e-MANTSHI

A KZNJETCOM Newsletter

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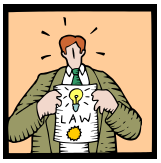
Welcome to the hundredth and fifty first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Justice and Correctional Services, acting under sections 15 and 16 of the Small Claims Courts Act, 1984 (Act No. 61 of 1984), has determined the amount for purposes of the said sections as R20 000.00 with effect from 1 April 2019. The notice to this effect was published in Government Gazette no 42282 dated 5 March 2019. The notice can be accessed here:

http://www.justice.gov.za/legislation/notices/2019/20190305-gg42282gon296-SCCamounts.pdf

Recent Court Cases

1. S v MEIRING 2019 (1) SACR 227 (GJ)

In a matter of contempt in facie curiae a magistrate and prosecutor must not overreact to frustrations expressed by an accused.

The accused was convicted in a magistrates' court of contempt *in facie curiae* and was sentenced to a fine of R5000 or three months' imprisonment. The matter came before the High Court on automatic review where it appeared that the conviction came about after the accused, who was appearing for the third time in the matter, audibly uttered an obscenity, perhaps twice, when his case was postponed yet again. The events took place whilst the court was either not in session or was no longer dealing with his matter. The magistrate took offence and the accused, who had been out on bail, was taken to the cells. Upon resumption, the accused apologised and explained that he was experiencing many frustrations. He was busy losing everything: his marriage was crumbling; he was losing his house; he had to care for his parents; and he was in financial trouble which was exacerbated by paying for his attorney for each appearance at court when nothing happened. He expressed sorrow for the word that he had used and explained that he was just frustrated with life at the time. The prosecutor then subjected him to a lengthy and intense cross-examination that elicited nothing in addition to what had already been established. On review,

Held, that it was immediately apparent that the magistrate was unaware of the provisions of s 108(1) and (2) of the Magistrates' Courts Act 32 of 1944 from which it was evident that the sentence of a fine of R5000 exceeded the maximum sum permissible. The magistrate had also failed to submit the statement prescribed by ss (2). On these grounds alone, the conduct was irregular. In addition, the fact that the court was either not in session or was no longer dealing with the accused's matter, was also a ground why the events could not constitute contempt *in facie curiae*. (See [2] and [4].)

Held, further, that mature persons did not approve of foul language being used, especially in any formal setting. However, the reality of life was that people who experienced exasperation would spontaneously swear. An overreaction was unwarranted.

The court suggested that appropriate steps should be taken by both the National Prosecuting Authority and the Magistrates Commission to educate officers of the court in the scope of their powers when unseemly behaviour occurred in and about a court. (See [16] – [17].) The conviction and sentence were set aside.

(In respect of the sentence it must be noted that in terms of the *Adjustment of Fines Act, Act 101 of 1991* the monetary sentence imposed did not exceed the maximum permissible fine - editor.)

2. SHAW AND ANOTHER v MACKINTOSH AND ANOTHER 2019 (1) SA 398 (SCA)

In a consumer credit agreement section 4(2) (c) of the National Credit Act 34 of 2005, provides that the Act applies to a credit guarantee only to the extent that the Act applies to a credit facility or credit transaction.

The issue in the present appeal was whether an agreement was subject to the National Credit Act 34 of 2005 (the Act) and therefore invalid. The dispute centred on the effect of clause 5 — headed 'Suretyship' — under which X agreed to assume liability, as 'co-principal debtor', for the repayment of Y's loan to Z. Z defaulted on its repayments and Y sued X in terms of clause 5. X and Y disagreed on whether their relationship was governed by the Act. Their argument in the High Court (both at first instance and on appeal to a full bench) proceeded on the basis that the main issue was whether the effect of clause 5 was to constitute X as surety. Both courts agreed with Y that it did and that the agreement was excluded from the ambit of the Act.
Held, It was unnecessary to decide whether clause 5 made X a surety: the appeal would be decided on the basis that X became a co-principal debtor with Z for the repayment of the admitted debt. The question, therefore, was whether the agreement between X and Y was a 'credit guarantee' under s 8(5), which would mean that the Act was not applicable because the underlying loan contract fell outside its purview, or a 'credit transaction' under s 8(4)*(f)*, which would mean that the Act was applicable. (See [7].)
An essential precondition to the operation of s 8(5) was that it had to involve an undertaking to satisfy an obligation of *another person*. In the present case the loan was advanced to Z, and the only purpose of the agreement was to arrange how X was to repay the amount owing to Y. X itself was not granted a loan, nor was any credit advanced to it, nor was it a party to the loan to Z. This brought X's obligations squarely within the language of s 8(5). Appeal dismissed. (See [10] – [13].)

