

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 14/19
Supreme Court of Appeal Case No: 1062/2017
Equality Court Case No: EQ 01/2012

in the matter between:

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION
ON BEHALF OF SOUTH AFRICAN JEWISH
BOARD OF DEPUTIES**

First Applicant

and

BONGANI MASUKU

First Respondent

**CONGRESS OF THE SOUTH AFRICAN TRADE
UNIONS**

Second Respondent

and

**SOUTH AFRICAN HOLOCAUST AND
GENOCIDE FOUNDATION**

First Amicus Curiae

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA

Second Amicus Curiae

FREEDOM OF EXPRESSION INSTITUTE

Third Amicus Curiae

MEDIA MONITORING AFRICA

Fourth Amicus Curiae

RULE OF LAW PROJECT

Fifth Amicus Curiae

NELSON MANDELA FOUNDATION

Sixth Amicus Curiae



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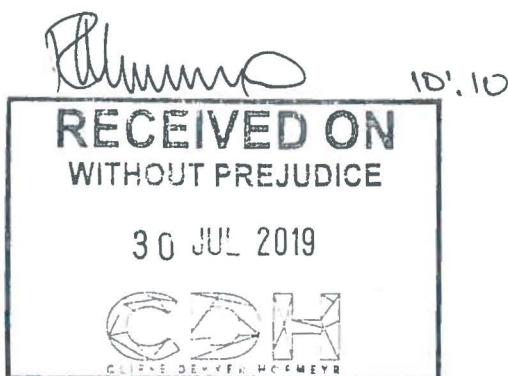
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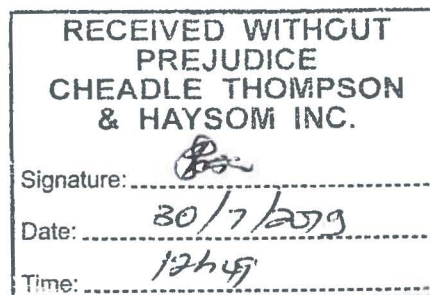
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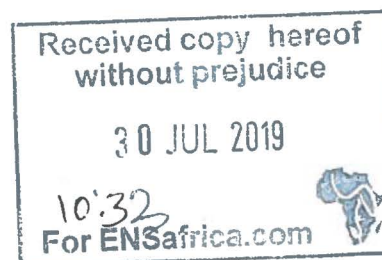
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MEDIA MONITORING AFRICA'S HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW

- 1 This matter concerns the careful balancing of the rights to free expression, dignity and equality in the context of hate speech legislation. In particular, this Court is called upon to interpret the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("**the Equality Act**") in a manner that appropriately balances and best protects and promotes these rights.
- 2 Media Monitoring Africa ("**MMA**"), an organisation which advocates for freedom of expression and supports the responsible free flow of information to the public on matters of public interest, has been admitted as an *amicus curiae* in this matter.
- 3 MMA participates in these proceedings in an effort to assist the court in interpreting section 10(1) of the Equality Act in a constitutionally compliant manner. Mindful of its role as an *amicus*, MMA does not enter the fray on the application of the Equality Act to the facts of this particular case.
- 4 These submissions are in three broad sections:
 - 4.1 First, we describe South Africa's repressive history of using laws ostensibly designed to curb the fomentation of racial hostility, which were used mainly against anti-apartheid activists. We submit that this history is important in interpreting section 10 of the Equality Act and section 16 of the Constitution.
 - 4.2 Second, we consider the nature of section 16 of the Constitution, and, in particular, the right to offend, shock and disturb.
 - 4.3 Third, having regard to the history described above, and to comparative and international law, we offer a sensible interpretation of section 10. In

doing so, we are guided by the injunction to interpret derogations from the right to freedom of expression restrictively.

SOUTH AFRICA'S REPRESSIVE HISTORY OF HATE SPEECH REGULATION

5 This Court has held that statutory and constitutional interpretation should be informed by our history.¹ In order to understand a statute's purpose, and to "*identify the mischief sought to be remedied...it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation*".

