THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1062/2017

In the matter between:

BONGANI MASUKU	**FIRST APPELLANT**
CONGRESS OF SOUTH AFRICAN TRADE UNIONS	**SECOND APPELLANT**

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION obo SOUTH AFRICAN JEWISH BOARD OF DEPUTIES	**RESPONDENT**

Neutral citation: *Masuku & Ano v SAHRC* (1062/2017) [2018] ZASCA 180 (04 December 2018)

Bench: Lewis, Wallis, Zondi and Dambuza JJA and Matojane AJA

Heard: 13 November 2018

Delivered: 04 December 2018

Summary: Constitutional Law – right to freedom of expression – principles on protection of freedom of speech re-stated – whether statements excluded from protection under s 16(1) of the Constitution – statements to be interpreted in the context within which they were made – only statements within the purview of s 16(2) of the Constitution are not protected.

ORDER

On appeal from: Gauteng Division, Johannesburg (Moshidi J sitting as the Equality Court):

1 The appeal is upheld.

2 The order of the Equality Court is set aside and substituted with an order in the following terms:

'(a) The complaint is dismissed.

(b) Each party is to pay its own costs.'

3 Each party to pay its own costs of the appeal.

JUDGMENT

Dambuza JA (Lewis, Wallis and Zondi JJA and Matojane AJA concurring):

Introduction

[1] On 26 March 2009 the second respondent, the South African Jewish Board of Deputies (SAJBOD), lodged a complaint with the first respondent, the South African Human Rights Commission (Commission), alleging that certain statements made by the first appellant, Mr Bongani Masuku, amounted to hate speech. On assessment, the Commission formed a view that the statements did amount to hate speech. So did the Equality Court, sitting in Johannesburg (Moshidi J), when the complaint was referred to it. This appeal, with leave of the Equality Court, is against that judgment.

Background

[2] The events from which these proceedings arose occurred on 6 February and 5 March 2009. They were preceded and fuelled by intensification, during December 2008 to January 2009, of the protracted conflict between Israel and Palestine in the Middle East, particularly the launch, shortly before then, of a military operation against Hamas in the Gaza Strip. This resulted in the death of more than seven hundred people. These events sparked strong worldwide reaction, (both condemnatory and supportive) from different parts of the world, including South Africa.

[3] In relation to these events, SAJBOD and the South African Zionist Federation (SAZF) published an open letter in which they expressed support for the Israeli actions. On the other hand another open letter signed by 315 members of the South African Jewish community, distancing themselves from the letter of support and condemning the 'disproportionate use of force' by the Israeli military, was also published.

[4] During this period Mr Masuku was the secretary of the International Relations arm of the Congress of South African Trade Unions (COSATU). COSATU also fiercely opposed the Israeli actions. A protest march against what was viewed as Israeli invasion of the Gaza Strip took place under the banner of COSATU and the Palestine Solidarity Committee (PSC), to the headquarters of SAJBOD and SAZF in Johannesburg.[1] COSATU also participated in an on-going campaign of solidarity with Palestinian people, including pickets, marches and press releases, all aimed at putting pressure on the South African Government to act in support of the Palestinian people.

[5] An online war of words erupted alongside these activities on a blog called 'It's Almost Supernatural'.[2] On 6 February 2009 the following statement appeared on the blog: 'Even when all the monkeys in Cosatu have died of Aids (even those who were cured by raping babies), I still wont return [to SA]. Jews should be in Israel supporting Israel – Friends – make Aliya! Do it!'

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[1] The march took place even though permission which had been sought from the City of Johannesburg was refused.

[2] This blog is hosted at: https://supernatural.blogs.com.

A further comment read:

'Let us bombard the COSATU offices with phone calls to let them know our anger. It is hard[er] to ignore phone calls than email. Maybe we should start a policy that Israel-loyal Jews refuse to employ COSATU members in retaliation to COSATU's evil actions.'

