Article

How to Make Sense of the Civil Prohibition of Hate Speech in Terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

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Abstract

In this article the authors offer a workable interpretation of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Many constitutional law and freedom of expression scholars have argued that section 10 is at least in part unconstitutional. The authors of this article analyse these scholars' views and chart a path towards saving section 10 from unconstitutionality. Section 10 is analysed by interrogating each of the requirements for hate speech as set out in the section: 'no person'; 'publish, propagate, advocate or communicate words'; 'based on one or more of the prohibited grounds'; 'that could reasonably be construed to demonstrate a clear intention'; 'to be hurtful; be harmful or to incite harm; promote or propagate hatred' and the defences listed in section 12. The article concludes with a proposal for legislative amendments to section 10 to remove any doubt about its constitutionality.

Keywords: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, hate speech, freedom of expression

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Introduction

Hate speech is prohibited in terms of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act.[1] Section 10 states that 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.

Afri-forum v Malema (Vereniging van Regslui vir Afrikaans as Amicus Curiae) ('*Afri-forum*')[2] is one of very few instances where a High Court sitting as an equality court has dealt extensively with section 10. Equality courts at magistrate's court level have made numerous findings that particular words constituted hate speech, usually without exhaustively interpreting and applying section 10.[3] Although the aims of the Equality Act can be achieved without presiding officers having to write long and intricate judgments, presiding officers should ideally explain and justify their decisions when finding that hate speech has been committed. This is so that parties to a dispute understand why a specific finding has been made and secondly, so that the courts can develop a body of law relating to hate speech that will in turn create more consistency and certainty in the application of the hate speech prohibition. The far-reaching ideals of the Equality Act can only be achieved through a court system with presiding officers who understand and properly apply the hate speech prohibition, especially at lower court level as this is where most complaints are lodged.

In this article we discuss the relationship between section 10 of the Equality Act and section 16 of the Constitution. Secondly, we set out the general considerations that should be taken into account when interpreting section 10. Thirdly, we deal with each requirement set out in section 10 separately. Where an element of the hate speech definition in section 10 of the Equality Act limits the right to freedom of speech in section 16(2) or differs from the definition of hate speech in section 16(2)(c) of the Constitution, we consider if this limitation constitutes a justifiable limitation of the right to freedom of expression.

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1 Act 4 of 2000 (hereafter 'Equality Act').

2 *Afri-Forum v Malema* (Vereniging van Regslui vir Afrikaans as Amicus Curiae) 2011 (12) BCLR 1289 (EqC).

3 The researchers have collected the vast majority of complaints lodged at the Durban and Johannesburg equality courts for the period 2008-2012. Many of these matters were concerned with hate speech.

The Relationship Between Section 16 of the Constitution and Section 10 of the Equality Act

One of the objects of the Equality Act is to give effect to the hate speech provision in section 16(2)(c) of the Constitution.[4] A question that arises is which of these provisions must be applied when considering if a statement constitutes hate speech: Section 10 of the Equality Act or section 16 of the Constitution?

In *African National Congress v Harmse:* In re *Harmse v Vawda (Afri-forum and Another Intervening),*[5] the court stated that it is not clear whether section 16(2)(c) of the Constitution or section 10 of the Equality Act should be applied or whether these sections should be applied jointly. Albertyn and others argue that before section 10 is applied, one should first ascertain whether the statement is protected in terms of section 12 of the Equality Act and section 16(1) of the Constitution and only then should section 10 be applied.[6] Alternatively, if the conduct falls under that which is described in section 16(2) of the Constitution, then one may proceed to apply section 10 to a given situation.[7]

In our view the view expressed in *Harmse* and the approach suggested by Albertyn and others are incorrect. The Constitutional Court explicitly stated in *MEC for Education: Kwazulu-Natal v Pillay*[8] that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by relying directly on the constitutional right. Therefore, a claim based on hate speech must be brought within the four corners of the Equality Act, except where the complainant/applicant challenges the constitutionality of section 10, which would bring section 16 of the Constitution into play.[9] The view of Albertyn and others, albeit expressed prior to the *Pillay* decision, is somewhat convoluted. In *Islamic Unity Convention v Independent Broadcasting Authority*,[10] the Constitutional Court held that section 16(2)(c) of the Constitution should not be understood as prohibiting hate speech and thereby creating a cause of action upon which one can base a claim in the event that someone uses words which would meet the threshold set out in this section.

In other words, where hate speech is alleged, an applicant must base the claim on section 10 of the Equality Act and not on section 16(2)(c) of the Constitution. It is of course open to any party to raise an argument that section 10 of the Equality Act is unconstitutional. In deciding whether section 10 meets constitutional scrutiny or not, section 16 of the Constitution will obviously come into play. Lastly, neither section 10

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4 Equality Act, s 2(b)(v).

5 2011 (12) BCLR 1264 (GSJ) para 58 (*'Harmse'*).

6 Cathi Albertyn, Beth Goldblatt and Chris Roedered (eds), *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Witwatersrand University Press 2001) 94.

7 ibid.

8 2008 (1) SA 474 (CC) para 40 (*'Pillay'*).

9 ibid.

10 2002 (4) SA 294 (CC) para 32 ('*Islamic Unity*').

nor section 16(2)(c) of the Constitution criminalise hate speech.[11] Section 10 merely allows an equality court to refer the matter for the possible institution of criminal proceedings in terms of section 21(2)(n) of the Equality Act.

General Considerations to take into Account when Interpreting Section 10

Arguably the Equality Act aims at bringing about changes in the hearts and minds of South Africans.[12] Section 10 should be interpreted through this prism—that the dignity of complainants should be upheld or restored when utilising the Equality Act.

Anti-discrimination Acts generally have a limited reach or area(s) of application.[13] Where anti-discrimination legislation focuses on particular grounds or has a limited reach, it implies that 'less favourable treatment ... where they fall outside the limited ambit of the Act' is legitimate.[14] The optimistic corollary is that 'this implication becomes less damaging the more thorough-going the legislation is.'[15] On the face of it, the Equality Act does not have a limited reach or limited areas or sectors of application. The prohibition against unfair discrimination is not qualified in the Act—in principle and on a strict literal interpretation the Act applies everywhere, anywhere and to all cases of private and public discrimination. The Act contains no (sector-specific) exclusions or defences, except the general fairness defence set out in section 14. Equality courts will have to develop principles over time as to what constitutes fair discrimination in particular contexts. In cases of harassment or hate speech, the fairness defence is not available.[16] This is another clear indication that Parliament wished the Act to facilitate the creation of a caring society. In the context of section 10, the intention seems to have been that this Act should not only address troublesome speech in the public arena but should also reach into intimate spheres of life.

