CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 226/16

In the matter between:

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Applicant
and	
DUBULA JONATHAN QWELANE	First Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
FREEDOM OF EXPRESSION INSTITUTE	Fourth Respondent

Neutral citation:	*Psychological Society of South Africa v Qwelane and Others* [2016] ZACC 48
Coram:	Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J
Judgment:	The Court
Decided on:	14 December 2016
Summary:	leave to appeal — order of postponement — due process — *audi alteram partem* — legal standing of applicant who was an *amicus curiae* in Court a quo leave to appeal refused — discretion to grant postponement not exercised judicially — but not in interests of justice to intervene — circumstances may, in public interest, warrant acknowledging legal standing of the *amicus curiae* to seek leave to appeal

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ORDER

On appeal against an order of postponement granted by the High Court of South Africa, Gauteng Local Division, Johannesburg:

The following order is made:

The application for leave to appeal is dismissed.

JUDGMENT

THE COURT (Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring):

Introduction

[1] This application for leave to appeal seeks to overturn an order the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) granted. The order for a postponement was granted in favour of the first respondent, Mr Dubula Jonathan Qwelane (Mr Qwelane). Leave to appeal was not sought from either the High Court or the Supreme Court of Appeal (SCA). Instead the applicant, Psychological Society of South Africa (PsySSA), lodged an application for leave to appeal in the SCA. When the Registrar of that Court advised them to first seek leave in the High Court, it abandoned that application and turned to this Court.

[2] This Court has decided the application without written submissions or oral argument.

Background

[3] At issue is a claim of hate speech against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. On 20 July 2008, Mr Qwelane published an article in the *Sunday Sun*: Call me names but Gay is NOT okay. In the article, Mr Qwelane likened gay and lesbian people to animals. They were, he said, responsible for the rapid degeneration of values in society. The article attracted widespread notice, controversy and response. In the article itself, Mr Qwelane warned the second respondent, South African Human Rights Commission (SAHRC), that he would not apologise for his expressed views. And, indeed, when SAHRC asked him to do so, he refused.

[4] In December 2009, SAHRC filed a complaint in the Equality Court sitting at the Johannesburg Magistrate's Court (equality proceedings). The complaint cited Mr Qwelane and Media24 Holdings (Pty) Limited (Media24), the publisher of the *Sunday Sun*.[1] SAHRC contended that the article amounted to hate speech and could be construed to demonstrate an intention to be hurtful, and to propagate hatred. The complaint was filed in terms of sections 10(1) and 11 of the Promotion of Equality and Prevention of Unfair Discrimination Act[2] (Equality Act) read with sections 9(4) and 16 of the Constitution. It asked for an order directing Mr Qwelane to apologise for his statements and to pay R100 000 to a gay and lesbian organisation and also to perform community service. The Freedom of Expression Institute and PsySSA joined the proceedings as *amici curiae* (friends of the court).

[5] On 31 March 2011, in default of appearance by Mr Qwelane, SAHRC obtained a judgment against him. But Mr Qwelane successfully applied for the rescission of this judgment. It was rescinded on 1 September 2011. On 11 April 2012, Mr Qwelane filed an answering affidavit in the complaint proceedings. SAHRC replied on 7 May 2012.

[1] SAHRC withdrew the complaint against Media24 on 23 May 2011.

[2] 4 of 2000.

[6] Then on 1 June 2012, Mr Qwelane applied to the High Court for an order declaring section 10 of the Equality Act constitutionally invalid. He requested a stay of the equality proceedings pending the determination of his constitutional challenge.

[7] The parties agreed that, in view of the constitutional challenge before the High Court, the equality proceedings should be transferred to that Court. They filed an application for transfer. The Johannesburg Magistrate's Court transferred the proceedings on 11 September 2012.

[8] But Mr Qwelane withdrew his constitutional challenge. Then, 15 months later, he changed course again. On 27 September 2013, he launched a fresh constitutional challenge. SAHRC and the *amici* were now respondents. This time he applied for an order declaring sections 10(1) and 11 of the Equality Act inconsistent with section 16 of the Constitution.[3] He also sought a stay of the equality proceedings.

