not protected by the Constitution is expression of 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."*[14]

[19] I must observe immediately that the above interpretational guidance to s 16 of the Constitution was made by our Constitutional Court after previously stating that:

> *"The right has been described as 'one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members … As such it is protected in almost every international human rights instrument. In Handy Side v The United Kingdom the European Court of Human Rights pointed out that this approach to 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"*.[15] (footnotes omitted)

In addition, it must also be observed that the Constitutional Court made the findings referred to above in paragraphs 31 to 33, pursuant to finding that the right to freedom of expression in s 16(1) is not absolute, and like other rights, it is subject to limitation under s 36(1) of the Constitution. The finding was

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[14] *Islamic Unity Convention v Independent Broadcasting Authority supra* para 33.
[15] *Islamic Unity Convention v Independent Broadcasting Authority supra* para 28.

also made after a careful balancing of the right to freedom of expression and other rights, including those in national legislation. Finally, I must also observe quite interestingly too, that in the present matter, counsel for the first *amicus curiae*, the Freedom of Expression Institute, Ms Yacoob, has, with some attractive articulation, placed great reliance on the right to human dignity as enshrined in s 10 of the Constitution, and sounding an interesting warning to this Court not to find the offending statements to amount to hate speech. More about this submission later below when the constitutional challenge launched by the applicant is discussed.

[20] Prior to discussing further what amounts to hate speech in the context of the instant matter, and dealing briefly with the evidence led, I must observe further that the constitutional prohibition on hate speech has in fact been given practical legislative effect by the Equality Act. This Act was enacted following s 9(4) of the Constitution which provides, as stated before, that national legislation must be enacted in order to prevent or prohibit unfair discrimination. As such, the hate speech, contended for by the Commission here, falls squarely into the category of conduct that perpetuates systemic patterns of discrimination, and as a direct consequence, the Equality Act aims at prohibiting such conduct. In *Islamic Unity Convention*[16], *supra*, it was held that, open and democratic societies permit reasonable prescription of activities and expression that pose a real and substantial threat to such values (of human rights, and the achievement of equality and the advancement of human rights and freedoms) and to the constitutional order itself, and that

[16] *Islamic Unity Convention v Independent Broadcasting Authority supra.*

many societies also accept limits on free speech in order to protect the fairness of trials. Further, that, speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.[17] Thomas J. Webb provides:

> "*Today, nearly every nation across the globe regulates hate speech in some way to promote human dignity and protect minorities from verbal prosecution. The United States, however, rests in the minority, and it remains the only country to expressly protect it. It protects hate speech under the pretext of promoting individualism as a 'cornerstone' of society. The United States holds the freedom of speech above other rights such as human dignity and social good. This approach, however, fails to adequately implement provisions of key international covenants and conventions; in other words, the United States is in violation of international law. Furthermore, in the absence of regulation, the United States, in effect, has become a safe haven for the promotion of hate speech.*"[18] (footnotes omitted)

It is therefore my view that the Equality Act ideally provides the appropriate legislative framework within which the present complaint must be adjudicated. There can clearly be no other approach.

[21] With the above in mind, I turn firstly, to the evidence led in this inquiry. The evidence is extensive which, in my view ought to be allowed within certain limitations and discretion by Equality Courts, particularly in order for the courts to collate and construct sufficient jurisprudence in matters of this nature in a developing democracy. There is a patent need for guidance to lower courts in what is relative legislation and the correct interpretational approach thereto.[19] In the course of the exercise of my discretion, I disallowed cross-examination of one of the applicant's witnesses, Mr Bennie

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[17] ,*supra*, para 29.
[18] Thomas J. Webb '*Verbal Poison-Criminalizing Hate Speech: A comparative Analysis and a Proposal for the American System*' 50 Washburn L.J. 445 2010-2011 at 446.
[19] *Afriforum and Another v Malema and Another* 2011 (6) SA 240 [EqC] para 58.

Viljoen (Viljoen) by counsel for the second *amicus curiae*. This, after an objection was raised by the applicant's counsel. I instead requested such questions aimed at cross-examination to be reduced to writing, and shown to me in chambers after a brief adjournment. The decision not to allow cross-examination was based, having in mind the special role of an *amicus curiae* tritely accepted, as well as the interest of justice. For example, *In re: Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign*,[20] where the Constitutional Court held that:

> *"The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participation in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence."*[21]

In the end, the cross-examination was not persisted with and no visible prejudice raised.

[22] The significant point to be made in regard to the approach to s 10 of the Equality Act is that the provisions of this section ought to be interpreted having due regard to the necessity of striking the correct and delicate balancing between the right to freedom of expression and the right to equality and dignity which the Equality Act aims to protect.

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[20] *In re: Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC).

[21] *In re: Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC) para 5. See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 9 and Uniform Rule 16A.

THE ORAL EVIDENCE

[23] In the course of substantiating its contentions that the offending statements amount to hate speech, the Commission led the evidence of some three witnesses. As mentioned earlier, one of such witnesses is Gregoriou. In short, he is employed by the Commission, and dealt with the present complaint at some stage in the course and scope of his employment. According to his evidence the Commission received numerous complaints, in the region of about 530. This was unusually high. However, and significantly, the complaints, which were categorised as based on sexual orientation, against members of the LGBTI community, predated the publication of the offending statements in 2008. The complaints had already commenced in 2006 up to April 2009. One source of such complaints is POWA, which shows recent incidents of violence perpetrated against black lesbian and transgender women in our country.

[24] What is particularly worrisome revealed by the evidence of Gregoriou, and other later witnesses called by the Commission, and which was not seriously contested, is the following: numerous of the complaints of violence, and ill-treatment of the LGBTI community were referred to the South African Police Services (SAPS), with little or no success at all. The statistics of the complaints were tabled and some continued from about 2012 to 2013 up to 2017, and long after the publication of the offending statements.

