IN THE EQUALITY COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: EQ2/19

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

R. MOKGOATLHENG DATE 8/3/2022

In the matter between:

SOLIDARITY	First Applicant
BEREAVED FAMILIES AS PER ANNEXURE "A"	Second Applicant
and	
BLACK FIRST LAND FIRST	First Respondent
LINDSAY MAASDORP	Second Respondent
ZWELAKHE DUBASI	Third Respondent

JUDGMENT

MOKGOATLHENG J:

1. The Applicants have instituted proceedings against the Respondents in terms of Section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("The Act") alleging that the Second and Third Respondents made

certain comments pursuant to the death of the four white leaners arising from the collapse of the walkaway bridge at Driehoek Hoërskool on 1 February 2019. According to the Applicants these comments:

1.1 Discriminated against the deceased four learners on the basis of race in contravention of section 7 of The Act;

1.2 Were intended to be hurtful, harmful, and promoted and propagated hatred based on race, in contravention of section 10 of The Act;

1.3 Were unwarranted, serious and were intended to demean, humiliate and create a hostile and intimidating environment based on race.

2. The Applicants allege that the comments made by the Second and Third Respondents with which the First Respondent has identified with, did not only celebrate the death of the four white learners, but conveyed the implicit message to the reader of ordinary intelligence that whites because of the colour of their skin are:

2.1. Deserving of death;

2.2. Deserving of punishment;

2.3. Are land thieves;

2.4. Need to be fought; and

2.5. Are the enemy of the Respondents and Blacks in general.

3. The Applicants contended that because of these comments, from the average reasonable South Africans and member of the white community and more specifically of the families of the deceased and injured white learners, was on of outrage, disappointment, disgust, degradation, and humiliation because these

comments constituted a serious affront to the families of the four learners constitutional right to their life, dignity and equality.

4. Further the Applicants contend that not only did the Respondents celebrate the demise of the four learners because of their race, but the Respondents comments were clearly intended to be harmful and hurtful to white people in general and to the families of the deceased and injured white learners in particular. Further, the Applicants argue that these comments were intended to incite, promote, and propagate racial hatred. The Applicants allege that the Second and Third Respondents being members and office bearers of the First Respondent a registered political party in terms of the Electoral Act, aspect rendered their comments more worth of censure, condemnation and prosecution.

5. The Applicant further allege that the Respondents comments constitute racial discrimination, hate speech, and harassment as defined by section 7, 10, 11 of the Act, and have resulted in the individual applicants suffering damages arising from the impairment of their rights to equality, life, dignity, emotional and psychological suffering, humiliation, and degradation and their hate speech comments in amount of **R150, 000.00**, respectively against the second and third respondents.

6. The Applicants also seek an order declaring that the Second and Third Respondents comments are hate speech as defined in the Equality Act, and also interdicting and restraining the Respondents from publishing, propagating, advocating or communicating the said hate speech comments as defined in section 10 of the Equality Act in any form whatsoever.

7. Further, the Applicants seek an order that the Respondents should publish an unconditional apology to them at a date and time to be arranged with the court and or the Respondents within 30 days of the finalization of this matter. The Applicants also seek an order that the Respondents should pay the costs of this application.

THE RELEVANT FACTS

8. The relevant facts are as follows:

8.1. On 1 February 2019, at approximately 08h00, a most tragic incident occurred when a walkaway bridge collapsed at the Hoërskool Driehoek, causing the deaths of four learners – Roydon Olckers (age 17), Marli Currie (age14), and Marnus Nagel (age 16) – and injuring approximately 20 (twenty) other learners, some of whom are still in a critical condition in hospital.

8.2. Within minutes of the incident having occurred a number of social media and online newspapers covered the tragic event as it unfolded. On the same day, one Siyanda Dizzy Gumede posted on his Facebook page the following comments:

> *'Don't have a heart to feel pain for white kids. Minus 3 future* problems'. See annexure **"AJB2"**

8.3. The Second Respondent thereafter, on his official twitter account, **#TakeBLFtoParliament @BLF_Lindsay**, posted the following comment:

> *'Siyanda Gumede is correct! God is responding, why should we frown on the ancestors petition to punish the land thieves including their offspring'*

8.4. When asked for clarification by the Citizen, the Second Respondent said he was "not certain" (whether) the victims were white, adding he would mourn them if they (the victims) turned out to be black. The Second Respondent added that:

> *"If our God has finally intervened and our ancestors have petitioned and seen that these white land thieves have now died then I definitely*

celebrate it. I celebrate the death of our enemies, their children, their cats and their dogs. That is our position." See annexures **"AJB3"** and **"AJB4"**, respectively.

8.5. The Third Respondent also commented on the post of Siyanda Gumede stating that:

'Ancestors are with BLF (Black First Land First), as we fight they fight too. They shake the land, and white buildings built on stolen land collapse. Keep fighting Zinyanya you are fighting a good fight. Camagu.' See annexure **"AJB5"**

9. The comments and statements of the Second and Third Respondents were reported by a number of media houses, and have received extensive coverage. The Applicants state that by posting the said comments on social media platforms and by publishing and making comments and statements to the mass media as the Second and Third Respondents did, who are respectively national spokesperson and deputy secretary general of the First Respondent, there was further publication and consequently, the Respondents should be further held liable for the secondary publication of the comments posted because the Respondents knew that these comments would be made public and reported by the mass media.

10. Further, the Applicants allege that the Second and Third Respondents have made it clear that the said comments and remarks made by themselves are in conformity with and bear the official political views of the First Respondent.

THE RESPONDENTS' DEFENCE

11. All the Respondents are represented by Mr. Andile Mngxitama, the president of the First Respondent (Black First Land First). The Second and Third Respondents

are both cited in their capacities as the national spokesperson and deputy secretary general respectively of the First Respondent, a political party which at the inception of these proceedings was registered as such in terms of the Electoral Laws of the Republic of South Africa.

12. The Respondents admit the publication and the contents of Annexures **"AJB"**, **"AJB2"**, **"AJB3"**, **"AJB4"**, **"AJB5"**, and **"AJB6"**, and further admit that the Second and Third Respondents have made the comments and statements attributed to them in the mass media and that same have received extensive coverage and publication in the mass media.

13. The Respondents deny that the comments and remarks made by the Second and Third Respondents are also the official view and political policy of the First Respondent and stated that such an allegation by the Applicants is a misrepresentation. The Respondents allege that the strategic objective of the First Respondent entails the institutional obliteration of white supremacy and the establishment of a radically new and meaningful state that will be fully responsive to the people's needs. The First Respondent argues that the Driehoek Hoërskool tragedy read with the comments and remarks made by the Second and Third Respondents highlights the need for a dialogue to be prioritised on the national political agenda towards facilitating the realisation of a peaceful society.

14. The Respondents state that the Second and Third Respondents' comment do not amount to incitement to cause imminent harm to white people. The Second and Third Respondents were merely acknowledging an event that had occurred as an indication of the historical redress for the evils of colonialism that back people have been and continue to be subjected to and the suffering endured by black people understandably brought into question whether God was with them or not in the travails, the death and injuries the white learners sustained was an indication that Blacks were not forsaken by God and that factor was instructive regarding the political situation in South Africa.

15. The First Respondent denies that the Respondents celebrated the death of the white learners at the Driehoek Hoërskool tragedy. The First Respondent is against violence and was formed to end the violence which has been going on since 1652 with the arrival of white people in South Africa. This violence is structural and arises from colonialism which in turn is based on the theft of land by the whites from the blacks. The collective pain of blacks is based on colonialism. The complaint of the Applicants exposes the selective outrage on the part of whites and their organisation which in turn dismisses the collective pain of blacks and gives recognition only to white suffering.

16. The Respondents deny that even if the comments were uncomfortable, crude or offensive, they state that these comments and remarks did not constituted a serious affront to the human dignity of the complainants and white people in general and neither did these comments constituted incitement to cause imminent harm or violence.

