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CASE NOTE

Hate speech in context: Commentary on the judgments of the Equality Court and the Supreme Court of Appeal in the *Masuku* dispute

1. Introduction

This contribution examines the judgment of the Equality Court in *SAHRC obo South African Jewish Board of Deputies v Masuku*[1] and subsequent appellate proceedings in the Supreme Court of Appeal.[2] Before this task can be undertaken, it is necessary to provide some context to the constitutional right to freedom of expression in South African law.

1.1 The constitutional backdrop

Sec. 7(1) of the *Constitution of the Republic of South Africa* 1996 acknowledges the *Bill of Rights* as a cornerstone of democracy in South Africa, while sec. 7(2) requires the state to respect, protect, promote and fulfil the rights in the *Bill of Rights*. Sec. 8(1) also imposes this responsibility on the judiciary. The state, in conjunction with the judiciary, is thus obliged to protect the right to freedom of expression,[3] and at

1 *SAHRC obo South African Jewish Board of Deputies v Masuku* 2018 3 SA 291 (GJ) (hereafter "*Masuku* Equality Court").

2 *Masuku v SAHRC obo South African Jewish Board of Deputies* 2019 2 SA 194 (SCA) (hereafter "*Masuku* SCA").

3 The right to freedom of expression is entrenched in sec. 16 of the *Constitution*, which provides as follows: "Everyone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom

the same time effectively restrain threats that inhibit citizens' participation in the democratic process.[4]

In *South African National Defence Union v Minister of Defence*,[5] the Constitutional Court described the crucial significance of freedom of expression for maintaining individual autonomy and preserving a democratic society as follows:

> [F]reedom of expression is one of a 'web of mutually supporting rights' in the *Constitution*. It is closely related to freedom of religion, belief and opinion (sec. 15), the right to dignity (sec. 10), as well as the right to freedom of association (sec. 18), the right to vote and to stand for public office (sec. 19) and the right to assembly (sec. 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.

Nevertheless expression can pose a critical threat to democracy, human dignity and transformation. It can incite, intimidate and destroy.[6] For this reason, sec. 16(2)(c) of the *Constitution* categorically excludes from constitutional protection certain extreme forms of expression relating to group characteristics.[7] To counter such expression, the legislature may employ the most effective legitimate means, including criminalisation, without having to provide justification in terms of sec. 36 of the *Constitution*. Comparably dangerous forms of expression that fall outside the narrow ambit of sec. 16(2)(c) may require equally harsh treatment, although this would be subject to justification.[8]

In addition, outside the ambit of the listed extreme forms of threatening hate speech, the competing values of dignity, equality and freedom may

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and freedom of scientific research." Sec. 16(2) limits the scope of sec. 16(1) and reads as follows: "The right in subsection (1) does not extend to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

4 See 1.3 and 3 below which discuss the exercise of judicial discretion in terms of sec. 10(2) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter "*Equality Act*"), which provides for the referral, when appropriate, of hate speech matters for the institution of criminal proceedings in terms of the common law or relevant legislation.

5 *South African National Defence Union v Minister of Defence* 1999 6 BCLR 615 (CC):par. 8.

6 Rosenfeld's description (with reference to art. 18 of the German Basic Law) of "extremist anti-democratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets" applies. See Rosenfeld 2002-2003:1549, with reference to art. 18 of the German Basic Law.

7 See 1.2 below.

8 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BCLR 433 (CC):par. 31.

necessitate less invasive limitations of the right to freedom of expression. As stated in *S v Mamabolo*:[9]

> With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression. ... [F]reedom of expression does not enjoy superior status in our law.[10]

Clearly, therefore, freedom of expression is not a predominant right. However, where this right is restricted in any way, it should be done with a distinct awareness of the significance of its protection for maintaining democracy, equality, dignity and freedom, as well as its potential to jeopardise these values at various levels.

1.2 Sec. 16(2)(c) of the *Constitution*

Sec. 16(2)(c) of the *Constitution* resembles art. 20 of the International Covenant on Civil and Political Rights (ICCPR) of 1966.[11] The ICCPR, which was adopted in the aftermath of World War II, requires member states to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence.[12]

Sec. 16(2)(c) excludes from the defined scope of the right to freedom of expression the advocacy of hatred that constitutes incitement to harm others based on the listed grounds of race, ethnicity, gender or religion. Other excluded forms of expression are propaganda for war (sec. 16(2)(a)) and incitement of imminent violence (sec. 16(2)(b)). The common denominator seems to be the substantial threat to the foundational tenets of democracy, including freedom of expression.[13] Equally harsh treatment

9 *S v Mamabolo* 2001 5 BCLR 449 (CC):par. 41.