[25] I must at the outset observe that, the allegations levelled against the SAPS by the Commission's witnesses, in particular in regard to the complaints referred to it for investigation, which appear to be probable, bringing into reckoning immediately, the provisions of s 21(4) of the Equality Act. The section provides, *inter alia*, that, 'the court may, during or after the inquiry, refer its concerns in any proceedings before it, particularly in the case of persistent contravention or failure to comply with a provision of this Act or in the course of systemic unfair discrimination, hate speech or harassment to any relevant constitutional institution for further investigation' (emphasis added). The relevance of this provision becomes apparent later below.

[26] The evidence of Gregoriou explains that the various complaints systematically relate to physical assaults, expression of violence, and discrimination against LGBTI members (these include refusal of access to venues or denial of medical treatment); death threats and the calling of derogatory expletives; and generally hate speech. Further, the denial of adoption to gay couples, and denial or refusal to marry same sex couples.

[27] The gist of the evidence of Gregoriou, which mirrors the contention of the Commission, is that: the offending statements and cartoon, constitute hate speech levelled against the LGBTI community. The reference to President Robert Mugabe, with his unflinchingly and unapologetic stance towards homosexuals, that gays and lesbians don't deserve constitutional protection, not deserving of human rights; compares gays and lesbians to animals. The applicant's unrepented attitude towards homosexuals and their

backers, insults the inherent part of their being. The applicant's call for the amendment of our Constitution to not allow same sex couples to be married, classifies them as community outsiders, and classifies members of the LGBTI community as different on the basis of their sexual orientation; and discriminates against and reduces their dignity, and not having the same rights and privileges as other human beings. The same applies to the applicant's reference to, '*otherwise at this rate how soon before some idiot*' demands to marry animals and argues that this Constitution allows it, '*which illustrates dehumanization of members of the LGBTI*'; Finally, that the entire offending statements and cartoon, when properly analysed, and construed by a reasonable person, is hateful, harmful and incite harm in terms of the severe psychological and emotional harm inflicted on the targeted LGBTI members of the community, and in violation of the applicable equality legislation. The comparison of homosexuals to animals like goats, which relates to bestiality, was deeply concerning and dehumanising.

THE EVIDENCE OF MS N MOKOENA

[28] The next witness for the Commission was Ms Nonhlanhla Mokoena (Mokoena). Her evidence extends over some 42 pages of the transcript. In brief, as a qualified social worker and Executive Director of POWA, her organisation provides support, counselling and shelter to female survivors of domestic violence in the community, in particular to lesbians. Most of the victims targeted, come from previously disadvantaged communities, such as Soweto, Katlehong, Vosloorus, Alberton and Tembisa.

[29] The victims, who are brave enough to approach POWA, often endure secondary victimisation when they report cases to the SAPS, who refuse to cooperate and investigate their complaints. Some of the cases reported to SAPS are extremely serious, ranging from harassment, physical assault, rape and even murder. Indeed, the evidence in this regard is extensive on the record, and require no unnecessary repetition here, save for its impact, which is for possible later consideration. The additional reason is that the evidence could not be reasonably controverted. However, worthy of mention here is a complaint received by POWA emanating from a Lesbian woman staying in Katlehong, just east of Johannesburg. The victim approached the Katlehong Police Station after she was raped. She was accompanied by her lesbian partner. The police officer involved refused to open a case of rape, because, "*boys cannot be raped, we are not going to open a case for you because you are boys. Boys cannot be raped*". POWA has lodged numerous similar complaints with the Commission.

[30] In the view of Mokoena and POWA, the offending statements by the applicant, are deeply hurtful and harmful to the targeted group, namely the LGBTI community. Mokoena testified further that the salient basis for POWA's and Mokoena's unhappiness about the offending statements, in her words is that:

> *"Homosexuality is not a lifestyle; homosexuals do not choose their lifestyles; they are human beings, are equal before the law; and in making the offending statements, the applicant, was in a position of excessive power and influence, fuelling potential violence against the vulnerable LGBTI community."*[22]

[31] I mention in brief some of the specific complaints of violence reported to POWA, on the evidence of Mokoena. There are at least five such: on 28 April 2008, one Ms Y Simelane (Simelane) a well-known former football player for the national soccer team, Banyanya Banyanya, was brutally murdered and allegedly gang raped by five men in a township in KwaThema, Springs, east of Johannesburg. She was a lesbian; prior to that and on 7 July 2007, one Sizakele Sikasa, an outreach coordinator at Positive Women's Network and LGBTI rights activists, and her friend, Salome Masuna, were tortured, raped, and brutally murdered in Soweto. On 22 July 2007, Thokozani Qwabe, a 23 year black lesbian, was found dead after being stoned, in a field in Ladysmith, KwaZulu-Natal. In June 2007, Smangele Nhlapho, a member of a support group for women living with AIDS/HIV, was found dead with her 2 year old daughter. They were both raped and killed. On 4 February 2006, Zoliswa Nkonyana, a 19 year old black lesbian, was slapped, beaten and stabbed to death by a group of 20 men between the ages of 17 and 20.

[32] The above specific incidents of ill-treatment of members of the LGBTI, are but a skeleton of the evidence of Mokoena. The transcript of the record is replete with other incidents. All the incidents were reported to the Commission and SAPS. However, what is of significance was Mokoena's evidence during cross-examination where she conceded readily that her

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[22] See transcript record, vol 1, page 135.

organisation, POWA, did not receive specific complaints of acts of violence aimed at the members of the LGBTI community because of the applicant's publication in 2008. In the view of Mokoena, the reference made by the applicant to President Robert Mugabe in the offending statements, suggested that he shares the views that homosexuals are animals, that is dogs and pigs. Mokoena conceded that the publication of the article resulted in a huge public debate.