17. The Respondents further deny that their conduct was intended to be hurtful, harmful or that it promoted and propagated hatred based on race. The Respondents also deny that their conduct was intended to demean, humiliate, or create a hostile and intimidating environment based on race against white people.

18. The First Respondent states that what happened at Driehoek Hoërskool is a tragedy, and is something that should not happen to any child. In a normal society all of us should without hesitation, find the death of the four white learners tragic and sad.

19. In context, Siyanda Gumede's comments were intended to perceive white children as future problems because they are the same people who have benefited from the dispossession of Black people, but under normal circumstances South Africa and should condemn such comments outright, but doing so now would amount to an erasure of the bitter history black people are living through.

The History of the Application

20. The matter was argued on the 17 September 2019 before this court by the Applicants represented by Advocate Groenewald and the Respondents represented Mr. Mngxitama. On the 03 December 2019 this court handed down the judgment and declared the proceedings a nullity pursuant to the Supreme Court of Appeal (SCA) judgment in the matter between Qwelane v South African Human Rights Commission [2019] ZASCA 167; 2020 (2) SA124 (SCA) which was delivered on the 29 November 2019 before this court handed down its judgment in the present matter on December 2019.

21. In that judgment Supreme Court of Appeal (SCA) held that section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 in its present form was inconsistent with the provisions of section 16 of the Constitution and was consequently invalid. Consequently this court pursuant such pronouncement by the Supreme Court of Appeal declared the proceedings a nullity because the Applicants case was predicated upon section 10(1) of The Equality Act.

THE SCA JUDGMENT

22. This Court granted the Applicants leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal ("SCA") upheld the appeal instituted by the Applicants on 24 March 2021.

23. The salent features of the Supreme Court of Appeal judgment are the following:

[1] "After the hearing, the parties were informed that judgment would be handed down on 3 December 2019. The events that took place on that day, though not confirmed on affidavit, were, as recounted by counsel for the appellants and confirmed by Mr Mngxitama, as follows.

Mokgoathleng J requested the parties to address him on the effect of this Court's judgment in Qwelane v SAHRC, which had been delivered on 29 November 2019 and which held that s 10 of the Equality Act was unconstitutional. It should be noted that this matter was subsequently appealed to the Constitutional Court and its judgment is awaited.

[2] After hearing oral submissions, the judge adjourned the matter to consider the submissions. What occurred thereafter we simply do not know. What we do know is that Across the front page of what appears to have been the written 'judgment' prepared by the judge, he had written by hand, '[t]he judgment is a nullity in view of the SCA judgment of Jonathan Dubula Qwelane case No 686/2108'. The order that was subsequently issued by the registrar recorded: 'The proceedings in case EQ2/2019 are declared a nullity'.

[3] Whether the court a quo considered the entire proceedings or merely the judgment to be a nullity is, on the papers before us, unclear. However, what is apparent is that the judge had prepared a written 'judgment' in the matter before the Qwelane judgment was delivered by this court. In it the judge found in favour of the applicants. The offending comments were declared to amount to hate speech in terms of s 10(1) of the Equality Act. The second and third respondents were interdicted from repeating the comments and were ordered to publish an apology within 30 days, directed to all South Africans, and to be disseminated by the South African Human Rights Commission, in which they acknowledged that their comments were hate speech and that they were wrong to publish them. In addition, the second and third respondents were ordered, jointly and severally, to pay R50 000 damages, arising out of emotional and psychological pain, and humiliation to each of the families of the deceased within 30 days.

[4] The Qwelane judgment dealt with a newspaper article written by the late journalist Jonathan Dubula Qwelane in which he criticised homosexual relationships and gay marriages. After a detailed exposition of the interplay between hate speech and s 16 of the Constitution, which guarantees freedom of speech, this Court held that s 10 of the Equality Act unnecessarily limited freedom of speech and was therefore unconstitutional.

[5] One of the primary functions of a court is to bring to finality the dispute with which it is seized. It does so by making an order that is clear, exacts compliance, and is capable of being enforced in the event of noncompliance. The court order in this matter did not achieve finality nor was it capable of being enforced. As it was put by Nugent JA in Makhanya v University of Zululand:

'The power of a court to entertain a claim derives from the power that all organised states assume to themselves to bring to an end disputes amongst their inhabitants that are capable of being resolved by resort to law. Disputes of that kind are brought to an end either by upholding a claim that is brought before it by a claimant or by dismissing the claim. By so doing the order either permits or denies to the claimant the right to call into play the apparatus of the state to enforce the claim.'

[6] The high court simply failed to discharge its primary function. The order that it issued declared the proceedings a nullity, and hence declined to determine the dispute before the court. To like effect, the court, by rendering its own 'judgment' a nullity, left the parties without a binding decision. A court does not enjoy the power not to decide a case that is properly brought before it. Nor may a court declare its own proceedings to be a nullity.

[7] [A court may lack jurisdiction or suffer from some other limitation of its powers. But a court, pronouncing on these matters nevertheless renders a decision that is dispositive of the case before it. But that is not what happened before the high court in this matter. The decision of this Court in Qwelane plainly had relevance for the decision that the high court was required to make. The high court should have taken time to consider Qwelane, and the parties' submissions, and then rendered its judgment so as to decide the case. More incautiously, the high court might have handed down the written judgment that it had prepared, without regard to Qwelane. In either event, an order would have been issued that determined the dispute before the court.

[8] The high court took neither course of action. Instead, it pronounced its own 'judgment' to be a nullity or indeed the proceedings to be a nullity. It simply declined to resolve a dispute that was properly before it and left the parties with no decision. That state of affairs cannot be left undisturbed by this Court.

[9] Once that is so, the matter must be remitted to the court a quo to enable the dispute that was properly before it, to be finally resolved. The proceedings had reached an advanced stage. The judge had been addressed in argument by both parties, whereafter judgment had been reserved. All that remained was for the judge to deliver his judgment. That is where the proceedings must recommence. On that there seemed to be agreement before us. There was some concern that the presiding judge may have since retired. In that event, the parties appeared to accept that the matter could recommence before another judge, as directed by the Judge President of the division. Should another judge come into the matter, he or she

would obviously be free to issue such directives as to the further conduct of the matter as appears meet, including but not limited to requiring further argument in the matter."

24. The Supreme Court of Appeal order:

(i) The Order of the court *a quo* is set aside;

(ii) The matter is remitted to the Equality Court to be finalised, either by the presiding judge or in the event that the presiding judge is, for whatever reason, unable to finalise the matter, any other Judge as the Judge President may direct

25. Pursuant the Supreme Court of Appeal order the judge President directed that this court which initially presided in this matter should finalise the same as per the order of the Supreme Court of Appeal.

26. On the recommencement of the proceedings following the Supreme Court of Appeal order on 13 April 2021 this court issued a directive to the litigants to file further submissions pursuant to the judgment of Jonathan Qwelane v South African Human Rights Commission Case 2019 ZA SCA 167; 2020(2) SA 124 (SCA). The further heads of argument were to be submitted before a specified date. The applicants filed their further submissions. The Respondent despite the directive to file further or additional written heads of argument did not do so despite having been advised by the Registrar that they should file their heads of argument timeously.

27. Subsequently thereto this court instructed the Registrar to request the parties to agree on a date for the further hearing and recommencement of this matter. The Applicants responded and indicated that they had written to the Respondents suggesting an agreed date for the further hearing of this matter but that there was no response fourth coming from the Respondents.

28. The Applicants duly filed their heads of argument before the stipulated time. The Respondents failed to file their heads of argument. Consequent to the Respondents failure to adhere to the courts directive, the Court Registrar set down the matter for hearing and recommencement on the 21 July 2021.

29. The Deputy Sherriff of the High Court WB Van Dijk on his return of service certified that on the 18th June 2021 at 11H24 he went to the address 253 Park Street Malvern being the place of business of the first Respondent and duly served a copy of the notice of set down set on the roll 21st July 2021 on Nomasonto Ngwenya Venter an adult person who was in charge of the premises of the Black First Land First. The notice of set down was also served to Mr. Andile Mngxitama who is the representative of the Respondents at their Email address Black first and landfirst@gmail.com and at the Respondents chosen domicilium citandi et executandi at 5th floor, office 514, Klamson Towers, 151, Commissioner Street Johannesburg.

