THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

***Qwelane v South African Human Rights Commission* (686/2018) [2019] ZASCA 167 (29 November 2019)**

From: The Registrar, Supreme Court of Appeal

Date: 29 November 2019

Status: Immediate

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Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a decision of Moshidi J sitting in the Gauteng Local Division of the High Court, Johannesburg. The appeal was upheld with costs.

The matter dealt with the constitutional validity of s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and was concerned, principally, with the tension between freedom of expression and the regulation of hate speech. At issue was an admittedly offensive article directed against the gay community (the article), authored by well-known anti-apartheid activist, Mr Jonathan Qwelane. It was published in the Sunday Sun on 20 July 2008 under the caption, 'Call me names – but gay is NOT okay', and unambiguously lambastes homosexuals who are, in the view of the appellant, 'against the natural order of things'. The article speaks of a 'rapid degradation of values and traditions' and calls for an amendment to the Constitution to remove the provisions which allow men and women to marry persons of the same sex. What is more, Mr Qwelane makes reference to former Zimbabwean President, Robert Mugabe, and says that he has no issue with his 'unflinching and unapologetic stance over homosexuals'. Exacerbating the offensiveness was a cartoon that appeared on the same page, depicting a man being married to a goat. The caption of the cartoon reads: 'When human rights meet animal rights' and the speech balloon attaching to the priest in front of them reads: 'I now pronounce you, man and goat'.

The publication was met with a huge public outcry. Both the South African Human Rights Commission (the HRC) as well as the press ombud received many complaints concerning the article and the cartoon, which were contended to amount to hate speech against the gay community and discrimination on the basis of sexual orientation and marital status. The press ombud accordingly conducted an investigation against Mr Qwelane and Media24, the public company that owns the Sunday Sun, and held that the newspaper was in breach of section 2.1 of the South African Press Code on three counts. The Sunday Sun was ordered to publish and appropriate apology, which it did in due course.

The HRC then instituted proceedings against Media24 and Mr Qwelane in the equality court, it being alleged that the article was in contravention of s 10(1) of PEPUDA – the provision prohibiting hate speech. In response thereto, both Media24 and Mr Qwelane launched an application in the high court seeking to have s 10(1), read with ss 12 and 1, and s 11 of PEPUDA declared unconstitutional. It was argued that these sections were inconsistent with the provisions of s 16 of the Constitution. The proceedings in the high court and the equality court were consolidated and Moshidi J adjudicated both the complaint by the HRC as well as the constitutional challenge. Both the Freedom of Expression Institute as well as the Psychological Society of South Africa (the Society) participated as *amici*.

Extensive evidence was led in relation to the hate speech allegation. The HRC's head of legal services testified that the HRC had received several complaints by members of the LGBTI community on being discriminated against based on sexual orientation. He also testified that it was difficult to have complaints by members of the LGBTI community investigated by the South African Police Service (SAPS), that some police officers demonstrated an anti-LGBTI disposition, and that members of the LGBTI community complained of being denied access to essential services and being subjected to abuse. He found Mr Qwelane's alignment with the sentiments of Mr Robert Mugabe particularly offensive and considered his remorseless stance to be an aggravation. The court below also heard from the executive director of People Opposing Women Abuse (POWA), who testified inter alia about an instance where police officers refused to open a case of rape because the complainant was a lesbian and, according to the officers, 'boys cannot be raped'.

The court below also heard from a deputy editor of the Sunday Sun at the time the article was published. He testified that a week after the article appeared, a headline banner for the newspaper indicated that Mr Qwelane had taken a beating. The Sunday Sun also published a full page of complaints. The complainants were adamant that Mr Qwelane was guilty of hate speech and called for action to be taken against him. It does not appear as if the Sunday Sun took any disciplinary action against Mr Qwelane. Although the deputy editor agreed that members of the LBGTI community would find the article offensive, his opinion was that a large proportion of the Sunday Sun's readers shared the views of Mr Qwelane.