[6] On the same day Mr Masuku posted the following statement on the blog:

'Hi guys,

Bongani says hi to you all *as 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.* Every Palestinian who suffers is a direct attack on all of us.' (Emphasis supplied on the portion allegedly constituting hate speech)

[7] On 5 March 2009 Mr Masuku made the following three statements as part of his speech at a gathering at the University of the Witwatersrand (Wits):

' ... COSATU has got members here on this campus, we can make sure that for that side it will be hell ...',

... the following things are going to apply: any South African family , I want to repeat it so that it is clear for everyone, any South African family who sends its son or daughter to be part of the Israeli Defence Force must not blame us when something happens to them with immediate effect ...', and

'... COSATU is with you, we will do everything to make sure that whether it is a t Wits, whether it is at Orange Grove, anyone who does not support equality and dignity, who does not support the rights of other people must face the consequences even if we will do something that may necessarily be regarded as harm ...'

Other statements, also extracted from Mr Masuku's speech at Wits that were included in the complaint. However, only the three stated above were found to amount to hate speech by the Equality Court.

[8] After the complaint was made, the Commission formed a preliminary view that Mr Masuku's statements constituted hate speech, prohibited under s 16(2) of the

Constitution, and s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 (the Equality Act).[3] It was also of the view that the statements probably violated the complainant's right to equality guaranteed under s 9 of the Constitution. More specifically, the Commission was of the view that the second and third statements, made during the speech at Wits University were directed at Jewish students and Jewish families respectively and that the reference to people at Wits campus and Orange Grove in the third statement was directed at 'Jews'. Regarding the statement posted on the blog the Commission concluded that those who were to be targeted as proposed were South African Jews.

[9] In the response to the Commission's preliminary view and invitation to respond, Mr Masuku admitted to having made the statements. He explained how he was repeatedly heckled whilst giving his speech at Wits. He also explained that his statements were directed at supporters of the State of Israel from different ethnic and religious backgrounds, rather than to Jewish students. He asserted that the religion and ethnicity of the supporters of the State of Israel were of no concern to him (and COSATU) and that his references to 'Zionists' connoted adherence to a political ideology rather than a religious or ethnic orientation.

[10] In concluding that the statements made by Mr Masuku amounted to hate speech and referring the matter to the Equality Court the Commission was of the view that the statements were offensive and unpalatable to society; that they were of an extreme nature in that they advocated that the Jewish community should be despised, scorned, ridiculed and thus subjected to ill-treatment because of their religious affiliation. It found that a prima facie case of hate speech had been established.

[11] The Equality Court granted an order that:

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[3] Section 10(1) of the Equality Act reads as follows:
'Subject to the provisio 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.'

'65.1 The impugned statements are declared to be 'hurtful, harmful, incite harm, and propagate hatred, and amount to hate speech as envisaged in s10 of the Equality Act No 4 of 2000;

65.2 The complaint against the respondent succeeds with costs;

65.3 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 statements'.

The Issues

[12] At the core of this appeal is the Equality Court's interpretation of hate speech. Mr Masuku contended that the Equality Court erroneously reasoned that because most people who support or 'would most likely support' Zionism, and those who most likely would have been offended by the statements are Jewish, therefore the statements were directed at people of Jewish religion or ethnicity. He contended that they were rather directed at the conduct of the State of Israel, and the fact that most Jewish People might support such conduct did not transform the statements into ones based on religion or ethnicity.

[13] Although the Commission and complainant's reliance on the offensive and hurtful nature of the statements continued in the complainant's Heads of Argument, during the hearing of the appeal counsel for the Commission disavowed the reliance on the Equality Act, accepting that the statements, as any other form of speech, would be excluded from protection (as hate speech) under s 16(1) of the Constitution only if they fell foul of s 16(2) thereof. However, the retraction of the reliance on the Equality Act left intact the underlying substantive arguments that had formed the basis of the claim. It was contended that the statements amounted to unambiguous threats of harm and violence and amounted to hate speech directed at members of the Jewish Community.