Albertyn and others argue that three things must be taken into account when interpreting the Equality Act's hate speech prohibition[17]: South Africa's international law obligations,[18] the Equality Act's interpretation section[19] and the constitutional

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11 *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) ('*Freedom Front*') at 1289.

12 Anton Kok, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform' (2008) 24 SAJHR 445 at 454.

13 Denise Réaume, 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law' (2002) 40 (2) Osgoode Hall LJ 113 at 124; P Bailey and A Devereux in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press 1998) 297.

14 Nicola Lacey in Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell 1992) 105.

15 ibid.

16 Equality Act, s 15.

17 See Albertyn (n 6) 90–92.

18 Equality Act, ss 2(h) and 3(2)(b).

19 Equality Act, s 3.

prohibition on hate speech[20] read with section 36 and the other provisions in the Bill of Rights.[21]

With regard to South Africa's international law obligations, the Equality Act states that one of its objects is to facilitate further compliance with South Africa's international law obligations, with specific reference to our treaty obligations under the Convention on the Elimination of All Forms of Racial Discrimination ('CERD') and the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW').[22] In *Afri-forum* the court took the provisions of CERD, the International Covenant on Civil and Political Rights and the Convention on the Prevention and Punishment of the Crime of Genocide read with the Rome Statute of the International Criminal Court into account when it interpreted section 10.[23]

CERD compels states to declare the 'dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'[24] an offence punishable by law.[25] South Africa does not currently have legislation in place that expressly criminalises such conduct, but for the common law crimes of *crimen iniuria* and criminal defamation,[26] which is essentially designed to protect a person's reputation.[27] Therefore, the hate speech prohibition in the Act, albeit that it only provides for civil enforcement, should be interpreted in light of the fact that certain kinds of expression is supposed to be a criminal offence, if South Africa is to comply with its obligations under international law.

In *Sonke Gender Justice v Malema*[28] the court suggested the following approach to determine whether the impugned words fall within the definition of hate speech:

1. Are the words communicated based on one or more prohibited grounds?

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20 1996 Constitution, s 16(2)(c). When we discuss the constitutionality of section 10 of the Equality Act in a later section of this article, we will delve into the interaction between section 16 of the Constitution and section 10 of the Equality Act and how the Act should be interpreted in light of the constitutional hate speech provision in section 16(2)(c).

21 The Act permits reference to CERD (s 3(2)(b)) and requires that reference is had to the Constitution (s 3(1)(a)) when interpreting the Act. It is also important to bear in mind that section 39(1)(b) of the Constitution compels one to consider international law, when interpreting the Bill of Rights. This is of much importance when one has to determine how the right to freedom of expression and especially the constitutional hate speech provision must be interpreted.

22 Equality Act, s 2(h).

23 *Afri-forum v Malema* (n 2) para 27.

24 CERD, art 4.

25 See Albertyn (n 6) 92.

26 'The crime of defamation consists of the unlawful and intentional publication of matter concerning another which tends to injure his reputation.' See *S v Hoho* [2009] All SA 103 (SCA) para 23.

27 ibid para 31.

28 2010 (7) BCLR 729 (EqC) para 14 ('*Sonke Gender Justice*').

2. Would a reasonable person consider the words to be intended to hurt, harm or incite hatred?

3. Do the impugned words fall within the prescribed exclusion in section 12 of the same Act?

In our view this is the approach that should be followed in applying section 10 *as it currently reads*.[29] We expand on the particular requirements set out in section 10 below.

The Requirements set out in Section 10 and the Constitutionality of each of these Requirements

In this part of the article we discuss each of the requirements set out in section 10. Milo and others state that the starting point in assessing the constitutionality of hate speech legislation is to establish whether or not the prohibited expression falls within the meaning of section 16(2)*(c)*.[30] If the requirement(s) in section 10 is synonymous with, or more limited than, the type of hate speech contemplated in section 16(2)(c), the legislation will pass constitutional muster. If however, the legislative prohibition is wider than section 16(2)(c), it limits the general right to freedom of expression in section 16(1) of the Constitution and must be justified under section 36(1).[31] In *Islamic Unity* the court held that there is no bar to the enactment of legislation that prohibits the forms of expression set out in section 16(2), but where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and such encroachment is only permissible if it meets the justification criteria in section 36(1) of the Constitution.[32]

In assessing the constitutionality of section 10, we will adopt an approach similar to that of Milo and others. In conducting the limitations analysis, it is important to bear in mind that there is a need to balance the right to freedom of expression against the rights to dignity and substantive equality.[33]

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29 In *Sonke Gender Justice* (n 28) the court also stated that the words complained of, will constitute hate speech if *either* of the first two questions is answered in the positive. In our view this is incorrect as a statement that is reasonably considered to intend to hurt or harm only amounts to hate speech if it is based on a *prohibited ground* as defined in section 1 of the Equality Act. Conversely, if a statement is based on a prohibited ground, it will not constitute hate speech if it could not be construed to demonstrate the intention to hurt, harm or incite hatred. Therefore, the answer to both questions needs to be in the positive before words will meet the threshold of hate speech in terms of the Equality Act.

30 Dario Milo, Glenn Penfold and Anthony Stein, 'Freedom of Expression' in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta 2008) 84.

31 ibid.

32 *Islamic Unity* (n 10) para 34.

33 See Milo (n 30).

a. 'No person may publish, propagate, advocate or communicate… against any person'

The Equality Act states that the word 'person' includes a juristic person, a non-juristic entity, a group or a category of persons.[34] This means that the hate speech prohibition applies to any company, partnership, closed corporation, trust, political party, trade union or any other organisation for that matter that is a juristic person, non-juristic entity or which constitutes a group or category of persons.

Although a juristic person could be held liable by virtue of vicarious liability, the Equality Act does not contain any express provisions in this regard.[35] Vicarious liability entails that a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct.[36] This would arise where there is a particular relationship between those persons, such as employment.[37] Whereas the Employment Equity Act[38] states that an employer will be held liable for any contravention of the EEA's provisions by its employee if the employer failed to take reasonable steps to eliminate the alleged conduct,[39] the Equality Act does not contain a similar provision. Subramanien and Whitear-Nel argue that in light of the positive obligations imposed by the Films and Publications Act[40] on an employer who knows (or ought to know), or suspects (or ought to suspect) that an employee is viewing child pornography online at work, read with the best interests of the child standard in the Constitution,[41] it is possible for an employer to be held liable in terms of the doctrine of vicarious liability.[42] By way of analogy, we argue that the same principle could be applied to a violation of the hate speech prohibition, meaning that if an employee transgresses section 10 of the Equality Act in the scope of her employment, her employer will be held liable on the basis of vicarious liability.[43] An

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34 Equality Act, s 1.

