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)

1 Introduction

In *South African Human Rights Commission v Qwelane* (hereinafter "*Qwelane*") the constitutionality of the threshold test for the hate speech prohibition in section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter the "Equality Act") was challenged. Although the court had no difficulty in finding that the publication in question fell squarely within the parameters of hate speech, the judgment is both incoherent and flawed. The court's conjunctive interpretation of the section 10(1) requirements for hate speech also differs from the disjunctive interpretation given to the same provision in *Herselman v Geleba* (ECD (unreported) 2011-09-01 Case No 231/09 hereinafter "*Herselman*") by the Eastern Cape High Court. The consequence is a "fragmented jurisprudence" which impacts on legal certainty, and which is especially dangerous when the legislation in question is critical to the achievement of the constitutional mandate (*Daniels v Campbell NO* 2004 (5) SA 331 (CC) par 104 hereinafter "*Daniels*").

This note demonstrates that the *Qwelane* court misapplied a number of key principles. These include: the court's mandate in terms of section 39(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter the "Constitution"); the need to strike an appropriate balance between competing rights in the constitutional framework; the importance of definitional certainty for a hate speech threshold test; the meaning to be ascribed to the terms "hate", "hurt" and "harm" in the context of hate speech legislation; and the role of international law when interpreting legislation intended to give effect to international obligations.

The consequence of these errors for hate speech regulation in South Africa is profound.

2 The case

2 1 Facts

In 2008 an article penned by Jon Qwelane (hereinafter "Qwelane"), entitled "Call me names – but gay is not okay", was published in the *Sunday Sun* newspaper (par 35). In the article Qwelane denigrated homosexual people. He aligned himself with the then recently published homophobic views of former Zimbabwean president, Robert Mugabe, who had compared homosexual people to dogs and pigs, and proceeded to state that (par 9):

> "Homosexuals and their backers will call me names … for stating as I have always done my serious reservations about their lifestyle and sexual preferences, but quite frankly I don't give a damn, wrong is wrong! I do pray that some day [sic] a bunch of politicians with their heads affixed firmly to their necks will muster their balls to rewrite the constitution of this country … Otherwise at this rate how soon before some idiot demands to marry an animal and argues that this constitution allows it?"

The article appeared alongside a cartoon depicting a minister marrying a man and a goat (although Qwelane was not the author of the cartoon). The publication resulted in a public uproar, the South African Human Rights Commission ("SAHRC") receiving some 350 complaints. The gist of these complaints was that the publication amounted to hate speech on the ground of sexual orientation and that the comparison between homosexuality and bestiality undermined the inherent human dignity of homosexual people (par 10).

The SAHRC instituted proceedings in terms of section 21(1)(f) of the Equality Act against Qwelane in the Magistrate's Court, sitting as an Equality Court, alleging that the publication contravened section 10(1) of the Act (par 2, 5−6). Qwelane launched a separate challenge to the constitutionality of section 10(1), as read with sections 1, 11 and 12 of the Act. The Equality Court proceedings and the constitutional challenge were consolidated for hearing before a single judge, Moshidi J, sitting as both an Equality Court and the High Court (par 3). The Freedom of Expression Institute and the Psychological Society of South Africa were admitted as *amici curiae*. The consolidation of the proceedings elicited an illogical judgment, the court electing to deal with the equality and constitutional aspects separately, but ultimately conflating the various issues.

2 2 Background to the Equality Act provisions

The characterisation of hate speech in section 10(1) of the Act was fundamental for both sets of proceedings. It provides 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 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.

Section 1 is the definition section. In the context of hate speech, the most relevant definition is that of the prohibited grounds, which are identical to those listed in section 9 of the Constitution. The grounds in the Equality Act, however, are open-ended and a complaint may be brought on an analogous ground.

Section 11 of the Act prohibits harassment. Qwelane contended that this provision impacted on the constitutionality of section 10(1), but this aspect of the argument was not addressed in detail and is not discussed further in this note.

The court accepted that the meaning, ambit and constitutionality of section 10(1) was to be considered in light of the Act's objectives (par 11, 14). The preamble records that the Act 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 … society where all may flourish". The preamble also provides that the Act aims to implement South Africa's international obligations in terms of both the International Convention on the Elimination of all Forms of Racial Discrimination (1965, ratified by South Africa in 1998, "ICERD") and the Convention on the Elimination of all Forms of Discrimination against Women (1979, ratified by South Africa in 1995, "CEDAW"), by putting measures in place promoting equality and prohibiting unfair discrimination and hate speech. To this end, the court correctly emphasised the prominence of the rights to equality and dignity in the legislative scheme (par 11). It also recognised the close link between the right to equality and the Equality Act, the latter serving as the enabling legislation envisaged by section 9(4) of the Constitution.

The court acknowledged that section 3(1) of the Act requires that its provisions be interpreted to give effect to the Constitution, including the advancement of substantive equality. It did not, however, consider the injunction in section 3(2), namely that when interpreting the Act, a court must be mindful of international law, particularly that pertaining to ICERD and CEDAW, and comparable foreign law.

2 3 The tension between the competing rights

Qwelane argued that his right to freedom of expression justified the publication (par 15). The court was thus compelled to address the tension between the rights to freedom of expression, equality and human dignity (par 17, 22). It did so by recognising that section 16 of the Constitution entrenches freedom of expression and that its protection buttresses the constitutional democracy (par 18−19, 45). The court acknowledged that the right is not absolute and may be limited in terms of both sections 16(2) and 36 of the Constitution. It confirmed *Islamic Unity Convention v Independent Broadcasting Authorit*y (2002 (4) SA 294 (CC) hereinafter "*Islamic Unity*"),

where the Constitutional Court held that hate speech (as defined constitutionally) is not worthy of constitutional protection because of the harm it causes to the dignity and equality of others and the constitutional mandate, specifically pluralism and respect for diversity (par 18−19, 47). The court added that the regulation of hate speech in terms of the Equality Act gives practical legislative effect to the exclusion of hate speech from constitutional protection. The court then stressed the need to promote the dignity and equality of homosexual people and to protect them from unfair discrimination in light of past patterns of disadvantage. The court concluded that because of the ongoing demeaning treatment of homosexual persons, Qwelane's rights to dignity and equality should not be preferred above the rights of homosexual persons (par 50). This deduction is a misconception of Qwelane's case, namely that his right to freedom of expression should be balanced with the rights to dignity and equality of homosexual persons. As explained below, the court's misunderstanding of the nexus between the competing rights and the complexity of hate speech regulation impacted on its reasoning.