THE EVIDENCE OF MS M NDLOVU (MN)

[33] The evidence of the final witness called by the Commission, Ms M Ndlovu (MN) a 52 year old lesbian, was, by agreement, heard *in camera* on certain conditions. Her evidence too, which was extensive, must be greatly summarised for present purposes. In essence, she testified about her own personal experiences of homophobia in many instances and in different forms and manner. She has been brutalised with people calling her by all sorts of derogatory names. For example, she has been called anti-Christ or devil, with allegations that she is a lesbian because she has not had "real sexual intercourse" with a man. If she did this, she will change and become heterosexual.[23] The witness testified that she has been discriminated against as a result of her sexual orientation. In this regard, she was barred from using a women's toilet, and was dismissed from her employment due to insults from customers relating to her sexual orientation. MN has also been attacked physically as a result of her sexual orientation. The attacks preceded the

[23] See her statement as MN and marked X6.

beatings by calling her derogatory names or challenging her to fight as she thinks she is a man. She has been threatened with rape because the perpetrators contend that this will correct her and change her into a heterosexual. In the view of MN, the offending statements of the applicant are hurtful and showed a disregard of the LGBTI community. In particular, to the extent that the statements contend that by allowing same sex marriages, soon marrying an animal will be allowed, this is an attack on the dignity and equality of the LGBTI and that the statements are an insult to her. It came as no surprise that, in the course of her evidence, MN broke down when she recalled the vicious nature of the attacks on her. These attacks were accompanied by, as mentioned, hateful slurs, while spectators stood by and said she must defend herself because she acts like a man. She never bothered to report some of the incidents as in her words "*the law does not protect people like me*". She said that the persistent victimisation she experienced in her life made her feel that she had "*passed on*", namely that she had died inside. Like Mokoena, MN said that the endorsement by the applicant of the views of President Robert Mugabe who called homosexuals animals like dogs, were hurtful and painful utterances, and displayed deep hatred to the LGBTI community.

[34] The cross-examination of MN was limited and focussed on certain issues only. She does not know the applicant personally except seeing him in the press. She believes that the applicant has never interacted with people like her who he hates. Like Mokoena, MN conceded readily that the incidents perpetrated on her can not be directly linked to the applicant's offending

statements. However, she added that the offending statements were exacerbating the current situation where people like her are being harassed.

THE EVIDENCE OF MR B C VILJOEN

[35] At the close of the Commission's case, one witness only, Mr Ben Christiaan Viljoen (Viljoen), testified for the applicant. At the time of his testimony, he was the Deputy Editor of the Sunday Sun newspaper in which the offending statements appeared in July 2008. At the time, Viljoen was the Production Editor of the newspaper. The offending statements appeared in the conversation column pages of the newspaper, which is intended to encourage conversation and debate.

[36] In regard to the internal processes of the newspaper, which are not seriously relevant here, Viljoen testified that, once the offending statements were submitted by the applicant and approved, the column would normally be accompanied by a cartoon. The applicant had no part to play in the creation of the cartoon.

[37] Following the publication of the offending statements, the newspaper received numerous complaints relating thereto. At the time, the target market, a mass market, was predominantly 99% black. It had a readership of about 2,5 million, the majority of which were black living in the traditional townships, informal settlements, and in suburbs. The target group is described as particularly homophobic. The newspaper subsequently published an apology

through its publisher, Mr Du Plessis. There were also proceedings brought by the Commission against both Media24 and the applicant.

[38] It is rather significant, in the context of this matter, that Viljoen in evidence-in-chief testified that the offending statements ought never to have been published in the first place. He said, in answer to a question whether the statements were offensive: "*I think it is reprehensible.*" Later on he said:

> "*Yes, I think the column should not have been published. I think it was a moral issue and I think there was poor judgment on the publisher and the editorial staff. I would say I wouldn't have published however I don't think it's illegal to have published dribble.*"[24]

This was repeated at the commencement of cross-examination, with the addition and acceptance that the offending statements are hurtful to the members of the LGBTI. In further cross-examination, Viljoen conceded that given the context of the residence, in which the gay and lesbians live, the offending statements have the potential of further harming the group. He also conceded that according to President Robert Mugabe, gays and lesbians are animals and therefore sub-humans, and when observed in the streets, they must be arrested and handed over to the police, which stance the applicant supports.

THE EVIDENCE OF PROFESSOR S A NEL

[39] At the conclusion of the applicant's case, the Psychological Society of South Africa (the second *amicus curiae*), led the evidence of Professor Sean

[24] See transcript, vol 2, pages 229 to 230.

Adriaan Nel (Nel). He is a Research Professor at the University of South Africa (UNISA) and duly rated by the National Research Foundation, under the Department of Science and Technology, as a Research Psychologist. In addition to research work and clinical work at the SAPS, he became involved in LGBTI activism at UNISA. Nel, himself is a gay person. He testified extensively about his own ill-treatment and discrimination meted out on him by virtue of his gay and sexual orientation status.

[40] The evidence of Nel extends over some 180 pages of the transcript of the record.[25] It too, requires extensive summary. In short, in relation to the kinds of psychological impact that the applicant's offending statements had on the LGBTI community, Nel said:

> *"The statements, coming from a high profiled, a reputed struggle-hero and journalist, like the applicant, as well as the platform he had (a columnist on the Sunday Sun newspaper), that these statements appeal to the deeply felt cultural, religious and social prejudices held by its audience; it equated homosexuality to bestiality, a deeply entrenched prejudice against the LGBTI community; the statements denigrated the intimate relationships of the LGBTI people and placed that community outside of the norm; the statements assumed a sexual identity which is not a choice, and treated it as if it were a type of lifestyle, which is susceptible to change or beaten out of a person or victim. Announcing or telling persons, at the time when there were high levels of physical violence against the LGBTI community, that they are 'not ok', as the statements highlighted, is deeply damaging to their imposed psyche."*

This approach to the evidence of Nel is aptly described in the second amicus curiae's heads of argument. There were no witnesses called by the remaining parties.

[25] See transcript from page 258 to 439.

[41] It is on the basis of the entirety of the above evidence, which was allowed generally in this case, as well as the provisions and objects of the Equality Act, and limited mention of certain case law and others, that the complaint of the Commission, coupled with the applicant's constitutional challenge, must now be adjudicated upon. The elements of proper content and context remain crucial, and from the perspective of a reasonable reader, apart from the subjective intentions of the offender.

