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Constitutional Court to finally give clarity on hate speech

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On 22 September 2020, the Constitutional Court heard arguments in the case of *Jonathan Dubula Qwelane v South African Human Rights Commission & Another*, the outcome of which is expected to redefine the landscape of hate speech complaints in South Africa.

Following the publication of a newspaper article by Mr Jonathan Dubula Qwelane, titled *"Call me names – but gay is NOT okay..."* – which contained blatantly offensive, discriminatory and critical remarks about homosexuals – the South African Human Rights Commission ("SAHRC") received 350 complaints about the article from members of the public. Consequently, the SAHRC instituted proceedings in the Equality Court alleging that the article constituted hate speech as it contravened section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA").

Section 10(1) of PEPUDA (titled *"Prohibition of hate speech"*) states that:

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

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred."

Section 12 of PEPUDA states that:

"No person may—

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice,

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

The term *"prohibited grounds"* in section 10(1) is defined in section 1 of PEPUDA and includes:

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

In his opposition, Mr Qwelane denied that his article constituted hate speech. He argued that his remarks were protected by his right to freedom of expression as envisaged in section 16 of the Constitution of the Republic of South Africa, 1996, which states that:

"(1) Everyone has the right to freedom of expression, which includes—

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

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

(a) propaganda for war;

(b) incitement of imminent violence; or

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

Importantly, Mr Qwelane also argued that section 10(1) of PEPUDA (read together with sections 1 and 12 thereof) was in fact unconstitutional because it was impermissibly vague and overly broad. However, the court dismissed that argument, with the consequence that the article was declared to constitute hate speech.

Dissatisfied with that judgment, Mr Qwelane approached the Supreme Court of Appeal ("SCA"). In its judgment, the SCA overturned the preceding court's judgment and agreed that section 10(1) is vague and overbroad. It held that section 10(1) is inconsistent with section 16 of the Constitution and could not be justifiably limited in terms of section 36 of the Constitution; therefore making it unconstitutional and invalid. It further held that even when section 10(1) is read with the proviso in section 12, that did not narrow the overbroad nature of section 10(1) which, in its view, extended far beyond the limitations on freedom of expression articulated in section 16 of the Constitution. While acknowledging that *"Mr Qwelane gave vent to his bigotry, was strident, provocative and unapologetic about it"* (SCA judgment, paragraph 76) the SCA dismissed the SAHRC's complaint against Qwelane and ordered Parliament to amend section 10 of PEPUDA so as to make it constitutionally compliant. It also rendered an interim version of section 10(1) which is virtually identical to the wording of section 16(2)(c) of the Constitution, but added "sexual orientation" to the existing grounds (i.e. race, ethnicity, gender and religion). It noted, however, that the interim provision could not apply retrospectively. In line with section 172(2)(a) of the Constitution, the SCA also referred the order to the Constitutional Court for confirmation of the order of constitutional invalidity.

In the Constitutional Court, Mr Qwelane once again raised the overbreadth and vagueness challenges, and reiterated his position that section 10(1) unjustifiably violates his rights to freedom of expression by impermissibly extending its scope beyond that of section 16(2)(c) of the Constitution, with the effect that section 10(1) unjustifiably prohibits a broader category of speech than what appears in section 16(2)(c).

The SAHRC appealed the SCA's decision, arguing that section 10(1) is not unconstitutional, as it is capable of an interpretation that is constitutionally compliant when the objectives of PEPUDA are properly considered. It further argued that to the extent that section 10(1) may limit section 16(1) of the Constitution, such limitation is reasonable and justifiable in terms of section 36 of the Constitution. This submission was repeated by the Minister of Justice and Correctional Services, who was cited due to being the cabinet minister responsible for the administration and implementation of PEPUDA.

Seven *amici curiae* (friends of the court) were admitted in the matter. Some *amici* restricted their submissions to contextualising the possible real-world impact and societal dangers of Mr Qwelane's remarks. Others submitted that even if section 10(1) limits section 16(1), such limitation is justifiable in terms of section 36 of the Constitution; while others raised concerns about the constitutionality of section 10(1) due to the overbroad and vague wording therein, and how this may impede the right to freedom of expression.

Having heard the parties' submissions, the court reserved judgment and is now tasked with making a determination that navigates the intricate balance between two important rights: freedom of expression, and prohibition of hate speech.



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