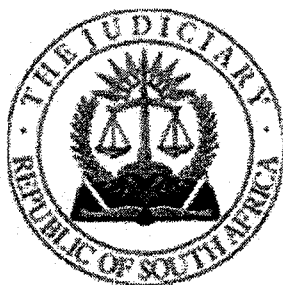


**REPUBLIC OF SOUTH AFRICA**

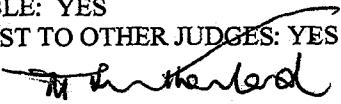


**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: EQ JHB 5/2019**

(1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES

31 October 2019

  
RT SUTHERLAND

In the matter between

**PRAVIN JAMNADAS GORDHAN**

**APPLICANT**

and

**JULIUS SELLO MALEMA**

**RESPONDENT**

**FREEDOM OF EXPRESSION INSTITUTE**

***AMICUS CURIAE***

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**JUDGMENT**

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**SUTHERLAND J:**

## Introduction

[1] The issue before the Equality Court is whether these utterances contravene section 10 of the Equality Act:<sup>1</sup>

“Our attack on Pravin Gordhan is an attack on White Monopoly Capital because Pravin is a dog of White Monopoly Capital. We must hit the dog until the owner comes out, and once the owner comes out, we must deal decisively with the owner.

Pravin is a cabal that belongs to the UDF and destroyed all good African comrades... he’s no good this guy. He has destroyed Peter Mokaba, he has destroyed Winnie Mandela, he has destroyed everyone else that stood for the truth against the apartheid regime. His shenanigans are not new.

Pravin has gone in to all SOE and removed all black excellence because he hates Africans, he doesn’t like Africans. Any African that speaks back to Pravin, Pravin threatens those people...

Once you take a decision to go after Pravin, you must be ready. If you are not ready, don’t come to the EFF. We’ve now taken a decision to fight Pravin, and therefore you must know Pravin is going to fight dirty... There will be casualties. There can even be loss of life. If you are not ready for that, stand aside. I’m not scared. I’m ready. I’m prepared to confront them one by one.”

[2] These utterances were made by the respondent in a speech to a crowd of his supporters on 20 November 2018 outside the venue where the hearings of the Zondo Commission into State Capture were being conducted, and shortly after the applicant had testified in the Commission, and among other statements, had criticised the Economic Freedom Fighters (EFF) and the respondent.

[3] The applicant is the Minister of Public Enterprises in the government and a leading member of the ruling party, for the time being, the African National Congress (ANC). The

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<sup>1</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

respondent is the leader of the EFF, the third largest political party represented in Parliament.

The ANC and the EFF are rivals for power and critical of one another and of their members.

[4] The provisions of the Equality Act relevant to this controversy are Section 10(1) and section 1: definition of 'prohibited grounds':

#### 10 Prohibition of hate speech

- (1) Subject to the proviso in section 12,<sup>2</sup> no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
- (a) be hurtful;
  - (b) be harmful or to incite harm;
  - (c) promote or propagate hatred.

#### Section 1: 'prohibited grounds' are-

- (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) undermines human dignity; or
  - (iii) 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)

[5] These sections of the Equality Act must be applied subject to the prescripts of section 16 of the Constitution. That section provides:

#### 16 Freedom of expression

- (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; and
  - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to-
  - (a) propaganda for war;
  - (b) incitement of imminent violence; or
  - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

<sup>2</sup> Section 12 provides for exceptions, but as none were cogently implicated in this controversy it can be ignored.

[6] The relationship between section 16 of the Constitution and these sections in the Equality Act have been addressed in the case law. The parties are in agreement that the interpretation of the subsections of section 10 be understood conjunctively and not disjunctively and that the scope of section 10 itself is circumscribed by section 16(2)(c) as set out in *SAHRC v Khumalo* 2019 (1) SA 149 (GJ) at [81] – [83]<sup>3</sup>.

[7] The test, as set out in section 10, whether the utterances could reasonably be construed to demonstrate a *clear intention* to be hurtful, harmful or incite harm, promote or propagate hatred is objective in that the effect of the words on hearers or readers is what is relevant. Mindful of this dimension of the test, the test seeks out the dominant impression *reasonably* created by hearing or reading these words. In this case the words were orally delivered in a speech and heard by its primary audience only once. The words were also broadcast to a wider audience.

