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DISPUTE RESOLUTION **ALERT**

IN THIS ISSUE >

Speech is powerful: A discussion on the constitutional validity of section 10 of the Equality Act

"It is a truth universally acknowledged that to be hated, despised, and alone is the ultimate fear of all human beings.

Speech is powerful – it has the ability to build, promote and nurture, but it can also denigrate, humiliate and destroy. Hate speech is one of the most devastating modes of subverting the dignity and self-worth of human beings."

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Speech is powerful: A discussion on the constitutional validity of section 10 of the Equality Act

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These words are from the Constitutional Court as it penned another landmark judgment in which it declared section 10(1)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA/Equality Act) unconstitutional.

The background to the matter, *Qwelane v South African Human Rights Commission and Others*, began in 2008, when Jon Qwelane wrote an article that was published in the Sunday Sun newspaper on 20 July 2008. The article was titled *"Call me names – but gay is not okay"*, which was deeply offensive to members of the LGBTQI+ community, and sparked outrage across the country.

As a result of the article, the first respondent, the South African Human Rights Commission (SAHRC), received 350 complaints, with a further 1,000 complaints having been lodged with the Press Ombud. This was the largest number of complaints the SAHRC had ever received as a result of a single incident. After considering the complaints, the Press Ombud found the *Sunday Sun* to be in breach of the South African Press Code and ordered it to publish an apology, which it did.

The SAHRC then instituted proceedings in the Equality Court in terms of the Equality Act, arguing that the article constituted hate speech in terms of section 10(1). In response, Qwelane challenged the constitutionality of section 10(1) of the Equality Act on the basis that certain provisions undermined the constitutionality of the section itself and the rule of law, on account of overbreadth and vagueness.

Section 10(1) states:

> *"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."*

The proviso in section 12 provides that no person may publish or display information that could reasonably be understood to demonstrate a clear intention to unfairly discriminate. Section 12 goes on to state 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."*

Speech is powerful: A discussion on the constitutional validity of section 10 of the Equality Act...*continued*

Finally, the court had to deal with the question regarding whether the provision leads to an unjustifiable limitation of section 16 of the Constitution.

Criteria for evaluating constitutionality

In evaluating the constitutionality of section 10(1) of the Equality Act, the court addressed several questions, including (i) whether the section entails a subjective or objective test; (ii) whether section 10(1)(a) to (c) should be read disjunctively or conjunctively; (iii) whether the provision is impermissibly vague; and (iv) whether the provision leads to an unjustifiable limitation of section 16 of the Constitution.

On the first question, the court referred to the phrase "*that could reasonably be construed to demonstrate a clear intention*" and found that it is plainly an objective standard that requires a reasonable person test. In this instance, the court differed from the Supreme Court of Appeal's (SCA) judgment. The SCA found that this was a subjective standard, which contributed to its ruling that the provision was unconstitutional in its entirety.

Secondly, the court found that on a disjunctive reading, section 10 would include private communication which could reasonably be construed to demonstrate a clear intention to be hurtful, meaning that private conversations between individuals, containing hints of menace, could be deemed "*hate speech*" in terms of the Equality Act. The court found that this would be an overly extensive and impermissible infringement of freedom of expression, and that in order to interpret the clause in a constitutionally sound way, the provision should be read conjunctively.

In deciding whether the provision referring to the term "*hurtful*", was impermissibly vague, the court heard testimony on the meaning of the words "*hurtful*" in section 10(1)(a) and "*harmful*" in section 10(1)(b), and the differences between them. The court found that there is no significant difference between these words and that "hurtful" on a conjunctive reading of the provision, is redundant and contributes to the lack of clarity of the provision. As such, it held that the term "*hurtful*" is vague and breaches the rule of law.

Finally, the court had to deal with the question regarding whether the provision leads to an unjustifiable limitation of section 16 of the Constitution. Section 16 of the Constitution protects the right to freedom of expression and has a built-in limitation to the right, in section 16(2). Specifically, this right does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, or that constitutes incitement to cause harm.

Justified limitation of hate speech

The term "*sexual orientation*" is not included in the limitation in section 16(2) of the Constitution, whereas the Equality Act includes a prohibition against hate speech based on sexual orientation. As such, the court held that a limitation analysis had to be done on section 36 of the Constitution to determine whether the extension of this limitation in the Equality Act was constitutional. Section 36(1) of the Constitution states that "*the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...*" The court found that the limitation of "*hurtful*" speech goes

Speech is powerful: A discussion on the constitutional validity of section 10 of the Equality Act...*continued*

The judgment in this case has important implications for the drafting and finalisation of the Hate Speech Bill.

beyond the justified limitation of hate speech, specifically because the bar for what constitutes hate speech would be set quite low if it included speech that was merely hurtful. Therefore, the court held that the relationship between the limitation and the purpose was not proportionate, and that section 10(1)(a) of the Equality Act led to an unjustifiable limitation of section 16 of the Constitution.

The Constitutional Court found that *"Section 10(1)(a) of the Equality Act is declared unconstitutional for vagueness and unjustifiably limiting section 16 of the Constitution. The complaint against Mr Qwelane is sustained, as section 10(b) and (c) of the Equality Act are constitutional, and it is in terms of these provisions that Mr Qwelane's abhorrent article constitutes hate speech."*

In the light of the above, the Constitutional Court concluded that there could be no question that Qwelane's statements constituted hate speech.

Unfortunately, Qwelane had passed away by the time this judgment was handed down and there could not be a personal remedy against him, such as him issuing an apology. However, the court did state that relief in terms of the Equality Act goes beyond holding perpetrators accountable. The court's declaratory order will meet the key objectives of the Equality Act, which are not to punish the wrongdoer, but to provide remedies for victims of hate speech and to vindicate their constitutional rights.

The judgment in this case has important implications for the drafting and finalisation of the Hate Speech Bill. In a recent presentation by the Portfolio Committee on Justice and Correctional Services, it considered the Qwelane case and emphasised that it is important to understand how the Constitutional Court approached the problem of hate speech, and how to identify the kinds of harmful speech that could permissibly be regulated. The draft bill has recently been opened to the public for comments. This is the second time the bill has been publicised for comments since its initial introduction in Parliament in 2016.

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