



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 14/19

In the matter between:

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION ON BEHALF  
OF SOUTH AFRICAN JEWISH BOARD OF DEPUTIES**

Applicant

and

**BONGANI MASUKU**

First Respondent

**CONGRESS OF THE SOUTH AFRICAN TRADE UNIONS** Second Respondent

and

**SOUTH AFRICAN HOLOCAUST AND  
GENOCIDE FOUNDATION**

First Amicus Curiae

**PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA**

Second Amicus Curiae

**FREEDOM OF EXPRESSION INSTITUTE**

Third Amicus Curiae

**MEDIA MONITORING AFRICA**

Fourth Amicus Curiae

**RULE OF LAW PROJECT**

Fifth Amicus Curiae

**NELSON MANDELA FOUNDATION**

Sixth Amicus Curiae

**Neutral citation:** *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5

**Coram:** Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ

**Judgment:** Khampepe J (unanimous)

**Heard on:** 27 August 2019

**Decided on:** 16 February 2022

**Summary:** Application for recusal — reasonable apprehension of bias — grounds for recusal not met

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 — Hate speech — subsidiarity

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## ORDER

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On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg, sitting as the Equality Court), the following order is made:

1. The application for recusal is dismissed.
2. Leave to appeal is granted.
3. The appeal is upheld in part.
4. The order of the Supreme Court of Appeal is set aside and substituted with the following:

“The appeal against the order of the Equality Court is dismissed with no order as to costs.”
5. Leave to cross-appeal is granted.
6. The cross-appeal is upheld.
7. Paragraph 2 of the order of the Equality Court is set aside and substituted with the following:

“The complaint against the respondents succeeds in respect of the first statement with no order as to costs.”

8. In the result, the order of the Equality Court is reinstated, subject to the following amendments:
  - “1. The first statement is declared to be harmful, and to incite harm and propagate hatred; and amounts to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
  2. The complaint against the respondents succeeds in respect of the first statement with no order as to costs.
  3. The respondents are ordered to tender an unconditional apology to the Jewish Community within thirty (30) days of this order, or within such other period as the parties may agree. Such apology must at least receive the same publicity as the offending statement.”
9. No order is made as to costs in this Court.

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## JUDGMENT

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KHAMPEPE J (Mogoeng CJ, Froneman J, Jafta J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

### *Introduction*

[1] At the heart of this matter are three fundamental rights, all indispensable to any healthy constitutional order. These rights – the rights to equality, human dignity, and the right to freedom of speech and expression – are rights that carry unique and troubled pasts interwoven into the fabric of apartheid history. In this constitutional dispensation, they are inextricably interconnected with what it means to be a citizen of a democracy, free to live a life in a condition of dignity and humanity. In this matter, these rights meet each other.

[2] The background to this matter is disturbing, and the genesis of the legal question with which this Court now finds itself seized, lies in four statements made orally and in writing by Mr Bongani Masuku in respect of the protracted feud between Israel and Palestine in the Middle East. It should be said at this earliest opportunity that what this Court is not called upon to do is to make any pronouncement on that situation, which is a concern of international relations and not a justiciable issue. To pronounce on this situation would be both wholly inappropriate and totally irrelevant to the legal questions that are the objects of our attention. Now that any ambiguity as to what we are doing here has been eradicated, let us turn to the background of this matter – the reason we are here.

[3] On 6 February 2009, Mr Masuku, while representing the Congress of South African Trade Unions (COSATU), made a series of remarks on the website [supernatural.blogs.com](http://supernatural.blogs.com), where he stated, verbatim:

“[A]s we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity.” (First Statement.)

[4] On 5 March 2009, at a rally convened by the Palestinian Solidarity Committee at the University of the Witwatersrand (Wits), Mr Masuku made three further statements, also while representing COSATU. When referring to what COSATU’s intentions were regarding those who supported Israel, he stated that “COSATU has got members here even on this campus; we can make sure that for that side it will be hell.” (Second Statement.)

[5] He further remarked:

“[T]he following things are going to apply: any South African family, I want to repeat it so that it is clear for anyone, any South African family who sends its son or daughter to be part of the Israel Defence Force must not blame us when something happens to them with immediate effect.” (Third Statement.)

[6] Finally, he stated:

“COSATU is with you, we will do everything to make sure that whether it’s at Wits, whether it’s at Orange Grove, anyone who does not support equality and dignity, who does not support rights of other people must face the consequences even if it means that we will do something that may necessarily cause what is regarded as harm.” (Fourth Statement.)

[7] On 26 March 2009, the South African Jewish Board of Deputies (SAJBD) lodged a complaint with the South African Human Rights Commission (HRC), alleging that the above statements (impugned statements) amounted to hate speech. The HRC formed the view that the statements amounted to hate speech and subsequently launched proceedings in the High Court of South Africa, Gauteng Local Division, Johannesburg, sitting as the Equality Court, on behalf of the SAJBD.

[8] The Equality Court determined that the statements constituted hate speech as defined in section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>1</sup> (Equality Act). The Supreme Court of Appeal, however, altogether avoided the question whether the statements constituted hate speech in terms of the Equality Act, and instead relied directly on the Constitution. Measuring the impugned statements against section 16(2) of the Constitution, it found that the statements did not amount to hate speech.

[9] It is against this disjuncture, as between the Equality Court and the Supreme Court of Appeal, that this matter comes before this Court. The approaches from the respective courts show stark disagreement not only as to the correct conclusions to be

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<sup>1</sup> 4 of 2000.

drawn from the facts of the matter but, more crucially, what the applicable law is. And so, it is to these questions that this Court applies itself.

### *Parties*

[10] The applicant is the HRC, a Chapter 9 institution governed by the Constitution and the Human Rights Commission Act.<sup>2</sup> The HRC brings the matter on behalf of the SAJBD, an organisation that represents members of the South African Jewish community. Its mission is to promote the safety and welfare of South African Jewish people, this includes combatting anti-Semitism in all its forms, and building bridges of friendship and understanding between Jews and the broader South African population.

[11] The first respondent is Mr Masuku who, at the time of the statements, was the Head of International Relations for COSATU. The second respondent is COSATU, a federation of trade unions representing various workers' interests in the Republic of South Africa, and, which, it is widely known, aligns itself with the Palestinian position in the intractable Israeli/Palestinian conflict.

[12] The first amicus curiae is the South African Holocaust and Genocide Foundation (SAHGF), an organisation that researches and promotes awareness of, among other things, the genesis of genocide.

[13] The second amicus curiae is the Psychological Society of South Africa (PsySSA), an organisation committed to promoting rigorous research and encouraging the application of research findings in the advancement of public well-being.

[14] The third amicus curiae is the Freedom of Expression Institute (FXI), an organisation that seeks to promote and protect the right to freedom of expression.

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<sup>2</sup> 54 of 1994.

[15] The fourth amicus curiae is Media Monitoring Africa (MMA), an organisation that advocates for freedom of expression and supports the responsible free flow of information to the public on matters of public interest.

[16] The fifth amicus curiae is the Rule of Law project (RoLP), which is a division of the Free Market Foundation. The objective of the RoLP is to provide intellectual substance to section 1(c) of the Constitution.

[17] The sixth amicus curiae is the Nelson Mandela Foundation (NMF), an organisation with a mission to create a society that remembers its past and pursues social justice.

### *Legal framework*

[18] Before launching into the litigation history of the matter, it is appropriate to traverse at this juncture the pertinent legal framework. The HRC submits that the impugned statements must be measured against section 10 of the Equality Act, which is the primary legislation prohibiting hate speech, and which reads as follows:

“Prohibition of hate speech:

- (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—
  - (a) be hurtful;
  - (b) be harmful or to incite harm;
  - (c) promote or propagate hatred.
- (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation 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 the common law or relevant legislation.”

[19] The “prohibited grounds” are set out in section 1 of the Equality Act, and are as follows—

- “(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
- (b) any other ground where discrimination based on that other ground—
  - (i) causes or perpetuates systemic disadvantage;
  - (ii) undermines human dignity; or
  - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).”

[20] Since Mr Masuku and the Supreme Court of Appeal relied heavily on the right to freedom of expression, as enshrined in section 16 of the Constitution, it is also prudent to set out this provision in full. Section 16 provides that:

- “(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.”

### *Litigation history*

#### *Equality Court*

[21] The question before the Equality Court was whether the impugned statements amounted to hate speech as contemplated in section 10(1) of the Equality Act.<sup>3</sup> In the

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<sup>3</sup> *South African Human Rights Commission v Masuku* 2018 (3) SA 291 (GJ) (Equality Court judgment) at para 2.



proceedings before the Equality Court, the HRC relied on expert testimony led by Dr Hirsch<sup>4</sup> and Dr Stanton<sup>5</sup> to contend that, despite Mr Masuku's assertion that his comments were directed at Zionists and not Jewish people, the relationship between Judaism and Zionism was too closely linked to be distinguished in the way Mr Masuku alleged.<sup>6</sup> According to the HRC, Mr Masuku's statements amounted to hate speech prohibited by section 16(2) of the Constitution and violated the complainant's right to equality, as guaranteed by section 9 of the Constitution.<sup>7</sup>

[22] In response, Mr Masuku relied on the expert evidence of Prof Friedman<sup>8</sup> to show that there was a distinction between anti-Semitism and legitimate criticism of the State of Israel (anti-Zionism).<sup>9</sup> The latter, Mr Masuku contended, more accurately reflects the character of his statements. According to Mr Masuku, his statements fell to be protected: they did not constitute hate speech, and they were based on fact, were true, and constituted fair comment on matters of public interest. Ultimately, he averred, the position held by the HRC would result in the legitimate expression of his right to free speech being unduly compromised.<sup>10</sup>

[23] According to the Equality Court, per Moshidi J, the matter involved a delicate balancing exercise of the right to freedom of expression as enshrined in the Constitution on the one hand, and the regulation of that right in order to give content to the rights to dignity, equality and non-discrimination, specifically the rights of the Jewish community not to suffer offence, on the other.<sup>11</sup> Against the backdrop of section 9 of

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<sup>4</sup> Dr Hirsch is a lecturer in Sociology at Goldsmiths University of London as well as an expert on Judaism and Zionism. See Equality Court judgment above n 3 at para 10.

<sup>5</sup> Dr Stanton is a Research Professor of Genocide Studies and Prevention at George Mason University. See Equality Court judgment above n 3 at para 11.

<sup>6</sup> Id at paras 10-1.

<sup>7</sup> Id at para 7.

<sup>8</sup> Prof Friedman is the director of the Centre for the Study of Democracy at the University of Johannesburg as well as Professor of International Relations at Rhodes University. See Equality Court judgment above n 3 at para 14.

<sup>9</sup> Id at para 14.

<sup>10</sup> Id at para 18.

<sup>11</sup> Id at para 1.

the Constitution,<sup>12</sup> Moshidi J analysed the Equality Act’s objects, and noted that one of its express objects<sup>13</sup> is:

“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.”<sup>14</sup>

[24] The Equality Court concluded that this indicates that the purpose of the hate speech provisions in the Equality Act is the regulation of speech that is not subject to constitutional protection under section 16(2) of the Constitution.<sup>15</sup>

[25] Because there was no frontal challenge to the constitutionality of section 10(1) of the Equality Act, ergo, no question as to whether it passed constitutional muster, the crux of the matter to be determined by the Equality Court was whether the impugned statements fell within the purview of section 10(1) of the Equality Act, and, thus, fell beyond protection.<sup>16</sup> The Equality Court noted that, whilst the Constitution puts certain forms of expression outside constitutional protection, the Equality Act goes further in regulating and prohibiting hate speech. It employs distinct categories of expression

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<sup>12</sup> Section 9 of the Constitution provides that:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

<sup>13</sup> Section 2 of the Equality Act sets out the express objects of the Act.

<sup>14</sup> Equality Court judgment above n 3 at para 21.

<sup>15</sup> Id at para 24.

<sup>16</sup> Id at para 9.

which it explicitly forbids, and which extend beyond the forms of hate speech that section 16 of the Constitution places outside the confines of constitutional protection.<sup>17</sup> Since the Equality Act constitutes the national legislation intended to prohibit hate speech, and in the light of the principle of subsidiarity, the Equality Court analysed the impugned statements under section 10(1).<sup>18</sup>

[26] The Equality Court, relying on a spate of judgments of this Court, observed that the right to freedom of expression is inseparable from a functioning democracy, and is an important right to be protected for it fosters the facilitation of truth, pluralism and tolerance.<sup>19</sup> However, the Court emphasised that, although important, it is not an absolute right and can be limited in accordance with section 36 of the Constitution.<sup>20</sup>

[27] The Equality Court dismissed as “untenable” Mr Masuku’s defences that the statements were either true, fair comment or in the public interest, and thus, ought to be protected.<sup>21</sup> It concluded that, understood in their proper context, the impugned statements targeted Jewish people, were hurtful, harmful and propagated hatred against Jewish people, and constituted precisely the mischief that section 10(1) of the Equality Act exists to combat.<sup>22</sup> It was held that the Constitutional Court has repeatedly

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<sup>17</sup> Id at para 42.

<sup>18</sup> Id at paras 19 and 60.

<sup>19</sup> Id at para 26.

<sup>20</sup> Id; Section 36 provides for the limitation of rights in the following terms:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

<sup>21</sup> Equality Court judgment id at para 47.

