

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO	☒ YES
(3) REVISED	☒
4 July 2019	
DATE	SIGNATURE

CASE NO: 87638/2016

In the matter between:

ECONOMIC FREEDOM FIGHTERS

1st Applicant

JULIUS SELLO MALEMA

2nd Applicant

And

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

1st Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

CASE NO: 45666/2017

In the matter between:

ECONOMIC FREEDOM FIGHTERS

1st Applicant

JULIUS SELLO MALEMA

2nd Applicant

And

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

1st Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

JUDGMENT

LEDWABA DJP, PRETORIUS J et MOLEFE J

Introduction

[1] The triumph of democracy in South Africa brought with it a revolution in our legal system. We now live in a constitutional democracy that is underpinned by values including human dignity, the achievement of equality and the advancement of human rights and freedoms. As the Constitution is the supreme law of the land, it stands to reason that its foundational values should be reflected in the law. Our courts are constitutionally empowered and mandated to declare all laws or conduct in conflict with the Constitution invalid.

[2] That is not to suggest that laws enacted before the time at which our hard-fought democracy was won are inherently unconstitutional. Instead, all law, whether enacted prior to 1994 or in the successive democratic years, must yield to the norms, values and letter of the Constitution.

[3] This case revolves around two pre-1994 lynchpin laws, namely the Riotous Assemblies Act¹ (the 'RA Act') and the Trespass Act.²

[4] The applicants brought two applications against the respondents under case numbers 87638/2016 and 45666/2017. The applicants seek the following relief in case number 87638/2016:

- a) Declaring that section 18(2)(b) of the RA Act is in conflict with the Constitution of the Republic of South Africa, 1996 and is therefore invalid;

¹ 17 of 1956.

² 6 of 1959

- b) Striking down section 18(2)(b) of the RA Act on the basis that it violates sections 1, 9, 16 and 19 of the Constitution;
- c) Reviewing and setting aside the decision of the National Prosecuting Authority to initiate criminal charges and to charge the second applicant with the offences in terms of section 18(2)(b) of the RA Act;
- d) Directing any such respondent who opposes this application to pay the costs thereof.

[5] In case number 45666/207, the applicants seek declaratory relief that, constitutionally interpreted, section 1(1) of the Trespass Act does not apply to occupiers of land protected by the Extension of Security of Tenure Act³ ('ESTA') and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act⁴ ('PIE').

Parties

[6] The first applicant, the Economic Freedom Fighters ('EFF'), is a political party registered in terms of section 15 of the Electoral Commission Act.⁵

[7] The second applicant is Mr Julius Sello Malema ('Mr Malema'), an adult male and leader of the first applicant. Mr Malema brings this application in his personal capacity, as well as in his capacity as leader of the first applicant.

[8] The first respondent is the Minister of Justice and Constitutional Development. He is cited herein in fulfilment of the requirements of rule 10A of the Uniform Rules of Court.

[9] The Second Respondent is the National Director of Public Prosecutions ('the NDPP').

³ 62 of 1997.

⁴ 19 of 1998.

⁵ 51 of 1996.

Factual background

[10] The two applications that were heard together arose out of three related charges laid against the second applicant, Mr Malema, on 16 December 2014, 26 June 2016 and 7 November 2016. All three charges are materially identical. The most recent charge, dated 7 November 2016, reads:

‘[in] that on or about the 7th Novemeber 2016 and at or near Newcastle, in the Regional Division of Kwazulu-Natal, the accused unlawfully and intentionally incited, instigated, commanded or procured his Economic Freedom Fighters followers and/or others to commit a crime, to wit: trespass in contravention of section 1(1) of the Trespass Act 6 of 1959 by illegally occupying any vacant land wherever they found same and thereby committing the crime of incitement’

[11] On being notified of the charges, the applicants sought to challenge the constitutionality of the RA Act as well as seeking declaratory relief relating to the Trespass Act. The applicants also request this Court to review and set aside the charges proffered against Mr Malema.

The constitutional challenge to the RA Act

[12] The applicants argue that section 18(2)(b) of the RA Act should be declared unconstitutional as it criminalises the exercise of free expression protected by section 16 of the Constitution. Section 18(2)(b) provides that:

‘(2) Any person who –

(a) . . .

(b) Incites, instigates, commands, or procures any other person to commit, any offence, whether in common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.’

[13] The applicants argue that the definition of the crime of incitement is overbroad and that the limitless scope of section 18(2)(b) is an unjustifiable limitation on the right to freedom of expression.

[14] In order to address these arguments we will deal with the following four issues:

- 1) the proper understanding of the crime of incitement;
- 2) the scope of the right to freedom of expression;
- 3) whether section 18(2) of the RA Act infringes this right; and
- 4) if such an infringement is reasonable and justifiable.

[15] However, a preliminary point must be dispensed with before addressing each of these issues. It would have been ideal for this matter to have gone to trial before the constitutional challenge was raised. In doing so, the trial court might have found that Mr Malema was not guilty of incitement for the very reason that no crime had been incited. In fact, this is exactly what the applicants argue for in this matter.