[42] First, as mentioned before, whether the Commission, as supported by other parties, save for the Freedom of Expression Institute (the first *amicus curiae*), has succeeded in discharging the *onus* of proving, on a balance of probabilities, that the offending statements amount to hate speech as envisaged in the applicable equality legislation outlined above.

<u>HATE SPEECH</u>

[43] Most recently, this Court, sitting as an Equality Court, and in the matter of the *South African Human Rights Commission, on behalf of the South African Jewish Board of Deputies against Bongani Masuku* [first respondent) *and Another* (Equality Court Case Number 01/2012), found that, the impugned statements made by the first respondent concerning the Jewish people, amount to hate speech as envisaged in s 10 of the Equality Act.[26] The finding (excluding any constitutional challenge) was arrived at pursuant to

[26] See judgment delivered on 29 June 2017.

extensive review of what constitutes hate speech here and abroad. For present purposes, it is truly unnecessary to repeat all such review.

[44] However, briefly stated, hate speech, has been defined variously up to now, as a readily discernible phenomenon. Also most recently, in this High Court, and in a matter which is currently highly topical, and in *Afriforum and Another v Malema and Another*, *supra*, had to consider whether the singing of the song in "*Dubula Ibhunu*" (kill the boer), by the African National Congress (ANC) Youth League's Julius Malema, and whether the song constituted hate speech in terms of the Equality Act (s 10(1)). In the course of the judgment, the Court (Lamont J), held that the song on its own, was created at the time when the oppressive apartheid regime was a system of government to be overthrown, however, despite this the political climate has changed, and the singing of the song has the ability to incite harm to persons belonging to the target group.[27] *Webb*, states the following:

> "*The power of words is limitless. Although words can be used to inspire people and promote good, they also can be used to destroy. In the form of hate speech, words can be 'used as weapons to ambush, terrorize, wound, humiliate and degrade' ... On an individual basis, hate speech inflicts 'emotional pain and distress, intimidation, and fear' on its targets ...*"[28]

[45] I have already dealt with the importance and nature of the right to freedom of expression, as entrenched in s 16 of the Constitution, including that it is not an absolute right. In addition, the Universal Declaration of Human Rights defines freedom of expression as the right of any individual, '*to hold*

[27] *Ibid*, paragraph [108] of judgment.
[28] *Supra*, at 445.

opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.[29] However, it is plain that the right of freedom of expression, with all its broadmindedness and pluralism required for an open and democratic society, like ours, can in fact be compromised by speech which seriously threatens democratic pluralism itself. For Christa van Wyk,[30] states that:

> "*Section 16(2) places certain forms of expression – including certain forms of 'hate speech' – outside the right of freedom of expression and removes them from the ambit of constitutional protection. The right to freedom of expression does not extend to the listed categories of speech, which in advance have been singled out by the framers of the South African Constitution as not deserving constitutional protection, since they have, amongst other things, the potential to impinge adversely on the dignity (one of the core values of the Constitution) of others and cause them harm.*"

In my view, from this, the argument of the first *amicus curiae* in the present matter, and in emphasising the right to dignity, although sound, is misplaced in the context of the equality legislation complaint.

[46] In addition, Article 4 of the Elimination of All Forms of Racial Discrimination of 1965 [ICERD] describes hate speech as:

> "[A]*ny speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates a protected individual or group.*"[31]

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[29] *United Nations General Assembly Universal Declaration of Human Rights* 10 December 1948, 217 A (III), Article 19. See also *Irwin Toy v Quebec (AG)* (1989) 1 SCR 927 at 970, and *Handy Side v The United Kingdom*. 7 December 1976, Application NO 5493/72 European Court of Human Rights para 49.

[30] "*Hate Speech in South Africa*" – available at http.www.stopracism.ca/content/hate speech – South African Accessed 03/03/2017.

[31] Article 4.

This is defined elsewhere as:

> "[S]*peech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground including race, nationality, ethnicity, country of origin, ethno-religious identity, religion, sexuality, gender identity or gender.*"[32]

[47] Indeed, our Constitutional Court has, on several occasions, highlighted the interest of the State in regulating hate speech since it may cause harm to the constitutionally mandated aim of building a non-racial and non-sexist society based on human dignity and the achievement of equality. See for example *Islamic Unity Convention v Independent Broadcasting Authority and Others*, *supra*, at paragraph [33]. In my view, the Equality Court should also follow this approach. The word "*hatred*", and what it entails, was described as "*hatred*" is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another.[33]

[48] With all the above principles in mind, I must revert to the present complaint under the Equality Act. The applicable provisions of the Act have been sketched above. It may be helpful at this stage also to have in mind the provisions of s 11 of the Act quoted above. The word "*harassment*" in this section is defined in s 1, as

> "*... means unwarranted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to*

[32] Linda Daniel (MA Journalism) Candidate, UTS – '*Regulation of Media: Hate Speech Essay*' available at https://lindadaniele.wordpress.com/2013/02/03/regulation-of-the-media-hate-speech-essay/ – accessed 9 February 2017.
[33] *R v Andrews* 43 CCC 3rd 193.

> *induce submission by actual or threatened adverse consequences and which is related to –*
>
> *(a) sex, gender or sexual orientation, or*
>
> *(b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group."*

More about this provision later if necessary.