### **Has there been a contravention of section 10?**

[8] The utterances are a mix of allegations of fact and of opinion. The utterances were, it can be inferred, aimed at rousing the crowd to endorse the respondent's opinions. The content and tenor of the utterances were clearly intended to be hurtful towards the applicant and promote hatred of the applicant for the reasons advanced in the speech. For the purposes of this judgment it will be assumed that every allegation of fact is false and every opinion obnoxious and severely disparaging of the applicant. The question is, however, whether the utterances go

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<sup>3</sup> The SCA in *Masuku & Another v SAHRC* 2019 (2) SA 194 (SCA) addressed the relationship between section 16(1) of the Constitution and Section 10 of the Equality Act and concluded that the disjuncture was problematic. Ultimately, at the invitation of the respondent in that matter the controversy was decided on the basis of section 16(1) and the implications of an application of section 10 were evaded. This decision is subject to a pending appeal before the Constitutional Court. The Constitutional Court in *Moyo v Minister of Police & Others* CCT 174/18 & CCT 178/18 (22 October 2019) considered the impact of section 16(1) of the Constitution on section 1(b) of the Intimidation Act 72 of 1982 and concluded that section 16(1) had to trump the overreach of section 1(b).

any further than that: are the utterances discriminatory within the meaning and purpose of the Equality Act?

[9] Several issues were traversed in argument. Not all need to be traversed in this judgment. There are two critical intertwined arguments advanced which dispose of the case.

9.1 First, the complaint about the utterances should fail because the utterances do not implicate any of the defined prohibited grounds.

9.2 Second, the utterances address the applicant as an individual and not a member of a class or group of persons as categorised in the defined prohibited grounds.

[10] The argument in support of the complaint invokes the race or ethnicity of the applicant, an Indian South African, from among the defined prohibited grounds. It is conceded that the applicant's Indian identity is not overtly expressed in the utterances but the argument is advanced that an anti-Indian bias is implied because of the overall context in which the speech was delivered. The implication is said to be located in the allusion to the "cabal that belongs to the UDF" of which the applicant was alleged to be a member. By reference to other sources, dealt with presently, it is argued that it would have been well known that this cabal was composed solely of Indians. The fact of the cabal and its ethnic composition, thus was known to the audience, composed mostly of EFF supporters, would therefore have been understood by them to be an Indian cabal when the applicant was referred to as a "cabal".

[11] The logic of, and the fact of, such a connection is refuted on behalf of the respondent. The source relied upon, and cited in the complaint, is a passage from a blog by Floyd Shivambu

published on 18 October 2018, about a month before the occasion of the impugned utterances. True enough, the Cabal was there referred to as “basically an Indian cabal” whose alleged aim was to suppress African leadership in the Mass Democratic Movement (MDM).<sup>4</sup> This allegation itself is derived from a report published two decades ago and reputedly written by Mac Maharaj, an Indian, and a leading member of the ANC. It is common cause that the fact of such criticism of the Cabal, inclusive of the applicant, has been well known by people supportive of the Liberation struggle and the otherwise cryptic allusion in the speech thereto would have been understood in that context by the listeners. However, the remarks in the Shivambu blog and in the initial report itself are not condemnatory of Indian South Africans *per se*. Rather, the remarks in the blog identify the cabal as being composed of Indians who are alleged to have been racist towards Africans, but does not allege that Indians are, by reason of their ethnic identity, racist nor is there a call to vilify Indians as a class.

[12] In my view the contention that this context supports the notion that the applicant, *qua* Indian, was being vilified is not apparent, even within this context.

[13] The imagery of the applicant as a “dog” of *White* monopoly Capital” is the sole allusion to race in the utterances. The utilisation of the metaphor of a person being a “dog” to portray a person as the instrument of an entity or social force to which the “dog” does not truly belong but whose interests the dog in servile deference to such entity or social force promotes is old hat. The label was not invented by the respondent. The label “white monopoly capital” was coined more recently and is a part of the jargonised sloganeering in contemporary South African political discourse. Its meaning is not necessarily stable. It usually is taken to refer to

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<sup>4</sup> The allusion to a cabal that belongs to the UDF (United Democratic Front) and the allusion to the cabal being in the MDM is to the same thing. The MDM emerged as the successor to the UDF upon it being banned by the Apartheid State.

the South African Big Business corporations which dominate economic activity in which White South Africans are disproportionately represented, relative to their proportion of the total population a phenomenon which is inimical to the interest of the masses of the population. What is plain is that it is a disparaging label and to associate a person with this supposedly evil force is to encourage the hearers to repudiate the person so identified with it.