3. MATHIMBA AND OTHERS v NONXUBA AND OTHERS 2019 (1) SA 550 (ECG)

Where both an advocate and an attorney were acting on contingency they could not enter into two separate contingency agreements in terms of section 2 of the Contingency Fees Act 66 of 1997. The cap of 25% is a global cap applicable to all legal practitioners in a case, so that jointly their fees cannot amount to more than 25% of an amount awarded.

Mr Mathimba had appointed law firm Nonxuba Inc to represent him, on a contingency basis, in two damages claims: one against the Road Accident Fund (RAF), in which he was ultimately awarded R6 977 105,84; and the other against the MEC for Health,

Eastern Cape (MEC), in which he was awarded R2 550 548,60. After the sums were paid into Nonxuba Inc's trust account and Mathimba received a bill of costs, he concluded that his attorneys had deducted an excessive sum for fees and disbursements. Mathimba (as first applicant) approached the High Court on application, seeking an order —

• declaring that the contingency fees agreement entered into in respect of the RAF and MEC matters (AM37 and AM15, respectively) were invalid and void for non-compliance with the Contingency Fees Act 66 of 1997 (the Act);

• declaring that the total fees of Nonxuba Inc (second respondent) plus the success fee of the appointed advocate (third respondent) may not exceed 25% of the capital amount awarded to Mathimba in the MEC matter; and demanding payment (in respect of both the RAF and the MEC matter) of the capital amounts outstanding, plus interest thereon, less the amounts to be (once again) taxed in the attorneys' attorney and client bill of costs.

Two principal issues were to be decided in the present matter, heard before the full bench.

Whether the settlement agreement reached was binding

After the matter was postponed, the parties, prompted by a tender contained in a supplementary affidavit filed by Nonxuba Inc, entered into negotiations and settled. A draft order purportedly encapsulating their settlement agreement was written. But the order was not made an order of court because Mathimba's attorneys withdrew their consent on the ground that the draft agreement made no provision for interest on the capital sums. Was the draft agreement binding?

Mathimba argued that the parties' real intention had been to include interest on capital and that this followed from the fact that Nonxuba Inc's previous tender — which formed the backbone of the negotiations — expressly stated that interest was payable. The failure to include interest in the written agreement was an oversight, something Nonxuba Inc would have been aware of and on which it could therefore not rely. In such circumstances Mathimba could not be held to the draft agreement. (See [40], [48] – [49].)

The court, however, held that the draft agreement was binding because there was no proof that the parties intended to include the interest in the draft agreement, or that Mathimba's attorneys were alive to the possibility of a mistake. (See [38], [42], [45], [52], [58], [60], and [70].)

Whether the contingency fees agreement AM15 between Mathimba and Nonxuba Inc was valid

The remaining issue was the validity of agreement AM15. This agreement was entered into between Mathimba and Nonxuba Inc mainly for the purpose of providing for contingency fees for the appointed counsel (third respondent), who also countersigned such agreement. Important context was that Nonxuba Inc itself was already acting on contingency in terms of a prior agreement (AM37) with Mathimba, in terms of which it was entitled to 25% of the value of the claim (this was later

conceded by Nonxuba Inc to be non-compliant with the Act). AM15's terms included, inter alia, the following: The advocate would recover no fees unless Mathimba was successful (or partially successful) in his claim against the MEC; and, if Mathimba was successful, the advocate would be entitled to a success fee of double his normal fees which would be calculated as being R15 000 per day or part thereof and R2000 per hour or part thereof, and should not exceed 25% of the total amount awarded to Mathimba in consequence of the proceedings (for purposes of calculating the success fee, costs were not included).

In considering whether agreement AM15 was compliant with the Act, the court considered the law on contingency fees agreements (see [118]), and stated:

• Absent compliance with the Act, a contingency fees agreement was void.

• The Act did not allow an advocate to sign a contingency fee agreement separately from the attorney or to conclude a contingency agreement directly with a client. Section 2 contemplated a *single contingency agreement* I for a single matter to which all the relevant legal practitioners (which included attorneys *and* advocates) on contingency were party, and *not separate agreements* for each practitioner.

