



IN THE EQUALITY COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 90405/18

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
24/10/2019	
DATE	D Sholefe
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SOUTH AFRICAN NATIONAL EDITORS' FORUM

NAVARANJENI MUNUSAMY

PAULI VAN WYK

ADRIAAN JERGENS BASSON

MAX DU PREEZ

BARRY BATEMAN

First Complainant

Second Complainant

Third Complainant

Fourth Complainant

Fifth Complainant

Sixth Complainant

and

THE ECONOMIC FREEDOM FIGHTERS

JULIUS SELLO MALEMA

MEDIA MONITORING AFRICA

First Respondent

Second Respondent

Amicus Curiae

JUDGMENT

MOLEFE J

Summary: *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act)* – Section 10 – Hate Speech – Section 16 of the Constitution of South Africa – violation of freedom of expression and freedom of the press and other media – Occupation of journalism not an analogous ground – Unpopular, offensive or controversial views do not necessarily constitute hate speech – Section 11 – Harassment of journalists on public platforms.

[1] This is a complaint which has been referred to the Equality Court in terms of the *Promotion of Equality and Prevention of Unfair Discrimination*¹ ('Equality Act'), in which the complainants pray for a ruling ordering the following relief:

1.1 Interdicting the respondents from intimidating, harassing, threatening or assaulting the second to sixth complainants and any other journalist;

1.2 Interdicting the respondents from publishing personal information of the second to sixth complainants or any other journalist, whether on public platforms or on social media or by other means;

1.3 Interdicting the respondents from expressly or tacitly endorsing the intimidation, harassment, threats or assaults on the second to sixth complainants or any other journalist by supporters or followers of the first respondent, whether on public platforms or on social media or by other means;

1.4 Interdicting the respondents from expressing or tacitly endorsing the publication of personal information of the second to sixth complainants or of any other journalist, by supporters or followers of the first respondent, whether on public platforms or on social media or by other means;

1.5 Directing the respondents to publicly denounce the harassment and abuse of the second to sixth complainants and other journalists and to call upon members and supporters of the first respondent to cease intimidating, harassing, threatening and/or assaulting any journalist, or publishing the personal information of any journalist;

¹ Act 4 of 2000.

1.6 Directing the respondents to publish an apology to the complainants in particular, and to journalists in general, for the threatening statements that have been made, coupled with a recognition by the respondents of the constitutionally protected role played by journalists in our society;

1.7 Directing the respondents, jointly and severally, to pay the costs of this matter, on an attorney and client scale, including the costs of two counsel.

[2] The particulars of the six complainants are as follows:

2.1 The first complainant is the South African National Editors' Forum ('SANEF'), a non-profit organization, registered in terms of the laws of the Republic of South Africa, with its primary place of business at Block A, 18 Cedar Avenue, Richmond, Johannesburg. SANEF consists of editors and senior journalists from all areas of the South African media. The organization advocates for the protection and promotion of ethical journalism and media freedom in South Africa.

2.2 The second complainant is Navaranjeni Munusamy, an adult female associate editor, employed as such by the Tiso Blackstar Group at Hill on Empire, 16 Empire Road, Parktown, Johannesburg.

2.3 The third complainant is Pauli van Wyk, an adult female journalist, employed as such by the Daily Maverick at Two Pence Six Building, 39 7th Street, Linden, Johannesburg.

2.4 The fourth complainant is Adriaan Basson, an adult editor-in-chief, employed as such by News 24, at Media 24 Centre, 40 Heerengracht Avenue, Cape Town. He is also the treasurer of the first complainant.

2.5 The fifth complainant is Max Du Preez, an adult male journalist and columnist, carrying on business at Media 24 Centre, 40 Heerengracht Avenue, Cape Town.

2.6 The sixth complainant is Barry Bateman, an adult male senior reporter, employed as such by Eyewitness News at Primedia House, 5 Gwen Lane, corner Fredman Drive, Sandown.

[3] The first respondent is the Economic Freedom Fighters ('EFF'), a political party registered in terms of section 15 of the *Electoral Commission Act*², with its principal place of business at 78 Korte street, Braamfontein, Johannesburg.

[4] The second respondent is Julius Malema, an adult male and president of the first respondent, employed as such at 78 De Korte Street, Braamfontein, Johannesburg.

[5] Media Monitoring Africa ("MMA") sought leave to intervene in the proceedings as *amicus curiae* and had sought consent of the parties to intervene. Written consent has been provided by both the complainants and the respondents. Leave to intervene was granted and the MMA has been admitted as *amicus curiae* in these proceedings.

Introduction and Background

[6] The complainants have joined together to seek a remedy from this court that will protect them and other journalists from the abuse and harassment they allege to have endured, by virtue of their work as journalists, a result of the conduct of the EFF and its leader Mr Malema. The statements objected to, formed part of a speech made by Mr Malema outside the Zondo Commission of Inquiry into State Capture ('Zondo Commission') on 20 November 2018 in Parktown, Johannesburg as well as a number of statements that the respondents have made against the journalists, generally.

[7] Mr Malema said the following outside the Zondo Commission:

"Let us attack fighters, let us occupy every street, every house, every space in society. Let us not leave the enemy to chance. Where we meet the enemy, we must crush the enemy. On Facebook, Twitter, social media, be there, guard the revolution. When the enemy raises its ugly head, cut the head. No time to entertain enemies of the revolution. We must protect the revolution at all costs".

² Act 51 of 1996.

[8] Mr Malema is alleged to have singled out journalists when he said the following:

"Peter Bruce, Max Du Preez, there is Ferial Haffajee, there is Ranjeni Munusamy, there is another one from Cape Town called Palesa Moduru, there's another called, this one that was the CEO of the Gender Commission, Nomboniso Gasas, and the husband, and that Pierre De Vos – that's the Ramaphosa defence force. . . you must write them down, everywhere you see their names, attend to them decisively".

[9] Counsel for the complainants submitted that these statements amount to hate speech and a call for violence. Counsel argued that Mr Malema then sought to wash his hands of the consequences of his hate speech by making the following statement:

"These people I'm mentioning by and them by name, you must engage with them from a civilized point of view. You must never be violent with them. Violence is for the empty heads. In the EFF we thrive through superior logic. Some of them are women. You must be extremely gentle with them. And don't use their gender status to attack them. Engage with them from an intellectual point of view. Display discipline and intellectual superiority when engaging with them.

And don't kill them. . .

I've got many of them on my Twitter on my phone and here. I talk to them all the time but I disagree with them. I don't have to declare them enemies. I don't have to kill them. I want them to live long, to see the success of the EFF. All we are asking from the media – be honest"³.

[10] After Mr Malema's speech (mentioned in paragraph [9] above), the EFF then posted certain parts of the speech on Twitter at different times.

[11] The complainants submit that the conduct of the respondents constitutes hate speech, within the meaning of section 10 of the *Equality Act*, and also constitutes an unjustified violation of section 16 of the Constitution⁴ which protects freedom of expression and of the press and other media.