[49] The offending statements uttered by the applicant, when evaluated objectively, in content and context, speaks ill of the gay and lesbian community, and went further by suggesting that the next step for South Africa will be allowing people to marry animals. It can never be acceptable, in the context and content of the equality legislation, and our democratic society, to equate human beings to bestiality or animals, and suggest to them that they are "*other*" or "*unnatural*". It severely undermines their ability to feel that they belong and have support, which is essential to psychological health and well-being of all humans. It equally did not help that the offending statements were uttered barely some month after President Robert Mugabe had called gay and lesbian people worse than dogs and pigs. The witness Nel, for the Commission, testified in this regard. *In the article Mugabe called on the South African people to strip the LGBTI community of their equal concern and respect. There can never be any direct frontal attack on their dignity than this. The offending statements plainly and unequivocally indicate hatred of homosexual individuals. It is common knowledge from the evidence of Nel and the other witnesses of the Commission that gay and lesbian people, who constitute a vulnerable group in society, and have been subjected to societal discrimination purely on the ground of sexual orientation. They are a

permanent minority in society and have suffered in the past from various patterns of disadvantage. The SAPS too, have not come to the party on the credible evidence. Indeed, this is a matter which must be addressed appropriately later below. The evidence, in particular that of Mokoena and MN, showed convincingly that the offending statements were deeply hurtful and harmful to the victims and targeted group. In addition, all the lay witnesses, as shown above, including Viljoen for the applicant, and Gregoriou, testified and confirmed that in the context in which the offending statements were published, they had the potential to cause harm to members of the LGBTI community. The hurt is exacerbated by the applicant's failure to apologise to the LGBTI community, just like the racist employee in the *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC) at paragraph [45]. It is significant that the evidence of Viljoen, called by the applicant, conceded that the statements were reprehensible, coupled with the above other concessions. It is equally significant that the applicant does not dispute making the statements or their possible implications, but rather rely on his entitlement thereto on the provisions of s 16 of the Constitution. However, as shown later in order to achieve the purpose in s 9(4) of the Constitution, it is permissible for the Equality Act to limit the right in s 16 of the Constitution further than the internal carve out contained in s 16(2), subject to s 36 of the Constitution. The applicant admits this.[34]

[34] See replying affidavit at 493-495.

[50] The Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others,*[35] observed that, society at large has generally, accorded far less respect to them and their intimate relationship with one another than to heterosexuals and their relationships. More importantly, the Constitutional Court proceeded to state that:

> *"Sting of the past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and rationality. It denies the gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays."*[36]

The last quoted sentence, in particular, is of great significance in the context of the instant matter. In the first place, it accords fully with the evidence of in particular, MN and Mokoena. The exception is their honest concession of not directly linking the offending statements to the attacks and discrimination and ill-treatment contained in their evidence. However, this may be irrelevant for purposes of the Equality Act. The actual intention of the perpetrator of hate speech is also not essential when the assessment and evaluation is made properly in context and content and objectively. The second significance from the above quotation is that, it clearly puts paid to the argument based on the rights to equality and dignity in favour of the applicant when all the rights in

[35] *National Coalition for Gay and Lesbian Equality and Others* 2000 (1) BCLR 39 (CC).
[36] *Supra*, para 42.

the Bill of Rights are equally balanced. The further significance, is as I see it, the constitutional and statutory obligation enjoined to the Equality Courts are to protect the rights of brutalised and discriminated minority groups in society, where appropriate, as discussed more fully immediately below.

[51] The Equality Act was enacted to implement s 9 of the Constitution, essentially to prohibit unfair discrimination and harassment; to promote equality; to prohibit hate speech, and to provide for matters connected therewith, as seen from its preamble and objects, and read with the prohibited grounds in s 1. Interestingly, Van Wyk elucidates the interaction between the hate speech provisions of the Constitution and Equality Act, as follows:

> "*The Act implements and clarifies the constitutional hate speech provision. While the Constitution puts these forms of expression outside constitutional protection, the Act clearly prohibits hate speech and creates rights. It provides remedies to counter the harmful effects of hate speech.*"[37]

One of the important objects of the Equality Act is to give effect to the letter and spirit of the Constitution, in particular, the prevention of unfair discrimination and protection of human dignity as contemplated in ss 9 and 10 of the Constitution, and the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in s 16(2)(c) of the Constitution.[38]

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[37] *Supra*, para 7.

[38] Shaun Teichner, in "*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 SAJHR 349 at 352.

[52] As stated by this Court previously, s 10 of the Equality Act creates two requirements for hate speech, namely:

(1) It must be based on a prohibited ground as contemplated in section 1 of the Act, or any other ground where discrimination based on that other ground promotes or perpetuates systemic disadvantage, and undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground specifically listed; and

(2) It must be reasonably construed to indicate a clear intention to be hurtful, be harmful or incite harm, or to promote or propagate hatred.[39]

It is also plain that s 10(1) is contingent on a significant proviso, namely the *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate publication of information, and advertisement of notice in terms of s 16 of the Constitution, are not precluded from the section. It is also rather significant that the Equality Act uses distinct categories of expression, which it seeks to forbid, and which extends beyond the forms of hate speech which s 16 of the Constitution puts outside the purview of constitutional protection. It is therefore clear that the limitation in s 10(1) of the Equality Act is expressly made subject to, or subordinate to the proviso in s 12 of the Act, as stated above. There is no evil in the proviso at all, since provisos are frequently

[39] *Van Wyk, supra*, para 7.

incorporated in legislative provisions by reference, as argued by the Minister of Justice and Constitutional Development (as it was), in this matter. The offending statements uttered by the applicant contain no constitutional value. It is plain that the offending statements were not produced in order to encourage a debate on homosexuality, but rather to persuade readers of his own views, to position his homophobia and invite others to join him in it. He remains unapologetic for his views. In any event, if it was indeed for the offending statements to spark debate, on issues affecting gay and lesbian people, it would have been up to the applicant to give such evidence in court. As we know, this never happened. This was regrettable. I make no conclusive finding on the reason for such default, since there remains some room for speculation. It is interesting that the second *amicus curiae* in this matter suggested very strongly that the offending statements were also produced for financial gain on the part of the newspaper.