• It was this single agreement with all legal practitioners involved on contingency that was subject to the constraints in s 2. Therefore the 25% cap (of the amount awarded) referred to in s 2(2) was not an individual cap applicable to each legal practitioner involved in a case on a contingency basis. Rather, it was a global cap applicable to all legal practitioners (including advocates) involved in a case, so that their joint fees could not exceed 25% of the amount awarded.

• A legal practitioner could not charge the maximum permissible under the Act plus taxed costs to be paid by the other side. The maximum practitioner's fees was what the Act said — a maximum above which no fees could be lawfully recovered. The party and party costs recovered by the successful party from the unsuccessful party were what the client recovered and were due to the client. An attorney could recover from party and party costs — once he or she has recovered the full attorney and client fees — only the reimbursement of one's out-of-pocket expenses and not fees.

The court concluded that contingency fees agreement AM15 was illegal and void for lack of compliance with the Act in the following respects (see [119] – [126]):

• Given that *both* Nonxuba Inc and the appointed advocate were acting on a no-win, no-fee basis, and on a success fee, these arrangements should have been dealt with in one and the same contingency fees agreement.

• The agreement provided only that it was the advocate's fee that may not exceed 25% of the total award, and not, as it should have the globular fees of both attorney and advocate (who were both acting on a contingency basis).

The court accordingly set aside agreement AM15, and granted an order in the terms set out in [127].

From The Legal Journals

Essack, J & Toohey, J

"Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa"

***South African Journal of Bioethics Law* 2018; 11(2):85-88.**

Abstract

Over the past 24 years, the South African criminal justice system has undergone major transformations in relation to sexual offences, including sexual violence against children. More recently, there have been a number of developments to certain provisions in the law relating to sexual offences involving children. In response to the Teddy Bear Clinic Court Case and Constitutional Court ruling, sexual offences legislation related to underage consensual sex was amended. In this regard, the legislation now decriminalises underage consensual sexual activity between adolescent peers aged 12 - 15-year-olds. In addition, the law provides broader definitions for consensual sexual activity, including decriminalising consensual sex and sexual activity between older adolescents (above age of consent for sex, i.e. 16 - 17-year-olds) and younger adolescents (below the age of consent for sex, i.e. 12 - 15-year-olds), granted that there is no more than a 2-year age gap between them. One of the reasons for decriminalising consensual sexual activities between adolescent peers was because the expanded legislation cast the net for sexual offences so wide that the effects had far-reaching harmful impacts, particularly for girls, who would then be exposed to the criminal justice system. This paper focuses on unpacking the 2-year age-gap provision in SA legislation relative to selected better-resourced countries, including the rationale and the potential implications for adolescents (outside of the 2-year age gap provisions), for researchers, service providers and policy-makers. It concludes with some recommendations for law reform and further research.

The article can be downloaded here:
http://www.sajbl.org.za/index.php/sajbl/article/view/594/576

Boniface, A & Rosenberg, W

"The challenges in relation to undocumented abandoned children in South Africa"

2019 TSAR 41

Rousseau, L E

"Repetition in order to support a reasonable apprehension of harassment in the Domestic Violence and Protection from Harassment Acts."

De Rebus March 2019

The article can be downloaded here:

http://www.derebus.org.za/repetition-in-order-to-support-a-reasonable-apprehension-of-harassment-in-the-domestic-violence-and-protection-from-harassment-acts/

Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Deindividuation

Crowd violence is a commonly encountered phenomenon in South African society. Given that crowd violence may inflict more harm than where an individual is acting alone, potentially not only violating public peace and order, but also threatening the rights of other people, it is required that any such violence must be consistently and comprehensively dealt with by the authorities. The response to such violence is therefore typically the application of the criminal law (the civil law may of course also be transgressed, see the ruling of the Constitutional Court in *SATAWU v Garvas* 2013 (1) SA 83 (CC) regarding harm caused to non-protesters by protesters or striking workers, discussed by Khumalo 'Developing the crime of public violence as a remedy to the violation of the rights of non-protesters during violent protests and strikes – a critical analysis of the South African jurisprudence' (2015) 36 *Obiter* 578). In such factual scenarios the State has often made use of the doctrine of common purpose in the criminal law context to facilitate the process of proving individual guilt, where such individual was a member of the crowd engaging in violent behaviour.
The question arises however as to what psychological factors are at play when a person is a member of a crowd? Social psychologists have used the term 'deindividuation' to describe the situation where, being part of a crowd caught up in