[16] The applicants have instead decided to challenge the constitutionality of the section in the abstract. This approach comes with its own limitations, as has been discussed elsewhere.⁶ A problem in the present case is that much of the applicants' argument focussed on the assertion that the charge against Mr Malema should be dismissed. It is not for this Court to make such an order. The fact that the applicants are confident that the charge is defective raises the question of whether there is in fact a constitutional issue at play.

[17] A second problem is that, in part, the crime of incitement has been largely mischaracterised by the applicants. A trial court would have appropriately dealt with the application of the RA Act, in light of our jurisprudence on the crime of incitement.

⁶ *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 313 (SCA); *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC)

We have been denied the benefit of the trial court's approach. The applicants argue that Mr Malema's supporters should be taken to be capable of making up their own minds – and so may or may not have followed his words. Any right-infringing action on their part therefore rests solely at their own feet and not at Mr Malema's. The applicants argue that the RA Act does not require any likelihood that the inciting conduct will actually have an effect on the listener.

[18] As the next section shows, these arguments misunderstand the crime of incitement, specifically the fault element of the crime. A proper understanding of the crime is needed for a competent inquiry into whether or not it infringes the right to freedom of expression.

The crime of incitement

[19] The definition of incitement can be found in *S v Nkosiyanana*. An inciter is 'one who reaches and seeks to influence the mind of another to the commission of a crime'.⁷ The court in *Nkosiyanana* further clarified that 'it is the conduct and intention of the inciter which is vitally in issue . . . the purpose of making incitement a punishable offence is to discourage persons from seeking to influence the minds of others towards the commission of crimes'.⁸

[20] The crime of incitement is the intention, by words or conduct, to influence the mind of another in the furtherance of committing a crime.⁹ The question then is what kind of unlawful acts form part of this definition?

[21] It is apparent from this definition that the mere voicing of one's opinion will not be enough for incitement. Snyman provides the example of a person expressing the desire that 'it would be a good thing if x should die' as not falling under the crime

⁷ *S v Nkosiyanana* [1966] 4 All SA 456 (A) at 458

⁸ *Ibid* at 459.

⁹ See Snyman *A Draft Criminal Code for South Africa* (Juta, Cape Town, 1995) at 18 for a more detailed definition.

of incitement.¹⁰ Following the position in German law, incitement requires that the inciting words are not too vague or indeterminate. The statement ‘take back the land’ would likely not constitute incitement as it specifies neither a crime nor an object of which the crime is to be committed against.¹¹ Support for this can be seen in the case of *Nathie* whereby the Appellate Division, in deciding that the conduct was not incitement, remarked that ‘[t]he passage in question does not contain any unequivocal direction to the listeners.’¹²

[22] The inciter’s conduct need not have an element of persuasion or coercion. It is now settled that the decisive question is not how but if the accused intended to influence the mind of the other person towards the commission of a crime.¹³ It is irrelevant whether or not the incitee was indeed influenced by the inciter to commit the crime, or acted upon the conduct or communication of the inciter.¹⁴ In fact incitement is limited to those situations in which the crime is not committed. If it were, liability would result from being an accomplice to the crime.

[23] The types of conduct which constitute incitement are fairly narrow. It also is clear that the intention behind the conduct or communication is vital in deciding whether or not incitement took place. Liability for incitement is further restricted by the manner in which our courts have handled the intention requirement.

[24] Before dealing with our jurisprudence on the intention requirement, the following must be noted. There is no merit to the argument that intention is not a requirement for the crime of incitement, either at common law or under the RA Act. The dictum in *Nkosiyana* above illustrates that the very definition of incitement

¹⁰ Snyman, *Criminal law* 6ed (Lexis Nexis, 2014) at 291

¹¹ See Snyman ‘Die misdaad uitlokking’ 2005 *THRHR* 428 at 435 – 38 for a more detailed account of a ‘concretisation’ requirement.

¹² *S v Nathie* [1964] 3 All SA 581 (A) at 586

¹³ *Ibid.* See also *Nkosiyana* supra note 7 at 458 – 459.

¹⁴ *Ibid.* See also *R v O* 1952 (3) SA 185 (T)

requires intention.¹⁵ Section 18(2) also does not expressly exclude intention and so no argument can be made that the purpose of the RA Act was to create strict liability.¹⁶

[25] Our courts, in applying section 18(2), have required that the State prove that the accused possessed the requisite intention, with the aim of influencing the mind of another to commit a crime, beyond a reasonable doubt.¹⁷ The case of *Nathie* is particularly germane to the allegations against Mr Malema in the present case.

[26] In that case, the appellant sought leave to appeal against his conviction of incitement to contravene the Group Areas Act 8 of 1953. The sordid history of the Group Areas Act is well known and its repeal celebrated. The inciting conduct in that case came from a report authored by the appellant that called on the Indian community to defy the Group Areas Act. The report was to be tabled at a general meeting of the Transvaal Indian Congress. The court remarked that the report was interspersed with ‘strongly worded comment’ on the political climate of the time.¹⁸

[27] In overturning the conviction, the Appellate Division held that ‘[t]he essential enquiry appears to be: what did the appellant intend to convey to the persons at the meeting when he used the words contained in the passage in question?’.¹⁹ After weighing up the evidence the court concluded that —

‘[i]t thus appears that the evidential material upon which the State relies for a conviction does not establish with the requisite degree of proof that the appellant, in addressing the persons attending the meeting, intended his words to be understood as

¹⁵ There is academic consensus that the negligent commission of the crime of incitement is impossible, see Snyman op cit 10 and Burchell *Principles of Criminal law* 4ed (Juta, 2014) at 544.