10 See also *Afri-Forum v Malema* 2011 6 SA 240 (EqC):par. 110, referred to in 1.3 below.

11 UN General Assembly International Covenant on Civil and Political Rights Treaty Series vol. 999 178, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed on 12 August 2019).

12 Ghanea 2013:937 states: "Article 20 of the ICCPR has been described as being 'among the strongest condemnations of hate speech', though strictly speaking the article does not concern itself with hate speech in general but only with incitement. Reference in Article 20 to both 'propaganda for war' as well as 'advocacy of national, racial or religious hatred' is indicative of the gravity of hatred that it is concerned with. It also qualifies its concern with hatred which is conditioned by that which 'constitutes incitement to discrimination, hostility or violence.'"

13 In *Islamic Unity Convention v Independent Broadcasting Authority*:par. 34, the following was stated: "Not every expression or speech that is likely to prejudice relations between sections of the population would be 'propaganda for war,' or 'incitement of imminent violence' or 'advocacy of hatred' that is not only based on race, ethnicity, gender or religion, but that also 'constitutes incitement to cause harm.'"

of comparably serious and threatening hate speech based on other protected grounds will readily comply with sec. 36 of the *Constitution*.[14] Currently, expression contemplated by sec. 16(2)(c) is partly covered by common law and statutory offences.[15] However, there is a need for a clear and narrowly defined hate speech offence that would reflect a distinct recognition of the need to protect the right to freedom of expression, on the one hand, and the duty to protect society from the threats posed by extreme hate speech, on the other.[16]

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14 Marais 2015:472-476. See also Bilchitz 2019:372-373, where the author argues that there appears to be a strong case for extending the definition of hate speech to also cover advocacy of hatred and incitement to cause harm on the basis of "belief" and "conscience".

15 These include sec. 17 of the *Riotous Assemblies Act* 17/1956 and the common law offence of incitement to commit any crime, including public violence. Marais 2015:478-479. In the past, comparably serious utterances that do not constitute incitement - but directly cause harm to a target group based on group identity – were potentially covered by the *Prevention of Public Violence and Intimidation Act* 139/1991, of which sec. 1(1) provided: "Any person who – (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint – (i) assaults, injures or causes damage to any person; or (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or (b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication – (i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any person; and (ii) … shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment." However, in *Moyo v Minister of Police; Sonti v Minister of Police* [2019] ZACC 40:par 69 the Constitutional Court recently declared this section unconstitutional and invalid. The Court concluded that the SCA's reading-in of a qualification of incitement of imminent violence unduly strained the text and was unjustified. "And if the proper reading of the section does not include incitement of imminent violence, but only covers intentional conduct that creates an objectively reasonable fear of harm to person, property or security of livelihood, then it would criminalise protected free speech and probably also peaceful forms of protest." This *dictum* emphasises the need for legislation that specifically addresses hate speech contemplated by sec. 16(2)(c) of the *Constitution* as well as comparably serious hate speech.

16 *The Prevention and Combating of Hate Crimes and Hate Speech Bill* B9-2018 was aimed at answering this need. The *Bill* has lapsed and must be reintroduced.

1.3 Sec. 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 ("the *Equality Act*")

The *Equality Act* primarily aims to give effect to the obligation in sec. 9(4) of the *Constitution*, namely to enact national legislation to prevent or prohibit unfair discrimination, and to promote the achievement of equality.[17] It establishes the divisions of the High Court and designated Magistrates' Courts as "Equality Courts" to hear complaints of discrimination, hate speech and harassment in terms of or under the *Act,* and to make appropriate orders.[18] Its preamble reflects the constitutional goal to "(h)eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".[19] It acknowledges that "systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy." It also expresses a commitment to the facilitation of "the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom".[20] As stated by Lamont J in *Afri-Forum v Malema*:[21]

> The *Equality Act* does not only seek to prohibit conduct. It seeks in the very prohibition to open avenues of conciliation; to confer dignity upon all members of society by assisting them to find the building blocks necessary to shape their ability to make the judgments which will regulate their future conduct. The *Equality Act* seeks to drive this process forward by setting the moral standard to which members of society must adhere. The wide powers the *Equality Act* provides enable a Court to craft its order so as to meet this difficulty.