strong emotion, the attention of the individual concerned is directed away from personal self-awareness and the usual methods of self-control, and towards the shared emotion (Louw and Edwards *Psychology: An Introduction* 2ed (1997) 764). Factors which contribute towards deindividuation include anonymity, diffusion of responsibility, the presence of a group, and a shortened time perspective (Mummendey 'Aggressive Behaviour' in Hewstone et al *Introduction to Social Psychology* (1988) 285). These factors, along with the physiological arousal usually linked with noise, excitement and stimulation, are typically associated with crowds (Middlebrook *Social Psychology and Modern Life* (1974) 528). Zimbardo's research on deindividuation in the 1970s pointed to people being less responsible or accountable for their own actions, as a direct result of their anonymity in the crowd, resulting in unrestrained, antisocial actions. More recent research by Postmes and Spears suggests that deindividuation may result in *either* more anti-social behaviour *or* more normative (norm-adhering) behaviour, the key factor being that when someone is in a large crowd, they are more likely to obey the norms of this group, whatever these norms may be (an everyday example being sports fans booing the opposing team or the referee). (For further brief explanation of this phenomenon, see Hoctor 'Crowd violence and criminal behaviour: Dissecting deindividuation' 2000 *Obiter* 161-166, Baron, Branscombe and Byrne *Social Psychology* 12ed (2009) 399-400; for a more extensive exploration of deindividuation and related phenomena see Zimbardo *The Lucifer Effect – Understanding How Good People Turn Evil* (2007).)

For present purposes the question is: what effect, if any, do the psychological processes associated with deindividuation have on criminal responsibility? Up to this point, deindividuation has not in itself given rise to a successful defence to a criminal charge, on the basis of excluding one of the requisite elements of criminal liability. It appears however that, in principle, there is nothing preventing such a defence being raised. Expert evidence has been led to the effect that deindividuation produces behaviour analogous to the behaviour of persons who are hypnotized or under the influence of alcohol (*S v Thabetha and others* 1988 (4) SA 272 (T) at 280E; *S v Motaung and others* 1990 (4) SA 485 (A) at 506C). Thus, depending on the intensity of the deindividuating process, it can operate to prevent people from foreseeing the consequences of their actions and from making rational and moral decisions about their actions (*Thabetha* at 280E-F; *Motaung* at 506C). In terms of application to the elements of liability, it is evidently therefore open for an accused to argue that, as a result of being in a deindividuated state, he lacked either capacity (on the basis of external factors, hence founding a defence of non-pathological incapacity) or intention.

While an acquittal on the basis of deindividuation as yet remains only a hypothetical possibility, the use of deindividuation as a factor relevant to mitigation of sentence is by contrast well established (see Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 228-229). In a number of South African cases (see, for example, *Thabetha*; *Motaung*; and *S v Matshili* 1991 (3) SA 255 (A)) evidence of deindividuation has been led. Whereas in the *Motaung* case, the court was not prepared to conclude on the facts that deindividuation could be established, in

Thabetha the court did rely on such evidence in its finding that extenuating circumstances existed, militating against the handing down of the death penalty. In the *Matshili* case, the Appellate Division, per Nestadt JA, summarized the testimony of the expert witnesses in respect of deindividuation as placing strong pressure on the individual to conform, obedience to authority, observation of aggressive role-models, and psychological arousal caused by shouting, singing, dancing or other kinds of physical exertion (at 271B-D; Terblanche 229). The court stated that the test for deindividuation is factual in nature: 'did…the group influence result in the accused's responsibility being diminished to an extent sufficient to reduce his moral guilt?' (at 271G-H). Applying this test to the facts of the case, the court found that despite the seriousness of the murders, due to the cumulative effect of the mitigating factors, and in particular that the appellants 'were subjected to psychological forces which caused them to act in an uncharacteristically violent manner towards persons against whom they had an intense resentment' (at 274F-G), the imposed death sentences should be set aside. Similarly, in *S v Khumalo en andere* 1991 (4) SA 310 (A), deindividuation was accepted as a mitigating factor, after the State's expert witnesses conceded that it was possible that at the time of the commission of the crime, the accused had been deindividuated by their identification with the group, in the context of a strong emotional upheaval (at 361A-G). As Terblanche points out, although expert witnesses will usually testify, even in the absence of such expert evidence, the court may nevertheless find that there was 'mob influence' (229, see also *S v Matala* 1993 (1) SACR 531 (A) at 537f).