[12] The complainants have made additional averments in respect of other matters that allegedly form part of the factual matrix of this complaint. The complainants

³ Founding affidavit, pages 15 and 16, paras 15 -18, Annexure mm 2.2 – mm 2.4 pp 30-32.

⁴ The Constitution of the Republic of South Africa, 1996.

detailed the alleged threats, intimidation, hate speech and harassment that came from supporters of the respondents in the wake of the respondents' statements and tweets.

Legal Framework

[13] Section 16 of the Constitution guarantees freedom of expression in the following terms:

- “(1) Everyone has 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 and freedom of scientific research
- (2) The right in subsection (1) does not extend to –
 - (a) propaganda and 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”.

[14] Section 16(2) of the Constitution provides for some types of speech that are not protected: propaganda and war, incitement of imminent violence and hate speech. Whenever government regulation goes beyond those narrow section 16(2) categories of unprotected speech, then section 16(1) is infringed. Where freedom of expression is in issue, the departure point is whether the particular form of speech is excluded by section 16(2). If not, it is then protected by section 16(1).

The Equality Act

[15] The Equality Court was promulgated by Parliament in order to purportedly give greater effect to section 9 of the Constitution.⁵

[16] Section 10(1) provides that:

- “(1) 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;

⁵ Section 9 of the Constitution guarantees the right to equality.

- (b) be harmful or to incite harm;
- (c) promote or propagate hatred".

[17] The prohibited grounds referred to in section 10, include:

- "(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
- (b) any other ground where discrimination based on that other ground –
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)".

[18] Section 10 must however, be read with section 12 which provides that:

"(12) No person may –

- (a) disseminate or broadcast any information;
- (b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: 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".

[19] It is immediately apparent that section 10 of the *Equality Act* is broader in scope than section 9 of the Constitution⁶. This discrepancy has recently received significant judicial attention. In *Masuku and Another v South African Human Rights Commission*⁷, the Supreme Court of Appeal ('SCA') held as follows:

"[14]. . . There is cause for concern that the provisions of s10 of the Equality Act have the effect of condemning speech that is protected under s 16(1) of the Constitution. In their book 'The South African Constitutional Law: The Bill of Rights', the writers Cheadle, Davis & Haysom examine the provisions of s10 of the Equality Act. They suggest that the formulation of s 10 of the Equality Act is 'a most unfortunate convoluted formulation' and it may well constitute an unjustified limitation of the freedom of expression in the context of a constitutional order 'committed to robust deliberation' for these reasons:

⁶ Section 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

⁷ 2019 (2) SA 194 (SCA) at para [14].

"It extends the prohibited grounds contained in s16(2) of the Constitution in that the latter provision refers to race, ethnicity, gender or religion only, and uncouples hurt and harm from incitement to cause harm. While the extension of the prohibited grounds can doubtless be justified in terms of the limitation clause as contained in section 36, particularly in the context of the prohibited grounds contained in section 9(3), the wider formulation adopted in section 10(1) will also have to be saved in terms of section 36. The combination of an extension of the prohibited grounds beyond those contained in section 16(2) and the dispensing with the requirement of causation creates the potential for challenge'.

The contention that a more extensive definition of hate speech can be justified under s 36 is at the least debatable as s 16(2) provides an internal limitation clause".

[20] The main issue to be determined is whether the complaint brought against the respondents in terms of the *Equality Act* can be sustained as hate speech. The respondents, in addition to submitting that the court cannot uphold the complaint on the basis of hate speech, raised the following legal defences:

- 20.1 the complainants' lack of *locus standi*;
- 20.2 SANEF's *locus standi*;
- 20.3 the jurisdiction of the Equality Court; and
- 20.4 the striking out of the factual allegations in the complainants' affidavits.

***Locus standi* of the complainants**

[21] The complainants brought a founding affidavit deposed to by the chairperson of SANEF, Ms Mahlatse Mahlatse which forms the basis of the application. Attached to the founding affidavit are several supporting affidavits by the second to the sixth complainants. The respondents argue that the complainants' supporting affidavits have, gone over and above the allegations made, by introducing further evidence, which they argue, is highly irregular. The respondents base this defence on the contention that SANEF is the only complainant before this court, and that the evidence of the remaining complainants is relevant only to the extent that it supports SANEF's evidence.

[22] The complainants' counsel contends that each complainant's affidavit contains evidence about how they were affected by the hate speech and harassment directed at them, as a result of the statements and tweets made by the respondents.

Counsel argues that read together, the complainants' affidavits establish a clear picture of an environment enabled by the respondents, in which their supporters are spurred to threaten, intimidate, harass and abuse journalists in the name of EFF.

[23] It was therefore submitted that the individual supporting affidavits are relevant in their entirety to the complaint that has been referred to this court, and that all six complainants have *locus standi* to join together and institute this complaint in terms of sections 20(1)(a) and (c) of the *Equality Act*, that each of the complainants seek identical relief from this court, and also associate themselves with the complaint as articulated by the first complainant.

[24] Counsel for the respondents argued that even if the complaints are before the court in their own right, then the supporting affidavits fall to be struck-out from the record because they do not meet the relevant threshold required for relief sought in terms of the *Equality Act*. This argument will be dealt with in the striking-out application.

[25] The second to sixth complainants emphatically state that each of them has authorised Ms Mahlatse to represent them and to bring this application. Each complainant, in his/her personal capacity seeks the relief sought in the notice of motion. In my view, there is no merit in the *point in limine* relating to their lack of *locus standi*.

Locus Standi of SANEF

[26] The respondents submitted that SANEF has failed to establish the requisite *locus standi* to bring this application, as a direct result of their failure to prove appropriate authority in these proceedings. It is argued that although SANEF purports to bring this application in the interests of protecting journalists and media freedom in South Africa⁸, it has failed to identify its members in the founding papers or undertaken to identify same to the court when it is a membership based organization.

⁸ Founding Affidavit, page 11, para 3.2.

[27] In the founding affidavit, Ms Mahlatse says:

"I have been authorized to institute these proceedings and to depose to this affidavit on behalf of SANEF by resolution of its management committee"⁹.

[28] The respondents' counsel argued that, having regard to SANEF's constitution¹⁰, it is clear that the management committee is not entitled to authorise these legal proceedings. While accepting that SANEF can sue and be sued in its own name (according to section 3 of its constitution), the respondents deny that the power to institute or defend such proceedings, vests with the management committee on the following grounds:

28.1 Clause 7.15 only designates the management committee as having a general responsibility for 'policy and administration'. The clause does not enumerate the management committee's power to institute or defend legal proceedings;

28.2 The Editors' Council may be capable of delegating certain powers (in respect of legal proceedings) to the management committee in terms of clause 7.9, however, and notwithstanding that there is no proof of same, it is notable that the Editors' Council is itself not clothed with the authority to bring or defend legal proceedings brought by or against SANEF. None of the powers listed in clause 7, generally, as they pertain to the Editors' Council, include any powers regarding SANEF's ability to participate in legal proceedings. Evidently, the Editors' Council cannot delegate a power that it does not have to the management committee.

28.3 The Forum is the highest decision-making body of SANEF, as it appears from the section of the constitution in respect of its structure, to the extent that it is contended that the Forum, in a plenary session of its members, may authorize such legal proceedings.