<sup>22</sup> Id at para 38.

highlighted the interests of the State in regulating hate speech because there is a recognition that, where it prevails, it threatens the constitutionally mandated objective of constructing a non-racial and non-sexist society based on common human dignity and the attainment of equality.<sup>23</sup> The Equality Court, thus, held that the statements unequivocally amounted to hate speech under section 10(1) as they: were based on prohibited grounds; reasonably indicated a discernible intention to be hurtful, harmful or incite harm, or propagate hatred; and did not add any value to public discourse nor could they possibly be said to contribute meaningfully to democratic dialogue.<sup>24</sup>

[28] The Equality Court also noted that the impugned statements did not even traverse the internal limitations imposed by section 16(2)(c) of the Constitution: they constituted material that would have been prohibited by the Constitution itself, even if the Equality Act did not render them prohibited.<sup>25</sup> Accordingly, there was simply no need to invoke section 36 to ascertain whether the limitation of Mr Masuku's freedom of expression was justifiable.<sup>26</sup> Ultimately, although the statements needed to be measured against section 10(1) of the Equality Act, the Equality Court held that they were neither protected by the Constitution nor the Equality Act, both of which they fell foul.<sup>27</sup>

[29] Having considered what would constitute an appropriate and effective remedy for the harm done, the Equality Court directed the respondents to tender an unconditional apology to the Jewish community within 30 days of the order. The details of the apology would be agreed to by the parties, provided that the apology must at least receive the same publicity as the impugned statements. The respondents were ordered to pay the costs of the HRC.<sup>28</sup>

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<sup>23</sup> Id at para 35.

<sup>24</sup> Id at para 39.

<sup>25</sup> Id at para 55.

<sup>26</sup> Id.

<sup>27</sup> Id at para 60.

<sup>28</sup> Id at para 65.3.

*Supreme Court of Appeal*

[30] Aggrieved by the findings of the Equality Court, the respondents sought leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal concluded that counsel for the HRC had disavowed the HRC's reliance on the Equality Act, conceding instead that the impugned statements were protected unless they fell within the exclusion of section 16(2) of the Constitution.<sup>29</sup> The Supreme Court of Appeal was of the view that this concession was properly made as there was a legitimate view in academic circles that section 10 of the Equality Act "may well constitute an unjustified limitation of the freedom of expression"<sup>30</sup> under the Constitution as section 10(1) has the effect of condemning speech that is protected under section 16(1) of the Constitution.<sup>31</sup> Thus, the matter, as seen by the Supreme Court of Appeal, would not turn on the wider formulation of hate speech under the Equality Act; rather, it was to turn on whether the impugned speech constituted hate speech in terms of section 16(2), and, if not, then it would be protected speech in terms of section 16(1).<sup>32</sup>

[31] As the Supreme Court of Appeal was of the view that the parties' expert evidence "was of minimal, if any, assistance to the resolution of the dispute as to whether Mr Masuku's statements amounted to hate speech",<sup>33</sup> it rejected it. The Supreme Court of Appeal analysed the impugned statements in the light of the dictionary definition of Zionism and found that Judaism and Zionism are not synonymous.<sup>34</sup> As a result, it came to the conclusion that the impugned statements did not connote religion or ethnicity, but represented political speech made in the context of the Israeli-Palestinian conflict and amounted to speech protected under section 16(1).<sup>35</sup> The Court noted that

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<sup>29</sup> *Masuku v South African Human Rights Commission* [2018] ZASCA 180; 2019 (2) SA 194 (SCA) (Supreme Court of Appeal judgment) at para 13.

<sup>30</sup> *Id* at para 14 quoting Cheadle et al *The South African Constitutional Law: The Bill of Rights* 2 ed (LexisNexis Butterworths, Durban 2005).

<sup>31</sup> Supreme Court of Appeal judgment *id* at para 14.

<sup>32</sup> *Id* at paras 14 and 31.

<sup>33</sup> *Id* at para 21.

<sup>34</sup> *Id* at para 25.

<sup>35</sup> *Id* at para 26.

no matter how hurtful or distasteful the impugned statements may have been to members of the Jewish community, they did not transgress the boundaries set out in section 16(2).<sup>36</sup> And, it went to great lengths to emphasise the importance of protecting freedom of speech and expression in a constitutional democracy.

[32] The Supreme Court of Appeal upheld the appeal, finding that the impugned statements did not amount to hate speech because none of the statements transgressed the boundaries of section 16(2) of the Constitution.<sup>37</sup> It set aside the order of the Equality Court and replaced it with an order that the HRC's complaint to the Equality Court be dismissed, with each party paying its own costs.<sup>38</sup>

### *Submissions before this Court*

#### *HRC's submissions*

[33] The HRC approaches this Court, maintaining that the matter plainly engages its constitutional and extended jurisdiction,<sup>39</sup> submitting that it is in the interests of justice to grant leave to appeal, and advancing several main grounds of appeal.

[34] First, the HRC submits that the Supreme Court of Appeal reached its order by following an approach that was fundamentally at odds with the well-established principle of constitutional subsidiarity, in terms of which neither litigants nor courts can sidestep an Act of Parliament that has been enacted to give expression to a constitutional right, if that Act exists, and instead rely directly on the Constitution itself. This is so, regardless of any perceived misgivings about the Act or its provisions – any misgivings must be addressed by way of a frontal challenge to the constitutionality of the Act or its provisions.

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<sup>36</sup> Id at para 31.

<sup>37</sup> Id.

<sup>38</sup> Id at para 32.

<sup>39</sup> The HRC avers that jurisdiction can also be established in terms of section 167(3)(b)(ii) on the basis that it raises an arguable point of law of general public importance that ought to be considered by this Court.

[35] According to the HRC, based on this principle, when the Legislature enacted the Equality Act, it intended to regulate expression which is not constitutionally protected, and to prohibit a wider range of speech and expression than that which is prohibited by the Constitution – in other words, section 10(1) of the Equality Act is broader in scope by design and not mistake. And, if the respondents were of the view that section 10(1) was too broad, and unduly restrained Mr Masuku's right to freedom of expression, they ought to have impugned the constitutionality of the Act, which they failed to do. Thus, the impugned statements had to be measured against section 10(1) of the Equality Act. It was, therefore, in error that the Supreme Court of Appeal relied directly on the Constitution, measuring the impugned statements against section 16(2) of the Constitution as opposed to measuring them against section 10(1), as the Equality Court had done, and as it was required to do.

[36] In sum: the HRC submits that the Supreme Court of Appeal conducted an entirely incorrect enquiry, which resulted in a judgment that, if left to stand, would create confusion for litigants and courts as to the proper place of the Equality Act and the interplay between the Constitution, its rights and legislative provisions enacted to give content to those rights.

[37] The HRC avers that, having misapprehended the standard against which the impugned statements should be judged, the Supreme Court of Appeal then erred in its analysis of the statements when it found that they did not relate to the Jewish community, and therefore, did not amount to advocacy of hatred based on ethnicity or race, but rather were a politically acceptable anti-Zionist commentary. According to the HRC, the fine distinction was not one that concerned Mr Masuku when he made the statements, which, understood within their context, target Jewish people.

[38] According to the HRC, the Supreme Court of Appeal failed to consider the statements in their proper context and therefore made its determination oblivious to the fact that a number of contextual indicators pointed to the fact that Jews were the target of Mr Masuku's speech. On this note, the HRC submits that the Supreme Court of

Appeal also erred in dismissing the relevance of the expert evidence, ignoring the pertinent role that expert testimony can play in demonstrating why speech that may appear neutral, in fact constitutes hate speech. Had it not dismissed the expert evidence, it would have been patent that the statements amounted to hate speech.

[39] Although the HRC recognises that the importance of the right to free speech in a constitutional democracy is indisputable, and that this extends even to ideas that offend, shock or disturb, what is permitted is public debate that does not amount to hate speech. The appropriate relief, so it contends, is an apology, to be tendered by the respondents, along the lines of that ordered by the Equality Court.

*Respondents' submissions*

[40] The respondents, Mr Masuku and COSATU, oppose the appeal and raise their own cross-appeal against the adverse costs order granted by the Equality Court.

[41] They are of the view that the matter does not raise constitutional issues in relation to the interpretation of sections 10(1) of the Equality Act and 16 of the Constitution such that this Court's jurisdiction is engaged. What the Equality Court and Supreme Court of Appeal were called upon to do was to interpret the speech, and, on this score, the conclusion reached by the latter is unassailable. Therefore, according to the respondents, the matter bears no prospects of success.

[42] The respondents maintain that the prohibition of expression does not extend to speech that does not fall within the ambit of section 16(2) of the Constitution. Thus, to the extent that section 10(1) prohibited a wider range of expression than that delineated in section 16(2), that section would be unconstitutional, and that extended prohibition would constitute an unreasonable and unjustifiable limitation of the rights guaranteed by section 16(1) of the Constitution.

[43] In any event, argue the respondents, before the Equality Court the HRC had pleaded that the impugned statements fell within the definition of hate speech as



contemplated in section 16(2), and before the Supreme Court of Appeal, had abandoned any reliance on the Equality Act. Therefore, there was no need for the statements to be measured against section 10(1) of the Equality Act, and no need for the respondents to have challenged the constitutionality of the Equality Act.

[44] The respondents concede that the cause of action remained in terms of the prohibition of hate speech in section 10(1) of the Equality Act; however, this was limited to those parts of the prohibition that do not go beyond the definition in section 16(2) of the Constitution. In other words, the case did not stray beyond the parts of section 10(1) that mirror section 16(2). Because of this overlap, the issue of subsidiarity never arose, and the Supreme Court of Appeal, essentially, albeit indirectly, measured the statements against the correct yardstick. And, because of this, it would have made no practical difference to the conclusion reached by the Supreme Court of Appeal had it conducted that exercise in respect of section 10(1) of the Equality Act, or in terms of section 16(2) of the Constitution.

[45] Ultimately, the respondents submit that a restrictive interpretation should be given to the prohibitions on freedom of expression, captured in both section 10(1) and section 16, in order to give meaning to the important right to freedom of speech. In this regard, they submit, the Supreme Court of Appeal struck the correct chord, whilst the Equality Court's judgment, if upheld, would have a chilling effect on political speech.

[46] They submit that the Supreme Court of Appeal came to the correct conclusions on assessing the impugned statements, finding that they were not based on the Jewish faith or ethnicity and did not constitute the propagation of hatred and incitement of violence against Jewish people. According to them, when understood in context, it is clear that Mr Masuku made a marked distinction between the Jewish faith and ethnicity and support for the Israeli State and the ideology of Zionism – his statements were anti-Zionist not anti-Semitic. His statements, they aver, had nothing to do with religion or ethnicity and everything to do with the conduct of the State of Israel towards the Palestinians. And, the Supreme Court of Appeal had the right idea about how to treat

the expert testimony in respect of unpacking these terms of art, finding that they were neither admissible nor useful to the Court.

*Respondents' cross appeal*

[47] The respondents also raise a cross-appeal relating to costs, submitting that, because the HRC had not sought costs against the respondents, the Equality Court erred in granting them. Furthermore, the Supreme Court of Appeal did not provide reasons as to why it departed from the ordinary rule that costs follow the result, when it ordered each party to pay their own costs even after it had found in favour of the respondents. The respondents submit that this issue of costs raises a constitutional issue, because if litigants are to be mulcted in costs when pursuing constitutional litigating against the State, they will be discouraged from seeking to vindicate their rights. The chilling effect on rights like the right to freedom of expression and to access to courts would be self-evident.

[48] The HRC opposes the cross-appeal, submitting that the Equality Court acted within the bounds of its discretion when it ordered the respondents to pay costs, and the Supreme Court of Appeal similarly acted within its discretion when it ordered that each party pay its own way. According to the HRC, this Court should not interfere, and the cross-appeal ought to be dismissed with each party paying its own costs.

*Amici's submissions*

[49] Six amici are admitted and advance a range of submissions that are of assistance to this Court in determining the matter. These submissions will not be outlined in full; however, the thrust of their submissions will be briefly canvassed.

[50] The SAHGF provides insight into the difference between anti-Semitism and anti-Zionism and suggests that this Court must look beyond the surface of the words to consider their sub-textual meaning within the context they were used. It provides a helpful analysis on the question whether the impugned statements propagated hatred

and incited violence against Jews. Ultimately, it submits that the impugned statements must be measured against section 10(1) of the Equality Act, and when this exercise is carried out, it is clear that the statements had the effect of inciting violence against South Africa's vulnerable Jewish minority. It aligns itself with the relief sought by the HRC.

[51] The PsySSA interrogates whether the Supreme Court of Appeal correctly framed its enquiry within the ambit of section 16(2) of the Constitution rather than section 10(1) of the Equality Act. It maintains that Parliament, when it promulgated section 10(1), intentionally crafted a further limitation on section 16(1) of the Constitution than that captured in section 16(2). Therefore, the Supreme Court of Appeal erred in reducing the case to a determination of whether the impugned statements contravened section 16(2), ignoring section 10(1). It also maintains that that Court erred in dismissing the expert evidence led at trial as being "of minimal value", as such evidence plays an important role in hate speech cases.

[52] The FXI, MMA, RoLP, and NMF all made submissions regarding the interpretation and constitutionality of section 10 of the Equality Act. Since this Court has subsequently pronounced on these issues, as will be explained in due course, these submissions are no longer relevant and need not be discussed here. It is thus fitting to move on to the adjudication of this matter, beginning with an interlocutory application that was filed by the respondents.

#### *Application for recusal*

[53] As set out above, the question this Court is asked to determine is whether the series of remarks made by Mr Masuku constitute hate speech. We turn presently to this question in what will be referred to as the "main application", but first, we must divert our attention to an interlocutory application filed by the respondents<sup>40</sup> on

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<sup>40</sup> Although Mr Masuku and COSATU brought this interlocutory application seeking recusal, and are therefore technically the applicants in this matter, they are the respondents in the main application, and, to avoid confusion, they will be referred to throughout as the respondents.

16 November 2021, for the recusal of Chief Justice Mogoeng (Mogoeng CJ) from the main application.<sup>41</sup> We shall refer to this henceforth as the recusal application. We must dispose of the recusal application first, because we cannot dispose of the main application without determining whether Mogoeng CJ can remain part of coram.

[54] Recusal from judicial proceedings takes place where a Judge excuses himself or herself from participating in a case. A Judge may recuse himself or herself *mero motu* (on his or her own volition), or alternatively, upon application by a party to the proceedings. This recusal application, which was launched at the instance of the respondents, has its genesis in certain comments made by Mogoeng CJ when he participated in a webinar, during which, *inter alia*, he conveyed a message of love for Israel and Palestine as well as for the Jews and Palestinians, which some, like the respondents, understood to be an expression of love for Israel and the Jews to the exclusion of Palestine and the Palestinians. According to the respondents, Mogoeng CJ's comments created a reasonable apprehension of bias against them, which militates in favour of his recusal.