In pursuing these broad objectives, the hate speech prohibition in sec. 10 of the *Act* inevitably includes,[22] but also goes far beyond the extreme

17 Marais & Pretorius 2019:par. 2. Kok 2017:26-29 describes the *Equality Act* as "ambitious" anti-discrimination legislation "that prohibits unfair discrimination in almost every sphere of society".

18 Secs. 16 and 21 of the *Equality Act*.

19 As contained in the preamble to the *Constitution*.

20 Albertyn & Fredman 2015:432 argue that "[n]o one value should take up all the space – dignity, equality, freedom and others should be interpreted in a generous, progressive and complementary manner, giving each its place within the overall, transformative project of the *Constitution* … In particular … substantive equality should be understood in terms of a four-dimensional framework, which aims at addressing stigma, stereotyping, prejudice and violence; redressing socio-economic disadvantage; facilitating participation; and valuing and accommodating difference through structural change".

21 *Afri-Forum v Malema*:par. 110.

22 One of the objects of the Act in terms of sec. 2(b)(v) is "the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the *Constitution* and section 12 of this Act". (The reference to sec. 12 should probably have been sec. 10.)

hate speech envisaged in sec. 16(2)(c) of the *Constitution* by covering discriminatory utterances that neither advocate hatred nor constitute incitement to harm, but can reasonably be construed as demonstrating a clear intention to be hurtful on the basis of group characteristics.[23] Sec. 21(2) of the *Act* accordingly provides for orders of a civil nature, including:

- the payment of damages in respect of proven financial loss, or impairment of dignity, pain and suffering, or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question (subsec. *(d)*);
- an order for the payment of damages in the form of an award to an appropriate body or organisation (subsec. *(e)*);
- an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question (subsec. *(h)*), and
- an order that an unconditional apology be made (subsec. *(j)*).

These and other available remedies, however, are clearly not sufficient to appropriately deal with extreme hate speech that incites, threatens, intimidates or violates, and warrants criminal punishment to ensure that society is duly protected. Nor will the healing of past divisions and the facilitation of a change in attitude be likely in situations where extreme hatred culminates in a real threat. This lack of suitable remedies in the *Equality Act* is addressed by the explicit provision in sec. 10(2), which reads as follows:

> Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with sec. 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.[24]

This provision positions the Equality Court as a key player in identifying expression that should be referred for proper scrutiny and investigation by the prosecuting authority and, where appropriate, for adjudication by the criminal courts. In this regard, Sutherland J in *SAHRC v Khumalo*[25] stated

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23 Sec. 10(1) reads 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 to incite harm; (c) promote or propagate hatred." The sec. 12 proviso then states: "Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the *Constitution*, is not precluded by this section."

24 See fn 15.

25 2019 1 SA 289 (GJ):paras. 113-114.

that, in exercising its discretion in terms of sec. 21(2)(n) of the *Equality Act*, it is unnecessary for the Equality Court to come to the conclusion that a crime has indeed been committed. The threshold is whether a crime *might* have been committed. If it is clear that no crime has been committed, it would have been an improper exercise of discretion to have the matter referred in the first place. The same reasoning would, of course, apply to the failure to refer a matter when doing so is called for.

2. The *Masuku* matter in the Equality Court and Supreme Court of Appeal

2.1 The facts

The complainant (respondent in the Supreme Court of Appeal (SCA)) was the South African Human Rights Commission (SAHRC) on behalf of the South African Jewish Board of Deputies. The first respondent (first appellant in the SCA) was Mr Bongani Masuku (Masuku), then international relations secretary of the Congress of South African Trade Unions (COSATU), the second respondent (second appellant in the SCA).

The SAHRC complained that the content of four statements by Masuku had been aimed at Jewish people with the intention to propagate hatred and violence towards them. Some of these statements had been posted on a blog called "It's Almost Supernatural", and others were made to an audience comprising mainly students on campus, including Jews, Zionists and Palestinian supporters. Many of the latter belonged to COSATU.

