CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 13/20

In the matter between:

JONATHAN DUBULA QWELANE	Applicant
and	
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
and	
SOUTH AFRICAN HOLOCAUST AND GENOCIDE FOUNDATION	First Amicus Curiae
PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Second Amicus Curiae
WOMEN'S LEGAL CENTRE TRUST	Third Amicus Curiae
SOUTHERN AFRICAN LITIGATION CENTRE	Fourth Amicus Curiae
FREEDOM OF EXPRESSION INSTITUTE	Fifth Amicus Curiae
NELSON MANDELA FOUNDATION TRUST	Sixth Amicus Curiae
MEDIA MONITORING AFRICA	Seventh Amicus Curiae

Neutral citation: *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22

Coram: Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Majiedt J (unanimous)

Heard on: 22 September 2020

Decided on: 30 July 2021

Summary: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 — constitutionality of section 10(1) — section 10(1) is unconstitutional to the extent that it includes "hurtful"

ORDER

On appeal from, and in an application for confirmation of an order of constitutional invalidity granted by, the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg), the following order is made:

1. In respect of the confirmation application:
   (a) The declaration of constitutional invalidity of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) made by the Supreme Court of Appeal is confirmed in the terms set out in paragraph (b).
   (b) It is declared that section 10(1) of the Equality Act is inconsistent with section 1(c) and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word "hurtful" in the prohibition against hate speech.
   (c) The declaration of constitutional invalidity referred to in paragraph (b) takes effect from the date of this order, but its operation is suspended for

24 months to afford Parliament an opportunity to remedy the constitutional defect giving rise to constitutional invalidity.

(d) During the period of suspension of the order of constitutional invalidity, section 10(1) of the Equality Act will read as follows:

"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

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

(e) The interim reading-in will fall away when the correction of the specified constitutional defect by Parliament comes into operation.

(f) Should Parliament fail to cure the defect within the period of suspension, the interim reading-in in paragraph (d) will become final.

2. In respect of the appeal against the complaint:

(a) Leave to appeal is granted.

(b) The appeal by the South African Human Rights Commission is upheld.

(c) The order of the Supreme Court of Appeal is set aside.

(d) The offending statements (made against the LGBTI community) are declared to be harmful, and to incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000.

3. In respect of the constitutionality challenge, the Minister of Justice is ordered to pay half of Mr Jonathan Dubula Qwelane's costs in the High Court, the Supreme Court of Appeal and this Court.

4. Mr Jonathan Dubula Qwelane is ordered to pay the costs of the South African Human Rights Commission in the High Court, the Supreme Court of Appeal and in this Court.

JUDGMENT

MAJIEDT J (Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] It is a truth universally acknowledged that "[t]o be hated, despised, and alone is the ultimate fear of all human beings".[1] 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. This is so because hate speech marginalises and delegitimises individuals based on their membership of a group. This may diminish their social standing in the broader society, outside of the group they identify with and can ignite exclusion, hostility, discrimination and violence against them. Not only does it wound the individuals who share this group identity, but it seeks to undo the very fabric of our society as envisioned by our Constitution. We are enjoined by our Constitution "to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom".[2]

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[1] Matsuda "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Michigan Law Review* 2320 at 2320.

[2] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at para 22.

[2] Central to the issue before us is a delicate balancing exercise between the fundamental rights to freedom of expression, dignity and equality. This exercise arises against the backdrop of an article penned by the applicant, the late Mr Jonathan Dubula Qwelane, and published in the Sunday Sun newspaper on 20 July 2008. The article, which was deeply offensive to members of the LGBT+ community,[3] evoked universal umbrage and denunciation and eventuated in proceedings in the Equality Court and the High Court. The latter proceedings culminated in this application for confirmation of the Supreme Court of Appeal's declaration of constitutional invalidity of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act[4] (Equality Act). Mr Qwelane sadly passed away on 24 December 2020.[5]

Background

[3] The impugned article was titled "*Call me names – but gay is not okay*". In relevant parts, the article reads:

> "The real problem, as I see it, is the rapid degradation of values and traditions by the so-called liberal influences of nowadays; you regularly see men kissing other men in public, walking holding hands and shamelessly flaunting what are misleadingly termed their 'lifestyle' and 'sexual preferences'. There could be a few things I could take issue with Zimbabwean President Robert Mugabe, but his unflinching and unapologetic stance over homosexuals is definitely not among those. Why, only this month – you'd better believe this – a man, in a homosexual relationship with another man, gave birth to a child! At least the so-called husband in that relationship hit the jackpot, making me wonder what it is these people have against the natural order of things. And by the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views. . . . Homosexuals and their backers will call me names, printable and not, for stating as I have always done my serious reservations about their

[3] LGBT+ is an acronym that refers to Lesbian, Gay, Bisexual and Transgender individuals. The "+" provides for an open list to include various spectrums of sexuality and gender such as Intersex, Queer and Asexual individuals.

[4] 4 of 2000.

[5] Mr Qwelane was accorded a special provincial official funeral, an indication of the high esteem he was held in during his lifetime.

> 'lifestyle and sexual preferences', but quite frankly I don't give a damn: wrong is wrong I do pray that someday 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?"

[4] This article was accompanied by a cartoon depicting a man on his knees next to a goat, appearing in front of a priest for their nuptials. A speech bubble linked to the priest contained the text: "I now pronounce you man and goat." The caption above the cartoon read: "[w]hen human rights meet animal rights." It is common cause that Mr Qwelane was not the author of the cartoon, nor was he aware of it before its publication. It is also common cause that the article was an endorsement of the former Zimbabwean President Robert Mugabe's strident remarks reviling homosexuals by comparing them to animals.

[5] At the time of the publication of the article, Mr Qwelane was a weekly columnist for the Sunday Sun, which was the fastest growing newspaper in the country,[6] and a host of a popular talk show on Radio 702. In addition, Mr Qwelane was a well-known and respected anti-apartheid activist of significant stature and was, in his own words, "an experienced journalist". Shortly after the publication of the article, Mr Qwelane received an ambassadorial posting to Uganda.[7]

[6] As a result of this publication, the first respondent, the South African Human Rights Commission (SAHRC), received 350 complaints, the largest number of complaints it had ever received at that time emanating from a single incident.[8] More than 1000 complaints were also lodged with the Press Ombud. The complaints to the

[6] The evidence was that it had the third highest circulation of weekend newspapers and 2.5 million readers, the majority of whom lived in the townships and were predominantly black (around 99%).

[7] Mr Qwelane's term as ambassador to Uganda expired in 2013.

[8] The SAHRC is a constitutional entity established to support constitutional democracy. It is tasked by section 184(1) of the Constitution to, amongst others, promote the protection, development and attainment of human rights.

Press Ombud largely centred around allegations that the article amounted to hate speech. After considering these complaints, the Press Ombud found the Sunday Sun in breach of section 2.1 of the South African Press Code on three counts and ordered it to publish an appropriate apology, which the Sunday Sun did.[9]

[7] Subsequent to the conclusion of the Press Ombud's proceedings, the SAHRC instituted proceedings in the Equality Court in terms of section 20(1)(f) of the Equality Act against Media24 Limited (the owner of the Sunday Sun) and Mr Qwelane.[10]

[8] The SAHRC alleged that the article constituted prohibited hate speech in contravention of section 10(1) of the Equality Act (the impugned section), which reads:

> "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."

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[9] Section 2.1 of the Press Code of Ethics and Conduct for South African Print and Online Media provides that:

> "The press should avoid discriminatory or denigratory references to people's race, colour, ethnicity, religion, gender, sexual orientation or preference, physical or mental disability or illness, or age."

[10] Section 20(1)(f) of the Equality Act reads:

> "(1) Proceedings under this Act may be instituted by—
>
> . . .
>
> (f) the South African Human Rights Commission, or the Commission for Gender Equality."

The Equality Act, in section 4 envisages the expeditious and informal processing of cases in order to facilitate participation by the parties to the proceedings; access to justice to all persons and the use of corrective or restorative measures in conjunction with measures of a deterrent nature. The section recognises—

> "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: and . . . the need to take measures at all levels to eliminate such discrimination and inequalities."

These aspects must be taken into account in the adjudication of matters in the Equality Court.

[9] Section 10(2) of the Equality Act is also of some importance. It reads:

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

[10] Section 12 of the Equality Act provides—

> "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."

[11] The "prohibited grounds", referred to in section 10(1), are defined in section 1 of the Act as follows:

> "(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience. belief, culture, language and birth; or
> (b) any other ground where discrimination based on that other ground—
> (i) causes or perpetuates systemic disadvantage:
> (ii) undermines human dignity; or
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

[12] Media24 and Mr Qwelane responded by challenging the constitutionality of section 10(1), read with sections 1, 11 and 12 of the Equality Act in the High Court of South Africa, Gauteng Division, Johannesburg.[11] The basis for the constitutionality challenge was that these impugned provisions undermine the constitutionality of the sections and the rule of law on account of their overbreadth and vagueness. Before the proceedings in respect of the constitutionality challenge commenced, the SAHRC reached a settlement with Media24, but the Equality Court proceedings against Mr Qwelane continued.

In the High Court

[13] By agreement between the parties, the proceedings before the High Court and the complaint proceedings before the Equality Court were consolidated and adjudicated. In the former proceedings, the second respondent, the Minister of Justice and Correctional Services, was joined and participated as a respondent. Two amici curiae were admitted: the Psychological Society of South Africa (Psychological Society)[12] and the Freedom of Expression Institute (Freedom Institute).[13] The Psychological Society and the Freedom Institute are the second and fifth amici curiae respectively in this Court. The other amici curiae in this Court are: South African Holocaust and Genocide Foundation (first amicus curiae, Holocaust Foundation); Women's Legal Centre Trust (third amicus curiae, WLC); Southern African Litigation Centre (fourth amicus curiae, SALC); Nelson Mandela Foundation Trust (sixth amicus curiae, Mandela Foundation) and Media Monitoring Africa (seventh amicus curiae, MMA).

[14] Extensive evidence was adduced in support of the SAHRC's hate speech complaint against Mr Qwelane. A brief outline will suffice – a more comprehensive narration will follow when the complaint against Mr Qwelane is discussed. The SAHRC's head of legal services, Mr Gregoriou, testified about the numerous

[11] Section 11 of the Equality Act states that "no person may subject any person to harassment".

[12] The Psychological Society is an association of more than 2000 eminent psychologists.

[13] The Freedom Institute promotes efforts to protect the public's right to receive and impart information, ideas and opinions; to defend freedom of expression and to oppose all forms of censorship.

complaints received from members of the LGBT+ community, even before the article was published. These complaints related to numerous horrific violent attacks against black lesbians and transgender persons; a lack of policing in the form of the police being seriously remiss in their duties to properly investigate complaints by members of the LGBT+ community and exhibiting an anti-LGBT+ inclination. He testified further that there were complaints from that community about the denial of access to essential services to them.

[15] Ms Mokoena, the executive director of People Opposing Women Abuse (POWA),[14] confirmed parts of Mr Gregoriou's evidence relating to the brutal attacks against lesbians, including the repulsive practice called "corrective rape". Her evidence, too, reflected poorly on the police for their disturbing apathy in respect of these types of complaints. Ms Mokoena alluded to five widely publicised instances of horrific violent attacks against lesbians.

[16] The last witness called by the SAHRC, Ms MN, a 52-year old who identifies as a lesbian, testified *in camera* for fear of reprisals. She recounted her personal encounters with homophobia and discrimination on the basis of her sexual orientation. Ms MN broke down in the witness box while narrating the verbal and physical attacks perpetrated against her. She poignantly remarked that she did not bother to report some of these incidents since, in her words, "the law does not protect people like me".

[17] The evidence adduced on behalf of the SAHRC remained largely uncontested. The only witness who testified on behalf of Mr Qwelane was Mr Viljoen, a Production Editor of the Sunday Sun at the time the article was published. He testified about the newspaper's internal processes for the publication of the article and the cartoon; the numerous complaints received after the publication of the article and the fact that the newspaper had subsequently published an apology. Significantly, Mr Viljoen conceded

[14] POWA provides support and counselling services as well as shelter to female victims of domestic violence in previously disadvantaged communities, particularly to lesbians.

during his evidence-in-chief that the article was "reprehensible" and that it should never have been published.

[18] The Psychological Society led the evidence of its former chairperson, Professor Nel, a research professor at the University of South Africa with a special interest in LGBT+ related work. Apart from recounting his own lived experiences of ill-treatment and discrimination on the basis of his identification as a gay man and the psychological trauma suffered generally by the LGBT+ community due to their exclusion and rejection, Professor Nel also commented on the severely deleterious psychological impact the article had on that community.

[19] Based on the evidence, the High Court found that the SAHRC had succeeded in proving that the article was hurtful and harmful and had the potential to incite harm and promote hatred against the LGBT+ community.[15] As a result, it held that the article constituted hate speech as contemplated by section 10(1) of the Equality Act and ordered Mr Qwelane to tender a written apology to members of the LGBT+ community.[16]

[20] The High Court considered the correct interpretation of the impugned section. It held that speech ought to be assessed objectively in its factual and social context.[17] It accordingly proposed that the word "hurtful" should be interpreted to mean a type of severe psychological impact, and "harmful" to refer to physical harm.[18] The High Court held that paragraphs (a)-(c) of the impugned section must be read conjunctively to ensure consistency with section 16 of the Constitution.[19]

[15] *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services* 2018 (2) SA 149 (GJ) (High Court judgment) at paras 52-3.

[16] Id at para 70.

[17] Id at para 53.

[18] Id at paras 58 and 60.

[19] Id at para 65.

[21] On the overbreadth challenge, the High Court held that the impugned section could be read in conformity with section 16(2)(c) of the Constitution,[20] and, if not, it could not be said to suffer from overbreadth until it was proven that it fails a limitation analysis in terms of section 36 of the Constitution.[21] On that score, it found that the impugned section did not fail the limitations test merely because it prohibits more speech than section 16(2)(c) of the Constitution.[22]

[22] The High Court dismissed the vagueness challenge as well. It reasoned that the operation of the impugned section is contingent on a significant proviso.[23] Therefore, speech falling under section 12 is not prohibited under section 10.[24] As a result, it dismissed the constitutional challenge.[25]

In the Supreme Court of Appeal

[23] Discontented with the outcome and relying on the same argument, Mr Qwelane appealed to the Supreme Court of Appeal.[26] That Court dismissed the overbreadth challenge on the basis that the impugned section includes the ground of sexual orientation as one of the prohibited grounds, beyond the listed prohibited grounds in section 16(2)(c) of the Constitution.[27] It reasoned that the Legislature sought to provide a wider protection, by imposing liability for hate speech based on the extended prohibited grounds, beyond the ones listed in section 16(2).[28]

[20] Id.

[21] Id at para 53.

[22] Id.

[23] Id at para 52.

[24] Id at para 59.

[25] Id.

[26] *Qwelane v South African Human Rights Commission* [2019] ZASCA 167; 2020 (2) SA 124 (SCA) (Supreme Court of Appeal judgment) at para 36.

[27] Id at para 67.

[28] Id.