6 This applies equally in the context of speech. As this Court explained in *Mamabolo*, "*[h]aving regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America*".² The Court cautioned that "*we should be particularly astute to outlaw any form of thought-control, however respectably dressed*".³

7 This was affirmed in *Islamic Unity*,⁴ where Langa DCJ explained:

Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'.

¹ *Daniels v Scribante* 2017 (4) SA 341 (CC) para 13; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd in re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 21

² *S v Mamabolo* 2001 (3) SA 409 (CC) para 37.

³ *Id.*

⁴ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 para 25

8 Censorship was rife under apartheid. As we demonstrate in this section, South Africa has a particularly painful history of using hate speech legislation as a formidable weapon of censorship, and as a means to stifle dissent.⁵

9 The first legislative enactment to proscribe incitement to racial hostility was the Native Administration Act 38 of 1927, an attempt to impose a uniform system of black administration throughout South Africa. Section 29(1) made it an offence for any person who uttered "*any words or does any other act or thing whatever with intent to promote any feeling of hostility between Natives and Europeans*". This provision was perniciously enforced. To give just two examples:

9.1 In *R v Mote*,⁶ the accused was alleged to have made a speech in which he described General Hertzog's passing of the Native Administration Act as "*a diabolical act*" and threatened to "*revolt against this so-called Christianity and hypocrisy*". The accused's challenge to the indictment on the basis that it did not disclose an offence failed.

9.2 In *R v Rulashe*,⁷ the accused acted as an interpreter of a speech and was convicted under section 29(1). The speech said that the Americans were going to arrive the following month, that the "*big fight*" would then begin, and that "*no natives were to join the European forces*". It also promised that when the Americans took over, "*South Africa would be a free country as far as natives were concerned*". The conviction was upheld on appeal.

10 Similar statutes were enacted throughout the remainder of the century.

⁵ See Gilbert J Marcus 'Racial Hostility: The South African Experience' in *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (S Coliver, Ed. 2002).

⁶ 1928 OPD 150.

⁷ 1928 EDL 376.

- 11 In 1930, the Riotous Assemblies and Criminal Law Amendment Act 19 of 1930 amended the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914 to prohibit gatherings and publications calculated to engender feelings of racial hostility.
- 12 The Suppression of Communism Act of 44 of 1950 defined communism as "*any doctrine or scheme...which aims at the encouragement of hostility between the European and non-European races*", calculated to achieve particular ends. Any organization that engaged in these activities could be declared unlawful by the Governor-General, and the Act made provision for the compilation of a list of banned organisations. In 1965, it was made a criminal act to print, publish or disseminate anything produced by any person whose name appeared on the list.
- 13 The Riotous Assemblies Act of 17 of 1956 introduced new features concerning the control of racial hostility. In particular, if the Minister prohibited a gathering on the basis that it was calculated to engender feelings of racial hostility, anyone who convened, presided at, addressed, or was involved in producing materials for such a gathering was guilty of an offence.
- 14 The Publications and Entertainments Act of 26 of 1963 prohibited "*undesirable publication*", which included "*publications which brought any section of the inhabitants of the Republic into ridicule or contempt, were harmful to relations between any sections of the inhabitants in the Republic, or were prejudicial to the safety of the State, the general welfare or peace and good order*".
- 15 The Terrorism Act 83 of 1967 created a presumption that, if it could be proved that an accused had committed the act in the charge, and that the commission of the act would "*cause, encourage or further feelings of hostility between the*

white and other inhabitants of the Republic", it was presumed that the act was committed with intent to endanger the maintenance of law and order.