⁹ Founding Affidavit, page 11, para 3.3.1.

¹⁰ Bundle page 485 annexure MM1.

[29] Counsel for the respondents, argued that on this basis, the court should refuse to hear this application, as the authority that SANEF purports to have to bring these proceedings is incompetent in law.

[30] The complainants' counsel submitted that management committee is the body that is required to deal with the day-to-day administration and the implementation of SANEF policies. Counsel argued that SANEF was therefore properly authorized by the management committee to institute these proceedings, and if there was any defect in the authorisation, it was ratified by the council at the meeting held on 9 February 2019. Counsel relied on the minutes of the meeting which were recorded as follows:

"The decision to explore legal action against the EFF that was taken at our last council meeting in November 2018, was taken forward by MANCOM. The case is now proceeding in the equality court and a judge has been allocated".

[31] In my view, the challenge to SANEF's authority is simply not correct and I am satisfied that SANEF has the requisite *locus standi* to bring this application, and that SANEF and its deponent Ms Mahlatse have been duly authorized to bring this application.

The jurisdiction of the Equality Court

[32] The complainants submitted that the respondents have published, propagated, advocated and communicated words that could reasonably be construed to demonstrate a clear intention to be hurtful or harmful to, or to incite harm or promote hatred at each of the individual complainants, and journalists generally. These words and statements, appear in speeches and tweets published by the respondents, all of which are referred to in the complainants' affidavits and in the complainants' heads of argument.

[33] The complainants referred to the examples of these statements and tweets which include the following:

33.1 Statement made by Mr Malema on 5 July 2018:¹¹

¹¹ Supporting affidavit, Munusamy, pages 75-76, para 15.

"Journalists, once they take side, are politicians. They must be treated as politicians. The same way we treat Malusi Gigaba, the same way we treat [Fikile] Mbalula, the same way we treat Zizi Kodwa, is the same way we will treat journalist who descend into the arena.

Ranjeni [Munusamy] is a politician. All EFF people must know that in dealing with Ranjeni you are dealing with a politician. She is a politician that has proposed to other politicians Pravin Gordhan must be made president. Only a politician can make that suggestion and she will be treated as such, she is a politician".

*33.2 Tweet posted by EFF on 20 November 2018 at 4:45 pm:*¹²

"#Pravin MustFall Malema: Everywhere you see their names you must attend to them decisively. They are no different to Bell Pottinger who was hired as a machine for the Guptas and Jacob Zuma".

*33.3 Tweet posted by Mr Malema on 20 November in response to tweet from Ms Haffajee:*¹³

Ms Haffajee tweets: "Malema says this in a speech and then EFF media turns it into a tweet which goes viral. We get attacked by EFF trolling army. It happens every day. Once marked like this it's open season by the digital army @ RanjeniM is threatened and attacked every day. This must end".

Mr Malema tweets: "It won't end, you are Ramaphosa Defence force. Just start acting professional it will end automatically".

*33.4 Tweet posted by Mr Malema on 24 November 2018 in response to tweet from Ms van Wyk:*¹⁴

Ms van Wyk tweets: "#Julius Malema has to take responsibility for violence meted out to journalists. He is stoking the flames of a campaign against journalists whose work he disputes. . . And ultimately endanger the lives of journalists".

Mr Malema tweets: "You are sick, go to hell satan".

*33.5 Tweets posted by Dr Ndlozi and Ms Mkhalihi on 30 November 2018:*¹⁵

Dr Ndozi (EFF spokesperson) tweets; "Fighters don't be surprised when @ Vodacom gathers journalists to strategies on how to deal with EFF. It just means our fight is right where it belongs, in the belly of the beast:#White MonopolyCapitalism. We would not be doing well if they were not all uniting against us#Asijiki".

Ms Mkhalihi (EFF Deputy Secretary General) tweets: "Vodacom have declared war against EFF. . . let's go. Let's see who will win this war . . . Fighters Lets goooo".

*33.6 Retweet posted by Mr Malema on 3 December 2018:*¹⁶

¹² Founding affidavit, Mahlase, page 31, annexure 'MM 2.3'.

¹³ Founding affidavit, Mahlase, page 31, annexure 'MM 2.3'.

¹⁴ Founding affidavit, Mahlase, page 62, annexure 'MM 18'.

¹⁵ Supporting affidavit, van Wyk, page 118, para 12.1; page 140, annexure 'PW5'.

"A list of Stratcom journalists home addresses would be a good Christmas present".

33.7 *Tweet posted by Mr Malema in December 2018 in response to tweet from Mr Basson*.¹⁷

TshekoTsk (EFF supporter) tweets: "But for the first time I agree with him, we must slaughter these white animals if they kill black Africans, actually we must come up with action to kill white people like you @ Adriaan Basson".

Mr Basson tweets: "Just opened a criminal case of intimidation against EFF supporter@ TskTsheko for threatening to kill me @SA Police Service very professional & I will assist them in tracking down suspect. No condemnation yet from EFF".

Mr Malema tweets; "We won't do it"

[34] The complainants in the founding affidavit¹⁸ contended that the conduct of the respondents constituted hate speech as defined in section 10 of the *Equality Act* and violated section 16 of the Constitution. In their replying affidavit¹⁹, the complainants state that the conduct of the respondents breaches sections 10 and 11 of the *Equality Act*.

[35] The respondents submit that the complainants have failed to establish neither the hate speech claim nor the harassment claim and in this regard, counsel for the respondents relied on the *South African Human Rights Commission v Khumalo*²⁰ where Sutherland, J held that section 10 of the *Equality Act* must be read conjunctively with section 16 of the Constitution²¹.

[36] Importantly, Sutherland J held that the test for hate speech then is "*whether the utterances could be reasonably construed to demonstrate a clear intention to incite harm*"²². In other words, even if the prohibited utterances in question could qualify as hate speech on its terms but fail to incite, or reasonably construed as inciting harm, no liability could arise in respect of section 10.

¹⁶ Supporting affidavit, Bateman, page 233-234, para 21-22, page 247, annexures 'BB 13' and 'BB 14'.

¹⁷ Supporting affidavit, Basson, page 174, para 19; annexure "AB25"; Replying affidavit, Basson pages 510-511, para 6.6-6.7; pages 513-514, annexure "AB1" and "AB2".

¹⁸ Founding affidavit, page 6, para 13.

¹⁹ Replying affidavit, page -, para 26.

²⁰ 2019 (1) SA 289 (GJ) at para 82.

²¹ Constitution of the Republic of South Africa, 1996.

²² *Khumalo supra* para 88.

[37] In identifying three different kinds of harm that arises from the kind of speech prohibited by section 10 of the *Equality Act*, the court emphasised that only if the utterer, uttered words which have the effect of inciting the causation of harm, then liability would arise in respect of section 10²³.

[38] The Supreme Court of Appeal's approach in *Masuku and Another v South African Human Rights Commission*²⁴ applied a restrictive interpretation to section 10 of the *Equality Act*:

"[31] In summary, the starting point of the enquiry in this case was that the Constitution in s16 (1) protects freedom of expression. The boundaries of that protection are delimited in s16 (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".