[14] However, it is the applicant's personal alleged connivance with this allegedly evil social force that is condemned. He, personally, is identified as an appropriate target to "hit" in order to penetrate the defences of the evil social force and expose the movers and shakers within the force. Nothing is said or implied in the utterances which implicates the applicant's own race or ethnic identity. Read with other passages, it is plain that the utterances sanctify a confrontation between, on the one hand, anything reminiscent of White ascendancy as exemplified in the form of Apartheid or of White Monopoly Capital, with which the applicant is identified, and on the other hand, the people and their struggle for true freedom. As obnoxious as such remarks about the applicant, if untrue, may be, they do not fall within the compass of the prohibited grounds.

[15] The passages that speak to "hitting" the dog and the "attack" on the applicant are plainly metaphorical.

[16] The allusion to "casualties" and the "loss of life" engendered much controversy. The use of "casualties" on its own might have been understood as metaphorical but for the conjoining of "loss of life". Plainly the image conjured is of real physical injury. However, read as a whole, this literal meaning is not the meaning a reasonable person would attribute to

the utterances. The fair understanding of the passage is that whoever challenges the applicant is at risk of injury owing to the applicant's "dirty tricks". It is plain that the allusion to loss of life is a mere example of an extravagant juvenile rant stretching hyperbole to the extreme in the course of a demonstrably demagogic speech. Its function was to proclaim the speaker as brave and steadfast in the face of any foe however mighty and that the space to stand at his right hand is reserved only for the sturdiest of fellows. The dominant impression is that it is puerile self-aggrandisement, not a threat to the applicant or anyone else.

[17] The objectives of the Equality Act are to create measures to address the injustices that result from social inequalities by combating unfair discrimination. Its enactment is to give flesh to section 9 of the Constitution as required by section 9(4). In particular section 9(3) and (4) deal with discrimination on a list of grounds which the definition of prohibited grounds in section 1 of the Equality Act replicates.<sup>5</sup>

[18] Sub-section (b) of the definition of prohibited grounds is a catch-all to cover any unlisted ground. Were a person to be discriminated against on such an additional ground and the result "undermines human dignity", such ground can be invoked to bring the discrimination within the compass of section 10. The character of these "other grounds" must in my view be

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<sup>5</sup> Section 9 of the Constitution:

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

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

understood to *eiusdem generis* with the list in (a). The statute was enacted in 2000. Since then social awareness of forms of discrimination not then recognised has developed; an example might be trans-gender status, a social circumstance only recently acknowledged. A notable omission from the prohibited grounds is, not unsurprisingly, political ideology: neither capitalists nor socialists can complain about their vilification as a class by invoking this statute.

[19] The significance of these considerations is that the effect of an utterance on a particular person which vilifies that person, but does not vilify that person on the ground of one or another personal attribute, as defined, is not the subject matter of Section 10.

[20] In my view, the attack on the applicant in the utterances was personal in nature only.

[21] In the result, the application falls to be dismissed.

#### **The costs: the evolution of the case and ancillary issues relevant thereto**

[22] An ancillary matter to decide is the costs to be borne in the matter. To do this it is necessary to deal briefly with the evolution of the litigation.

[23] The complaint was laid initially in the Magistrates' Court sitting *qua* Equality Court. The matter was set down to be heard. At that stage, by consent, that court made an order transferring the matter to the High Court sitting *qua* Equality Court. Upon such transfer, the matter was case-managed to the hearing. At the initial case management meeting several procedural and substantive aspects were canvassed. As a result, the parties agreed that the matter would be heard on the papers and a directive was made to that effect. Furthermore,

directives were made about the further preparatory requirements. In short, this resulted in the complaint which was initially made against the respondent, and his colleague Floyd Shivambu, in respect of a series of utterances being revised. This was, for convenience, done in a replying affidavit, the effect of which was to abandon the complaint against Shivambu in its entirety and to restrict the complaint to the respondent's remarks cited above. The respondent responded thereto by asserting that a vast portion of the affidavit of Shivambu and three documents annexed thereto were incorporated by reference into the respondent's defence.

[24] This stance provoked an application to strike out these inclusions on, principally, the grounds that they were irrelevant. The three inclusions were a report of the Inspector –General of Intelligence of 31 October 2014, (IGI report), the “Report of the Commission on the cabal” of 14 March 1990 in its form as found on the O'Malley Archives website, (the Cabal report) , and the so called “Sikhakane report” of 5 November 2014.

[25] Of these reports, the IGI report stood in a distinctive category in that it was a document admittedly classified secret that had been, allegedly, improperly leaked into the public domain. To deal with this document as a special case, the application to strike it out was heard in a preliminary hearing. The application was dismissed and the costs reserved for the main hearing for determination.