- 16 The Internal Security Act 74 of 1982 consolidated and revised South Africa's security laws, and retained the substantive content of most of the existing laws concerning racial hostility. It created the offence of "*subversion*", defined as causing, encouraging or fomenting feelings of hostility between different population groups with the intent to achieve the object of bringing about or promoting constitutional, political, industrial, social or economic aim.
- 17 During the various States of Emergency between 1986 and 1990, regulations were passed that incorporated many of these racial hostility restrictions. A "*subversive statement*" was one that contains anything which is calculated to have the effect or is likely to have the effect of "*engendering or aggravating feelings of hostility*".⁸ Similarly, emergency regulations in 1987 empowered the Minister of Home Affairs to close down newspapers temporarily where matter had been published which had or was calculated to have the effect of "*stirring up or fomenting feelings of hatred or hostility in members of the public*" either towards the state, "*or towards members of any population group or section of the public*".⁹
- 18 In short, these laws, which prohibited propagation of, *inter alia*, "*hatred*", "*ridicule*", "*contempt*", "*harmfulness*" and "*hostility*", were used as a formidable weapon of censorship to restrict legitimate freedom of expression.
- 19 Undoubtedly, the Equality Act is directed at the laudable aims of advancing equality and social cohesion. The applicant emphasises this with reference to the *Islamic Unity* case, which held that the advocacy of hatred perpetuates

⁸ Regulation 1(viii)(d) of Proc. R109, Government Gazette 10280 of 12 June 1986.

⁹ Regulation 7A(1)(a)(iv) of Proc R123, Government Gazette 10880 of 28 August 1987.

discrimination and inequality and has the potential to perpetuate the negative aspects of the past.¹⁰ But what the applicant omits to mention is that the provision at issue in *Islamic Unity*, which, in stark resemblance to many of the statutes described above, prohibited speech that was “*likely to prejudice relations between sections of the population*”, was unanimously struck down by this Court.

- 20 In seeking to achieve the goals of preventing discrimination, preserving dignity and advancing reconciliation and cohesion, courts must exercise care not to censor unpopular speech. The Equality Act can only truly signal a decisive break from our past, if it strikes a balance that protects dignity and equality, but at the same permits vigorous, acrimonious, and even offensive debate.

THE NATURE OF THE RIGHT TO FREEDOM OF EXPRESSION

- 21 The right to freedom of expression is described as one of “*a web of mutually supporting rights*”,¹¹ being closely related to freedom of religion, belief and opinion, the right to dignity and the right to freedom of association. It has both instrumental social importance for a democratic society and intrinsic individual value in opinion-formation, “*even where those views are controversial*”.¹² Therefore, “[i]n essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.”¹³

- 22 This case does not simply involve pitting rights against each other – expression on one hand, and dignity and equality on the other. Expression itself is “*constitutive of the dignity and autonomy of human beings*”.¹⁴ That is, “[w]e

¹⁰ Applicant’s heads of argument para 47.

¹¹ *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) para 8.

¹² *Id.*

¹³ *Id.*

¹⁴ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 21.

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 on the ground that we are not fit to hear and consider it."¹⁵

23 The importance of the right to freedom of expression is such that, as Moseneke J (as he then was) held in *Laugh it Off*, "we are obliged to delineate the bounds of the constitutional guarantee of free expression generously".¹⁶ Thus, while the right to freedom of expression is not absolute, when giving definition to the bounds of hate speech, courts should do so in such a way that generously protects expression.

24 That means, necessarily, recognising that speech which causes offence, which is distasteful, and which hurts, is protected. As the Canadian Supreme Court has put it, the right to freedom of expression ensures that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."¹⁷

25 Our courts have repeatedly recognised that the right to freedom of expression – a cornerstone of our democracy, and a vital means to ensuring the free flow of information and ideas – applies not only to popular, inoffensive or favourable speech, but also to speech that "offends, shocks and disturbs."

26 In *Islamic Unity*, this Court cited the seminal European Court of Human Rights decision in *Handyside*,¹⁸ which held that the right to freedom of expression is applicable "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock and disturb...Such are the demands of that pluralism, tolerance

¹⁵ Ronald Dworkin, *Freedom's Law: The Moral Reading of the America Constitution* (1996), at 2

¹⁶ *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) para 47.

¹⁷ *Irwin Toy v Quebec* [1989] 1 SCR 927.