[24] However, the Supreme Court of Appeal found that the impugned section limits speech beyond the limitations of section 16(2)(c) of the Constitution. The Court reasoned that by using the words "reasonably construed to demonstrate a clear intention", it introduced a subjective standard of assessment of speech, contrary to the objective standard imposed by section 16(2)(c).[29] It held that the words "reasonably construed" removes the threshold from the objective test and replaced it with the subjective opinion of a reasonable person hearing the words.[30] In this way, it becomes unnecessary for potential or actual harm to be demonstrated.[31]

[25] The Supreme Court of Appeal found that, based on the fact that paragraphs (a)-(c) of the impugned section are not connected by the conjunction "and", but are separated by a semicolon, they should be interpreted disjunctively.[32] It held that the section, as currently formulated, decouples the constitutional requirements of "advocating hatred and incitement to cause harm, so that one or neither of them may lead to a finding of hate speech".[33] It reasoned that the disjunctive reading is supported by the disjunctive placement of the words "publish", "propagate", "advocate" or "communicate".[34]

[26] In addition, the Supreme Court of Appeal noted that the impugned section is vague in that it is difficult to define what "hurtful" means. It found that harm envisaged in section 16 of the Constitution and contemplated in the provisions of the impugned section, need not necessarily be physical harm, but can be related to psychological impact. However, the impact has to be more than just hurtful in the dictionary sense.[35]

[29] Id at pars 62 and 64.

[30] Supreme Court of Appeal judgment above n 26 at para 66.

[31] Id at para 64.

[32] Id.

[33] Id.

[34] Id at para 65.

[35] Id at para 70.

[27] The Supreme Court of Appeal held that section 12 of the Equality Act merely excludes from the limitation any of the stipulated activities, but does not narrow the limitation of freedom of expression caused by the impugned section.[36] However, it found that section 12 is difficult to understand, in particular, if one has regard to the concluding part of the provision: "publication of information, advertisement or notice in accordance with section 16 of the Constitution".[37]

[28] For all these reasons, the Supreme Court of Appeal found that the impugned section in its present form is inconsistent with the provisions of section 16 of the Constitution, and is therefore invalid. It also dismissed the complaint against Mr Qwelane. Ultimately, it proposed the following reading-in to section 10, which forms the subject of these proceedings:

> "(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.
>
> (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the advocacy of hatred that is based on race, ethnicity, gender, religion or sexual orientation, and that constitutes incitement to cause harm, as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."[38]

In this Court

[29] This matter comes before us as confirmation proceedings in terms of section 167(5), read with section 172(2), of the Constitution. This Court has exclusive jurisdiction to confirm the Supreme Court of Appeal's declaration of constitutional invalidity of the impugned section.[39] This is supervisory jurisdiction in respect of

[36] Id at para 75.

[37] Id at para 76.

[38] Id at para 96.

[39] Section 167(5) provides that:

declaration of invalidity made by the High Court and the Supreme Court of Appeal.[40] Accordingly, there is no need for a further enquiry into jurisdiction.

[30] It is, however, necessary to note that the order granted by the Supreme Court of Appeal has been cross-appealed by SAHRC, including the order on the complaint against Mr Qwelane. This cross-appeal plainly engages this Court's jurisdiction, for it is linked to the confirmation proceedings.

[31] The issues for determination are:

(a) whether the impugned provision entails a subjective or objective test;

(b) whether section 10(1)(a)-(c) must be read disjunctively or conjunctively;

(c) whether the impugned provision is impermissibly vague;

(d) whether the impugned provision leads to an unjustifiable limitation of section 16 of the Constitution;[41]

(e) if the constitutional challenge is successful, the appropriate remedy;

(f) the complaint against Mr Qwelane in terms of the Equality Act; and

(g) costs.

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

In terms of section 172(2)(a):

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[40] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 27.

[41] I use the term "unjustifiable limitation" throughout this judgment when discussing the challenge levelled at section 10(1). While the parties have largely preferred "overbreadth", I am cognisant of the potential confusion that may arise out of the concept of the overbreadth of a provision. That was recognised by this Court in *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA469 (CC) 1999 (6) BCLR 615 (CC) at para 18 where it alluded to the fact that it may be used either at the first or second stage of the limitations analysis. I therefore avoid using the term.

[32] Before discussing these issues, a broad overview of the Equality Act in its constitutional setting and the correct approach to section 10 of that Act will be considered. Hate speech in general and in its international and South African context will also bear consideration. This will provide the basis for a discussion of the two challenges facing section 10 – one concerning the suggestion of an unjustified limitation of section 16, and the other concerning the suggestion that the section is inconsistent with the rule of law. The conclusions reached in respect of these two enquiries will lead to the particular remedies that are granted in this case.

The applicant's submissions

[33] Mr Qwelane did not challenge the Supreme Court of Appeal's finding that the inclusion of sexual orientation as a prohibited ground is reasonable and justifiable. He contended that, while the article evinces a strident view on homosexuality, it does not advocate hatred against the LGBT+ community, nor does it incite others to cause harm to them as there is no instigation of others to take action, let alone harmful action, against them. He justified the article by virtue of his right to freedom of expression.

[34] Mr Qwelane broadly contended further that the impugned section extends beyond section 16(2)(c) and therefore infringes section 16(1), in the following ways:

(a) It sets a lower threshold for assessing hate speech than the Constitution.

(b) On a proper interpretation, subsections (a)-(c) must be read disjunctively, giving rise toa far broader category of prohibited hate speech than the category prohibited in the Constitution, although even a conjunctive reading unjustifiably limits section 16(1) of the Constitution.

(c) It includes more prohibited grounds than those listed in section 16(2)(c), (although the inclusion of sexual orientation is not challenged by the applicant).

(d) The proviso in section 12 is not capable of an interpretation that renders the impugned section constitutional.

[35] In amplifying his contentions, Mr Qwelane pointed out that a disjunctive reading of the elements in the impugned section significantly limits freedom of expression, considering that the comparable elements of section 16 are expressly conjunctive.[42] He contended that even a conjunctive reading results in a limitation of free expression, given the difference in standards between section 16(2) and the impugned section. Whereas section 16(2) envisages an objective standard in which the expression is assessed against the requirements that it be "advocacy of hatred", based on a listed ground and which "constitutes incitement to cause harm", the impugned section differs in two material respects. First, it does not require an objective standard, but a subjective test as to whether the expression "could reasonably be construed to demonstrate a clear intention". And, second, the expression need not amount to "advocacy", but rather an expanded list of prohibited expression via publishing, propagating, advocating or communicating words based on the prohibited grounds.

[36] Mr Qwelane supported the Supreme Court of Appeal's finding that section 12 does not save the impugned section from being unconstitutional, but instead exacerbates its vagueness. He cited as an example the challenge of ascertaining what is meant by "mala fide" publication of information envisaged in that section.

[37] In respect of a proportionality enquiry, Mr Qwelane alluded to the reasons why freedom of expression is so important in our constitutional landscape. He pointed out that the Equality Act's laudable objectives do not warrant the constitutionality of the impugned provision.[43] The overbreadth of the impugned section does not strike an appropriate balance between the rights to freedom of expression on the one hand and the right to equality on the other, and thereby unduly infringes the right to freedom of expression. It was emphasised that the limitation is clearly overbroad – the result of such overbroad and vague language would be to have a chilling effect on expression, as

[42] In this regard reliance is placed on the views espoused by Cheadle et al *South African Constitutional Law: The Bill of Rights* 2 ed (Lexis Nexis, Cape Town 2017).

[43] This Court's dictum is invoked from *Print Media South Africa v Minister of Home Affairs* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) at para 55.

ordinary citizens will be unable to determine in advance with a reasonable degree of certainty whether their expression will fall foul of the impugned section. That, while this limitation clearly seeks to promote equality, the limitation on free expression goes far beyond what the promotion of equality requires.

[38] Mr Qwelane submitted that the threshold for hate speech is set at an appropriate level in section 16(2)(c). The promotion of equality can be achieved by identifying further groups of vulnerable persons that could justifiably be afforded protection from speech of that nature. This overbroad restriction does not properly promote equality, nor adequately balance equality with freedom of expression. It therefore fails to be justifiable in relation to the purposes it seeks to achieve. In its order, the Supreme Court of Appeal correctly found less restrictive means by maintaining the threshold set by section 16(2)(c), but incrementally expanding the list of grounds (and therefore the groups of vulnerable persons protected from hate speech). In sum, Mr Qwelane supported that Court's broad reasoning and its proposed remedy.

The respondents' submissions

[39] The SAHRC emphasised that equality is the bedrock of our Constitution and that the Equality Act fulfils the injunction in section 9(2) of the Constitution, which mandates the State to provide for legislative and other measures to promote and protect the achievement of equality.[44] It asserted that the objective of the impugned section is to ensure that human dignity and equality are not limited in the name of freedom of speech. Where speech infringes equality and dignity, the impugned section reasonably and justifiably limits the right to freedom of expression.

[40] The SAHRC advanced a wide-ranging attack on the Supreme Court of Appeal's findings. It that that Court lost sight of the fact that the first duty in an interpretative

[44] Section 9(2) reads:

> "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."

exercise is to comply with section 39(2) of the Constitution – when interpreting any legislation, it "must promote the spirit, purport and objects of the Bill of Rights". It also failed to interpret the impugned section consistently with the Constitution as far as possible, to the extent that the text is reasonably capable of bearing that meaning.

[41] The SAHRC contended that the phrase "that could reasonably be construed to demonstrate a clear intention to" is clear, and that the Supreme Court of Appeal was wrong in its finding that this introduces a subjective test, whereas section 16 postulates an objective test. The requirement in the impugned section is an objective test, as the speech must objectively demonstrate the requisite intention. The impugned section does not only require demonstrable intention (thus excluding negligent or inadvertent speech), but the intention must also be "clear". The requirement of reasonableness also indicates an objective test. Intention also encompasses the secondary meaning and innuendo of words. The requirement of reasonableness indicates an objective test.

[42] In respect of "hurtful", the SAHRC submitted that dignity is the threshold by which the impugned words must be assessed. "Harmful or to incite harm" extends beyond mere physical harm and includes psychological, emotional and social harm that adversely affects the right to dignity, as long as the harm is serious enough to pass the hate speech threshold. With regard to "promote or propagate hatred", it emphasised that the dictionary meanings are clear and should be applied. The proviso in section 12 is intended to be a carve-out of the exclusions to hate speech and it refers not to section 16(2), but to section 16(1).

[43] The SAHRC accepted that the impugned section infringes the right to freedom of expression, but submitted that the limitation is reasonable and justifiable in terms of section 36(1). It emphasised the fact that the Equality Act creates civil remedies, as opposed to criminalising hate speech. This is achieved by creating a civil law prohibition against hate speech and preventing speech that may impinge on a person's dignity. The impugned section also promotes the right to equality, as required by section 9(2).

[44] The SAHRC also contended that the Supreme Court of Appeal was wrong in suggesting that less restrictive means would mirror the provisions of section 16(2). This is because first, speech under section 16(2) is unprotected and there is no limitation analysis involved. Second, if one were to mirror the provisions of section 16(2), one would then exclude the grounds of prohibition set out in section 1 of the Equality Act, which reflects the grounds in section 9(3) of the Constitution.[45] Third, it would remove the protection afforded to journalists and artists in section 12. Lastly, the SAHRC submitted that costs should not have been ordered against it, given its special constitutional obligations.

[45] The Minister restricted his submissions to the question of the constitutionality of the impugned section. He accepted that the impugned section limits the right to freedom of expression, but submitted that the limitation is reasonable and justifiable. His contention was that the impugned section prohibits expression that falls beyond that outlined in section 16(2)(c) in three ways. First, it enumerates the forms of expression which are prohibited (no person may publish, propagate, advocate or communicate words). This is not dealt with in the Constitution. Second, it prohibits hate speech on "prohibited grounds" as defined in the Equality Act. These prohibited grounds reflect the grounds of discrimination enumerated in section 9(3) of the Constitution. Section 16(2)(c), on the other hand, lists only four prohibited grounds, namely race, ethnicity, gender and religion. Third, the impugned section is broader than section 16(2)(c) in the following ways: (a) it includes words clearly intended to be "hurtful" or "harmful"; and (b) it introduces a different standard, namely that of "reasonably construed to demonstrate a clear intention to", whereas section 16(2)(c) speaks of "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

[45] Section 9(3) provides:

> "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."

[46] The Minister emphasised the constitutional obligation on the State to, for present purposes, respect, protect, promote and fulfil the rights to equality and human dignity. These two rights are connected. He supported most of the arguments advanced by the SAHRC in criticising the approach adopted by the Supreme Court of Appeal in its interpretation of the impugned section. The Minister submitted that, ultimately, in balancing the competing rights, it is clear that the section 16(1) right must yield to the rights to equality and dignity as encapsulated in the impugned section.

[47] The amici made very helpful wide-ranging and insightful submissions. Most of the amici confined their submissions to the issue of whether the impugned section passes constitutional muster, and did not venture into a discussion of the merits of the complaint against Mr Qwelane. All of them, save for the Freedom Institute and MMA, adopted the position that the Supreme Court of Appeal erred in its decision on the constitutionality of the impugned section.[46] Reference will be made to these submissions in the course of this judgment. A useful starting point is to place the Equality Act within an appropriate constitutional context. This will allow us to interpret section 10(1) of the Equality Act in line with section 39(2) of the Constitution, setting out the basis for the consideration of the challenges to the provision.[47]

The Equality Act in a proper constitutional setting

[48] The Equality Act has three main objectives: First, it seeks to prevent and prohibit unfair discrimination from thriving in our society by giving effect to section 9(4) of the Constitution. Second, it aims to protect and advance categories of persons

[46] It must be said, though, that MMA adopted a more neutral approach to the question of the constitutionality of the impugned section. It disclaimed an absolutist position and propounded a balanced approach. Ultimately, it contended that the impugned section does not pass constitutional muster.

[47] This interpretive stage is similar, although not identical, to the two-stage process followed to determine whether there has been a limitation of a right, as established in *Ex parte Minister of Safety and Security: In Re: S v Walters* [2002] ZACC 6, 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para 26. This Court stated that that process "entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b)".

disadvantaged by unfair discrimination as envisaged in section 9(2) of the Constitution. Finally, it facilitates the State's compliance with its international law obligations.

[49] The preamble to the Equality Act explicates that its overarching goal is to steer our journey to an equal and democratic society by, amongst other things, eradicating inequality, transforming our society and embracing our diversity. It is thus clear that the Equality Act aspires to heal the wounds of the past and guide us to a better future. This commitment was fulfilled by Parliament, pursuant to section 9(2) of the Constitution. One of the ways in which the Equality Act realises this commitment is through prohibiting hate speech in section 10. The Legislature was alive to the reality that unfair discrimination can be perpetuated by both conduct and the dissemination of words (or more broadly, through expression). Through this prism, section 10 is located at the confluence of three fundamental rights: equality, dignity and freedom of expression, and we ought to navigate an interpretation of that section within this terrain.