While the psychological model of deindividuation has developed since its earliest theoretical manifestations to the most recent theoretical approach (for a useful summary see Vilanova et al 'Deindividuation: From Le Bon to the social identity model of deindividuation effects' 2017 *Cogent Psychology* 4: 1308104), in essence what deindividuation acknowledges is that when individuals are alone, they tend to behave differently to when they are in a group. The particular concern for the criminal law is where such action in a group results in accused who commit crimes while being part of a crowd, while not seeing themselves as individuals. Anonymity can easily give rise to antinormative (i.e. unlawful) behaviour. How the blameworthiness of such accused should be evaluated poses a challenging factual problem for the presiding judicial officer in cases of criminality arising from the actions of a crowd. While the common purpose doctrine assists in imputing liability to the individual in such cases, the court is required to reflect on whether the blameworthiness of the individual accused should not be regarded to have been diminished by deindividuating factors. In a society characterized by protest, which is often emphasised by violent conduct, it is incumbent on the courts to carefully strike this balance.

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Matters of Interest to Magistrates

A comparison of sections 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act)

PART 1

1. Introduction

Section 10(1) of the Equality Act prohibits hate speech. Section 12 of the Act prohibits the dissemination and publication of information that unfairly discriminates. Both provisions regulate "discriminatory" acts of expression and it is very difficult to determine in which circumstances each prohibition should apply. The positioning of the proviso in section 12 causes more problems, because it also qualifies section 10. This note aims to provide clarity. It begins by setting out the objectives of the Equality Act and then moves to the elements of sections 10 and 12, which must be interpreted in accordance with the Act's overall objectives. Thereafter, the distinctions between sections 10 and 12 are addressed, followed by an explanation of the types of circumstances in which the respective sections would apply.

2. The Equality Act's overall structure and objectives

Both sections 10 and 12 must be interpreted and applied with reference to the Act's objectives and guiding principles. The underlying purpose of the Equality Act is to give effect to the constitutional right to equality, with the Act serving as the enabling legislation envisaged by section 9(5) of the Constitution. It does this by providing legal mechanisms aimed at promoting equality and overcoming unfair discrimination and hate speech. It also provides the victims of such conduct with a wide range of remedies to redress the harm caused (*Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA)).

The preamble of the Equality Act records that it was enacted to give effect to substantive equality, to overcome the systemic inequalities of the past, to prohibit *inter alia* unfair discrimination and hate speech, and to promote human dignity, equality and social justice "in a united, non-racial and non-sexist society where all may flourish". The Act's objectives are specifically listed in section 2, with a repeat of many of the preamble's transformative goals. Furthermore, section 4(2) of the Act provides that when applying the Act it is necessary to consider both the existence of systemic discrimination and historical inequalities, especially on the basis of race, gender and disability, and the need to implement measures at all levels of society to overcome and eliminate such discrimination

Section 3(1) of the Equality Act requires that it be interpreted to give effect to the Constitution, including the advancement of substantive equality, and the Act's overall purpose as reflected in the preamble, objects and guiding principles. Section 5(2) of the Equality Act provides that in the event of a conflict arising between the Act and any other law, the Act will prevail, with the Constitution remaining pre-eminent. This ensures that the Act is interpreted in light of constitutional principles. However, as the Constitutional Court explained in *MEC for Education: Kwazulu Natal v Pillay* (2008 (1) SA 474 (CC) para 43), the Act need not mirror section 9 exactly. Enabling legislation enacted to give effect to an entrenched right may extend the protection afforded by the right, but may not decrease such protection or infringe another right (in which case a constitutional challenge could be entertained). Furthermore, claims lodged under the Equality Act must be decided "within the four corners of that Act." A party cannot elect to circumvent enabling legislation by relying directly on the constitutional right. Absent a challenge to the constitutionality of enabling legislation, the courts must apply such legislation and assume that it is consistent with the Constitution (*Pillay* para 40, applying *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 (2) SA 311 (CC) paras 96 and 434-437) . In my note for the January 2019 issue of *e-Mantshi*, I dealt with the SCA's decision in *Masuku v South African Human Rights Commission obo the South African Jewish Board of Deputies* [2018] ZASCA 180 and explained that the SCA erred by not applying this principle.