¹⁸ *Case of Handyside v the United Kingdom* (Application No 5493/72) (ECTHR) para 49.

and broadmindedness without which there is no 'democratic society'. This Court has affirmed that principle on numerous occasions since.¹⁹

27 The applicant acknowledges that freedom of expression extends to speech that offends, shocks and disturbs. However, with reference to the Supreme Court of Canada decisions in *Keegstra*²⁰ and *Attis*,²¹ it argues that hate speech strays from the core values of freedom of expression and can therefore be limited more frequently.²² But this is question-begging. It is no answer to say that hate speech should receive lesser protection when the very question is how to draw the permissible boundaries of hate speech. And the fact that free expression includes the right to offend, shock and disturb is an important starting point for purposes of defining those limits.

28 At the same time, it is important to recognise an aspect of everyday human behaviour when it comes to speech, articulated by the House of Lords in *Horrocks*, and cited in *Vincent v Long* (albeit in the context of qualified privilege as a defence to a defamation claim):

"In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more."²³

¹⁹ See for example, *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC) para 49.

²⁰ *R v Keegstra* [1990] 3 S.C.R 697

²¹ *Attis v Board of School Trustees, District No 15* [1996] 1 SCR 825 at p 877; (1996) 35 CRR (2d) 1.

²² Applicant's heads of argument, para 43.

²³ *Vincent v Long* 1988 (3) SA 45 (C) at 50F-I citing *Horrocks v Lowe* 1975 AC 135 (HL) at 150. See also *Yazbek v Seymour* 2001 (3) SA 695 (E) at 704E

29 In other words, people hold and express prejudices, they speak intuitively and emotively, they leap to conclusions, and they might regularly offend. All of this forms part of everyday expression.

INTERPRETING SECTION 10 OF THE EQUALITY ACT

30 The starting point in interpreting any legislation is section 39(2) of the Constitution, which enjoins courts to promote the spirit, purport and objects of the Bill of Rights.²⁴ In addition, when interpreting the Bill of Rights, courts must have regard to international law,²⁵ and may consider foreign law²⁶ and must prefer an interpretation of legislation that is consistent with international law.²⁷ These duties are echoed in section 3(1) and 3(2) of the Equality Act.

31 In interpreting section 10, we submit that this Court should be anxious to preserve liberty to the greatest extent possible, and should only permit the limitation of expression where it is absolutely necessary.

32 This rule that statutory provisions that interfere with speech should be restrictively interpreted has been part of the common law for at least a century. As Wessels J held in *R v Bunting*, "*As there is no sign in the Act of an intention on the part of the Legislature generally to suppress the freedom of speech I am bound to give a restrictive and not an extended meaning to the words. . . .*"²⁸

33 That rule is now also constitutionally prescribed. As this Court explained in *Makate v Vodacom*,²⁹ section 39(2) of the Constitution requires courts not only to construe statutes in a manner that avoids limiting or infringing rights in the

²⁴ Hyundai para 21.

²⁵ Section 39(1)(c).

²⁶ Section 39(1)(b).

²⁷ Section 233.

²⁸ *R v Bunting* 1916 TPD 578 at 583.

²⁹ *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 87-89

Bill of Rights,³⁰ but, also, where two interpretations are possible, to prefer the interpretation that better promotes the Bill of Rights.

34 In the present case, the SCA expressed concerns that the Equality Act is very possibly unconstitutional. While the constitutional validity of the statute is not before this Court, its provisions are, at a minimum, constitutionally suspect. This plainly calls for an interpretation that is as restrictive as possible, and which limits speech to the least degree possible.

35 Section 10(1) provides as follows:

10 Prohibition of hate speech

(1) 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.

36 The “*proviso*” in section 12 is 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*” (Emphasis added).

37 Below, we make six broad submissions, with reference to South African, comparative and international law, in an effort to assist this Court in crafting an appropriately restrictive reading of section 10. These submissions are, in sum, that:

³⁰ *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 128; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at para 46. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at para 23.

