CONSTITUTIONAL COURT OF SOUTH AFRICA

South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another

CCT 14/19

Date of judgment: 16 February 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 16 February 2022 at 11h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of the Supreme Court of Appeal, hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg, sitting as the Equality Court (Equality Court). The matter related to section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act), and the question for determination was whether four statements made by Mr Masuku (first respondent) amounted to, or qualified as, hate speech, which is not protected by section 16 of the Constitution, in terms of section 10(1) of the Equality Act.

At the core of this matter were three fundamental rights, all indispensable to any healthy constitutional order, namely, the rights to equality, human dignity, and the right to freedom of speech and expression. The first respondent made four statements related to the protracted feud between Israel and Palestine during tensions that broke out in response to the Gaza War of 2008/2009. At the time that these impugned statements were made, the first respondent was employed by the second respondent, the Congress of South African Trade Unions (COSATU), as the Head of International Relations for COSATU. The first of the statements was made on an online blog on 6 February 2009, and the second to fourth statements were made at a rally convened by the Palestinian Solidarity Committee at the University of the Witwatersrand (Wits) on 5 March 2009.

The genesis of the litigation in this matter can be traced back to 26 March 2009, when the South African Jewish Board of Deputies (SAJBD) lodged a complaint with the applicant, the South African Human Rights Commission (HRC), in which it alleged that the impugned statements amounted to hate speech. Concluding that the impugned statements indeed constituted hate speech, the HRC launched proceedings in the Equality Court, on behalf of the SAJBD. The Equality Court held the view that the matter involved a delicate balancing of the right to freedom of expression on the one hand, and the regulation of that right in order to give content to the rights to dignity, equality, and non-discrimination on the other. Thus, the Equality Court analysed the objects of the Equality Act against the backdrop of section 9 of the Constitution,

and found that the purpose of the hate speech provision in the Equality Act is to regulate speech that is not protected under section 16(2) of the Constitution. Furthermore, absent a frontal challenge to section 10(1) of the Equality Act, the Equality Court had only to determine whether the impugned statements fell within the purview of this provision. In the light of the principle of subsidiarity, the impugned statements were tested against the Equality Act precisely because it is the national legislation intended to prohibit hate speech. In conclusion, the Equality Court noted that, while it is an important right, the right to freedom of expression can be limited in terms of section 36 of the Constitution. Furthermore, understood in their proper context, Mr Masuku's statements targeted the Jewish community, and were hurtful, harmful and propagated hatred against the Jewish community. In the result, it held that these statements unequivocally amounted to hate speech under section 10(1), and would still be prohibited by section 16(2)(c) of the Constitution even if the Equality Act did not prohibit them. Accordingly, the Equality Court ordered the respondents to tender an unconditional apology to the Jewish community within 30 days of the order, and to pay the costs of the HRC.

On appeal, the Supreme Court of Appeal concluded that the applicants had abandoned their reliance on section 10(1) of the Equality Act and had instead correctly conceded that the impugned statements were only protected if they did not fall within the exclusion of section 16(2) of the Constitution. The Supreme Court of Appeal was also of the view that the expert evidence was of little or no assistance in the matter and rejected it. Upon analysing the impugned statements, then, the Supreme Court of Appeal found that Judaism and Zionism were not synonymous, and that the impugned statements did not connote religion or ethnicity, but only represented political speech that was made in the context of the Israeli-Palestinian conflict. In the result, the Supreme Court of Appeal held that the impugned statements amounted to speech protected by section 16(1) of the Constitution. That Court upheld the appeal and set aside the order of the Equality Court, replacing it with an order dismissing the HRC's complaint to the Equality Court.

In the main application launched in the Constitutional Court, the applicant sought to overturn the decision of the Supreme Court of Appeal, submitting that the Supreme Court of Appeal had flouted the principle of subsidiarity and erred in its conclusion. Furthermore, the HRC submitted, if the Supreme Court of Appeal's judgment were left to stand, it would cause great confusion regarding the correct place of the Equality Act, and its interplay with the Constitution. The respondents, Mr Masuku and COSATU, opposed the application and launched a cross-appeal in relation to the costs orders of the Equality Court and the Supreme Court of Appeal. In relation to the main application, the respondents submitted that the jurisdiction of the Constitutional Court was not engaged as the matter neither raised constitutional issues nor bore any prospects of success. The respondents submitted further that the Supreme Court of Appeal reached the correct conclusion in its finding that the impugned statements were not based on the Jewish faith or ethnicity and did not constitute or propagate hatred nor incite violence. In the cross-appeal, the respondents argued that the Equality Court erroneously ordered them to pay the HRC's costs, which had not been sought by the HRC. They submitted further that the Supreme Court of Appeal did not provide reasons for its order that each party pay its own costs, even though it found in favour of the respondents. The HRC opposed the cross-appeal.

Six amici curiae were admitted in the main application, and they advanced a plethora of submissions before the Constitutional Court. These amici curiae were the South African Holocaust and Genocide Foundation (SAHGF), the Psychological Society of South Africa (PsySSA), the Freedom of Expression Institute (FXI), Media Monitoring Africa (MMA), the

Rule of Law Project, and the Nelson Mandela Foundation (NMF) respectively. Most importantly, the first amicus curiae provided insight into the differences between anti-Semitism and anti-Zionism, as well as helpful analysis regarding whether the impugned statements propagated hatred and incited violence against the Jews. The second amicus curiae interrogated whether the Supreme Court of Appeal correctly framed its enquiry when it relied on section 16(2) of the Constitution as opposed to section 10(1) of the Equality Act. The four remaining amici curiae all made submissions relating to the interpretation and constitutionality of section 10 of the Equality Act.