¹⁶ *S v Coetzee and Others* 1997 (3) SA 527 at 177.

¹⁷ *S v Nathie* supra note 12 at 595; *R v Milne and Ereliegh* (7) [1951] 2 All SA 113 (A); *R v Segale* [1960] 1 All SA 456 (A) at 732.

¹⁸ *Nathie* supra note 12 at 585.

¹⁹ *Ibid* at 586.

an exhortation to them (and Indians in general) to embark on a campaign involving contraventions of the Group Areas Act.²⁰

[28] This was in light of the fact that the report strongly urged its readers not to remain silent, to fight against injustice and inhumanity, and to make it clear to previous community leaders who had already begun defiance campaigns against the Group Areas Act that they were not alone. This is all to show that, shorn of any heated political rhetoric, the clear intention to influence the mind of another to commit a crime must be present. This evidently is a high bar for the State to prove beyond a reasonable doubt.

[29] There is some disagreement on whether or not the incitee must possess the requisite intention to commit the crime they have been incited to commit. The case of *Milne* appears to lend support to the notion that the inciter must also know that the incitee will act with the intention required to commit the crime.²¹ There the accused was charged with incitement, having caused another to make false entries into a book of accounts in contravention of the Companies Act 27 of 1914. The accused was not convicted of incitement for the reasons that he knew the entry would be false, but also knew that the person he caused to make the entry did not know the entry to be false and would make the entry thinking it to be correct.²²

[30] This line of thinking was referred to in *Segale*, where the court held:

‘The incitement of municipal employees to stay away from their work on the days in question was therefore in the circumstances of the incitement, clearly an incitement to commit an act which to the knowledge of the inciters would have been an offence if committed by the incitees, and the decision in *Rex v. Milne and Erleigh* (7), 1951 (1) S.A. 791 (A.D.) at p. 822, is not applicable as in that case the incitee was incited to

²⁰ Ibid at 587.

²¹ *Milne* supra note 17 at 822.

²² Ibid at 822.

commit an act which the inciter knew would not constitute an offence if committed by the incitee.²³

[31] On this basis it has been argued that the inciter must believe that the incitee will actually possess the requisite intention to commit the crime in question. As only this would satisfy the requirement in section 18(2) of the RA Act that what is incited is the commission of a crime. This would be due to the fact that where there is no intention on the part of the incitee then there can be no crime.²⁴

[32] However, the relevance of the intention on the part of the incitee to the liability on the part of the inciter is not clear-cut.²⁵ It might be required that the inciter is guilty only if the act committed would be a crime for the incitee, including the fact that they possessed the requisite intention, regardless of what the inciter actually believed. This, in our view, would be incorrect for the simple reason that liability for the crime of incitement does not require that the incited crime was actually committed.

[33] The better position is that the presence or absence of intention on the part of the incitee is irrelevant to whether or not the inciter is liable. The question is whether the inciter believed that the act incited would, all things considered, be unlawful, notwithstanding that the incitee might be ignorant to the fact that they are committing a crime. To reiterate what was held in *Nkosiya*, the decisive question is whether or not the inciter intended to influence the mind of another to commit a crime.

[34] Subsequently, it is clear that for the crime of incitement to be committed the accused must possess the direct intention to influence the mind of another so that they may intend to commit a crime. I must refer back to the fact that the constitutional challenge against section 18(2) has been brought without the benefit of the trial proceedings being concluded. It is not for this Court to pronounce on the validity of

²³ *Segale* supra note 17 at 463.

²⁴ See Snyman op cit note 10 at 294.

²⁵ Cf. Burchell op cit note 15 at 545- 7 and *Segale* supra note 17

the allegations against Mr Malema. However, it must be said that nothing from the above excursus of the crime of incitement indicates that heated political rhetoric would necessarily constitute the crime of incitement.

The scope of the right to freedom of expression

[35] It is now trite that the right to freedom of expression plays an important and venerated role in our constitutional democracy. The Constitutional Court has referred to it as the ‘cornerstone of democracy’.²⁶ Section 16 guarantees that:

1. 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;
 - d. academic freedom and freedom of scientific research.

[36] The right to freedom of expression plays a particularly important role when it comes to political debate. As put by the Constitutional Court in *McBride*, ‘untrammelled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values’.²⁷ It is only when political actors, and the citizenry generally, can speak freely that democracy thrives. It allows for the contestation of ideas, that may involve ‘particularly controversial or unpopular views, or those that inconvenience the powerful’.²⁸ Robust political debate should not be unduly suppressed, as to do so would not only violate the inherent worth of the right to freedom of expression, but impact on other affiliated rights, such as the right to vote.²⁹

²⁶ *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at 122

²⁷ *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) at 82.