[50] The Holocaust Foundation contended that section 9(4) of the Constitution requires legislation to be enacted to prevent or prohibit unfair discrimination. Thus, so it contended, all that is required for purposes of testing the constitutionality of section 10 is an investigation into whether section 10 fulfils that constitutional injunction. That argument is fallacious, because it effectively pits the rights to human dignity and equality against the right to free speech by attributing more weight on the constitutional injunction at the expense of the fundamental right to free speech. The injunction cannot be considered in isolation, but in harmony with other constitutional provisions. We are required to go further and consider section 10 in light of sections 9, 10 and 16 of the Constitution, as opposed to setting these rights against one another.

[51] The Equality Act in general, and the impugned section in particular, must be understood in the context of the obligation imposed on the State in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. This is an obligation that emanates from the transformative objective of our

Constitution.[48] The ambit of this obligation is both positive and negative.[49] It requires of the State not only to refrain from infringing on fundamental rights, but also to take positive steps to ensure that these rights are realised.[50] We must be cognisant of the requirement that measures taken in terms of section 7(2) must be "reasonable and effective".[51]

Section 39(2) of the Constitution

[52] The appropriate point of departure in interpreting the impugned section is section 39(2) of the Constitution, which enjoins courts when interpreting legislation to "promote the spirit, purport and objects of the Bill of Rights". Along this interpretative journey, we must be guided by the jurisprudence of this Court. In *Cool Ideas* this Court expounded that:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[52]

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[48] In *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 74, this Court explicated:

> "The Preamble to the Constitution, its founding values and this Court's jurisprudence have all emphasised that our venture in constitutionalism and democracy commits us to transforming our society from an oppressive past to a non-racial, just and united nation."

[49] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 46-50.

[50] *Brink v Kitshoff N.O.* [1996] ZACC 9;1996 (4) SA 197(CC);1996 (6) BCLR 752 (CC) at para 42.

[51] *Glenister v President of the Republic of South Africa***[**2011] ZACC 6;2011 (3) SA 347(CC);2011 (7) BCLR 651 (CC) at para 189, confirmed recently in *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26 at paras 42-3.

[52] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28. This was recently affirmed in *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14; 2020 JDR 1227 (CC); 2020 (10) BCLR 1204 (CC) at para 34.

[53] Moreover, when interpreting legislation that implicates a fundamental right entrenched in the Bill of Rights, a court must read the particular statute "through this prism of the Constitution".[53] In *Hyundai* this Court stressed that a purposive approach is essential and that:

> "The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[54]

[54] Turning to the interpretation, the correct approach is to interpret the impugned provision in light of these rights congruently. This approach is undergirded by an array of reasons. First, freedom of expression is "constitutive of the dignity and autonomy of human beings"[55] and it constitutes "a web of mutually supporting rights" in the Constitution.[56] Second, section 39(2) cannot be invoked in a partisan way. If various rights are implicated, this Court must give effect to the normative force of the spirit, purport and objects of the Bill of Rights.[57] Third, this concatenation of inextricably linked rights is evident in the various objects of the Equality Act.[58]

[55] Before considering the proper interpretation of section 10, it is necessary to analyse these fundamental rights, with due regard to this Court's jurisprudence.

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[53] *Makate v Vodacom* (Pty) Ltd [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 87.

[54] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 22.

[55] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771

at para 21.

[56] *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 27.

[57] *Phumelela Gaming and Leisure Limited v Grundlingh* [2006] ZACC 6; 2006 (8) BCLR 883 (CC) at para 35.

[58] See section 2 of the Equality Act, in particular subsections (iv) and (v).

Equality and dignity

[56] Our constitutional commitment to equality lies at the heart of our new constitutional order and is crucial to our transformation.[59] It has been said that "it permeates and defines the very ethos upon which the Constitution is premised".[60] In *Van Heerden,* this Court held:

> "The achievement of equality goes to the bedrock of our constitutional architecture . . . the achievement of equality is not only a guaranteed and justifiable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."[61]

[57] Section 9 of the Constitution provides:

> "(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."

[59] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 12 BCLR 1696 (CC) at para 8.

[60] *Fraser v Children's Court Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20 and fn 11.

[61] *Van Heerden* above n 2 at para 22.

[58] Our jurisprudence is resolute that the type of equality underpinning our constitutional framework is not mere formal equality, but in order to give meaning to the right to dignity, also substantive equality.[62] Substantive inequality "is often more deeply rooted in social and economic cleavages between groups in society", and so it aims to tackle systemic patterns where the structures, context and impact underpinning the discrimination matters.[63]

[59] There is also the principle of intersectionality, which interrogates how aspects of identity are mutually constitutive.[64] Recently, in *Mahlangu*,[65] this Court expressly endorsed this principle. It said:

> "There is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence. It means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination".[66]

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[62] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition I*) at para 62.

In Albertyn and Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248 at 249, it is postulated that the transformative nature of our Constitution—

> "require[s] a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships."

[63] Albertyn and Goldblatt "Equality" in Woolman et al *Constitutional Law of South Africa* at 6. They observe further at 8 that "the idea of inequality as systemic – deeply embedded within society, and manifest in group disadvantage through social stigma and stereotypes, material inequality or social and economic forms of exclusion".

[64] Crenshaw "Mapping the margins: intersectionality, identity politics, and violence against women of colour" (1993) 43 *Stanford Law Review* 1241 at 1244.

[65] *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC), 2021 (1) BCLR (CC) 1.

[66] Id at para 76.

[60] Intersectionality is particularly relevant in our grossly unequal society, in which people occupy vastly different positions in society in terms of wealth and resources.

[61] Based on this, unfair discrimination is the linchpin of inequality. It is for this reason that section 9(3) of the Constitution expressly proscribes unfair discrimination on specified grounds.[67] Section 9(4) of the Constitution envisages the need to enact, amongst other things, legislative measures to protect categories of persons disadvantaged by unfair discrimination. To this end, this Court in *National Coalition II* remarked that:

> "It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."[68]

[62] This Court emphasised in *Harksen* that the prohibition of unfair discrimination in the Constitution is instrumental in that it provides a bulwark against invasions, which impair human dignity.[69] While equality and dignity are self-standing rights and values,[70] axiomatically, equality is inextricably linked to dignity.[71] As *Hugo* expounds:

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[67] It is worth noting that our Constitution was the first in the world to entrench LGBT+ equality through prohibiting unfair discrimination on the grounds of sexual orientation. See Williams and Judge "Happy (N)ever After? Public Interest Litigation for LGBTI Equality" in Brickhill (ed) *Public Interest Law in South Africa* (Juta & Co Ltd, Cape Town 2018) at 239. Also see *Fourie v Minister of Home Affairs* [2004] ZASCA 132; 2005 (4) SA 429 (SCA) at para 6.

[68] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (*National Coalition II)* at para 60.

[69] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300; 1997 (11) BCLR 1489 (CC) at para 50.

[70] Section 10 of the Constitution provides:

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

See further *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 35-7 and Moseneke J in *Daniels v Campbell* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

[71] In particular, dignity and unfair discrimination are linked. This Court's jurisprudence on unfair discrimination, shows that treating people differently in a way that impairs their fundamental dignity as human beings essentially

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[72]

[63] In *Freedom of Religion*, this Court underscored the importance of the right to human dignity:

> "There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim 'to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past'. Unsurprisingly because not only is dignity one of the foundational values of our democratic state, it is also one of the entrenched fundamental rights".[73]

[64] And, in *Makwanyane*, this Court stressed that the protection of dignity is a cornerstone of our democratic project:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. . . . Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were

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renders human dignity the basis for the test for unfair discrimination. See further Ackermann *Human Dignity: Lodestar for Equality in South Africa* (Juta & Co Ltd, Cape Town 2012) at 179 and 251. Kant also links dignity to equality, see *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997) at 56-7.

[72] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41. The Court quoted the Canadian case of *Egan v Canada* [1995] 2 SCR 513, which analysed the purpose of section 15 of the Canadian Charter and held that equality dictates zero tolerance for legislative distinctions that treat certain people as second-class citizens, that demean them without valid reason, or that otherwise offends fundamental human dignity. See also: *National Coalition I* above n 66 at para 30.

[73] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC) (*Freedom of Religion*) at para 45.

> refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[74]

[65] Chaskalson, writing extra-curially, explained that:

> "in a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner".[75]

[66] It has been acknowledged that the concept of dignity is not easy to define in exact terms. However, in *National Coalition I*, this Court said that "it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.[76]

Freedom of expression

[67] It is not only the rights to equality and dignity that our Constitution seeks to protect. The right to free speech is equally protected. The right to freedom of expression, as enshrined in section 16(1) of the Constitution, is the benchmark for a vibrant and animated constitutional democracy like ours. Section 16 of the Constitution provides:

> "(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—

[74] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC);1995 (6) BCLR 665 (CC) *(Makwanyane)* at paras 328-9.

[75] Chaskalson "The Third Bram Fisher Lecture: Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 *SAJHR* 193 at 203.

[76] *National Coalition I* above n 66 at para 28.

(a) propaganda for war

(b) incitement of imminent violence; or

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

[68] Freedom of expression "is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm".[77] This is because it "is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability".[78]

[69] According to Emerson, there are four particular values that undergird the right to freedom of expression.[79] These, as I understand them, include: (a) the pursuit of truth; (b) its value in facilitating the proper functioning of democracy; (c) the promotion of individual autonomy and self-fulfillment; and (d) the encouragement of tolerance.

[70] Dworkin suggests that these values can be reduced to two overarching justifications: the instrumental conception and the constitutive conception.[80] The former refers to the notion that the quality of government is improved when criticism is free and unfettered, "a collective bet that free speech will do us more good than harm

[77] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo*) at para 37.

[78] *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at para 1.

[79] Emerson *The System of Freedom of Expression* (Random House, New York 1970) at 6-7. See further the helpful analyses in Davis "Freedom of Expression" in Cheadle above n 42 at 11-2 to 11-4(1) and Milo et al "Freedom of Expression" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2014) at 15-30.

[80] Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge 1996) at 200. First, the instrumental approach to free speech "not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us". Second, the constitutive approach that considers free speech as valuable because expression is an important part of what it means to be a human and that "[w]e retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us of the ground that we are not fit to hear and consider it".

Currie and de Waal in *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd Pty, Cape Town 2018) at 340 note that Dworkin's instrumental conception "is important because it contributes to the Constitution's project of overturning an authoritarian polity and establishing a democracy in place" however "this conception of the right should not be focused on the extent that the intrinsic and dignity-reinforcing value of free expression is obscured".

over the long run".[81] The latter refers to the idea that freedom of expression "is an essential and constitutive feature of a just, political society the government of which treats all its adult members, except those who are deemed legally incompetent, as responsible moral agents".[82]

[71] As has been acknowledged, "[t]he right to freedom of expression lies at the heart of our constitutional democracy, not only because it is an 'essential and constitutive feature' of our open democratic society, but also for its transformative potential".[83] Both the instrumental and constitutive value of freedom of expression, as articulated by Dworkin, bear emphasis.

[72] This was largely echoed by the majority of this Court in *Democratic Alliance*:

> "This Court has already spoken lavishly about this right. The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values. What is more, being able to speak freely recognises and protects 'the moral agency of individuals in our society'. We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human."[84]

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[81] Dworkin id.

[82] Id at 57. Davis observes that:

> "[T]he value of free speech articulated by both Emerson and Dworkin cannot be underestimated in our constitutional state. The ability of citizens to speak their minds, to receive information and opinions allows each individual to develop as a human being."

While I firmly acknowledge the differences in freedom of expression in the context of the United States of America when juxtaposed with South Africa, the philosophical underpinnings and a broader understanding of the rationales for freedom of expression are relevant and helpful when unpacking the content of the right.

[83] *Economic Freedom Fighters* above n 81 at para 95 with reference to Dworkin above n 87 at 200.

[84] *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at paras 122-3.

[73] In addition, this Court has highlighted that "[t]he corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."[85] In *Islamic Unity*, Langa DCJ elucidated:

> "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 the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."[86]

[74] These dictates of pluralism, tolerance and open-mindedness require that our democracy fosters an environment that allows a free and open exchange of ideas, free from censorship no matter how offensive, shocking or disturbing these ideas may be.[87] However, as stated by this Court in *Mamabolo*, this does not mean that freedom of expression enjoys superior status in our law.[88] Similarly, a unanimous Court in *Khumalo v Holomisa* stated that, although freedom of expression is fundamental to our democratic society, it is not a paramount value.[89] That being said, as this Court observed in *Laugh it Off*, "we are obliged to delineate the bounds of the constitutional guarantee of free expression generously".[90]

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[85] *SANDU* above n X at para 8. See further *Moyo v Minister of Justice and Constitutional Development; Sonti v Minister of Justice and Correctional Services* [2018] ZASCA 100; 2018 (2) SACR 313 (SCA) at para 42.

[86] *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) (*Islamic Unity*) at para 26 endorsed *Handyside v the United Kingdom*, no 5493/72, § 49, ECtHR 1976.

[87] *Handyside* above n 94 at para 49.

[88] *Mamabolo* above n 80 at para 41.

[89] *Khumalo v Holomisa* above n 55 at para 25.

[90] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (*Laugh It Off*) at para 47.

[75] Furthermore, the historical stains of our colonial and apartheid past reinforce the point that freedom of expression has a particularly important role to play in our constitutional democracy, as Mogoeng CJ lamented:

> "Expression of thought or belief and own worldview or ideology was for many years extensively and severely circumscribed in this country. It was visited, institutionally and otherwise, with the worst conceivable punishment or dehumanising consequences. The tragic and untimely death of Steve Biko as a result of his bold decision to talk frankly and write as he liked, about the unjust system and its laws, underscores the point. This right thus has to be treasured, celebrated, promoted and even restrained with a deeper sense of purpose and appreciation of what it represents in a genuine constitutional democracy, considering our highly intolerant and suppressive past."[91]

[76] Turning to how section 16 ought to be interpreted. It is well accepted that *Islamic Unity* is the lodestar for how section 16 is to be interpreted and applied. In that case, this Court outlined the contours of the right enshrined in section 16 of the Constitution. Section 16(1) entrenches the right to freedom of expression and demarcates the scope of the right. Section 16(2) is definitional in that it sketches what does not form part of the scope of the right in section 16(1) and is expressly excluded from constitutional protection.[92] In consequence, regulation of expression that falls within section 16(2) would not be a limitation of the right in section 16(1).[93] However, "where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution".[94]

[77] I accept that, on a plain reading of section 10 of the Equality Act, juxtaposed with section 16(2)(c) of the Constitution, the former is broader than the latter in various respects. In true fidelity to the reasoning in *Islamic Unity*, the key consideration then is

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[91] *Economic Freedom Fighters* above n 81 at para 2. See also: *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at paras 23-4.

[92] *Islamic Unity* above n 94 at paras 30-2.

[93] Id at para 31.

[94] Id at para 34.

whether, on a proper interpretation, section 10 limits the right to freedom of expression protected in section 16(1) of the Constitution. As stated, only once we have established the existence of a limitation of a right, will it be necessary to proceed to a full section 36 limitations analysis. With these general principles as a backdrop, what follows is a close consideration of hate speech.