35 See also the matter of *Baloyi v Immelman* (32/2009) Pretoria Equality Court. In this case the first respondent presented the complainant with a driver's licence where two pictures of a monkey/baboons appeared next to the name of the complainant. The second respondent, who employs the first respondent, took disciplinary action against the first respondent and the other parties responsible for this incident, but in the affidavit submitted by its Managing Director it questioned on what basis it can be held liable for the actions of the first respondent in terms of the Equality Act.

36 *F v Minister of Safety and Security (Institute for Security Studies as Amici Curiae)* 2012 (3) BCLR (CC) para 40.

37 ibid.

38 Employment Equity Act 55 of 1998 ('EEA').

39 EEA, ss 60(2) and 60(3).

40 Films and Publications Act 65 of 1996.

41 Section 28(2).

42 Darren Subramanien and Nicci Whitear-Nel, 'A Fresh Perspective on South African Law Relating to the Risks Posed to Employers when Employees Abuse the Internet' (2013) 37 SAJ Labour Relations 9 at 13–16.

43 It has not been definitively decided if employment-related hate speech complaints should be decided in terms of the EEA or the Equality Act. See Anton Kok, 'Which is the Appropriate Forum When

example of this is the decision in *Burdett v SADTU*,[44] where the complainant alleged that the content of two letters sent to her by the defendants constituted hate speech. The court accepted the second defendant's uncontested evidence that as the content of the first letter was 'decided on and approved by a working committee of SADTU acting within their official capacities within SADTU',[45] the hate speech was imputed to SADTU and not to the second defendant and SADTU was subsequently ordered to pay R80 000 in damages and unconditionally apologise for its conduct to the complainant.[46] The legislature should ideally add a section to the Equality Act expressly incorporating the principles relating to vicarious liability.[47]

The phrase 'publish, propagate, advocate or communicate' relates to the requirement of publication, as it is known in the law of defamation and insult. In our view these words do not constitute a closed list but provide examples of the manner in which the publication requirement can be met. According to Pillay, the judgment in *Afri-forum* shows that even though the Equality Act makes use of the word 'publish', it should be interpreted to mean, 'advocate'.[48] In terms of the law of insult, the impugned words need only be published to the complainant.[49] In terms of the law of defamation, a defamatory statement must be published, or made known, to a person or persons other than the person defamed, before it can constitute defamation.[50] In terms of the law of defamation, publication is presumed if it is proved that a book, newspaper, journal or other such document containing the statement has been sold or distributed to the public.[51] This is clearly one of the intended meanings of the word 'publish' in the context of section 10. Equality courts at magistrate court level have accepted that words published in a newspaper meet this requirement.[52] Words that have only come to the

Hate Speech Occurs in the Workplace: The Equality Court or Labour Court? *Strydom v Chiloane* 2008 (2) SA 247 (T)' 2009 (24) SAPL 651.

44 (51/2009) [2009] Durban Equality Court (24 February 2011) para 29 (*'Burdett'*).

45 ibid.

46 *Burdett* (n 44) paras 62–65.

47 Kok (n 12) 459.

48 Karmini Pillay, 'From "Kill the Boer" to "Kiss the Boer" – Has the Last Song Been Sung? *Afri-Forum v Julius Sello Malema* 2011 12 BCLR 1289 (EQC)' (2013) 28 SAPL 221 at 238.

49 Johann Neethling, 'Personality Infringement' Laws of South Africa (2009) 20(1) para 422.

50 FDJ Brand, 'Defamation' Laws of South Africa (2017) 14(2) para 113.

51 See Brand para 113 fn 6, where *African Life Assurance Society Ltd, African Guarantee & Indemnity Co Ltd, African Consolidated Investment Corporation Ltd v Robinson & Co Ltd and Central News Agency Ltd* 1938 NPD 277 at 295 and *Trimble v Central News Agency Ltd* 1933 WLD 88 at 96 are cited as authority.

52 *Faasen v Die Burger* (E/C 6/06) [2008] Cape Town Equality Court (11 April 2008) (unreported) ('*Faasen*'); *South African Human Rights Commission v Qwulane* (44/EQJHB) [2011] ZAEQC 3 (31 May 2011) para 2 ('*Qwulane*').

attention of the complainant probably also meet the requirement of section 10, at least in terms of the qualifier 'communicate'.[53]

Statements posted on the Internet, including social networking sites such as Facebook, MySpace or Twitter are also published, propagated, advocated or communicated, but as these words are posted on the Internet, the question arises whether a South African court can vest jurisdiction in such instances. A problem could arise if the statement is made on a website based outside South Africa, such as Facebook, which is based in California in the United States.[54] With reference to the decision in *Tsichlas v Touch Line Media (Pty) Ltd*,[55] where the court held that publication for purposes of the law of defamation takes place where the site on which the alleged defamatory statement was made, was accessed and accessible in the jurisdictional area of the court,[56] Marx argues that an equality court will be vested with jurisdiction if the cause of action arose in South Africa and the defendant (the person who made the statement) is present in the jurisdictional area of the court.[57] Therefore, section 10 will apply and vest a court with jurisdiction if a statement was posted on the Internet, including on social networking sites, if these two requirements are met.[58]

An important question that arises is whether hate speech can be committed in the absence of the members of the target group? This relates specifically to the phrase 'against any person' as it appears in section 10. This issue arose in *Afri-forum* where the court had to decide whether the singing of the song 'Dubula ibhunu' (shoot the Boer) by Mr Julius Malema, had been publicised to Afrikaans-speaking white persons, even though they were not present at any of the events at which he sang the song. It was common cause that Malema had recited and/or sung and/or chanted the impugned words[59] at his birthday party, at the University of Johannesburg, at a public address in

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53 See *S v Du Plessis* 1981 (3) SA 382 (A) for the difference between 'publish' and 'communicate', albeit in a different context.

54 Frans Marx, 'Hate Speech on Social Network Sites: Perpetrator and Service' (2011) 32(2) Obiter 322 at 329.

55 2004 (2) SA 112 (W) ('*Tsichlas*').

56 ibid para 120.

57 See Marx (n 54) 330.

58 ibid 330–340, for a discussion of the circumstances under which the service provider can be held liable for statements constituting hate speech. This issue falls outside the scope of this article.

