"This is hate speech" - ConCourt rules

By Dakalo Singo   4 Aug 2021

The Constitutional Court has handed down judgment in the case of *Qwelane v South African Human Rights Commission and Another [2021]*. This seminal judgment resolves the [long-standing conundrum](#) of: (i) whether or not section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is constitutional; and (ii) how the provision should be interpreted in the adjudication of hate speech complaints.

Source: Rabia Elif Aksoy – [123RF.com](#)

In 2008, Jonathan Dubula Qwelane authored a blatantly homophobic newspaper article titled *Call me names – but gay is NOT okay…* which, amongst other things, blamed gay and lesbian people for the degradation of society's values and traditions. Unsurprisingly, the article was widely criticised for its offensive and discriminatory remarks, leading to 350 complaints being made to the South African Human Rights Commission (Commission).

As a result, the Commission instituted proceedings in the Equality Court, alleging that the article constituted hate speech in terms of section 10(1) of PEPUDA, 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."*

A notable oddity in this definition is the absence of either the word *"or"* or *"and"* between paragraphs (b) and (c), which created significant ambiguity regarding how the provision should be interpreted. Essentially, the confusion was whether the definition should be read disjunctively (using "or") or conjunctively (using "and").

Qwelane denied that his remarks constituted hate speech. His opposition was twofold. First, he contended that his remarks were protected by his constitutional right to freedom of expression. Secondly, he argued that he could not be deemed to have committed hate speech in terms of section 10(1) as that provision was unconstitutional because it was impermissibly vague and overbroad. The Equality Court dismissed Qwelane's arguments and held that his remarks constituted hate speech.

Dissatisfied with that ruling, Qwelane appealed to the Supreme Court of Appeal (SCA), which upheld his appeal and overturned the Equality Court's judgment. The SCA held that section 10 is vague and goes beyond the right to freedom of expression, making it unconstitutional. Additionally, the SCA held that section 10(1) should be read disjunctively (using "or") and should be interpreted subjectively. The SCA therefore dismissed the Commission's complaint and referred the matter to the Constitutional Court for confirmation of the order of constitutional invalidity.

In the Constitutional Court, the issues for determination, included whether:

a. Section 10(1) should be interpreted subjectively or objectively;

b. Section 10(1) should be read disjunctively or conjunctively;
c. Section 10(1) is vague (and therefore unconstitutional); and
d. Qwelane committed hate speech in terms of section 10(1).

In a unanimous judgment, navigating the intricate balance between freedom of expression on the one hand and prohibition of hate speech on the other, the Court noted that

> *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.*

Ultimately, the Court found as follows in relation to the principal issues.

First, section 10(1) requires the application of an objective standard (the reasonable person test). Essentially, this requires a consideration of the effect of the alleged hate speech on a reasonable person, instead of the intention of the person who expresses the hateful speech. The Court's finding in this regard endorses the finding in *South African Human Rights Commission v Khumalo* *[2018]*, which adopted the objective approach.

Secondly, the Court found that section 10(1) should be read conjunctively, further endorsing another finding in Khumalo.

Court rules Jon Qwelane guilty of hate speech
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Thirdly, the Court agreed with Qwelane that the use of the word *"hurtful"* in section 10(1) is vague, and unjustifiably infringes the right to freedom of expression (and the rule of law), and is therefore unconstitutional, to that limited extent – meaning the remainder of the provision is constitutionally compliant. Consequently, the Court severed the word *"hurtful"* from section 10(1) and suspended the order of invalidity for 24 months to allow Parliament to correct the constitutional defect. In the interim, the Court ordered that section 10(1) be read as follows:

> " *No person may publish, propagate or advocate 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.* "

Lastly, the Court found that *"Mr Qwelane vilified the LGBT+ community as 'animals', as less than human beings [whose] sexual preferences and relations were degraded to bestiality"*. It added that homophobic hate speech not only injures the dignity of the LGBT+ community, but also *"serves to delegitimise their very existence and their right to be treated as equals."* It then found that in terms of both the (constitutionally compliant portions of the) old provision and the interim one, the article constitutes hate speech.

In attempting to craft a suitable remedy against Qwelane personally, however, the Court's options were limited by the fact that he passed away in December 2020, prior to the handing down of the judgment.

ABOUT THE AUTHOR

Dakalo Singo, Director at Werksmans Attorneys

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