Hate speech

[78] Hate speech is the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy.[95] As the Holocaust Foundation submitted, section 10 of the Equality Act is the primary mechanism to prevent or prohibit unfair discrimination caused by expression.

[79] It bears emphasis that the expression of unpopular or even offensive beliefs does not constitute hate speech.[96] This is because, as noted above, a healthy democracy requires a degree of tolerance towards expression or speech that shocks or offends. This begs the question then: what constitutes hate speech? There is no universally accepted definition of the term "hate speech".[97]

[80] In their submissions, the Psychological Society drew this Court's attention to *Whatcott*, where the Supreme Court of Canada held:

> "Restricting expression because it may offend or *hurt feelings* does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which 'ridicules,

[95] *Vejdeland v Sweden* (2012), no 1813/07, ECHR, concurring opinion of Spielmann J joined by Nussberger J at para 5. *Handyside* above n 94 at para 49.

[96] *Handyside* above n 94. In *Hotz v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA) at para 68 Wallis JA observed that:

> "A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity."

[97] Benesch "Defining and Diminishing Hate Speech" in Minority Rights Group International (2014) *State of the World's Minorities and Indigenous Peoples* (Minority Rights Group International, London, 2014) at 18 at 20.

> belittles or otherwise affronts the dignity of' protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the *extreme detestation and vilification which risks provoking discriminatory activities against that group*. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way."[98] (Emphasis added.)

And that:

> "Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimise them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims."[99]

[81] Thus, it would appear that hate speech travels beyond mere offensive expression and can be understood as "extreme detestation and vilification which risks provoking discriminatory activities against that group".[100] Expression will constitute hate speech when it seeks to violate the rights of another person or group of persons based on group identity. Hate speech does not serve to stifle ideology, belief or views. In a democratic,

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[98] *Saskatchewan (Human Rights Commission) v Whatcott* 2012 SCC 11; [2013] 1 SCR 467 (*Whatcott*) at para 109.

[99] Id at para 41.

[100] This definition is the culmination of a trilogy of hate speech cases emanating from the Supreme Court of Canada. In *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 (*Taylor*), "hatred" was defined at 928 as: "strong and deep-felt emotions of detestation, calumny and vilification". In *R v Andrews* [1990] 3 SCR 870, the Court found that:

> "Hatred is not a word of causal connection. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. . . . When expression does instil detestation it does incalculable damage to the Canadian community and lays the founds for the mistreatment of the victimised groups."

Then, in *R v Keegstra* [1990] 3 SCR 697. it was said that hatred is—

> "the most severe and deeply felt form of opprobrium" and that "[h]atred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation."

open and broad-minded society like ours, disturbing or even shocking views are tolerated as long as they do not infringe the rights of persons or groups of persons. As was recently noted, "[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced".[101]

[82] Our case law accords with Canadian jurisprudence. There is a string of jurisprudence emanating from this Court in the context of racism in the workplace. In *Rustenburg Platinum Mine*,[102] this Court was confronted with the question whether referring to a fellow employee as a "swart man" (black man), within the context of that case, was racist and derogatory. This Court observed that:

> "Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by strife, conflict, untold suffering and injustice. Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regard to race but it can also be seen with reference to gender discrimination."[103]

[83] *Rustenburg Platinum Mine* demonstrates how the effect of even facially innocuous words must be understood based on the different structural positions occupied by white people in relation to black people in contemporary South African society. This approach takes cognisance of how words or, more broadly, expression contribute towards creating or exacerbating systemic disadvantage and subordination.

[84] In *South African Revenue Service*,[104] this Court had to consider the use of the repulsive term "kaffir" in the workplace and an insinuation that African people are

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[101] *Economic Freedom Fighters* above n 81 at para 155.

[102] *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC); 2018 (8) BCLR 951 (CC).

[103] Id at para 52.

[104] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC).

inherently foolish and incapable of providing any leadership worthy of submitting to. This Court reminded us:

> "South Africa's special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racialism. Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us".[105]

[85] With reference to our jurisprudence, this Court pointed out that in essence:

> "[R]acist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. To achieve that goal would depend on whether they view the use of words like kaffir as an extremely hurtful expression of hatred, the lowest form of contempt for African people, or whether the outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack."[106]

[86] These two cases demonstrate the presence of deeply rooted structural subordination in relation to race. While these cases focused on race,[107] the facts in the case before us vividly demonstrate the continuing structural subordination and vulnerability relating to sexual orientation and gender identity. In these cases, the Court underscored how facially innocuous words or notorious words have to be understood

[105] Id at para 2.

[106] Id at para 14.

[107] Id at paras 2 and 14, and *Rustenburg Platinum Mine* above n 111 at para 52.

based on the different structural positions in post-apartheid South African society. This is an approach which takes cognisance of how words perpetuate and contribute towards systemic disadvantage and inequalities. In essence, this is the corollary of our substantive equality demands that flow from the Constitution. The purpose of hate speech regulation in South Africa is inextricably linked to our constitutional object of healing the injustices of the past and establishing a more egalitarian society. This is done by curtailing speech which is part and parcel of the system of subordination of vulnerable and marginalised groups in South Africa.

Regulating hate speech: international law perspectives

[87] I turn now to consider how free speech, and hate speech, are regulated. Section 233 of the Constitution mandates us to, when interpreting legislation, prefer reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with it.[108] Having regard to international law, numerous instruments are in place to limit hate speech. Article 19 of the International Covenant on Civil and Political Rights (ICCPR)[109] entrenches the right to freedom of expression, but restricts that right when necessary.[110] Article 20 limits expression if it is hate speech, by providing that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by

[108] Section 233 of the Constitution must of course be read with section 39(1) of the Constitution, which provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law."

The fourth amicus, SALC, provides useful insight in this sphere in its written and oral submissions. These sources include those identified in Article 38(1) of the Statute of the International Court of Justice; international and regional treaties; United Nations resolutions; decisions of international and regional courts and tribunals; decisions of UN human rights treaty bodies; and reports of UN mandate-holders. See further Brownlie *Principles of Public International Law* 6 ed (OUP, 2003) at 6.

[109] International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR). The ICCPR was signed and ratified by South Africa in 1994 and 1998, respectively.

[110] Article 19(3) of the ICCPR reads:

> "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary."

law". The ICCPR calls upon state parties to adopt legislation to enforce these provisions.[111] In addition, the Equality Act expressly seeks to implement the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[112] From a regional perspective, the African Charter on Human and Peoples' Rights (Banjul Charter) also entrenches the right to freedom of expression,[113] coupled with obligations "to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance".[114]

[88] The right to freedom of expression in international law contains two parts – the first imposes on states the obligation to protect the right to free speech, the second makes it equally mandatory for States to prohibit hate speech.[115] The judgment of the Supreme Court of Appeal, while making cryptic reference to international law,[116] did not address at all the provisions of the ICERD, despite its central role. That central role emanates from its Article 4(a) that obliges South Africa to proscribe (as "an offence punishable by law") not only "incitement to racial discrimination [or violence]" but "all dissemination of ideas based on racial superiority or hatred".

[89] Various factors have been identified in international law that justify the curtailment of freedom of expression. These include: (i) the prevailing social and political context; (ii) the status of the speaker in relation to the audience; (iii) the

[111] Article 2(2) of the ICCPR.

[112] Sections 2(h) and 3(2)(b) of the Equality Act. International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 (ICERD). South Africa signed and ratified this Convention in 1994 and1998, respectively.

[113] Article 9 of the African Charter on Human and People's Rights (Banjul Charter), 21 October 1986. South Africa signed and ratified the Banjul Charter on 9 July 1996.

[114] Id at para Article 28

[115] Articles 19 and 20 of the Universal Declaration of Human Rights, 10 December 1948 (UDHR), and Article 19 of the ICCPR.

[116] It referenced the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

existence of a clear intent to incite; (iv) the content and form of the speech; (v) the extent and reach of the speech; and (vi) the real likelihood and imminence of harm.[117]

[90] Section 3 of the Equality Act encourages a comparative foreign law analysis.[118] In its judgment, the Supreme Court of Appeal limited its analysis to the United States, Canada and Germany. It failed to acknowledge that in Canada and Germany, hate speech is criminalised,[119] whereas here hate speech is regulated through civil remedies in the Equality Act.[120] Our approach accords with that of the United Nations Rabat Plan of Action where it is recommended that:

> "Criminal sanctions related to unlawful forms of expression should be seen as a last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply."[121]

[91] That is not to say that helpful guidance cannot be gained from these jurisdictions – Canadian jurisprudence in particular provides useful insight into some of the aspects under consideration, particularly in respect of the definition of hate speech. The only caveat is that we must be ever mindful that in Canada, hate speech is criminalised.[122] A more extensive conspectus is required to illustrate the scope of developments under foreign law in relation to hate speech as it is applied to the LGBT+ community.. An analysis of comparative foreign law must take into account that:

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[117] Principle 23 of the African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 10 November 2019.

[118] See section 3(a)-(c) of the Equality Act.

[119] Section 319(1) of the Canadian Criminal Code and section 130(1) of the German Criminal Code.

[120] Section 10(2) pertinently provides that the Equality Court may refer a case relating to hate speech to the Director of Public Prosecutions to institute criminal proceedings. Criminal sanctions play no role here and the Equality Act is plainly a civil statute.

[121] Annual Report of the United Nations High Commissioner for Human Rights, 11 January 2013 A/HRC/22/17/Add 4 at para 34.

[122] See above n 126.

> "[T]he international standard for hate speech regulation becomes less consistent in the absence of equalising circumstances. Depending on the country and its history and culture, the standard vacillates between more or less speech-protection."[123]

[92] The emphasis a society places on freedom of expression and its approach to hate speech regulation is largely a product of that society's culture, history, values and norms. This is an important insight when considering how each jurisdiction aims to reconcile the tension between freedom of expression and hate speech. We are able, however, to discern general features in broad strokes that are common across various jurisdictions.

[93] On 5 October 2020, this Court, as it has on previous occasions, submitted a request to the World Conference on Constitutional Justice (Venice Commission) regarding other jurisdictions' positions on freedom of expression and hate speech prohibitions. Various jurisdictions provided useful submissions on this score and in summary, free speech is generally constrained by prohibitions on hate speech and various forms of hurtful and harmful speech.[124] Useful guidance can be gained from these jurisdictions and others with well-developed hate speech legislation.[125] What bears consideration next is how section 10(1) ought to be interpreted.

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[123] Chandramouli "Protecting Both Sides of the Conversation: Towards a Clear International Standard for Hate Speech Regulation (2013) 34 *University of Pennsylvania Journal of International* Law 831 at 848.

[124] Submissions were received from Germany, Sweden, the Netherlands, Brazil and Mexico.

[125] In Belgium, the Belgian Holocaust denial law, passed on 23 March 1995, bans public Holocaust denial. Specifically, the law makes it illegal to publicly "deny, play down, justify or approve of the genocide committed by the Nazi German regime during the Second World War". Prosecution is led by the Belgian Centre for Equal Opportunities. The offense is punishable by imprisonment of up to one year and fines of up to €2 500. In France, France's penal code and press laws prohibit public and private communication that is defamatory or insulting, or that incites discrimination, hatred, or violence against a person or group on account of place of origin, ethnicity or lack thereof, nationality, race, specific religion, sex, sexual orientation, or handicap. The law prohibits declarations that justify or deny crimes against humanity – for example, the Holocaust (Gayssot Act). In Luxembourg, Luxembourg law "provides custodial sentences of between 9 days and 2 years and or a fine of €251 to €25 000 for the verbal, written or graphic communication or materials that are made available in public places or meetings which incite discrimination, hate or violence against a natural or legal person or a group or community of persons. Sexual orientation is considered a protected characteristic." In Chile, Article 31 of the "Ley sobre Libertades de Opinión e Información y Ejercicio del Periodismo" (Statute on Freedom of Opinion and Information and the Performance of Journalism) punishes with a large fine those who "through any means of social communication make publications or transmissions intended to promote hatred or hostility towards persons or a group of persons due to their race, sex, religion or nationality". Finally, in Denmark, section 266b of the Danish Criminal Code states that:

Interpretation of section 10(1)

[94] Having identified the relevant constitutional background to the Equality Act, and section 10 more particularly, we can proceed to answer some of the interpretive questions that were discussed before us.

The remedial character of section 10(1)

[95] In essence, section 10(1) can be described as a statutory delict that innovatively offers, unlike any crime or other delict in our law, specific remedies concerning the right to equality, as the Mandela Foundation argued.[126] I agree with the submissions that Parliament sought to protect victims from infringements of their right to equality, not only in the form of unfair discrimination, but also through hate speech and harassment, by forging new statutory delicts bearing those names, actionable in the Equality Court.

"That could reasonably be construed to demonstrate a clear intention"

[96] Before this Court, the parties debated whether the phrase "that could reasonably be construed to demonstrate a clear intention" postulates a subjective or objective test. In my view, it is plainly an objective standard that requires a reasonable person test. This is based on the gloss "reasonably be construed" and "to demonstrate a clear intention", implying an objective test that considers the facts and circumstances

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"(1) Any person 'who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.

(2) In determining the punishment it shall be considered a particularly aggravating circumstance if the conduct is of a propagandistic nature."

[126] Some of the amici drew analogies between the impugned section and common law defamation and delict. It is indeed so that, while defamation regulates speech that damages reputation and dignity, the impugned section seeks to regulate speech by protecting the rights to equality and dignity of vulnerable people. In a successful defamation claim the victim receives monetary compensation as damages, or an apology or a retraction of the defamatory statements may be ordered. Under the Equality Act, the victim may, apart from a claim for damages, seek an unconditional apology, or ask for the perpetrator to undertake counselling or to make a contribution to an organisation that promotes the rights of the vulnerable.

surrounding the expression, and not mere inferences or assumptions that are made by the targeted group.[127]

[97] This approach accords with the interpretation advanced in *SAHRC v Khumalo* that "[t]he objective test in section 10(1) implies in the terminology used to articulate it, that an intention shall be deemed if a reasonable reader would so construe the words. Because the objective test of the reasonable reader is to be applied, it is the effect of the text, not the intention of the author, that is assessed."[128] I endorse this approach. It is consistent with our jurisprudence concerning similar issues. An objective normative reasonable person test was accepted by this Court, albeit in a different context, in *Mamabolo*.[129] This is also consistent with our common law delict of *inuria*, which evaluates these claims by the reasonableness standard of wrongfulness. In *Le Roux*, this Court held that, in order to determine whether expression was defamatory—

> "[t]he test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that [they] would have had regard not only to what is expressly stated but also to what is implied."[130]

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[127] In his written submissions the Minister cites Marais and Pretorius "A Contextual Analysis of the Hate Speech Provisions of the Equality Act" (2015) 18 *Potchefstroom Electronic Law Journal* at 912:

> "The requirement of a 'clear' intention points to an element of deference to the speaker, as well as caution not to prohibit seemingly discriminatory expression that may in fact serve to promote rather than jeopardise equality."