59 The words of the song are as follows:
Dubula! Dubula! Dubula nge s'bhamu
Dubul' ibhunu
Dubula' Dubula Dubula nge s'bhamu
Mama, ndiyeke ndidubul' ibhunu
Dubula' Dubula' Dubula nge s'bhamu
Ziyareypa lezinja
Dubula! Dubula! Dubula nge s'bhamu

The literal translation is as follows:
Shoot! Shoot! Shoot them with a gun

the course of a Human Rights Day celebration and a few days later in Rustenburg.[60] The court held that speech that is political and that takes place in public is intended, and must be considered, to be communicated to the public at large and not only to people who are present at the time.[61] Therefore, hate speech can take place even if members of the target group,[62] in this case white Afrikaners,[63] are not present when the words are uttered.[64] Publication takes place as the words are uttered at a political rally and 'in the actual sense of publication by the press'.[65]

The court explained that the publication of words includes the propagating, advocating or communication thereof and encompasses secondary publication of words by the press.[66] Coupled with the finding that publication of words at a political rally must be treated as publication to the nation,[67] the court endorsed a broader interpretation of the publication requirement. The target group of the hate speech need not be present at the political event at which the impugned words are spoken as secondary publication takes place because of the presence of the media at such an event (and the subsequent reporting of events by them). Furthermore, the court's finding that the singing of the impugned words at Mr Malema's birthday also constituted hate speech,[68] even though the media was not present,[69] seems to suggest that secondary publication could even take place without the media's presence. The court noted that the only difference between singing the song at public and private events is that Mr Malema should have known that the media would be present at the public events and report on the singing of the song. In practical terms, this means that the publication requirement is met if any member of the target group hears the impugned words or hears that the words were uttered through the media or through any person informing her of the uttering. In light of the finding that the chanting of the song at Mr Malema's birthday party also

'shoot the Boer'
Shoot! Shoot! Shoot them with a gun
Ma, let me 'shoot the Boer'
Shoot! Shoot! Shoot them with a gun.
These dogs rape us
Shoot, shoot, shoot them with a gun

60 *Afri-forum v Malema* (n 2) paras 49–51. However, Mr Malema argued that the words in the original language had a different meaning than the meaning when translated into English—see paras 51–53.
61 ibid para 33.
62 ibid para 30. The target group is defined as those individuals who are affected by the (hate) speech.
63 ibid para 91.
64 ibid para 33.
65 ibid para 91.
66 ibid para 42.
67 ibid para 109.
68 ibid paras 108–109 and 120.
69 ibid para 90.

constituted hate speech, we submit that the distinction drawn by the court between the words being sung at a public or private event is superfluous.[70]

Constitutional Issues Pertaining to this Requirement

The court's decision in *Afri-forum* that private publication of words could constitute hate speech in terms of section 10 raises a constitutional issue. Albertyn and others argue that as section 10 can be contravened without causing hurt or harm to the person at whom it is directed, that is, a statement that misses its mark, it effectively prohibits hate speech 'in the air'. The question is whether this constitutes an unjustifiable infringement of the right to freedom of expression. With reference to the court's decision, that both Mr Malema and the ANC 'are interdicted and restrained from singing the song … at any public or private meeting held by or conducted by them' and that third parties should also refrain from using the words and singing the song,[71] De Vos argues that this constitutes 'a rather absurd and drastic infringement on the right to freedom of expression not warranted by the Equality Act – even given the broad provisions of that Act.'[72] He explains that the effect of this is that if ANC members are at a party and one of its members then sings this song in remembrance of the struggle days, it will violate the court's ruling and constitute hate speech. In the same vein, if Piet and his friends, for example, were to make racist remarks while having a braai, it would also constitute hate speech, even if his black neighbour Thabo or his work colleague Mandisa, did not hear it and were not present. Here, we are not questioning whether the court was empowered to make such an order in terms of section 21,[73] but only whether the commission of hate speech through publication at a private event or function, unjustifiably infringes on the right to freedom of expression in section 16 of the Constitution.

The preamble of the Equality Act seems to endorse the approach taken by the court in *Afri-forum*. One of the Act's objectives is the facilitation of the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.[74] In *Afri-forum*, the court rejected the argument that words need to have an effect to constitute hate speech and held that hate speech has an effect on the target group as well as those who espouse the hate and

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70 For a detailed discussion on this aspect of the judgment see Anton Kok and Louis Botha, 'Die Siviele Verbod op Haatspraak – "Shoot the Boer" in die Gelykheidshof, Hoë Hof en die Uitsaaiklagtetribunaal' (2014) 11(2) Litnet Akademies 198.

71 *Afri-forum v Malema* (n 2) para 120.

72 See Pierre De Vos, 'Malema Judgement: A Re-Think on Hate Speech Needed' Constitutionally Speaking (12 September 2011) <http://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/> accessed 10 June 2014.

73 *Afri-forum v Malema* (n 2) para 110.

74 Shaun Teichner, 'The Hate Speech Provisions of the Promotion of Equality and Unfair Discrimination Act 4 of 2000: The Good, the Bad and the Ugly' (2003) 19 SAJHR 349 at 350

partake 'in the utterance'.[75] For one, it detracts from the perpetrators' own dignity by 'lower[ing] them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers'.[76] The court even went as far as saying that 'all genocide begins with simple exhortations which snowball'[77] and that the indiscriminate use of words should therefore not be allowed.[78] Teichner also supports the notion that hateful speech can cause greater damage than physical harm inflicted and that it is anomalous to restrain harmful conduct, but that society can do nothing about advocating such conduct until just before this conduct occurs.[79] The definition of hate speech in section 16 of the Constitution gives no indication that hate speech can only be committed where the 'advocacy of hatred' is directed at a person in the presence of that person. There is therefore sufficient support for the notion that a private communication can constitute hate speech and is in line with section 16 of the Constitution. In practical terms however, a claim for hate speech will only arise if the person(s) at whom the statement was directed hears the impugned words or if someone who hears the statement brings a claim on behalf of the person(s) at whom the statement was directed. This is what occurred in *Sonke Gender Justice* where the complainant, a non-governmental organisation, brought a complaint against the respondent on behalf of women, as it alleged that the respondent's statement trivialised rape.[80]

'Words'

The prohibition of hate speech only applies where the use of *words* are involved.[81] The section does not apply to a picture or to non-verbal forms of communication[82] (even if a picture paints a thousand words.[83]) This does not render gestures accompanying the words irrelevant as these gestures form part of the context and are used to determine the reasonable meaning of the words.[84] For example, in *Afri-forum* the court took into account the gestures made by Mr Malema while singing 'Shoot the Boer', which included rhythmic movements made while his arm took the shape of a firearm. In *Fishman v Barkhuizen*[85] the court held that the painting of a swastika along with the words *Hebreso manser* ('Jewish bastard'), by the property owner on a wall facing the entrance to the workshop of his Jewish neighbour constituted hate speech in terms of

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75 *Afri-forum v Malema* (n 2) para 94. See also Alexander Traum, 'Contextualising the Hate Speech Debate: The United States and South Africa' (2014) 47 CILSA 64 at 85.

76 *Afri-forum v Malema* (n 2) para 94.

77 ibid.

78 ibid.

79 See Teichner (n 74) 364.

80 *Sonke Gender Justice* (n 29) para (17)(b)(iii). This case is discussed in more detail below.

81 *Herselman v Geleba* (231/2009) [2011] ZAEQC 1 (1 September 2011) para 12-13. *Sonke Gender Justice* (n 29) para 12.