The Equality Court related "the offending statements" as follows:[26]

> For proper context, the impugned statements, indisputably uttered in reference to the protracted feud in the Middle East, particularly between Israel and the Palestinians, and made by the first respondent during a series of remarks on the website supernatural. blogs.com, are reproduced hereunder almost *verbatim*:
>
> '… As we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity. Every Palestinian who suffers is a direct attack on all of us! Cosatu is a tri-partite alliance with the ruling ANC party. A vote for the ANC is a vote for Bongani [sic].'
>
> The statement was made on 10 February 2009 (hereinafter 'the first statement').

26 *Masuku* Equality Court:paras. 5-6.

> On 5 March 2009 and during a rally convened by the Palestinian Solidarity Committee (the PSC), at the University of the Witwatersrand (Wits), the first respondent made the statement: '… Cosatu has got members here even on this campus; we can make sure that for that side it will be hell …'.
>
> This was with reference to what Cosatu's intentions were regarding those who supported Israel (hereinafter 'the second statement'). On the same occasion and venue, the first respondent said that:
>
> '… The following things are going to apply: any South African family, I want to repeat it so that it is clear for anyone, any South African family who sends its son or daughter to be part of the Israel Defence Force must not blame us when something happens to them with immediate effect …' (hereinafter 'the third statement').
>
> The final statement made by the first respondent was that:
>
> '… Cosatu is with you, we will do everything to make sure that whether it's at Wits, whether it's at Orange Grove, anyone who does not support equality and dignity, who does not support rights of other people must face the consequences even if it means that we will do something that may necessarily cause what is regarded as harm …' (hereinafter 'the fourth statement').
>
> For purposes of the judgment, all the above statements, collectively, shall be referred to as 'the offending statements'.

Masuku contended that the statements were not based on religion or ethnicity, but had been directed at the conduct of the state of Israel; that the offensive statements referred to Zionism, a political ideology inclusive of various religious groupings, and that the fact that the majority of Jewish people might support Israel's conduct did not automatically mean that the statements were based on religion or ethnicity.[27]

2.2 Criticism of the judgments

The Equality Court concluded that the statements indeed constituted hate speech in terms of sec. 10 of the *Equality Act*. This conclusion was properly substantiated. The court's approach to the application of sec. 36 of the *Constitution*, however, deserves critical scrutiny. In addition, considering the court's findings regarding the extreme nature of the statements, an order directing the clerk of the court to submit the matter to the Director of Public Prosecutions for the possible institution of criminal proceedings in terms of the common law or relevant legislation would have been appropriate.

The SCA, in turn, completely misconstrued the various constitutional contexts of hate speech. It perceived sec. 16(2)(c) of the *Constitution* as

27 *Masuku* Equality Court:par. 8.

a hate speech prohibition, negated the hate speech prohibition in sec. 10 of the *Equality Act*, found no relation to protected grounds and, ultimately, concluded that the expression had not exceeded the boundaries of constitutional protection.

Let us now turn to an analysis of the judgments based on these criticisms.

3. Remarks about the findings of the Equality Court

The Equality Court reached a substantiated conclusion that the offensive statements constituted hate speech within the ambit of sec. 10 of the *Equality Act*.[28] The court went further to state that the statements also fell within the narrower ambit of sec. 16(2)(c) of the *Constitution* and had clearly propagated hatred[29] and threatened to cause harm.[30] The court further argued that the utterances unequivocally referred to Jews and their religion and/or origin, and had instilled fear in, and intimidated members of the Jewish community.[31] Presumably with reference to the aspect of incitement, the court said:

> The statements were made to an extremely tense audience and in a tense political climate. The statements conveyed more than ordinary detestation for the Jewish and Israeli community and their origin and religion, and were accompanied by threats of potential violence, and aim to subject this minority targeted group to probable mistreatment, based purely on their religious and ethnicity affiliation.[32]

First, it was incorrect for the court to reason that *because the statements fell under sec. 16(2)(c) of the Constitution*, it was "unnecessary, for present purposes, to consider the balancing enquiry envisaged in s 36 of the *Constitution*".[33] After all, a sec. 36 analysis would have been equally "unnecessary" in applying *sec. 10 of the Equality Act*, regardless

28 I will not discuss the merits of the conclusions reached. The link with prohibited grounds was a prominent issue in the SCA judgment and will be addressed in that context in 4.2 below.

29 *Masuku* Equality Court:par. 49: "In essence, the post was made to instil detestation, enmity, ill-will and malevolence towards Jews in South Africa. It is distinct advocacy of hatred – nothing else."