²⁸ *Democratic Alliance* supra note 26 at 125.

²⁹ In *Democratic Alliance* supra note 26 at 124 the Constitutional Court remarked that the right to freedom of expression forms part of a web of associated rights and that:

‘Apart from its intense connection to the right to vote, it is closely related to freedom of religion, belief and opinion, the right to dignity, as well as the right to freedom of association and the right to assembly.’ (footnotes omitted)

[37] The Minister put forward the argument that section 16 only offers protection to expressive acts within a certain scope. The applicants are correct that this view should be rejected. The right to freedom of expression is not limited to the values of a functioning of democracy, self-fulfilment and the search for truth, as was proposed. The right extends to any and all conduct that is not excluded in section 16(2) of the Constitution.

[38] So much is clear from what the Constitutional Court held in *Print Media*:

‘Section 16(2) provides an exclusionary list of the varieties of expression not protected by the right. Section 16(1), on the other hand, is merely illustrative of the kinds of protected expression and is non-exhaustive in character. It necessarily follows that whatever expression does not fall under section 16(2) must do so under the purview of section 16(1). Put differently, any expression, which is not excluded from protection under the Constitution, benefits from the preserve of the right.’³⁰

[39] For section 18(2)(b) of the RA Act not to infringe the right in section 16(1), it must criminalise only that conduct which falls within section 16(2). The applicants’ make much of the fact that section 18(2)(b) of the RA Act criminalises conduct that goes far beyond the ‘incitement of imminent violence’ exclusion in section 16(2) of the Constitution. We find this argument unpersuasive.

[40] The incitement of many crimes will fall under the exclusions in section 16(2). The incitement to murder in *Nkoyisani* is an obvious example of incitement of imminent violence. But that is not the only exclusion implicated. The exclusion in 16(2)(c), of the advocacy of hatred based on race, ethnicity, gender and religion that constitutes incitement to cause harm, could readily be applied to any number of crimes. Xenophobic rhetoric that calls for the dispossession of foreign owned property is but one example.

³⁰ *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at 48.

[41] It now remains to assess to what extent, if any, section 18(2)(b) infringes the right to freedom of expression guaranteed in section 16(1) of the Constitution.

The right to freedom of expression is infringed

[42] It is clear that section 18(2)(b) criminalises conduct by a person which evidences an intention to influence the mind of another to themselves commit a crime. As stated above, much of this conduct would fall within the exclusions of free speech listed in section 16(2) of the Constitution.

[43] The section criminalises, at least for some conduct, acts which would form part of the general right to free speech enshrined in section 16(1). Whilst other legislation might criminalise expressive conduct, yet possess a 'free speech defence' in section 16(1), the RA Act is no such legislation. It actively criminalises conduct that is otherwise protected by section 16(1) and for this reason alone is an infringement of the right to freedom of expression.³¹ It does so because it states that a person is guilty of an offence by inciting any other person to commit *any offence*.

[44] The example given by the applicants, of a person inciting a group of people to take part in a tax revolt is one such example. Another would be certain instances of theft. Generally, such crimes will not form part of the exclusions in section 16(2).

[45] To reiterate, whilst the prohibition of the incitement of certain crimes would violate section 16(1), the incitement of a number of crimes would form part of section 16(2). It remains now to assess whether such an infringement is reasonable and justifiable, in line with section 36 of the Constitution.

³¹ Cf. The Intimidation Act 72 of 1982. In *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others* the Supreme Court of Appeal 2018 (2) SACR 313 (SCA) the Supreme Court of Appeal held that section 1(1)(b) past constitutional muster for, *inter alia*, the reason that on a proper interpretation the section only criminalised conduct falling within section 16(2) of the Constitution. A free speech defence was therefore applicable to those alleged to have contravened the Act.

[46] One last point needs to be made on this aspect. The applicants argued at length regarding the history and circumstances in which section 18(2) was enacted. These were truly deplorable times in our country's history. However, that this is so is of little value in determining whether or not section 18(2) is unconstitutional. We no longer interpret the meaning of statutory provisions by resort to the phantom of legislative intent, as was reaffirmed in *Endumeni*.³² Instead, one looks to the purpose of the statute and identifies the mischief which it seeks to correct.

The section is a reasonable and justifiable infringement of section 16(1) of the Constitution.

[47] Having determined that a constitutional right has been limited, we are then required to conduct a limitations analysis in terms of section 36(1) of the Constitution. Section 36(1) of the Constitution reads:

‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.’

[48] The nature of the right to freedom of expression is well known and has already been discussed.³³ That is not to say that the right can never be justifiably limited. Freedom of expression naturally may implicate other rights, such as the right to dignity. Our courts have long grappled with achieving the appropriate balance in this

³² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 20 – 1.

³³ See further *Case and Another v Minister of Safety and Security and Others*; *Curtis v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC) at 28; *Khumalo and Others v Holomisa* 2002 (8) BCLR 771 at 21; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 at 24.

regard.³⁴ *Crimen iniuria* is an example where the right to dignity is protected by criminal sanction at the expense of the right to freedom of expression.