[39] Section 10 of the *Equality Act* is of limited application and only applies to the prohibited grounds. Prohibited grounds are defined in section 1 and includes, but is not limited to race, gender and disability. The definition of '*prohibited grounds*' creates the ability for a person claiming relief under section 10, to establish analogous grounds. The complainants, in their heads of argument²⁵, belatedly attempted to establish journalism or occupation as an analogous ground. This is notwithstanding that, SANEF has simply not pleaded any facts to demonstrate that the complainants suffer any discrimination based on any analogous grounds. The complainants overlooked the fact that the analogous grounds refer to an intrinsic or inalienable quality or characteristic for which a person may be discriminated against.

[40] Counsel for the complainants submitted that '*occupation*' constitutes a ground that fits comfortably into part (b) of the definition of '*prohibited grounds*'. Counsel

²³ *Khumalo supra* para 98.

²⁴ 2019 (2) SA 194 (SCA) at para 31.

²⁵ SANEF heads of argument, page 10, para 33.

argued that '*occupation*' in relation to journalists in particular, hate speech, harassment and abuse directed at them, perpetuates systematic disadvantage, undermine their human dignity and adversely affect the equal enjoyment of their rights and freedom in a serious manner that is comparable to discrimination on a ground in part (a) of '*prohibited grounds*', and that journalism as an occupation should have been a listed ground. In this regard counsel relied on *Minister of Home Affairs and Others v Watchenuka and Another*.²⁶

[41] I do not agree with this argument. The purpose of the *Equality Act* is clear: the Act seeks to protect people from being adversely disadvantaged for conditions that they are subjected to, but which fall outside their ability to change or control. Occupation is not such a characteristic²⁷. The complainants' reliance on *Watchenuka* is inappropriate. The case simply was not concerned with the *Equality Act* and did not establish occupation as a ground analogous to a ground of discrimination in terms of section 9 of the Constitution.

[42] Analogous grounds are personal characteristics that, like enumerated grounds, are "*immutable, difficult to change or changeable only at unacceptable personal costs*"²⁸. The Constitutional Court has explained the test for "*analogous grounds*" as follows:²⁹

"[19] I will now apply the above principles to the facts of this case. The disadvantaged group in this case is foreign citizens. Because citizenship is an unspecified ground, the first leg of the enquiry requires considering whether differentiation on that ground constitutes discrimination. This involves an inquiry as to whether, in the words of Harksen:

"... objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner".

I have no doubt that the ground of citizenship does. First, foreign citizens are a minority in all countries, and have little political muscle. In this respect, I associate myself with the views expressed by Wilson J in the Canadian Supreme Court in *Andrews v Law Society of British Columbia* that:

²⁶ 2004 (1) All SA 21 (SCA).

²⁷ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at para 43.

²⁸ Sec 15 of the Canadian Charter of Rights and Freedoms.

²⁹ *Larbi-Odam and Others v Member of the Executive Council for Education (North West Province) and Another* (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (CC).

"Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among those groups in society whose needs and wishes elected officials have no apparent interest in attending"(citation omitted).

Second, citizenship is a personal attribute which is difficult to change. In that regard, I would like to note the following views of La Forest J, from the same case:

"The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs".

[43] There are no personal attributes linked with being a journalist in the sense contemplated by *Larbi-Odam supra*. Journalism is a profession, and not a characteristic comparable to the grounds listed in section 10 of the *Equality Act*, and I have no doubt that it is not based on attributes which have the potential to impair the fundamental dignity as human beings or affect them adversely.

[44] In my view, journalism is not an inherent and immutable quality. It is a career choice for which an individual opts. Unlike race, sex or gender, a career choice cannot be what defines one's affiliation as per what is envisaged by the *Equality Act*, nor can it constitute a protectable interest. 'Press exceptionalism' i.e. the idea that journalists deserve special protections as a class of belonging to their chosen profession was rejected by Cameron, J (as he then was), who regarded that notion not only unconvincing, but dangerous as well³⁰.

[45] I have noted that the complainants' papers are riddled with instances where they express their complaints in respect of the statements made by the respondents, and how they consider them defamatory, derogatory and upsetting. None of the classes of speech listed in section 16(2) apply to these proceedings. Some of the statements are indeed hurtful, distasteful and offensive, but they are not excluded from protection. In my view, the objections as framed by the complainants, strictly speaking, falls outside the jurisdiction of the Equality Court.

³⁰ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

[46] Unpopular, offensive or even controversial views do not necessarily constitute hate speech, and caution needs to be exercised when declaring something as hate speech. If all distasteful or offensive statements are labelled as 'hate speech' (even when they do not qualify as such), then the serious nature and magnitude of such designation will be undermined. The complainants have simply failed to make out a case that the speech complained of is hate speech and have failed to establish a breach of section 10 of the *Equality Act*.

Section 11 of the Equality Court

[47] The complainants submitted that the harassment to which the complainants and other journalist have been subjected to by the respondents and their followers is prohibited by section 11 of the *Equality Act*.

[48] Harassment is limited in terms of its definition in section 1, as follows:

“ ‘harassment’ means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –

- (a) sex, gender or sexual orientation; or
- (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group”.

[49] The complainants argued that as evidenced by the respondents' statements and tweets, followed by their supporters' tweets, followed in turn by the respondents' express or tacit approval, the intention is to create a hostile and intimidating environment that discourages or stops the complainants in particular, and journalists in general, from reporting critically on the respondents. It is submitted that because of this hostile and intimidating environment, journalists have fears or reservations about reporting on the respondents.

[50] By way of example, counsel for the complainants referred the court to the following statements from the supporting affidavits:

50.1 Ms Munusamy states that following Mr Malema's address on 20 November 2018, the consistent attacks on her integrity and

professionalism are wearing her down and that she is “*finding it increasingly difficult to do my work*”³¹.

50.2 Ms van Wyk states that the aim of the comments or tweets were “*to shut me down and to stop me (and journalists like me) from writing articles that are critical of the EFF and its leaders*”³².

50.3 Mr Basson states that Mr Malema’s comments are likely to “*have a chilling effect on a younger generation of journalists, which in turn will fundamentally undermine the right to freedom of expression, including freedom of the press and other media*”³³.

[51] The complainants contend that the EFF was obliged to take all reasonable steps to ensure that journalists are not subjected to harassment by any of their representatives or supporters. In this regard, the complainants rely on *Brown v Economic Freedom Fighters*³⁴. I agree with the respondents’ counsel that the facts in *Brown* are distinguishable from this case. *Brown* was decided in respect of the Electoral Code of Conduct, which creates a positive obligation for political parties to take all reasonable steps to ensure that their members and supporters do not engage in any conduct that amounts to harassment of journalists. *Brown* is inapposite because, unlike the Electoral Code, the *Equality Act* does not create a means of vicarious liability for persons to be held liable for the conduct of third parties.