[9] SAHRC filed its answering affidavit on 30 October 2013 and Mr Qwelane replied on 4 April 2014. The constitutional challenge was set down for hearing on 13 and 14 November 2014. But SAHRC successfully applied for the two

[3] Section 16 of the Constitution provides:

"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."

applications – the constitutional challenge and the equality proceedings – to be consolidated.[4]

[10] It is this consolidated application that is before us now. Months in advance, at the instance of the Judge President, it was set down for hearing from 29 August to 9 September 2016. But, just days before the hearing, on Thursday, 25 August 2016, Mr Qwelane's attorneys wrote to SAHRC and the *amici*, requesting a postponement. They reasoned that Mr Qwelane suffered from multiple chronic conditions.[5] He was therefore not fit to attend the proceedings. The third respondent, the Minister of Justice and Constitutional Development (Minister), assented, but SAHRC objected. Mr Qwelane's attorneys wrote again on Friday, 26 August 2016. They attached a medical report by Dr Ameen Seedat.

[11] This time PsySSA wrote back. It requested that an independent medical specialist examine Mr Qwelane to confirm his medical conditions and to determine whether he was fit to attend the proceedings and to give evidence. Mr Qwelane objected. He stated that PsySSA was an *amicus curiae* (friend of the court) and did not have an interest in the proceedings other than to assist the court on issues of law. Mr Qwelane did not seek their permission. At this, SAHRC, the complainant, made an identical request. Mr Qwelane's attorneys refused this too. They said there was no basis for anyone other than Dr Seedat to conduct the medical examinations.

[12] On the very eve of the trial, Sunday, 28 August 2016, Mr Qwelane served an application for the hearing to be postponed *sine die* (without any specified date for reconvening).[6] He stated that the severity of his medical condition precluded him from attending the proceedings. He would not be able to testify or follow the proceedings. Mr Qwelane stated that he struggles to breathe without artificially

[4] *Qwelane v Minister of Justice and Constitutional Development* 2015 (2) SA 493 (GJ).

[5] Chronic obstructive airways disease, insulin-dependent diabetes mellitus, fibrosis alveolitus, hypertension and cardiac failure. As a result of his condition, Mr Qwelane was dependent on oxygen support for 24 hours a day.

[6] The application was served on SAHRC, the Minister and the amici, with an original copy handed up to the Judge on Monday, 29 August 2016.

supplied oxygen. He battles to remember pertinent events. He would therefore be prejudiced if compelled to attend the trial.

[13] There was, he contended, no way to determine when his condition would improve. Hence the formal request for a postponement *sine die*. But during the hearing, when probed about the length of the postponement, his counsel changed tack. He said that the postponement should be for more or less three months.

[14] PsySSA and SAHRC opposed the postponement. They asked the Court to order that Mr Qwelane subject himself to an examination by their own doctors to confirm the veracity of his reasons for seeking a postponement.

High Court

[15] The High Court (Moshidi J) delivered an *ex tempore* judgment. It granted the postponement *sine die*. The Court directed the parties to approach the Deputy Judge President for a new date.

[16] PsySSA was aggrieved that the Court granted the postponement after only oral submissions had been made – and, more importantly, before SAHRC and PsySSA could file papers opposing the application, which they had received barely hours before.[7] The Court thought giving these parties the chance to respond was unnecessary. It was not convinced that any answering affidavit would change Mr Qwelane's physical condition. "If a person is sick", the Court said in granting the postponement, "[he] is sick". The Court declared that, after considering all aspects, including possible prejudice to the other parties and the interests of justice, the application was well-grounded and *bona fide* (in good faith).

[7] The Minister and the Freedom of Expression Institute did not oppose the application for a postponement.

In this Court

PsySSA's submissions

[17] PsySSA roots its legal standing in this Court's decision in *Campus Law Clinic*.[8] There, the applicant sought leave to appeal against a judgment of the SCA, to which it was neither a party nor involved as an *amicus curiae*. It sought to do so on the ground that this was in the public interest. The Court embraced this principle. It said there could be standing to appeal against a judgment in the public interest. It held that the fact that a party was not a party to the proceedings in the lower court is not an absolute bar to it being accorded standing to seek leave to appeal.[9]

[18] PsySSA complains that by postponing the matter *sine die*, the High Court caused PsySSA and the LGBTI persons whose interests it seeks to advance an injustice. The Court denied it an opportunity to file opposing papers. A postponement *sine die* in effect amounted to a permanent stay. This was because Mr Qwelane's condition is, on his own showing, chronic and likely to deteriorate. His prognosis is not good. Hence it was in the interests of justice for the hearing to be expedited and the Court should have found a just means of doing so.

