Understanding the SCA's freedom of expression judgment

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The Supreme Court of Appeal (SCA) judgment in the Jon Qwelane case removes the concept of "hurt" from South Africa's hate speech laws. It affirms freedom of expression.

The Supreme Court of Appeal in Bloemfontein's 29 November judgment affirms freedom of expression. Photo: Ben Bezuidenhout via Wikimedia (CC BY-SA 4.0)

Espousing and fostering hatred is the antithesis of South Africa's Constitutional order, but freedom of expression is vital to - and indeed the lifeblood of - a democratic society. So begins a 46-page judgment penned by Supreme Court of Appeal Judge Mahomed Navsa (with four judges concurring) which has got tongues wagging.

Before them was an appeal by columnist and former Ugandan ambassador Jon Qwelane who, 10 years ago, penned an offensive column in which he sided with former Zimababwean President Robert Mugabe's anti-gay stance, calling for a revision of laws which allow same-sex marriages because "at this rate, how soon before some idiot demands to marry an animal".

The SA Human Rights Commission took action against him, saying he was advocating hatred against gay people, relying on section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).

Qwelane launched his own application, attacking the Constitutionality of PEPUDA saying its provisions were vague and overbroad.

The matters were consolidated and heard by Judge Seun Moshidi who, after hearing evidence from the Commission, the Freedom of Expression Institute and the Psychological Society of South Africa, ruled against Qwelane, finding that his column was “hurtful, harmful, incited harm and propagated hate and amounted to hate speech”. Judge Moshidi ordered Qwelane to publish a prominent apology.

Aggrieved, Qwelane persisted with his attack on PEPUDA in the SCA — an appeal Judge Navsa described as “bringing into focus the tension between hate speech and freedom of expression”.

The Constitution, it was argued, guarantees the rights of freedom of expression except if it is propaganda for war, incitement of imminent violence or “advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm”.

PEPUDA, however, extends the prohibited grounds to race, gender, sex pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, HIV/Aids status or “any other ground where discrimination based on that other ground causes or perpetuates systematic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a persons rights and freedoms in a serious manner that is comparable to discrimination”.

Judge Navsa said the Constitutional test was objective - a primary assessment of whether the expression complained of comprised advocacy of hatred based on one of the prohibited grounds and then a further assessment of whether it constituted incitement to cause harm (our emphasis).

PEPUDA, on the other hand, demanded consideration of whether a person had published or communicated the words based on one of the broad prohibited grounds and whether they “could reasonably be construed” to demonstrate an intention to be hurtful, harmful, or propagate hatred.

Judge Navsa said: “The difficulty in dealing with the standard set in PEPUDA in relation to the constitutional standard is the former is barely intelligible.” He said the provisions were so vague the average person would not be able to use the act as a guide for his or her conduct.

The use of the word “hurt” for example, required a test of subjective emotions and feelings which did not equate with causing harm or incitement to harm.

“One could say that pronouncements by agnostics and atheists, that the clergy and people of faith believe in fairytales could be hurtful to those targeted?

“Daily human interaction produces a multitude of instances where hurtful words are uttered and to prohibit this is going too far.”

The judge quoted law professor Pierre De Vos who had labelled PEPUDA as “absurdly broad in a vibrant democracy which respects difference and diversity”.

“Some of us remember all to well how the apartheid government tried to censor our thoughts and our speech,” De Vos noted.

Judge Navsa said he accepted that harm need not necessarily be physical but could be psychological but the impact had to be more than just hurtful in the dictionary sense.

“One must be careful not to stifle the views of those who speak out of genuine conviction and who do not fall within the

Constitutional limitations," he said.

"Unsurprisingly no counsel could point to any decision or regulation in any comparable democratic system which equates with, or even comes close to, the low threshold in PEPUDA, even assuming it is intelligible.

"We can all agree that it is important to protect the dignity of all our citizens. Equally we must agree, given our history, that freedom of expression must also be prized. That does not mean that hate speech cannot be proscribed. But it must be tailored to comply with constitutional prescripts and must survive a justification analysis.

"The legislature may well have wanted to regulate hate speech as broadly as possible, but it has not done so with the necessary precision," he said, ruling that the relevant section of PEPUDA is unconstitutional and giving lawmakers 18 months to rectify it.

The Judge said: "I am not unmindful of the threat to life and limb and psyche that members of the LGBTI community face. They must not be left without recourse."

He ordered that in the interim, PEPUDA would read: "No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation that constitutes incitement to cause harm."

He said the interim measures would not apply retrospectively.

The fact that Qwelane had succeeded meant the ruling against him had to be set aside. But he had a last word for Qwelane who, he said, had "given vent to his bigotry, was strident, provocative and unapologetic about it".

"We were informed by his counsel that he is ailing. He had an iconic status and had fought hard against the divisions of the past. He might well want to consider that it is worth preserving that legacy by seeking rapprochement, even now. I urge him to do so.

"We have to, in our beloved country, find a way in which to relate to each other more graciously. Differences of opinion are often laced with vitriol. We should be allowed to be firm in our convictions and to differ. What we are not free to do is infringe on the rights of others and we are certainly not free to inflict physical or psychological harm on others."

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