[49] As to the purpose of the limitation, the respondents pointed to the fact that should Mr Malema's call be taken up, the result would be chaos. This would take the form of a mass violation of property rights across the country and an impermissible resort to 'self-help'. The latter due to the fact that the government has put in place plans to provide access to land and housing in a manner that is orderly and predictable.³⁵ Such plans would be frustrated if even a fraction of Mr Malema's supporters resort to land invasions.

[50] It remains to be tested at trial whether Mr Malema was calling for the kind of land invasions countenanced by the Constitutional Court and the self-help to which the respondent refers. As a matter of general principle, our courts have stated that the purpose of criminalising incitement is to prevent crimes from happening before they occur.³⁶ The text and context of the RA Act plainly evidences that the purpose of section 18(2) is the prevention of the commission of crimes.

[51] The importance of this purpose is self-evident. Our law has already prescribed that certain acts are unlawful. It is vital to the functioning of our criminal justice system that our law should also prohibit the incitement of committing such unlawful acts, so that they do not in fact arise. Beside the crime of incitement being a prophylactic measure to prevent the commission of crimes, it serves other important ends. It ensures that we do not live in a society of fear marked by the threat of acts which have already been determined as undesirable and unlawful.

³⁴ See *De Reuck v Director of Public Prosecutions (WLD) and Others* 2003 (12) BCLR 1333 (CC) at 59; *Khumalo* supra note 33; *Mthembi-Mahanyele v Mail and Guardian and Another* 2004 (11) BCLR 1182 (SCA); and *Le Roux and Others v Dey* 2011 (6) BCLR 577 (CC).

³⁵ Such an approach being endorsed by the Constitutional Court, *inter alia*, in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169

³⁶ *Nkosiya* supra note 7 at 458;

[52] It is true that robust political debate is important for democracy. Though it is difficult to see how this important purpose, crime prevention, is somehow in competition with political debate. In our view, robust political debate is not necessarily furthered by allowing a person to intentionally incite others to commit criminal acts. We fail to see how this preserves freedom of expression and does not in fact prevent it. If political opponents are faced with the incitement of harm against them, it is unlikely that such a threat will lead them to express their opinions more freely.

[53] In all likelihood it will have the opposite and undesirable effect of causing them to change their opinions out of fear. It may even cause them to not express their opinions at all.³⁷ The right to freedom of expression is guaranteed so that we may have a culture of robust political debate, not a culture of fear marked by the incitement of criminality. The limitation in section 18(2) serves this worthwhile purpose. To equate robust political rhetoric with the incitement of criminal acts is, sadly, to say little about the quality of our political discourse.

[54] The nature and extent of the limitation is also marginal. In *De Reuk* the Constitutional Court distinguished between limitations concerning the core and the periphery of the right to freedom of expression. The Court held that —

‘the limitation of the right caused by section 27(1) does not implicate the core values of the right. Expression that is restricted is, for the most part, expression of little value which is found on the periphery of the right and is a form of expression that is not protected as part of freedom of expression in many countries.’³⁸

[55] The limitation in section 18(2) does not attack the core of the right to freedom of expression. It most apparently limits the listed ground in 16(1)(b) of the Constitution which enshrines the ‘freedom to receive or impart information or ideas’.

³⁷ See D Bilchitz ‘Why incitement to harm against those with different political opinions is constitutionally impermissible’ 2019 *TSAR* 364 at 372.

³⁸ *De Reuk* supra note 34 at 59.

Section 18(2) only limits this to the extent that one is prohibited from imparting the idea to commit a crime that would not otherwise be excluded in section 16(2). It is not a wholesale restriction on speech, but merely a prohibition on influencing the minds of others to commit acts that our law already considers to be unlawful.

[56] It is important to reiterate the requirement that the inciter must intend for the incitee to commit a crime. The mere voicing of an opinion will not be enough. This is exactly that what the applicants argued in this matter, that Mr Malema did not possess the requisite intention to incite anyone to commit any crime. It would have been appropriate to raise this as a defence in the criminal trial.

[57] Some argument was made by the applicants that section 18(2) would curtail political expression by activists who wish to mount defiance campaigns or commit acts of civil disobedience. This in turn would silence opposing political voices. This argument is wrong. In the context of a defiance campaign, the singular purpose is to purposefully and consciously break a law that one thinks is unjust.³⁹ In the setting of a defiance campaign, political actors choose to break a law in the hope that doing so will bring about its repeal. It would be strange to think that the law itself could somehow facilitate this purpose.

[58] The same would apply to acts of civil disobedience. However, the difference here is that a law itself is not necessarily challenged. Instead, the peaceful refusal to follow a legal norm is undertaken in the furtherance of ones' political agenda. We cannot think that any activist worth her salt would wish that the law would somehow allow for the commission of crimes when it is in the aid of a worthy political purpose. In truth, such would render the act of civil disobedience impotent.

³⁹ Cf. *Nathie* supra note 12; notwithstanding the fact that a conviction of incitement to defy the Group Areas Act was overturned.