3. <u>Section 10 introduced</u>

Section 10(1) of the Equality prohibits hate speech and is worded as follows:

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 incite harm;
c) promote or propagate hatred.

The proviso in section 12 excludes the "*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" from section 10(1)'s ambit. This type of speech is not prohibited by section 10. The proviso should be interpreted as a defence to a hate speech claim. The onus will be on the Respondent to prove that the speech is exempted because it falls within the parameters of the proviso.

The prohibited grounds in the Equality Act are identical to those listed in section 9 of the Constitution. Additionally, a complaint in terms of the Equality Act may be brought on an analogous (or unlisted) ground, such as HIV status, for example.

The constitutionality of section 10(1) has been debated extensively in academic scholarship [see generally Botha and Govindjee. "Hate speech provisions and provisos: A response to Marais and Pretorius and proposals for reform" 2017 20 (1) *PER* 902; Botha "Of semi-colons and the interpretation of the hate speech definition in the Equality Act-South African Human Rights Commission v Qwelane (Freedom of Expression Institute as Amici curiae) and a related matter [2017] 4 All SA 234 (GJ)" 2018 39 (2) *Obiter* 526; Botha and Govindjee "The regulation of racially derogatory speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" 2016 32 (2) *SAJHR* 293; Marais and Pretorius "A contextual analysis of the hate speech provisions of the Equality Act" 2015 18 (4) *PER* 902; Kok and Botha "Vonnisbespreking: die siviele verbod op haatspraak" 2014 11 (2) *Litnet Akademies* 198]. I do not engage with the constitutional issues in this note. Instead I briefly discuss the appropriate definition of hate speech and then provide a brief overview of the elements of section 10(1).

4. Definition of hate speech

Upfront, it is stressed that there is a general tendency to use the "hate speech" label loosely to refer to a wide range of harmful types of expression (see Botha "Towards a South African Free Speech Model" 2017 134 (4) *SALJ* 778 779). Courts should avoid this. Definitional precision for a hate speech threshold test is crucial. Use of an incorrect definition undermines the limits of the legislation in question and the obligations imposed thereby. In turn, the court's findings are compromised.

For example, in *South African Human Rights Commission v Qwelane (Freedom of Expression Institute as amici curiae) and a related matter* [2017] 4 All SA 234 (GJ) para 46) the court defined hate speech with reference to Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (the ICERD) and an online student essay. The court found that Article 4 of the ICERD describes hate speech as "[A]ny speech, gesture, or conduct, writing or display which is forbidden because it may incite violence or prejudicial action against or by a protected

individual or group, or because it disparages or intimidates a protected individual or group." This is not correct (this seems to be a definition used on various online platforms, such as Wikipedia). Article 4 of the ICERD does not define hate speech at all, let alone in these terms.

The student's definition of hate speech quoted, namely "speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground including race, nationality, ethnicity, country of origin, ethno-religious identity, religion, sexuality, gender identity or gender" is a better definition, but is actually correctly ascribed to the Australian academic, Katharine Gelber (see Gelber and Stone eds *Hate Speech and Freedom of Speech in Australia* (2007) xiii).

Courts are urged to define hate speech consistently in accordance with the constitutional text and the legislation which applies in each particular case. So, a court should commence with the constitutional requirements for hate speech, as interpreted in decisions such as *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 and *ANC v Harmse: In Re Harmse v Vadwa* 2011 (12) BCLR 1264 (GSJ). Then, if section 10(1) applies, the court should move to this threshold test. In cases of a constitutional challenge, these tests can be juxtaposed during the section 36 proportionality analysis.

5. Elements of section 10(1)

In both *Afri-forum v Malema* (2011 (6) SA 240 (EqC)) and *Qwelane* the respective Equality Courts found that section 10(1) specifies two main requirements for hate speech, namely that: 1) it be based on a prohibited ground and 2) that the speech "must be reasonably construed to indicate a clear intention to be hurtful, be harmful or incite harm, or to promote or propagate hatred".

5.1. On a prohibited ground

This component of the test is relatively simple. The hate speech must target its victim *on the basis of one or more of* the seventeen prohibited grounds. There must be a direct link between the speech and the prohibited ground, with the victim targeted because of his or her group membership. The use of "one or more" allows for intersectional complaints, for example hate speech targeting a victim on the basis of race *and* gender. This means that victims do not have to force their claims within the parameters of a particular ground, the so-called pigeonhole approach. In addition, because the grounds are open-ended, a hate speech case can also be brought on any other ground which perpetuates systemic discrimination or undermines human dignity, such as socio-economic status. An example is hate speech directed at a vagrant because of his or her state of poverty.