2 4 The hate speech case

The court was tasked with determining whether the publication amounted to hate speech as prohibited by section 10(1) of the Act. It considered the testimony of numerous witnesses, all of whom stated that they believed that Qwelane's publication was hate speech on the ground of sexual orientation. These witnesses detailed the impact of homophobic statements on homosexual people. They also testified that the offending publication was particularly offensive because it denigrated the intimate relationships and sexual identity of homosexual people (par 23−40).

The court then turned to the definition of hate speech and the meaning of the section 10(1) requirements. It endeavoured to define hate speech with reference to Article 4 of the ICERD and a student essay, available online (par 46). The court found that Article 4 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." As discussed below, Article 4 does not define hate speech at all, let alone in these terms. The student's definition of hate speech, 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 actually correctly ascribed to the Australian academic, Katharine Gelber (see Gelber and Stone eds *Hate Speech and Freedom of Speech in Australia* (2007) xiii).

The court found that section 10(1) specifies two requirements for hate speech: 1) that it must be based on a prohibited ground; and 2) that "it must be reasonably construed to indicate a clear intention to be hurtful, be harmful or incite harm, *or* to promote or propagate hatred" (par 52, author's own emphasis). The court accepted that the threshold test for hate speech in section 10(1) is broader than the constitutional definition for hate speech in section 16(2)(c) of the Constitution, namely the advocacy of hatred, on the

grounds of race, gender, ethnicity and religion, and which constitutes incitement to cause harm (par 53). Firstly, the listed grounds in section 10(1) are more extensive than the four constitutional grounds. Secondly, the speech need not incite harm and the advocacy of hatred is not a pre-requisite (par 53). Thirdly, the subjective intention of the hatemonger is unnecessary. 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 and whether harm (in the form of either hurt or hatred) is a possible consequence, proof of actual harm not being needed (par 53). (Compare the court's finding during the vagueness challenge that "harm" means "physical harm of whatever nature" – see par 59 – the judgment contains many such inconsistencies, a matter which is addressed in more detail below).

Before deciding whether the offending speech fell within the net of section 10(1), the court turned to the proviso in section 12 of the Act, which excludes certain types of listed speech from prohibition (par 52). The court found the proviso did not exempt Qwelane's publication as it was not published to promote a debate about homosexuality. Instead, its purpose was to persuade readers of the veracity of Qwelane's homophobic views.

The court ultimately held that the offending statements, when assessed objectively, "spoke ill" of homosexual persons and undermined their self-worth (par 49). The suggestion that the legalisation of homosexual marriage could lead to marriage between people and animals equated homosexuality with bestiality and was deeply hurtful and dehumanising. The publication therefore had the capacity to cause harm to the LGBTI (an acronym for lesbian, gay, bisexual, transgender and intersex) community, aggravated by Qwelane's failure to apologise. The court later concluded that Qwelane's publication was hurtful, harmful, had the potential to incite harm towards LGBTI people, and propagated hatred against them (par 53). The statements therefore amounted to hate speech, as defined by section 10(1).

2 5 The constitutional challenge

Qwelane claimed that his publication was protected speech in terms of section 16(1) of the Constitution and that section 10(1) of the Equality Act was unconstitutional on the grounds of both vagueness and over-breadth. The vagueness challenge was directed at the phrasing of the proviso in section 12, which Qwelane claimed rendered the section 10(1) hate speech requirements meaningless. The crux of the over-breadth challenge was that section 10 unjustifiably prohibits speech beyond the parameters of section 16(2) of the Constitution (par 54).

To assess the vagueness challenge, the court referred to the Constitutional Court decision in *Affordable Medicines Trust v Minister of Health* (2006 (3) SA 247 (CC) hereinafter "*Affordable Medicines Trust*") and confirmed that the doctrine of vagueness is founded on the principle of legality (par 55). In summary this means that the rule of law requires that laws be clear and accessible. Absolute certainty and perfect lucidity are not the standard: the test is one of reasonable certainty. Those who are bound by the law must know what is required of them so that they may regulate their behaviour. The doctrine of vagueness must also be reconciled with

government's need to pursue legitimate social and economic objectives and should not be used to impede these. The substance of the law must, however, remain intelligible.

The court accepted that the correct approach when assessing a vagueness challenge is to start by interpreting the legislation in question by applying the usual rules of interpretation. Relying on section 39(2) of the Constitution, the court stressed that an interpretation of the Equality Act must reflect that the Act was enacted to give effect to the right to equality. Thus, the court pronounced that the "impugned provisions are difficult to attack" (par 57).

The court held further, albeit somewhat baldly, that section 10(1) of the Act, as read with the proviso in section 12, "does not discern any vagueness" (par 56). It found that the words used in both sections are clear and not difficult to interpret. Section 10 creates an objective test for intention; "harmful" and "hurtful" are "capable of easy and intelligible meaning"; "harmful" is to be equated with "physical harm of whatever nature"; "hurt" denotes "hurt feelings"; and speech falling within the proviso is not prohibited by section 10(1) (par 58).

The court acknowledged that the wording in the proviso, which precludes "any information, advertisement or notice in accordance with section 16 of the Constitution" from the prohibition, could be considered broad and that the proviso appears to exempt from liability the speech prohibited by section 10(1) (par 59). The court resolved this problem by ruling that the proviso allows hatemongers to argue that their speech should escape sanction if they prove that the speech "pursued one of the central objectives". The court did not elaborate on these objectives but was presumably referring to the specifically listed exemptions in the proviso. The court added that the application of the proviso to section 10(1) is not impermissibly vague, because section 10(1) does not incorporate the whole of section 12, merely the proviso, and the proviso qualifies the entire prohibition in section 10(1) (par 59−60). Whilst this part of the judgment is obscure, the court may have been responding to an argument that section 12 as a whole is vague (note that the proviso also applies to section 12, which prohibits the dissemination and publication of information that discriminates unfairly). The court concluded that section 10(1), as read with the proviso, is not subject to any uncertainty.

Then, whilst still dealing with the vagueness claim, the court again referred to the imperative in section 39(2) of the Constitution and found that sub-sections (a) to (c) of section 10(1) must be read conjunctively to ensure compliance with section 16 of the Constitution (par 60). The court added the conjunction "and" after the semicolons separating sub-sections (a), (b) and (c) of section 10(1). In other words, according to the court, a hate speech complainant must 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 hatred.