30. The submissions regarding the SCA Jonathan Qwelane Judgment.
On the 21 July 2021 the Applicants represented by Advocate Groenewald were present. The Respondents represented by Mr. Andile Mngxitama, who was representing the first, second and third Respondents was not present at court. There was no explanation proffered by all Respondents regarding their absence. Consequently the matter proceeded in their absence. After the hearing argument from Advocate Groenewald on behalf of the applicants the court reserved its judgment.

Subsequent to this court having the caused a directive to be issued, calling upon the parties to file additional written submissions to address the Constitutional Court judgment in the matter of *Qwelane v South African Human Rights Commission and Another [2021] ZACC 22 (Qwelane)* and the effect, if any, it might have on the matter. Advocate Groenewald on behalf of the applicants submitted that the factual

findings which this court already made remains undisturbed and need not be revisited. In his heads of argument we shall only indicated how the SCA Jonathan Qwelane judgment supports and justifies the order so made by this court.

31. While preparing judgment in this matter, the Constitutional Court on the 30 July 2021 delivered the Appeal judgment in the matter of Jonathan Dubula Qwelane and South African Human Rights Commission in Case 13/2020, pursuant thereto I issued a directive dated the 18 October 2021 to Hurter Spies INC the Attorneys of the Applicants, and also to first Respondent, Black First Land First, the second Respondent, Lindsay Maasdorp, and the third Respondent, Zwelakhe Dubusi , and instructed the Registrar to serve same at the addresses of the parties chosen domicilium et executandi citendi. The court advised all the litigants that because the aforementioned Constitutional Court judgment dealt with the constitutionality of section 10 of the Equality Act 4 of 2000 on which the Applicants case was predicated, the Constitutional Court judgment bears a direct and definitive relevance on their case before this court because the LIS/case between the parties was predicated on Constitutionality of section 10 of the Equality Act read with section 16 of the Constitution.

32. The court further indicated in its directive that this court was obliged in the interests of justice and by law to accord the parties the opportunity to submit additional heads of argument for consideration by this court in view of the said Constitutional Court judgment in the matter between Jonathan Qwelane v South African Human Rights Commission regarding Constitutionality of section 10(1) of the Equality Act 4 of 2000 read with section 16 of the Constitution.

33. This court thereafter instructed the Registrar to advice the parties to agree on the date of the further hearing of this matter, further that the parties are at liberty to file further additional heads of Arguments having regard to the Constitutional Court Judgment in the matter of *Jonathan Dubula Qwelane v South African Human*

Rights Commission and Another, case Number: CCT13/20 of [2021] ZACC 22 delivered on 30 July 2021.

34. On the 15 November 2021 this court instructed the Registrar of this court Mr. M. Mthembu to set this matter down for the hearing on the 30 November 2021 Mr. Mthembu duly advised the Applicants and the Respondents accordingly. The Applicants on the 18 November 2021 duly acknowledge receipt of the notice of set down. The Respondents despite service of the notice of set down at their chosen domicilium et executandi citandi did not acknowledge receipt of the notice of set down dated 15 November 2021.

35. The Respondents did not respond to the Court's directive. The Applicants attorneys on 18 October 2021 responded to the courts directive and suggested that they proposed filing their client's further written submissions by 5 November 2021, and that the Respondents file their written submissions by 19 November 2021. The Respondents did not respond to the Court's directive. The Applicants duly filed their further submissions timeously which were settled by Advocate Kemp. The Respondents despite due notice to file their further submissions did not file any further submissions as directed by the Court.

36. On the 30 November 2021 the matter proceeded. The Applicants were present and were represented by Advocate Kemp. There was no appearance by the Respondents nor by their chosen representative Mr. Andile Mngxitana, further there was explanation proffered regarding all the respondents absence.

The Recommenced Hearing on 30 November 2021.

37. Mr. Kemp submitted that pursuant to the Constitutional court in the case of Jonathan Qwelane v South African Human Rights Commission amended the constitutional invalidity of section 10 of the Equality Act 4 of 2000 to the limited extend and as ordered by the Constitutional Court section 1 of the Equality Act was decreed that it should read as follows: 'subject to the provision in section 12 no person may be publish, propagate, advocate or communicate words that are

based on one or more of the prohibited ground against any person that would reasonably be construed to demonstrate a clear intention to be harmful incite harm and to promote or propagate hatred".

38. Further Advocate Kemp submitted that the nature of the test regarding hate speech is objective meaning that the court consider the comments impugned as opposed to the intention of the person propagating or advocate in making the communicated words based on one or more of the prohibited grounds against any person.

39. Further Advocate Kemp submitted that the Constitutional Court held that elements of section 10 of the Equality Act 4 of 2000be read conjunctively by having recourse to the core of what Constitutes hate speech at paragraph 78 of its judgment namely that :

"Hate speech is the antithesis of the of the values envisioned by the right of free speech, whereas the latter advances democracy hate speech is destructive democracy"

40. Further Advocate Kemp contended that comments that damage the Constitutional project of nation building is to be seen as harmful, consequently he submitted that the comments of the Respondent in celebrating the death of white children amount to hate speech because the comments are harmful to the dignity of the person as well as the targeted group and to society in general.

41. Advocate Kemp contended that the Respondent's defence of justification of their comments as an exercise of their Constitutional right to freedom of expression has absolutely no merit even under the old test as expressed by Supreme Court of Appeal such defence would not have succeeded especially in view of paragraph 112 of the Constitutional Court's ratio that incitement to cause harm is an ineluctable impairment more especially because the Constitutional Court held in Jonathan Qwelane v South African Human Rights Commission case that the

comments would still Constitute hate speech even under the old test as enunciated in paragraph 184 of the Constitutional Court Judgment that:

"Before the amendment of section 10, the elements of hate speech that were clear and Constitutional were those in section 10(1) (b) and (c) and it is these provisions that Mr. Qwelane fell font of. Therefore, he could not have claimed that he was prejudiced by not knowing the law before hand and the hate speech prohibition did not exist at the time article was published". Consequently Kemp argued 4 the same ratio obtains in the present case with regard to the Respondents.

41(A) The High Court did not agree with the Supreme Court did and held that section 10 of the Equality Act is impermissibly broad and vague that persons seeking to exercise their right to freedom of expression cannot with sufficient clarity and certainty predict would constitute hate speech or not and thereof the Supreme Court of Appeal dismissed the complaint against Mr. Qwelane and read in a new reading of section 10 of the Equality Act.

41. (B) The matter then proceeded to the Constitutional Court where the crux, because the outcome of the matter in the Constitutional Court is that it concerns the constitutional invalidity of section 10 of the Equality Act to a limited extent. The Constitutional Court has now provided finality and clarity and the remedy they ordered in confirming only to a limited extent the finding of the Supreme Court of Appeal was also a reading in order and essentially similar to how it read previously except with regard to the present reading one word has fallen away.

41. (C) The test now; firstly it is objective, not subjective , objective, which means that it implies that the reasonable person, what meaning they would take from the comments that are impugned as opposed to the intentions the person on receiving end of the comments or the person making that. Aspect number two is that the Constitutional Court has made it clear that section 10 of the Equality Act should be

read conjunctive, meaning that the elements cannot really be separated, conjunctive reading is necessary indicative that the elements cannot be separated.

41. (D) Constitutional Courts reasoning in this regard delved deeply into the meaning of hate speech, the reason why it is prohibited and why that specific type of speech is seen to be constitutionally compliant in limiting the freedom of expression. Freedom of expression, especially given South Africa's particularly troubled racial past. It is very difficult to define the limits which constitutional rights should have preference over the right prevails over the other the constitutional Court approached this problem by looking at the core of what constitutes hate speech and is the purpose of preventing it. At paragraph 78 of the judgment the Court held: "Hate speech is the antithesis of the values envisioned by the right to free speech whereas the latter advances democracy hate speech is destructive of democracy"

Because the hate speech has an effect on the broader society at paragraph 79 the court states that:

"The expression of unpopular or even offensive beliefs do not constitute hate speech".