[59] We now deal with the relationship between the limitation and its purpose. Quite clearly the limitation bears a rational relation to the purpose of timely law enforcement and the prevention of the commission of crimes *en masse*.⁴⁰

[60] There is however one aspect of section 18(2) that, in our view, is not suitably connected to this purpose. This also exposes that a less restrictive means is available in achieving the purpose of the RA Act. That is the part of section 18(2) which reads:

‘shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.’

[61] The result is that a person who incites a crime, for instance murder, is liable to the maximum punishment as if they had actually committed that crime. This cannot be rationally connected to the purpose of crime prevention. The mere possibility of criminal sanction is enough to successfully dissuade one from inciting another to commit a crime. It is also difficult to find a rational reason why a person who incites the commission of a crime should be punished to the same extent as the person who actually committed the crime. The fact is that, properly understood, the crime of incitement is reserved for instances in which the crime has not yet been committed.

[62] It is therefore not reasonable and justifiable that the inciter should be held liable as if they actually committed the crime. To this limited extent section 18(2) is unconstitutional.

The declaratory relief sought in relation to the Trespass Act

[63] The applicants argued that even if the RA Act withstands constitutional scrutiny, then it does not necessarily follow that Mr Malema has committed the crime of incitement. This, they argued, is seen when one properly understands the

⁴⁰ Quite clearly the purpose of the crime of incitement is not only to prevent the individual commission of crimes, but also crimes committed *en masse*, meaning either by a group or by widespread acts of criminality. See further Burchell op cit 15 at 541.

constitutionally compliant interface between the Trespass Act and our post-Constitution eviction laws. Section 1 of the Trespass Act provides that:

‘(1) Any person who without permission –

- (a) of the lawful occupier of any land or any building or part of a building; or
- (b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,

enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.

(1A) A person who is entitled to be on land in terms of the Extension of Security of Tenure Act, 1997, shall be deemed to have lawful reason to enter and be upon such land.’

[64] The gist of the applicants’ argument is that land occupation falls outside the Trespass Act and so the charge against Mr Malema is a ‘non-starter’ because he in fact incited no crime at all.

[65] The applicants argued that the Trespass Act must be read subject to our post-Constitution eviction laws, including PIE and ESTA. Such a reading, conducted with the injunction of section 39(2) of the Constitution in mind, shows that the Trespass Act stops where PIE starts. In other words, someone who is an ‘unlawful occupier’ under PIE is not guilty under the Trespass Act. Mr Malema then incited no crime by calling for the occupation of land.

[66] The applicants ask for an appropriate declarator on the proper interpretation of section 1(1) and related relief. We must agree with the respondents that this is ill-conceived for at least two reasons.

[67] The first is obvious in light of the analysis of the RA Act above. The applicant's request for appropriate declaratory relief is just another way of saying that Mr Malema did not commit the crime of incitement. According to the applicants, what Mr Malema actually called for was the occupation of land and, in light of PIE and ESTA, that is no longer a crime. The result is that under the guise of statutory interpretation the applicants are in fact raising a defence to the charge of incitement.

[68] As discussed above, that defence might simply be that Mr Malema never intended to incite any crime by calling for the occupation of land. The main thrust of the applicants' argument is that on their interpretation of the interplay between the Trespass Act and PIE, Mr Malema did not incite anything unlawful. The defence being that where no crime is committed there can be no incitement.⁴¹ An obvious problem arises regarding the declarator the applicants seek in this regard.

[69] As has already been stated, this Court is not the appropriate forum to adjudicate such a defence. The applicants are in effect asking this Court to determine whether the utterances or conduct of Mr Malema amounted to the incitement of a crime (trespass) or lawful activity (occupation). Such a determination is better left to the trial court.

[70] The crime that is incited need not to have been committed. The pivotal question is whether the accused intended to incite a crime. It is open to the prosecution to prove that whilst Mr Malema called for lawful occupation he also intended to incite people to commit trespass. The exact crime need not be explicitly specified. Whilst a vague statement won't do, the utterance of 'I want you to attack x, take all his belongings and run away' clearly means to incite the crime of robbery.

[71] Whether or not Mr Malema incited trespass is best left to the trial court to determine. Finally, even if this Court was to give a declarator that 'unlawful

⁴¹ See paragraph [22] above and the works cited there.

occupiers' under PIE are not guilty under the Trespass Act, this would not render an inquiry by the trial court into the charge against Mr Malema unnecessary.

[72] Notwithstanding the above, should this Court embrace the interpretive question in order to decide what appropriate relief should be granted, the second reason for the application being ill-conceived becomes apparent. However, it is difficult to comprehend the crux of the applicants substantive argument. It appears to be a thinly-veiled attack on the constitutionality of the Trespass Act. Certainly this is the way in which the respondents understood the argument.⁴²

[73] There is a clear benefit to the applicants mounting an attack on the constitutionality of the Trespass Act. If the applicants fail to show that Mr Malema's conduct concerned not incitement to trespass but unlawful occupation under PIE and ESTA, then the charge can still be avoided by attacking the constitutionality of the Trespass Act directly. Although this is neither here nor there, as we understand the applicants case to be one of constitutional interpretation rather than one seeking an order of constitutional invalidity. The relevance of this to the charge of incitement against the Mr Malema is, for the reasons given above, not altogether clear.