Mr Qwelane's submissions

[19] Mr Qwelane opposes the application on a number of grounds. These include that PsySSA, an *amicus curiae*, has no standing; the impugned order is not appealable; and the matter is moot since a date for resuming the trial has already been set.

[20] Mr Qwelane submits that PsySSA joined the proceedings merely as an *amicus curiae*. Its role is to assist the court by making submissions on issues of law the other parties have not made. It is not a party and is therefore not entitled to seek its own relief. Additionally, SAHRC has not supported the application. Instead

[8] *Campus Law Clinic, University of Kwa-Zulu Natal v Standard Bank of South Africa Ltd* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) (*Campus Law Clinic*).

[9] Id at para 20.

SAHRC has applied to the Deputy Judge President for a date for the resumed hearing. PsySSA's reliance on *Campus Law Clinic*, he says, is misplaced. That judgment, he says, allows for a party who was not party to the lower court proceedings to appeal in the public interest. But here, PsySSA is acting in its own interest. So it does not fall within *Campus Law Clinic*.

[21] Mr Qwelane urges that PsySSA's contention that the High Court order is final in effect cannot be maintained. It is clear from SAHRC's letter requesting a special allocation of a date for the renewed hearing that it considered the postponement to be until Mr Qwelane is fit to attend. SAHRC does not endorse PsySSA's contention that the order is indeterminate.

[22] During oral argument before the High Court, Mr Qwelane's counsel adapted his cloth to request a three-month postponement. And in its request to the Deputy Judge President for a special allocation, SAHRC provided for an additional three months. So the total postponement now envisaged is six months. The order is interim and not appealable. So the application should be dismissed.

[23] Mr Qwelane also submits that expecting him to attend the proceedings in his current health is not in the interests of justice. It would violate his dignity and privacy. The Court should therefore refuse leave to appeal. And if this Court sets down this application for oral argument, it may be heard only in March or April 2017. This is the very time the High Court will hear the postponed application. So it would not be sensible to uphold the application.

[24] Both the Minister and SAHRC filed notices to abide.

[25] But, in an explanatory affidavit, SAHRC explains that abiding does not mean it agrees with the High Court's order. It does not. It supports PsySSA's submissions that the High Court erred in granting the postponement. It sought a set down date from the Deputy Judge President only because it considered this more expedient in

ensuring the matter is heard soon. SAHRC also submits that the High Court's refusal to accept answering affidavits in the postponement proceedings was procedurally unfair.

Discussion

PsySSA's legal standing

[26] The applicant was not a party to the proceedings. It was an *amicus curiae*.[10] In *Campus Law Clinic*, this Court held that granting an *amicus* standing would depend on various factors:

> "The factors that would be relevant would be: whether there is another reasonable and effective manner in which the challenge may be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court; the degree of vulnerability of the people affected; the nature of the rights said to be infringed; as well as the consequences of the infringement. The list of factors is not closed."[11]

[27] It is wrong to claim that PsySSA is acting in its own interest. It is acting to vindicate the rights of many LGBTI people who, it says, felt injured, affronted and diminished by Mr Qwelane's column. PsySSA states through its deponent, Professor Juan Nel, an expert in this field, that LGBTI people have been hurt and degraded and that their constitutional rights were violated by Mr Qwelane's published remarks.

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[10] In *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1235 (CC) at para 63, about the status of an *amicus* in court proceedings, Ngcobo J said:

> "An *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the Court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation ".

[11] *Campus Law Clinic* above n 8 at para 21.

[28] The nature of the complaint, the time that has passed since the complaint was originally filed, plus the constitutional challenge to provisions in the Equality Act all indicate the high level of importance of the proceedings and the public interest invested in them.[12] Given its professional stature in the field, PsySSA has standing to bring the application to this Court.

[29] It is worth noting that PsySSA erred in approaching the SCA by simply filing a notice of appeal without first obtaining leave to appeal in the High Court. It took the view that *George*[13] did not apply because there reference was made to the Supreme Court Act,[14] which has since been repealed by the Superior Courts Act,[15] and that section 23 of the Equality Act confers a right of appeal without leave. This was wrong. Even under the Superior Courts Act, which replaced the Supreme Court Act, appeals lie to the SCA only with leave of either the High Court or the SCA itself.[16] The Court in *George* made it plain that section 23 of the Equality Act does

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[12] In *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] ZASCA 14; 2001 (3) SA 482 (SCA) at para 28, Schutz JA said:

> "A party opposing an application to postpone an appeal has a procedural right that the appeal should proceed on the appointed day. It is also in the public interest that there should be an end to litigation."