The Society adduced the evidence of Professor Nel, a research professor and practising clinical psychologist, who testified with reference to articles he had authored and research that had been conducted on the issue of homophobic victimisation and factors affecting vulnerability to depression among gay men and lesbian women. Professor Nel's view was that the plight of members of the LGBTI community was to be seen in the light of them constituting sexual and gender minorities in our largely heteronormative society. It is a community often considered abnormal, discriminated against and victimised, leading to internalised conflict, self-suppression and feelings of shame and guilt. He further contended that hate speech caused people opposed to the LGBTI community to resort to violence and wanting to 'correct' what they consider to be aberrant behaviour. According to him, research indicates that townships and informal settlements are where the highest degree of verbal victimisation is experienced. Professor Nel also testified about the LGBTI community being subjected to secondary victimisation. Many members felt that the criminal justice did not serve them, which led often to a failure to report crimes to the police. He stated that Mr Qwelane's article had caused shock waves within the LGBTI community, the most significant impact being on members of the community's human dignity. The article's reference to Mr Mugabe was degrading and dehumanising because of his (Mr Mugabe's) view of homosexuals being lower than pigs and dogs coming just a few months prior to Mr Qwelane's article. Lastly, Professor Nel contended that the statements in the article are to be seen against Mr Qwelane's status as a celebrity with struggle credentials. The article asserted that homosexuality is wrong and sinful and that it justified victimisation.

On the basis of this evidence, Moshidi J upheld the complaint against Mr Qwelane: the court held that the offending statements against homosexuals were hurtful, incited harm and propagated hatred; and

that they accordingly amounted to hate speech for purposes of s 10(1) of PEPUDA. Mr Qwelane's application to have the impugned sections of PEPUDA declared unconstitutional was dismissed. So, too, were Mr his contentions that the provisions of s 10(1) of PEPUDA were vague and overbroad. The court held that the 'first words' of s 10(1) clearly postulated an objective test; that the proviso to s 12 was not unclear; and that, in any event, no facts were pleaded before it in order for Mr Qwelane to claim the benefit thereof. Section 10(1)(*a*)-(*c*) were held to apply conjunctively so that the section would be consonant with s 16 of the Constitution. Mr Qwelane was ordered to tender an unconditional, written apology to the LGBTI community, which apology was to 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.

The SCA held that the point of departure in determining the appeal was the constitutionality of the impugned provisions of PEPUDA, as this would be foundational to the appeal outcome. The submissions on behalf of Mr Qwelane were that, firstly, s 10(1) of PEPUDA impermissibly extended far beyond the speech excluded from protection by s 16(2) of the Constitution, and, secondly, that the relevant provisions were overbroad and vague and on this basis did not pass constitutional muster.

The SCA referred to the judgment of the Constitutional Court (CC) in *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC) as a relevant and instructive authority on the present issue. In *Islamic Unity* the CC referred to the importance of freedom of expression in a democratic state and noted that the right is protected in almost every international human rights instrument. The CC also noted the dangers of this right and went on to deal with the necessary limitations to the freedom of expression. These are found in s 16(2) of the Constitution, which implicitly acknowledge that certain expression is not deserving of constitutional protection because of the potential harm it may cause through adversely affecting the dignity of others. Expression that falls within the listed categories in s 16(2) would not be a limitation of the right conferred by s 16.

The SCA thereafter scrutinised the provisions of s 10(1) of PEPUDA. Though the provisions certainly restrict the right to freedom of expression, the question was whether they extend beyond the provisions of s 16(2)(*c*) of the Constitution and, if so, whether they were justifiable. The SCA held that s 10(1) was indeed a limitation of the freedom of expression wider than s 16(2)(*c*) of the Constitution. The first manifestation of this is that 16(2)(*c*) excludes from constitutional protection the advocacy of hatred that constitutes incitement to cause harm only on the grounds of race, ethnicity, gender or religion. Section 10(1) of PEPUDA purports to extend those bases to include all of the categories set out under the definition of 'prohibited grounds' in s 1, including sex, pregnancy, marital status, age, disability, conscience, belief, culture, language, birth and HIV/AIDS status; and even any other ground, where discrimination on that ground causes or perpetuates systemic disadvantage, 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 one of the listed grounds.