[128] *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ); (*SAHRC v Khumalo*) at para 89. See also at para 88:

> "The standard of the reasonable person, applied to section 10(1), means, therefore, whether a reasonable person could conclude (not inevitably should conclude) that the words mean the author had a clear intention to bring about the prohibited consequences. Words obviously mean what they imply."

In addition, in *Whatcott* above n 107, the Canadian Supreme Court stated at para 95:

> "[I]n view of the reasonable person aware of the context and circumstances, the representation exposes or tends to expose any person or class of persons to detestation and vilification on the basis of a prohibited ground of discrimination."

[129] *Mamabolo* above n 80 at para 43.

[130] *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 89.

[98] In *Rustenburg Platinum Mine*, this Court held that context is axiomatically important as the words in themselves were not racist, and accepted that "the test to determine whether the use of the words is racist is objective".[131] This further buttresses an objective approach.

[99] Importantly, an objective standard gives better effect to the spirit, purport and objects of the Bill of Rights.[132] On the one hand, if it were based on the subjective perception of the target group, it would unduly encroach on freedom of expression, since claims could be based on "a multiplicity of trivial actions by hypersensitive persons".[133] On the other hand, if it were based on the subjective intention of the speaker, the threshold would be considerably high for civil liability.[134]

[100] An objective approach, accounting for the general circumstances and context, as well as other factors elucidated by the Special Rapporteur, is appropriate for what hate speech laws aim to prohibit. In *Whatcott*, the Supreme Court of Canada underscored the *effects* of hate speech, not the intent, and notes that *systemic* discrimination tends to be more widespread than intentional discrimination.[135] This Court has acknowledged that "systemic motifs of discrimination" are part of the fabric of our society.[136] This

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[131] *Rustenburg Platinum Mine* above n 111 para 38. This Court drew an analogy with the test for whether a statement is defamatory, as enunciated in *Sindani v Van der Merwe* [2001] ZASCA 130; 2002 (2) SA 32 (SCA) at para 11.

[132] *SATAWU v Moloto N.N.O.* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 117 (CC) at para 72.

[133] *Delange v Costa* 1989 (2) SA 857 (A) at 862A-B, cited in *Dendy v University of the Witwatersrand* [2007] ZASCA 30; [2007] 3 All SA 1 (SCA) at para 6.

[134] For instance, as was stated in the Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (A/HRC/22/17/Add.4):

> "Article 20 of [the ICCPR] anticipates intent. Negligence and recklessness are not sufficient for an act to be an *offence* under article 20 of the Covenant, as this article provides for 'advocacy' and 'incitement' rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience."

[135] *Whatcott* above n 107 at para 126, affirming *Taylor* above n 109:

> "The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of the anti-discrimination statute."

[136] *Brink* above n 53 at para 41.

analysis is apt when considering the philosophical underpinnings of hate speech prohibitions that attach civil liability, coupled with the role of hate speech and systemic discrimination in this country. However, when plugging in an abstract reasonable person test in order to construe the meaning of alleged hate speech, courts ought to be mindful of our diverse and dynamic society and not inadvertently reify prejudices.[137]

[101] For all these reasons, I conclude that the test phrase is an objective reasonable person test and the Supreme Court of Appeal erred in concluding that the test imposed by the impugned section is a subjective one. I therefore endorse those decisions of the Equality Court that have reached a finding that the test is objective.[138]

The correct reading and interpretation of "hurtful"; "harmful or to incite harm"; "promote or propagate hatred"

[102] I am of the view that the Supreme Court of Appeal erred in finding that paragraphs (a)-(c) of section 10(1) must be read disjunctively. The absence of the conjunction "and" between the paragraphs, accentuated by the Supreme Court of Appeal in its reasoning, is countered by the absence of the disjunction "or". This is therefore a neutral factor. On a disjunctive reading, section 10 would prohibit mere private communication which could reasonably be construed to demonstrate a clear intention to be hurtful – this is an overly extensive and impermissible infringement of freedom of expression.

[103] Expressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech. It is well established that the prohibition of hate speech is not aimed at merely offensive speech, but that offensive

[137] Modiri "Race, Realism and Critique: The Politics of Race and Afriforum v Malema in the (In)Equality Court" (2013) *SALJ* 274 at 274.

[138] *Afriforum v Malema* 2011 (6) SA 240 (EqC) at para 109 and *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) at para 11.

speech is protected by freedom of expression.[139] This point is eloquently articulated in *Whatcott*, where it was noted that merely offensive or hurtful expression should be excluded from the ambit of a hate speech prohibition and respect should be given to the Legislature's choice of a provision predicated on *hatred*.[140] As mentioned above, the Supreme Court of Canada persuasively defined, in the context of hate speech, the legislative term "hatred" as:

> "being restricted to manifestations of emotion described by the words 'detestation' and 'vilification'. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other harmful effects."[141]

[104] In striving to interpret the section in a constitutionally compliant manner, as we are required to do, provided that such interpretation can be reasonably ascribed to the provision,[142] the impugned section is reasonably capable of a conjunctive reading. That reading is thus called for. This approach also advances a contextual and purposive interpretation. It is buttressed by the fact that: prohibiting hurtful expression would undermine the ability to "offend, shock and disturb"; a disjunctive reading is not required by international law;[143] and the impugned provision's title makes it clear that it deals with the prohibition of *hate* speech. Furthermore, and critically, a disjunctive

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[139] See *Handyside* above n 94 at para 49 and *Keegstra* above n 109. Waldron *The Harm in Hate Speech* (Harvard University Press, London 2012) at 105-6 observes that "[p]rotecting people's feelings against offense is not an appropriate objective for the law" but—

> "[d]ignity on the other hand, is precisely what hate speech laws are designed to protect – not dignity in the sense of any particular level of honour or esteem (or self-esteem), but dignity in the sense of a person's basic entitlement to being regarded as a member of society in good standing."

[140] *Whatcott* above n 107 at para 46. In that case, the Canadian Supreme Court upheld the regulation of speech that refers to LGBT+ persons as "dirty", "filthy", "degenerate" and as paedophiles.

[141] Id at 471. It is important to note that the impugned provision in *Whatcott* only prohibits public communication of hate speech; it does not restrict hateful expression in private communications between individuals. In this regard, one can also consider the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to the General Assembly on "Hate Speech and Incitement of Hatred" (2012) which states that hatred is "a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group".

[142] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at paras 49-59.

[143] Article 20(b) of the ICCPR above n X and Article 4 of the ICERD above n X.

reading would render the impugned section unconstitutional, since merely hurtful speech, with no element of hatred or incitement, could for example constitute prohibited hate speech. This would be an impermissible infringement of freedom of expression as it would bar speech that disturbs, offends and shocks.[144] Therefore, for all the reasons canvassed above, a conjunctive interpretation is warranted.[145]

[105] In endorsing a conjunctive approach, a truly reasonable interpretation is subject to whether such meanings can be ascribed to the various terms. I turn next to the key question: what are the precise meanings of the terms "hurtful", "harmful" and "to incite harm"? The parties and the amici proffered an array of interpretations.

[106] SAHRC contended that there is a distinction between "hurtful" and "harmful" in that harmful is a more permanent and severe type of harm. On the one hand, "hurtful" refers to expression that causes emotional pain to a person's dignity, but the concept "harmful" connotes deep psychological and emotional effects. In oral argument, however, the SAHRC conceded that there is considerable overlap. The Minister, on the other hand, submitted that "hurtful" refers to when distress is caused to someone's feelings and "harmful" refers to psychological or emotional harm.

[107] Considering next the phrase "to incite harm", it is imperative to point out at the outset that there is no requirement of an established causal link between the expression and actual harm committed. According to international treaties, this form of incitement is not restricted to physical violence, as it also refers to the incitement to discrimination and hatred. Article 20(2) of the ICCPR, provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". In addition, Article 4(a) of the ICERD prohibits "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts".

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[144] *Whatcott* above n 107 at para 109.

[145] This approach was endorsed in *Khumalo v Holomisa* above n 55 at para 82 and echoed in *Gordhan v Malema* 2020 (1) SA 587 (GJ) at para 6.

[108] It is accepted by the European Court of Human Rights (ECHR) that "inciting hatred does not necessarily entail a call for an act of violence, or other criminal acts" and speech that does not "directly recommend individuals to commit hateful acts may still reach the threshold of hate speech".[146]

[109] In *Whatcott*, the Supreme Court of Canada also questioned the requirement of a causal link in the context of hate speech prohibitions – "both the difficulty of establishing a causal link between an expressive statement and the resulting hatred, and the seriousness of the harm to which vulnerable groups are exposed by hate speech, justify the imposition of preventive measures that do not require proof of actual harm".[147] That Court went on to find that "a reasonable apprehension of societal harm as a result of hate speech" is sufficient.[148]

[110] The Supreme Court of Appeal erred when it concluded that no evidence was presented to show a link between the article and any subsequent physical or verbal attacks on members of the LGBT+ community".[149] This is misplaced. Our Constitution requires that we not only be reactive to incidences or systems of unfair discrimination, but be pre-emptive. We need to act after the damage has occurred where so required, but, importantly, we are also required to act to ensure that it does not occur.

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[146] In *Vejdeland* above n 103 at para 55 the Court reiterated:

> "[I]nciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. . . . In this regard, the Court stressed that discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'."

Vejdeland is apposite as that case entailed speech where it was claimed that homosexuality was one of the main reasons why HIV/AIDS came into existence and that the "homosexual lobby" tried to play down paedophilia.

[147] *Whatcott* above n 107 at para 129 referring to *Keegstra* above n 109 at 776.

[148] Id at paras 132-135. The Supreme Court of Canada stated that "[t]his approach recognises that a precise causal link for certain societal harms ought not to be required. A Court is entitled to use common sense and experience in recognising that certain activities, hate speech among them, inflict societal harms."

[149] Supreme Court of Appeal judgment above n 26 at para 33.

[111] Our law does not require a causal link. In addition, that finding also disregards the compelling, uncontested evidence in the Equality Court that graphically demonstrated the pervasive past violence and general enmity against members of the LGBT+ community. That, in turn, demonstrates the potential harm contained in the article. The difficulty in determining actual harm against the LGBT+ community is indicative of the hideous nature of hate speech committed against this target group. That there is no requirement for a causal connection is clear from the Equality Act itself. To require a causal link would in and of itself undermine the very same objectives of the Equality Act to prohibit unfair discrimination, in that not every harmful and/or hurtful speech will result in imminent violence. There may be expression which certain groups find hurtful and/or harmful which does not actually result in violence; but that does not take away from the fact that such expression would have been hate speech.

[112] Lastly, it is of some significance that the impugned section distinguishes between "harmful" or "to incite harm" in clear disjunctive terms. This reveals that, even on an overall conjunctive reading, it may be sufficient to demonstrate harm, absent incitement of harm. Thus, the section postulates prohibiting expression that either harms or evokes a reasonable apprehension of harm to the target group.

"Words"

[113] The approach in *Nelson Mandela Foundation Trust*,[150] that "speech" must be interpreted broadly, so as to encompass the ideas behind the words themselves and both verbal and non-verbal expressions, commends itself to me.[151] This wide meaning accords not only with our Constitution, but also with the provisions of the Equality Act. And it is consonant with international law and comparative foreign law.

[114] The use of the terms "advocate" and "propagate" in section 10 of the Equality Act is indicative of ideas rather than words, if they are to be accorded their full

[150] *Nelson Mandela Foundation Trust v Afriforum NPC* 2019 (6) SA 327 (GJ).

[151] Id at para 47.

meaning. Attaching a literal interpretation to these words would not achieve the objects of the provision. The inclusion of these two concepts suggests that the intention is to give effect to article 4 of the ICERD and section 16(2)(c) of the Constitution respectively, which are specifically concerned with racist "propaganda" and the "advocacy" of hatred.[152]

"Communicate"

[115] Words have meaning and effect should be given to them. To communicate assumes the conveyance of ideas. Words in and of themselves are otherwise meaningless. As it was described in *Nelson Mandela Foundation Trust*, "[w]hat the section targets is thus the meaning behind the words, and not simply the words".[153] I am also in agreement with that Court's view that an interpretation of the term "words" to include speech, ideas, ideologies, belief, meaning, instructions and so forth, affords this term a sensible and reasonable interpretation that is constitutionally compliant. A purposive interpretation of this sort is undoubtedly required.

[116] In contradistinction to the other verbs in the impugned provision – such as "publish"; "propagate" or "advocate" that all inherently require some form of public dissemination[154] – "communicate" is capable of both being public and private. But, "communicate" in terms of section 10(1) plainly requires that the speaker transmits words to a third party – there must be communication, the transmission of information. And the conjunctive reading required here entails that "communicate" must be read in light of what appears in section 10(a)-(c). The concepts "promote" and "propagate" in (c) connote the dissemination of information and do not fit the notion of communicating in private. And on a reading that accords with section 39(2), one would – in any event –

[152] As set out in sections 2(b)(v) and 2(h) of the Equality Act.

[153] *Nelson Mandela Foundation Trust* above n 160 at para 132.

[154] According to *Lexico,* the definition of these terms are as follows: "publish" refers to "prepare and issue (a book, journal, piece of music, etc.) for public sale, distribution or readership"; "advocate" refers to "a person who publicly supports or recommends a particular cause or policy"; and "propagate" means "to spread and promote (an idea, theory etc.) widely".

have to read "communicate" to mean communication that excludes private conversations.

[117] Our most private communications – and being able to freely communicate in one's private and personal sphere – forms part and parcel of the "inner sanctum of the person" and is in the "the truly personal realm".[155] This approach resonates with Canadian jurisprudence. I hasten to acknowledge that their jurisprudence must be understood in view of the fact that section 319 of the Canadian Criminal Code extends to private conversations. It is nonetheless useful to consider it with that caveat in mind.[156]

[118] Hate speech prohibitions, even those that attach civil liability, should not extend to private communications, because it is incongruent with the very purpose of regulating hate speech – that *public* hateful expression undermines the target group's dignity, social standing and assurance against exclusion, hostility, discrimination and violence. Furthermore, the purpose of hate speech prohibitions is "to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination. *It is improbable that most private conversations will have this effect*".[157]

[119] Ultimately, hate speech prohibitions are concerned with the *impact* and *effect* of the hate speech and protecting the public good; this is inevitably limited when communicated in the private sphere. Therefore, true hate speech presupposes a public dissemination of some sort, [158] or at the very least it cannot be conveyed in mere private

[155] *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 67.

[156] See, amongst others: *R v Ahenakew* 2006 SKQB 27 at para 15; *Keegstra* above n 109 at 772-3.

[157] Botha and Govindjee "Hate Speech Provisions and Provisos: A Response to Marais and Pretorius and Proposals for Reform *Potchefstroom Electronic Law Journal* (2017) 2 at 13.