CONCLUSION

[53] For all the above reasons, I must conclude, as I do in the ultimate order below that the Commission has succeeded in making out a case, on a balance of probabilities, that the offending statements amount to hate speech as contemplated in s 10(1) of the Equality Act. More specifically, the offending statements are hurtful and harmful and have the potential of inciting harm towards the LGBTI community, and plainly propagate hatred towards them. It must be recalled that s 10(1) is part of the scheme of the Equality Act designed to give effect to the guarantee of equality and freedoms and the

prohibition against unfair discrimination aimed at in s 9 of the Constitution. The prohibition is intended to protect vulnerable groups against utterances that are intended or calculated to hurt such groups; to incite harm against them, or to promote or propagate harm against such group. In order to achieve this, an objective assessment is required of the offending statements in their factual and social context and content to determine whether such an intention is manifest, and that harm, including in the form of hurt or hatred, is possible. As dealt with in the second part of this judgment, s 10(1) is manifestly broader in scope than s 16(2) of the Constitution, since it includes in its s 1, sexual orientation as a prohibited ground, whereas s 16(2) of the Constitution does not contain such a ground; further that the s (10(1)) does not require incitement to cause harm to be proved for purposes of all subsections (a), (b) and (c) of s 10(1), as quoted above; and prohibits speech that might not necessarily constitute advocacy of hatred. More about this later. I also conclude that the defences of the applicant proffered in terms of s 16 of the Constitution must fail in the context of the complaint under the Equality Act. It also appears to me that, in order for speech to meet the second requirement of s 16(2)(c) of the Constitution, that is that, which constitute incitement to cause harm, does not require proof of actual harm resulting from the offending statements. It is sufficient that the speech has the potential to cause harm.[40] In regard to the appropriate remedy in the present matter, and on which substantive submissions were made by the parties, I deem it necessary to deal with same later below.

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[40] *Islamic Unity Convention supra* para 35.

THE CONSTITUTIONAL CHALLENGE

[54] I must deal with the constitutional challenge of the applicant. The contentions in this regard are extensive. In essence, as alluded to briefly previously, the applicant contends that he was entitled to utter the offending statements since these are protected by s 16 of the Constitution.[41] He seems to suggest that his utterances, without leading any evidence, do not amount to hate speech and protected in particular by s 16(2) of the Constitution and that the hate speech provisions of the Equality Act, in particular, ss 1, 10, 11 and 12, are unconstitutional on the basis that the sections are overbroad and vague. Stated succinctly, the overbreadth challenge alleges that s 10(1) of the Equality Act prohibits excessive speech, whilst the vagueness challenge, contends that, when s 10 is read with the proviso in s 12 of the Act, s 10 is rendered meaningless. The question for decision is therefore whether the challenges are capable of withstanding scrutiny. All these ss are quoted fully in the first part of this judgment. It is not an easy task, clearly.

[55] I commence with the vagueness challenge. It is trite that the test in this regard is a strict one, and not without difficulty, as correctly pointed out by the Minister of Justice and Constitutional Development. For example, in *Affordable Medicines Trust and Others v Minister of Health of RSA and Another*,[42] the constitutionality of certain aspects of a licensing scheme introduced by the government was challenged. The scheme provided that health care providers such as medical practitioners and dentists would not be

[41] See constitutional challenge, bundle 1, para 66 -68.

[42] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC).

permitted to dispense medicines unless they had been issued by the Director-General of the Department of Health (DG) with a licence to do so. The challenge was directed at the powers of the DG to prescribe the different conditions listed in the matter. The Court stated that:

> *"Sub-regulation (18)(5) was challenged on the basis that it was vague and does not conform to the principle of legality. The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it. What is required of them so that they may regulate their conduct accordingly? The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives. And should not be used unduly to impede or prevent the furtherance of such objectives. As the Canadian Supreme Court observed after reviewing the case law of the European Court of Human Rights on the issue:*
>
> > *'Indeed ... laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in the fields governed by public policy circumstances may vary widely in time and from one case to another. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between social interests and individual rights. A measure of generality all sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.'"*[43] (footnotes omitted)

The Court went on to say:

[43] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another supra* para 108.

> *"Where, as here, it is contended that the regulation is vague for uncertainty, the court must first construe the regulation applying the normal rules of construction including those required by constitutional adjudication. The ultimate question is whether so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them."*[44] *(emphasis added)*

[56] From the above principles, several guidelines become clear: the provisions of s 39 of the Bill of Rights come into play. In particular, s 39(2) provides that:

> *"When interpreting any 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."*

The normal rules of construction apply. The question should be asked if so construed whether the legislative provision under attack, indicates with reasonable certainty to those who are bound by it, what is required of them. Reasonable certainty is required, and not perfect lucidity. Caution is undoubtedly required in using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives and a delicate balance must be maintained between societal interests and individual rights. Additionally, s 39(3) of the Bill of Rights guarantees that it does not deny the existence of any other rights or freedoms that are recognised or conferred by, *inter alia*, legislation, to the extent that they are consistent with the Bill (emphasis added). In applying all of the above principles to the facts of the instant matter, it is difficult to discern any impermissible vagueness in the provisions of s 10 of the Equality Act.

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[44] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another supra* para 109.

[57] The objects of the Equality Act have been sketched and dealt with previously. The objects include the enactment of legislation required by s 9 of the Constitution, and also include the provision of remedies for victims of unfair discrimination, hate speech and harassment and persons whose rights to equality have been infringed. The Equality Act must therefore be seen or interpreted in this manner in order to give effect to the Constitution, and be based on the above principles. The provisions of the Equality Act specifically include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination. Section 4, in particular, deals with the guiding principles. It provides that, when applying the Act, the existence of systemic discrimination and inequalities; particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination brought about by colonialism, the apartheid system and patriarchy should be considered. Also, the necessity to take remedial measures at all levels to eliminate such discrimination and equalities; must be considered with the objectives and provisions in mind. In light of this, the impugned provisions are difficult to attack.

[58] To add to the above finding. The first words in s 10(1) of the Equality Act, are clear that the section imposes an objective test in order to determine whether the words in question reflect the requisite intention. Furthermore, the proviso in s 12 is not susceptible to any uncertainty. It is plain that speech that falls within the proviso is not prohibited by s 10, more so that no case has been made out to place the offending statements in the proviso. Furthermore,

the words '*hurtful*' and '*harmful*' are capable of easy and intelligible meaning. Hurt connotes hurt to feelings and harmful relates to physical harm of whatever nature. The evidence led put these concepts into proper context and content.