[26] When dismissing the application I undertook to provide reasons later. I do so now. Although the decision to hear this issue separately was to address the secret classification question, the applicant advanced three grounds why it should be struck out:

26.1 The document was classified secret

26.2 The document was irrelevant

26.3 The document was prejudicial to the applicant who would be obliged to “engage” with its contents.

[27] The secret classification point was advanced with reference to an affidavit made by the Minister of State Security in other litigation where, similarly, its striking out was being contested. The applicant replicated the Minister’s affidavit and added no facts to the grounds thus presented.

[28] The decision of the Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services, In Re: Masetla v President, RSA & Another* 2008 (5) SA 31 (CC) at [53] – [56] dictates how a court approaches such a matter. In short, the Court is required to determine the propriety of a release of a top secret document to the public and is not bound by the Minister’s opinion or its classification. The contending values of national security on the one hand and a right to information on the other hand must be balanced. The Constitutional Court held thus:

“[53] In my view, the mere fact that documents in a court record carry a classification does not oust the jurisdiction of a court to decide whether they should be protected from disclosure to the media and public. We were not referred to, and I could not find, any legislative provision on the classification and protection of information on grounds of national security or any other authority which purports to oust the jurisdiction of a court over any document which forms part of a court record. As I have said above, different considerations may very well apply where the request to disclose classified intelligence documents occurs in any context other than where the documents have been placed before a court by a party to the proceedings and thus form part of the court record. In that event, a court will always have the power to regulate the proceedings before it because it is clothed by s 173 of the Constitution with an inherent power to regulate its own process, taking into account what is in the interests of justice.<sup>53</sup>

[54] I agree with the submission made by Independent Newspapers that ordinarily, the starting point is that court proceedings and so too court records must be open to the public. A mere classification of a document within a court record as ‘confidential’ or ‘secret’ or even ‘top secret’ under the operative intelligence legislation or the mere *ipse dixit* of the minister concerned does not place such documents beyond the reach of the courts. Once the

documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.

[55] It follows that where a government official objects to disclosure of a part of the record before a court on grounds of national security, the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public. This forms part of a court's inherent power to regulate its own process that flows from s 173 of the Constitution. In my view, a court in that position should give due weight both to the right to open justice and to the obligation of the State to pursue national security within the context of all relevant factors. As in the present matter, it would not be concerned with a statute or other law of general application as the basis for restricting the disclosure of the material. In deciding whether documents ought to be disclosed or not, a court will have regard to all germane factors which include the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court. These factors are neither comprehensive nor dispositive of the enquiry.

[56] However, in the final analysis, a court should be alive to the fact that it is confronted by competing constitutional claims. The one claim is for open justice and the other relates to the government's obligation to pursue national security. Because the contested documents form part of the court record, a court is obliged, in its own right, to examine the documents concerned in order to ensure that it impairs as little as possible the other constitutional interests at stake whilst striking a harmonious balance between the two or more competing claims."

[29] A reading of the report and of the Minister's rationale for excluding it from the public domain reveal that the rationale is wholly unfounded. The burden of the Minister's perspective is that agents of the security agencies may be compromised. No agents' identities are disclosed. The persons described are not secret operatives in the least. Moreover, at the time the document was attached to Shivambu's affidavit, the document was already in the public domain and had been the subject of media reports. Any confidentiality claimed for the document is futile.

[30] The upshot is that no sound reason exists why its contents could usefully or appropriately be suppressed.

[31] As to the issue of relevance to the pleaded case it was inappropriate to decide, in an interlocutory application, whether that proposition was correct, because in the absence of a consideration of the merits of the arguments advanced in the main case, such a conclusion could not properly be reached. Potentially, the respondent could have drawn on the contents to offer, whether meritoriously or otherwise, for an argument. (As it turned out neither party had need to refer to it at all, which is the true mark of its valuelessness.)

[32] As to the fear that the applicant would be prejudiced by having to deal with the allegations of fact in the report, the notion was misconceived. As conceded in the argument in the interlocutory hearing, the respondent sought to rely on the existence of the report, not the truth of its contents. Its existence was not the subject of any possible cogent dispute.

[33] In the result, the interlocutory application was dismissed. I return to the appropriate costs order hereafter.

[34] The other three strike-out applications stood over to be dealt with in the main hearing.