[74] It would appear that the relief sought is a declaration that the Trespass Act is somehow inconsistent with PIE and ESTA when read in light of the section 39(2) injunction in the Constitution. This is not so. This Court gave judgment in *Zwane*, a matter dealing with a direct constitutional attack to the Trespass Act on grounds substantively similar to those that the applicants gesture to in this case.⁴³

[75] In *Zwane* the applicant submitted that:

⁴² The respondents sought to have the application dismissed on the grounds that Rule 16A (1) of the Uniform Rules of Courts, regarding the mandatory requirements on any person who raises a constitutional issue in an application, was not complied with.

⁴³ *Zwane v S and Another* 2016 (A635/2016) (GP) (unreported judgment)

‘[B]oth the Trespass Act and the PIE Act apply to the same class of persons, i.e. ‘unlawful occupiers’ where in both instances the ‘occupation’ is without permission or other lawful right to occupy. . . the effect of the two acts contradict each other. The Trespass Act criminalises unlawful occupation of property and provides for summary ejectment, whereas on the other hand, the PIE Act decriminalises unlawful occupation and limits the eviction only where it would be just and equitable in the circumstances.’⁴⁴

[76] The court in *Zwane* correctly found that this argument conflated the provisions of the Trespass Act and that of PIE. It was held that the ‘two Acts can exist together. The two Acts are not necessarily conflicting. They are ‘complimentary to each other’.⁴⁵ The facts of *Zwane* bear this out.

[77] In *Zwane* the appellant was convicted under section 1(1) of the Trespass Act after unlawfully entering a property that she had been lawfully evicted from under PIE. It would entirely defeat the purpose of PIE if, following a lawful eviction, the appellant was allowed to re-enter the property and remain in unlawful occupation in perpetuity. Section 1(1) of the Trespass clearly applied as the appellant had re-entered and re-occupied the property without the permission of the complainant in order to thwart the eviction order.

[78] The court also dealt with a constitutional challenge to section 2(2) of the Trespass Act, which reads:

‘A court which convicts any person under subsection (1) may make an order for the summary ejectment of such person from the land concerned: Provided that an occupier who has a right of resident or right to use land in terms of the Extension of Security of Tenure Act, 1997, shall not be ejected in terms of this subsection from land in respect of which he or she has such a right’

⁴⁴ Ibid at 17.

⁴⁵ Ibid at 19.

[79] The argument posed there, much the same as put by the applicants in this case, was that section 2(2) allowed for ‘eviction by the back door’. There is no merit in this submission. The section merely confers a discretion to a court that it *may* make an order for summary ejectment. This discretion is unfettered and must be exercised judiciously. It requires the court to investigate the relevant circumstances prior to exercising such a discretion. It in no way circumvents PIE nor can it be said to lead to an arbitrary eviction as contemplated in section 26(3) of the Constitution.

[80] Our courts have repeatedly held that ‘the Director of Public Prosecutions should not allow prosecutions for trespass to be used as a means to procure a person’s eviction without compliance with the onerous but salutary provisions of the PIE Act’.⁴⁶ The court in *Koko* was alive to the fact that a conflict may arise between section 2(2) of the Trespass Act and the provisions of section 4(1) in PIE.⁴⁷ However, a conflict could only arise in cases where a court chose to exercise its discretion in terms of section 2(2) and order ejectment.⁴⁸ As stated above, such a discretion would have to be judiciously exercised.

[81] The upshot of all of this is that there is no immediate conflict between the Trespass Act and PIE which requires this Court to grant any declaratory or other relevant relief. Accordingly the applicants challenge to the Trespass Act, absent a direct constitutional attack, must fail.

The review and setting aside of the charges against Mr Malema

[82] The applicants argued that, notwithstanding the success or failure of their arguments against the RA Act and the Trespass Act, the charge against Mr Malema must be set aside for two reasons.

⁴⁶ *S v Koko* [2005] JOL 14870 (C) at 24; *Du Plessis v S* [2016] ZAWCHC 68 at 18. See also *Samuels v S* [2016] ZAWCHC 33 at 25

⁴⁷ The provisions in section 4(1) of PIE are those that guard against summary ejectment and which provide the constitutionally mandated procedure for eviction

⁴⁸ *Koko* supra note 46 at 10

[83] The first is that Mr Malema has a constitutional right to be informed of the charge against him with sufficient detail with which to answer it.⁴⁹ The argument is that if section 18(2)(b) of the RA Act is declared unconstitutional and is read to require the incitement of only 'imminent violence' then the current charge is deficient. This is because there is no mention, let alone 'sufficient detail' of imminency or a crime of violence in the charge. This ground of review does not apply. This Court has not found that the RA Act is unconstitutional for criminalising the incitement of crimes. It is only unconstitutional in that the sentence it imposes on the incitee is the same as if they had in fact committed the crime.