[55] The HRC, which launched the main application on behalf of the SAJBD, filed a notice of intention to abide by this Court's decision in this recusal application. And, although six parties applied to be admitted as amici curiae to assist this Court in the determination of the main application, only the RoLP filed a response opposing this recusal application.

### *The presumption of judicial impartiality*

[56] In the matter of *Basson*, this Court remarked that "[a]ccess to courts that function fairly and in public is a basic right".<sup>42</sup> Section 34 of the Constitution entitles everyone to the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and

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<sup>41</sup> The main application was heard by eight Justices of this Court, among whom was Mogoeng CJ.

<sup>42</sup> *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson*) at para 23.

impartial tribunal or forum. The impartiality and independence of Judicial Officers are essential requirements of a constitutional democracy and are core components of the constitutional right of access to courts.<sup>43</sup> It is these requirements that constitute the source of public trust in the Judiciary and in the administration of justice in general.<sup>44</sup> And, because impartiality of Judicial Officers and the impartial adjudication of disputes of law constitute the bedrock upon which the rule of law exists, there must, in any sound legal system, exist a general presumption of impartiality on the part of Judicial Officers. In *SARFU*, this Court stated—

“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.”<sup>45</sup>

[57] Judicial Officers in this Republic are also constitutionally bound to discharge their duties impartially and without bias.<sup>46</sup> Furthermore, in terms of section 174(8) of the Constitution, which relates to the appointment of Judicial Officers, “before Judicial Officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution”. Courts have repeatedly recognised the presumption that officers of the Judiciary will discharge their oath of office through the impartial adjudication of all disputes.<sup>47</sup> In *SARFU*, this Court recognised this, stating that—

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<sup>43</sup> Id at para 24.

<sup>44</sup> Id at para 27.

<sup>45</sup> *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU*) at para 35.

<sup>46</sup> Section 165(2) of the Constitution states that “[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.

<sup>47</sup> See, for example, this Court’s decision in *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC), at paras 31-3 expanded on the meaning of the Judicial oath of office and the presumption of impartiality:

“What must be stressed here is that which this court has stressed before: the presumption of impartiality and the double requirement of reasonableness. The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood

“[i]n applying the test for recusal, Courts have recognised a presumption that Judicial Officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare Judges for the often-difficult task of fairly determining where the truth may lie in a welter of contradictory evidence.”<sup>48</sup>

[58] All this to say that the law does not suppose the possibility of bias. If it did, imagine the bedlam that would ensue. There is an assumption that Judges are individuals of careful conscience and intellectual discipline, capable of applying their minds to the multiplicity of cases which will seize them during their term of office, without importing their own views or attempting to achieve ends justified in feebleness by their own personal opinions.

[59] The presumption of impartiality has the effect “that a Judicial Officer will not lightly be presumed to be biased”.<sup>49</sup> This was confirmed in *SACCAWU*, where this Court emphasised that, not only is there a presumption in favour of the impartiality of

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in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law ‘impartially and without fear, favour or prejudice’. Their oath of office requires them to ‘administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law’. And the requirement of impartiality is also implicit, if not explicit, in section 34 of the Constitution which guarantees the right to have disputes decided ‘in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’. This presumption therefore flows directly from the Constitution.

As is apparent from the Constitution, the very nature of the judicial function requires judicial officers to be impartial. Therefore, the authority of the judicial process depends upon the presumption of impartiality. As Blackstone aptly observed, ‘(t)he law will not suppose a possibility of bias or favour in a judge, who [has] already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea’. And, as this court observed in *SARFU II*, judicial officers, through their training and experience, have the ability to carry out their oath of office, and it ‘must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions’. Hence the presumption of impartiality.

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The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased.”

<sup>48</sup> *SARFU* above n 45 at para 40.

<sup>49</sup> *Bernert* above n 47 at para 33.

the Court, but that this is a presumption that is not easily dislodged.<sup>50</sup> This point is worthy of emphasis.

[60] That being said, there are of course instances where a Judicial Officer may not be able to demonstrate impartiality or there may exist some apprehension of bias. Therefore, although the correct point of departure must always be a presumption of impartiality, “the presumption can be displaced with ‘cogent evidence’ that demonstrates that something the Judge or Magistrate has done gives rise to a reasonable apprehension of bias”.<sup>51</sup>

[61] However, as cautioned in *SARFU*:

“The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.”<sup>52</sup>

[62] Accordingly, the presumption in favour of impartiality must always be taken into account when conducting the enquiry into whether a reasonable apprehension of bias exists.<sup>53</sup> With that in mind, then, we turn to the test for establishing grounds for recusal.

*The test for recusal: reasonable apprehension of bias*

[63] As alluded to above, it has become trite law that the test for recusal is the “reasonable apprehension of bias” test.<sup>54</sup> And, as it says on the tin, the “existence of a

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<sup>50</sup> *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (SACCAWU) at para 12.

<sup>51</sup> See for example, *R v S (RD)* (1997) 118 CCC (3d) 353 cited in *SARFU* above n 45 at para 40.

<sup>52</sup> *SARFU* above n 45 at para 48.

<sup>53</sup> *Id* at para 41.

<sup>54</sup> *BTR Industries South Africa (Pty) Ltd v Metal & Allied Workers Union* [1992] ZASCA 85; 1992 (3) SA 673(A).

reasonable suspicion of bias satisfies the test”.<sup>55</sup> The Code of Judicial Conduct for Judges addresses recusal thus:

“A judge must recuse him or herself from a case if there is a—

- (a) real or reasonably perceived conflict of interest; or
- (b) reasonable suspicion of bias based upon objective facts, and shall not recuse him or herself on insubstantial grounds.”<sup>56</sup>

And the test for recusal was later expanded upon by this Court, for example, in *SARFU*. We can do no better than cite the pertinent finding of that case in full:

“It follows . . . that the correct approach to this application for the recusal of members of this Court is objective and the *onus of establishing it rests upon the applicant*. The question is whether a reasonable, objective and informed person would *on the correct facts* reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. *It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions*. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”<sup>57</sup>

[64] The test for recusal is objective and constitutes an assessment of whether a reasonable litigant in possession of all the relevant facts would have a reasonable apprehension that the Judge is biased and unable to bring an impartial mind to bear on

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<sup>55</sup> Id at 821A.

<sup>56</sup> Article 13 of the Code of Judicial Conduct, GN R865 GG 35802, 18 October 2012 (Code).

<sup>57</sup> *SARFU* above n 45 at para 48.

See also *SACCAWU* above n 50 at para 13, where this Court held that the applicant for recusal bears the onus of rebutting the presumption of judicial impartiality and requires “cogent” or “convincing” evidence to do so.



the issues in dispute. The application of the test requires both that the apprehension of bias be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds.<sup>58</sup> This test must, thus, be applied to the *true* facts on which the recusal application is based.

[65] *SARFU* made clear that—

“a Judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the Judge may be biased, acts in a manner inconsistent with section 34 of the Constitution and in breach of the requirements of section 165(2) and the prescribed oath of office”.<sup>59</sup>

[66] The question of what will give rise to a “reasonable apprehension of bias” requires some interrogation. This test does not mean that any Judge who holds certain social, political or religious views will necessarily be biased in respect of certain matters, nor does it naturally follow that, where a Judge is known to hold certain views, they will not be capable of applying their minds to a particular matter. The question is whether they can bring their mind to bear on a case with impartiality. To do so plainly does not require a Judge to absolve himself or herself of his or her human condition and experience. As Cardozo J put it: “absolute neutrality on the part of a Judicial Officer can hardly if ever be achieved”<sup>60</sup> for—

“[t]here is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs . . . . In this mental background every problem finds it[s]

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<sup>58</sup> *SACCAWU* above n 50 at para 14.

<sup>59</sup> *Basson* above n 42 at para 25.

<sup>60</sup> Cardozo J in *The Nature of the Judicial Process* (Yale University Press, New Haven 1921) at 12-3 and 167, which is quoted with approval by L’Heureux-Dube J and McLachlin J in *R v S (RD)* above n 51 at para 34, as cited by this Court in *SARFU* above n 45 at para 42.

setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.

...

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or Judge.”<sup>61</sup>

[67] It is true that a Judge does not exist in a vacuum. In fulfilling his or her adjudicative function, he or she brings personal and professional experiences and, what is more, “it is appropriate for Judges to bring their own life experience to the adjudication process”.<sup>62</sup> This Court has said that in “a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that Judicial Officers should share all the views and even the prejudices of those persons who appear before them”.<sup>63</sup>

[68] What an applicant raising an apprehension of bias must prove is that there is some connection between the views, opinions or experiences of a Judicial Officer and the subject matter they are to be seized with. So, proving that a Judicial Officer holds a particular view is not, without more, sufficient to establish a reasonable apprehension of bias.

[69] In *Goosen*, this Court, dismissing the recusal application, emphasised that—

“[i]t is unnecessary for a Judge to occupy a place of utter isolation from an issue or from even a party for that matter. Judges do not recuse themselves when the banking institution which keeps their money is sued and comes before them. Similarly, holding shares in a public company quoted on the stock exchange does not trigger bias or a perception of bias unless the value of the shareholding is substantial and likely to be affected by a judgment.”<sup>64</sup>

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<sup>61</sup> *SARFU* above n 45 at para 42.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at para 43.

<sup>64</sup> *Ex parte Goosen* 2020 (1) SA 569 (GJ) (*Goosen*) at para 25.

This Court went on to emphasise that more is needed before the test for recusal will be satisfied:

“There must be an articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on the merits. The bare assertion that a Judge has an ‘interest’ in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making is articulated.”<sup>65</sup>

Ultimately, then, the test for reasonable apprehension of bias requires more than mere association with a matter. The relevant connection must call into question the ability of the Judge to apply their mind in an impartial manner to the case before them.

*The irrelevance of certain issues to the recusal enquiry*

[70] At the outset, it is imperative that one properly understands what this case is not about. And, at this juncture, two points in particular must be emphasised.

[71] First, what this Court must decide in this recusal application is strictly whether the respondents have satisfied the test for recusal. This may sound as though we are stating the obvious. But this must be clarified because Mogoeng CJ’s comments, which form the bedrock of this recusal application, also constituted the substance of an enquiry conducted by the Judicial Conduct Committee (JCC), which was tasked with ascertaining whether these comments demonstrated that Mogoeng CJ had involved himself in political controversy, contrary to the Code of Judicial Conduct. That was an entirely different enquiry to the instant matter. The JCC, per Mojapelo J, in dealing with the complaints lodged against Mogoeng CJ, specifically and expressly stated that any issue pertaining to his possible recusal from matters, including the main application here, could be determined by Mogoeng CJ and this Court alone: the JCC was simply

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<sup>65</sup> Id at para 29.

not competent to make a finding in respect of this enquiry, and so it did not.<sup>66</sup> It ought to be borne in mind that the findings of the JCC, on any issue, are not binding on this Court, nothing turns on the correctness of its findings,<sup>67</sup> and ultimately, the enquiry conducted by the JCC has absolutely no relevance to the question whether Mogoeng CJ ought to be recused from the present matter. In sum, let he or she who cares to place him- or herself in a position to properly engage with the following reasoning, simply forget that that enquiry took place altogether.

[72] The second issue to be disposed of is one raised by the RoLP, which requires our attention because it formed a significant component of their opposition to the recusal of Mogoeng CJ and, we fear, if not tackled head-on, might lead a reader astray. The RoLP pointed out that—

“should [Mogoeng CJ] not form part of the coram . . . it would render the entire proceedings . . . inquorate as the matter was only heard by eight Justices of the Constitutional Court. Were the quorum of the Court to be broken by recusal, it would necessarily entail that the matter would require to be argued afresh”.

[73] This is indeed a correct reflection of what would happen should Mogoeng CJ be recused. The main application was heard by eight Justices. Were one to be recused, this Court would be rendered inquorate with the consequence that this Court would not be able to make an order.<sup>68</sup> Based on this unfortunate situation that would ensue, it then

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<sup>66</sup> See Mojapelo J’s decision at paras 45-7.

<sup>67</sup> Mogoeng CJ has appealed against the findings of the JCC that he breached the Code of Judicial Conduct by embroiling himself in political controversy. However, the findings and the appeal have no bearing on this Court in disposing of this recusal application since that enquiry is wholly distinct from the recusal enquiry conducted here.

<sup>68</sup> Section 167(1) of the Constitution provides that the Constitutional Court consists of eleven Judges. Section 167(2) of the Constitution states that “a matter before the Constitutional Court must be heard by at least eight Judges”.

In *Judge President Hlophe v Premier, Western Cape Province; Judge President Hlophe v Freedom Under Law (Centre for Applied Legal Studies as Amici Curiae)* [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC) (*Judge President Hlophe*), a similar conundrum to that which arises in the present matter, arose. In that case, the matter was heard by a bare constitutional quorum of eight Judges, including three Justices who were parties to the complaint lodged with the JSC against the applicant and two others who had been involved in attempted mediation. The Court noted that “if these Judges are disqualified from hearing the applications for leave to appeal because of their perceived or actual interest in the outcome of the matter, there would be no quorum for this Court to hear and determine the matters” (see para 17). However, this Court held that the President is

stated that “the recusal of Mogoeng CJ at this late stage of the proceedings would create significant procedural and logistical hurdles that would needlessly frustrate and further delay already protracted proceedings”. Accordingly, so the RoLP goes on, these considerations along with deference to the principles of equity and justice are germane to this Court determining the application for recusal. In sum, this Court is advised to find that Mogoeng CJ need not be recused because it would not be in the interests of justice to allow the consequences of his recusal to unfurl.