5.2. Communication

Section 10(1) requires that words in question be advocated, published, propagated or communicated. All of the verbs involve the conveyance of a message to someone else. "Communicate" is the broadest of the four terms used. It includes private conversations. The expression need not be disseminated to a public audience (note, however, that the reach of the expression may impact on the extent of the harm and the remedy awarded).

5.3. Of words

It is strange that the prohibition in section 10(1) is limited to the expression of *words*. By way of comparison, section 16 of the Constitution protects "expression", which has been widely interpreted to include any action or conduct which communicates meaning. The narrow use of "words" in section 10(1) has caused confusion. See, for example, Manamela *v Shapiro* where the SAHRC found that strictly speaking the drawing of a cartoon would not fall within section 10(1). Nonetheless, the term "words" should be interpreted broadly by using reading down as an interpretative technique so as to ensure that all forms of hate "speech" fall within its ambit. For example, it is quite conceivable that the display of the old South African flag could be interpreted to amount to hate speech, provided the other section 10(1) requirements are met.

5.4. *Intention*

Section 10(1) provides that speech will amount to hate speech if the words in question "could reasonably be interpreted to demonstrate a clear intention" to be hurtful, harmful, incite harm, or promote or propagate hatred. As confirmed in *Malema*, *Qwelane* and *Herselman v Geleba* (ECD (unreported) 2011-09-01 Case No 231/09), this means that the subjective intention of the hatemonger to spread hate is not a requirement. The test is an objective one. With reference to context and the speech's content, it must be assessed whether the speaker had the requisite intention (to be hurtful, incite harm, or promote or propagate hatred). Most courts also assess whether such harm is a possible consequence of the speech, but do not ask for proof of actual harm (note though that section 10(1) does not require a causal link between the speech and the harm – an omission which has been criticised).

In short, the *effect* of the speech is the crucial factor. Some courts have held that the effect on the target group is the deciding factor, but this is too narrow. The test is objective. Thus, neither the subjective intention of the victim, nor the perspective of the hatemonger, should be preferred because this approach would permit too much subjectivity. Instead, it must be established whether the reasonable person, aware of the context and circumstances surrounding the publication, would regard the speech

as demonstrating an intention on the speaker's part to promote hatred etc on a prohibited ground.

5.5. To be hurtful, or to be harmful or to incite harm, or to promote or propagate hatred

This component of section 10(1) has caused considerable controversy. See, for example, the judgments in *Herselman, Qwelane, Masuku* (in the SCA) and Masuku in the High Court, sitting as Equality Court [*SAHRC obo South African Jewish Board of Deputies v Masuku* ([2017] 3 All SA 1029 EqC and my commentary in "Of semi-colons" 2018 39 (2) *Obiter* 526]. The wording used is highly problematic. It seems that the Equality Act drafters tried to capture a wide range of speech forms within the ambit of section 10(1). Possibly this is why aspects of the constitutional test are replicated in a haphazard fashion. Nonetheless, there are a number of issues needing attention.

5.5.1. The meaning of the terms used

Firstly, the meaning of the words used in the section 10(1) test must be assessed. The first possibility is that the words could be regarded as hurtful on a prohibited ground. The inclusion of hurt has elicited much academic debate, because the regulation of hate speech is generally not concerned with hurt feelings. The reason is obvious: the proper purpose of hate speech regulation is to address expression that risks undermining the status of marginalised groups and causes damage to the overall social fabric. To overcome this problem, the court in *Qwelane* found that the section 10(1) requirements should be interpreted conjunctively – see the discussion below. This interpretation is highly debatable and does not apply in all divisions. Nonetheless, when we talk about hurt, we mean the subjective offence that the individual experiences when his or her feelings are affronted (a similar test to that used for a claim of *iniuria*) on a prohibited ground.

The second option is that the words could be regarded as harmful or could incite harm. Although there have been some inconsistent judgments, "harm" must be interpreted broadly to include "psychological, emotional and other harm", provided that the harm is "serious and significant" [*Freedom Front* 1292]. It is widely accepted in hate speech scholarship that the "harm in hate speech" includes not only physical harm, but also psychological harm and, within the context of the constitutional mandate, the impairment of a diverse and tolerant society committed to the achievement of social justice [see *Islamic Unity Convention v Independent Broadcasting Authorit*y (2002 (4) SA 294 (CC). It is therefore incorrect to limit the term "harm" to mere physical harm.