- 37.1 the phrase "*based on one or more of the prohibited grounds*" must be read narrowly;
- 37.2 the requirements in sub-sections (a), (b) and (c) must be read conjunctively;
- 37.3 the phrase "*could reasonably be construed to demonstrate a clear intention*" must be read to apply to all forms of conveyance, and to all potential effects of speech;
- 37.4 "*hurtful*" must be read to connote individual psychological hurt, but objectively determined;
- 37.5 "*harmful*" must be read to connote social and physical harm, and "*incitement*" must be read to involve an element of imminence and likelihood; and
- 37.6 "*hatred*" must be read to mean "*detestation*" and "*vilification*".

The prohibited grounds must be read restrictively

- 38 Section 10 applies to speech based on the "*prohibited grounds*", which extend beyond the grounds in section 16(2). They include, for example, belief.
- 39 This calls for a restrictive interpretation of those grounds, for their inclusion necessarily limits the right in section 16(1) – even if permissibly. In this regard, MMA agrees with the respondents that:
- 39.1 First, belief should not be understood to include political ideology. If the purpose of the legislation was to include political thought as a prohibited ground, it would have included "opinion". The confinement to "*belief*",

“conscience” and “religion” suggests an emphasis on value systems that are either part of, or separate from, faith-based religion.

39.1.1 An extension of the prohibited grounds to political ideology should not be inferred lightly. This Court has explained that political discourse in South Africa is fractious and vigorous.

39.1.2 For example, in *McBride*, the Court cited *Pienaar and Another v Argus Printing and Publishing Co. Ltd*, which held that, in this context, “[s]trong epithets are used and accusations come readily to the tongue”.³¹ And in *DA v ANC*, it held that political life “has always been loud rowdy and fractious” and that it is “good for individuals to permit as much open and vigorous discussion of public affairs as possible.”³²

39.2 Second, as the respondents argue,³³ to be “based on” one of the prohibited grounds, the prohibited grounds must be the reason for the speech.

The requirements in (a), (b) and (c) are conjunctive

40 Neither “and” nor “or” appear between sub-sections (a), (b) and (c) in section 10(1). Textually, the provision is thus capable of a conjunctive or disjunctive reading. We submit that the only way in which the constitutional validity of the provision can conceivably be preserved is to read the provisions conjunctively. This means the requirements of each sub-section must be satisfied for speech to constitute hate speech.

³¹ *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) para 199 citing *Pienaar and Another v Argus Printing and Publishing Co. Ltd* 1956 (4) SA 310 (W) para 99.

³² *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) para 133.

³³ Respondents’ heads of argument paras 45-47.

41 The applicants appear to accept that the provision must be read conjunctively. They say that, to qualify as hate speech under the Equality Act, the expression “*must advocate hatred*”.³⁴ But then they contradict themselves, when they say that section 10 provides “*three bases on which expression may constitute hate speech, namely where the expression ‘could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm or promote or propagate hatred*”.³⁵

42 The underlined “*or*” does not in fact appear in the provision. More importantly, the applicants cannot at once contend that expression must advocate hatred (a requirement under (c)) and that hate speech can be established on any one of the bases in (a), (b) and (c).

43 We submit there are at least five reasons that a conjunctive approach – which Sutherland J adopted recently in the Equality Court in *Khumalo*³⁶ – is to be preferred.

43.1 First, it gives better effect to the Bill of Rights. The alternative would be that speech which contravenes (a) – that is, which could be reasonably construed to demonstrate a clear intention to be hurtful, but which involves no harm, no incitement, and no hatred – would be prohibited. That would fly in the face of the right to offend, shock and disturb, articulated repeatedly by this Court. Indeed, as the Canadian Supreme Court held in *Saskatchewan v Whatcott*³⁷ (in considering the words “*ridicules, belittles or otherwise affronts the dignity of*”):

³⁴ Applicant's heads of argument para 57.1.

³⁵ Para 57.3.