41. (E) At paragraph 80 of the judgment the Court quotes with approval from case laws emanating from the Supreme Court of Canada:

"Prohibiting any representation which ridicules, belittles or otherwise affronts the dignity of protected groups could capture a great deal of expression which while offensive to most people falls short of exposing its target group to the extreme devastation and vilification which risks provoking discriminatory activities against that group".

41. (F) The core of it is really is hate speech where the group is subjected to a type of comment that whilst it being insufficient to that person personally to feel attacked there

is a knock-on effect in terms of broader society and what that comment tends to imply regarding the group and as vilification. This is an extremely pertinent word in this regard in paragraph 86 the Court states:

"The purpose of hate speech regulation in South Africa is inextricably linked to our constitutional object of healing the injustices of the past and establishing a more egalitarian society"

41. (G) Hate speech relates to a broader matrix of values and what is important, so that speaks to the purpose of prohibiting hate speech. Paragraph 108 and 109 regarding the necessity of a causal link between the speech and harm, because we know incitement was seen in the past to be a key component but in light of the Constitutional Court Qwelane judgment. The case at 109 with reference to the Supreme Court of Canada:

"The Court went on to find that reasonable apprehension of societal harm as a results of hate speech is sufficient". The court goes on to confirm this at paragraph 111 that there is no:

"Our law does not required a causal link that there is no requirements for a causal connection is clear from the Equality Act itself."

41. (H) The proper interpretation of Qwelane while the Court expressly said that section 10 should be read conjunctively, in other words that the speech or publication be harmful and that element of incitement. The true expression is found at paragraph 112 and the court here say expressly:

"Lastly it is of some significance that the impugned section distinguishes between harmful or to incite harm in clear disjunctive terms. This reveals that even on an overall conjunctive reading it may be sufficient to demonstrate harm, absent incitement of harm. Thus the section postulates prohibiting expression that either harms or evokes a reasonable apprehension of harm to the target group."

41. (I) That really is a nub of it that the new section or how the section is to be read now it can be understood speech, which is harmful, is prohibited and also hate speech that incites harm or the reasonable apprehension of harm. Harmful is really the connective tissue here hurtful has been expunged because that is impermissibly vague, but regarding when something is harmful that relates to the effect on society and the Court made this very clear. The damage to the Constitutional project of nation building is to be seen as harmful. That is the ratio of the Constitutional and that is the heart of the new test, here at paragraph 154 is a good summary of that submission again the with reference to the Supreme Court of Canada:

"On the plain reading harmful…"

"…harmful can be understood as deep and psychological harm that severely undermines the dignity of the group."

41.(J) "In keegstra the Supreme Court of Canada eloquently summed up the two types of interconnected harm that resonates with the ethos of our diverse constitutional democracy, namely harm done to society at large. Similarly in the case of the *SA Human Rights Commissioner v Khumalo* three types of harm were illustrated: first, the reaction of persons who read the utterances and who are inclined to share those views; second, the type of harm experienced by the target group, which includes demoralisation and physiological hurt and the harm caused from responding in kind, thereby creating a spiral of invective back and forth and third, harm to the social cohesion in South African society which can undermine our national building project."

41.(K) The crux of it, that statement of what constitutes harm with reference to a societal project and the values of the constitution finds expression in how the Equality Act is and how to be interpreted. The content of that harmful comments of the second Respondent were harmful and they promote hatred and in fact, everything else contained also therein. When we apply this new test to the comments of the second respondent, it is applicant's submissions that they

amount to hate speech both under the old and the new section 10 of the Equality Act.

41(L) If we look at the new test, the fact that harmful should be defined by harm to society, as well as the dignity of the person and the targeted group. Celebrating the death of white children has the effect of making it very obvious that a different racial group is to be seen as the enemy and that they are in conflict with that person and that it would not be the implication of course and tragedy if more of these persons of that targeted group were to die. The Respondents justification that the comment did not cause or incite or call for violence.

41(M) The test it would not have succeeded and especially now where the court at paragraph 112 in the Jonathan Qwelane matter made it clear that incitement to cause harm is not an ineluctable requirement. The crux of it is that the speech must be harmful, both to the targeted group and to society. Consequently given by the judgment the court already wrote, the ratio on that judgment is congruent with the ration of the Constitutional Court.

41(N) In that regard the Constitutional Court found that Mr. Qwelane's comments would still constitutes hate speech and that he would still be liable for those comments having regard to the old and the new object test propounded by the Constitutional Court. Quote from paragraph 184:

"Before the amendment of section10 the elements of hate speech that were clear and constitutional were those in section 10(b) and (c), so excluding and it is these provisions that Qwelane fell foul of, therefore he could not have claimed that he was prejudiced by not knowing the law beforehand and that the hate speech prohibition did not exist at the time the article was published."

41(O) The exact same circumstances obtain in this case previously the comments made by in terms of the old test, under (b) and (c) that law existed when the

Respondents made the comments, and the fact that has changed does not mean that they could predict with certainty what they were falling foul of when they made these comments.

41(P) Finally with regards to costs nothing has changed in that regard either. The Respondents have treated the directives of this Court and the Court of their change in address. In these circumstances and additionally the fact that they had lost the matter essentially they should be multed with costs in this case the Court ordered in the previous order as well. The crux of it, is that the Respondents celebrated the death of white children. It was a hate speech back then it still hate speech. This court agreed and declared the comments hate speech.

41(Q) The relationship between section 16 of Constitution and these sections in the Equality Act have been addressed in the case law. The Law as espoused by the Constitution Court in the Qwelane case is trite that the interpreting of the sections of section 10 be understood and to be read 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].*

42. Advocate Kemp contended that the respondents defence of justification of their comments as an exercise of their Constitutional right to freedom of expression has, absolutely no merit. Even under the old test as espoused by the Supreme Court of Appeal such defence would not have succeeded especially in view of paragraph 112 of the Constitutional Courts ratio that incitement to cause harm is not an ineluctable requirement.

43. Advocate Kemp submitted that the crux of the matter is whether celebrating the death of white children is still hate speech in terms of the section 10 of the Equality Act in light of the Constitutional Courts judgment in the Jonathan Qwelane v South African Human Rights Commission matter. Rhetorically the Applicants submit that undoubtedly because what the comments made by the Respondents, because they

bear all the fundamental hallmarks of hate speech the remains so even under the new test as formulated by the Constitutional Court in Jonathan Qwelane v South African Human Rights Commission is the crux of the matter.

The Constitutional Court judgment

44. The test formulated by the Constitutional Court is objective in this new test to comments some parts of the previous judgment, are congruent to the ration and the expressions of the Constitutional Court and is absolutely in compliance with speech therein contained was overboard and vague and therefore constitutional impermissible as essentially it infringed upon the right of freedom of expression, which is a constitutionally protected rights.

The Constitutional Court Judgment.

In light of the fact that this court previously declared its judgment and the proceedings a nullity in light of the Supreme Court of Appeal judgment and orders in the Qwelane matter it is appropriate to distinguish between the orders of the Constitution Court (herein referred to as the CC) and the Supreme Court of Appeal.

The relevant orders made by the Constitutional Court read as follows:

In respect of the confirmation application:

(a) The declaration of constitutional invalidity of section 10 of the promotion of the Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) made by the Supreme Court of Appeal is confirmed in the terms set out in paragraph (b).

(b) It is declared that section 10(1) of the Equality Act is inconsistent with section 1(c) and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word "hurtful" in the prohibition against hate speech.

(c) The declaration of constitutional invalidity referred to in paragraph (b) takes effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the constitutional defect giving rise to constitutional invalidity.