30 *Masuku* Equality Court:par. 54: "It is reasonably conceivable that, in the context of the present matter, a reasonable person in the Jewish community, in particular a Wits University student or associate, or an ex-student, such as the witness, Shullman, would probably have been driven out of sheer fear and intimidation for their security."

31 *Masuku* Equality Court:paras. 48-52.

32 *Masuku* Equality Court:par. 5. In the context of the prohibition and prevention of unfair discrimination, the primary focus of the sec. 10 prohibition is the impact on the addressee, not the subjective intention of the speaker. See *President of RSA v Hugo* 1997 6 BCLR 708 (CC):paras. 729I-730A; *City Council of Pretoria v Walker* 1998 3 BCLR (CC):par. 43.

33 *Masuku* Equality Court:par. 55.

of whether or not the statements simultaneously constituted hate speech in terms of sec. 16(2)(c). Of course, by design, sec. 10 of the *Equality Act* undoubtedly[34] exceeds the ambit of sec. 16(2)(c) of the *Constitution* and encroaches on the terrain of sec. 16(1). Obviously, this limitation of the right to freedom of expression needs to be justifiable in terms of sec. 36 of the *Constitution*. However, since the constitutionality of sec. 10 was not duly challenged, the sec. 10 prohibition had to be applied.[35]

Secondly, having found that the offensive statements did, in fact, constitute extreme hate speech, as defined in sec. 16(2)(c) of the *Constitution*, the court erred in regarding an order for an unconditional apology as an adequate remedy. Indeed, the court expressed the view that "an order for an unconditional apology is by no means lenient, and should not be viewed in the light of the proverbial slap on the wrist". It referred to the restorative effect of an apology, stating that it would represent a recognition of "the fact that the statements are found to be hurtful and hate speech", and would constitute "a notable move towards compensating the target groups, in this case, the Jewish community". The court also stressed how important it was for "the nature of remedies imposed by the Equality Courts … [to] be seen by both the victims, the offenders, and the broader society as sufficiently and appropriately effective, equitable and just".[36] Yet, while an apology may very well have the positive effects envisaged by the court, society can hardly be expected to feel protected from the potential devastating effects of the type of hate speech contemplated in sec. 16(2)(c) of the *Constitution* by an order to make an apology or pay damages. This line of reasoning fails to acknowledge the extreme nature of sec. 16(2)(c) hate speech and other, equally serious forms of hate speech that warrant criminal prosecution and cannot be properly addressed through the available remedies provided by the *Equality Act*.[37] Moreover, the radicalism that often inspires incitement to harm others makes a sincere apology highly unlikely.

In my view, therefore, the Equality Court erred by ignoring the explicit reference to sec. 21(2)(n) in sec. 10 of the *Equality Act*, which provides for referral to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant

34 Sec. 15 of the *Equality Act* provides that the application of sec. 10 is not subject to the fairness analysis required in terms of sec. 14 of the *Act*.

35 See *MEC for Education: Kwazulu-Natal v Pillay* 2008 2 BCLR 99 (CC):par. 40. "Absent a direct challenge to the Act, courts must assume that the *Equality Act* is consistent with the *Constitution* and claims must be decided within its margins."

36 *Masuku* Equality Court:par. 62. See also De Vos "Supreme Court of Appeal gets the law very wrong in a hate speech judgment", https://constitutionallyspeaking.co.za/supreme-court-of-appeal-gets-the-law-very-wrong-in-a-hate-speech-judgment/ (accessed on 1 June 2019).

37 See 1.3 above. Referring to incitement to hatred laws, Brown 2017:609 states that "free and equal people would nevertheless still have grounds to reasonably reject a failure to enact and apply such laws, which is a matter of political legitimacy".

legislation.[38] The court disregarded its constitutional obligation in terms of secs. 7(2) and 8(1) of the *Constitution* when it failed to duly exercise the discretion bestowed on it to identify hate speech that should be strictly abolished by all legitimate means. If this provision is so easily ignored when, within the context of a sec. 10(1) referral, a court explicitly finds that the relevant speech complies with sec. 16(2)(c) of the *Constitution*, it serves no purpose. This view also extends to comparably serious hate speech on protected grounds other than those listed in sec. 16(2)(c), as well as hate speech that does not constitute incitement, but poses a direct serious threat to the target group, and potentially constitutes a criminal offence.[39]