[13] *Minister of Environmental Affairs and Tourism v George* [2006] ZASCA 57; 2007 (3) SA 62 (SCA) (*George*).

[14] 59 of 1959.

[15] 10 of 2013.

[16] Section 16 provides:

> "(1) Subject to section 15(1), the Constitution and any other law—
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> (a) an appeal against any decision of a Division as a court of first instance lies, *upon leave having been granted—*
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> (i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6); or
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> (ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;
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> (b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and
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> (c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context."

not entitle a party to appeal without leave.[17] The supersession of the Supreme Court Act by the Superior Courts Act did not change this.

Postponement

[30] Postponements are not merely for the taking.[18] They have to be properly motivated and substantiated. And when considering an application for a postponement a court has to exercise its discretion whether to grant the application.[19] It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court cannot substitute its decision simply because it disagrees.[20] The decision to postpone is primarily one for the first instance court to make.

[31] In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.[21] All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.[22]

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[17] *George* above n 13 at paras 15-6.

[18] *National Police Service Union v Minister of Safety and Security* [2000] ZACC 15; 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) at para 4 and *Lekolwane v Minister of Justice and Constitutional Development* [2006] ZACC 19; 2007 (3) BCLR 280 (CC) at para 17.

[19] *R v Zackey* 1945 AD 505 at 510-11.

[20] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at paras 83-9, citing *Ex parte Neethling* 1951 (4) SA 331 (A) at 335A-E and *Media Workers Association of South Africa v Press Corporation of South Africa Limited* [1992] ZASCA 149; 1992 (4) SA 791 (A) at 800E.

[21] *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314F-315J. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 3 and *Shilubana v Nwamitwa* [2007] ZACC 14; 2007 (5) SA 620 (CC); 2007 (9) BCLR 919 (CC) at paras 10-2.

[22] *National Police Service Union* above n 18 at para 5.

[32] It is evident that the High Court omitted fully to weigh these considerations here. The Court seems to have adopted the "no difference" approach. This was that receiving answering affidavits from SAHRC and PsySSA would have made no difference to the result. Mr Qwelane was going to get his postponement anyhow.

[33] That was wrong. It is trite that at common law and in terms of the tenets of natural justice, hearing the other party – *audi alteram partem* – is an indispensable condition of fair proceedings. As Donaldson LJ put it in *Cheall*:

> "[N]atural justice is not always or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'."[23]

[34] The principle is underpinned by two important considerations of legal policy. The first is recognising the subject's dignity and sense of worth. Second, there is a more pragmatic consideration. This is that *audi alteram partem* inherently conduces to better justice. Milne JA summarised both considerations in *South African Roads Board*.[24] He said the application of the *audi alteram partem* principle—

> "has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."[25]

[35] So the "no difference" approach is generally anathema.[26] Courts resist accepting that the right to a hearing disappears when it is unlikely to affect the outcome. This was elucidated in *Zenzile*:[27]

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[23] *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 1 QB 126 at 144B.

[24] *South African Roads Board v Johannesburg City Council* [1991] ZASCA 63; 1991 (4) SA 1 (A).

[25] Id at 13B-C.

[26] See *Friedland v The Master* 1992 (2) SA 370 (W) at 378A-C; *Muller v Chairman Ministers' Council, House of Representatives* 1992 (2) SA 508 (C) at 514F-G; *Fraser v Children's Court, Pretoria North* 1997 (2) SA 218 (T) at 231H-233B; and *Yuen v Minister of Home Affairs* 1998 (1) SA 958 (C) at 969J-970G.

[27] *Administrator Transvaal v Zenzile* 1991 (1) SA 21 (AD) (*Zenzile*).

> "It is trite . . . that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade *Administrative Law* 6th ed puts the matter thus at 533-534:
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> > 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly'".[28]

[36] The complaint against Mr Qwelane was set down for two weeks. SAHRC and PsySSA, and those whose interests they seek to advance, had waited many years for their day in court. Whether rightly or wrongly – it is not necessary for us to determine this – they felt aggrieved that the matter had been repeatedly delayed at the instance of Mr Qwelane. At the end of all this, they asked that the matter be stood down so they could file answering affidavits. The Judge's time had been set aside. There is no shadow of doubt about this: both convenience and entitlement gave PsySSA and SAHRC the right to be properly heard on whether a postponement should be granted.