[74] Although this Court is grateful for the assistance of amicus curiae in determining matters generally, in respect of this case, let me say this: this is an entirely unhelpful and, in fact, misguided submission. There is absolutely no merit in any suggestion that the determination of whether or not a Judge should be recused ought to be guided by the consequences of a court being inquorate. In *Judge President Hlophe*, this Court did note that the interests of justice might be taken into consideration when determining whether to engage in the merits notwithstanding that the Court is inquorate as a result of recusal.<sup>69</sup> But this is not the same as allowing the interests of justice to weigh on the enquiry of reasonable apprehension of bias itself. Conspicuously, whether or not this Court is rendered inquorate is of no relevance to whether Mogoeng CJ ought to recuse himself. As set out above, when a court is seized with a recusal application, the legal test is whether or not a reasonable apprehension of bias can be said to exist. That is all. That test is not informed nor is it guided by any consideration other than whether there is reasonable apprehension of bias. If there is, *cadit quaestio* (the question falls away/the case is closed), no matter what effect this might have on the particular proceedings. What to do with an inquorate court would be a question for that particular court to address subsequent to its establishing that recusal is warranted. And that might

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permitted to appoint a person to be an Acting Judge of the Constitutional Court “if there is a vacancy or if a judge is absent”. However, the word “absent” is to be interpreted narrowly to mean physically absent (see para 40), and it is not possible to interpret “absent” in section 175(1) of the Constitution to cover a situation where Constitutional Court Justices have recused themselves from hearing a specific matter (at para 42). It was held that the effect of a recusal therefore cannot be considered to be an absence so the position of the recused Justice may not be filled by another (see para 34). Specifically, this Court held that the option of the appointment of Acting Justices under section 175(1) of the Constitution is not available as a means to render the Court quorate.

<sup>69</sup> *Judge President Hlophe* id at para 46.

be where what was said as obiter in *Judge President Hlophe* comes into play. Fortunately, in this case, we need not get to that for the reasons set out below.

*Does a reasonable apprehension of bias exist?*

[75] In *Goosen*, the High Court noted that “[i]t is self-evident that the fate of a recusal application depends on the totality of the relevant facts in any given case”.<sup>70</sup> Thus, before delving into the application of the law, it is useful to reiterate what the main application is about. At its heart is the question of whether Mr Masuku’s statements constitute hate speech in terms of the Equality Act. What this involves is an interpretative exercise to ascertain the meaning, target group, and impact of the impugned statements. What it does not involve is any kind of moral assessment of the spoken words, nor does it require this Court to comment on the truth or value of the statements, or render an opinion on their contents. It simply demands that we apply our minds to the objective determination of whether the Equality Court correctly concluded that the statements constitute hate speech. We emphasise this, because the matter’s connection to the conflict in the Middle East is a red herring. The fact that any or all members of the Bench may hold opinions, even strong opinions, on this conflict is of no moment to our ability to determine whether the impugned statements constitute hate speech. For now, this is all that needs to be said on that, and we turn to assess whether the respondents have met the test for recusal.

[76] This recusal application is grounded in the following facts and events that transpired after the main application was heard by this Court. On 26 June 2020, Mogoeng CJ participated in a webinar hosted by the Jerusalem Post,<sup>71</sup> during which he and Chief Rabbi Warren Goldstein were interviewed by Mr Yaakov Katz.<sup>72</sup> During the course of the webinar, Mogoeng CJ made certain comments related to the State of Israel.

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<sup>70</sup> *Goosen* above n 64 at para 14.

<sup>71</sup> The Jerusalem Post is a daily newspaper based in Israel, which markets itself as the “oldest and largest English daily newspaper in Israel”.

<sup>72</sup> Chief Rabbi Goldstein is the current Chief Rabbi of South Africa, meaning that he is the leader of the Jewish faith in South Africa. Mr Katz is the Editor-in-Chief of the Jerusalem Post.

These comments catalysed controversy, much public discourse, and somewhat of a media-storm. The details of the aftermath need not be discussed here, but in the briefest possible terms, the public responses to the comments were divided along partisan political views, with proponents of the State of Israel expressing their support for the comments while opponents of the Israeli State objected. As alluded to above, all of this culminated in proceedings before the JCC on the basis of allegations that Mogoeng CJ had breached the Code of Judicial Conduct by becoming embroiled in a political controversy.<sup>73</sup> The South African Zionist Federation (SAZF) wrote a letter to Mogoeng CJ expressing its support for him in relation to the JCC proceedings.<sup>74</sup> As already stated, the particulars of those proceedings are entirely separate from and distinct to this recusal application.

[77] At various points throughout these events, Mogoeng CJ has responded to the public scrutiny and criticisms that his comments received. He has done so publicly and in his papers before the JCC. Without being detained by unnecessary details, the nub of these responses was that the comments have been taken completely out of context and misinterpreted. He averred that the comments were no more than a reflection of his earnestly held religious views, which advocate for universal peace and love, and were in no way indicative of his political support for, or opposition to, any particular political stance towards the Israel-Palestine conflict. However, the respondents argue that the cumulative effect of Mogoeng CJ's attitude reflected in his responses, as well as the overall factual matrix, creates a reasonable apprehension of bias warranting his recusal.

[78] Since the law on recusal evidently requires an objective analysis of the facts giving rise to an application for recusal, our first step must be to examine the comments

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<sup>73</sup> Article 12(1)(b) of the Code stipulates that a Judge must not “become involved in any political controversy or activity”.

<sup>74</sup> The letter, in relevant part, stated that—

“The SAZF would like to give every support possible in the upcoming matter as regards your stance on Israel- Palestine conflict. [An employee of SAZF] would appreciate the opportunity of communicating with a person in your legal team. What do you suggest?”

This letter was disclosed to the parties in correspondence issued by this Court on 29 October 2021, together with directions calling for the filing of an application of recusal and written submissions.

themselves. To avoid any misrepresentation, the relevant portion of the transcript of the webinar is quoted here in its entirety. Early in the webinar, Mogoeng CJ made the following remarks, while reflecting generally on forgiveness and his personal experiences with forgiveness:

“Some possibly expect of me to be very hateful of Israel and the Jews, I do not. I love the Jews. I love Israel. I love Palestine, I love Palestinians. I love everybody. One, because it is a commandment from the God in whom I believe. But also, because when you love, when you pursue peace with all human beings, you allow yourself the opportunity to be a critical role-player wherever there is a dispute.”

[79] He later went on to say:

“Mr Katz: Right, this is a . . . the state of Israel is a country, we used to have very close relations with South Africa, they’ve gone up and down over the years. Um, is that something that should be improved, in your opinion?

Mogoeng CJ: I think so. Uh, let me begin by saying I acknowledge without any equivocation that the policy direction taken by my country, South Africa, is binding on me, it is binding on me as any other law would bind on me. So, whatever I have to say should not be misunderstood as an attempt to say the policy direction taken by my country in terms of their constitutional responsibilities is not binding on me. But just as a citizen, any citizen is entitled to criticize the laws and the policies of South Africa or even suggest that changes are necessary, and that’s where I come from.

Let me give the base. The first base I give is in Psalm 122, verse 6, which says ‘Pray for the peace of Jerusalem. They shall prosper that love thee’. And see, also Genesis 12, verse 1 to 3 that says to me as a Christian that, if I curse Abraham and Israel, God, the Almighty God, will curse me too. So, I’m under an obligation as a Christian to love Israel, to pray for the peace of Jerusalem which actually means the peace of Israel. And I cannot as a Christian do anything other than love and pray for Israel because I know hatred for Israel by me and for my nation will, can only attract unprecedented curses upon our nation.

So, what do you think should happen? I think, I think as a citizen of this great country, that we are denying ourselves a wonderful opportunity of being a game changer in the Israeli-Palestinian situation. We know what it means to be at loggerheads, to be a nation at war with itself, and therefore the forgiveness that was demonstrated, the understanding, the big heart that was displayed by President Nelson Mandela and we,



the people of South Africa, following his leadership, is an asset that we must use around the world to bring about peace where there is no peace, to mediate effectively based on our rich experience.

Let me cite another example, for instance in regards to the Israeli-South African situation. Remember the overwhelming majority of South Africans of African descent are landless, they don't have land. Why? Because the colonialists came and took away the land that belongs to them. The colonialists came and took the wealth that belongs to them and that has never stopped. To date, in South Africa and in Africa, people are landless and some are wallowing in poverty and yet, South Africa and the whole of the continent is rich in fertile soil, rich with water, rich with mineral resources.

Have we cut diplomatic ties with our previous colonisers? Have we embarked on a disinvestment campaign against those that are responsible for untold suffering in South Africa and the continent of Africa? Did Israel take away our land? Did Israel take away the land of Africa? Did Israel take the mineral wealth of South Africa and of Africa?

So, we've got to move from a position of principle here, we've got to have the broader perspective and say: we know what it means to suffer and to be made to suffer. But we've always had this spirit of generosity, this spirit of forgiveness, this spirit of building bridges and together with those that did us harm, coming together and saying, 'Well, we can't forget what happened but we're stuck together. Our history forces us to come together and look for how best to coexist in a mutually beneficial way.'

Reflect on all those colonial powers in South Africa. Now in Africa there is neo-colonialism, it is an open secret, we know why South Africans and Africans are suffering. What about diplomatic ties, what about disinvestment, what about strong campaigns against those that have ensured that we are where we are, those that supported apartheid, vocally.

So, I believe that we will do well to reflect on these things as a nation, and reflect on the objectivity involved in adopting a particular attitude towards a particular country, that did not, that does not seem to have taken as much and unjustly from South Africa and Africa as other nations that we consider to be an honour to be having sound diplomatic relations with. People that we are not even, nations that we are not even criticising right now and yet, the harm they have caused South Africa and Africa and the rest of the developing world is unimaginable. So, we've got to reflect, take a deep breath and adopt a principled stance here, that we will go somewhere."

[80] The crux of the respondents' case is that the above comments and Mogoeng CJ's subsequent conduct are indicative of the fact that he holds strong personal views that are diametrically opposed to the beliefs of the respondents, which beliefs led to the impugned statements that are under scrutiny in the main application. Based on the above comments, they aver that Mogoeng CJ has professed his unconditional support for the State of Israel, and that he has openly condemned the BDS movement and South Africa's political stance towards the Israel-Palestine conflict. On the basis of these publicised views, the respondents submit that it is evident that Mogoeng CJ will not be able to bring an impartial mind to the adjudication of the main application.

[81] On a plain reading of the transcript of the webinar, which is quoted above, the respondents' submissions are unsustainable. Interpreted objectively and within the context of the entire webinar, none of Mogoeng CJ's statements can be taken to be anything more than his religious and personal views. Quite contrary to what the respondents argue, an objective reader would not understand the comments to be advocating for a particular political stance towards the conflict other than, at most, hopes of forgiveness, peace and love. They do not intimate any kind of hostility or negative views towards any of the parties involved in the conflict.

[82] It is an untenable stretch to characterise Mogoeng CJ's comments as expressing "unconditional support for the State of Israel" when the context quite evidently shows that Mogoeng CJ was communicating his biblical love for all, including Israel and Palestine, and his opinion on South Africa's painful past and unique perspective which enables it to advocate for peace in the global context. There is also nothing in the evidence provided by the respondents which supports the notion that Mogoeng CJ condemned the BDS movement and South Africa's stance towards Israel. On the contrary, the transcript of the webinar reveals that Mogoeng CJ declined to comment on whether the BDS movement is conducive to a peaceful resolution of the conflict.

[83] The emphasis placed by the respondents on Mogoeng CJ's religious beliefs about the consequences of "hating" or "cursing" Israel is also plainly taken out of context. It

does not follow from Mogoeng CJ's belief that he, personally, bears a religious obligation to love all and pray for peace in the Middle East, that he holds views that are opposed to those of the respondents, and certainly not to the extent that renders him partial. As has already been explained, the law does not expect Judges to deactivate their humanity and operate from islands of indifference, and the test for recusal will not be satisfied on the basis that a Judge may have views or beliefs that differ from those of the parties before them, even if those beliefs are relevant in some way to the matter. It is safe and pragmatic to assume that Judges are able to set aside their personal views and be guided by the relevant legal principles when deciding any matter. We must, after all, be reminded of the weight of the presumption of impartiality.

[84] With all of this in mind, it is perspicuous that the respondents, not only failed to provide an interpretation of the comments that adheres to the standard of objectivity required by the test for bias, but have also failed to prove that Mogoeng CJ's religious views and opinions render him incapable of impartially applying his mind to whether Mr Masuku's statements constitute hate speech. It may be conceivable that a reasonable apprehension of bias could exist in respect of a Judge who is known to "equate criticism of Israel with 'hatred' of Israel and of Jewish people", as the respondents have alleged is the case here. However, the respondents have failed to establish that this allegation is borne out by Mogoeng CJ's statements. It bears repetition that an objective interpretation of the statements reveals nothing more than Mogoeng CJ's support for Israel and Jewish people dictated by very broad religious convictions. Nothing in the statements can be reasonably understood to establish that Mogoeng CJ equates criticism of Israel with hatred of Jewish people.

[85] In these circumstances, it cannot be said that the test for recusal has been met, or that there is any reason to apprehend bias on the part of Mogoeng CJ. Whatever disagreement or disapproval the respondents may harbour in relation to the personal and religious views that Mogoeng CJ espoused, is simply insufficient to constitute a valid ground for recusal. Indeed, if it were open to litigants to request the recusal of every Judicial Officer whose worldview and beliefs differ from their own, the work of

our courts would be entirely suspended: our courts would spend most of their time processing recusal applications and battling the Sisyphean task of finding Judges who would not be disqualified on account of their opinions or religious affiliations.

[86] Although we are not persuaded at all by the respondents' interpretation of and submissions on the webinar comments, we must also consider the other concerns that they raised in their recusal application. These include the fact that Mogoeng CJ elected to participate in the webinar without disclosing that intention to the parties, and his subsequent defences of his comments. Having considered the transcript of the webinar in its totality, as well as the impugned comments, it is manifestly evident that the interview canvassed broad topics and general principles. There is nothing in the transcript that bears any relation or relevance to the main application, and the respondents have failed to draw this Court's attention to any truthful or accurate aspect of the webinar that reveals why Mogoeng CJ was obliged to disclose his participation beforehand. It follows that this argument, too, is a non-starter.