Whilst this finding is more relevant to the over-breadth challenge, it seems that the court was highlighting that it regarded section 10(1)'s evidentiary

requirements to be clear, admitting of no vagueness. The court settled the vagueness challenge by holding that should a hate speech complainant overcome section 10(1)'s evidentiary hurdle, a respondent may then argue that the speech is exempted by the proviso.

Qwelane and the First *Amicus* argued that section 10(1) is constitutionally invalid because it regulates speech in broader terms than section 16(2) of the Constitution. They claimed that a disjunctive reading of section 10(1) permits the illegitimate regulation of hurtful, harmful or offensive speech on a prohibited ground and that the true test for hate speech lies in section 16(2)(c) of the Constitution (par 61). In support of their argument they relied on *Saskatchewan Human Rights Commission v Whatcott* (2013 1 SCR 467, incorrectly cited in the judgment par 63). Here, the Canadian Supreme Court held that a remedial human rights provision regulating expression which "belittles or otherwise affronts the dignity of any person" was unconstitutional and severed it from the Saskatchewan Human Rights Code.

The court again acknowledged that section 10(1) is broader than the constitutional definition for hate speech (par 64). With reference to the jurisprudence of the Constitutional Court in decisions such as *South African National Defence Union v Minister of Defence* (1999 (4) SA 469 (CC) par 18), the court held that the concept of "overbreadth" is limited to cases where the law in question, correctly interpreted, "exceeds its constitutionally legitimate underlying objectives". Thus, a constitutional challenge to section 10(1) on the grounds of over-breadth must show why the regulation of speech in broader terms than section 16(2)(c) is not reasonable and justifiable in terms of section 36 (par 63−64). This acknowledgement notwithstanding, the court did not conduct a limitation analysis and simply concluded that a "proper reading down" of section 10(1) renders the provision a justifiable limitation to freedom of expression. According to the court, "the hate speech of and the extent of the harm" caused by the speech prohibited by section 10(1) outweighs the interests of speakers regulated thereby (par 64). The court referred specifically to the content of Qwelane's speech to justify this conclusion. It added that the term "hurtful" should be interpreted to mean "severe psychological impact", such as the deeply traumatising impact Qwelane's speech had on the LGBTI community (compare the court's earlier finding that hurt should be equated with "hurt feelings" − par 58). In addition, the proviso plays a prominent role in limiting the scope of section 10(1) by providing a defence. Thus, said the court, the constitutional challenge to the impugned provisions must fail. Strangely, however, the court did not explicitly use its conjunctive interpretation of section 10(1) to support this finding.

2 6 The remedy

The question of an appropriate remedy does not form part of this note, but it is recorded that the court dismissed the constitutional challenge and declared Qwelane's publication to be prohibited hate speech. Qwelane was ordered to publish an unconditional written apology to the LGBTI community, and to pay costs (par 69).

3 Analysis

3 1 General comments

The judgment is difficult to evaluate because of the propensity to blur the various issues, the use of fallacious legal reasoning, and the lack of engagement with the merits of hate speech regulation. The court also addressed the factual question prematurely. The court should have resolved the interpretative and constitutional challenges before embarking on an analysis of whether the offending publication amounted to prohibited speech in terms of section 10(1). This approach would have allowed the court to clarify the meaning of the requirements for section 10(1) during the constitutional analysis. It would also have prevented the content of the offending speech, and its impact on the recipient group, from influencing the outcome of the constitutionality enquiry.

The flawed logical structure undoubtedly compromises the quality of the judgment, but the court's understanding of its mandate in terms of section 39(2) of the Constitution also requires attention. The court read down the threshold test for hate speech in the Equality Act to ensure constitutional compliance, but its interpretation disregarded both South African and international jurisprudence dealing with the suitability of a hurt requirement in a hate speech threshold test and the correct meaning of the term "harm". The court's strained construal of these terms and its reading of section 10(1) ultimately undermined the rationale for hate speech regulation.

It is also not clear whether the court's conjunctive interpretation of section 10(1) by means of the introduction of the word "and" into the provision (to cure the claim of vagueness − par 60) was an interpretative reading down exercise or whether the court engaged in a form of "reading-in". The first process is an interpretative one and is confined to what the text is reasonably capable of meaning. The second is remedial and takes place only after a finding of constitutional invalidity in terms of section 172(1)(a) of the Constitution (*The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) par 24 hereinafter "*National Coalition*"). Whilst the *Qwelane* court specifically inserted words into section 10(1) to remedy the provision, the court did not declare section 10(1) constitutionally invalid and also did not expressly indicate that it was engaging in the act of "reading-in". This approach tends to conflate reading-in and reading down. The court should have indicated that its conjunctive interpretation was an interpretative reading down exercise mandated by section 39(2) and that this interpretation was used to counter both the vagueness and over-breadth challenge.

In the analysis that follows, various aspects of the judgment are addressed, beginning with the court's definition of hate speech and moving to its interpretation of the Equality Act requirements for hate speech. Finally, the court's treatment of the constitutional challenge is addressed. The note concludes that the court's misapplication of section 39(2) of the Constitution and its lack of engagement with a section 36 limitation analysis compromised the integrity of its conclusion.

3 2 The definition of hate speech

The definition of hate speech has always been contentious. 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). Yet, definitional precision for a hate speech threshold test is desirable and important for many reasons. Firstly, citizens and officials must understand what is expected of them. Secondly, vagueness creates uncertainty, which in turn compromises the rule of law and the effectiveness of the prohibition. Thirdly, the enactment of imprecise provisions with variable terminology violates the right to freedom of expression. Definitional precision is needed to strike a balance between the competing rights and to foster the optimal regulation of hate speech (see Botha 2017 134(4) *SALJ* 778).

Variables such as context and form are, however, legitimate factors impacting on the parameters of a hate speech test. The definition of hate speech in a criminal provision, for example, must contain stringent requirements, such as an intention to advocate hatred and incite harm. On the other hand, in remedial human rights legislation (the Equality Act being a typical example), the focus is on the impact of the speech on the group targeted. For this reason, hate speech provisions in human rights codes do not usually require that the hatemonger intend to advocate hatred. Instead, the nature and extent of the harm is the critical factor (see Botha and Govindjee "Prohibition through Confusion: Section 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" 2017 28(2) *Stell LR* 245). But, even though context permits some flexibility when formulating a hate speech threshold test, all hate speech restrictions, whether criminal or remedial, should be drafted with accuracy and not be used to curtail expressions of protest, insult, hurt or offence (General Recommendation No 35: Combating Racist Hate Speech UN Doc CERD/C/GC/35 (2013) par 20 "GR No 35").