The phrase "incitement of harm" is used in the constitutional definition of hate speech and is a strict requirement. It envisages a speaker who engages in hate speech

directed at a target group which is intended to *incite others* (that is, an audience) to react to the speech and to cause harm to the group and / or the broader societal good. There must be a real possibility that the effect of the words in the context in which they are spoken will cause serious harm to the group or to the broader societal good.

The third possibility is that the speech could promote or propagate hatred. It is now trite law that "hatred is not a word of casual connotation" and that the promotion of hatred means the advancement of "detestation" against the victim of the speech and that for expression to qualify as hate speech, it must go "a long way" [*Freedom Front* 1290, quoting the Canadian decision of *R v Andrews* [1990] 3 SCR 870]. Generally speaking, the "tone, content and context" of the speech will establish whether the speech advocates hatred. The focus must be on the effects of the words and whether discrimination is likely to occur as a result. In this regard, useful pointers include the so-called hallmarks of hatred quoted in *Saskatchewan Human Rights Commission v Whatcott* [2013] 1 SCR 467 paras 43-46 – (the judgment can be accessed here https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12876/index.do).

5.5.2. Conjunctive or disjunctive interpretation

Recently, there has been much debate about whether the section 10(1) requirements should be interpreted conjunctively or disjunctively. A conjunctive interpretation requires the addition of the conjunction "and" after the semicolons separating sub-sections a), b) and c) of section 10(1). In other words, on this approach, a hate speech complainant would have to prove that the words published could reasonably be construed to demonstrate a clear intention to: a) be hurtful; *and* b) be harmful or to incite harm; *and* c) promote or propagate hated. On the other hand, with a disjunctive interpretation, a complainant has to prove only either a) *or* b) *or* c).

In *Qwelane*, the court was faced with a constitutional challenge to section 10(1). To solve the problem, it interpreted section 10(1) conjunctively. Whilst this has been criticised (as strained and imposing a very strict test for hate speech regulation in a human rights statute), the court reasoned that this reading was mandated by section 39(2) of the Constitution to ensure that section 10(1) "is consistent" with the right to freedom of expression in section 16(1) of the Constitution.

The *Herselman* court, on the other hand, held that a conjunctive interpretation of section 10(1) could lead to absurd results. It reasoned that this could mean that racially discriminatory words (in this case the appellation "baboon" for a black man) addressed at an individual would not be regulated by section 10, as inter-personal speech would not meet the promotion or propagation of hatred requirement. The court concluded that a conjunctive interpretation would undermine the Act's purpose, which was intended to regulate racially discriminatory words, whether addressed inter-personally or in a group context. Therefore, the complainant need only prove that either section 10 (a), (b) *or* (c) applied in the determination of whether the offending conduct amounted to hate speech [*Herselman* 13, 18-19)]. It is unfortunate

that the *Qwelane* court did not consider the decision in *Herselman*, which offers a thought-provoking perspective on the consequences of a conjunctive interpretation.
The problem, however, is that as a result of the conflicting interpretations in *Herselman* and *Qwelane*, a strict test for hate speech applies in Gauteng, whereas in the Eastern Cape a complainant need only show that the speech was hurtful, or harmful, or incited hatred.

6. Conclusion

In the next edition, section 12 of the Equality Act, which prohibits the dissemination and publication of information that unfairly discriminates, will be introduced. The elements of the "cause of action" for this prohibition will be discussed and juxtaposed with the hate speech regulator in section 10(1). The note will then demonstrate in which circumstances a claimant should rely on section 10 as opposed to section 12.
TO BE CONTINUED

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The findings of the South African Human Rights Commission regarding certain statements made by Mr Julius Malema and another member of the Economic Freedom Fighters in March 2019 can be accessed here: https://www.sahrc.org.za/home/21/files/SAHRC%20Finding%20Julius%20Malema%20&%20Other%20March%202019.pdf

A Last Thought

"Lawyers are students of language by profession . . .
They exercise their power in court by manipulating the thoughts and opinions of others, whether by making speeches or questioning witnesses.
In these arts the most successful lawyers reveal (to those who can appreciate their performance) a highly developed skill."

F Philbrick *Language and the Law: The Semantics of Forensic English* (1949) vi.