[84] The second is that the charge against Mr Malema is unconstitutionally vague. This is because, according to the applicants, a charge of inciting trespass must contain all the statutory elements of trespass itself. This is incorrect. What is required is that the inciting words are not vague or equivocal.⁵⁰ The essential elements of trespass need not be listed because the state is not required to prove that the crime of trespass did in fact occur. Instead the state must prove the elements of the crime of incitement, as given above.

[85] There is a further fatal flaw to the applicants argument. If the charge against Mr Malema omits to state the essential elements of the offence, then the correct remedy would be to invoke section 87 of the Criminal Procedure Act⁵¹ (CPA) to request further and better particulars. Further, it is open to Mr Malema to object to the charge. Section 85 of the CPA governs the objection procedure before a criminal court. The section outlines a clear procedure for an objection and the grounds of objection, including:

'(a) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;

(b) that the charge does not set out an essential element of the relevant offence;

⁴⁹ Section 35(3)(a) of the Constitution.

⁵⁰ See paragraph [21] above and the case of *Nathie* supra note 12

⁵¹ 51 of 1977.

- (c) that the charge does not disclose an offence;
- (d) that the charge does not contain sufficient particulars of any matter alleged in the charge;⁵²

[86] The appropriate avenue then is for any objection to the charge against Mr Malema to be raised at trial. This Court is not required to decide this issue and has confined itself to answering the constitutional challenge to the RA Act and the correct interpretation of the Trespass Act.

Remedy

[87] An appropriate remedy must be granted as section 18(2) of the RA Act has been found, to a limited extent, to be constitutionally wanting.

[88] The remedy of severance is appropriate in this case, as section 18(2) is only inconsistent in part with the Constitution. Generally, the remedies of severance, notional severance and reading in are to be preferred rather than the striking down of legislation. This is less intrusive on the powers that are granted to the legislature.⁵³ The test for severance was laid down by the Constitutional Court some time ago in *Coetsee*. The test being:

‘if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?’ (footnotes omitted)⁵⁴

[89] The requirements for the test are satisfied in this case. It is indeed possible to sever the offending section. The part of section 18(2) which reads:

⁵² Section 85(1) of the CPA.

⁵³ See *De Reuck* supra note 34 at 86.

⁵⁴ *Coetsee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (10) BCLR 1382 at 16.

‘and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.’

can be removed without problem. The section offends for the very reason that it is not rationally connected to the purpose of the Act. The result is that the legislative scheme remains intact but the issue of unconstitutionality is avoided.

Costs

[90] In case number 87638/2016 the applicants have been, in part, successful. The question then is whether an adverse costs order should be made against the respondents? We think not. As each party has been partly unsuccessful, each party should pay their own costs.⁵⁵

[91] In case number 4566/2017 the applicants have been unsuccessful. The question then is whether the *Biowatch* principle, that an unsuccessful constitutional litigant should not be mulcted with an adverse costs order, should apply.⁵⁶ We think it does.

[92] It cannot be said that the applicants are not ‘constitutional litigants’ in line with what was stated in *Biowatch*. The applicants have not asked for declaratory relief absent any meaningful constitutional dimension. The relief they seek is directed at a determination of the constitutional interpretation to be given to the Trespass Act in light of PIE and ESTA, which are both pieces of legislation that give effect to the right to property enshrined in section 26 of the Constitution. Various constitutional rights are at play and the matter has a clear constitutional dimension.

[93] That the applicants have failed to show that any conflict exists between the Trespass Act and our post-Constitution eviction legislation does not mean they should be mulcted with costs. The applicants have not acted in a vexatious or frivolous

⁵⁵ *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (2) SA 621 (CC) at para 3.

⁵⁶ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)

manner in bringing this application and therefore are entitled to be immunised from an adverse costs order.⁵⁷

Conclusion

[94] Section 18(2) of the RA Act is invalid to the extent that it allows for those that incite crimes to be liable to the punishment as if they had in fact committed such a crime.

Order

[95] We therefore make the following order:

Under case number 87638/2016:

- 1) Prayer 1 in the notice of motion, requesting that section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 be declared unconstitutional in its entirety, is dismissed.
- 2) In terms of section 172(1)(a) of the Constitution, section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 is declared unconstitutional and invalid to the limited extent dealing with sentence, in that a person convicted under the section is:

'liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

- 3) The declaration is referred to the Constitutional Court in terms of section 172(2)(a) of the Constitution for confirmation.
- 4) Prayers 2 and 3 in the notice of motion are dismissed.
- 5) The parties are ordered to pay their own costs.

⁵⁷ Id at para 24

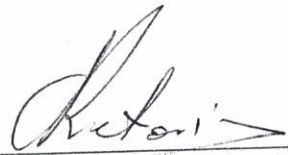
Under case number 4566/2017:

- 1) The application is dismissed
- 2) The parties are ordered to pay their own costs.



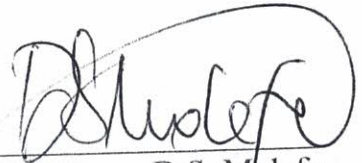
A.P. Ledwaba
Deputy Judge President of the High Court Pretoria

I agree.



C. Pretorius
Judge of the High Court Pretoria

I agree.



D.S. Molefe
Judge of the High Court Pretoria

APPEARANCES:

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