[52] In my view, vicarious liability, or a form thereof, does not apply *in casu*. The common law principles of vicarious liability are discussed in *K v Minister of Safety and Security*³⁵:

“[24] The general principles of vicarious liability holds an employer responsible for the wrongs committed by an employee during the course of employment. The Courts have held that as long as the employee is acting “within the course and scope of his or her duty” or is “engaged with the affairs of his master” that the employer will be liable. The principle of vicarious

³¹ Supporting affidavit, Munusamy, page 82, para 42.

³² Supporting affidavit, van Wyk, page 121, para 18.

³³ Supporting affidavit, Basson page 175, para 27.

³⁴ (14686/2019) [2019] ZAGPJHC 166; [2019] 3 All SA 499 (GJ).

³⁵ 2005 (6) SA 419 (CC) at para [24].

liability is not peculiar to our common law, but is also to be found in customary law rules. It is clear therefore, that there is a deep-seated sense of justice that is served by the notion that in certain circumstances, a person in authority will be held liable to a third party for injuries caused by a person falling under his or her authority".

[53] At common law level, vicarious liability only applies in circumstances where there is an employment relationship in place which necessitates an element of control. This is absent *in casu*. The complainants do not allege, nor can they allege that the tweets they object to belong to a person in respect of whom the EFF can exercise control. On the facts before the court, it is not clear whether those persons who tweeted are EFF members or supporters. There is no direct evidence presented to causally link the conduct of the third parties who tweeted, with the actions of the respondents.

[54] Counsel for the respondent contended that it would also be unjust to hold the respondents liable in circumstances where their supporters conduct themselves in a way that the respondents themselves have stated should not occur. In this regard, counsel relied on the Constitutional Court's decision in *SATAWU and Another v Garvas and Others*³⁶. In that case, the court was called upon to consider whether the extension of liability in terms of section 11 of the *Regulation of Gatherings Act, 205 of 1993*, to the organiser of a strike was permissible. In that case the extension of liability in terms of section 11(1) was limited by section 11(2). Notwithstanding that the legislature specifically chose to extend liability in this way, a factor which is not applicable in this case, the court ultimately found that the section withstood constitutional scrutiny on account of the fact that, having regard to the circumstances, the organiser of the strike could escape liability, where they failed to take reasonable steps to limit any consequent damage by third parties.

[55] In this current matter, the complainants' attempt to hold the respondents liable in the absence of such an express duty is, in my view, impermissible. Furthermore, the complainants' attempt to hold the respondents liable in this way, serves to impose strict liability in the absence of an express provision to that effect in the *Equality Act*.

³⁶ 2013 (1) SA 83 CC.

[56] The failure of the complainants to establish causation is more apparent when regard is had to the explanation advanced by the respondents in the answering affidavit in respect of social media, and why they cannot be held liable for the conduct of third parties unknown to them, who tweet in an offensive and potentially unlawful way³⁷. This remains unchallenged.

[57] In the premises, causation, as an essential element for liability is absent, and the application should fail. However, we are all aware that social media is a huge part of our lives. With the huge numbers of social media users, all types of users will undoubtedly be subjected to some form of social media trolling during their usage. Trolling is defined as creating discord on the Internet by starting quarrels or upsetting people by posting inflammatory or off topic messages in an on-line community.

[58] Social media has changed the way people communicate. The change specific to social media is the anonymity of its agents; those who write and comment often use nicknames and aliases. Anonymity leads to avoidance of responsibility. On application to the facts of this case, the anonymous third parties, ("trollers") cannot be said to have acted on behalf of the EFF. No established legal relationship exists between the anonymous third parties and the EFF that could attract liability to it.

[59] Applying the principles of vicarious liability to illustrate that no liability may arise is apposite in this case. The conduct of the anonymous third parties can never be attributed to the respondents where the conduct in question is in direct violation of Mr Malema's speech.

[60] There is no dispute that the Constitution recognises and specifically protects the freedom of the media. The importance of the media in our society has also been repeatedly re-affirmed by our courts in several landmark cases.

60.1 In *van Breda v Media 24 Ltd*³⁸ the court held:

³⁷ Answering affidavit page 280-282, para 59-63.

³⁸ 2017 (5) SA 553 (SCA) at para [10].

"[10] The right of the media to gather and broadcast information, footage and audio recordings flows from s 16 of the Constitution. The right to freedom of expression is one of a 'web of mutually supporting rights' that holds up the fabric of the constitutional order. The right is not limited to the right to speak, but also to receive information and ideas. The media hold a key position in society. They are not only protected by the right to freedom of expression, but are also the 'key facilitator and guarantor' of the right. The media's right of freedom of expression is thus not just (or even primarily) for the benefit of the media: it is for the benefit of the public".

60.2 In *Khumalo and Others v Holomisa*³⁹ Constitutional Court explained the role of the media:

"[22] The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate".

60.3 In *National Media Ltd and Others v Bogoshi*⁴⁰, the vital role of the media was stressed:

"[I]n a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognized. The success of our constitutional venture depends upon robust criticism of the exercise of power. . . It is for this very reason that the Constitution recognises the special importance and role of the media in nurturing and strengthening our democracy".

[61] The right to free expression protects the underlying values of free and frank debate, the promotion of openness, transparency and accountability and among others, freedom of information. Freedom of the media undeniably aids the quest for truth and allows citizens the necessary exposure to information required for meaningful social commentary. This is crucial to the pursuit of a participatory democracy where all citizens are active and involved, having access to information, and platforms to share their views.

³⁹ 2002 (5) SA 401 (SCA) at para [22].

⁴⁰ 1998 (4) SA 1196 (SCA) at p 1217 B-C.

[62] The media has sometimes come under scrutiny for its portrayal of events and people in circumstances where bias is shown towards certain people and/or versions of events. With the advent of greater connectivity in an age of technological advances, more media sources and greater access to those sources by more people than ever before, there is an equally heavy burden on the media to report in a manner which does not violate other people's rights.

Final Interdict

[63] The complainants seek a final interdict against the respondents and it was submitted, that to the extent that the relief sought falls outside the *Equality Act*, the complainants have in any event met the requirement for an interdict that can be granted by the High Court. The complainants' counsel submitted that in the event that this court hold that the complaint ought to have been referred to the High Court in terms of section 20(3) of the *Equality Act*, it would be convenient that I hear this matter sitting as the High Court, and to consider the interdict application. In this regard counsel relied on *Minister of Environmental Affairs and Tourism v George and Others*⁴¹:

"[19]... Given that the problem of concurrency will inevitably recur, the most productive and expeditious way of achieving efficiency would seem to lie in the matter being referred to the same High Court Judge who, in his capacity as an Equality Court Judge is presiding in that Court".

[64] The respondents' response to this submission is that I should not detain myself with examining whether the requirements of an interdict have been met. Counsel for the respondents contended that the complainants have failed to establish a breach of section 10 of the *Equality Act*, and are therefore not entitled to a common law interdict from this court. The failure to establish such breach shows an absence of a right. I agree with this submission.

[65] It is trite in our law that where a right has not been established, the court need not entertain the matter further. The complainant's attempts to establish the right in respect of generic relief, so as not to be harassed and intimidated, is inappropriate for the exercise of this court's statutory limited discretion. In my view, the

⁴¹ 2007 (3) SA 62 (SCA) at para 19.

complainants have failed to make out an appropriate case for interdictory relief on the papers before me. The kind of prohibitory and never-ending interdict that the applicants seek has already been rejected as an unjustifiable infringement on free speech.