(d) During the period of suspension of the order of constitutional invalidity, section 10(1) of the Equality Act will read as follows:

(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

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

45. After preparing the judgment herein, On the 21 February 2022 this court issued a directive to the Registrar of Court to set the matter down for hearing on the 2nd March 2022 at 10:00am or as soon as the matter may be heard. The notice of set down was duly served on the applicants and the respondents at their chosen domicilium executandi et citandi on the 21st of February 2022.

46. Evidently the Constitutional Court did not confirm the declaration of constitutional invalidity for the same reasons as the Supreme Court of Appeal did, it concluded that, "only that the inclusion of the term "hurtful" rendered the section vague and contrary to the rule of law. In so concluding the Constitutional Court stated the following:

"[156] Despite the best endeavours to fashion a constitutionally complaint and reasonably understandable meaning of the impugned section, there is no saving grace for its problematic part. Given the troubling meaning of "hurtful "in the context of section 10(1), it is difficult for ordinary citizens to know whether their conduct will

be "hurtful "or "harmful" and thus whether it meets the threshold required by section 10. Consequently, for all the reasons cited, the term "hurtful "in section 10 (1) (a) is vague and so breaches the rule of law. For that reason, its inclusion in section 10(1) results in the section suffering from vagueness and it is thus unconstitutional. [157] section 10(1) (a) is irredeemably vague and undermines the rule of law enshrined in section 1(c) of the Constitution. It thus does not pass constitutional muster. However, this does not render the entire impugned provision unconstitutional. It is possible to excise the constitutionally offensive part from the rest of the provision."

46. Further to this the Constitutional Court upheld the appeal against the findings of the Supreme Court of Appeal in respect of the complaint against Mr. Qwelane and declared his statements to be 'be harmful and to incite harm and propagate hatred; and amounted to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000."

47. The undeniable consequence of the Constitutional Court judgment is that this court's previous judgment and order requires no further scrutiny seeing that it complies with the legal principles so set out by the Constitutional Court. The aforementioned ought to be apparent from the following extracts of the Constitutional Court judgment:

"In confirming that the test to be applied is objective the Constitutional Court confirmed the following:

"[97] This approach accords with the interpretation advanced in *SAHRC v Khumalo* that "[t]he objective test in section 10(1) implies in the terminology used to articulate it, that an intention shall be deemed if a reasonable reader would so construed the words. Because the objective test of reasonable reader is to be applied, it is the effect of the text, not the intention of the author that is assessed" I endorse the approach. It is consistent with our jurisprudence concerning similar

issues. An objective normative reasonable person test was accepted by this court, albeit in a different context, in S v Mamabolo. This is also consistent with our common law delict of inuria, which evaluates these claims by the reasonableness standard of wrongfulness. In Le Roux, this court held that, in order to determine whether expression was defamatory-

"[t]he test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that [they] would have had regard not only to what is expressly stated but also to what is implied."

48. In finding that statements which are merely hurtful are insufficient to constitute hate speech the Constitutional Court state as follows:

[103] Expressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech. It is well established that the prohibition of hate speech is not aimed at merely offensive speech, but that offensive speech is protected by freedom of expression. 139 This point is eloquently articulated in Whatcott, where it was noted that merely offensive or hurtful expression should be excluded from the ambit of a hate speech prohibition and respect should be given to the Legislature's choice of a provision predicated on hatred. 140 As mentioned above, the Supreme Court of Canada persuasively defined, in the context of hate speech, the legislative term "hatred" as:

"being restricted to manifestation of emotion described by the words 'detestation' and 'vilification'. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other harmful effects."

49. According to the Constitutional Court the prohibition of hurtful speech would certainly serve to the protect the rights to dignity and equality of hate speech victims, however, hurtful speech does not necessarily seek to spread hatred against a person because of their membership of a particular group, and it is that which was being targeted by section 10 of the Equality Act. Therefore, the relationship between the limitation and its purpose was found not to be proportionate.

50. The Constitutional Court defined 'harmful 'as follows:

{154] In construction to the insuperable difficulties with 'hurtful', the term 'harmful' does not suffer the same fate. On a plain reading, 'harmful' can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group. In Keegstra, the Supreme Court of Canada eloquently summed up two types of interconnected harms that reasonate with the ethos of our diverse constitutional democracy, namely "harm done to the members of the target group" and harm done to "society at large." Similarly, in SAHRC v Khumalo, three types of harm were illustrated. First, "the reaction of persons who read the utterances and who are inclined to share those views and be encouraged by them to also shun, denigrate and abuse the target group". Second, the type of harm experienced by the target group which includes "demoralisation and physiological hurt "and "the harm caused from responding in kind thereby creating a spiral of invective back and forth". And third "harm, "harm to the social cohesion in South African society "which can undermine our nation building project."

51. The Constitutional Court confirm that there is no requirement of an established causal link between the expression and actual harm committed and that the section postulate prohibiting expression that either harms or evokes a reasonable apprehension of harm to the target group. The Constitutional Court further

confirmed that *'speech must be interpreted broadly, so as to encompass the ideas behind the words themselves and both verbal and non-verbal expression.'*

52. In dealing with the purpose of prohibiting hate speech and the presumption of unfairness the Constitutional Court state as follows:

"[130] It bears emphasis that the prohibiting of hate speech seek to protect against the dissemination of hatred that cause or incites harm, in that it undermines the dignity and humanity of the target group and undermines the constitutional project of substantive equality and acceptance in our society. Provisions prohibiting hate speech can be contrasted with our law around unfair discrimination. In that context, listed grounds are grounds where the "dignity assessment "is presumed to have already been done – our jurisprudence tells us that discrimination on the basis of a listed ground is presumed to be unfair. This is based on past experiences, historic suffering or systematic disadvantage. As a result, in the unfair discrimination scenario, the onus shifts onto the respondent to show that discrimination on a listed ground is not unfair. In this regard, listed grounds differ from analogous grounds, where unfairness must be shown.

What must determined and how?

53. In dealing with the complainant against Mr. Qwelane the Constitutional Court confirmed what must be determined and how, as follows:

"[176] in the context of hate speech, what must objectively be determined is whether Mr. Qwelane's article could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred. Important considerations in making that determination include: who the speaker is, the context in which the speech occurred and its impact, as well as the likelihood of inflicting harm and propagating hatred".

54. The judgment of this court is on all fours with the aforementioned assessment by the Constitutional Court. I now turn to briefly, with reference to the facts of the matter, indicated why the statements by the respondents constitutes hate speech.

(i) **The Comments by the Respondents**

There is no dispute regarding the comments made by the respondents, same have been admitted.

(ii) **Can the statement of the second and third respondent reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred?**

The answer to the aforementioned must be in the affirmative. This was the exact purpose of the statements made. It was the dissemination of hatred with the intent to cause or incite harm and was meant to undermine the dignity and humanity of the children who have died and were injured, their parents and whites in general.

55. The respondents cannot dispute the fact that they have vilified whites because Whites are the enemy, and they are Land thieves. The respondents view themselves as being at WAR with whites. According to the respondents Whites people are not deserving of life, according to the respondents their deaths ought to be celebrated even the death of innocent children including their cats and their dogs.

56. Even when asked for clarity on his statements made the second respondent confirmed that he rejoices in the death of white children and commended those who have so rejoiced in their deaths. It is mere harmful statements which have been made by the respondents but harmful statements which fall within all three of the categories of harm identified by the Constitutional Court, as referred to above. This much this court has already accepted.

57. ***The relevant considerations***

Who the speakers were

The speakers were members of a political party in a formal statement of the party. The comments enjoy considerable publicity and the comments were shared across the country. The comments were clearly intended to arouse their members and followers and those it hoped to recruit in their political aspirations and cause.

Context in which the speech occurred and its impact

58. The statements were made subsequent to it being reported by the media that a number of children died at school. This court cannot ignore this backdrop and there can be no other "context "given to the statements as suggested by the respondents. The impact thereof was devastating. At a time when parents had to mourn the death of their children they were confronted with statements by the respondents which dehumanised and demoralised their children.