[14] The retraction was properly made. There is cause for concern that the provisions of s 10 of the Equality Act have the effect of condemning speech that is protected under s 16(1) of the Constitution. In their book *The South African Constitutional Law: The Bill of Rights* the writers Cheadle, Davis and Haysom examine the provisions of s 10 of the Equality Act. They suggest that the formulation of s 10 of the Equality Act is 'a most

unfortunate convoluted formulation' and that it may well constitute an unjustified limitation of the freedom of expression in the context of a constitutional order 'committed to robust deliberation' for these reasons:

'It extends the prohibited grounds contained in s16(2) of the Constitution in that the latter provision refers to race, ethnicity, gender or religion only, and uncouples hurt and harm from incitement to cause harm. While the extension of the prohibited grounds can doubtless be justified in terms of the limitation clause as contained in section 36, particularly in the context of the prohibited grounds contained in section 9(3), the wider formulation adopted in section 10(1) will also have to be saved in terms of section 36. The combination of an extension of the prohibited grounds beyond those contained in section 16(2) and the dispensing with the requirement of causation creates the potential for challenge'.

The contention that a more extensive definition of hate speech can be justified under s 36 is at the least debatable as s 16(2) provides an internal limitation clause.

The Law

[15] Consideration of the issues that arise in this appeal will be confined to the Constitution. Section 16 thereof guarantees the right to freedom of expression. The section reads as follows:

'(1) Everyone has a right to freedom of expression, which includes-

(a) freedom of press and other media;

(b) freedom to receive and 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.

[16] Since the advent of our Constitution the right to enjoy freedom of expression is one that has been fiercely promoted and jealously guarded in this country. Section 15 of the Interim Constitution protected both 'speech' and 'expression'.[4] The use of only the wider

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[4] 'Expression' being a wider concept than 'speech'. See Cheadle, Davis and Haysom *The South African*

concept, 'expression' in s 16 of the Constitution, has been interpreted as signifying a deliberately expansive approach to constitutional protection of speech and expression. None of the parties in this appeal take issue with the liberal approach to protection of freedom of expression in this country as demonstrated in the various judgments of the court around the country.

[17] In *South African National Defence Union v Minister of Defence & another*[5] O'Regan J highlighted the importance of the right to freedom of expression as follows:

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form, and express opinions and views freely on a wide range of matters.'

[18] In *The Citizen 1978 (Pty) Ltd & others v McBride*[6] the Constitutional Court upheld a defence of fair comment in an action for defamation based on reports which referred to the plaintiff as a murderer even though he had been granted amnesty in terms of s 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995. The court remarked that comment on matters of public interest is protected under the guarantee of freedom of expression and that the values and norms of the Constitution determine the boundaries of what is protected. The courts cannot prescribe what people may or may not say. The right to freedom of expression is an essential component of dignity and continued improvement in the quality of people's life. As the Constitutional Court said in *Democratic Alliance v ANC & another*:[7]

'It [the right to freedom of expression] is valuable for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and mis-governance to be exposed. It also helps the search for the truth by both individuals and society generally. If society represses views it considers unacceptable

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Constitutional Law: The Bill of Rights 2 ed (2018) at 11-3.

[5] *South African National Defence Union v Minister of Defence & ano* 1999 (4) SA 469 (CC) para 7.

[6] *The Citizen 1978 (Pty) Ltd & others v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC).

[7] *Democratic Alliance v African National Congress & another* [2015] ZACC 1 (CC) at para 122.

they may never be exposed as wrong. Open debate enhances truth finding and enables us to scrutinise political argument and deliberate social values.'

[19] However, the Constitution recognises that the right to freedom of expression must be limited in certain circumstances for the protection of other rights, particularly the right to dignity. Thus s 16(2)(*c*) of the Constitution qualifies the extent and scope of the right to freedom of expression. Of relevance to this case is that under that sub-section advocacy of hatred is excluded from protection where such hatred (1) is based on ethnicity, gender or religion and (2) constitutes incitement to cause harm. But a hostile statement is not necessarily hateful in the sense envisaged under s 16(2)(c). Hence the decision of this court in *Hotz & others v University of Cape Town*[8] that:

'A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity'.