[158] See Article 4(a) of ICERD: "Shall declare an offence punishable by law *all dissemination* of ideas based on racial superiority or hatred, or incitement".

communications. Indeed, "the regulation of hate speech which occurs publicly sets a normative benchmark and has the potential to shape future behaviour".[159]

[120] This approach accords with the requirement of a constitutionally compliant interpretation in terms of section 39(2) of the Constitution. And this restrictive interpretation is justified on the basis of the *eusdem generis* canon of construction (of the same kind, class, or nature), when general words follow specific words in a statute in which several items have been enumerated, the general words are construed to embrace only objects similar in nature to the objects enumerated by the preceding specific words of the statute.[160]

"Against any person"

[121] The main criticism is that hate speech prohibitions focus on the negative impact on the targeted group and the greater societal harm as opposed to the specific impact on an individual (it is not based on their individual characteristics).[161] Put differently, the focus ought to be on group or societal harm not solely individual harm. It is contended that "against any person" may diminish the critical role of the wider targeted group.

[122] It is quite conceivable, though, that hate speech may be directed at an individual but impact not just that individual, but the group to which that individual belongs. The offensive language used by Mr Qwelane might have been directed by an individual at one homosexual person – something like, "I do not understand your sexuality. Just how can you be sexually attracted to another man? One of these days you are going to want to marry an animal." Although purportedly directed at one homosexual person, that will definitely cause untold harm, insult and injury to the LGBT+ community, not just the individual to whom the words were directed. Analogously, the same is bound to happen with the black community if a person uses the vile word "kaffir" against one

[159] Id.

[160] *Road Traffic Management Corporation v Waymark (Pty) Ltd* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) at para 48.

[161] Botha and Govindjee above n 157 at 16.

black person. In my view, there is nothing objectionable with the words "against any person". This interpretation makes sense in the context of the wide – and not individualised – dissemination that the section requires. Indeed, the words are a necessary component of section 10, if it is to cover what is required by section 16(2) of the Constitution.

The proviso in section 12

[123] Section 12 of the Equality Act is not part of these confirmation proceedings. However, the High Court reasoned that because it is inextricably linked to section 10 through the proviso, a case may be made that it bears consideration. In view of the conclusion that I reach below in respect of section 10(1)(a), however, I do not deem it necessary to decide this point.

Challenges to section 10

[124] Having discussed the interpretive background against which section 10 must be understood, we can now turn to the challenges it faces in this Court. Since the constitutional challenge is based on two overarching attacks, I will consider the issues in terms of whether the impugned provision violates the Bill of Rights, and whether it is vague.

Bill of Rights challenges: limitation of section 16

[125] The main complaint by Mr Qwelane is that the impugned provision's limitation of freedom of expression is overbroad, by which he means that it is unjustified and therefore unconstitutional. He founds this claim on a number of words and phrases, which he submits make section 10(1) impermissibly overbroad. In considering this Bill of Rights challenge, there must first be a determination of whether they go beyond what is envisioned in section 16 of the Constitution, thereby limiting the right.[162] If they do,

[162] *Walters* above n 50 at para 26.

we are enjoined to conduct a justification analysis in terms of section 36 of the Constitution.[163]

The prohibited grounds

Sexual orientation

[126] The Supreme Court of Appeal provided for an interim reading-in that merely adds "sexual orientation" to the other grounds already listed in section 16(2)(c), namely race, ethnicity, gender or religion. This means that the prohibited ground of sexual orientation is enough to found a case of hate speech based on section 10(1) of the Equality Act, but it goes beyond the limitations of free speech that are constitutionally allowed in section 16(2). Therefore, it is clear that the inclusion of this ground is a limitation of section 16(1) beyond what is permitted in section 16(2). This requires a justification analysis on this ground.

The conundrum: no evidence and no reasoning on the other "prohibited grounds"

[127] The Supreme Court of Appeal observed that, other than the added ground of sexual orientation, "the other prohibited grounds provided for in section 1 of [the Equality Act] beyond those set out in section 16(2) of the Constitution, were not in issue before us and no evidence was directed to them". In the High Court this issue was not considered in any detail. That Court noted the broadness of the prohibited grounds, but undertook no further analysis. Instead, it focused on the evidence regarding hate speech against the LGBT+ community. This presents a potential conundrum, inasmuch as no evidence was led concerning the other grounds, nor has there been any reasoned decision in respect of them in either the High Court or the Supreme Court of Appeal.

[128] Through a recent amendment to section 1(a) of the Equality Act, the prohibition of discrimination on the ground of HIV/AIDS status was included as a prohibited

[163] Id at para 27.

ground.[164] The remaining potentially vexed inclusions are those that are wide-ranging and that may elicit apprehension about interference by the draconian "thought police", like the concepts "conscience" and "belief". There are well-grounded fears that their inclusion may impermissibly encroach upon the right to freedom of expression. Some of the amici make insightful submissions in this regard.[165] However, since this is not an issue that is before this Court for confirmation and, particularly in view of the absence of judgments on this point by the High Court and the Supreme Court of Appeal, it is not in the interests of justice to engage with this issue.[166] It is best left to Parliament to deal with this issue.

Adding analogous grounds

[129] What bears consideration next is the inclusion of analogous grounds. It bears emphasis that various thresholds must be cleared in order for grounds to constitute analogous grounds for the purposes of section 1 of the Equality Act. These thresholds resonate with the very purpose of combating hate speech through legislative regulation. As it was articulated in *Whatcott*:

> "Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eye of the majority, reducing their social standing and acceptance within society."[167]

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[164] In 2017, section 1(a) of the Equality Act was amended to include a prohibition of discrimination on the grounds of HIV/AIDS status. For purposes of the Equality Act HIV/AIDS status "includes actual or perceived presence in a person's body of the Human Immunodeficiency Virus (HIV) or symptoms or Acquired Immune Deficiency Syndrome (AIDS), as well as adverse assumptions based on this status".

[165] Thus, the Holocaust Foundation contends that repeating the section 9(3) prohibited grounds and adding HIV/AIDS status is appropriate, since the Equality Act, through the constitutional injunction of section 9(4) of the Constitution, is obliged to prevent unfair discrimination. Therefore, so the argument goes, section 10(1) is thus mandated and required by the Constitution itself. The Freedom Institute, on the other hand raises concerns in respect of overbreadth. Its difficulty lies with the expansion of the wide-ranging acts that may constitute hate speech, as opposed to the broadness of the grounds the hate speech is based on. A restrictive interpretation of the additional prohibited grounds is advocated by MMA. It cited as an example that "belief" should not be understood to include political ideology. MMA also contends for a causal link between the speech and the prohibited ground – to be "based on" one of the prohibited grounds, the prohibited grounds must be the "reason for the speech".

[166] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC) at paras 18-24.

[167] *Whatcott* above n 107.

[130] It bears emphasis that the prohibition of hate speech seeks to protect against the dissemination of hatred that causes or incites harm, in that it undermines the dignity and humanity of the target group and undermines the constitutional project of substantive equality and acceptance in our society. Provisions prohibiting hate speech can be contrasted with our law around unfair discrimination. In that context, listed grounds are grounds where the "dignity assessment" is presumed to have already been done – our jurisprudence tells us that discrimination on the basis of a listed ground is presumed to be unfair. This is based on past experiences, historic suffering or systemic disadvantage. As a result, in the unfair discrimination scenario, the onus shifts onto the respondent to show that discrimination on a listed ground is not unfair. In this regard, listed grounds differ from analogous grounds, where unfairness must be shown.

[131] In this way. section 1(b) of the Equality Act plays a similar role to that of the unfairness requirement as espoused in *Harksen*. It is necessary to reiterate the provisions of section 1(b):

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

[132] One must guard against a narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases, they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity

and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.[168]

[133] While it is essential that targeted groups are not overly broad, it is equally clear that, since section 10(1)(b) does encapsulate and require certain elements that underscore the importance of membership, systemic discrimination and the undermining of dignity, this does not leave the door open for the addition of analogous grounds that allow for an unjustifiable limitation of the right to freedom of expression.

[134] For these reasons, the expansion of the listed grounds to include analogous grounds, does not render the definition of prohibited grounds unconstitutional. The extended prohibited grounds are narrowly crafted to fulfil the purpose of the hate speech prohibition. Accordingly, I conclude that the limitation is proportionate in an open and democratic society. The challenge based on a limitation of section 16 of the Constitution must therefore fail.

"Hurtful"

[135] The potential vagueness of the term "hurtful" will be discussed below, but a separate question is whether it limits section 16 of the Constitution. Section 10(1)(c) of the Equality Act prohibits words that "promote or propagate hatred", and this may be interpreted to accord with the prohibition of the "advocacy of hatred" in section 16(2). Similarly, the classification in section 10 of hate speech as speech that is "harmful or incite[s] harm" may be read to align with the prohibition against the "advocacy of hatred" in section 16(2)(c) of the Constitution. However, there is no similar exercise that can be conducted to read "hurtful" constitutionally, as section 16 has no similar wording. Furthermore, the term is clearly broader than what is envisioned in section 16, which focuses on war, violence and hatred, and not merely speech that hurts. Therefore, on this count, section 10 limits section 16 of the Constitution, and a justification analysis is required.

[168] *Harksen* above n 72 at para 47.

Justification analysis

[136] The term "hurtful" and the inclusion of "sexual orientation" in the Equality Act extend the regulation of expression beyond expression envisaged in section 16(2) of the Constitution. *Islamic Unity* holds that "[w]here the State extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution".[169] Similarly, here the Equality Act is certainly past what is envisaged in section 16(2), so that there is a limitation of the section 16(1) right. Therefore, that takes us directly to the justification analysis.

[137] Section 36(1) provides:

> "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, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[138] It is necessary to apply the various factors in section 36 to each limitation caused by section 10(1). These are the limitations brought about firstly through the inclusion of the term "hurtful", and secondly through the inclusion of the prohibited ground of "sexual orientation".

[169] *Islamic Unity* above n 94 at para 32.

Can "hurtful" be justified?

[139] With respect to the term "hurtful", much of what is relevant to the justification analysis has already been discussed. The importance of the right to freedom of expression on the one hand and the importance of the purpose of the limitation of that right, namely to protect the equally important rights to equality and dignity by way of prohibiting hate speech, have been expounded. So too, the nature and extent of the limitation and the relation between the limitation and its purpose. However, it is here that the usefulness of the term "hurtful" becomes less clear. If speech that is merely hurtful is considered hate speech, this sets the bar rather low. It is an extensive limitation. The prohibition of hurtful speech would certainly serve to protect the rights to dignity and equality of hate speech victims. However, hurtful speech does not necessarily seek to spread hatred against a person because of their membership of a particular group, and it is that which is being targeted by section 10 of the Equality Act. Therefore, the relationship between the limitation and its purpose is not proportionate.

[140] This finding on proportionality suggests that section 10(1) leads to an unjustifiable limitation of section 16 of the Constitution, and that there might be less restrictive means to achieve the purpose of limiting hate speech. Most obviously, the term "hurtful" – which is the source of the limitation – can merely be excised from the provision.

[141] The existence of less restrictive means to achieve the purpose is a strong indication that the limitation occasioned by the term "hurtful" in section 10 cannot be justified. However, as this Court held in *Economic Freedom Fighters*:

> "While less restrictive means is where most limitations analyses may 'stand or fall', one must not conflate this leg with the broader balancing proportionality enquiry as envisaged by section 36(1)."[170]

[142] Further in *Mamabolo* this Court explicated:

[170] *Economic Freedom Fighters* above n 81 at para 146.

> "Where section 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant."[171]

[143] Rather, as this Court explained in *Economic Freedom Fighters*:

> "All relevant factors must be taken into account to measure what is reasonable and justifiable, and the factors listed in section 36(1)(a)-(e) are not exhaustive. What is required is for a court to 'engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'."[172]

[144] Following this approach, we must consider the important constitutional purpose of limiting freedom of expression in the case of hate speech. We must also consider the fact that the limitation of "hurtful" speech goes beyond the justified limitation of hate speech, and that it is possible to avoid this by merely excising "hurtful". In the circumstances, the term "hurtful" leads to an unjustifiable limitation on freedom of speech, and is therefore unconstitutional.

Can the inclusion of "sexual orientation" as a prohibited ground be justified?

[145] The inclusion of "sexual orientation" as a prohibited ground in section 10(1) read with section 1 of the Equality Act stands on an entirely different footing. The justification analysis must begin in the same way: the importance of the right to freedom of expression – as explored above – must be considered, and the limitation of this right in the case of hate speech remains central to the protection of the rights to dignity and

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[171] *Mamabolo* above n X above n 80 at para 49. See also cited above *Case* above n 56 at para 49:

> "To determine whether a law is overbroad, a court must consider the means used (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad."

[172] *Economic Freedom Fighters* above n 81 at para 91.

equality. However, the prohibition of hate speech based on sexual orientation is entirely proportional to its purpose. It would not be possible to protect the rights of the LGBT+ community without prohibiting hate speech based on sexual orientation. Less restrictive means of achieving this purpose have not been suggested, and are in fact inconceivable.

[146] All of the section 36 factors therefore point towards justifiability, and so the inclusion of the prohibited ground of "sexual orientation" in section 10(1) of the Equality Act is a justified limitation of section 16(1). The order of the Supreme Court of Appeal in this regard is therefore constitutional.

Rule of law challenge

[147] Section 10 of the Equality Act has also been challenged on the ground that it is vague. If it is, it would be contrary to the rule of law, and would therefore violate section 1(c) of the Constitution. More specifically, what we must consider is whether in section 10 the terms "hurtful", "harmful" and "to incite harm" are vague.

General principles

[148] The rule of law requires, amongst other things, that laws be coherent, clear, stable and practicable.[173] This Court has noted that "[i]t is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that rules be articulated clearly and in a manner accessible to those governed by the rules".[174] In *Affordable Medicines Trust*, this Court held:

> "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

[173] Fuller *The Morality of Law* (Yale University Press, New Haven and London 1964) at 63-5.

[174] *Dawood* above n 73 at paras 47 and *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie Van Zyl*) at para 22.

> 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."[175]

[149] This Court expounded that 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".[176] In *Hyundai* it was explained that "the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them".[177] And in *Opperman*, this Court observed that "[l]aws must of course be written in a clear and accessible manner. Impermissibly vague provisions violate the rule of law, a founding value of our Constitution. For the 'law' to 'rule', it must be reasonably clear and certain".[178] This Court continued:

> "Before constitutional compliance can be evaluated, a court must attribute a meaning to a provision. If more than one meaning is reasonably plausible, the one resulting in constitutional compliance must be chosen. But if the interpretation that emerges from the wording and context results in constitutional invalidity a court has to make a finding of unconstitutionality. The fact that a constitutionally compliant interpretation cannot reasonably be given to it, does not necessarily lead to vagueness. A finding of vagueness based on a perceived inability to interpret the provision would in any event also result in constitutional invalidity. And an interpretation that renders the provision meaningless would lead nowhere. It would be futile."[179]

[150] In international law, a previous United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression stated

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[175] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108.

[176] Id at para 109.

[177] *Hyundai* above n 57 at para 24 citing *Dawood* above n 73 at paras 47-8.

[178] *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1; 2013 (2) BCLR 170 (CC) (*Opperman*) at para 46, citing *Affordable Medicines Trust* above n 186 at para 108; *Bertie Van Zyl* above n 185 at para 100; and *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 27.