59. The likelihood of the infliction of harm and the propagation of hatred is beyond doubt. It is difficult to conceive of a more egregious assault on the dignity of white people than to celebrate the death of their children and denouncing their offspring as thieves worthy of death. The children's dignity as human beings deserving of equal treatment, was catastrophically denigrated by politicians in a widely publicised statement. The harm was not only to a vulnerable targeted group, minor white children, but also to the country's constitutional project, which seeks to create an inclusive society based on the values of equality, dignity and inclusiveness is indispensable.

60. The test, as set out in section 10, whether the utterances could reasonably be construed to demonstrate a clear intention to be harmful or incite harm, promote

or propagate hatred is objective in that the effect of the word on hears 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 those words. In this case the words were published and read by its primary audience. The word were broadcast to a wider audience.

61. The applicants counsel Mr. Groenewald submitted that the respondents defence which is based on the historical political opinion or views of the first respondent underpin its pending litigation against The F. W De Klerk Foundation, Johan Rupert, The Democratic Alliance, Afriforum, and Kalie Kriel which the respondents are utilising as their defence to the historical legacy of colonialism, apartheid and white supremacy perpetrated by whites against black people. In the context of this case this legal defence is misconceived because, other parties are not party to the present proceedings and historical context cannot amount to or found a sustainable tenable defence against the present matter.

The applicable legal principles

62. Section 3 of the Equality Act provides that" when interpreting, The Act, the court must take into account the context of the present dispute and the purpose of The Act", consequently the dispute is limited to the comments, remarks and publication of the said comments arising from the circumstances of the tragic death and injury of the learners of the Driehook Hoerskool the 1st February 2012 due to the collapse of the walk on bridge.

The preamble to the Constitution state;
We the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country

Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law;

Improve the quality of life of all the citizens and free the potential of each person; and

Build a united and democratic South Africa able to stand its rightful place as a sovereign state in the family of nations."

63. The constitution states;

"South Africa is one sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedom;

(b) Non-racialism and non-sexism; and

(c) Supremacy of the constitution and the rule of law."

64. Section 10(1) of The Equality Act prohibits hate speech and provides;

"Subject to the proviso in section12, 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 harmful or to incite harm;

(b) Promote or propagate hatred."

'prohibited grounds' as defined by the Equality Act is fairly broad, and includes race, sexual orientation, "or any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage or undermines human dignity.

The proviso in section 12, states that any:
"bona fide engagement in artistic creatively, 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 precluded by the section."

65. "Advocate of hatred"
Section 16(1) of the Bill of Rights protects freedom of expression. Section 16(2), however, excludes certain categories of speech from the protection of section 16(1). Section 16(2) (c) removes hate speech from the protection of section 16 (1) by excluding any "*advocacy of hatred* that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm." One sees immediately the expression advocacy of hatred "which is echoed and repeated insection2 (b) (iv) of the Equality Act. That expression where it appears in section 2 (b) (iv) of the Equality Act must bear the same meaning as it bears in section 16(2) (c) of the Bill of Rights. The prohibition in section 10 of the Equality Act is intended *inter alia* to prohibit the kind of speech excluded from protection by section 16(2) (c) of the Bill of Rights.

66. The Constitutional Court made this clear in Islamic Unity Convention b Independent Broadcasting and Others (Islamic Unity Convention) when explaining what genuine hate speech is:

"Section 16 (2) (c) is directed at what is commonly referred to as hate speech. What is not protected by the Constitution is expression or speech that amounts to "advocacy of hatred" that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to 'incitement to cause harm'.

67. Section 1(1) of the Equality Act defines prohibited grounds as follows:

"Prohibited grounds' are:

(a) Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; 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 enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

68. The provisions of section 10 of the Equality Act are inextricably linked to the Bill of Rights. Section 10 (1) gives effect to the following sections of the Constitutions: section 9 (the right to equality), section 10 (the right to dignity), and section 16(2) (c) (the exclusion of hate speech from the ambit of the right to expression). Similarly, section 7 of the Equality Act which forbids unfair racial discrimination is linked to section 9 and 10 of the constitution. Section 11 of the Equality Act is also linked to both constitutional rights, and other rights in the Bill of Rights. Section 10(1) read together with the proviso in section 12 which deals with hate speech.

69. Section 3 (1) of the Equality Act provides that-

*Any person applying this Act must interpret its provisions to give effect to_*

(a) The Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantage by the past and present unfair discrimination:

(b) The preamble, the objects and guiding principles of this Act thereby fulfilling the spirit, purport and objects of this Act."

70. Section 3(2) of the Equality Act provides that-

"Any person interpreting this Act may be mindful of –

(a) Any relevant law or code of practice in terms of a law;

(b) International law, particularly the international agreements referred to in section 2 and customary international law:

(c) Comparable foreign law."

71. In the present instance, it is accordingly appropriate for this Court to make reference to foreign law in considering the proper scope and application of section 10 of the Equality Act, because of it on the right to equality in section 9, the right to dignity in section 10, and on the limitation of the right to freedom of expression in section 16(2) (c) of the Constitution.

72. Section 3 (3) of the Equality Act requires that any person applying or interpreting the Act "must take into account the context of the dispute and the purpose of this Act."

Section 2 of the Equality Act sets out its objects in the relevant part as follows:

"The objects of this Act are –

(a) To enact legislation required by section 9 of the constitution;

(b) To give effect to the letter and spirit of the Constitution, in particular –

(i) The equal enjoyment of all rights and freedoms by every person;

(ii) The promotion of equality;

(iii) The values of non-racialism and non-sexiem contained in section 1 of the Constitution;

(iv) The prevention of the unfair discrimination and protection of human dignity as contemplated in section 9 and 10 of the Constitution;

(v) The prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2) (c) of the Constitution and section 12 of this Act;

73. Section 39(2) of the Constitution provides that;

"When interpreting any legislation, and when developing the common law or customary law, every count, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

The duty upon a court to interpret legislation in a manner consistent with the Bill of Rights was set out by the Constitutional Court in the case of *Investigating Directorate: Serious Economic Offences and Other v Hyundai Motor Distributors (pty) Ltd and others: in re Hyundai Motor Distributors and Others v Smit NO and Others (Hyundai)* as follows:

"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution" (Emphasis added)

74. Article 20, paragraph 2 of the International Convection on Civil and Political Rights (ICCPR), ratified by South Africa on 10 December 1998, provides that:

"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Dignity

Human dignity informs the interpretation of all other rights, including the right to freedom of expression and the right to equality. The right to freedom of expression must be realised in a manner that does not violate the dignity of others. The right to equality must be realised in a manner that ensures everyone is equal before the law and has the right to equal protection and benefit of the law, so as to ensure their dignity. Human dignity entails that an individuals or groups have the right to feels self-respect and self-worth, emotional and psychological integrity. Human dignity is harmed when individuals or groups are marginalised or devalued.

See The Canadian Supreme Court in Law v Canada (1999) 170 DLR4th 1 (SCC).

75. Section 7 of the Equality Act provides amongst other that:

"No person may unfairly discriminate against any person on the ground of race, including -

(a) The dissemination of any ....idea, which propounds the racial superiority or inferiority of any person...

(b) The engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity based on race..."

76. Section 16 of the Constitution provides in its entirety as follows:

Freedom of expression

(1) Everyone has the right to freedom off expression, which includes –

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity;

(d) academic freedom and freedom of scientific research.

(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."

77. There are clearly two parts to section 16. Section 16 (1) protects freedom of expression and specifies categories of the freedoms that are included under its protection, like freedom of the press and media etc. Section 16(2), however, excludes certain specified categories of speech from the protection of section 16(1). The excluded expressions can therefore simply not claim the protection of section16 (1).