[87] The same can be said of Mogoeng CJ's subsequent remarks. Objectively analysed, these responses are nothing more than attempts to explain and contextualise the original comments. Nothing in any of those responses objectively confirms the allegations of bias made by the respondents. Rather, it seems that the respondents have taken for granted that the webinar comments were indefensible and, thus, that Mogoeng CJ's attempts to defend them reflect his strong opinions that are opposed to their own, which underpin the main application. This does not cohere, and since the webinar comments do not objectively reflect any bias, we do not see how the act of defending and contextualising these statements can, without more, lead to a reasonable apprehension of bias.

[88] The final item in the so-called "basket" of factors supporting the recusal application is the correspondence sent by the SAZF to Mogoeng CJ expressing the organisation's support for him, and the attention that his comments received in the media.

[89] Turning first to the correspondence, while the propriety of the SAZF's conduct may be questionable, and somewhat unfortunate, the facts are that Mogoeng CJ did not act on receipt of the correspondence, nor did he provide any response. Under these circumstances, the mere existence of the correspondence does not create a reasonable apprehension of bias. It is absurd to suggest that Judges' impartiality and ability to adjudicate matters could be so easily affected by the unilateral act of some party attempting to contact them. This would strip Judges of their judicial powers all the time and render them vulnerable to recusal for conduct entirely beyond their control. The correspondence was disclosed in the interests of full transparency, but does not in and of itself demonstrate that there exists a reasonable apprehension of bias.

[90] The respondents have also failed to explain why the controversy in the media creates a reasonable apprehension of bias. That controversy may have been of some relevance to the JCC proceedings, but reliance thereon in this recusal application is misplaced. In determining this enquiry, we have to assess the facts relating to Mogoeng CJ's conduct, not the media's interpretation thereof. On the contrary, courts must cautiously avoid being influenced by the media, for failure to do so would be the end of a functional and independent Judiciary. The issue of recusal must be determined by taking stock of the objective facts, which can hardly be said to be found in the pages of the press. We have already determined and discussed the objective facts that are relevant to this recusal application, and are aware of no reason why anything in the media should have any bearing on this enquiry. We could very easily find ourselves going down a treacherous rabbit hole if the media were to guide our objective assessment of facts in cases that seize us.

#### *Conclusion on recusal application*

[91] After applying the law to the facts, the only conclusion that we can reach is that the respondents have not discharged the onus of establishing that, on the correct facts, Mogoeng CJ's conduct created a reasonable apprehension of bias. Moreover, the evidence does not indicate any predisposition on the part of Mogoeng CJ towards any

of the parties before this Court, nor do they provide any basis for the conclusion that he would be unable to “disabuse [his] mind of any irrelevant personal beliefs or predispositions.”<sup>75</sup>

[92] Having made this finding, it naturally follows that the respondents’ application for recusal is dismissed, and that Mogoeng CJ is to remain part of the coram in the main application. On finding this, to that is where we now direct our attention.

*Jurisdiction and leave to appeal*

[93] Having finally reached the point where we are to address the main application, we must dispose of two preliminary questions: whether this Court’s jurisdiction is engaged and whether it is in the interests of justice to grant leave to appeal.

[94] This matter concerns the interaction between section 16 of the Constitution and section 10(1) of the Equality Act, promulgated to give effect to the right to equality, to prevent unfair discrimination and, more broadly, to heal the wrongs of the past.<sup>76</sup> The Equality Act, at its heart, engages in a balancing exercise with rights that are guaranteed under sections 9 and 10 of the Constitution.<sup>77</sup> This Court’s jurisprudence has reiterated that when it comes to legislation that is enacted to give effect to a constitutional right, questions concerning the proper interpretation and application of that legislation are a constitutional issue.<sup>78</sup> Since the Equality Act is legislation enacted to give effect to constitutional rights, the interconnected tasks of interpreting and applying section 10(1) of the Equality Act, self-evidently, give rise to constitutional issues. Furthermore, at

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<sup>75</sup> *SARFU* above n 45 at para 48.

<sup>76</sup> In its preamble, the Equality Act states that it is the legislation designed to give effect to the right to equality set out in section 9 of the Constitution. Section 9(4) of the Constitution mandates that national legislation codifying this right must be enacted.

<sup>77</sup> Preamble to the Equality Act.

<sup>78</sup> For example, in the context of the Labour Relations Act 66 of 1995, see *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 14; and, in relation to the Restitution of Land Rights Act 22 of 1994, see *Alexkor Limited v The Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 23.

the heart of this matter are competing, yet interrelated, constitutional rights. This matter, then, is one imbued with constitutional significance.

[95] The constitutional issues in this matter are further evinced by the fact that this Court is called upon to comment on the decision of the Supreme Court of Appeal to sidestep section 10(1) of the Equality Act and instead, in resolving the dispute, to place reliance entirely on the Constitution itself. All the parties accepted that this implicates the important constitutional principle of subsidiarity. This principle will be discussed in great depth later in this judgment. At this stage, it suffices to say that questions concerning this principle, which operates to ensure comity between the arms of government in circumstances where legislation has been designed to codify a constitutional right and, thus, in circumstances where the courts and the Legislature act in partnership to give life to a constitutional right, unequivocally constitute questions of constitutional law.<sup>79</sup> In this matter, the question whether the judgment of the Supreme Court of Appeal violated this principle goes to the heartland of the separation of powers doctrine, and most certainly engages our jurisdiction. In fact, there can be no doubt that questions concerning the principle of subsidiarity necessarily constitute questions of an inherently constitutional character that engages this Court's jurisdiction in terms of section 167(3)(b)(i) of the Constitution.

[96] Notwithstanding that the jurisdiction of this Court is engaged, we must still apply ourselves to the question whether it is in the interests of justice for this Court to grant leave to appeal. Upon transition, our constitutional dispensation made a commitment to building a non-racial and non-sexist society which chooses to celebrate and accommodate our diversity rather than reject it. However, more than 27 years since that constitutional promise was first made, as a country we are still grappling with how to reconcile that promise with our commitment to protecting and promoting freedom of expression and a culture of openness, transparency and healthy democratic dialogue

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<sup>79</sup> In *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31, 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts*), this Court expanded upon the extent of the constitutional issues that underpin the principle of subsidiarity. At para 61, this Court said that "[t]he principle is concerned in the first place with the programmatic scheme and significance of the Constitution".

which necessarily means that free expression must have its limits. This exercise of navigation is far from complete. This country is still grappling with identifying where the bounds of freedom of expression lie, with the meaning of hate speech, and with the extent to which speech of an offensive and harmful nature can be tolerated. These are issues of broad public interest which remain as relevant today as they ever did. It is in the interests of justice for leave to be granted so that this Court may pronounce on these issues.

### *Issues*

[97] We can now turn our attention to the salient issues raised by this application for leave to appeal, which are as follows:

- (a) Whether the Supreme Court of Appeal erred in its reliance on section 16(2) of the Constitution rather than the relevant provisions of the Equality Act, in the light of the principle of subsidiarity.
- (b) If it did err, what the proper and constitutionally compliant interpretation of section 10(1) of the Equality Act is.
- (c) In the light of that interpretation, whether the HRC has established that the impugned statements made by Mr Masuku constitute hate speech in terms of section 10(1) of the Equality Act.
- (d) And finally, whether the respondents' cross-appeal against the costs order granted against them in the Equality Court succeeds.

We proceed to deal with these issues in turn.

### *Subsidiarity and whether the Supreme Court of Appeal erred in relying on section 16(2) of the Constitution rather than section 10(1) of the Equality Act*

[98] As set out above, the Supreme Court of Appeal opted not to determine the matter on the basis of section 10(1) of the Equality Act, instead relying directly on section 16(2) of the Constitution. It did so because, in its view, the constitutionality of section 10(1) was suspect, and it had understood the HRC to have abandoned reliance



on that provision. The question is whether the Supreme Court of Appeal was correct in its conclusion that it was empowered to do this. The corollary to that question is another question: did the Supreme Court of Appeal violate the principle of subsidiarity?

[99] In respect of the first question – whether the Supreme Court of Appeal was empowered to rely on section 16(2) of the Constitution – let me say now that there is a straightforward answer to this question. This is that, whatever the Supreme Court of Appeal’s apprehension about section 10 of the Equality Act may have been, its reliance on section 16(2) of the Constitution is simply untenable because section 16(2) does not create a cause of action by which Mr Masuku could have been found to have contravened anything.<sup>80</sup> Nothing in the language of section 16(2) creates any crime or prohibition which an individual may be held liable for contravening, nor does the section prescribe any avenue of recourse or promise of remedy. All that section 16(2) does is to create a category of expression which does not enjoy constitutional protection. The effect of this is merely to say that this type of expression can be prohibited in legislation without raising any constitutional concerns. As this Court put it in *Islamic Unity*:

“Section 16(2) . . . 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.”<sup>81</sup>

And then later noted:

“There is no doubt that the State has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation

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<sup>80</sup> See section 16 of the Constitution.

<sup>81</sup> *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) (*Islamic Unity*) at para 32.

that prohibits such expression. Any regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right in section 16.”<sup>82</sup>

[100] As the Court correctly stated in that case, while section 16(2) may define the forms of expression that fall outside of constitutionally protected expression, it is still incumbent on the Legislature, if it so wishes, to enact legislation to regulate these forms of speech. And, while legislation of this sort will always have to be interpreted in the light of the closed list of constitutionally unprotected forms of speech defined in section 16(2) together with the open list of constitutionally protected forms of speech defined in section 16(1), this does not without more create a prohibition out of thin air. In that regard, the Supreme Court of Appeal’s attempt to adjudicate Mr Masuku’s speech against section 16(2) was misguided.

[101] This finding may be dispositive of the question whether the Supreme Court of Appeal erred, but there are further issues worth unpacking here. This is because the reasons underlying why the approach of the Supreme Court of Appeal was incorrect are important, and worth ingemination, for they go to the heart of a court’s role when our Constitution has expressly demarcated competency as between various branches of the State. The question then also becomes whether the principle of subsidiarity finds applicability or relevance in this matter, and whether that principle was violated by the Supreme Court of Appeal.

[102] Broadly, the principle of subsidiarity is the judicial theory whereby the adjudication of substantive issues is determined with reference to more particular, rather than more general, constitutional norms. The principle is based on the understanding that, although the Constitution enjoys superiority over other legal sources, its existence does not threaten or displace ordinary legal principles and its superiority cannot oust legislative provisions enacted to give life and content to rights introduced by the Constitution. In simple terms, the principle can be summarised thus:

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<sup>82</sup> Id at para 33.

“Once legislation to fulfil a constitutional right exists, the Constitution’s embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.”<sup>83</sup>

Ultimately, the effect of the principle is that it operates to ensure that disputes are determined using the specific, often more comprehensive, legislation enacted to give effect to a constitutional right, preventing them from being determined by invoking the Constitution and relying on the right directly, to the exclusion of that legislation.<sup>84</sup>

[103] This principle has been pronounced upon by this Court on numerous occasions. And, in *My Vote Counts*, Cameron J, noting how deeply entrenched in South African constitutional litigation the principle is, identified three categories of cases where the principle has been endorsed.<sup>85</sup> Firstly, in a range of socio-economic rights cases where the government is under a duty to take reasonable legislative and other measures, within its available resources, to progressively realise the rights, this Court has affirmed the proposition that claimants must first impugn the legislation enacted to give effect to those rights before they may rely on the right itself in the Constitution.<sup>86</sup>

[104] The second line of cases were those where this Court had determined that there existed legislation which was “codifying a right afforded by the Bill of Rights”.<sup>87</sup>

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<sup>83</sup> *My Vote Counts* above n 79 at para 53.

<sup>84</sup> *S v Mhlungu* 1995 ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (*Mhlungu*) at para 59. See du Plessis “‘Subsidiarity’: What’s in the Name for Constitutional Interpretation and Adjudication?” (2006) 17 *Stell LR* at 207; and see also de Visser “Institutional Subsidiarity in the South African Constitution” (2010) 1 *Stell LR* at 90.

<sup>85</sup> *My Vote Counts* above n 79 at paras 44-66. Although Cameron J wrote the minority judgment in this case, the Court unanimously concurred in this section of his judgment.

<sup>86</sup> See *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC), where the litigant had argued that a local authority’s water provision policy was unreasonable in the light of the right to have access to sufficient water guaranteed by section 27(1)(b) of the Constitution. However, the litigant in that case had not made a frontal challenge to the constitutionality of the governing legislation, the Water Services Act 108 of 1997. O’Regan J, writing for the Court, noted at para 73 that this situation gave rise to the question of subsidiarity as the Court had on numerous occasions held that “where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution”.

<sup>87</sup> *My Vote Counts* above n 79 at para 55.

Cameron J noted that this principle was first affirmed in *New Clicks*,<sup>88</sup> and then expounded and endorsed in the context of labour rights in *SANDU*.<sup>89</sup> In that instance, the litigant had attempted to rely directly on their section 25(3) right to collective bargaining as enshrined in the Constitution, as opposed to what had been codified in the Labour Relations Act<sup>90</sup> (LRA). This Court held that, where legislation has been enacted to give effect to a constitutional right, “a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard”.<sup>91</sup> If the legislation is wanting in its protection of the right, then a frontal attack to the constitutionality of that legislation must be brought.<sup>92</sup>

[105] Notably, for the purposes of this matter, the principle of subsidiarity has also been recognised with approval in relation to the interaction between the Equality Act and section 9 of the Constitution. In *Pillay*, for example, Langa J reiterated that:

“[C]laims brought under the Equality Act must be considered within the four corners of that Act. This Court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to ‘fail to recognise the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.’ The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.”<sup>93</sup>

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<sup>88</sup> In *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (*New Clicks*) the judgments of Chaskalson CJ and Ngcobo J alluded to the principle.

<sup>89</sup> *South African National Defence Union v Minister of Defence* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) (*SANDU*).

<sup>90</sup> 66 of 1995.

<sup>91</sup> *SANDU* above n 89 at para 51.

<sup>92</sup> *Id* at para 52.

<sup>93</sup> *MEC for Education: KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*) at para 40.