Strike Out Application

[66] The respondents' answer to the factual allegations in the complainants' affidavits is to seek their striking out on the basis that they are irrelevant, or constitute hearsay or that the respondents have no knowledge of the facts alleged and therefore cannot dispute same. The strike-out application is based on the premise that it is incompetent to establish a cause of action (or several causes of action) on anything other than the founding affidavit. It is for this reason that the application to strike out the supporting affidavits (including annexures) was brought.

[67] Rule 6(15)⁴² provides for the striking out of any matter contained in an affidavit in application proceedings, which is scandalous, vexatious or irrelevant. A court will not grant an application to strike out, unless it is satisfied that the party seeking relief will be prejudiced in the conduct of the claim or defence, if the application is not granted.

[68] In *Vaatz v Law Society of Namibia*⁴³ it was held:

"The phrase 'prejudice to the applicant's case' clearly does not mean that if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party's allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party."

[69] The respondents do not dispute that there are six complainants before court, but what they dispute is, the contents of the supporting affidavits to the extent that they go beyond what is alleged in the founding affidavit deposed to by Ms Mahlatse.

⁴² Uniform Rules of Court.

⁴³ 1991 (3) SA 563 at 566-567.

It is argued that the supporting affidavits have gone over and above the allegations made by introducing further evidence, which is highly irregular.

[70] These supporting affidavits are briefly discussed below.

[71] *Ms Munusamy's affidavit*

71.1 Ms Munusamy stated in her supporting affidavit that she is one of the journalists that Mr Malema singled out in his address to EFF supporters on 20 November 2018 at the Commission of Inquiry. She even broke down in the presence of her colleagues. As a result, she has been singled out for attacks by EFF supporters who have taken it upon themselves to threaten and harass her⁴⁴. She has been referred to as part of an 'Indian mob', 'cabal of kulikies', a 'curry chakalaka woman' and a 'devil'⁴⁵.

71.2 Shortly after Mr Malema had singled her out as being part of the 'Ramaphosa defence force', she was accosted by three men while visiting a shopping Centre on 23 November 2018. As a consequence, she has relocated to a new neighbourhood because she felt unsafe⁴⁶.

71.3 Ms Munusamy states that she suffered online harassment that has affected her well-being and her ability to function as a journalist. She did not attend to EFF media events during the elections and refrained from contacting EFF leaders for comments⁴⁷. She has also been forced to block Mr Malema on twitter to protect herself from harassment and intimidation⁴⁸.

[72] It is noteworthy that on Ms Munusamy's own version, she sent a text message to Mr Malema, thanking him in respect of the speech complained of, specifically in respect of Mr Malema's message to his supporters not to resort to violence. The respondents' counsel argued that paragraphs [6] – [8] and [10] – [14] in Ms

⁴⁴ Supporting affidavit, Munusamy page 80, para 32-34.

⁴⁵ Supporting affidavit, Munusamy page 74, para 12, 13, 15.

⁴⁶ Replying affidavit, Munusamy pages 501-502, para 6.3.

⁴⁷ Replying affidavit, Munusamy pages 501-502, para 6.3.

⁴⁸ Supporting affidavit, Munusamy page 77, para 31.

Munusamy's affidavit goes beyond what was alleged in the founding affidavit, and pertain to comments made by neither of the respondents and ought to fall away.

[73] Counsel contends that Ms Munusamy could have obtained confirmatory affidavits to confirm her allegations, which she failed to do. It is therefore near impossible for the respondents to rebut the allegations made by Ms Munusamy, given the fact that, not only is such knowledge hearsay and unique to her, but the details are vague and scant, and the respondents are severely hampered in being able to respond thereto.

[74] It was further argued that it was only in reply that Ms Munusamy alleges to have moved to a different neighbourhood for her personal safety. This is impermissible, it being trite in our law that a party is not permitted to make a case out in reply. Counsel contended that this alone justifies that the affidavits of Ms Munusamy be struck out.

[75] The respondents further argued that regarding the incident she experienced at a shopping mall, there is no indication in her affidavit as to why she considered the persons who allegedly accosted her, to be affiliated with the respondents or their treatment of her to be directly attributable to Mr Malema's speech. The respondents are therefore again prejudiced as they are unable to put up an alternate version in rebuttal.

[76] *Ms van Wyk's affidavit*

76.1 Ms van Wyk stated in her supporting affidavit that she became the subject of attack and harassment by the EFF and its supporters as a result of articles that she published in the Daily Maverick on 11 October 2018, 21 November 2018 and 9 December 2018, respectively, alleging that Mr Floyd Shivambu and the EFF indirectly benefitted from monies flowing from the VBS bank⁴⁹. Thereafter, when she told Mr Malema in a tweet that he was endangering the lives of journalists, Mr Malema's response was to call her 'satan'. EFF supporters then made misogynistic tweets and online sexual

⁴⁹ Supporting affidavit, van Wyk pages 116-117, para 6.

innuendos against her and referred to her as 'satan', having taken their cue from Mr Malema⁵⁰.

76.2 Ms van Wyk states that she fears for her safety and has been warned by various security specialists not to take the threats against her lightly. Her sources have told her that she may be in physical danger, and her editor had offered to assign bodyguards to her⁵¹.

[77] The respondents' counsel argued that Ms van Wyk included various allegations in both her supporting and replying affidavits which are not relevant to the main application. These allegations mostly pertain to her investigations regarding the VBS bank report are not relevant to either of the respondents nor the merits of the application, and ought to be struck out. Furthermore, Ms van Wyk's comments in paragraphs [12.2] – [16] and [18] of her affidavit are not authorised by the respondents.

[78] It was further argued that Ms van Wyk alleged to have been warned by security specialists as to the threats made to her, and that these threats were not made by the respondents. There is, however, no further evidence supplied by Ms van Wyk to confirm the veracity of her statements. The remaining allegations in paragraphs [19] and [20] of her affidavit constitute hearsay evidence, and ought to be struck out.

[79] *M Basson's affidavit*

79.1 Mr Basson stated in his founding affidavit that after the press conference on 5 July 2018, where Mr Malema accused journalists of being 'politicians', he has been the subject of hate speech that has led to a barrage of abuse and intimidation by EFF supporters⁵². During a press conference on 16 October 2018, Mr Malema referred to him as being part of the 1652 mob. This has resulted in a barrage of online threatening, abusive and harmful

⁵⁰ Supporting affidavit, van Wyk, pages 148-155; 'PW13-PW20' pages 143-146.

⁵¹ Supporting affidavit, van Wyk, page 122, para 20.

⁵² Supporting affidavit, Basson, page 170, para 7-8.

insults by EFF supporters. Mr Malema had called him a “*racist thing*” on twitter. One of the EFF supporters posted that Mr Basson should be killed⁵³.

79.2 Mr Basson states that he was “*deeply offended by Mr Malema’s defamatory statement*” and considers the attacks dehumanising and as an affront to his dignity.