³⁶ *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ) para 82.

³⁷ [2013] 1 SCR 467 para 109.

"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, 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 significant way."

43.2 Second, a disjunctive reading is not required by the two primary international law instruments regulating hate speech.

43.2.1 Article 20(b) of the International Covenant on Civil and Political Rights requires state parties to prohibit "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*"

43.2.2 Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires state parties to "*declare an offence punishable by law 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 against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.*"

43.2.3 Neither instrument considers that speech which is merely calculated to cause hurt and is based on a prohibited ground should be prohibited.

43.3 The third reason is the provision's title. It is titled "*Prohibition of hate speech*". While the provision itself defines what hate speech is, it is unlikely, given its title, that its purpose is to extend to "*hurt speech*".

43.4 Fourth, the Equality Act's objects clause indicates the intended ambit of the provision. In particular, section 2(b)(v) provides that, insofar as hate speech is concerned, the purpose is "*the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act*".

43.5 Fifth, the proviso in section 12 of the Equality Act is incorporated by reference into section 10. It excludes from the ambit of section 10 "*publication of any information, advertisement or notice in accordance with section 16 of the Constitution.*" That too would appear to require an approach that does not prohibit merely hurtful speech.

44 As we demonstrate below, reading the requirements in section 10(1) conjunctively results in no redundancy. Properly interpreted, each of the provisions entail a distinct element, and each must be satisfied.

"Could reasonably be construed to demonstrate a clear intention" applies to all forms of conveyance and all effects of speech

45 Section 10 applies to speech which "*could reasonably be construed to demonstrate a clear intention...*" This requirement clearly attaches to all forms of conveyance. Thus, whether the speech is published, propagated, advocated or communicated, it must reasonably convey the requisite intention. Similarly, the requirement attaches to all possible effects. Thus, the speech must be such that it could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or inciting harm, and promoting or propagating hatred.

46 The respondent expresses concern that “*could*” might be interpreted to mean that one might be guilty of hate speech where the interpretation is not even the most probable, and that a standard lower than balance of probabilities might apply.³⁸

47 But we submit that this concern is misplaced. The word “*clear*” before “*intention*” means the effect is precisely the opposite; a court will only find that speech constitutes hate speech where the objective facts point clearly – unequivocally – to an intention to be hurtful, to be harmful or incite harm, and to propagate hatred.

48 The test in this regard is objective. The court is required to assess the extent to which a clear intention on the part of the speaker can be inferred from the objective facts, including, but not limited to, the words themselves. While it is perhaps an overstatement to suggest that actual intention is *entirely* irrelevant,³⁹ it is certainly not decisive.

“*Hurtful*” means individual psychological hurt

49 Sub-section (a) requires that the speech could reasonably be construed to demonstrate a clear intention to be *hurtful*. We agree with the applicants that this provision refers to psychological or emotional harm experienced by individuals and the target group.

50 However, that does not make the test subjective. The question remains whether the speech could be reasonably construed to demonstrate a clear intention to be hurtful.

³⁸ Respondent’s written submissions, para 41.3.

³⁹ *Afriforum and Another v Malema and others* 2011 (6) SA 240 (EqC) para 109;

51 We submit that the position in respect of hurt is thus akin to the common law of *iniuria*, where it is insufficient for a plaintiff only to demonstrate subjective psychological harm. Instead, for purposes of wrongfulness, it must be shown that the speech is objectively insulting. As Smalberger JA explained in *Delange v Costa*⁴⁰ (cited in the minority judgment of Froneman J and Cameron J in *Le Roux v Dey*):

'This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for iniuria"

52 The reason for the objective standard is to avoid the courts "*being inundated with a multiplicity of trivial actions by hypersensitive persons*". We submit that the same applies here. While the criterion of hurt is concerned primarily with the psychological effect on the subject of the speech, the test remains an objective one.

53 In this context, the appropriate role of an expert witness might be to provide opinion evidence as to the likely psychological effects that particular speech might have on individuals in the affected group, insofar as this bears on the clear intention that the statements in question might demonstrate. But it cannot be the role of an expert to interpret the objective meaning of words.