4. Remarks about the findings of the Supreme Court of Appeal

In the SCA, Masuku (the first appellant) contended that

> the Equality Court erroneously reasoned that because most people who support or 'would most likely support' Zionism, and those who most likely would have been offended by the statements are Jewish, therefore the statements were directed at people of Jewish religion or ethnicity.[40]

According to him, the statements "were rather directed at the conduct of the State of Israel, and the fact that most Jewish People might support such conduct did not transform the statements into ones based on religion or ethnicity".[41] The SCA summarised its findings as follows:

> [T]he starting point for the enquiry in this case was that the *Constitution* in s 16(1) protects freedom of expression. The boundaries of that protection are delimited in s 16(2). The fact that particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection. Public debate is noisy and there are many areas of dispute in our society that can provoke powerful emotions. The bounds of constitutional protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Nothing that Mr Masuku wrote or said transgressed those boundaries, however hurtful or distasteful they may have seemed to members of the Jewish and wider community. Many may deplore them, but that does not deprive them of constitutional protection.[42]

38 Criminal prosecution would require further investigation into additional requirements, such as subjective intention.
39 *Islamic Unity Convention v Independent Broadcasting Authority*:par. 32.
40 *Masuku* SCA: par. 12.
41 *Masuku* SCA: par. 12.
42 *Masuku* SCA: par. 31.

As I will point out below, the SCA misguidedly applied sec. 16(2) of the *Constitution* instead of sec. 10 of the *Equality Act*.[43] Moreover, the court apparently held the erroneous view that expression enjoying constitutional protection may not be limited. Finally, the court's finding that the offensive statements did not relate to the grounds of religion and culture is questionable.

4.1 The exclusive application of sec. 16(2)(c) of the *Constitution*

Par. 13 of the SCA judgment points to a flawed understanding of the constitutional framework. It states that, during the appeal hearing, counsel for the SAHRC "disavowed the reliance on the *Equality Act*, accepting that the statements, as any other form of speech, would be excluded from protection (as hate speech) under s 16(1) of the *Constitution* only if they fell foul of s 16(2) thereof". The court continued by saying:

> [T]he retraction of the reliance on the *Equality Act* left intact the underlying substantive arguments that had formed the basis of the claim. In that argument it was contended that the statements amounted to unambiguous threats of harm and violence, and amounted to hate speech directed at members of the Jewish Community.[44]

While it is, in fact, correct to state that only expression under sec. 16(2)(a), (b) and (c) of the *Constitution* is excluded from constitutional protection in terms of sec. 16(1) of the *Constitution*, as indicated earlier, the problem with the court's approach is that sec. 16(2) of the *Constitution* does not prohibit hate speech. Moreover, hate speech prohibitions can

43 See 4.1 below.

44 Par. 13 of the SCA judgment reads as follows: "Although the Commission and the complainants' reliance on the offensive and hurtful nature of the statements continued in the complainants' Heads of Argument, during the hearing of the appeal counsel for the Commission disavowed the reliance on the *Equality Act*, accepting that the statements, as any other form of speech, would be excluded from protection (as hate speech) under s 16(1) of the *Constitution* only if they fell foul of s 16(2) thereof." The SAHRC's correct view pertaining to the scope of constitutional protection does not per se constitute a disavowal of its reliance on the *Equality Act*. Had the SAHRC indeed, by other means, disavowed its reliance on the *Equality Act*, it should have been the end of the matter. Not only does sec. 16(2) of the *Constitution* not prohibit expression, the well-established principle of subsidiarity – namely that where legislation gives effect to a constitutional right, the litigants must rely on the underlying legislation – should have prevented direct reliance on the *Constitution*. See De Vos: "Supreme Court of Appeal gets the law very wrong in a hate speech judgment", https://constitutionallyspeaking.co.za/supreme-court-of-appeal-gets-the-law-very-wrong-in-a-hate-speech-judgment/ (accessed on 1 June 2019). See also *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* 2016 1 BCLR 1 (CC):par. 53. See also Bilchitz 2019:367-368.

lawfully extend to constitutionally protected speech.[45] Depending on the circumstances, nature and attributes of the incident concerned, hate speech claims or complaints should be adjudicated in terms of sec. 10 of the *Equality Act*, the relevant provisions of the *Films and Publications Act* 65 of 1996 and other statutes, and/or relevant common law offences.[46] In this matter, abandoning reliance on sec. 10 of the *Equality Act* would amount to abandoning the claim.[47] Lastly, as in the Equality Court case, compliance with sec. 36 of the *Constitution* was not an issue before the SCA, and should not have prevented the proper application of sec. 10.