[35] After the IGI strike-out application had been dismissed, the attorney for the respondent wrote to request an oral hearing to afford the opportunity to cross-examine the applicant on the contents of the reports. The applicant objected thereto. This difference of opinion was resolved by a ruling I made after considering the correspondence. I ruled thus:

1. "I have noted the correspondence of 9 and 11 October 2019 regarding the views expressed about future conduct of this matter and given consideration to the submissions therein. The key proposition is that because a document survived an application to strike it out a proper basis now exists to present oral evidence to the court.

2. A directive was given at the first case management conference that the matter would proceed on affidavit. The parties were then agreed on such a procedure. I am unpersuaded that the reason offered for the request to change that directive to allow an oral hearing has any merit. Accordingly the decision that the matter proceed on affidavit shall not be changed: the matter will proceed as directed.
3. The parties have already filed the papers they have sought to rely upon. Heads of argument are due. The parties are directed to fulfil their obligations to enable the hearing to take place, as scheduled, on 24 October 2019.
4. Given various remarks made, some tangentially, in the course of this matter it seems appropriate to give further directions about the forthcoming hearing:
  - 4.1. This matter is not about the actual or alleged defamation of the applicant. The enquiry shall therefore not concern itself with issues pertinent thereto.
  - 4.2. The question before the Equality court is plainly and simply whether or not the utterances (which are common cause) contravened Section 10, read with section 12 of the Equality Act.
  - 4.3. The test prescribed for a contravention of section 10 is whether such utterances "could reasonably be construed to demonstrate a clear intention" to have the prescribed consequences.
  - 4.4. Arguments which go beyond addressing that issue are superfluous and shall not be entertained."

[36] At the main hearing the applicant persisted with the applications to strike out the passages in Shivambu's affidavit and the remaining documents, but addressed no argument beyond the perfunctory submissions in the heads of argument which were filed.

[37] As alluded to, the IGI report was not referred to in argument. Also, the Sikhakane report was not referred to in argument. The applicant sought to refer to certain citations in the initial complaint from Shivambu's blog to sustain the contention that "Cabal" was understood to be an Indian cabal, but persisted with the notion that the source material relied on by Shivambu, ie the Cabal report, for his allegations should be excluded. This is a plainly unsustainable contention, even if the fact that the cabal report had been in the public domain for twenty years is ignored.

[38] The documents were allegedly pertinent to Shivambu's defence and when the complaint against him was abandoned they become superfluous. The respondent's choice in his further

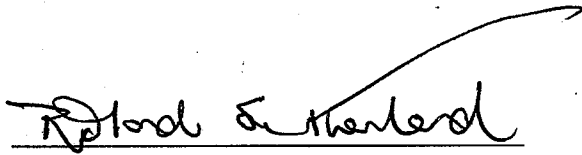
answering affidavit to persist with the incorporation of passages from Shivambu's defence resurrected their potential relevance. In the result, however, they were of no assistance to his case at all.

[39] The upshot is that any energy spent on the strike out applications was a waste. The culpability for this waste must be borne by the applicant. The costs of the interlocutory application must be borne by the applicant. The costs implications of remaining strike-out applications were lost in the wash of the main hearing and I do not make any specific order in respect of them.

[40] The respondent has been successful in the main application. He is entitled to the costs absent any sound reason to suggest otherwise. The litigation is plainly a dimension of a political contestation. When politicians choose to utilise the courts to conduct their campaigns and draw on the resources of the courts, it should not be supposed that such resources can be utilised without consequences. All litigants must know that they risk an adverse costs order if they fail. Despite the fact that the utterances were indeed hateful and aimed at engendering hatred against the applicant, the applicant has failed to bring his understandable grievances within the compass of the Equality Act. In these circumstances, the applicant ought nevertheless to bear the costs.

### **The Order**

1. The Application is dismissed with costs, including the costs of two counsel.
2. The costs of the interlocutory application shall be borne by the applicant, including the costs of two counsel.



**ROLAND SUTHERLAND**

**Judge of the High Court**

**Gauteng Local Division, Johannesburg**

Date of hearing: 30 September 2019 and 24 October 2019

Date of judgment: 31 October 2019

For the Applicant: Advs M le Roux and J Chanza (interlocutory application)

Advs NH Maenetje SC, M le Roux and J Chanza (main application)

Instructed by: Malatji & Co Attorneys

For the Respondent: Advs TN Ngcukaitobi and J Mitchell (interlocutory application)

Advs TN Ngcukaitobi and K Premhid (main application)

Instructed by: Ian Levitt Attorneys

For the *Amicus Curiae*: Adv MM Ka-Siboto

Instructed by: Freedom of Expression Institute – Law Clinic