On whether extending 'prohibited grounds' to include sexual orientation, the SCA had regard to s 9 of the Constitution – the equality clause – and noted that it obliged the state to enact legislation to prevent or prohibit unfair discrimination. This came in the form of PEPUDA. Section 3 provides that those interpreting the Act may be especially mindful of the international agreements referred to in s 2, which sets out the objects of PEPUDA, and may also consider customary international law and comparable foreign law. The SCA noted that international treaties and covenants to which we are signatories provide for protection against discrimination and also the regulation of hate speech, citing the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It held that the state thus has a legitimate interest in promoting equality and prohibiting hate speech that impinges on equality, and accordingly an interest in extending the protection against discrimination, including discrimination based on sexual orientation. It held further that the state has a constitutional obligation to promote and protect the right to human dignity of members of the LGBTI community, which it

purported to do by way of s 10 of PEPUDA. This, together with the clear evidence of the discrimination directed at members of the LGBTI community, meant that Mr Qwelane's contention that the extension of protection to include protection against discrimination based on sexual orientation is constitutionally impermissible, was without merit.

A further problem in relation to the constitutionality of s 10(1) of PEPUDA is the difference in the standard when compared to s 16(2)(*c*) of the Constitution. While the latter requires advocacy of hatred, on one of the listed grounds, that constitutes incitement to cause harm; the former requires an expression, 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. The constitutional standard is objective: an assessment of whether the expression complained of comprises advocacy of hatred on one of the prohibited grounds, followed by a further assessment of whether the advocacy of hatred constitutes incitement to cause harm. The two elements – advocacy of hatred, and incitement to cause harm – are inextricably linked. However, an enquiry under s 10(1) operates differently. After considering whether one of the forms of expression there listed is based on one or more of the prohibited grounds, the following step is to determine whether the words complained of 'could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm, promote or propagate hatred. The HRC, the Minister and the Society all conceded that subsections (*a*), (*b*) and (*c*) of s 10(1) are to be read disjunctively. However, the formulation of the subsections as alternatives decouples the constitutional requirements of advocacy of hatred, and incitement to cause harm. The result is that one, or even neither, of these may lead to a finding of hate speech, which is also an extensive infringement of the right to freedom of expression. Accordingly, any one of the forms of expression that can reasonably be construed to demonstrate a clear intention to have any of the results in subsections (*a*), (*b*) and (*c*) would lead to liability. Any one of the forms of expression not constituting advocacy of hatred nor incitement to cause harm are therefore prohibited under s 10(1) of PEPUDA, another respect in which the section limits the right in s 16(1).

A further problem is that the test under s 10(1) requires the words, as reasonably construed, to demonstrate a clear intention to have any of the results set out in s 10(1)(*a*)-(*c*). The result is to depart significantly from the objective constitutional test and to replace it with the subjective opinion of a reasonable person hearing the words. This was held to be yet another extensive infringement on the right to freedom of expression.

Regarding the first result in s 10(1), namely, 'hurtful', the SCA held that it would be almost impossible for control to be exercised jurisprudentially in respect of hurtful words and that daily human interaction produces a multitude of instances where hurtful words are uttered, but to prohibit words with such an effect would be going too far. Thus, while accepting that the 'harm' envisaged in s 16 of the Constitution, and contemplated in the provisions of s 10(1) of PEPUDA, need not necessarily be physical but may include psychological impact, the SCA found that the impact would need to be more than merely 'hurtful' in the dictionary sense.

The SCA concluded that, in regulating hate speech, s 10(1) of PEPUDA travels far beyond the limitation envisaged by s 16(2)(*c*) of the Constitution. It was suggested that the proviso in s 12 of PEPUDA could assist in narrowing the limitation on freedom of expression by s 10 of PEPUDA, but it was held that Mr Qwelane's article had nothing to do with the proviso.

The SCA thereafter considered whether limitations that are akin or come close to the provisions of s 10 of PEPUDA can be found in comparable constitutional regimes – the United States of America, Canada and Germany. None of the democracies explored had regulation in a form that was akin to, or that even came close to, the lower threshold contained in s 10(1) of PEPUDA.

In the result, the SCA held that the provisions of s 10 of PEPUDA could not be saved by an interpretive exercise to render it consistent with, rather than inimical to, the Constitution. The appeal was upheld with costs; s 10 of PEPUDA was declared to be inconsistent with the provisions of s 16 of the Constitution and therefore unconstitutional and invalid; the complaint by the HRC against Mr Qwelane was dismissed; Parliament was afforded a period of 18 months from 29 November to remedy the defect; and s 10 was recrafted in order to act as an interim provision until Parliament amends the defect. Though not part of its order, the SCA also urged Mr Qwelane to seek rapprochement.