4.2 The failure to relate the statements to the grounds of religion and culture

In dealing with the issue of whether the statements had been directed at people of Jewish religion or ethnicity,[48] the SCA scrutinised expert evidence on the meaning of "Zionism", and concluded:

> Nothing in these definitions and explanations conveys identification on the basis of ethnicity or religion. The furthest one can take the matter is that because very many Zionists are Jewish and very many Jews may be Zionists, the two concepts may, in some circumstances, become blurred if care it [*sic*] not taken to distinguish between them.[49]

45 *Islamic Unity Convention v Independent Broadcasting Authority and Others*:par. 32. The *Masuku* SCA court's confusion in this regard is apparent in par. 19, where it stated that the *Constitution* recognises that the right to freedom of expression must be limited in certain circumstances for the protection of other rights, particularly the right to dignity, and then restrictively interpreted this limitation as merely excluding expression in terms of sec. 16(2)(c) of the *Constitution* from constitutional protection.

46 See fn 15.

47 See *MEC for Education: Kwazulu-Natal v Pillay*:par. 40: "[C]laims brought under the Equality Act must be considered within the four corners of that Act. This Court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the *Constitution* to respect, protect, promote and fulfil the rights in the Bill of Rights'. The same principle applies to the *Equality Act*."

48 As for the other elements of sec. 16(2)(c), the court remarked that threatening or unsavoury words in the statement such as "bitter medicine" and "perpetual suffering" were only metaphorical. See par. 26: "Even if ethnicity or religion was implied in the blog statement, neither the offensive words nor the blog statement could be considered advocacy of hatred or incitement of harm for the purpose of s 16(2)(c) of the *Constitution*, particularly in the context in which they were made."

49 *Masuku* SCA: par. 25.

This reasoning disregards context and is oversimplified and generalised.[50] It is common knowledge that many believe the Israel-Palestine conflict to be a "bitter religious war", which is "a central reason that [no] … solutions have worked, despite the intense diplomatic efforts to resolve the conflict".[51] Anyone who has read the Old Testament of the Bible would understand Zionism as being inextricably linked to religion. In fact, God's "chosen nation" is metaphorically referred to as children or daughters of Zion.[52] Instead of blindly inferring from the political context that hate speech did not occur, the court should have taken account of the fact that political context might also inform hate speech.[53]

All relevant circumstances should have been considered. The "tense atmosphere"; the presence of a group of disconcerted Jewish students[54] and their display of pro-Jewish sentiments; the reference to Hitler by a member of the audience even before Masuku started speaking,[55] as well as Masuku's own sarcastic Hitler remark; the threat to harm the target group at Wits and Orange Grove specifically, while it was common knowledge that the Jewish Community Affairs offices were situated in a predominantly Jewish suburb between Orange Grove and Linksfield;[56] the testimony that the only audience members who may have held a different view from Masuku would have been Jewish – these were all indications that Jews

50 See De Vos "Supreme Court of Appeal gets the law very wrong in a hate speech judgment", https://constitutionallyspeaking.co.za/supreme-court-of-appeal-gets-the-law-very-wrong-in-a-hate-speech-judgment/ (accessed on 1 June 2019). See also Bilchitz 2019:371.

51 Pfeffer 2014.

52 Genesis 15:18-21 reads: "On that day the Lord made a covenant with Abram and said: 'To your descendants I give this land, from the Wadi of Egypt to the great river, the Euphrates the land of the Kenites, Kenizzites, Kadmonites, Hittites, Perizzites, Rephaites, Amorites, Canaanites, Girgashites and Jebusites.'" See also Zechariah 9:9; Isaiah 62:11, and 2 Kings 19:21.