[59] Having said the above, namely that the proviso under s 12 protects speech that would otherwise be prohibited under s 10 of the Act, it may be argued that the proviso under s 12 of the Act is broad to the extent that it provides *inter alia* that, *bona fide* engagement in artistic creativity, academic and fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with s 16 of the Constitution, is not precluded by this section. This is so since it is conceivable that information published under s 16 of the Constitution may vary extensively and cover all practical speech under s 10. The consequence may be that all speech will fall under the proviso and therefore no such speech will be protected under s 10 of the Equality Act. It is however clear that the legislature has left it open to speakers, whose words cause severe harm, psychological trauma or other forms of harm, to nonetheless escape sanction under the Equality Act if they succeed in proving that their speech pursued one of the central objectives, as argued by the second *amicus curiae*. However, in whatever other manner construed, there is no room for vagueness in s 10 or the proviso in s 12, as indicated.

[60] The provisions of ss 1, 10(1), 11 and 12 of the Equality Act must be interpreted in terms of s 39(2) of the Constitution. The provisions of s 10(1)(a) to (c) must be read conjunctively to ensure that s 1(1) is consistent with section 16 of the Constitution. It is also an interpretation which on general principles is permissible.[45] . In addition, the application of the proviso in s 12 of the Act in relation to s 10 is not impermissibly vague. Section 10(1) only incorporates the proviso in s 12, and not the entirety of s 12. The proviso qualifies the whole of the prohibition in s 10(1).

THE OVERBREADTH CHALLENGE

[61] I must deal with the overbreadth challenge. Based on the principles enunciated above, it is extremely difficult to appreciate this challenge. In essence, the challenge is that s 10(1) of the Equality Act is overbroad because it limits more speech than s 16(2) of the Constitution. In the heads of argument it is contended that s 10(1) of the Equality Act in its current form stifles any forms of public debate emanating from speech based on the protected grounds, especially when certain members of the public would reasonably construe that speech as being hurtful, harmful or offensive. It is further argued that the true test for "*hate speech*" lies in s 16 of the Constitution since s 10(1) of the Equality Act is broader than what the Constitution intended it to be. The argument is supported by the first *amicus curiae*, whilst the second *amicus curiae* opposes it.

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[45] *Ngcobo v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA).

[62] In short, the challenge attacks the disjunctive reading of s 10, and contends that it is not legitimate to interfere with speech merely on the basis that it is hurtful, and that hurtful speech ought not be prohibited. In this regard, reliance is placed on several case law, including certain foreign case law, such as *Saskatchhewan v Human Rights Commission* (a Canadian Supreme Court decision).[46]

[63] The provisions of s 16 of the Constitution have already been dealt with. It is not a limitless right as entrenched in s 36 of the Constitution. The challenge is unfounded since s 16(2) of the Constitution does not protect speech, but lists the three categories of speech that is not constitutionally protected. In order for the challenge to succeed, based on protected speech in s 16(1) of the Constitution, it must demonstrate firstly, why a particular legislative interference is unconstitutional. Secondly, the challenge must show that s 10(1) of the Equality Act prohibits more speech than is reasonable and justifiable. Webb stated that:

> "*Recently, South Africa followed the international movement to regulate speech. The racial divisions during apartheid in South Africa played a prominent role in its push to adopt hate speech regulations. In fact, the concept of human dignity in the South African constitution was added to 'combat the extreme abuses of human dignity in the apartheid era of South Africa. The South African approach includes the addition of a constitutional provision limiting the Freedom of Speech under certain circumstances. In doing so, South Africa formulated its regulation <u>in a manner that can better withstand constitutional challenges</u>.*"[47] (footnotes omitted)

[46] *Saskatchhewan v Human Rights Commission* [2013] 1 SCR 467 para 109.
[47] *Webb supra* at 463.

[64] The challenged provisions of the Equality Act exclude, not only the "*advocacy of hatred*", as does s 16(2) of the Constitution, but also the publication, propagation and communication of words based on the listed grounds. These provisions (of the Equality Act) require that the speech act "*could reasonably be construed to demonstrate a clear intention*", whereas s 16(2) of the Constitution requires speech that, in fact, "*constitutes incitement to cause harm*". The factors in s 10(1) of the Equality Act are broader than the concepts of "*hatred*" or "*incitement to cause harm*" in s 16(2). It is plain that s 16 of the Constitution protects even bad faith engagement in any of the activities listed in its proviso. A proper reading down of s 10(1) of the Equality Act brings into the ambit of s 16(2) of the Constitution. In any event, even if the challenged provisions of the Equality Act prohibits more speech than s 16(2) of the Constitution, that in itself can never be interpreted to constitute overbreadth. It is apparent from the Constitutional Court's jurisprudence that the concept of "*overbreadth*" is limited to instances where the means used, that is the impugned law itself, properly construed, exceeds its constitutionally legitimate underlying objectives.[48] As a consequence, it can hardly be said that a statute suffers from "*overbreadth*" until it is proved that it fails to meet the requirements of the limitations clause in s 36 of the Constitution. It is plain that the impugned provisions of the Equality Court in the present matter do not fail the limitations test, merely because they prohibit more speech than s 16(2) of the Constitution. In my view, and to the contrary, these provisions constitute a reasonable and justifiable limitation of the right to freedom of expression, relied upon by the applicant, because the hate speech of and

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[48] For example, *Case v Minister of Safety and Security: Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC) para 49; and *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) para 18.

extent of the harm that could be caused by speech of the kind prohibited by s 10(1) of the Equality Act, by far outweighs the limited interests of speakers in nevertheless communicating such speech.

[65] The probable effect of the offending statements, coming from a speaker and platform such as proved by the evidence in this case, has been shown by the evidence of Nel. According to him, these types of statements from people in positions of authority have a deeply traumatising impact on members of the LGBTI community. The word "*hurtful*" in s 10(1)(a) of the Equality Act means this type of severe psychological impact. Section 10(1)(a) of the Equality Act should be seen and interpreted in this manner, which will not produce any result of overbreadth. In any event, on proper construction, as stated earlier, the potential of any overbreadth has been narrowed by the first words therein, "*Subject to the proviso in section 12*". The proviso clearly provides a defence to a person (speaker) whose speech would otherwise fall foul of the section. For all these reasons, I find that the constitutional challenge to the impugned provisions of the Equality Act has no merit, and must fail. The finding includes the challenge levelled against s 11 of the Equality Act. As is apparent from its provisions, this section merely provides that, no person may subject any person to harassment. The challenge in this regard is that the section is poorly formulated. Again, whether or not a s of legislation is unconstitutional depends on its proper interpretation, assessed against specific provisions of the Constitution. The interpretation contended for by an interested party only is an irrelevant consideration. Section 11, in simple terms, prohibits harassment. The definition of "*harassment*" in s 1 of

the Equality Act does not detract from the provisions of s 16(2) of the Constitution. There is nothing constitutionally impermissible here.