[20] Before I consider the question whether the statements made by Mr Masuku amounted to hate speech, it is necessary that I advert to one other issue – the extensive evidence led in the Equality Court, particularly the expert evidence led with the intention, it was said, to explain the difference between 'anti-Zionism' and 'anti-Semitism'. Dr David Hirsch, a lecturer in Sociology at Goldsmiths University of London, Dr Gregory Stanton, a research professor and an expert on Judaism and Zionism, and Mr Benjamin Shullman, a lay person of Jewish origin, all testified on behalf of the Commission. Professor Steven Friedman, then the Director of the Centre of the Study for Democracy at the University of Johannesburg, testified as Mr Masuku's witness. Dr Hirsch, Dr Stanton and Prof Friedman testified as expert witnesses.

[21] This evidence was of minimal, if any assistance to the resolution of the dispute as to whether Mr Masuku's statements amounted to hate speech. At best it revealed that academics are not in agreement as to the meaning of the terms.

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[8] *Hotz & others v University of Cape Town* [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) para 68.

[22] It is also necessary to deal with certain credibility findings made by the Equality Court against Prof Friedman. That court found it difficult to accept of Prof Friedman's evidence. This is because, in the judge's opinion, Prof Friedman had not demonstrated 'convincingly' that he was an expert on issues of 'anti-Semitism', and its proper inter-relationship with 'anti-Zionism' in the context of the broader Israeli-Palestinian conflict'. Although he had 'immense interest in these matters [they had] not been the focus of his academic career. In addition he [had] somewhat showed that he [was] partisan which on its own, offend[ed] the approach and principles to expert testimony'. The basis for this finding was that Prof Friedman had previously supported a campaign for the boycott, sanctions and disinvestment campaign against Israel (BDS campaign), and was part of a group of academics that had made submissions to the University of Johannesburg to terminate its association with the Ben-Gurion University of Israel.

[23] Other than highlighting Prof Friedman's general activism in relation to Israel, the judge did not refer to any evidence showing bias, or unreliableness, either in the content of his evidence, or in any other evidence. Neither did he make any negative finding regarding his independence, integrity, candour, knowledge of the subject, intellect, and reputation. If the basis for the Equality Court's assessment of Prof Friedman was anything to go by, Dr Hirsch's membership of 'Engage', an activist group that was engaged in mobilising against the academic boycott of Israel, would also disqualify him as a witness in this case. This finding by the Equality Court was therefore unjustified.

The Blog

[24] Turning to the use of the term 'Zionists' in the blog statement by Mr Masuku, the Shorter-Oxford dictionary defines the term 'Zionism' as 'a movement for (originally) the re-establishment and (now) the development and protection of a Jewish nation that is now Israel'. The Merriam-Webster Dictionary describes it as 'an international movement originally for the establishment of a Jewish national or religious community and later for the support of modern Israel'. And the Cambridge Advanced Learner's Dictionary and Thesaurus defines the term as 'a political movement that had as its original aim the creation of a country for Jewish people, and that now supports the state of Israel'.

[25] It bears mention that both of the Commission's experts and Mr Shullman defined the term 'Zionism' broadly in the same terms as the dictionary definitions, and were in agreement that not all Zionists are Jewish and not all Jewish people are Zionists. Dr Hirsch defined Zionism as historically referring to a political or ideological movement for the establishment of a Jewish state, although, after the establishment of the State of Israel in 1948, it no longer has that meaning. He did not give a definition of the current meaning, other than to say that it has a different meaning to different people. Prof Friedman defined 'Zionism' as a political ideology, which is founded on a belief in a state for Jews only. He explained that prior to 1948 the ideology focused on working for creation of the state, and thereafter on defending its existence as an ethnic state. And Mr Shullman's evidence was that at the core of Zionism is the support for the existence of a Jewish state in the Middle East and that the term is not synonymous with the word 'Jew'. Nothing in these definitions and explanations conveys identification on the basis of ethnicity or religion. The furthest one can take the matter is that because very many Zionists are Jewish and very many Jews may be Zionists, the two concepts may in some circumstances become blurred if care it not taken to distinguish between them.