It is therefore regrettable that the court erred in its attempt to define hate speech. The position is aggravated by the misquote of Article 4(a) of the ICERD. The Equality Act was enacted to give effect to the ICERD and section 3(2) of the Act stipulates that relevant international law (the ICERD is most applicable) should inform the interpretation of the Act's provisions. (See too s 233 of the Constitution which provides that when interpreting any legislation, a court must prefer a reasonable interpretation of such legislation that accords with international law over other inconsistent interpretations.) Although the court seemed to appreciate the significance of the ICERD for a purposive interpretation of the Equality Act, its findings were compromised by a misunderstanding of the limits of hate speech regulation and the obligations imposed by the ICERD, to which the discussion now turns.

States parties to the ICERD condemn all forms of racial discrimination, vowing its elimination and ensuring that civil, political, social and rights are established free of discrimination (Articles 2 to 5). The ICERD thus proscribes certain acts, activities and speech when used against racial "minorities" (Thornberry "International Convention on the Elimination of all Forms of Racial Discrimination: The Prohibition of 'Racist Hate Speech'" in

McGonagle and Donders *The United Nations and Freedom of Expression and Information* (2015) 121).

For hate speech, Article 4(a) of the ICERD is particularly relevant. It provides that:

> "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, … :
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination …"

It is apparent that the ICERD does not define hate speech. Instead, it requires States Parties to enact criminal provisions to sanction the speech acts specified in Article 4. (Note that the role played by human rights systems to curb hate speech is equally important. A multi-faceted approach is recommended.) In 2013 the Committee on the Elimination of Racial Discrimination ("CERD") published General Recommendation No 35 in which it clarified the meaning of racist hate speech. CERD acknowledges that the term "hate speech" is not specifically used in the ICERD, but describes racist hate speech as "a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society" (GR No. 35 par 10).

The hate speech definition quoted by the *Qwelane* court is not comparable with CERD's description of hate speech (it seems to be a definition used on various online platforms, such as Wikipedia), nor the jurisprudence emanating from CERD as a human rights monitoring committee. CERD certainly does not proscribe that State parties regulate speech that "disparages or intimidates a protected individual or group".

The court's mistaken assessment of a proper definition for hate speech thwarted its understanding of internationally acceptable requirements for a hate speech regulator. For example, precise formulations for hate speech restrictions are considered essential. Broad measures are susceptible to abuse and can be used to curtail a wide range of offensive speech types. Thus, it is improper for a hate speech restriction to regulate offence and hurt feelings, even at a human rights level (see General Comment No 34: Article 19: Freedoms of Opinion and Expression UN Doc CCPR/C/GC/34 (2011) "GC No 34"; GC No 35 par 14, 20; Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression UN Doc A/67/357 (2012) par 49; Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression UN Doc A/HRC/32/38 (2016) par 57).

As indicated earlier, the other definition of hate speech accepted by the court was penned by Katharine Gelber. Her definition is not overly-problematic, except for the fact that prejudice is broader than hatred and whilst this may be acceptable in remedial legislation, it does not suffice for a criminal measure. Additionally, her specified target groups do not correlate

with those identified in the Equality Act. This is not surprising. The named target groups in anti-discrimination legislation are usually context sensitive and based on the vulnerability of the groups in question in that particular jurisdiction.

The definition of hate speech in South Africa must be addressed consistently in accordance with the constitutional text and other relevant legislation. The court should have commenced 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 hereinafter "*Freedom Front*" and *ANC v Harmse: In Re Harmse v Vadwa* 2011 (12) BCLR 1264 (GSJ)), and then moved to the threshold test for hate speech in section 10(1) of the Equality Act. Whilst the court accepted that this provision is broader than the constitutional definition for hate speech and required proportional justification, it failed to juxtapose the tests during the constitutionality analysis.

The court justified its lack of engagement with the meaning of the hate speech requirements on the ground that it had recently expounded upon these in its own judgment in *SAHRC obo South African Jewish Board of Deputies v Masuku* ([2017] 3 All SA 1029 EqC hereinafter "*Masuku*"), and that repetition was unnecessary (par 43). This is a constrained approach. In *Masuku* the constitutionality of section 10(1) was not challenged, whereas in *Qwelane* this was a core issue. The *Qwelane* court was accordingly compelled to scrutinise the section 10(1) requirements. The provision required justification in terms of section 36 of the Constitution, which in turn entailed an analysis of the nature and extent of the limitation and thus proper engagement with the requirements for hate speech in section 10(1).

It is also noted with some unease that the *Masuku* court relied on the same incorrect definitions for hate speech (par 34). It also endorsed the decision of the European Court of Human Rights ("ECtHR") in *Vedjeland v Sweden* (App No 1813/07 ECHR 9 February 2012 hereinafter "*Vedjeland*"), where the ECtHR opined that:

> "inciting to hatred does not necessarily amount to a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combatting racist hate speech in the face of freedom of expression exercised in an irresponsible manner."

It is unfortunate that the *Masuku* court used the ECtHR precedent, and *Vedjeland* in particular, to justify a broad definition for hate speech. ECtHR hate speech jurisprudence is both complex and inconsistent, mainly because states are afforded a wide margin of appreciation, especially on matters relating to public morality, decency and religion. (In *Vedjeland* anti-gay leaflets were distributed at schools.) The consequence is that the boundaries of hate speech regulation in Europe tend to be flexible. Additionally, the court in *Masuku*, and by implication the *Qwelane* court, failed to consider that the decision in *Vedjeland* has been subjected to criticism. For example, Kiska ("Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence" 2012 25 *Regent University LR* 107 112) states that "*Vejdeland* represents a shocking

departure from very well-settled case law on freedom of expression." Another concern is that the European Convention on Human Rights is a regional treaty, which does not bind South Africa. Both the ICERD and the International Covenant on Civil and Political Rights (1966, ratified by South Africa in 1998, ICCPR) and the General Comments published thereunder, clearly stipulate that a narrow and precise definition for hate speech is required (GC No 34; GR No 35; Articles 19 and 20 ICCPR).