82 *Sonke Gender Justice* (n 28) para 12.

83 See Albertyn (n 6) 94.

84 *Afri-forum v Malema* (n 2) paras 39 and 56.

85 (01/2005) [2005] White River Equality Court (17 October 2006) (unreported) ('*Fishman'*) paras 8–9.

section 16(2) of the Constitution and in terms of the Equality Act.[86] This was because it incited harm, humiliated the complainant and dehumanised him by reminding him of the Nazi era during which the Jews were persecuted.[87]

In *Manamela v Shapiro*[88] the complainant lodged a complaint regarding a cartoon that depicts African National Congress president Jacob Zuma with his pants undone, while ANC Youth League president Julius Malema and the then secretaries-general in the tripartite alliance, Gwede Mantashe, Blade Nzimande and Zwelinzima Vavi, hold down a blindfolded female figure. The female figure is wearing a sash with the words: 'Justice System' on it. A speech bubble indicates Mr Mantashe saying to Mr Zuma: 'Go for it, Boss!' With reference to section 10 of the Act, the Human Rights Commission held that only the words used in the cartoon and not the whole of the cartoon fall within the ambit of this section.[89] However, in *South African Human Rights Commission v Qwulane*,[90] the Johannesburg Equality Court found that not only the words in a newspaper article propagating hatred against homosexuals, but also the cartoon accompanying the article constituted hate speech.[91]

Pillay argues that although it is not clear from *Afri-forum* whether other forms of expression, when accompanied by words, would constitute hate speech the position adopted by the court is a step in the right direction.[92] We agree with the approach followed in *Afri-forum* and *Qwulane*, as it is an inclusionary one that is in line with the Equality Act's stated aim of giving effect to the hate speech prohibition in section 16(2)(c) of the Act.[93] However, a disconnect remains between section 10 of the Equality Act and section 16(2) of the Constitution in that the latter classifies hate speech as a form of expression and does not limit it to words.[94] The effect of this is that certain forms of expression will not constitute hate speech, in the absence of words. For example, if the respondent in *Fishman* had only painted swastikas on his wall without the words 'Hebreso manser', it would not have constituted hate speech in terms of section 10. If the cartoon in *Manamela* contained no words whatsoever, it would fall

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86 According to the decision in *Islamic Unity* (n 10) para 32, s 16(2)(c) of the Constitution should not be understood as prohibiting hate speech and thereby creating a cause of action upon which one can base a claim in the event that someone uses words which would meet the threshold set in this section. Section 16(2)(c) merely limits the scope of the right to freedom of expression in an attempt to protect the right to human dignity. See also Pierre De Vos, 'Regter Ken Nie die Wet' *Rapport* (22 May 2011) 3, for a brief discussion in this regard.

87 *Fishman* (n 85).

88 See *Manamela, Buti v Shapiro, Jonathan* Case Reference No. GP/2008/1037/E <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=183777&sn=Marketingweb%20detail> accessed 23 June 2014 ('*Manamela*').

89 See Pillay (n 48) 242.

90 *Qwulane* (n 52).

91 ibid para 2.

92 See Pillay (n 48) 243.

93 Equality Act, s 2(b)(v).

94 See Albertyn (n 6) 92; Pillay (n 48) 241.

outside the scope of section 10. The same applies to the cartoons in which President Zuma was drawn with a showerhead on his head and the twelve cartoons depicting the prophet Mohammed in a satirical manner and which caused international furore amongst the Muslim community, which were the subject of the decision in *Jamiat-Ul Alama of Transvaal v Johncom Media Investment Ltd*.[95]

However, where the alleged conduct does not consist partly of words, the complainant can in appropriate cases rely on the prohibitions of unfair discrimination and harassment. To use the example of *Fishman* above—had the respondent only drawn a swastika without the words 'Hebreso manser', the complainant could have alleged that he was being harassed as drawing a swastika was serious, in that it was the symbol of the Nazi regime under Hitler responsible for killing millions of Jews during the Second World War; it creates a hostile or intimidating environment in that the statement was drawn on the wall facing the complainant's workshop and the parties live right next to each other; and is related to the complainant's membership to the Jewish community, meaning the conduct is based on the prohibited grounds of ethnic and social origin or, depending on the facts, religion. He could alternatively bring a claim based on unfair discrimination and argue that in terms of the definition of 'discrimination' in section 1, the painting of a swastika on the wall facing his yard would impose a psychological burden on him of having to witness it every day and be reminded of the atrocious acts committed by the Nazi regime against Jews. By relying on unfair discrimination as the cause of action the complainant however allows the respondent to raise fairness as a defence, which would not be the case with hate speech and harassment as the causes of action.

Constitutional issues arising from this requirement

As section 10 only applies if words are used, it has a narrower scope than the Constitution, which does not limit hate speech to words but prohibits certain forms of expression. The Constitutional Court held in *Pillay* that an Act that provides *more* protection than the Constitution is constitutional.[96] By only outlawing insulting *words*, freedom of expression is granted more protection in the Equality Act than provided for in the Constitution. On the other hand, by privileging freedom of expression in this way, the right to dignity is concomitantly afforded less protection than provided for in the Constitution. The facts of *Le Roux v Dey*[97] would for example not constitute hate speech in terms of the Equality Act as no words were used in denigrating the deputy principal. If only insulting words are outlawed, as opposed to insulting words and conduct or symbols, pictures and the like, a claimant would have to institute a much more expensive action in the ordinary High Courts for claims based on demeaning or insulting conduct, while a similar claim based on words could be lodged at much less expense in an

95 (1127/06) [2006] ZAGPHC (3 February 2006). See also Karmini Pillay, 'The Cartoon Wars: Free Speech or Hate Speech?' (2010) 127(3) SALJ 463.

96 *Pillay* (n 8) para 43.

97 *Le Roux v Dey* 2011 (3) SA 274 (CC) (*'Le Roux'*).

equality court. This situation seems to amount to irrational differentiation, unless it is argued that in cases of insulting conduct a claimant must lodge a claim in the equality court based on harassment or unfair discrimination. The more sensible approach still appears to be to amend the Equality Act to include insulting conduct, pictures, symbols and the like.

'Based on one or more of the prohibited grounds'

The definition of 'prohibited grounds' in section 1 of the Equality Act consists of two paragraphs. Paragraph (a) lists 17 prohibited grounds, identical to the grounds listed in section 9(3) of the Constitution. Paragraph (b) makes it possible for new prohibited grounds to be recognised. Paragraph (b) states that 'where discrimination (read 'hate speech') 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 in a serious manner that is comparable to discrimination on a ground in paragraph (a)' such ground will also constitute a prohibited ground. This provision makes explicit what is implicit in section 9 of the Constitution, which allows for discrimination to take place on unlisted grounds, such as HIV/Aids.[98] 'Socio-economic status', 'HIV/AIDS status', 'nationality', 'family responsibility', 'family status',[99] 'physical appearance'[100] or 'weight'[101] could all, as examples, be classified as prohibited grounds in terms of paragraph (b). However, in terms of section 13(2)(b), if a complainant wishes to rely on a ground in paragraph (b) of the definition of 'prohibited grounds' she first has to show that one of the conditions in paragraph (b) have been met.