53 See the following *dictum* in *Afriforum v Malema*:par. 33: "Public speech involves a participation in political discourse with other citizens, in a manner that respects their own correlative rights. Hate speech has no respect for those rights. It lacks full value as political speech." Reid 2019: 1, 15 argues that, while a wide-ranging right to freedom of expression is an essential political right in a liberal democracy, "[w]hen some actors are using acts of expression to undermine the political rights of others, leaving them be just because this best conforms to the ideal will not necessarily bring about the best achievable realisation of political rights". In view of strong *pro tanto* reasons not to regulate hate speech on democratic grounds, as well as *pro tanto* reasons to regulate hate speech in some cases, whether the harmful effects of hateful speech on the democratic process outweigh those of restriction should be determined on a case by case basis. See also Gelber 2010:304-324; 2017:624-625.

54 *Masuku* Equality Court:paras. 30 and 54.

55 *Masuku* SCA:par. 29.

56 *Masuku* Equality Court:par. 13.

were indeed targeted as a religious or ethnic group, as contemplated by sec. 16(2)(c) of the *Constitution*.[57]

Having said that, however, the root of the problem remains that the court failed to apply sec. 10 of the *Equality Act*, which prohibits hate speech as a form of unfair discrimination.[58] Discrimination can be direct or indirect. The Constitutional Court stated that

> [t]he inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) [of the interim *Constitution* (Act 200 of 1993)] evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination…[59]

Likewise, "[t]he test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation."[60]

Had sec. 10 been duly applied, a "situation-sensitive human rights approach" not focused on "abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society"[61] would have been followed.[62] (The Equality Court followed such an approach in *Afri-Forum v Malema* when it held that words could simultaneously have different meanings and mean different things to different people: "The search is not to discover an exclusive meaning but to find the meaning the target group would reasonably attribute to the words.")[63] Contrary to the court's assumption, it is improbable that the Jews who were exposed to the threats captured in Masuku's impugned statements and, for that matter, other members of the audiences concerned would have construed the statements as "only metaphorical"; as mere noisy, emotional public debate that was not at all concerned with Jewish identity, but was instead directed at the "conduct of the State of Israel".[64] It seems much more likely that they would have experienced the threats as relating to Jewish

57 In particular considering the relation between sec. 16(2)(c) of the *Constitution* and sec. 20 of the *ICCPR*, which was adopted in the aftermath of WWII. See 1.2 above.

58 Marais & Pretorius 2015:904-905; 2019:par. 2; Kok 2017:26-29.

59 *City Council of Pretoria v Walker*:par. 31. See Bilchitz 2019:369.

60 *Harksen v Lane NO and Others* 1997 11 BCLR 1489 (CC):par. 53.

61 See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC):par. 126, where the Court determined the constitutionality of the common-law crime of sodomy.

62 See Bilchitz 2019:371, where the author concludes, with reference to a relevant survey, that "there is a strong argument to be made that Masuku's statements would have been understood disproportionately to target Jews. As such the statements should have been recognized to fall within the categories of 'religion and ethnicity' in section 16(2) of the *Constitution* as well as section 10 of the act".

63 *Masuku* Equality Court:par. 109.

64 *Masuku* SCA:paras. 12 and 26.

identity.[65] This contextualised reasonable understanding should have been a pertinent consideration in the objective determination of whether or not the remarks were "based on" prohibited grounds.

5. Conclusion

Both courts erred in their understanding that sec. 10 of the *Equality Act*, to the extent that it exceeded sec. 16(2)(c) of the *Constitution*, was subject to a sec. 36 analysis on a case-by-case basis. Such an analysis would become necessary only once the constitutionality of sec. 10 is directly challenged.

Moreover, the SCA's complete negation of sec. 10 of the *Equality Act* points to a serious misconception of the definitional functioning of sec. 16(2) of the *Constitution*, and of the distinct aims of the *Equality Act* as well as common and statutory law applicable to different forms of hate speech. Had the SAHRC indeed disavowed reliance on the *Equality Act*, it should have been regarded as a withdrawal of the claim.

The SCA further misconceived the process of determining grounds. All relevant circumstances should have been taken into account, including the audience's reasonable understanding of the statements as bearing relevance to group identity. The last-mentioned consideration is of particular relevance in the application of sec. 10(1) of the *Equality Act.*

Finally, the provision allowing for the referral of hate speech that potentially constitutes a criminal offence in terms of secs. 10(2) and 21(2)(n) of the *Equality Act* should have been invoked. After all, this discretion bestowed on the Equality Court puts the court in the front line entrusted with the responsibility to identify verbal onslaughts that threaten our democracy and should not be allowed to prevail. It is a discretion that must be exercised judiciously.

65 *Masuku* Equality Court:par. 54.

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