In summary, the *Qwelane* court endorsed inappropriate, incorrect and overly broad definitions for hate speech. Given these discrepancies at benchmark level, the result was inevitable – the court's interpretational analysis of the elements of section 10(1) was flawed and lacked jurisprudential profundity, aggravated by the cursory referral to hate speech precedent from both South Africa and abroad (international law included).

3 3 The court's interpretation of the section 10(1) requirements

The court's interpretation of section 10(1) was addressed both during the hate speech enquiry analysis and the constitutional challenge. The court correctly found that incitement of harm is not a section 10(1) requirement and that the speaker need not subjectively intend to promote or advocate hatred. This test is objective – context and content being critical factors. In remedial anti-discriminatory legislation this is quite legitimate (see Botha and Govindjee "Hate Speech Provisions and Provisos: A Response to Marais and Pretorius and Proposals for Reform" 2017 20 *PELJ* 1 15). The effect of the speech (on the victim, the group and society) is the pivotal consideration.

The court's interpretation of the terminology in section 10(1) is, however, questionable. The restricted interpretation of the term "harm", namely "physical harm of whatever nature", is especially problematic and discounts the dangers of hate speech (which is surprising, given earlier aspects of the judgment where these were acknowledged). The court probably adopted this construal to limit the reach of section 10(1) and to define the provision narrowly in conformity with the Constitution, but in so doing, the court undermined the underlying rationale for the regulation of hate speech. It also diminished the work of academics such as Jeremy Waldron, Alexander Tsesis, Mari Matsuda and many others, all of whom detail the intensity of and the variety of "harms" caused by hate speech (see Waldron *The Harm in Hate Speech* (2012); Tsesis *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (2002); Matsuda "Public Response to Racist Speech: Considering the Victim's Story" 1989 87(8) *Michigan LR* 2320).

The *Qwelane* court's interpretation of harm also disregards the jurisprudence of the Constitutional Court in *Islamic Unity* (par 29−30, 33), where Langa CJ held that:

> "The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself ... There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial

> and non-sexist society based on human dignity and the achievement of equality."

It is clear from this *dictum* that the purpose of the constitutional hate speech exclusion is to protect human dignity and to promote the achievement of a pluralistic society embracing tolerance, non-racialism and non-sexism. The decision in *Freedom Front* is also relevant. Here, the SAHRC linked the constitutional exclusion of hate speech to the imperative to heal the divisions of the past and achieve national unity. It found that "harm" should be interpreted broadly to include "psychological, emotional and other harm", provided that the harm is "serious and significant" (*Freedom Front* 1292). It is therefore now widely accepted 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.

The court also contradicted itself. Whilst it ultimately settled on physical harm as the definition for harm, elsewhere it indicated that harm could take the form of "hurt" or "hatred" (par 53). Both CERD and the United Nations Human Rights Committee ("UNHRC") have warned against lax phraseology when defining the parameters of a hate speech threshold test. Most hate speech tests require that the speaker promote hatred against a target group *and* that the speech have the potential to cause harm (the meaning of which was correctly demarcated in *Freedom Front* and *Islamic Unity*). "Hatred" is generally defined as an extreme emotion of "detestation, enmity, ill-will and malevolence" (*R v Andrews* [1990] 3 SCR 870 par 19, quoted with approval in *Qwelane* par 47). With hurt, however, we mean the subjective offence that the individual experiences when his or her feelings are affronted. The regulation of hate speech is not concerned with hurt feelings. The reason is obvious: the 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. Although the law is not indifferent to an individual's hurt feelings (a civil claim for *iniuria* is available), this is not the focus of hate speech prohibitions. So, care must be taken not to blur the conceptual limits of hurt, hatred and harm, as this diminishes the underlying objective of the regulation of hate speech. A conflation of the concepts also opens the door for the regulation of offensive and insulting speech under the guise of hate speech, albeit on a prohibited ground. It is accordingly unfortunate that the court used inconsistent terminology. For hate speech regulation, where definitional certainty is important to ensure a proportional limitation of the right to freedom of expression, this type of inaccuracy is especially problematic. These insights are directly linked to the constitutionality of section 10(1) as a limitation to freedom of expression. Section 36 requires a rational link between the limitation and its purpose. The restriction must be legitimately connected to its purpose. In the context of hate speech regulation, the objectives of the Equality Act, specifically overcoming systematic discrimination and promoting an egalitarian society, are most relevant. It is clear that the Act aims to protect vulnerable groups and not the feelings of individuals *per se* – yet, the wording of section 10(1) includes within its ambit the communication of *hurtful* words directed at *individuals*

based on group characteristics (interpreted by the *Qwelane* court to mean hurt feelings).

3 4 The conjunctive interpretation

There are many difficulties with the conjunctive reading of sub-sections (a) to (c) of section 10(1).

Firstly, the court contradicted itself throughout the judgment. The judgment is replete with instances where section 10(1) is described in disjunctive language (see par 15, 52, 53) using the word "or" to separate the hurtful, harmful and hateful requirements. Similarly, the two elements for hate speech identified by the court also depict section 10(1) in disjunctive terms (par 52). The court's conclusion that these requirements must be interpreted in the conjunctive sense is thus inconsistent.

Secondly, the conjunctive interpretation amounts to an endorsement of a hurtful requirement for hate speech and compounds the anomalies mentioned earlier.

Thirdly, the court's statement that a conjunctive construal is permissible "based on general principles" was misconstrued. The court supported this finding through a footnoted reference to *Ngcobo v Salimba CC; Ngcobo v Van Rensburg* (1999 (2) SA 1057 (SCA) hereinafter "*Ngcobo*"). In *Ngcobo* the Supreme Court of Appeal ("SCA") had to decide whether to apply a conjunctive or disjunctive interpretation to the definition of a labour tenant in the Land Reform (Labour Tenants) Act 3 of 1996. The definition had three separate requirements and contained the word "and" between the second and third requirements. The SCA held that:

> "It is unfortunately true that the words "and" and "or" are sometimes inaccurately used by the legislature … Although much depends on the context and the subject matter, … there must be compelling reasons why the words used by the legislature should be replaced; *in casu* why 'and' should be read to mean 'or', or *vice versa*. The words should be given their ordinary meaning ... unless the context shows or furnishes very strong grounds for presuming that the legislature really intended that the word not used is the correct one … Such grounds will include that if we give 'and' or 'or' their natural meaning, the interpretation of the section under discussion will be unreasonable, inconsistent or unjust … or that the result will be absurd … or, I would add, unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights …" (par 11, authorities omitted, original emphasis).

