CONSTITUTIONAL COURT OF SOUTH AFRICA

Qwelane v South African Human Rights Commission and Another

Case CCT 13/20

Date of hearing: 22 September 2020
Date of judgment: 30 July 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 30 July 2021 at 10h00, the Constitutional Court handed down judgment in an application for confirmation of an order of constitutional invalidity granted by the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg), concerning section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

Mr Qwelane, a popular columnist, penned an article titled "Call me names – but gay is not okay", which was published by the Sunday Sun newspaper in 2008. In the article, the applicant compared gay and lesbian people to animals and postulated that they were responsible for the rapid degeneration of values in society. This article was met with a public outcry, and the South African Human Rights Commission received over 350 complaints. The SAHRC referred the hate speech complaint to the Equality Court. In response, Mr Qwelane instituted a constitutional challenge against section 10(1) of the Equality Act, which defines and prohibits hate speech. The proceedings were consolidated for hearing before a single Judge sitting as both the Equality Court and the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court).

In the High Court, the applicant argued that section 10(1) read with sections 1, 11, and 12 of the Equality Act are too broad in that they unjustifiably limit the right to free expression. Further, he argued that section 10(1) is impermissibly vague, especially when it is read with section 12 of the Equality Act.

The High Court dismissed the applicant's overbreadth challenge. It reasoned that section 10(1) of the Equality Act was not overbroad because it could be read in conformity with section 16(2)(c) of the Constitution, and passed the limitations test pursuant to section 36 of the Constitution. Similarly, the High Court dismissed the vagueness challenge, as the proviso in section 12 qualifies section 10(1). Ultimately, Mr Qwelane's statements constituted hate

speech as contemplated in section 10(1) of the Equality Act. The High Court ordered that the applicant tender a written apology to the LGBTI+ community and pay the costs of proceedings.

Discontented with the High Court's decision, Mr Qwelane appealed to the Supreme Court of Appeal. In a unanimous judgment handed down on 29 November 2019, the Supreme Court of Appeal upheld the finding on overbreadth and held that the impugned section was inconsistent with the provisions of section 16 of the Constitution, and was therefore invalid. Aggrieved, Mr Qwelane approached the Constitutional Court.

In a unanimous judgment penned by Majiedt J, the Constitutional Court established that the issues that arose for determination were: (a) whether the impugned provision entails a subjective or objective test; (b) whether section 10(1)(a)-(c) must be read disjunctively or conjunctively; (c) whether the impugned provision is impermissibly vague; (d) whether the impugned provision leads to an unjustifiable limitation of section 16 of the Constitution; (e) what the appropriate remedy would be if the constitutional challenge is successful; (f) the complaint against Mr Qwelane in terms of the Equality Act; and (g) costs.

In dealing with the first issue, the Court held that section 10(1) entails an objective reasonable person test, thereby upholding the decision of the Equality Court in that respect. Secondly, the Court found that the Supreme Court of Appeal erred in finding that paragraphs (a)-(c) of section 10(1) must be read disjunctively, as this would unjustifiably limit section 16 of the Constitution. Thirdly, the Court considered whether the terms "hurtful", "harmful" and "to incite harm" are vague, as they appear in section 10 of the Equality Act. It held that the term "hurtful' is indeed vague, while the others are not.

The Court also found that the inclusion of both the term "hurtful" in section 10(1) of the Equality Act, and the prohibited ground of "sexual orientation" in section 1, constitute limitations of section 16(1) of the Constitution. Applying the test in section 36 of the Constitution, the Court held that the limitation occasioned by "hurtful" cannot be justified, and is therefore unconstitutional. However, the inclusion of "sexual orientation" as a prohibited ground was found to be proportional to its purpose. It is a justifiable limitation of section 16(1). The Court reasoned that it would not be possible to protect the rights of the LGBT+ community without prohibiting hate speech based on sexual orientation.

Therefore, section 10(1) of the Equality Act was found to be unconstitutional to the extent of the inclusion of the term "hurtful". The Court reasoned that the unconstitutionality could be cured through the excision of that term, but that the declaration of constitutional invalidity should be suspended for 24 months to afford Parliament an opportunity to remedy the constitutional defect. The Court ordered that in the interim, section 10 should be read to refer exclusively to speech that is harmful and incites hatred.

With respect to Mr Qwelane, his abhorrent article was found to constitute hate speech in terms of the elements of section 10(1) which remained constitutional, as it had clearly been harmful and incited hatred. The Court reasoned that Mr Qwelane was advocating hatred, as the article plainly constitutes detestation and vilification of homosexuals on the grounds of sexual orientation. The Court upheld an amended version of the declaratory order of the High Court, but could not confirm the orders relating to an apology and an investigation by the Commissioner of the South African Police Service, due to the recent passing of Mr Qwelane.

Finally, in respect of the constitutional challenge the Court granted Mr Qwelane only half his costs, reasoning that while he had been substantially successful, it was his reprehensible homophobic behaviour that led to this dispute. The State was ordered to pay these costs. Given the constitutionally mandated role of the SAHRC, the Court found that a costs order against the SAHRC was not appropriate, and ordered that Mr Qwelane should pay their costs in the High Court, the Supreme Court of Appeal and the Constitutional Court.