REMEDY

[66] I must deal with the appropriate remedy. Section 21 of the Equality Act sets out the powers and functions of the Equality Courts. The remedies provided, pursuant to the holding of en inquiry, such as the present, range from remedies such as issuing an interim order, to an order ordering costs against any party to the proceedings. What appears to be an attractive remedy for present purposes, are remedies ordering that an unconditional apology be made and an order directing the clerk of the Equality Court (in this case the registrar of the court) to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible investigation of criminal prosecutions in terms of the common law or relevant legislation.

[67] The provisions of s 21(3) and s 21(4) of the Equality Act are equally significant. These provisions provide that an order made by the Equality Court has the same effect as an order of court made in a civil action. And more importantly that, the Equality Court has the power to refer, "*its concerns in any proceedings before it, particularly in the use of persistent contravention or failure to comply with a provision of this Act or in the use of systemic unfair discrimination, hate speech or harassment to any relevant constitutional institution for further investigation*". In the present case, this remedy brings to mind immediately the alleged conduct of the SAPS, as revealed by the

evidence of POWA and MN, in failing to open cases by them and victims of the LGBTI community. For this reason, I deem it appropriate, if not obligatory, to refer these proceedings to the National Police Commissioner for further investigation and to report back to this Court. At this point, it is of interest to look at the Harassment Act 17 of 2011 (Harassment Act). Section 18 of the Harassment Act criminalises harassment. Harassment is defined as "indirectly or indirectly engaging in conduct that the respondent knows or ought to know causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related persons by unreasonably engaging in verbal, electronic or any other communication aimed at the complainant or a related person; by any means, whether or not conversation ensues.[49] *Mnyandu v Padayachi*[50] provides that for conduct to amount to *harassment* "*the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim; alternatively, the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences*".[51] One seeking therefore to institute proceedings against the applicant based on harassment would have to prove that the conduct was of such an overwhelmingly oppressive nature inducing serious fear or distress in the victim. Section 18(1)(a) provides that where an interim or final protection order has been granted, a person who contravenes the order by contravening any prohibition, condition, obligation or order imposed, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years. Therefore, persons aggrieved by Qwelane's publication are at

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[49] Section 1(1)(a)(ii) of the Harassment Act.
[50] *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP).
[51] *Supra*, para 68.

liberty to approach the courts for an interim or final protection order prohibiting the applicant from committing harassment in terms of the Harassment Act, and follow the necessary procedures stated therein. However if I refer these proceedings to the National Police Commissioner for further investigation I would irrespective of the ultimate outcome of the present case, shall be contributing, hopefully, to carrying out the objects of the equality legislation. It will be helpful for the South African Human Rights Commission and POWA to submit to the National Commissioner of the South African Police Service further and better particulars of all the complaints lodged at various police stations, as revealed by the evidence.

[68] At the conclusion of the proceedings, various and opposing submissions were made regarding an appropriate remedy. For example, the Commission contended for a remedy ordering the payment of damages for emotional or psychological suffering as a result of, *inter alia*, hate speech, and an order for an unconditional apology. I have had due regard to all the submissions. However, in the exercise of my discretion, I am persuaded that in considering all the relevant circumstances of this matter cumulatively, the order made below, will be just and equitable.

COSTS

[69] In regard to costs, which equally is a discretionary matter, I received opposing submissions. The Commission argued, rather convincingly, for an order of costs against the applicant. In favour of the argument is the fact that,

despite his conduct, the applicant (Qwelane) chose to abscond from this Court throughout the proceedings for suspect reasons. The first *amicus curiae* argued against a costs order levelled against it. There is merit in the submission, which should apply equally to the second *amicus curiae*. They were invited as friends of the court and discharged their role in an admirable manner, for which the court is grateful. In fact, the court is indebted to all the counsels who took part in this matter, and their invaluable contributions towards what is relatively a novel matter in equality proceedings. In the exercise of my discretion, and considering all the relevant circumstances, as envisaged in *Biowatch Trust v Registrar, Generic Resources*[52] , it will be just and proper for the applicant to pay the costs.

<u>ORDER</u>

[70] In the result I make the following order:

70.1 The complaint by the Commission as contained in the referral against the applicant (Mr Qwelane) succeeds with costs.

70.2 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 Promotion Act No 4 of 2000.

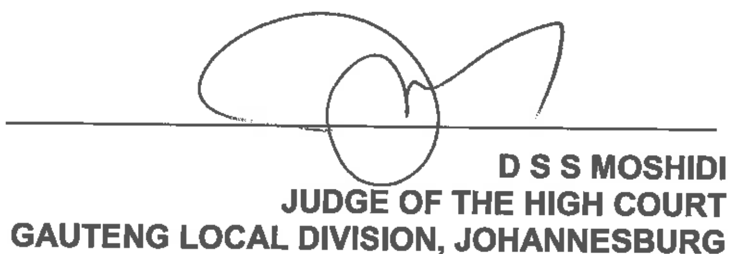
[52] *Biowatch Trust v Registrar, Generic Resources* 2009 (6) SA 232 (CC).

70.3 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.

70.4 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 Promotion Act 4 of 2000 (the Equality Act).

70.5 The constitutional challenge of the applicant is dismissed with costs.

70.6 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.



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DATES OF HEARING	6 MARCH 2017 TO 16 MARCH 2017
DATE OF JUDGMENT	18 AUGUST 2017