Albertyn and others argue that calling someone stupid or ugly or saying that they are stupid and ugly because they are fat or because they come from a specific university

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98 See the decision in *Hoffman v South African Airways* 2001 (1) SA (CC).

99 Section 34(1) of the Act states special consideration must be given to the inclusion of 'socio-economic status', 'HIV/AIDS status', 'nationality', 'family responsibility' and 'family status' in paragraph (a) of the definition of prohibited grounds and that the Equality Review Committee must make recommendations to the Minister within one year of the commencement of the Act. Although the Equality Review Committee proposed in 2003 that all of these grounds be included in the paragraph (a), this has not taken place—see Marlise Richter, 'Are Nursery Schools 'Nice Places' for Children with HIV/Aids? The case of *Karen Perreira v Buccleuch Montessori Pre-School and Primary (Ltd)*' (2006) 123 (2) SALJ 220 at 222. Albertyn (n 6) cite the case of *Mossop v Treasury Board of Canada* (1993) 1 SCR 554 as an instance where a discrimination claim based on the ground of family status was denied. In this case a gay man who was denied bereavement leave to attend the funeral of his partner's father, was denied protection under the Canadian Human Rights Act on the basis that two gay men did not have 'family status' and thus could not suffer discrimination on this ground.

100 See Marius Pieterse, 'Discrimination Through the Eye of the Beholder' (2000) 16 SAJHR 121 for a discussion of discrimination on the basis of physical characteristics.

101 European Union law might in future recognise severe obesity as a ground of discrimination—see Owen Bowcott, 'Severe Obesity is a Disability, European Court Adviser Rules' *The Guardian* (17 July 2014) <http://www.theguardian.com/law/2014/jul/17/obesity-disability-european-court-discrimination-claim> accessed 25 June 2014.

would not constitute hate speech unless that statement is based on one of the prohibited grounds such as race, gender, age or sexual orientation and provided the other requirements of section 10 are met.[102] De Vos states that the effect of this requirement is that personal insults based on the actions of an individual or generally hurtful, disrespectful or insulting utterances, such as saying that the President is a sex obsessed idiot, giving the President the middle finger wave or saying that Helen Zille is a racist madam whose brain might or might not have been afflicted by all the Botox, might be rude or defamatory but it would not constitute hate speech in terms of the Equality Act as these statements are not based on one of the prohibited grounds.[103]

We submit that personal insults may well often amount to hate speech as defined in the Equality Act. Calling someone a racist could be construed as a value judgment of another person's beliefs. 'Conscience' and 'belief' are prohibited grounds in terms of paragraph (a). Referring to someone as an 'idiot' or 'stupid because you are fat' constitutes an opinion regarding that person's 'mental capacity', calling someone 'fat' or 'ugly because you are fat' amounts to an opinion regarding that person's 'weight'. 'Mental capacity' and 'weight' are both grounds where discrimination based on these grounds could undermine human dignity in terms of paragraph (b) of the definition of 'prohibited grounds'. 'Mental capacity' and 'weight' could therefore constitute prohibited grounds in terms of paragraph (b) of the definition. Provided the other requirements of section 10 are met, calling a person an 'idiot', a 'racist' or 'fat' could thus rise to the level of hate speech as defined in the Equality Act. Taking an example from the Durban Equality Court, comparing a person's conduct to the 'white racist apartheid architect called Dr Basson' and accusing them of bringing about the rebirth of apartheid in a particular institution could therefore constitute hate speech on the ground of conscience or belief as the statement implies that a person is a racist.[104]

Utterances that reinforce racist, sexist or homophobic stereotypes would meet the threshold test, as such utterances would be based on one or more of the prohibited grounds and would go beyond the particularity of the individual targeted by the speech to encompass the group that he or she belongs to.[105] For example, if a statement implies that a homosexual person, like many gay men, are perverts who will burn in hell, or that Julius Malema, like many black people, is less intelligent than whites or that the Zuma rape accused, like many women, is a devious slut who wrongly reports rape to get back at men, the statement will have been made on the prohibited grounds of sexual orientation, race and sex or gender respectively and amount to hate speech provided that

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102 See Albertyn (n 6) 93.

103 Pierre De Vos, 'On "Shoot the Boer", Hate Speech and the Banning of Struggle Songs' (2010) 6 Pulp Fictions 5 at 10.

104 These statements were made against the complainant in *Burdett* which the court found to constitute hate speech on the ground of race. We submit that the finding is based on the incorrect ground and should have been based on the ground of 'conscience' or 'belief' as we have explained above.

105 See De Vos (n 103).

the other requirements are met.[106] An example of where stereotyping was found to constitute hate speech was the judgment in *Mdabe v Reid*,[107] where the Durban Equality Court held that a racist remark[108] directed by the respondent at the race group to which the complainant belongs, constituted hate speech in terms of section 10 on the prohibited ground of race. Another example is the decision of the Johannesburg Equality Court in *Sonke Gender Justice* where it held that Mr Malema's statement amounted to reinforcing a rape myth or stereotype.[109]

In *Afri-forum*, the court held that the phrase 'shoot the Boer' referred to the white Afrikaans speaking community including the farmers belonging to that group,[110] which it held were a recognisable, but not precisely identifiable grouping in society.[111] Except for mentioning that the words 'undermine their dignity',[112] which is a requirement for a ground to be recognised as a prohibited ground in terms of paragraph (b) of the 'prohibited grounds' definition, the court did not specifically state whether the statement constituted hate speech based on paragraph (a) or (b). This is despite the complainants alleging that the chant took place on a ground meeting all three conditions stated in paragraph (b) as well as on the grounds of ethnic or social origin, culture and language. We submit that the court should have stated on which ground(s) the statement constitutes hate speech, as failure to indicate the exact prohibited ground creates confusion. This is particularly important in the context of creating new prohibited grounds in terms of paragraph (b), where the prohibited ground still needs to be identified and named. It is insufficient for a court to find that the conduct in question undermined a person's human dignity or that it met one of the other two requirements in paragraph (b)—a particular utterance can only amount to hate speech if a particular, named 'prohibited ground' was implicated.