[106] The third line of cases were those where “the Court has applied the principle of subsidiarity to those provisions of the Bill of Rights that specifically *oblige* Parliament to enact legislation: sections 9(4), 25(9), 33(3), and 32(2)”.<sup>94</sup> In that case, it would be plainly inappropriate for litigants to ignore legislation that Parliament had been required by the Constitution to enact.

[107] In *My Vote Counts*, the majority noted general reasons underpinning the principle:

“First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, ‘would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation’. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, ‘allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of ‘two parallel systems of law’’. ”<sup>95</sup>

[108] On a conspectus of the above, it is perspicuous from this Court’s jurisprudence that subsidiarity as a principle serves important practical and normative purposes. It respects the separation of powers, as designed by the Constitution. Moreover, it promotes principled and consistent application of judicial reasoning to the hierarchical scheme of legal norms laid out in the Constitution.

[109] The question, therefore, is whether the Supreme Court of Appeal violated the principle of subsidiarity in this case when it measured the impugned statements against section 16(2) of the Constitution rather than against section 10(1) of the Equality Act.

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<sup>94</sup> *My Vote Counts* above n 79 at para 160.

<sup>95</sup> *Id.*

[110] The first port of call is, of course, to determine whether the Equality Act constitutes legislation promulgated to give effect to one or more of the rights in the Bill of Rights. The Equality Act was enacted pursuant to Parliament's obligation under section 9(4) of the Constitution, where it was prescribed that "[n]ational legislation must be enacted to prevent or prohibit unfair discrimination". This much is evident from the preamble to the Equality Act.<sup>96</sup> Thus, as quoted above, "claims brought under the Equality Act must be considered within the four corners of that Act".<sup>97</sup>

[111] The Equality Act goes beyond the mere furtherance of the right to equality and non-discrimination, however. It also expressly regulates hate speech.<sup>98</sup> As one of its objects set out in section 2, the Equality Act states that it was enacted—

- “(b) to give effect to the letter and spirit of the Constitution, in particular—
- ...
- (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.”

[112] The denouement of the above is that the hate speech provisions of the Equality Act are clearly designed to give scope to section 16 of the Constitution, which at section 16(2)(c) carves out hate speech from constitutional protection. In this regard, this fits within the second line of cases identified above, where the legislation attempts to codify a right in the Bill of Rights. Thus, the principle of subsidiarity must apply so that, unless there is a direct frontal challenge to the hate speech provision of the Equality Act (section 10(1)), a court must adjudicate the dispute with regard to that provision, and not with direct reliance on section 16(2) of the Constitution.

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<sup>96</sup> The long title of the Equality Act states that the legislation is intended—

“to give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.”

<sup>97</sup> *Pillay* above n 93 at para 40.

<sup>98</sup> See the long title of the Equality Act above n 1.

[113] The judgment in the Supreme Court of Appeal noted that academic commentators had questioned the constitutionality of section 10 of the Equality Act and that, together with the supposed disavowal of those provisions by the HRC's counsel, mandated it to rely directly on section 16(2) of the Constitution. The third amicus curiae raised the argument that the Supreme Court of Appeal was empowered to act on this basis, as the principle of subsidiarity was not rigid and could be departed from in situations where the legislation may very well be constitutionally invalid. In support of this proposition, they cite this Court's previous decisions in *Albutt*<sup>99</sup> and *KZN JLC*<sup>100</sup> as authority for the contention that the principle of subsidiarity may be relaxed. This argument is misplaced. Properly understood, neither *Albutt* nor *KZN JLC* provide support for the Supreme Court of Appeal's decision to ignore the legislation that was enacted to codify section 16(2)(c) of the Constitution.

[114] In *Albutt*, this Court was confronted with the question whether it was unlawful for the President to establish a special dispensation process in accordance with his pardon powers under section 84(2)(j) of the Constitution without the participation of victims in the process.<sup>101</sup> This Court chose to avoid the question of whether the President's pardon powers amounted to administrative action because, in any event, his decision was irrational under the principle of legality. This Court did not attempt to flout the Promotion of Administrative Justice Act<sup>102</sup> (PAJA), it merely chose to dispose of the matter before deciding whether it even applied. Considering the fact that the President's decision was irrational under "the less exacting constraints imposed by the principle of legality",<sup>103</sup> this approach was entirely sagacious in that case.

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<sup>99</sup> *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

<sup>100</sup> *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) (*KZN JLC*).

<sup>101</sup> *Albutt* above n 99 at para 1.

<sup>102</sup> 3 of 2000.

<sup>103</sup> *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) (*Motau*) at para 27.

[115] The *KZN JLC* case provides even less support for the proposition that the hate speech provisions of the Equality Act could be ignored. In that case, this Court was confronted with the question whether certain promises made by government were necessarily binding. The applicants had relied on contractual principles rather than PAJA as the basis of their claim. The Court ultimately decided the question on the basis of the rationality requirement of the principle of legality. Again, this Court did not ignore PAJA, but rather chose to dispose of the matter without having to answer the question whether PAJA applied.

[116] In the matter before us, where we must decide whether the impugned statements amounted to hate speech, it is evident that section 10 of the Equality Act applies. This, because the Equality Act expressly attempts to regulate hate speech and, moreover, section 16(2)(c) of the Constitution does not prohibit hate speech, but merely indicates that it will not enjoy constitutional protection. Ergo, we can only conclude that the Supreme Court of Appeal erred. This is patent from the concluding paragraph of that Court's judgment:

“In summary, the starting point for the enquiry in this case was that the Constitution in section 16(1) protects freedom of expression. The boundaries of that protection are delimited in section 16(2). The fact that particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection. . . . The bounds of constitutional protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Nothing that Mr Masuku wrote or said transgressed those boundaries.”<sup>104</sup>

[117] The Supreme Court of Appeal went no further. No mention was made of the prohibition of hate speech by section 10(1) of the Equality Act. And, whilst it is indeed so that the starting point for the enquiry required of a court in a matter like this is

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<sup>104</sup> Supreme Court of Appeal judgment above n 29 at para 31.



section 16(1) of the Constitution, the enquiry does not end at section 16(2). In measuring the impugned statements against that which is expressly prohibited by section 16(2), and failing to measure the statements against the relevant provision of the Equality Act, the Supreme Court of Appeal erred.

[118] As has already been stated, the principle of subsidiarity is a key tenet upholding the separation of powers. Whatever anxiety the Supreme Court of Appeal may have had over the constitutionality of section 10(1), absent an explicit frontal challenge, it was bound to rely on the Equality Act. It was empowered to attempt to interpret section 10(1) in the most constitutionally compliant manner, though it chose not to. This decision undermined the well-established principle that requires respect for the Legislature's concomitant role in giving effect to the Bill of Rights, and the duty that each arm of the State bears, to give effect to the Constitution. This approach was also inconsistent with the binding precedent on adjudicating claims under the Equality Act set in *Pillay*.

[119] It would be remarkable indeed, if this Court, having made known its fidelity to the principle of subsidiarity through jurisprudence that spans decades, were to depart from it now or find anything but that the Supreme Court of Appeal erred when it turned to the Constitution at the expense of legislation specifically enacted by Parliament to address the mischief in question. Need we say more? We should think not. This part of the appeal is upheld.

#### *The decision in Qwelane*

[120] In precise terms, the following issues, which are relevant for our purposes, arose for determination in *Qwelane*:

- “(a) whether [section 10(1)] entails a subjective or objective test;
- (b) whether section 10(1)(a)-(c) must be read disjunctively or conjunctively;
- (c) whether [section 10(1)] is impermissibly vague;

- (d) whether [section 10(1)] leads to an unjustifiable limitation of section 16 of the Constitution.”<sup>105</sup>

These issues were decided against the backdrop of the Constitution itself and, indeed, the specific constitutional provisions from which the Equality Act derives its life force.<sup>106</sup> Notably, this Court held that “section 10 is located at the confluence of three fundamental rights: equality, dignity and freedom of expression, and we ought to navigate an interpretation of that section within this terrain”.<sup>107</sup> Within that context, and prior to determining the issues, this Court noted that “section 10(1) can be described as a statutory delict that innovatively offers, unlike any crime or other delict in our law, specific remedies concerning the right to equality”.<sup>108</sup>

[121] This Court’s unanimous findings on each of the above issues, insofar as they are relevant to the matter with which we are presently seized, will be addressed in turn.

*Is the test subjective or objective?*

[122] After giving due consideration to the debate as to whether the phrase “that could reasonably be construed to demonstrate a clear intention” connotes an objective or subjective test, this Court held that—

“it is plainly an objective standard that requires a reasonable person test. This is based on the gloss ‘reasonably be construed’ and ‘to demonstrate a clear intention’, implying an objective test that considers the facts and circumstances surrounding the expression, and not mere inferences or assumptions that are made by the targeted group.”<sup>109</sup>

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<sup>105</sup> *Qwelane v South African Human Rights Council* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 219 (CC) at para 31.

<sup>106</sup> *Id* at paras 48-93, where this Court referred specifically to sections 9, 10, 16, 39 and 233 of the Constitution in an exercise of contextualising the interpretation of section 10 of the Equality Act.

<sup>107</sup> *Id* at para 49.

<sup>108</sup> *Id* at para 95.

<sup>109</sup> *Id* at para 96.

It is pertinent that this interpretation was held to be consistent with the jurisprudence of our courts as well as foreign law.<sup>110</sup>

[123] Later in the judgment, when applying this objective test, this Court held that the following considerations are important to the determination: “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.”<sup>111</sup>

*Must section 10(1)(a)-(c) be read disjunctively or conjunctively?*

[124] On the next issue, this Court disagreed with the Supreme Court of Appeal’s finding that section 10(1)(a)-(c) must be read disjunctively. It held that a disjunctive reading of these paragraphs creates a bar for hate speech that is significantly too low, thereby encroaching on the right to freedom of expression. It held thus:

“The absence of the conjunction ‘and’ between the paragraphs, accentuated by the Supreme Court of Appeal in its reasoning, is countered by the absence of the disjunction ‘or’. This is therefore a neutral factor. On a disjunctive reading, section 10 would prohibit mere private communication which could reasonably be construed to demonstrate a clear intention to be hurtful – this is an overly extensive and impermissible infringement of freedom of expression.”<sup>112</sup>

[125] Further, this Court held that a conjunctive reading is necessary for section 10(1) to withstand constitutional scrutiny, for a disjunctive reading would prohibit expressions that are merely hurtful. This Court emphasised that this would have egregious consequences for freedom of expression, and would result in

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<sup>110</sup> Id at paras 97-101 where this Court cited *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC); 2018 (8) BCLR 951 (CC); *SATAWU v Moloto N.N.O.* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 117 (CC); *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC); *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC); *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC); *Dendy v University of the Witwatersrand* [2007] ZASCA 30; [2007] 3 All SA 1 (SCA); *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ); *Afriforum v Malema* 2011 (6) SA 240 (EqC); *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC); and *Saskatchewan (Human Rights Commission) v Whatcott* 2012 SCC 11; [2013] 1 SCR 467.

<sup>111</sup> *Qwelane* above n 105 at para 176.

<sup>112</sup> Id at para 102.

overly-extensive censorship of expressions that might “offend, shock and disturb.”<sup>113</sup> The salient point made in these findings is that, in an open and democratic society like ours, where diversity is celebrated and inclusivity and participation are encouraged in politics and all spheres of life, a conjunctive reading which guards against oppressive censorship of opinions must be preferred.

*Whether the impugned provision is impermissibly vague*

[126] This Court engaged in a rigorous exercise of interpretation to determine whether section 10(1) is impermissibly vague. In doing so, it specifically considered whether the terms “hurtful”, “harmful” and “to incite harm” are vague. It is instructive, once more, to consider this Court’s eloquent exposition of the interpretative difficulties that arose:

“Various interpretations for ‘harmful’ and ‘hurtful’ were suggested . . . . However, they all present problems. In particular, it is not clear whether there is any difference in their meaning or whether one is a component of the other. If one accepts that ‘hurtful’ only refers to emotional or psychological harm and ‘harmful’ refers to physical harm, the immediate difficulty is that expression cannot in and of itself ‘be harmful’ in the physical sense. Put differently, words cannot intrinsically cause physical harm. The HRC’s proposed definition of these concepts does not appear to me to create any distinction between them. Substantively they appear to mean the same thing. Intricate semantic contortions are required to reach separate meanings in them, and even then, the attainment of separate meanings seems to be a bridge too far. This tortuous interpretative odyssey usurps the Legislature’s legislative functions and offends the principle of separation of powers.”<sup>114</sup>

[127] This Court accordingly held that the term “hurtful” does little more than to create confusion as to what is required by section 10(1) by espousing an additional requirement yet, in the same breath, adding nothing.<sup>115</sup> However, as the Court held, “[i]n

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<sup>113</sup> Id at para 104.

<sup>114</sup> Id at para 152.

<sup>115</sup> Id at para 153.

contradistinction to the insuperable difficulties with ‘hurtful’, the term ‘harmful’ does not suffer the same fate”.<sup>116</sup> This is because the meaning of “‘harmful’ can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group”.<sup>117</sup> Thus, unlike “hurtful”, “harmful” imposes a requirement that can be clearly and plainly understood. The Court concluded thus:

“[T]he use of ‘hurtful’ on a conjunctive reading appears to be redundant and that contributes to the lack of clarity of the impugned section. This is because ‘harmful’ can be understood as emotional and psychological harm that severely undermines the dignity of the targeted group as well as physical harm. ‘Hurtful’ could reasonably mean the same as ‘harmful’, that is including both emotional and psychological harm. There is no need to have both. A possible solution would be for ‘hurtful’ to mean something other than emotional harm, something less perhaps. However, due to the conjunctive reading, a claimant would have to show that in addition to being emotionally harmed, she was also hurt. It may be so that harmful communication is always hurtful. If it is, the removal of the word ‘hurtful’ due to its vagueness avoids any redundancy that can lead to a lack of clarity.”<sup>118</sup>

[128] After reaching this conclusion, this Court held that section 10(1) of the Equality Act was “irredeemably vague” and accordingly undermined the rule of law. Consequently, it declared that the provision could not pass constitutional muster in this regard.<sup>119</sup>

*Whether the impugned provision leads to an unjustifiable limitation of section 16 of the Constitution*

[129] The constitutionality of section 10(1) was not only attacked by the allegation of vagueness. Indeed, this provision was also challenged on the basis of its impact on the

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<sup>116</sup> Id at para 154.