78. Hate speech is an expression which is specifically excluded from protection by section 16(2) (c). Section 16(2) (c) does so by excluding any "advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm" as the Constitutional Court explained in Islamic Unity Convention. "What is not protected by the Constitution is expression or speech that amounts to advocacy of hatred' that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to incitement to cause harm."

79. Judge Sutherland in the case of The South African Human Rights Commission v Velaphi Khumalo, case No: EQ6 of 2016 and EQ1/2018 masterfully explained the reason why the provisions of the Equality Court Act must be interpreted purposively regarding the implementation of its value choices and the policy options Thus:

"South African society is, manifestly, a community that exhibits significant social in which, amongst other social distinctions, we are marked off and categorised by race and personal appearance. A significant inter-racial tension exist, derived from several circumstances, no least from inequality and the persistence of some degree of inter-racial hostility. This unhappy and regrettable condition is our historical legacy. The Constitution has proclaimed that we recognise the fractured character of our community and set about transforming our society towards a goal that unequivocally repudiates inter-racial hostility so that we may build a nation upon a consensus that every South African deserves dignity and that our whole community, through sharing resources and through respect for one another, can experience social cohesion. The pre-amble of the Equality Act states that among its objectives is an endeavour."

"to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principle of equality, fairness, equity, social progress, justice, human dignity and freedom."

80. The court recognises this. The court recognises our past; the court recognises the fact that there is still tension. But the court says that is not the context from which we shall move. We shall move from the context of what the Constitution provides and what The Equality Act provides, that is our purpose and our objection and objective.

"in South Africa, however, our policy choice is that utterances that have the effect of inciting people to cause harm is intolerable because of the social damage it wreaks and the effect it has on impending a drive towards non-racialism. The idea that in a given society, members of a 'subaltern' group who disparage members of the 'ascendant' group should be treated differently from the circumstances were it the other way around has no place in the application of the Equality Act and would indeed subvert its very purpose. Our nation building project recognises a multitude of justifiable grievances derived from past oppression and racial domination. The value choice in the Constitution is that we must overcome the fissures among us. That cannot happen if, in debate, however robust, among us, one section of the population is licensed to be condemnatory because its members were victims of oppression, and the other section, understood to be, collectively, the former oppressors are disciplined to remain silent."

"There can never be an excuse that absolves any one of us from accountability in terms of section 10(1). There may be surrounding circumstances which aggravate the utterances or mitigate the likelihood of incitement to cause harm; these are matters fall to be dealt with when remedies are considered."

To sum up, section 10must be understood as an instrument to advance social cohesion. The "othering" of whites or any other racial identity is inconsistent with our constitution values. These utterances, in as much as they, with dramatic allusions to the holocaust, set out a rationale to repudiate whites as unworthy and that they ought deservedly to be hounded out, could indeed, be construed to incite the causation of harm in the form of reactions by Blacks to endorse those attitudes, reactions by whites to demoralisation and rachet up the invective by responding in

like manner, and thus by such developments, on a large enough scale, derail the transformation of South African Society."

81. The second and third respondents align themselves with the postings of Siyanda Gumede. They endorse same and adopt and repeat same as their own comments and they identify with same as their own words. The first respondent represented by its president endorses the views of the second and third respondents who are members of the BLF, Mr. Andile Mnxitama as the president of the first endorses Siyanda Gumede's published view and adumbrates his standpoint that god and his ancestors are punishing the white land thieves and their white children.

82. Even though the second respondent was not absolutely certain that all the children who died at the Driehook Hoerskool Walkway were white children, implicit in his statement is that if the victims of the said tragedy, the children turn out to be black he would mourn these victims because then the victims of the tragedy would be black children who are not be the offspring (the children) of the white land thieves (who according to the second respondent happen to be white people) but would be black children who the God and the ancestors of the respondents and by extention of logic the God and ancestors of black would have intervened on behalf of the suffering blacks and had precipitated in the tragedy which has caused the death of the white children and, consequently black people celebrate the death of these white children because they are the offspring of white land thieves who are the enemies of black.

83. These comments constitute not only the views and standpoint of the respondents because only the deaths of the offspring (the children) of Black people who are not land thieves are worth mourning, but the deaths of the offspring's of white land thieves cannot be mourned and have to be celebrated. Blacks are also entitled to celebrate the deaths of not only the children of the white land thieves, but even that of their cats and dogs.

84. The respondents equate the life, and worth of white land thieves and their children to that of their dogs, and cats, meaning the life of whites it is not worth of being categorised as human life. This in my view is a direct attack and infringement of the right to life and equality and human dignity of white people based on the colour of the skin. On the contrary the respondents accord Blacks their constitutional right to the life, dignity and equality based on the colour of the skin colour of Blacks. These utterings endorsed by respondents are based on race and are discriminatory and constitute hate speech and consequently infringe the Constitution and The section 10 of the Equality Act.

85. The respondents in justification of these utterings claim that the reference to white children, women, their dogs and cats is rhetorical because the historical legacy of racism suggest that when white people were perpetrating black genocide, they acted indiscriminately and did not make any distinction between black men, black women, children and their livestock they killed them all indiscriminately consequently the reference to white children as well as their dogs and cats is rhetorical and meant to create a minor image which serves as a deterrent to the black on black violence. This so-called justification is untenable and unsustainable as it infringes the Constitution and Equality Act.

86. I agree with the applicant's contention that the respondents comments amount to "discrimination, hate speech and harassment on the based on race in that they propagate and incite racial tension and hatred because they are intended to be hurtful, harmful.

87. The submissions by the respondent that these comments are not hurtful, or harmful or intended to propagate and incite hate speech that they do not cause incitement to imminent violence because the respondents were was merely acknowledging an event that has occurred as an indication of a historical redress for the ills of colonialism that black people have been and continue to be subjected is disingenuous because according to the respondents the same event which is sanctioned by God and petitioned by the black ancestors if it had occurred to black

children they would not have celebrate it, but would have mourned the tragic death of the Black children but in the same if the opposite had happened they would have celebrated the deaths if they occurred to white children.

88. According to Mr. Andile Mngxitama in the SA colonial context more fully elaborated in the respondents opposing affidavit, it is difficult if not impossible not to feel empathy and sorrow for whites in instances of tragedy. This would not be the situation in the free society. From this point of view, the foundation of the respondent's utterances is a response to the racism of the white that constitutes the lifeblood of colonialism which in turn is based on the historical dispossession of blacks of their land. Consequently the utterances of the Respondents suggest the reality of the main contradiction currently prevailing in the country, between white supremacy and black oppression. In my view this contention is both illogical and unsustainable having regard to the constitutional prescripts founded on non-racialism.

89. Mr. Andile Mngxitama argues that the BLF does not celebrate the deaths of the learners at Driehoek because BLF believe that black children's live also matter and this can be achieved with the return of the land to ensure justice. The obvious logical corollary according to Mr. Mngxitama is that white children lives also matter consequently he argues. The allegation that the response of the "average reasonable South Africa", the members of the first Applicant (Solidarity) and the families of the deceased and injured children was that of outrage, disgust and disappointment is denied if it refers to "average reasonable South Africa" because we live in a deeply divided society where the majority is black. I fail to logically follow the tortuous logic because it is unsustainable.

90. The respondents further argue that the applicant's rights do not extend to curtail their rights to freedom of expression and political engagement on the facts alleged, or in the current political climate of anti-black racism perpetuated by white against blacks.

91. The Respondents state that they are against violence yet, they view themselves as being at WAR with whites, that the incident which occurred has reassured them that God and their ancestors have not forsaken them and are assisting them in their fight against whites, that consequently this tragic incident is in fact seen as a victory in their WAR against whites who are land thieves and beneficiaries of colonialism and the oppression of Blacks.

92. The respondents are disingenuous in their comments in response to the death of the four white learners, by opinion that their comments cannot be delinked from the historical legacy of colonialism and apartheid imposed by white supremacist governments on blacks, because since the demise of apartheid a new democratic and indecisive constitution is in existence.