The SCA favoured a conjunctive interpretation of the relevant definition. It referred to the inclusion of the word "and" between the second and third requirements to support this interpretation. It also found that a disjunctive interpretation would ignore the wording of the second requirement and result in an untenable interpretation (par 8). Thus, the decision in *Ngcobo* is not precedent for a blanket preference for a conjunctive interpretation as it was based on the specific wording of the definition in issue. Additionally, the definition in *Ngcobo* is not comparable to section 10(1) of the Equality Act, which separates the three sub-sections by way of semi-colons and uses neither "or" nor "and" between the punctuation marks.

Fourthly, the conjunctive interpretation disregards the repeated use of the word "or" in section 10(1). It is prohibited for a speaker to publish, propagate,

advocate *or* communicate words which demonstrate a clear intention to be "harmful *or* incite harm" or to "promote *or* propagate hatred" (author's own emphasis). A consistent and contextual interpretation of the language in section 10(1) points to a broad test for hate speech, as opposed to one requiring a complainant to prove that the words were hurtful, and harmful, and hateful. This view is supported by the similarly wide definitions for discrimination and harassment in the Act, which both make regular use of the word "or". Supporting this criticism is the principle of interpretation that remedial legislation, specifically that which gives effect to constitutional rights, should be construed generously (*Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) par 53).

Fifthly, the acceptance of a conjunctive interpretation was not thoroughly researched. In particular, the *Qwelane* court overlooked the decision in *Herselman*, where the appellant argued that section 10(1) should be interpreted narrowly and, thus conjunctively, by adding "and" between the requirements in sub-sections 10(1)(a), (b) and (c). The *Herselman* court held that the placement of a semicolon between sub-sections should usually not be read to mean "and" as this could lead to absurd results. In support of this conclusion, the court had regard to extensive precedent, including the decision in *Commissioner for Inland Revenue v Dundee Coal Co. Ltd* (1923 AD 355), where it was held that the division of a section into sub-sections divided by semi-colons should be treated as arbitrary punctuation for "punctuation is no part of the statute". The language of the provision and its purpose should prevail. (Note, however, the sound views of Lourens du Plessis, who states that this line of judicial reasoning is odd, given that punctuation plays a vital role in conveying meaning – see *Re-Interpretation of Statutes* (2002) 223). The *Herselman* court also referred to *Minister of Finance v Van Heerden* (2004 (11) BCLR 1125 (CC) par 30) where a disjunctive reading of section 9 of the Constitution was rejected as frustrating the achievement of substantive equality. It then relied on *S v Staggie* (2003 (1) BCLR 43 (C) incorrectly cited as *Stagie*) and *Domingo v S* (2003 (2) BCLR 213 (C)) where the grounds in section 158(3) of the Criminal Procedure Act 51 of 1977 were interpreted disjunctively because this reading accorded with the meaning of the text: a list separated by semi-colons with a final "or" between the last two circumstances. (Note, that *Domingo* was confirmed by the full bench in *S v Domingo* 2005 (1) SACR 193 (C) and *Staggie* was confirmed by the SCA in *Staggie v S* 2012 (2) SACR 311 (SCA) par 18).

Although the provision in *Staggie* and *Domingo* is distinguishable from section 10(1) of the Equality Act in the sense that the word "or" appeared at the end of that list, it is clear that when interpreting section 10(1) a purposive approach must be applied. Here, the *Herselman* court reasoned that if a conjunctive construal were to be applied to section 10(1), it would result in a situation where 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.

Section 10(1) undoubtedly uses the semi-colon inaccurately to separate requirements (a), (b) and (c). The semi-colon has two functions in English grammar. The first is to connect two closely-related independent clauses and the second is to separate items in a complicated series, where the individual items in the list contain internal commas (Wydick *Plain English for Lawyers* (2005) 90, who quips that "some writers put semicolons and wild mushrooms in the same category: some are delicious, but others are deadly, and since it is hard to tell the difference, they should all be avoided"). The semi-colons in section 10(1) serve neither of these purposes. It is thus unclear whether the listed items should be interpreted conjunctively or disjunctively. Despite the precedent in *Herselman*, and the cases quoted therein, the answer is not that apparent where neither "and" nor "or" is used in the list. This being so, the court correctly used the interpretative canon in section 39(2) of the Constitution to construe the text. However, as explained below, it is not clear whether the court's conjunctive construal of section 10(1) amounted to reading-in or reading down. Furthermore, it is evident that the court's justification of a conjunctive interpretation of section 10(1) on the basis of general principles was unfounded.

3 5 The constitutional challenge

Qwelane tackled the constitutionality of section 10(1) on two fronts: vagueness and overbreadth. Both challenges failed. The court gave an interpretation to section 10(1) which it believed rendered the provision clear and precise and thus constitutionally compatible. It also found that through a "proper reading down" the provision could be construed as a justifiable limitation to freedom of expression. The court's reasoning, however, is not convincing.

Section 39(2) of the Constitution obliges courts to promote the "spirit, purport and objects" of the Bill of Rights when interpreting any legislation and to prefer interpretations that fall within constitutional bounds over those that do not (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) par 24 hereinafter "*Hyundai*"). This duty, however, is constrained by an important qualification – the interpretation must not be unduly strained and must be such that it can be reasonably ascribed to the section in question. The interpretation must not be "distorted" or "fanciful or far-fetched", for the text used in a statute is not "infinitely malleable" (*Daniels* par 83).

Section 39(2) requires courts to adopt a purposive and contextual interpretation of statutory provisions. Meaning is dependent upon context, which includes the language of a statute, its historical background and the purpose it was enacted to achieve (*Jaga v Dönges NO; Bhana v Dönges* NO 1950 (4) SA 653 (A) 662D−667H; *Bato Star Fishing Pty) Ltd v Minister of Environment Affairs and Tourism* 2004 (4) SA 490 (CC) par 89−90). This

rule is especially important where a statute is enacted to give effect to a constitutional right. So, the Equality Act, as a subsidiary constitutional statute, must be construed to promote the objects of the Bill of Rights and the right to equality, in particular. At the same time, however, the provisions in the Act must not be interpreted so as to decrease the protection that the right affords or to infringe other constitutional rights (*Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd supra* par 53).