<sup>117</sup> Id.

<sup>118</sup> Id at para 155.

<sup>119</sup> Id at para 157.

right to freedom of expression. In determining whether section 10(1) of the Equality Act leads to an unjustifiable limitation of section 16, this Court held as follows:

“Section 10(1)(c) of the Equality Act prohibits words that ‘promote or propagate hatred’, and this may be interpreted to accord with the prohibition of the ‘advocacy of hatred’ in section 16(2). Similarly, the classification in section 10 of hate speech as speech that is ‘harmful or incite[s] harm’ may be read to align with the prohibition against the ‘advocacy of hatred’ in section 16(2)(c) of the Constitution. However, there is no similar exercise that can be conducted to read ‘hurtful’ constitutionally, as section 16 has no similar wording. Furthermore, the term is clearly broader than what is envisioned in section 16, which focuses on war, violence and hatred, and not merely speech that hurts. Therefore, on this count, section 10 limits section 16 of the Constitution, and a justification analysis is required.”<sup>120</sup>

[130] After conducting the justification analysis in terms of section 36, this Court concluded that the inclusion of “hurtful” constitutes an unjustifiable limitation of the right to freedom of expression. It accordingly declared this aspect of section 10(1) to be unconstitutional. To illustrate the principles underlying this finding, we can do no better than to quote directly from *Qwelane*:

“The importance of the right to freedom of expression on the one hand and the importance of the purpose of the limitation of that right, namely to protect the equally important rights to equality and dignity by way of prohibiting hate speech, have been expounded. So too, the nature and extent of the limitation and the relation between the limitation and its purpose. However, it is here that the usefulness of the term “hurtful” becomes less clear. If speech that is merely hurtful is considered hate speech, this sets the bar rather low. It is an extensive limitation. The prohibition of hurtful speech would certainly serve to 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 is being targeted by section 10 of the Equality Act. Therefore, the relationship between the limitation and its purpose is not proportionate.”<sup>121</sup>

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<sup>120</sup> Id at para 135.

<sup>121</sup> Id at para 139.

*Remedy*

[131] After making the above findings in *Qwelane*, this Court declared section 10(1) of the Equality Act to be invalid insofar as it was inconsistent with the Constitution. This order of invalidity was suspended for 24 months to permit the Legislature sufficient time to remedy the statutory defects.<sup>122</sup>

[132] Furthermore, the Court considered appropriate interim relief and held that severance was appropriate in the circumstances, because severing the word “hurtful” from section 10(1) would still enable the objects of the Equality Act to be realised and fulfilled.<sup>123</sup> In the result, the following order was issued:

“During the period of suspension of the order of constitutional invalidity, section 10 of the Equality Act will read 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.’”<sup>124</sup>

*The implications of Qwelane*

[133] Having held the present matter in abeyance, it behoves this Court to determine its outcome with regard to the findings in *Qwelane*, as expounded above. This means that we find ourselves in the happy position of being able to apply section 10(1) of the Equality Act to the facts of this matter, comforted by the knowledge that this provision is constitutionally compliant. So, the next question that arises is how this Court’s findings in *Qwelane* may affect the determination of the present matter. The parties were invited to make written submissions on this question, which will now be considered briefly.

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<sup>122</sup> Id at para 162.

<sup>123</sup> Id at para 161.

<sup>124</sup> Id at para 1(d) of the order.

*HRC's further submissions*

[134] The thrust of the HRC's submissions is that the impugned statements constitute hate speech in terms of section 10(1), both before and after its reformulation in *Qwelane*. The HRC argues that the aspect of section 10(1) that was declared unconstitutional in *Qwelane* did not form any part of its case, which accordingly remains entirely intact.

[135] The HRC further submits that the *Qwelane* decision bolsters its case insofar as it clarified that an objective approach is required in relation to allegations of hate speech. This, it submits, indicates that the Supreme Court of Appeal fatally erred in relying on Mr Masuku's subjective explanation of the impugned statements, as opposed to determining the objective meaning and import of the statements. It also casts serious doubt as to the correctness of the Supreme Court of Appeal's decision to disregard the expert evidence, for expert evidence may be instrumental to a court seeking to objectively determine the meaning of alleged hate speech. After all, there are peculiar features of the antipathy and attacks encountered by the targets of hate speech which may not be ordinarily known to a court.

[136] The HRC submits that the impugned statements plainly satisfy the threshold set by section 10(1) of the Equality Act, as they contain direct threats of violence and harm, as well as invitations to their audience to band together and target the subjects of the statements with perpetual suffering and hatred. Thus, the HRC submits, a reasonable audience would construe the impugned statements as seeking to violate the rights of another person or group of persons based on their group identity, and that there can be no doubt that these statements incited discrimination and hatred towards the target of the speech. The HRC also refers to the considerations outlined by this Court in *Qwelane* and submits that: Mr Masuku is a prominent political figure; the impugned statements were made in the context of a political rally concerning the deeply divisive, inflammatory and controversial conflict between Israel and Palestine; and that the



impugned statements were highly likely to inflict harm and propagate hatred towards members of the Jewish faith.

[137] Finally, the HRC submits that there can be no doubt that the impugned statements, interpreted objectively, targeted the Jewish community. The HRC submits that the statements contain explicit metaphorical references that any reasonable person would associate with the Jewish community, and that cannot be explained away as references to political ideology.

*Respondents' further submissions*

[138] The respondents submit that *Qwelane* is distinguishable from this matter on the facts, because the target of the alleged hate speech in this matter is in dispute. Further to this, the respondents reiterate that Mr Masuku's statements were based on political ideology and were unrelated to a religious or marginalised group.

[139] The respondents are of the view that the objective requirement and related considerations espoused in *Qwelane* support their case. To this end, the respondents argue that Mr Masuku is not a prominent political figure, and emphasise the context in which the statements were made, being a rally about the conflict between Israel and Palestine where Mr Masuku was heckled and provoked by Jewish students in attendance. They accordingly submit that the target of the impugned statements, objectively determined, was clearly not the Jewish community but rather proponents of the Israeli State, and that political statements of this kind are protected by the right to freedom of expression. On the strength of these considerations, they submit that the impugned statements do not constitute hate speech.

*Amici's further submissions*

[140] Submissions on the import of *Qwelane* in this matter were filed by the first, fourth, fifth, and sixth amici curiae. In the interests of brevity, the pertinent points that can be gleaned from their submissions will be dealt with as a collective.

[141] On behalf of the amici, it was submitted, *inter alia*, that the impugned statements must be assessed against section 10(1) as reformulated in *Qwelane*, and that doing so does not give rise to issues of retrospectivity because harmful speech that propagates hatred was always excluded from constitutional protection. Thus, holding Mr Masuku to the recrafted section 10(1) does not deprive Mr Masuku of any existing rights that he had prior to *Qwelane*. The amici also provide extensive submissions on how, contextually, the impugned statements can only be reasonably and objectively understood to connote Jewish people as opposed to Zionists.

*Application of section 10(1)*

[142] At the outset of these proceedings, it appeared necessary to embark on an interpretative exercise into what the prohibition against “hate speech” as defined in section 10(1) of the Equality Act entails. However, as noted and demonstrated above, *Qwelane* has shed considerable light on the matter, and what remains now is to engage with the facts at hand and measure them against the constitutionally compliant section 10(1). In the interests of completeness and avoiding confusion, we should mention that the amici curiae were absolutely correct to emphasise that no issues of retrospectivity will arise, for the severance applied to section 10(1) has unequivocally not had the effect of depriving Mr Masuku of any pre-existing rights.<sup>125</sup> There is accordingly no issue, whatsoever, with this Court applying section 10(1), as severed, to the current facts. It is to that exercise that we now turn.

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<sup>125</sup> In this way, this matter is squarely on all fours with *Qwelane*. In this regard, see para 184 where this Court held:

“In this matter, there is no impingement of the rule of law and the principle of legality and the typical concerns regarding retrospectivity are not triggered. This is simply because the recrafted provision does not take away or deprive Mr Qwelane of any existing rights that he had. 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 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.”

*Meaning, context and the relevance of expert evidence*

[143] The usual first step in a hate speech enquiry in terms of section 10(1) of the Equality Act will be to ascertain the meaning of the words and determine whether they fall within the section. This is the logically anterior question. In this regard, in the context of defamation law, our courts have repeatedly confirmed that the determination of the meaning of a statement is an objective test.<sup>126</sup> And the standard of assessing whether statements constitute hate speech in terms of section 10(1) of the Equality Act, as recently found by this Court in *Qwelane*, is also one of objectivity.<sup>127</sup> Making this determination falls within the exclusive functions of a court and no evidence whatsoever is admissible – either expert or otherwise.<sup>128</sup> There is no reason why this should also not be the position in adjudicating section 10 cases. Making a determination as to the meaning of words is a task that rightfully falls to the expertise, competency, and responsibility of courts. That said, it would be remiss of me not to acknowledge that words are naturally coloured by the context in which they appear and are used. Indeed, this Court, in *Le Roux*, discussed the importance of determining the meaning of words with recourse to their context:

“The primary meaning is the ordinary meaning given to the statement in its context by a reasonable person . . . . The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning.”<sup>129</sup>

[144] In *Bester*, this Court explained that it is “accepted that the test to determine whether the use of the words is racist is objective – whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory”.<sup>130</sup> And context, to the objective person, is important and instructive of meaning. In *Bester*, this Court held that when dealing with, for example, racial tropes

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<sup>126</sup> *Le Roux* above n 110 at para 89.

<sup>127</sup> See *Qwelane* above n 105 at para 94.

<sup>128</sup> *Le Roux* above n 110 at paras 91 and 156.

<sup>129</sup> *Id* at paras 87 and 90.

<sup>130</sup> *Rustenburg Platinum Mine* above n 110 at para 38.

which are inherently imbued with deep historical roots and contemporary manifestations, it would be unwise to assume that the context in which words are used is neutral. On this, this Court held thus:

“[A] starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary.”<sup>131</sup>

What this means is that, whilst the determination as to whether words are likely to be harmful and propagate hatred, and thus constitute hate speech, falls within the exclusive aegis of a court, evidence that shines a light on the context of those words may be of assistance to that court in conducting this exercise.

[145] Because it has long been held that an expert may not usurp the adjudicative functions of our courts,<sup>132</sup> the experts in this matter could not be used to determine the meaning of the statements and whether they were based on Judaism or Zionism. Nevertheless, as was held in *Salem Party Club*, “courts routinely rely on experts in fields [varying] from medicine to sociology to clarify issues and to understand complexities in evidence”.<sup>133</sup> In the matter at hand, the complex nature of the nexus between anti-Zionism and anti-Semitism means, the evidence of experts as to patterns

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<sup>131</sup> Id at para 48.

<sup>132</sup> As the Court in *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616H noted—

“the true and practical test of the admissibility of the opinion of a skilled witness is whether or not the Court can receive ‘appreciable help’ from that witness on the particular issue . . . the test is a relative one, depending on the particular subject and the particular witness with reference to that subject.”

<sup>133</sup> *Salem Party Club v Salem Community* [2017] ZACC 46; 2018 (3) BCLR 342 (CC); 2018 (3) SA 1 (CC) at para 63.

of discrimination, historical uses of language, its harmful effects, and the fine nuances between anti-Semitic and anti-Zionist tropes can only be of assistance to this Court. Expert testimony colours the context that we need to understand before we can assess the statements properly. With careful management and circumspection, expert evidence may be useful to courts in adjudicating hate speech cases. The Supreme Court of Appeal erred in dismissing the expert evidence as being of limited to no value whatsoever.

*Did Mr Masuku commit hate speech in terms of section 10(1) of the Equality Act?*

[146] It is worth noting at the outset of this part of the enquiry that, during the hearing, the parties appeared to be *ad idem* (in agreement) on the application of the law. The second amicus argued that there are at least five points of commonality between the two primary parties. The list of points of commonality included the fact that: (i) evidence about the impact of speech on the target group is relevant to remedy; (ii) witnesses may not be asked what they understood the words to mean or what they meant by the words as this undermines the accepted objective test; (iii) meaning is dependent on context and thus evidence of context matters; (iv) expert evidence is admissible in so far as it can help the court understand context; and (v) the Supreme Court of Appeal ought to have approached the question with regard to section 10 of the Equality Act and not section 16 of the Constitution.

[147] The glaring legal issues around section 10(1) of the Equality Act having been dealt with by this Court in *Qwelane*, the crisp issue with which this Court is now seized is whether the Equality Court was correct to find that the impugned statements constituted hate speech. It must accordingly be borne in mind that the test for permissible interference by a court of appeal with a trial court's factual findings imposes a high threshold.<sup>134</sup> It is, of course, trite that the powers of a court of appeal against

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<sup>134</sup> *Maphana v S* [2018] ZASCA 8 at para 17.

factual findings are limited. There must be demonstrable and material misdirection by the trial court before a court of appeal will interfere.<sup>135</sup>

[148] In *Mashongwa*, it was unanimously held that it is undesirable for this Court to second-guess the well-reasoned factual findings of the trial court.<sup>136</sup> Only under certain circumstances may an appellate court interfere with the factual findings of a trial court. What constitute those circumstances are a demonstrable and material misdirection and a finding that is clearly wrong. Otherwise, trial courts are best placed to make factual findings.

[149] This Court has also explained that the principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is recognition of the advantages that the trial court enjoys that the appellate court does not.<sup>137</sup> These advantages flow from observing and hearing witnesses as opposed to reading “the cold printed word”,<sup>138</sup> the main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to “tie the hands of appellate courts”.<sup>139</sup> It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.

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<sup>135</sup> *S v Hadebe* [1997] ZASCA 86 (*Hadebe*) at 645F.

<sup>136</sup> *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) at para 45.

<sup>137</sup> *Bernert* above n 47 at para 106.