[37] After all, SAHRC and PsySSA were best placed to help the Court determine whether the postponement would be prejudicial to them or to the public – and to weigh that prejudice against Mr Qwelane's. The Court should have permitted them time to make submissions. And it should have taken what they said into account before ruling on the postponement. This would have enabled it to balance the prejudice on to them were the postponement granted, against prejudice to Mr Qwelane, were it refused. Prejudice to SAHRC was a legitimate factor in the exercise of the discretion.[29] The High Court was duty bound to take it into account.

[38] The High Court controls its process. It does so with a measure of flexibility. At the forefront, when it does so, is a litigant's right to due process. Granting the

[28] Id at 37C-D.

[29] *Myburgh Transport* above n 21.

postponement before PsySSA and SAHRC could file answering papers did them an injustice. They sought to submit evidence, including an expert opinion that might affect consideration of Mr Qwelane's medical evidence. It was neither procedurally nor substantively justified to deny them this. It resulted in a miscarriage of justice.

[39] Whether the evidence would have changed the outcome is not the issue. The fact is that there was a denial of fair process. That it occurred in a case of high public interest, where injurious words are alleged to have been published, accentuates the injustice.

Leave to appeal

[40] Should this conclusion lead to this Court granting relief to PsySSA? This Court has emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity – where grave injustice threatens, and where intervention is necessary to attain justice.[30] In *Afriforum* Mogoeng CJ said:

> "It is indeed a general principle of our law that leave to appeal against an interim order would ordinarily be refused unless the applicant is able to demonstrate that irreparable harm would otherwise ensue."[31]

[41] But the fact that an order is temporary does not in itself determine whether the interests of justice require that leave to appeal be granted.[32] A court has to consider

[30] See *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) (*Afriforum*) at para 40; *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) (*Informal Traders*) at para 20; *Magidiwana v President of the Republic of South Africa* [2013] ZACC 27; 2013 JDR 1788 (CC); 2013 (11) BCLR 1251 (CC) at para 11; *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) at paras 24-5; *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at paras 22-3; and *Machele v Mailula* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 766 (CC) at paras 22-4.

[31] *Afriforum* id at para 48. At para 39, the Court stated that the appealability of interim orders in terms of the common law depends on whether they are final in effect. See also *OUTA* id at paras 24-5 and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531H-533A.

[32] *Albutt* above n 30 at para 22.

the circumstances and decide "whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs".[33] Equally, whether "the fact that a final determination of the main dispute between the parties, which decisively contributes to its final resolution, might be more expeditious and cost-effective".[34]

[42] Interference on appeal in a lower court's exercise of a discretion is possible only if the discretion was not judicially exercised.[35] Because of the procedural injustice, this is established here.

[43] But that is not the end of the story. Following the postponement, on 23 September 2016, SAHRC's attorneys wrote to the Deputy Judge President. The letter noted that SAHRC had instructed them not to appeal against the High Court order. Instead, they requested a specified date for the hearing, in March or April 2017. They also noted that during oral submissions, Mr Qwelane's counsel requested a postponement of three months. If the matter were heard in March or April 2017, Mr Qwelane would be afforded six months to recover.

[44] And according to correspondence between the parties and the Deputy Judge President of the High Court, filed in this Court, the matter will in all likelihood be heard from 6 to 17 March 2017.

[45] These facts mean it is inapt for this Court to intervene at this stage. Though the High Court dealt roughly with PsySSA and SAHRC and the important public interests they represent, it is not in the interests of justice to intervene. The postponement is no longer indefinite. The matter should be heard in March 2017. That tips the scales of justice against intervention.

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[33] *Informal Traders* above n 30 at para 20(g).

[34] *Albutt* above n 30 at para 23.

[35] *National Coalition for Gay and Lesbian Equality* above n 21 at para 11. See also *Naylor v Jansen* [2006] ZASCA 94; 2007 (1) SA 16 (SCA) at para 14.

[46] The application for leave to appeal to this Court against the High Court's order must in all the circumstances be refused.

Order

[47] The following order is made:

The application for leave to appeal is dismissed.