Constitutional issues arising from this part of the prohibition

The number of prohibited grounds on which hate speech can take place in terms of the Equality Act far exceeds the grounds cited in section 16(2)(c) of the Constitution.[113] The grounds listed in section 10 of the Act are identical to those in section 9 of the Constitution. Section 16(2)(c) of the Constitution states that hate speech can only take place on the grounds of race, ethnicity, gender or religion.

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106 ibid.

107 (09/2004) [2004] ZAEQC 2 (1 June 2004) 4 ('*Mdabe*').

108 The statement was as follows: 'Look at your government now. That government is a real monkey government and does not provide anything for you. Thabo Mbeki is the biggest baboon that is controlling the other monkeys like Jacob Zuma who is stealing his money'—*Mdabe* (n 107) para 1–2.

109 *Sonke Gender Justice* (n 28) para 17.

110 *Afri-forum v Malema* (n 2) para 108.

111 *Afri-forum v Malema* (n 2) para 109.

112 *Afri-forum v Malema* (n 2) para 109.

113 See De Vos (n 103) 15 and Milo (n 30).

Teichner states that one could look at this limitation in one of two ways:[114] On the one hand, one could argue that section 39(1) of the Constitution may allow a court to interpret section 16(2)(c) in a manner that it applies to advocacy of hatred on all the grounds set out in section 9(3) of the Constitution (and section 10 of the Equality Act). The alternative argument is that the drafters were aware of the difficulties of restricting freedom of expression and wanted to ensure that the limitation only applied to hate speech based on those grounds regarded as being fundamental in our nascent democracy. He agrees with the latter interpretation by stating that freedom of expression is regulated as hate speech 'touches closely the unchangeable and objective core of one's social identity, which contributes to the harmful effects of the speech';[115] that this notion corresponds with the four grounds set out in section 16 and that not all the prohibited grounds in the Equality Act can be regarded as forming the unchangeable and objective core of one's identity.[116] He uses the examples of pregnancy, age or even marital status and argues that 'it is difficult to imagine' how hate speech on these grounds will have the same grave effects as hate speech on the four grounds in section 16(2)(c) and that the grounds in section 16 are broad enough to cover the harmful forms of hate speech that need to be regulated, without risking abuse of the provision to prohibit that expression which need not be regulated.[117] We respectfully disagree with Teichner. Why would only the grounds listed in section 16(2)(c) form part of the 'unchangeable and objective core of one's identity', especially in a pluralistic society such as South Africa? Teichner recognises the anomaly to allow citizens to express ideas that could incite or cause harm, but only to intervene just before such harm will ensue.[118] Hurtful, harmful or other statements propagating hatred and directed against someone based on prohibited grounds falling outside the four grounds in section 16(2)(c) could cause some claims to fall through the cracks, meaning that the complaint is unsuccessful if it is not based on one of the prohibited grounds in the Act,[119] and by extension, undermine the purpose of hate speech, being the prevention of harm ensuing.[120] Furthermore, parties asserting that hate speech took place on one of the prohibited grounds outside the four grounds mentioned in section 16(2)(c) of the Constitution—if it was said for example that 'gays are stupid' or that 'people in wheelchairs are useless'—will have to institute a claim for defamation or for the impairment of dignity in an ordinary High Court or magistrate's court based on the *actio iniuriarum.*[121] The legal

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114 Teichner (n 74) 354.

115 ibid 379.

116 ibid.

117 ibid.

118 ibid 364.

119 See the brief discussion of Albertyn (n 6) 54, who explain that in some countries the small number of prohibited grounds has led complainants to fall through the cracks.

120 *Afri-forum v Malema* (n 2) at para 94 where the court stated that 'all genocide begins with simple exhortations that snowball.'

121 *Le Roux* (n 97) paras 139–140 where the court explained that under the *actio iniuriarum* a person can be successful in a claim for defamation or in a claim for impairment of dignity based on the same facts and cannot succeed with both causes of action on the same facts.

costs in such instance will likely be higher as opposed to the equality courts where substance triumphs over technicality[122] and where litigants are allowed to approach the court without legal representation and eliminates the obstacle of significant legal costs.[123] Arguably a complainant could pursue a hate speech claim in the equality court while simultaneously proceeding with a claim in the normal courts based on ordinary common law principles,[124] but this could also prove very costly.

Most importantly, *Le Roux* found that the common law cause of action of insult (intentional impairment of dignity) does not require a party to indicate that she has suffered harm based on a specific ground[125] as is the case with a claim based on hate speech in terms of section 10 of the Equality Act. The court also implicitly found in *Le Roux* that the common law requirements for a claim of impairment of dignity are in line with the Constitution's protection of everyone's right to dignity.[126] The effect of *Le Roux* is that the inclusion of all prohibited grounds in section 10 of the Equality Act is constitutional[127] as the hate speech prohibition in section 10 of the Equality Act is aimed at protecting the right to dignity in the same way that the common law cause of action of impairment of dignity protects the right to dignity. (Put differently, in effect the Constitutional Court declared constitutional the requirements 'on any prohibited ground' and 'hurtful' in section 10 of the Equality Act. The fault requirement is discussed below.)

'Reasonably be construed to demonstrate a clear intention to'

The common law cause of action of insult (impairment of dignity) requires intent on the part of the respondent.[128] In terms of the common law, intention can take three different forms[129] namely *dolus directus,*[130] *dolus indirectus*[131] and *dolus eventualis.*[132] The intention requirement in section 10 of the Equality Act is somewhat different. Albertyn and others argue that the test in section 10 is strictly speaking not one of intention, but rather 'whether a person *could* interpret the conduct as demonstrating a clear

122 See Kok (n 12) 449.

123 See the guiding principles in s 4 of the Equality Act.

124 See the judgment in *Minister of Environmental Affairs & Tourism v George* 2007 (3) SA 62 (SCA).

125 *Le Roux* (n 97) paras 84–92 and 138–149.

126 ibid para 175.

127 See also the discussion of the meaning of 'hurtful' in *Le Roux* (n 97) under the heading *'Be hurtful; be harmful or to incite harm; promote or propagate hatred'* below.

128 *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) para 599G-H; *Minister of Police v Mbilini* 1983 (3) SA 705 (A) para 715F-716E; *Delange v Costa* 1989 (2) SA 857 (A) para 860I-861A.

129 *Black v Joffe* 2007 (3) SA 171 (C) para 39.

130 The attainment of a particular consequence which the appellant intends to bring about—*Black v Joffe* (n 129) para 39.