Absent a frontal challenge to the constitutionality of section 10 of the Equality Act in this matter, this judgment was held in abeyance pending the outcome in the matter of *Qwelane v South African Human Rights Commission* [2021] ZACC 22 (*Qwelane*), which was heard soon after the present matter and in which the constitutionality of section 10 of the Equality Act was challenged. Soon after the judgment in the *Qwelane* matter was handed down, the respondents in this matter filed an application for the recusal of Chief Justice Mogoeng (Mogoeng CJ) in the main application. This application was brought before the Constitutional Court following a series of public comments made by Mogoeng CJ, which the respondents believed showed Mogoeng CJ's bias against them, and, thus, diminished his impartiality and disqualified him from forming part of the coram in the main application. These comments related to Mogoeng CJ's religious convictions, and conveyed his love for Israel and Palestine, and the Jews and Palestinians. The respondents understood these comments to be an expression of love for Israel and the Jews, to the exclusion of Palestine and the Palestinians. The HRC filed a notice of intention to abide by the Court's decision in the recusal application.

In a unanimous judgment penned by Khampepe J, the Constitutional Court began by considering the recusal application. The Constitutional Court noted that the impartiality and independence of Judicial Officers are indeed essential requirements of a constitutional democracy, and core components of the constitutional right of access to courts. Furthermore, in terms of section 174(8) of the Constitution, it behoves Judicial Officers to uphold and protect the Constitution – a responsibility that implies that Judges will discharge their oath of office through the impartial adjudication of all disputes. Therefore, the Constitutional Court found, although the correct point of departure must always be a presumption of impartiality, this presumption can be dislodged through the presentation of cogent evidence that demonstrates that a "reasonable apprehension of bias" exists in relation to the Judge. In applying the established "reasonable apprehension of bias" test, the Constitutional Court found that the respondents did not discharge the onus of establishing that, on the correct facts, Mogoeng CJ's conduct created a reasonable apprehension of bias. Thus, the respondents' application for recusal was dismissed.

Having disposed of the recusal application, the Constitutional Court then turned to the adjudication of the main application. As a point of departure, the Constitutional Court noted that the Equality Act constitutes legislation promulgated in order to give effect to the right to not be unfairly discriminated against, as reflected in the Constitution. And, in the result, the principle of subsidiarity ought to be applied in this matter, especially considering the absence of a frontal challenge to section 10(1) of the Equality Act. As a result, the Court found that the Equality Act expressly attempts to regulate hate speech. Ergo, the Supreme Court of Appeal erred in deciding the matter in terms of section 16 of the Constitution as opposed to section 10 of the Equality Act.

The Court then considered the impact of the decision in *Qwelane* on the present matter. Importantly, in *Qwelane*, the Court declared section 10(1) of the Equality Act to be invalid insofar as it was inconsistent with the Constitution and severed the word "hurtful" from section 10(1). After this modification to section 10(1), the Court was satisfied that the provision was constitutionally compliant. In the present matter, the Constitutional Court held that this finding enabled it to apply section 10(1), as it was interpreted in *Qwelane*, to the facts at hand comforted by the knowledge that the provision is consistent with the Constitution.

In determining whether the impugned statements constituted hate speech in terms of section 10(1), the Court emphasised that the expert evidence in relation to the fine nuances between anti-Semitic and anti-Zionist tropes could only be of assistance to the Court. With this in mind, the Court then assessed each of the impugned statements in turn.

Regarding the first statement, the Constitutional Court upheld the Equality Court's finding that a reasonable person would understand the statement as being based on Jewishness as an ethnicity, not on anti-Zionism. This was primarily because of the statement's reference to "Hitler", because a reasonable reader would have noted that a reference to Hitler to a group which was predominately Jewish was used because of their Jewish ethnicity and identity. After all, Hitler's anti-Semitic extermination campaign was not limited to people of the Jewish faith or ethnicity who identified as Zionists. Thus, the Constitutional Court held that the first statement clearly contravened section 10(1) of the Equality Act.

However, after considering the second to fourth statements in the light of the available evidence, the Constitutional Court found that the facts of the case did not conclusively support the finding that, seditious as they may have been, these statements were targeted at members of the Jewish faith or ethnicity. Thus, the Constitutional Court held that the second to fourth statements were not based on a prohibited ground, and did not constitute hate speech in terms of section 10(1). In the result, the Constitutional Court set aside the order of the Supreme Court of Appeal and reinstated that of the Equality Court insofar as it related to the first statement.

Finally, the Constitutional Court considered the cross appeal and issue of costs. It held that the Equality Court ought to have applied the *Biowatch* principle because Mr Masuku was attempting to assert his constitutional right of freedom of speech. Applying the *Biowatch* principle, then, the cross-appeal was upheld. The Constitutional Court ordered Mr Masuku to tender an unconditional apology to the Jewish Community in respect of the first statement, and ordered that the apology must receive at least the same publicity as the offending statement. No order was made as to costs in the Constitutional Court.