[179] *Opperman* id at para 42.

that,[180] amongst other things, domestic laws prohibiting hate speech ought to be "[p]rovided by law, which is clear, unambiguous, precisely worded and accessible to everyone".

[151] Mere shoddy draftsmanship, impreciseness and opacity are, however, not in themselves conclusive. In order to reach a point of "a constitutionally fatal level of vagueness . . . the provision [must be] utterly meaningless and unworkable".[181] If, applying the ordinary rules of construction, there are words or phrases in an impugned section or other related sections that render a constitutionally viable meaning, effect should be given to that interpretation.[182] The lack of reasonable certainty has serious concomitant effects. It erodes the ability for ordinary citizens to exercise their agency and autonomy when they express themselves. It undermines the norm-changing impact of the law; and undermines the deterrent goal of hate speech prohibitions. What bears consideration next is the specific challenges presented by the impugned provision in respect of vagueness.

Does the impugned provision suffer from vagueness?

[152] Various interpretations for "harmful" and "hurtful" were suggested above. However, they all present problems. In particular, it is not clear whether there is any difference in their meaning or whether one is a component of the other. If one accepts

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[180] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression "Hate Speech and Incitement of Hatred" (7 September 2012) A/67/357 at para 41(a) and para 41 which states that:

> "The Special Rapporteur wishes to underscore that any restriction imposed on the right to freedom of expression, on the basis of any of the above-mentioned instruments, must comply with the three-part test of limitations to the right, as stipulated in Article 19 (3) of the Covenant. This means that any restriction must be:
>
> '(a) Provided by law, which is clear, unambiguous, precisely worded and accessible to everyone;
>
> (b) Proven by the State as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals;
>
> (c) Proven by the State as the least restrictive and proportionate means to achieve the purported aim.'''

[181] *Opperman* above n 189 at para 51, citing *South African Liquor Traders Association* above n 189.

[182] Id at paras 52-5.

that "hurtful" only refers to emotional or psychological harm and "harmful" refers to physical harm, the immediate difficulty is that expression cannot in and of itself "be harmful" in the physical sense. Put differently, words cannot intrinsically cause physical harm. The SAHRC's proposed definition of these concepts does not appear to me to create any distinction between them. Substantively they appear to mean the same thing. Intricate semantic contortions are required to reach separate meanings in them, and even then, the attainment of separate meanings seems to be a bridge too far. This tortuous interpretative odyssey usurps the Legislature's legislative functions and offends the principle of separation of powers, which I have expanded on above. It falls foul of the caution expressed in *Islamic Unity*:

> "It is obvious that the interpretation contended for would entail a complicated exercise of interpreting the very wide language of the relevant part of clause 2(a) in the light of the very concise and specific provisions of section 16(2)(c). Whilst this process might assist in determining whether particular expression can be regarded as hate speech, I fail to see how its meaning can coincide with that of the impugned clause on any reasonable interpretation, without being unduly strained."[183]

[153] In addition, if one were to accept the interpretations advanced by the SAHRC and the Minister, they clearly set an unacceptably low standard in the context of hate speech prohibitions that may unduly encroach on freedom of expression. On a conjunctive reading the threshold will naturally be elevated by the requirements in the other paragraphs, but the paragraphs will then suffer from superfluity. It is a well-established principle of statutory interpretation that "effect is given to every word or phrase in it . . . 'a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant'".[184] Furthermore, while some of the parties contended that "hurtful", considered in the context of section 10 as a whole, would elevate what is required, the problem with this line of

[183] *Islamic Unity* above n 94 at para 41.

[184] *S v Weinberg* 1979 (3) SA 89 (A) at 98 quoted in de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants Limited, 2000) at 167 fns 18-9. This principle was reiterated by this Court in *Case* above n X at para 57 citing *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436. More recently this principle was affirmed in *Opperman* above n 189 at para 99.

reasoning is that it naively expects the other components of the already convoluted and torturous provision to alleviate the difficulties. The section cannot, as it were, be expected to pull itself up by its bootstraps.

[154] In contradistinction to the insuperable difficulties with "hurtful", the term "harmful" does not suffer the same fate. On a plain reading, "harmful" can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group.[185] In *Keegstra,* the Supreme Court of Canada eloquently summed up two types of interconnected harms that resonate with the ethos of our diverse constitutional democracy, namely "harm done to the members of the target group" and harm done to "society at large".[186] Similarly, in *SAHRC v Khumalo,* three types of harm were illustrated.[187] First, "the reaction of persons who read the utterances and who are inclined to share those views and be encouraged by them to also shun, denigrate and abuse the target group". Second, the type of harm experienced by the target group which includes "demoralisation and physiological hurt" and "the harm caused from responding in kind thereby creating a spiral of invective back and forth". And third, "harm to the social cohesion in South African society" which can undermine our nation building project.

[155] In conclusion: it seems to me that the use of "hurtful" on a conjunctive reading appears to be redundant and that contributes to the lack of clarity of the impugned section. This is because "harmful" can be understood as emotional and psychological harm that severely undermines the dignity of the targeted group as well as physical harm. "Hurtful" could reasonably mean the same as "harmful", that is including both emotional and psychological harm. There is no need to have both. A possible solution would be for "hurtful" to mean something other than emotional harm, something less

[185] See Meyerson Meyerson *Rights Limited, Freedom of Expression, Religion and the South African Constitution* (Juta & Co Ltd, Cape Town 1997) at 130 opines that "it would not be constitutionally legitimate to punish someone for inciting someone else to cause harm if the harmful act thus incited were not itself an offence – or, at the very least, a civil wrong"

[186] *Keegstra* above n 109 at 746-7.

[187] *SAHRC v Khumalo* above n 137 at paras 95-7.

perhaps. However, due to the conjunctive reading,[188] a claimant would have to show that in addition to being emotionally harmed, she was also hurt. It may be so that harmful communication is always hurtful. If it is, the removal of the word "hurtful" due to its vagueness avoids any redundancy that can lead to a lack of clarity.

[156] Despite the best endeavours to fashion a constitutionally compliant and reasonably understandable meaning of the impugned section, there is no saving grace for its problematic parts. Given the troubling meaning of "hurtful" in the context of section 10(1), it is difficult for ordinary citizens to know whether their conduct will be "hurtful" or "harmful" and thus whether it meets the threshold required by section 10. Consequently, for all the reasons cited, the term "hurtful" in section 10(1)(a) is vague and so breaches the rule of law. For that reason, its inclusion in section 10(1) results in the section suffering from vagueness and it is thus unconstitutional.

[157] Section 10(1)(a) is irredeemably vague and undermines the rule of law enshrined in section 1(c) of the Constitution. It thus does not pass constitutional muster. However, this does not render the entire impugned provision unconstitutional. It is possible to excise the constitutionally offensive part from the rest of the provision.

Remedy on the constitutional challenge

[158] Section 172(1) of the Constitution is clear that a court may go further than just declaring certain conduct or laws unconstitutional. There is a further obligation to grant effective remedies.[189] In terms of this provision this Court may supplement a declarator with an order that it considers just and equitable.

[159] Having concluded that a part of the impugned section is not constitutionally compliant, the question is what to do with the bad part of the impugned provision and

[188] As mentioned above, it would also be fatal on the disjunctive approach, since it would prohibit merely hurtful speech.

[189] *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) at para 68 and *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 19.

how to salvage the good. To recap: the troublesome concept "hurtful" is irreparably vague. The possible severance of this invalid part of the provision bears consideration.

[160] In *Coetzee*, this Court said:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?"[190]

[161] Having concluded that it was not possible to sever the offending provisions from the relevant legislation without intruding into the legislative sphere, the Court in *Coetzee* opted to excise the provisions that dealt with the imprisonment of civil debtors. The Court was satisfied that, "in severing such provisions, the object of the statute will nevertheless remain to be carried out".[191] Here, severing the word "hurtful" from the impugned provision would still enable the objects of the Equality Act to be fulfilled.

[162] As stated, Parliament is obliged by section 9(4) of the Constitution to enact legislation to prohibit hate speech. The order of invalidity will be suspended for 24 months for Parliament to do the necessary. In the interim, section 10(1) must read:

> "Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred."

[163] As a consequence of the amendment to section 10(1), section 10(2) should read:

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[190] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer Port Elizabeth Prison*, [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16.

[191] Id at para 17.

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

How does this affect the complaint against Mr Qwelane? That is the next aspect for consideration.

The complaint against Mr Qwelane

[164] The second issue to be determined by this Court is whether Mr Qwelane's statements constituted hate speech. In doing so, we need to consider this issue in light of the finding that paragraph (a) of section 10(1) of the Equality Act has been rendered unconstitutional. The unfortunate passing of Mr Qwelane does not render this aspect moot. The complaint in terms of the Equality Act, that the rights of the LGBT+ community had been infringed by the impugned statement, is live and must still be adjudicated.

[165] It cannot be gainsaid that members of the LGBT+ community were impacted negatively by Mr Qwelane's article. In unequivocally aligning himself with former President Mugabe's abominable comments, Mr Qwelane vilified the LGBT+ community as "animals", as less than human beings. Their sexual preferences and relations were degraded to bestiality. Mr Qwelane's article unabashedly exuded his loathing and revulsion. This can be discerned from:

(a) its accusation that members of the LGBT+ community are responsible for the rapid decay of societal values;

(b) the insinuation that their sexual choices are against the natural order of things and akin to bestiality;

(c) the claim that the LGBT+ community should be denied the right to marry; and

(d) its insinuation that they are not worthy of the protection of the law.

[166] An added aggravation is Mr Qwelane's deplorable subversion of the Constitution. He said:

> "I do pray that someday 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?"

[167] Mr Qwelane was also unflinchingly unapologetic in the article, saying "[a]nd by the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views. I will write no letters to the commission either, explaining my thoughts." This intransigence was perpetuated in his papers in which he contended that the article is "merely an expression of belief and opinion".

[168] It is critical to note that unfair discrimination against the LGBT+ community is not a new phenomenon. It has been prevalent since time immemorial. As Cameron opined extra-curially: "Apartheid South Africa was viciously homophobic – like most of the rest of Africa still is. Gays and lesbians, transgender people and gender non-conforming persons were persecuted, assaulted, sidelined and jailed."[192] In this sense, ensuring the LGBT+ community has equal social standing and public assurance against exclusion, hostility, discrimination and violence is part of the greater transformative constitutional project. In the present matter, homophobic speech is part and parcel of the broader system of homophobia and transphobia in South African society which includes both hate speech and violent crimes perpetrated against members of the LGBT+ community. Homophobic speech is not only problematic because it injures the dignity of members of the LGBT+ community, but also because it contributes to an environment that serves to delegitimise their very existence and their right to be treated as equals. Hate speech regulation in our country ought in my view to be grounded in

[192] Cameron "How We Internalise Stigma and Shame" *GroundUp* (4 December 2019) available at https://www.groundup.org.za/article/how-we-internalise-stigma-and-shame/.

the express anti-racist and anti-sexist tenets of our Constitution. In this respect, our jurisprudence is unique because of its strong pronouncements on the transformative nature of the Constitution and its aim of eradicating the remnants of our colonial and apartheid past.

[169] It is appropriate to consider how, on previous occasions, our courts (and those around the world) have confronted the grotesque nature of unfair discrimination against the LGBT+ community. In *National Coalition II*, this Court observed:

> "Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of 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 relationality. It denies to 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."[193]

[170] In the Supreme Court of Appeal, Cameron JA explained:

> "Gays and lesbians are a permanent minority in society which in the past has suffered from patterns of disadvantage. . . The impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels. The sting of the past and continuing discrimination against both gays and lesbians lies in the message it conveys, namely that, viewed as individuals or in their same sex relationships, they do not have the inherent dignity and are not worthy of the human

[193] *National Coalition II* above n 71 at para 42.

> respect possessed by and accorded to heterosexuals and their relationships. This denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, namely that 'all persons have the same inherent worth and dignity', whatever their other differences may be."[194]

[171] We were reminded in *Prinsloo* that:

> "Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin, one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."[195]

[172] Jurisprudence emanating from the ECHR acknowledges hate speech committed against the LGBT+ community. *Vejdeland* concerned the applicants' conviction for distributing in a secondary school approximately 100 leaflets containing homophobic statements.[196] The ECHR found that the statements constituted serious and prejudicial allegations. It accepted that the applicants' right to freedom of expression was infringed by the conviction and so the key issues were whether the infringement was prescribed by law and whether it was necessary in a democratic society. The ECHR found that it met these two requirements: it pursued a legitimate aim, namely protecting the rights and reputation of others, and it was not disproportionate.[197] Therefore, there was no violation of Article 10 (the right to freedom of expression). Critically, the ECHR found that:

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[194] *Fourie* above n 70 at para 13.

[195] *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA1012at para 31.

[196] *Vejdeland* above n 103 at para 8. The statements in the leaflets were, in particular, allegations that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and AIDS.

[197] Id at paras 49 and 59. Pursuant to Article 8 of the Swedish Penal Code, which pursued a legitimate aim: to protect the reputation and rights of others.

> "[I]nciting hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'."[198]

[173] More recently, in *Beizaras and Levickas*, two young men in a relationship posted a photograph on Facebook of them kissing, which prompted hundreds of online hate comments.[199] Notably, the ECHR found the prevalence of hate speech on the internet against the LGBT+ community to be widespread. The ECHR reiterated that "pluralism and democracy are built on genuine recognition of, and respect for, diversity. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion."[200] The ECHR also noted that when it comes to hate speech, "this equally applies to hate speech against persons' sexual orientation and sexual life. The [ECHR] observe[d] that the instant case concerned undisguised calls to attack the applicants' physical and mental integrity."[201] In sum, the ECHR required the state to investigate online homophobic comments promoting violence against the LGBT+ community.

[174] In *Lilliendahl*,[202] the applicant had been convicted of having made hateful comments against the LGBT+ community. The ECHR found that hate speech against the LGBT+ community falls outside the scope of the right to freedom of expression, which is provided for in Article 10 of the Convention. Interestingly, the ECHR provided guidance on infringements in terms of Article 17 (prohibition of the abuse of rights), read with Article 10.[203] Ultimately, the ECHR found that the comments

[198] Id at para 55.

[199] *Beizaras and Levickas* above n X at paras 9-10.

[200] At para 107.

[201] At para 128.

[202] *Lilliendahl v Iceland*, no 29297/18, 2020.

[203] Id, where the ECHR observed at para 33-6 that:

constituted hate speech. It further found that, because of this, there had been a reasonable and justifiable limitation of the right to freedom of expression. Importantly, the case reveals the ECHR's continued condemnation of hate speech against the LGBT+ community.

[175] The Supreme Court of Canada expounded the type of harm inflicted by discrimination in respect of sexual orientation:

> "Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."[204]

[176] In the context of hate speech, what must objectively be determined is whether Mr Qwelane's article could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred. Important considerations in making that determination include: who the speaker is, the context in

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> "Hate speech', as this concept has been construed in the Court's case-law, falls into two categories. . . . The first category of the Court's case-law on 'hate speech' is comprised of the gravest forms of 'hate speech', which the Court has considered to fall under Article 17 and thus excluded entirely from the protection of Article 10. As explained above, the Court does not consider the applicant's comments to fall into this category. The second category is comprised of 'less grave' forms of 'hate speech' which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict. . . , Into this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression. In cases concerning speech which does not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute 'hate speech', that conclusion has been based on an assessment of the content of the expression and the manner of its delivery."