[80] The respondents argued that the fact that Mr Basson states that he was offended and defamed is clearly a defamation allegation. Insofar as Mr Basson refers to insults directed at him as stated in paragraphs [17] – [21] of his supporting affidavit, and paragraphs [6.1], [6.6] and [6.7] of the replying affidavit, these were uttered by anonymous twitter users and not by respondents.

[81] *Mr Du Preez’s affidavit*

81.1 Mr Du Preez states in his supporting affidavit that he was one of the journalists singled out by Mr Malema at a rally on 20 November 2018⁵⁴. As a result, he was attacked by EFF supporters when he attended the Zondo Commission hearings on 21 November 2018. He has also been subjected to extreme harassment on twitter by EFF supporters and had been called *inter alia* ‘white racist’, ‘a stratcom agent’, and been told that he could be dead⁵⁵.

81.2 Mr Du Preez states that strangers, presumably EFF supporters, have approached him in public places and warned him to refrain from criticising the EFF and its leadership⁵⁶.

[82] The respondent’s counsel submitted that Mr Du Preez’s supporting and replying affidavits do not contain a single relevant allegation to the respondents, as all the complaints pertain to anonymous individuals in circumstances where even Mr Du Preez fails to establish that they are affiliated with the respondents. He also makes remarks pertaining to the Vodacom incident, which incident does not form part of the subject matter of this application, and is therefore entirely irrelevant.

⁵³ Supporting affidavit, Basson, page 203 annexure “AB25”.

⁵⁴ Supporting affidavit, Du Preez, pages 206-207, para 10-11.

⁵⁵ Supporting affidavit, Du Preez, page 208, para 14.

⁵⁶ Supporting affidavit, Du Preez, page 209, para 19.

[83] *Mr Bateman's affidavit*

83.1 Mr Bateman states that during December 2018, he reported on the alleged relationship between Mr Malema and Mr Mazotti, an alleged tobacco smuggler. Afterwards, he and his family have been subjected to a series of twitter threats by EFF supporters, even threatening to visit him at his house⁵⁷.

83.2 Mr Bateman states that he fears for his safety given the response by the EFF supporters, who violently attacked and vandalised Vodacom premises in response to a tweet by the EFF's deputy secretary-general that Vodacom had declared war against the EFF⁵⁸.

[84] Counsel for the respondents submitted that paragraphs [11] - [14], [17], [21] - [24], [26] and [28]⁵⁹ in Mr Bateman's founding affidavit, pertain to tweets made by anonymous twitter users and cannot be attributed to the respondents. In addition, Mr Bateman makes extensive reference to the Vodacom incident, which is not related to the complaint raised in respect of this application. These paragraphs are irrelevant and should be struck out.

[85] Insofar as the various annexures are concerned the respondents argue that they consist primarily of inadmissible evidence pertaining to tweets sent to the complainants by anonymous third parties⁶⁰. The respondents concede that the contents of some of the tweets are admittedly abhorrent, but even though that might be the case, they argue that it would not be just to attribute the actions of independent twitter users to that of the respondents. The respondents have distanced themselves from the tweets by the unknown sources.

⁵⁷ Supporting affidavit, Bateman page 240, annexure 'BB3'.

⁵⁸ Supporting affidavit, Bateman pages 234-235, para 22-27.

⁵⁹ Supporting affidavit, Bateman pages 231-235.

⁶⁰ Annexures "RM5-RM10", pages 90-95; Annexures "PW5-PW32"; pages 140-167, Annexures "AB4-AB25", pages 182-203; Annexures "MD1-MD10, pages 211-221; Annexures "BB3-BB9" pages 240-246; "BB11-BB12" page 248-249.

[86] Counsel for the complainants opposed the application to strike out, and submitted that the evidence sought to be struck out is indeed relevant to the complaint that is before this court. I do not agree with this submission.

[87] In his heads of argument, the complainants' counsel submitted that the Equality Court is not empowered to entertain a strike out application on the basis of the provisions of section 4(1) of the *Equality Act*. Section 4(1) directs that the principles that should apply in the adjudication of any proceedings include the 'expeditious and informal' processing of cases, which should facilitate participation by the parties to the proceedings.

[88] In my view, this submission is misconceived. Section 4 does not create a special species of enquiries heard by the Equality Court that then disregard all the rules of evidence. I agree that the *Equality Act* contemplates an informal process to adjudicate disputes and the deviation of the rules in so far as the expeditious enrolment of cases is concerned. As far as case management issues are to be determined, it must be in a more expeditious manner that falls outside the Uniform Rules of Court.

[89] The next argument by the complainants is that section 19 of the *Equality Act*⁶¹ does not make provision for applications to strike out. In my view, this argument is completely without merit. Section 19 actually carves out the ability for the respondents to rely on Rule 6(15) for the strike out application. The application is an interlocutory application, and although it is not regulated in terms of the *Equality Act*, it can still be heard together with the merits in this case, which is an 'expeditious manner' of processing the case.

[90] The complainants' counsel relied on *South African Human Rights Commission v Qwelane; Qwelane v Minister of Justice and Correctional Services*⁶² where it was held:

⁶¹ Section 19 – Rules and Court proceedings.

⁶² (EQ44/2009; EQ13/2012) [2017] ZAGPJHC 218; [2017] 4 All SA 234 (GJ); 2018 (2) SA 149 at para [6].

"[6]... It is equally plain that access to the Equality Court does not have the traditional and procedural red tape. The procedure thereat is also aimed to be informal as mirrored by ss such as section 21(1) of the Equality Act which refers to an "*inquiry*". In my view, all of this points to the fulfilment [sic] of the right to access to courts, as enshrined in section 34 of the Constitution".

[91] Counsel also relied on *Manong and Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape*⁶³ where the Supreme Court of Appeal described the Equality Court as a creature of statute deriving its powers from its empowering statute.

[92] The reliance by the complainants on these two cases does not support their argument nor take their case any further as to why the strike out application should not be granted. In the *Manong* matter, the Judge was called upon to determine a point of law in terms of Rule 65(d)(3) which is regulated in terms of the Uniform Rules of Court. In the *Qwelane* matter, the Judge decided that they were dealing with a novel issue and had regard to as much evidence as possible.

[93] The complainants' contention that a strike out application cannot be brought in the Equality Court is in my view, wrong. I have noted that although on the one hand the complainants argue that the strike out application cannot be entertained as these proceedings are an enquiry and informal, on the other hand they seek a final interdict as relief against the respondents.

[94] In my view, the admission of irrelevant information will result in the respondents suffering prejudice. Apart from having to deal with hundreds of pages of irrelevant annexures, the main issue before me may be side-tracked. Under the circumstances, the application to strike out succeeds.