Thus, when applying section 39(2), courts should appreciate that all "overlapping and conflicting" constitutional rights and values must be considered and that there may be more than one interpretation which gives effect to the Bill of Rights. The interpretation which best achieves these outcomes should be adopted (Brickhill and Bishop "In the Beginning was the Word: The Role of Text in the Interpretation of Statutes" 2012 129 *SALJ* 681 685). In summary, courts must interpret statutes in a contextual, purposive and holistic manner that gives expression to the underlying values of the Constitution within the bounds of language and context (Brickhill and Bishop 2012 129 *SALJ* 685).

The directive in section 39(2) enables courts to read-down statutes to ensure constitutional conformity. Reading down must be distinguished from reading words into or severing them from a statutory provision. Reading down is an interpretative tool and is constrained by what the text is reasonably capable of meaning, whilst reading-in is a remedial measure under section 172(1)(b) of the Constitution, following a declaration of constitutional invalidity under section 172(1)(a) (*National Coalition* par 24; *Daniels* par 86). So, reading-in is used only after the provision has been declared unconstitutional.

In *National Coalition*, Ackermann J stressed that when altering the words of a legislative provision the court must respect the doctrine of separation of powers. The court must be wary of unconstitutional intrusion into the domain of the legislature, which is responsible for legislative drafting (par 65−68). However, a balance must be struck between the court's duty to interpret legislation in conformity with the Constitution, and the duty of the legislature to pass legislation that is reasonably clear and precise. The following principles guide the process: after severance or reading-in, the resulting provision must be consistent with the Constitution; the courts must interfere as little as possible with the legislative text; it is inappropriate for a court to read words into a statute without delineating how the statute should be applied thereafter; and the court should ensure that the altered provision is consistent with the entire legislative scheme (*National Coalition* par 73−75).

How do these principles impact on the court's conjunctive interpretation of section 10(1) in *Qwelane*? 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 court added that a proper reading down of section 10(1) brought the provision within the ambit of section 16(2) of the Constitution (par 60). It is not clear which part of section 10(1) was read down by the court to ensure constitutional conformity, but it seems that the court had in mind its interpretation of the hate, harm and hurt requirements. The court

then found that whilst section 10(1), as interpreted by it, prohibited more speech than that specified in section 16(2) of the Constitution, this was constitutionally justifiable in terms of section 36 of the Constitution, mainly because of the type of hate speech prohibited by the provision and the harm such speech causes, with specific reference to the publication in question (par 64).

A number of objections arise. Firstly, the court should have used the decision in *Islamic Unity* to guide its analysis of section 10(1). Here, the Constitutional Court considered whether a clause in the Broadcasting Code violated freedom of expression. The relevant part of the clause read: "Broadcasting licensees shall ... not broadcast any material which is … likely to prejudice … relations between sections of the population." The court held that laws enacted to regulate expression within the strict categories of section 16(2) do not limit the right to freedom of expression. However, legislation broadening the scope of excluded expression as envisaged in section 16(2) must be proportionately justified in terms of section 36 of the Constitution (*Islamic Unity* par 34). The court found that the relevant part of the clause was clearly broader than any of the limitations in section 16(2) and proceeded directly to a section 36 limitation enquiry. In relation to the section 36 factors, it was argued that the clause could be interpreted narrowly (that is, read down), which interpretation would result in a constitutionally justifiable limitation to freedom of expression. The Court disagreed. Applying the *Hyundai* principle, it found that this construal entailed a complicated exercise of interpreting the wide language of the clause to fit the concise contours of section 16(2). It added that "whilst this process might assist in determining whether particular expression can be regarded as hate speech", the meaning proposed was unduly strained (par 41). The court then concluded that the clause was not constitutionally justifiable. Had the *Qwelane* court implemented this approach, it would have been an easy exercise to determine that section 10(1) was broader than section 16(2) and required constitutional justification. Then, during the section 36 analysis, the court would have had an opportunity to interrogate the meaning of section 10(1) by applying all permissible methods of interpretation, spearheaded by section 39(2) of the Constitution, because the section 36 factors demand an evaluation of the nature, extent and purpose of the limitation. This approach would have eliminated the incoherent line of reasoning applied and ensured a comprehensive section 36 analysis, encompassing the imperative in section 39(2). Moreover, a closer reading of *Islamic Unity* may have convinced the *Qwelane* court that section 10(1) could not reasonably be read-down to fit the boundaries of section 16(2) of the Constitution.

Secondly, it is not clear whether the court's insertion of "and" into section 10(1) after the semi-colons separating sub-sections (a) and (b) can be correctly described as an interpretative reading down exercise. The court added words to the provision and could be accused of using reading-in as a remedial measure to overcome the constitutional challenge. On the other hand, the court did not label its conjunctive interpretation as an act of reading-in. This would clearly be a flawed approach, because the court did not declare section 10(1) unconstitutional in terms of section 172(a) of the

Constitution, which is a pre-requisite for employing reading-in as a section 172(b) remedy.

Thirdly, and whether the conjunctive interpretation amounted to reading-in or reading down, the court's attempt to narrow the limits of section 10(1) gave it a meaning not mandated by the Act's context and overall purpose. A conjunctive interpretation of section 10(1) places an additional burden on a hate speech complainant who will be required to prove that the words demonstrate a clear intention to a) be hurtful (in the form of deep psychological hurt) *and* b) be harmful (causing physical harm of some sort) *and* c) incite or promote hatred (as defined traditionally, and including an incitement requirement). This evidentiary burden runs counter to the treatment of discrimination cases, where a low burden is placed on complainants (see Botha and Govindjee 2017 20 *PELJ* 19−20). The cumulative requirements for hate speech undermine the Equality's Act purpose and are not true to the legislative scheme. The court ultimately contradicted itself: the Act aims to provide easy access to justice for vulnerable groups, yet interpreted as such, an onerous threshold test for hate speech is created.

Additionally, the conjunctive interpretation does not cure the strained reading given to the term "harm" and the inclusion of the hurtful requirement in a hate speech regulator. Interpreted thus, the rationality of the provision is questionable. It is submitted that the regulation of hurtful speech on a prohibited ground causing physical harm and which incites or promotes hatred is not connected to the true purpose of hate speech regulation. As indicated earlier, the objective of hate speech regulation is to address speech which causes discrimination to vulnerable groups in our society and which harms the constitutional mandate.