<sup>138</sup> *R v Dhlumayo* 1948 (2) SA 677 (A) (*Dhlumayo*) at 696.

<sup>139</sup> *Id* at 695.

[150] In *Florence*<sup>140</sup> and *Competition Commission*,<sup>141</sup> this Court noted that this circumspection at overturning factual findings of trial courts is heightened when one has regard to the factual findings of specialist courts like the Land Claims Court and Competition Appeal Court. The Equality Court had the benefit of listening to the evidence of witnesses who were present at the march as well as the expert testimony. In this regard, the Court was able to make credibility findings that could assist it in determining how much to weigh the evidentiary value of this evidence as to the context of the impugned statements.

[151] The immediate context in which Mr Masuku made the impugned statements was during tensions that broke out in response to the Gaza War of 2008/2009. Supporters of Israeli and Palestinian causes were involved in increasingly fraught demonstrations, debates and communications.<sup>142</sup> COSATU had come out denouncing Israel's actions and reiterated its support for the Palestinian community. The SAJBD and SAZF defended Israel's military actions.

[152] The expert evidence relied on during the trial showed that, although Judaism and Zionism are distinct, Zionism forms a part of the core identity for many Jews. Responding expert testimony noted that there was also a tendency to silence legitimate criticism of Israel as being anti-Semitic. As noted by the applicant's expert, Zionism means various different things to different people.

[153] For the reasons already provided, this Court must tread carefully before interfering with the factual findings made by the Equality Court regarding this evidence. However, the crisp question is whether we ought to pay deference to the Equality Court's finding on whether a reasonable person would have considered the impugned statements to have been based on Jewish identity and intended to incite harm

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<sup>140</sup> *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 24.

<sup>141</sup> *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26; 2019 (5) SA 598 (CC); 2019 (9) BCLR 1049 (CC) (*Media 24*) at para 52.

<sup>142</sup> Equality Court judgment above n 3 at para 31.

or propagate hatred. This enquiry involves a mixed question of fact and law to the extent that it requires an evaluative exercise entailing, *inter alia*, the weighing up of expert evidence in the light of the criterion of reasonableness. This enquiry does not turn entirely on the merits of the factual findings made by the Equality Court, which it was best placed to make as a trial court. Thus, on the one hand, the Equality Court's findings on factual questions relating to the composition of the attendees at the rally, what was said or shouted, and whether the impugned speech included anti-Semitic innuendos, cannot be overturned unless they are vitiated by material misdirection. On the other, however, as an appellate court we are entitled to draw inferences from these facts to determine whether a reasonable person would have interpreted Mr Masuku's statements in a manner that would render them in contravention of section 10(1), for that is a question of law that this Court is well-placed to answer.

[154] At this juncture, it is noteworthy that the preceding analysis and this Court's jurisprudence, most recently detailed in *Qwelane*, reveals that words cannot always be taken for their plain meaning. The first amicus aptly emphasised that there exists a long narrative of anti-Jewish rhetoric. This has dominated world history for thousands of years, and culminated in the Holocaust. Due regard to this context and history must be observed when dealing with expressions that are allegedly anti-Semitic, because many socially acceptable words may become a proxy for anti-Semitic sentiments. Focusing on the plain text and ignoring the objectively ascertainable subtext would be ignorant, inappropriate and antithetical to what our Constitution demands.

[155] Bearing these considerations in mind, we turn now to the impugned statements, to ascertain whether they constitute hate speech.

*First statement*

(i) *Were the words based on Jewishness as a religion or ethnicity?*

[156] In respect of the first statement, the Equality Court concluded that the words were based on membership of the Jewish religion or ethnicity. The Supreme Court of



Appeal made its finding in terms of a separate area of the law, so it can be put to one side. The Equality Court concluded as it did, because the majority of Jewish people are Zionists in South Africa and globally.<sup>143</sup> Although this may not be ordinarily sufficient to find that the remarks were based on the Jewish identity – as that would mean every mention of Zionism may potentially open itself to censure – the Equality Court went on to conclude that the further reference to “Hitler” made it clear that the statement was based on Jewish ethnicity. The Equality Court held that a reasonable reader would have noted that a reference to Hitler to a group that was predominately Jewish was used because of their “Jewishness” – namely, their Jewish ethnicity and identity. As the Equality Court noted, Hitler’s anti-Semitic extermination campaign was not limited to people of the Jewish faith or ethnicity who identified as Zionists.<sup>144</sup> Moreover, any mention of “Hitler” undeniably evokes semantic associations with the entire global Jewish community, and not a specific faction thereof.

[157] There were no contextual factors that indicate that a reasonable person who had sight of the blog post would not have thought this the most probable meaning. Although Mr Masuku seemed to be responding to a particularly racist comment directed towards Black COSATU members, this could not disturb the reasonable apprehension that a reader of the blog post would have concluded that, more likely than not, Mr Masuku based his remarks on membership of the Jewish identity. We accordingly agree with and uphold the Equality Court’s inference that a reasonable interpretation of the first statement would understand it as being based on Jewishness as an ethnicity, and not on anti-Zionism.

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<sup>143</sup> Equality Court judgment above n 3 at para 41.

<sup>144</sup> Id at para 48.

- (ii) *Would a reasonable person conclude that there had been a clear intent to be harmful or incite harm and promote and propagate hatred?*

[158] The Equality Court further held that a reasonable reader would have found that there was a clear intent to be harmful or incite harm and propagate or promote hatred in the blog statement. The Equality Court concluded that the tenor and explicitness of Mr Masuku's threats would have indicated to a reasonable reader that his intention was to cause harm. The vehemence and aggression in his tone and allusions to the horrors suffered by Palestinian civilians at the hands of the Israeli forces was enough to give the impression that the aim would be for reprisals or revenge. This sort of threat, in the view of the Equality Court, manifested a clear intention of detestation, enmity, ill-will and malevolence. This sort of expression could reasonably be interpreted to have been intended to be harmful to those who heard it and to society, and to have sought to incite others to harm Jewish people and promote hatred.

[159] While the Equality Court proceeded to ignore Mr Masuku's subjective intention on this score, the same result would have arisen if the Equality Court had taken into account contextual factors, including his possible subjective intention. There were no contextual factors that indicated that Mr Masuku was unaware of the meaning or likely effect of his words so that a reasonable person might conclude that he had no clear intention for his words to have their effect.

[160] It is therefore clear that the first statement meets the threshold required by section 10(1), and the Equality Court was correct to conclude that this first statement amounted to a contravention of section 10(1).

*Second, third and fourth statements*

- (i) *Were the words based on Jewishness as a religion or ethnicity?*

[161] The second to fourth statements were all made at the Wits rally; thus, it is sensible to analyse them together. The Equality Court concluded on the basis of the

eyewitness evidence that the only members of the audience who held a different view to Mr Masuku would have been Jewish. The transcript of the rally indicates that Mr Masuku was subject to much heckling from people who opposed his speech. Where Mr Masuku showed his opposition to those whom he believed were oppressing Palestinians, he faced retorts of “Including Jews!”, “Especially Jews!”, “By Jews!”. It is unclear why the individuals opposing Mr Masuku would have shouted these things, but the respondents contend that this was done to bait Mr Masuku into saying something which singled out Jews. Curiously, the Equality Court does not include this relevant context in its analysis of the statements made at the rally.

[162] Although there is no reason that anything should turn on this omission by the Equality Court, we pause to make one comment on this purported defence. It seems to be flagrantly incongruent to persist with the argument that the impugned statements were political in nature and were in no way targeted at the Jewish community; but in the same breath to justify these statements, as the respondents do in their further submissions, by the context of antagonism from Jewish people. We note this only to express discomfort at the notion, which is seemingly suggested by the respondents, that retort to anti-Semitism may be acceptable in the context of provocation.

[163] In these statements, Mr Masuku cajoles that he would confront his opponents whether it was at Wits University or whether it was at Orange Grove. The HRC contended, and the Equality Court accepted, that the reference to Orange Grove was meant as a reference to a predominately Jewish neighbourhood. Mr Masuku contended that his reference to Wits University and Orange Grove was simply because these were the sites of the most recent marches and rallies, and of the offices of two major defenders of Israel’s actions in Gaza (which are also prominent Jewish associations). It is not conclusive either way that a reasonable reader who would have known that Orange Grove was a predominately Jewish suburb would also not have been aware of the march to the offices of the SAJBD and SAZF which are in Raedene, a small suburb between Orange Grove and Linksfield.

[164] The tenor of this back and forth continued between the groups when Mr Masuku made a threat to those who would join the Israeli Defense Force (IDF). It was common cause that only Jewish families would send their children to join the IDF, but that it was unlikely that a Jewish person would join the IDF if they were not a Zionist-supporter. While a threat of this sort is offensive and menacing, it is not clear that a reasonable person would conclude that this reference was based on Jewish identity.

[165] Furthermore, this analysis of the rally holds that it was inconclusive as to whether a reasonable person would have considered Mr Masuku's statements to have been based on Jewish identity. Thus, while the first statement contravened section 10(1), the second to fourth statements, on a balance of probabilities, did not. On the whole, these statements were undoubtedly adversarial and inflammatory, but they were clearly aimed at Israel and those who support Israel. Indeed, Mr Masuku targeted those who support Israel via their membership of the IDF and their support for pro-Israel organisations. However, there was a degree of specificity – clearly, Mr Masuku had in mind those persons actively involved in support of the state of Israel – and a political hue to these comments, which make it more likely than not that a reasonable person would not understand Mr Masuku as singling out Jewish people generally as an ethnic and religious group. The facts and evidence do not support the conclusion that the second to fourth statements, seditious as they may have been, were targeted at members of the Jewish faith or ethnicity.

[166] The second to fourth statements were accordingly not based on a prohibited ground, and do not constitute hate speech in terms of section 10(1). Thus, the question as to whether a reasonable person would have concluded that there was an intention to be harmful or promote hatred does not arise for consideration in respect of these statements. Therefore, the Equality Court's conclusion in relation to the second to fourth statements must be overturned.

## Cross-appeal

[167] The respondents brought a cross-appeal, appealing the decision of the Equality Court to award costs against them, even though the HRC did not pray for this costs order and in fact, disavowed any costs order.

[168] The *Biowatch* principle requires that an unsuccessful private party in legal proceedings against the State be spared from paying the State's costs in constitutional matters.<sup>145</sup> The purpose of the principle is to shield unsuccessful litigants in genuine constitutional litigation from the obligation of paying costs, as the risk of being mulcted in costs might discourage litigants from seeking to vindicate their constitutional rights.<sup>146</sup> In litigation between the government and a private party seeking to assert a constitutional right, *Affordable Medicines Trust* established the principle that, ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.<sup>147</sup> Again, the idea is to encourage bone fide litigation between individuals and organs of State without the fear of "chilling" legal costs.<sup>148</sup>

[169] Exceptional circumstances may justify a departure from this rule where, for example, litigation is frivolous or vexatious or the party conducts himself or herself in a manner warranting disapproval by the Court.<sup>149</sup> However, we are of the view that Mr Masuku raised a bona fide constitutional argument on the basis that his statements constituted political speech. This argument succeeded in part, and we cannot ignore the fact that Mr Masuku was attempting to assert his right to freedom of expression, an important constitutional right which, unless its exercise falls foul of the applicable

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<sup>145</sup> *Biowatch Trust v Registrar Genetic Resources (Biowatch)* [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC).

<sup>146</sup> *Id* at para 21.

<sup>147</sup> *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

<sup>148</sup> *Id*.

<sup>149</sup> *Id*.

constitutional protections, is worthy of protection in any constitutional democracy. The *Biowatch* principle applies. The Equality Court erred, and the cross-appeal succeeds.

*Relief*

[170] In the circumstances, the appropriate relief is undoubtedly to set aside the order of the Supreme Court of Appeal and reinstate the order of the Equality Court, save for the aspect thereof that is inconsistent with this Court’s decision in *Qwelane*,<sup>150</sup> and save for the findings above on the second to fourth statements and costs. This imposes the obligation on Mr Masuku to tender an unconditional apology to the Jewish community in respect of the first statement. And so it is that he who expressed the harmful words that led to these proceedings, and undoubtedly a great deal of emotional suffering for the Jewish community, must find the words to make amends.

### *Conclusion*

[171] In dealing with the delicate relationship between the fundamental rights at stake in a matter like this, the ends of our constitutional democracy are served by striking an elusive yet crucial balance between the imperative to regulate hate speech and the importance of fostering “an environment that allows a free and open exchange of ideas, free from censorship, no matter how offensive, shocking or disturbing these ideas may be”.<sup>151</sup> This is unlikely to be a straight-forward task, and will involve careful consideration of the law and context. In the context of this matter, and in appreciating the power of words to inflict harm, it is fitting to close with a cautionary and apposite extract taken from the Tanuch: “Death and life are in the tongue”.

### *Order*

[172] In the result, the following order is made:

1. The application for recusal is dismissed.
2. Leave to appeal is granted.

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<sup>150</sup> In line with the wording of section 10(1) of the Equality Act prior to this Court’s pronouncements in *Qwelane*, the order of the Equality Court declared the impugned statements to be “hurtful”. It is this aspect of that order that can no longer be sustained for the reasons explained in this judgment.

<sup>151</sup> *Qwelane* above n 105 at para 74.

3. The appeal is upheld in part.
4. The order of the Supreme Court of Appeal is set aside and substituted with the following:

“The appeal against the order of the Equality Court is dismissed with no order as to costs.”
5. Leave to cross-appeal is granted.
6. The cross-appeal is upheld.
7. Paragraph 2 of the order of the Equality Court is set aside and substituted with the following:

“The complaint against the respondents succeeds in respect of the first statement with no order as to costs.”
8. In the result, the order of the Equality Court is reinstated, subject to the following amendments:
  - “1. The first statement is declared to be harmful, and to incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000.
  2. The complaint against the respondents succeeds in respect of the first statement with no order as to costs.
  3. The respondents are ordered to tender an unconditional apology to the Jewish Community within thirty (30) days of this order, or within such other period as the parties may agree. Such apology must at least receive the same publicity as the offending statement.”
9. No order is made as to costs in this Court.

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