54 An expert's role is "*to put before a court facts that require specialist skill to ascertain them or to interpret facts adduced that are not readily susceptible to interpretation by a judge owing to that judge's absence of such specialist skill.*"⁴¹

⁴⁰ *Delange v Costa* 1989 (2) SA 857 (A) 861D-862G, cited in *Le Roux and others v Dey* 2011 (3) SA 274 (CC) paras 178-180.

⁴¹ *Thomas v BD Sarens* [2012] ZAGPJHC 161 para 8,.

55 In *Holtzhausen v Roodt*,⁴² the Court explained that:

“Opinion evidence must not usurp the function of the Court. The witness is not permitted to give an opinion on the legal or general merits of the case. The evidence of the opinion of the expert should not be proffered on the ultimate issue. The expert must not be asked or answer questions which the Court has to decide.”

56 The interpretation of a publication to determine its objective meaning is at the core of the court’s functions, capabilities and responsibilities. It is simply not the appropriate subject of expert evidence. Indeed, in defamation proceedings, determining the meaning of a statement is an objective question on which no evidence *whatsoever* is admissible⁴³ – not to mention expert evidence.

“Harmful” means social and physical harm

57 We submit that harm refers to something altogether different to hurt. Speech can be harmful or can incite harm, without causing psychological hurt. And it can cause hurt, without being harmful or inciting harm. Both elements must be present to qualify as hate speech under section 10(1).

58 Sub-section (b) applies both to speech that could be reasonably construed to be intended to cause such harm itself – that is, actual demonstrable harm – and to speech that seeks to incite such harm.

59 That harm is distinct from hurt is well illustrated by the reasoning of Sutherland J in *Khumalo*. Whereas hurt is focused on the psychological or emotional effect of the speech on the individual, harm is decidedly social in character. It includes, but is not limited to, physical harm in the form of violence.⁴⁴ But it also

⁴² 1997 (4) SA 766 (W) at 768B-C. See also *Sasol Chemical Industries v Competition Commission* 2015 (5) SA 471 para 178.

⁴³ *Le Roux v Dey* paras 91 and 156.

⁴⁴ *Khumalo* paras 93 and 94.

includes denigration and abuse; the harm of retaliation and retribution through a spiral of invective; and possibly even the broader harm to social cohesion.⁴⁵

60 As to the meaning of incitement, the applicant contends that "*to incite harm*" means that the expression must "*instigate or actively persuade others to cause harm*".⁴⁶

61 We would add that the test for incitement should entail an element of both *imminence* and *likelihood*. The vague advocacy of violence, which no reasonable person could think would ever come to fruition, should not be understood to constitute incitement to cause harm.

62 The United States has recognised this principle, first in the "*clear and present danger*" test,⁴⁷ and subsequently in the "*imminent lawless action*" test,⁴⁸ and has struck down the prohibition of speech which constitutes "*nothing more than advocacy of illegal action at some indefinite future time*".⁴⁹

Hatred signals detestation and vilification

63 On the meaning of propagation of hatred, the parties agree, as do we, that this Court should adopt the definition of hatred espoused by the Canadian Supreme Court in *Keegstra*, namely that "*To promote hatred is to instill detestation, enmity, ill will and malevolence in another*".

64 Importantly, the Court's reasoning in this regard was that, properly and narrowly interpreted, such a definition of hatred would exclude "*merely offensive or*

⁴⁵ *Khumalo* paras 95-97.

⁴⁶ Applicants heads of argument, 57.3.2.

⁴⁷ See *Schenck v United States* 249 US 47 (1919)

⁴⁸ See *Brandenburg v Ohio* 395 U.S. 444 (1969)

⁴⁹ *Hess v Indiana* 414 U.S. 105 (1973).

hurtful expression from the ambit of the provision and respects the legislature's choice of a prohibition predicated on 'hatred'."

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30 July 2019

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