[204] *Vriend v Alberta* [1998] 1 SCR 493; at para 102. See also: *Norris v Republic of Ireland*, no 10581/83, ECHR 1998 at para 21.

which the speech occurred and its impact, as well as the likelihood of inflicting harm and propagating hatred. These are the considerations I discuss next.

Identity and status of the speaker

[177] As alluded to, Mr Qwelane enjoyed significant stature as a seasoned journalist, commentator of note and a veteran of the liberation struggle. He wrote to a predominantly Black township audience which took his views seriously. In his oral evidence before the Equality Court, Mr Viljoen tellingly observed that at that time it was "damn hard to be gay and stay in a township". There was a clear intent on the part of Mr Qwelane to instigate hatred towards the LGBT+ community amongst his audience.

Context

[178] Mr Qwelane's article was written against the backdrop of the vile remarks of former President Mugabe,[205] which were approvingly referred to, as well as the extraordinarily high levels of violent attacks against members of the LGBT+ community. This Court cannot ignore this backdrop.

The impact of the speech

[179] The speech comprised unadulterated vilification and debasement of the LGBT+ community. Its reach and impact was undeniably extensive and devastating. Apart from the flood of complaints to both the SAHRC and the Press Ombud, there is the deeply touching testimony of the witnesses, in particular Ms MN and Professor Nel. In this regard, Ms MN during her testimony lamented that she prays that courts come to their rescue and punish those who harass and unfairly discriminate against members of the LGBT+ community. Her poignant complaint that the law does not care about people like her has been alluded to. Ms MN testified that the physical attacks on her

[205] He called gays and lesbians "animals", said that they were "sub-human" and likened them to pigs and dogs. Former President Mugabe also called on Zimbabweans to hand gays and lesbians over to the police if they saw them in the street.

were accompanied by hateful slurs, while onlookers merely stood around and said that she must defend herself because she acts like a man. She testified that the unrelenting victimisation that she had experienced in her life made her feel that she had died inside, that she had "*passed on*".

[180] Professor Nel's evidence graphically demonstrated the strong correlation between the prevalence and tolerance of hate speech in a society and the prevalence of hate crimes perpetrated against vulnerable groups. He highlighted the severe effects of hate speech on the dignity and self-esteem of vulnerable groups, particularly LGBT+ communities, culminating in increased incidences of depression and suicide. Professor Nel explained that hate speech results in its victims internalising the notions of inferiority engendered by hate speech, suffering from self-doubt and self-loathing and often experiencing suicidal ideation. It prevents them from becoming fully functioning members of society.

The likelihood of inflicting harm and propagating hatred

[181] The likelihood of the infliction of harm and the propagation of hatred is beyond doubt. It is difficult to conceive of a more egregious assault on the dignity of LGBT+ persons. Their dignity as human beings deserving of equal treatment, was catastrophically denigrated by a respected journalist in a widely read article. The harm to not only the already vulnerable targeted LGBT+ community, but also to our constitutional project, which seeks to create an inclusive society based on the values of equality, dignity and acceptance, is indubitable.

[182] There can be no question then that Mr Qwelane's statements constitute hate speech. Mr Qwelane was advocating hatred, as the article plainly constitutes detestation and vilification of homosexuals on the grounds of sexual orientation. He was publicly advocating for law reform in favour of the removal of legal protection for same sex marriages. In doing so, he was undermining the protection of the law, the dignity of the LGBT+ community and the public assurance of their decent treatment in society as human beings of equal worth, deserving of human dignity and the protection and

enjoyment of the full panoply of rights under the Constitution. In the context of hate speech prohibitions as civil remedies, a proven causal link between the hateful expression and actual harm is not required. But should Mr Qwelane have incurred liability for this hate speech?

Mr Qwelane's liability in terms of the recrafted section 10(1)

[183] The Supreme Court of Appeal invoked the criminal law maxim *nullum crimen nulla poena sine lege* (no crime, no punishment without law), based on the principle of legality, for its finding that Mr Qwelane cannot be held liable on the SAHRC's complaint on the ground of the new section crafted by it. It found that the only solution for the hate speech complaint was that Mr Qwelane should consider seeking rapprochement.

[184] In this matter, there is no impingement of the rule of law and the principle of legality and the typical concerns regarding retrospectivity are not triggered. This is simply because the recrafted provision does not take away or deprive Mr Qwelane of any existing rights that he had. Before the amendment of section 10, the elements of hate speech that were clear and constitutional were those in section 10(1)(b) and (c), and it is these provisions that Mr Qwelane fell foul of. Therefore, he could not have claimed that he was prejudiced by not knowing the law beforehand and that the hate speech prohibition did not exist at the time the article was published. The Holocaust Foundation correctly contended that "Mr Qwelane cannot be heard to say that he could not have been expected to know that he was susceptible to a hate speech complaint" and that "it is accordingly in no way analogous to a situation where a harsher punishment is imposed retrospectively for a crime committed, contrary to the reasoning of the [Supreme Court of Appeal]". During oral argument Mr Qwelane's counsel offered very little resistance to this proposition regarding the complaint.

[185] It would not be just and equitable to allow a person to escape liability in these circumstances. To do so would deny an effective remedy to vindicate the rights of the LGBT+ community. Other concerns are attenuated, since the Supreme Court of Appeal

did not interfere with the evidence and factual findings of the High Court, except in one respect – the causal link between the article and physical or verbal attacks. As explained, a causal link is not a requirement for hate speech. In the premises, there are no cogent reasons for this Court not to accept the factual findings of the Equality Court.

[186] Based on both the old provision and the recrafted one, the article indubitably constitutes hate speech. Mr Qwelane was advocating hatred, as the article plainly constitutes detestation and vilification of homosexuals on the grounds of sexual orientation. He was publicly advocating for law reform in favour of the removal of the legal protection for same sex marriages. In doing so, he was undermining the protection of the law, the dignity of the LGBT+ community and the public assurance of their decent treatment in society as human beings of equal worth, deserving of human dignity and the protection and enjoyment of the full panoply of rights under the Constitution.

[187] As the preceding discussion shows, in the context of hate speech prohibitions as civil remedies, a proven causal link between the hateful expression and actual harm is not required. In any event, while a causal link between the article and specific incidents of violence against the LGBT+ community could not be demonstrated by the evidence, it cannot be gainsaid that the article penned by Mr Qwelane undeniably constituted vilification and detestation. The detailed narration of that evidence clearly illustrates the point.

[188] There is a reasonable apprehension that Mr Qwelane's article fueled the already anti-LGBT+ burning fire (alluded to by the witnesses) and galvanised further discrimination, hostility and violence against the LGBT+ community. This is particularly pertinent when, as contended by the Psychological Society, one considers the context when the article was published in 2008, which in turn fortifies a reasonable apprehension of harm. The Psychological Society points out that that period was characterised by an "extraordinarily high level of violence against the LGBT+ community in South Africa".

[189] The question of a causal link has an additional layer when considering hate speech against vulnerable targeted groups and their lived experiences. We must be mindful that there is reluctance in reporting incidences of violence perpetuated against members of the LGBT+ community, owing to concerns regarding secondary victimisation, the fear of future targets and the lack of trust in the criminal justice system.[206] Therefore, the lack of clear evidence of subsequent linked violent or hostile acts should not negate the harsh reality of vilification, enmity and outright hatred that members of the LGBT+ community continue to experience as a result of the article and similar types of hateful expressions.

[190] In the circumstances, just and equitable considerations demand that a person in the position of Mr Qwelane should not evade liability on the basis that a causal link between their article and incitement of harm cannot be established. Our law does not require such proof. It would adversely affect the rights of the LGBT+ community where there was a full-frontal attack on their dignity as a targeted group and the chipping away of the assurance of their place in society and protection against hostility, discrimination and violence. And, as explicated, none of Mr Qwelane's prevailing rights are being taken away. The Equality Court was correct in upholding the complaint against Mr Qwelane.

[191] A consequence of Mr Qwelane's unfortunate passing is that the personal apology ordered by the Equality Court can no longer be realised. The High Court ordered that:

> 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

[206] This was noted by Professor Nel as summarised by the Supreme Court of Appeal at para 30 of its judgment. In addition, See Brodie *Femicide in South Africa* (Kwela Books, Cape Town 2020) at 140-148 which draws a timeline of media reporting of violence and hate crimes committed against black lesbians. The author notes at 137: "This may have been one of the factors which had inhibited, or which continued to inhibit, reporting of hate crimes and violence against lesbians – because of the very real fear that identifying the victim in one crime would implicate other women, and that this might make them targets in turn." Brodie proceeds to note at 139 that the reported cases in the news "did not represent the extent of such killings in real life. But, as above, there were a number of real deterrents to reporting these types of crimes (the risk of others becoming targets, the poor treatment of lesbian complainants by the police)."

> 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".

[192] That personal remedy against the late Mr Qwelane falls away and it cannot be enforced against third parties. So too, the order of the High Court that the Registrar refer the matter to the Commissioner of the South African Police Service for investigation in terms of section 21(4) of the Equality Act.[207] But, for the reasons set out, the declaratory order of the High Court stands on a completely different footing. It reads:

> "The offending statements (made against the LGBTI community) are declared to be hurtful; harmful, incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000."

[193] The test whether the article amounts to hate speech is objective. And the declaratory order will not only ameliorate the severe harm caused to the LGBT+ community, but will also convey a strong message of deterrence in respect of hate speech directed against members of that community. That harm is ongoing. The impugned article continues to contribute to an environment of intolerance that may further normalise discrimination and violence against members of the LGBT+ community. Without unequivocal disapprobation from this Court, the contents of the article will continue to haunt those who were – and are – the targets of its hatred.

[207] The relevant order was in para 70.4 of the High Court judgment, and read as follows:

> "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)."

[194] A declaratory order will meet the key objectives of the Equality Act, namely not to punish the wrongdoer, but to provide remedies for victims of hate speech and to vindicate their constitutional rights. Mr Qwelane's passing did not remove the harm caused by the article he penned. Relief under the Equality Act goes beyond holding perpetrators accountable – it feeds into our constitutional project of building a more tolerant society and Mr Qwelane's passing does not nullify this project. Furthermore, that order will ensure that South Africa complies with its obligations under international law to prohibit hate speech. Section 38 of the Constitution and section 21 of the Equality Act empower this Court to order any appropriate relief. The two sections do not envisage that a declaratory order is parochial or personal to the immediate parties – it does not require the parties to do anything and may therefore still be granted. Consequently, we must make a declaratory order. Of course, because of the excision of section 10(1)(a), it must differ from that of the High Court.

Costs

[195] The Equality Court ordered costs against Mr Qwelane and held that the *Biowatch*[208] principle did not persuade it to the contrary. The SAHRC supported this costs order and its underlying motivation. It seeks a similar order before us in respect of the costs here and in the preceding Courts. The reasons for the adverse costs order, as explicated by the Equality Court are:

(a) the manner in which Mr Qwelane litigated in that Court by electing not to come to Court and then failing to produce medical certificates in respect of his alleged ill-health, which he advanced as a reason for his absence from Court;

(b) his lack of remorse and grievous undermining of the Constitution; and

(c) the egregious nature and extent of his abuse of free speech.

[208] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[196] The Equality Court and the Supreme Court of Appeal erred in not applying *Biowatch*.[209] This misdirection by the Equality Court and the Supreme Court of Appeal warrants interference with the costs orders. I am of the view that, in properly applying *Biowatch*,[210] the costs order ought to reflect that Mr Qwelane is partially successful in his constitutional challenge of the impugned provision in this Court. But it bears consideration that this partial success emanates from Mr Qwelane's egregious violation of the rights of others that resulted in the Equality Court complaint, ultimately leading to him going to Court to vindicate his own rights. Mr Qwelane is consequently entitled to half of his costs. The State, represented here by the Minister, should pay those costs.

[197] As far as the SAHRC is concerned, it is a Chapter 9 institution constitutionally enjoined to strengthen democracy, and is bound to litigate where necessary to vindicate the rights of victims and survivors. As stated, the SAHRC received the largest number of complaints it has ever received in respect of a single incident. Given the circumstances, a costs order against the SAHRC is not appropriate and the Supreme Court of Appeal's adverse order against it should be set aside. The High Court's costs order in favour of the SAHRC must be confirmed and that should also be the outcome in respect of its costs in this Court and in the Supreme Court of Appeal.

Conclusion

[198] Section 10(1)(a) of the Equality Act is declared unconstitutional for vagueness and unjustifiably limiting section 16 of the Constitution, the Supreme Court of Appeal's declaration of invalidity is confirmed only to that limited extent. 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.

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[209] Id.

[210] Id at para 43. The Court noted that "the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the State, and if unsuccessful, each party should pay its own costs.

Order

The following order is made:

1. In respect of the confirmation application:
   (a) The declaration of constitutional invalidity of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) made by the Supreme Court of Appeal is confirmed in the terms set out in paragraph (b).
   (b) It is declared that section 10(1) of the Equality Act is inconsistent with section 1(c) and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word "hurtful" in the prohibition against hate speech.
   (c) The declaration of constitutional invalidity referred to in paragraph (b) takes effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the constitutional defect giving rise to constitutional invalidity.
   (d) During the period of suspension of the order of constitutional invalidity, section 10(1) of the Equality Act will read as follows:
      "(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.
      (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

(e) The interim reading-in will fall away when the correction of the specified constitutional defect by Parliament comes into operation.

(f) Should Parliament fail to cure the defect within the period of suspension, the interim reading-in in paragraph (d) will become final.

2. In respect of the appeal against the complaint:

(a) Leave to appeal is granted.

(b) The appeal by the South African Human Rights Commission is upheld.

(c) The order of the Supreme Court of Appeal is set aside.

(d) The offending statements (made against the LGBT+ community) are declared to be harmful, and to incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000.

3. In respect of the constitutionality challenge, the Minister of Justice is ordered to pay half of Mr Jonathan Dubula Qwelane's costs in the High Court, the Supreme Court of Appeal and this Court.

4. Mr Jonathan Dubula Qwelane is ordered to pay the costs of the South African Human Rights Commission in the High Court, the Supreme Court of Appeal and in this Court.

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For the Third Amicus Curiae:	F Hobden and B Pithey instructed by Women's Legal Centre Trust
For the Fourth Amicus Curiae:	B Meyersfeld instructed by Lawyers for Human Rights
For the Fifth Amicus Curiae:	SL Shangisa SC and MM Ka-Siboto instructed by Freedom of Expression Institute
For the Sixth Amicus Curiae:	AA Gabriel SC, B Winks and K Raganya instructed by Rupert Candy Incorporated
For the Seventh Amicus Curiae:	G Marcus SC, S Budlender SC and M Mbikiwa instructed by Webber Wentzel