93. The Constitutional Court held in Tshwane Metropolitan Municipality v Afriforum and Another (2016) ZACC 19; 2016 (6) SA 279 (CC) para [122]

"Whites South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people's interest. South Africa no longer 'belongs' to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the preamble and our values, if our constitutional aspirations are to be realised."

94. In essence the respondents admit that according to them these white children were deserving of death as a redress of white supremacy because they are the offspring of the white land thieves who are responsible for the colonial subjugating of blacks. In my view that these utterance cannot be justified by any reasonable person no

matter what the context. The respondents have referred to these innocent white children (and whites in general) as land thieves whose death should be celebrated, without any justifiable cause. In my view the respondent's comments are an offensive and based on racial bigotry which is discriminatory, and is out lawed by the Constitution and The Equality Act.

95. In the matter of ***President of the Republic of South Africa v Hugo'5*** the Constitutional Court confirmed that all member of our society will be accorded equal dignity and respect regardless of their membership of particular group.
The court stated as follows:

"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect [1997] ZACC 4; 1997 (4) SA 1 (CC): 1997 (6) BCLR 708 (CC) (HUGO) at para 41. See also Minister of Home Affairs v Fourie [2005] ZACC 19: 2006 (1) SA 524 (CC): 2006 (3) BCLR 355 (CC) at para 60 where it was stated:

"Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of differences. Respect for human dignity requires the affirmation of self, not the denial of self.
Equality therefore does not imply a levelling or homgenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that differences should not be the basis for exclusion, marginalisation and stigma." Regardless of their membership of particular groups. The achievements of such a society in the context of our deeply in-egalitarian past will not be forgotten or overlooked".
At the heart of the Respondents argument is the contention that whites (even white children) are not worthy of being accorded equal dignity and respect under the Constitution, due to their past, and in fact they are not even worthy of life seeing that their deaths are seen as a victory which should be celebrated.

In the matter of Harksen v Lane N. 016 the Constitutional Court formulated the test for discrimination as follows:

"Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, 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. If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation if, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2) [of the Constitution]."

96. I agree with Mr. Groenewald on behalf of the applicants that the parents of the deceased who should have been afforded the opportunity of mourning the death of their children with dignity, but are now confronted with a situation where the respondents turned a tragic accident into racial victory, vilified their beloved children, rejoiced in their anguish and celebrated their death that this conduct should be visited with rigorous sanction.

97. In Islamic unity Convention Langa CJ explained the scope of section 16 of The Constitution:

"Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to' A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to as hate speech, even if it has overtones of race or ethnicity.

98. There can be no greater advocacy of hatred than to rejoice and celebrated the death of innocent children because of the fate relating to the colour of their skin. There can also be no greater advocacy of hate speech to proclaim and celebrate the death of another human being, and to proclaim such death as a victory. The hatred and hate speech is galling even more so when those who have died were fallen by a tragedy and their only crime according to the respondents is because they are the offspring's of white parents whom the respondents categorise as land thieves.

99. This racial hatred and categorisation of the tragic death of these white children by Siyanda Gumede is endorsed by the respondents as "minus three future problems" was adopted as correct by the second respondent and was not repudiated by Mr. Andile Mngxitama in his capacity as the President of B.L.F (the first respondent). Consequently, this view can be regarded as the adopted official B.L.F political policy regarding the fact that "God has finally intervened after being petitioned by BLF's black ancestors" whose supplications have resulted in precipitating the death of the children of white land thieves, that as a consequence of such death, the B.L.F and its members definitely celebrates same as the deaths of their enemies, the white land thieves, their children, their cats and dogs.

100. It is disingenuous of Mr. Andile Mngxitama to claim that the applicants are wrong to claim that the comments made by the second respondent and by logical extension also the third respondent "are not the official view and political position of the first respondent that such assertion by the applicants is misrepresentation.

101. Mr. Andile Mngxitama as the deponent of the answering affidavit in respect of all the respondents and as the president of the first respondent did not pertinently denounce and repudiate the comments of both the second and the third respondents as not representing the official political policy of the B.L.F even though both the second and the third respondents articulated and attributed their comments as the view, standpoint and political policy position of the B.L.F and it Black Members. It is common cause that the comments made by the second and the third respondents were denied but were admitted by Mr. Andile Mngxitama on behalf of all the respondents.

102. Mr. Andile Mngxitama has admitted that the death of the four white children and the serious injuries suffered by twenty other white children was tragedy and was something that should not happen to any child in any normal society nor at a school like Driehoek Hoerskool, which incidentally is a non-racial high school, attended by all races! That this was a tragedy which all of us should without any hesitation find tragic and sad. Paradoxically Mr. Andile Mngxitama stated that B.L.F (the first respondent) does not celebrate the death of the learners at Driehoek Hoerskool, that B.L.F is against violence and was formed to end violence, yet he did not repudiate the comments made by the second and third respondents regarding tragic death of the four learners despite such comments being racist, crude, insensitive, barbaric and being made with the intention to cause hurt, harm and cause incitement to propagate racial hatred, these comments are contravention of section 16 of the Constitution and section 10 (1) of the Equality Act because they amounted to the advocacy of racial hatred which is based on race and which also amounts to the hate speech.

103. In conclusion the relationship between sections 16 of the Constitution and these sections in the Equality Act have been addressed in the case law. The law as espoused by the Constitutional Court in the Qwelane case is the trite that the interpretation of the subsections of section 10 be understood and to be read 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]3.*

104. The test as set out in section 10, whether the utterances could reasonably construed to demonstrate a clear intention to be 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 these words. In this case the words were published and read by its primary audience. This words were broadcast to a wider audience.

105. The utterance are a mix of allegations of fact and of opinion. The utterances were, it can be inferred, aimed at celebrating and to endorse the respondents opinions that the death of which school children must be celebrated because they are the children of land thieves. The content and tenor of the utterances were clearly intended to be harmful towards the applicants and promote hatred of the applicant for the reason advanced in the published words. For the purpose of this judgment it will be assumed that every allegation of fact is false and every opinion obnoxious and severely disparaging of the applicant.

106. In the case of Qwelane v South African Human Rights Commission and Another the Constitutional Court declared that section 10(1) of the Equality Act is inconsistent with section 1(c) and section 16 of the Constitution and this Unconstitutional and invalid to the extent that it excludes the word "hurtful" in the

prohibition against hate speech. Consequently section 10 (1) of the Equality Act now reads as follows:

"Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred."

107. Regarding Costs, Advocate Kemp submitted that the Respondents have treated the same with extreme contempt and that the Respondents should be multed with Costs.

The order

(1) The comments of the second and third respondents are declared to be hate speech and are prohibited in terms of section 10(1) of the Equality Act :

(2) The respondents are interdicted from repeating, posting or publishing the said comments in any social media platform or any mass media platform;

(3) The second and third respondents are ordered to delete the said comments and all references from any social media or other public communication platform;

(4) The second and the third respondents are ordered to publish within 30 days of the date of this order a written apology directed at all South Africans in which they acknowledges that their comments were hate speech, that they were wrong to publish or post same, and undertake to desist publishing or posting the said comments as they are prohibited by section 10 (1) of the Equality Act;

(5) The apology made by the respondents shall be communicated to the South African Human Rights Commission for further dissemination to the South African public;

(6) The second and third respondents are jointly and several ordered to pay the amount of R50 000.00 to each of the families of the four deceased children within 30 days of this order as damages arising from the impairment of their right to equality, dignity, emotional and psychological pain, suffering, humiliation and degradation;

(7) The second and third respondents jointly and severally are ordered to pay the applicants legal costs the one paying the other to be absolved.

MOKGOATLHENG J
JUDGE OF THE EQUALITY COURT
AND THE HIGH COURT OF SOUTH
AFRICA, GAUTENG LOCAL DIVISION JOHAHANNESBURG.

AND THE HIGH COURT OF SOUTH AFRICA
JOHANNESBURG
Counsel for the Applicants: Adv. Kemp and Adv. Groenewald.
Instructed by: The First, second and Third Respondents.
Date of Judgment: 02 March 2022.