Amicus Curiae

[95] Media Monitoring Africa ('MMA') intervened as an *amicus curiae* in these proceedings. MMA is a highly respected NGO which has an established track record

⁶³ (457/09) [2010] ZASCA 169; 2011 (2) SA 90 (SCA); 2011 (5) BCLR 548 (SCA); [2011] 2 All SA 383 (SCA).

of acting in the public interest in matters relating to media issues⁶⁴. MMA seeks to protect the rights to freedom of the media. It does so from the perspective of a watchdog that seeks to promote ethical and fair journalism that supports constitutional rights. Although MMA is a strong defender of freedom of expression, it states that it does not adopt an absolutist stance on freedom of expression or freedom of the media. On the contrary, when it is appropriate, MMA contends that freedom of expression ought to be limited in appropriate circumstances.

[96] Although the media's importance in a democratic South Africa is uncontentious, counsel for MMA made out a generalised case about the importance of freedom of expression and freedom of the press and other media in particular. MMA sought to introduce an argument on where an appropriate balance may be stuck between the protection of media freedom, and the prevention of intimidation and harassment of the media on the one hand, and legitimate and robust political rhetoric on the other hand.

[97] MMA's counsel submitted that the verbal and written intimidation of journalists is designed to chill media reports concerning the respondents, by instilling fear in the journalists and prevent or discourage them from carrying out their employment role, in a manner that is fair, unbiased and ethical, and that such conduct cannot be treated as protected speech under section 16 of the Constitution. Counsel argued that rather, the expression ought to be recognized as a concerted campaign by the respondents to use tools within their sphere of authority and influence to cower the named journalists from their professional mandate, for fear of physical or other harm.

[98] In my view, this unsubstantiated allegation by MMA against the respondents is startling, to say the least. No such case is made out by the complainants, and the purpose of granting MMA's application to be admitted as *amicus curiae* was not for it to raise new facts. An *amicus* is not entitled to raise a new cause of action.

⁶⁴ See participation of MMA in the matter of *Electronic Media Network Limited and Others v etv (Pty) Limited and Others* 2017 (9) BCLR 1108 (CC); *Van Breda v Media 24 Limited and Others*; *National Director of Prosecutions v Media 24 Limited and Others* 2017 (2) SACR 491 (SCA) and *Motsepe v S* 2015 (5) SA 126 (GP).

[99] MMA relied heavily on international law and referred the court to the international law instruments applicable to the safety of journalists, and the need for State protection of journalists, and the media in general in the furtherance of an open and democratic society, and the enhancement of tolerance of contested views within society.

[100] The United Nations General Assembly (GA) and specifically, its Human Rights Council, have on an ongoing basis, monitored, considered, and issued Resolutions pertaining to the safety of journalists. The UN Security Council has similarly issue Resolutions on the protection and safety of journalists in conflict areas. In so doing, the international law position as expressed by the community of nations in the GA, thus including South Africa, have repeatedly committed themselves to acknowledging the importance of an independent media and the need to ensure constant vigilance for any threat, intimidation, harassment or victimization of journalists or media personnel, based solely on the professional reporting function they fulfill in society.

100.1 The GA Human Rights Council Resolution 21/12, Safety of Journalists⁶⁵, recalls article 19 of the International Covenant on Civil and Political Rights (ICCPR)⁶⁶ which provides that “[e]veryone shall have to hold opinions without interference” and for the protection of freedom “to seek, receive and impart information and ideas”.

100.2 GA Human Rights Council Resolution 27/5, Safety of Journalist⁶⁷, reiterates certain recordals from earlier Resolutions, and in addition:

“Takes note of the good practices of different countries aimed at the protection of journalists, as well as, *inter alia*, those designed for the protection of human rights defenders that can, where applicable, be relevant to the protection of journalist”.

100.3 GA Human Rights Council Resolution 33/2, Safety of Journalists⁶⁸, records the important contribution of the promotion and protection of safety of journalists to the UN 2030 Agenda for Sustainable Development, and the commitments therein to promote peaceful and inclusive societies for

⁶⁵ 22nd Session, dated 1 September 2014.

⁶⁶ Dated 16 December 1966, entry force on 23 March 1976, signed by South Africa in October 1994.

⁶⁷ 27th Session, dated 2 October 2014.

⁶⁸ 33rd Session, dated 26 September 2016.

sustainable development, including, by ensuring public access to information and protecting fundamental freedom. The Resolution recognises:

“... that the work of journalists often puts them at specific risk of intimidation, harassment and violence, the presence of which often deters journalists from continuing their work or encourages self-censorship, consequently depriving society of important information...”.

100.4 GA Human Rights Council Resolution 39/6, Safety of Journalists⁶⁹, stated that:

“Alarmed at instances in which political leaders, public officials and/or authorities denigrate, intimidate or threaten the media, including individual journalists, which increases the risk of threats and violence against journalists and undermines public trust in the credibility of journalism”.

[101] Finally, the UN Security Council Resolution 1738⁷⁰ condemns all attacks, violence and the incitement of violence against journalist in conflict situation. In recalling the Geneva Conventions 1949, the Resolution urges that journalists are treated as civilians in conflict situations and emphasises the responsibility on States and all parties to respect the professional independence and rights of journalists and media professionals.

[102] It is clear that the principles on the safety of journalists are no different to the foundational values regarding freedom of media expression as pronounced on by our courts, and the values and obligations imposed on South Africa on the international plain are harmonious with its constitutional obligations in the domestic sphere. It is thus incumbent on all organs of State, including the judiciary, to not only have regard to, but to take positive steps to protect the safety and independence of journalists.

[103] As much as I appreciate the participation of MMA in this matter, it did not contribute anything insofar as the issue which is before me is concerned; which is

⁶⁹ 39th Session, dated 21 September 2018.

⁷⁰ 1613th Session dated 23 December 2006. This is amplified and developed in Security Council Resolution 2222, adopted at the 7450th Session, dated 27 May 2015.

not about whether the media is important in a democracy, but whether the complaint breaches sections 10 and 11 of the *Equality Act*.

Costs

[104] Although in their heads of argument, the respondents asked for punitive costs order against the complainants, at the hearing of this matter, the respondents' counsel submitted that as both the complainants and the respondents are acting in the public interest, there should be no order as to costs. Counsel contends that the dismissal of the case is due to it being legally misconceived, and reiterated that the respondents do not endorse nor support the abuse of journalists through social media.

[105] The Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources and Others*⁷¹ was concerned with the potential chilling effect that an adverse costs order would have on litigation conducted in the public interest. Based on *Biowatch* and the respondents' counsel's submission, there will be no order as to costs.

[106] In my view, the complainants have failed to establish that being a journalist qualifies for the protection under section 10 and 11 of the *Equality Act* directly or as an 'analogous' ground. The respondents' conduct does not qualify as hate speech due to the absence of hatred and incitement of hatred of journalists as a whole.

[107] A constitutionally compliant reading of the *Equality Act* necessitates a restrictive interpretation, and consequently favours not limiting the freedom of speech, save in the clearest of cases, and this is not such a case. Therefore, there is no factual and legal causation such that the respondents may be held liable for breaching the *Equality Act*.

[108] In the premises, the following order is made:

1. *The application is dismissed.*
2. *There is no order as to costs.*

⁷¹ 2009 (6) SA 232 (CC).



MOLEFE J
JUDGE OF THE EQUALITY COURT

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Date of Hearing:

5, 6 August 2019

Date of Judgment:

24 October 2019