[26] Further, none of the other offending terms 'racists', 'fascists' and 'friends of Hitler', either on their own or within the statement, connote religion or ethnicity. The terms may be irrational, offensive or ever insulting. Threatening or unsavoury words in the statement such as 'bitter medicine', and 'perpetual suffering' are only metaphorical. Even if ethnicity or religion was implied in the blog statement they could not be considered advocacy of hatred or incitement of harm for the purpose of s 16 (2)(*c*) of the Constitution, particularly in the context in which they were made.

[27] The context in which the statement was posted on the blog has been outlined above.

The second to fourth statements

[28] These statements also fell to be interpreted within the context of the speech and the circumstances attendant at the place and time they were made. [9] The meeting at which Mr Masuku gave his speech at Wits was part of a global annual event called Israel-Apartheid week. It was not in dispute that, as the title of the event conveys, it is intended to highlight the similarities between the State of Israel and the apartheid state and call for action similar to that which had been taken by the international anti-apartheid movement. It is not difficult to imagine the atmosphere that prevailed at this gathering. That tense atmosphere would have been exacerbated by the presence of a small, but vociferous, group of Jewish students, who repeatedly heckled Mr Masuku during his speech.

[29] The theme of Mr Masuku's speech was how practical solidarity with Palestinians could be demonstrated. In his speech he referred to a boycott, divestment and sanction campaign against Israel, refusal by SATAWU workers to offload goods arriving at Durban from Israel, working to ensure that other countries in Southern Africa should also not allow exports to and imports from Israel, efforts to remove Israel from the International Trade Union Confederation, an academic boycott and refusal of a visa for an Israeli sportsman.

[30] On Mr Shullman's own evidence, before Mr Masuku had uttered any offensive statement, he (Mr Shullman) shouted the words 'Heil Hitler!' at him. The transcript of portions of the speech, the contents of which were not in dispute, shows that indeed Mr Masuku was heckled and booed on numerous occasions during the speech. On the transcript it was the hecklers who interjected with the words 'Jews'. For example, at one instance, when Mr Masuku stated that other people deserved dignity, peace, food etc, a heckler shouted 'including Jews'. Mr Masuku's explanation that his utterances had nothing to do with Jews but were directed at supporters of the State of Israel find support in the transcripts. Nothing in the content of the speech shows that it was anything more than a political speech.

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[9] *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC).

[31] Much of the argument made in the Commission's Heads of Argument and before us on whether a statement amounts to hate speech was drawn from the approach in some foreign jurisdictions. Reliance was placed, for example on *R v Keegstra*.[10] Such reliance on foreign jurisprudence must be considered carefully in the interpretation of this and similar rights. As Langa DCJ said in *Islamic Unity Convention v Independent Broadcasting Authority & others*[11] our courts need to take account of:

'... [the] severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systematic violations of other fundamental human rights in South Africa.'

[32] In summary, the starting point for the enquiry in this case was that the Constitution in s 16(1) protects freedom of expression. The boundaries of that protection are delimited in s 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. Public debate is noisy and there are many areas of dispute in our society that can provoke powerful emotions. 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, however hurtful or distasteful they may have seemed to members of the Jewish and wider community. Many may deplore them, but that does not deprive them of constitutional protection.

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

1 The appeal is upheld.

2 The order of the Equality Court is set aside and substituted with an order in the following terms:

'(a) The complaint is dismissed.

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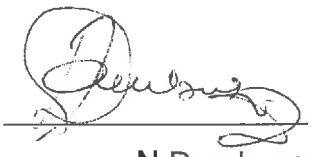
[10] *R v Keegstra* (1990) 3 CRR (2d) 193.

[11] *Islamic Unity Convention v Independent Broadcasting Authority and others* [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 para 25.

(b) Each party is to pay its own costs.'

3 Each party to pay its own costs of the appeal.



N Dambuza

Judge of Appeal

APPEARANCES

For Appellants:	A de Kok SC
	Instructed by: Cheadle Thompson & Haysom Inc., Braamfontein McIntyre van der Post, Bloemfontein
For Respondent:	C Bester (with him M Seape and J Chanze) (heads of argument drawn also by S Scott)
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