In *National Coalition* the court stressed that when amending the words of legislation, the court must be wary of intrusion into the domain of the legislature (par 65−68). Moreover, in *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* (2010 (2) BCLR 99 (CC) par 87) the court warned that where judicial interpretation is elevated to statutory redrafting there is a danger of "usurping the legislative function through interpretation". This caution is linked to the rule of law and the need for legal certainty. Whilst it is acknowledged that the legislature is obliged to pass legislation that is reasonably clear, the problem is that inconsistent judicial interpretations of legislative measures make laws vaguer. Where a court interprets a law by adding additional requirements to a threshold test for hate speech, and fails to indicate how the redrafted provision should be applied, it becomes extremely difficult for citizens to appreciate what is required of them and to comply with the prohibition (see too Brickhill and Bishop 2012 129 *SALJ* 697). The position is aggravated where a court rewrites a legislative prohibition without a declaration of constitutional invalidity.

There are further problems with the court's reasoning. The court failed to have proper regard to both international law and relevant foreign law when testing the requirements of section 10(1), as required by section 3(2) of the Act and section 233 of the Constitution. The court should have considered the jurisprudence that has developed under article 4(a) of the ICERD and

article 20 of the ICCPR when assessing the legitimate form for a hate speech regulator in human rights legislation. Likewise, the Canadian hate speech jurisprudence, which sets the benchmark for the regulation of hate speech at a domestic level, and to which the court was referred, also provides valuable guidance. Had the court engaged substantively with this jurisprudence, it is unlikely that it would have clouded the rationale for hate speech regulation (which is constitutionally mandated) with the form of the threshold test. The consequence is the elevation of the rights to dignity and equality at the expense of freedom of expression. Whilst hate speech undoubtedly infringes the target group's rights to equality and dignity and cannot be tolerated, it is imperative to strike an appropriate balance between the competing rights. The definition for hate speech in regulatory legislation plays a critical role in the balancing exercise. A broad threshold test for hate speech, which includes hurtful speech within its ambit, will unjustifiably infringe the right to freedom of expression. A better grasp of the relevant principles may have resulted in a more nuanced weighting of the rights involved.

The court's handling of the assertion that the section 12 proviso renders the hate speech prohibition vague also disappoints. It is trite that speech falling within the proviso is exempted from liability. The difficulty lies in delineating the nature of such speech. The court's response was evasive: provisos are not unusual and the respondent must prove that the offending speech meets one of the listed central objectives in the proviso. The position is somewhat more complicated. Having dealt with the wording of the proviso elsewhere (see Botha and Govindjee 2017 20 *PELJ* 18−26), this issue is not explored in detail here, suffice to state that the court overlooked a number of key issues. These include: whether the *bona fide* engagement and "in accordance with section 16(1)" requirements qualify all the forms of expression listed; whether the press exemption is adequate; and the meaning and scope of "the publication of any information, advertisement or notice in accordance with section 16(1) of the Constitution". The reality is that the proviso does not cure section 10(1)'s overbreadth and its meaning is imprecise, which uncertainty cannot be cured by reading the provision down or by engaging in legislative redrafting. An amendment of the proviso is required to create clarity. Serious consideration should also be given to the insertion of specifically tailored hate speech defences for section 10.

Finally, the court used inductive reasoning to justify the broad parameters of the hate speech test in section 10(1). For example, the court regularly referred to the offending publication and its impact on the target group to explain that this was exactly the type of speech and harm which the prohibition aimed to curtail and, furthermore, that the evidence led clarified the conceptual requirements for hate speech in section 10(1). Whilst the factual question of whether a particular statement amounts to hate speech must be assessed in context, this exercise must occur against the backdrop of a precise legislative provision. Stated differently, the offending speech should not be used to justify the constitutionality of the regulatory provision, especially where there is little doubt that the speech falls within the parameters of an acceptable hate speech threshold test. This fallacy in legal reasoning is best described as "smuggling the conclusion into the premise" (Posner "Legal Formalism, Legal Realism, and the Interpretation of Statutes

and the Constitution" 1986 37(2) *Case Western Reserve LR* 179 189). The shortcoming with such logic is that it treats all potential offending statements on the same basis: namely, because the instant harmful case (Qwelane's speech) is worthy of sanction in terms of section 10(1); so, the next experienced case will be similarly worthy; *ergo* section 10(1) is a reasonable and justifiable limitation to freedom of expression. This position disregards the reality that a broad prohibition regulates a wide range of speech forms, some of which clearly amount to hate speech, and others of which do not. The *Qwelane* court would have done far better had it appreciated that it was required to test section 10(1)'s legitimacy against a full range of potentially harmful statements.

4 Conclusion

Qwelane was an ideal, but wasted, opportunity to test the constitutionality of the threshold test for hate speech in section 10(1) of the Equality Act, an issue which has been much debated in South Africa (see Teichner "The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, the Bad and the Ugly" 2003 *SAJHR* 349; Marais and Pretorius "A Contextual Analysis of the Hate Speech Provisions of the Equality Act" 2015 (18) *PELJ* 901; Botha and Govindjee 2017 20 *PELJ* 1).

The judgment disappoints on many fronts, in particular because of the strained interpretation given to section 10(1), and the failure to subject section 10(1) to full scrutiny in terms of section 36 of the Constitution. It is undeniably ironic that the vagueness challenge prompted an interpretation of section 10(1) which causes further legal uncertainty. Whilst the rule of law does not demand that laws be absolutely certain and perfectly lucid, the *Qwelane* court should have appreciated that definitional precision for a hate speech regulator is needed to promote reasonable certainty. Proper regard to the benchmark in relevant international and foreign law for the acceptable limits of a hate speech prohibition would have averted this oversight and ensured a proportional balancing of the rights to freedom of expression, dignity and equality.

In short, the *Qwelane* court was insensitive to the limits of judicial interpretation. It should have appreciated that the requirement of legal certainty also applies to the interpretation of laws. Fragmented interpretations of legislative measures by the various high courts results in inconsistent precedent and have an adverse effect on how people regulate their conduct. This a very real problem in the context of the Equality Act where a change in behaviour is a critical objective. The result of the conflicting interpretations in *Herselman* and *Qwelane* means that in Gauteng a strict test for hate speech applies, whereas in the Eastern Cape a complainant need only show that the speech was hurtful, or harmful, or incited hatred.

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