131 A secondary result which was a necessary consequence of the intended conduct—*Black v Joffe* (n 129) para 39.

132 Where one acts with the intention of attaining a particular object but subjectively realises or appreciates that another consequence may reasonably result, and one reconciles oneself with this possibility, and recklessly proceeds with the conduct nevertheless—*Black v Joffe* (n 129) para 39.

intention'.[133] In other words, their argument is that there must be a mere possibility that the words can be construed as being hurtful, harmful or inciting harm, or as promoting or propagating hatred (on a prohibited ground).[134]

De Vos argues that the intention of the speaker, being a subjective question, must be determined by considering what a reasonable speaker would have thought of the words.[135] He argues that one need not find that the speaker actually had the intention to be hurtful or to incite harm.[136] He then mentions some factors which need to be taken into account to determine what the intention of the speaker was, namely who the speaker is, in what context the words were uttered and how a reasonable person would have interpreted the words in the given context.[137] He describes such a reasonable person as someone who understands the values of the Constitution and the importance of freedom of speech and robust debate in a democratic society; someone who is not hypersensitive and who will not merely assume that the speaker intended to be hurtful or incite harm merely because some people might experience the words as such.[138] If members of the targeted group experienced the words as hurtful or inciting harm against them, it would only be hate speech if the reasonable person believed that this was the speaker's intention.[139]

The current seminal case on this aspect of section 10 is *Afri-forum*, although the court's judgment is not a model of clarity.[140] The court held that the meaning of the words depend on what they would mean to a reasonable listener having the common knowledge and skill attributed to an ordinary member of society.[141] The court went even further by saying that the words could simultaneously have different meanings and mean different things to different people and that the focus is on the meaning that the target group would reasonably attribute to the words.[142] The number of possible meanings of the words depend on, *inter alia*, the context, circumstances under which and manner in which the words were sung, including the gestures accompanying the words and that the context depends on the occasion, the history of the conduct and the response of the public and press, gestures and physical movements used, crowd interaction, the words and the expression and delivery thereof in a chant-like manner.[143]

133 See Albertyn (n 6) 92–93.
134 ibid.
135 See De Vos (n 103) 11.
136 ibid.
137 ibid.
138 ibid.
139 ibid.
140 See Pillay (n 48) 227.
141 *Afri-forum v Malema* (n 2) para 109.
142 ibid.
143 ibid paras 96 and 98.

Afri-forum confirmed that the intention of the speaker when uttering the words is irrelevant.[144] This has also been held in a number of equality court decisions at magistrate's court level,[145] such as the decision in *Sonke Gender Justice*,[146] which dealt with the words uttered by Mr Malema at a political rally regarding the complainant in the rape case involving current President Zuma (then Mr Zuma): 'When a woman didn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, request breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don't ask for taxi money from somebody who raped you'.[147] According to the court, the test is 'whether a reasonable person would consider the speech as demonstrating a 'clear intention' to be hurtful',[148] which is determined by having regard to the context in which the statement was made.[149] It was common cause that the words were mentioned at a political rally, during an electioneering campaign by a person who was a prominent and influential political figure, particularly in the eyes of young people.[150] According to expert testimony presented, the respondent engaged in myth-making in that his words distorted the actual findings made in the *S v Zuma*[151] judgment and furthermore, these comments are based on generalisations about women, rape and consent which reinforce rape myths.[152] These myths being that women who did not enjoy a sexual encounter leave soon thereafter, that 'real' rape survivors do not ask for things from their attackers i.e. that consent can be inferred from a victim's conduct (afterwards) and that women lie about rape.[153] Even though the respondent thought that his audience did not perceive his utterances as hurtful or harmful,[154] as they loudly applauded him after he made them,[155] the court found that the words could be construed as such and that the first two utterances were made in general terms.[156] This was because of his status as an influential public figure whose utterances are widely

144 ibid para 106.

145 For example in *Mdabe* (n 107) 4, where the court held that the test to be applied is objective and that the subjective impact of the words on the complainant is pivotal and whether they elicit the responses in subparagraphs (a), (b) and (c) of section 10; the same was said in *Maphumulo v Sheik* (16/2004) [2004] Durban Equality Court (5 August 2004) (unreported), 4 ('*Maphumulo*'), where the court added that 'even if a person comes to court and says 'I didn't mean it' or 'this is what I meant, that is what I meant', that is not important.'

146 *Sonke Gender Justice* (n 28) para 14.

147 ibid para 2.

148 ibid para 15.

149 ibid para 17(b).

150 ibid.

151 *S v Zuma* 2006 (2) SACR 191 (W). This was also evident from the fact that the following was written regarding the complainant's conduct on page 218 of that judgment: 'The next morning she wandered around in the house for at least one and a half hours. She took food from the fridge...'

152 *Sonke Gender Justice* (n 28) para 17(b)(vii).

153 ibid para 17(b)(viii). The respondent's statement with regard to the complainant in the *Zuma* matter was also incorrect as she refused taxi money when it was offered to her by the accused.

154 ibid para 17(b)(ix).

155 *Sonke Gender Justice* (n 28) para 17(b).

156 ibid para 17(b)(x). The court also found that the respondent made these statements applicable to the complainant in the *Zuma* matter by referring to her.

reported and as he was essentially addressing the broader public on the day in question, he should have known that his words were not just meant for that audience.[157]

Finally, in *Afri-forum v Malema,*[158] which was heard in the North Gauteng High Court by Bertelsmann J on an urgent basis and preceded the main case heard by Lamont J in *Afri-Forum*, Bertelsmann J referred to the decision in *Freedom Front,* where it was held that the 'kill the boer, kill the farmer' slogan constituted hate speech in terms of section 16(2)(c) of the Constitution and found that the words 'shoot the farmer' constitute hate speech in terms of section 10 of the Equality Act.[159] Bertelsmann J did not apply section 10 in detail, presumably because of the urgency[160] of the matter and because the judgment was handed down on the same day[161] the application was heard. In finding that section 10 had been contravened, he stated that 'the true yardstick of hate speech is neither the historical significance thereof, nor the context in which the words are uttered, but the effect of the words, *objectively considered upon those directly affected and targeted thereby*.'[162] He also took into account the fact that the song, 'Shoot the Boer' was sung at high-profile functions organised by the ANC and that the singing and events were highly publicised.[163] He also alluded to the fact that the applicants' members feel threatened by the song and that the respondents should have been aware of this because of the controversy that has surrounded the singing thereof.[164]

Overall, we agree with the approach adopted in *Afri-forum* as it underlies the Equality Act's purpose of promoting the right to dignity and changing the hearts and minds of people. The court's finding that the words can mean different things to different people also acknowledges the pluralistic nature of our society. The approach adopted in *Sonke Gender Justice* provides a good example of how this flexible approach to the objective test is effective in protecting the human dignity of the group at which the words are directed, which should be the main purpose of hate speech. In respect of *Afri-forum NGHC*, we agree with the test adopted by the court, except for its rejection of context as a factor that should be taken into account to determine the meaning of the words. Although the Equality Act does not allow for a 'contextual defence', the context in which words are spoken are still relevant to determine the meaning attributed to them by the target group.

We disagree with the approach of Albertyn and others as their interpretation of the fault requirement, that there must be a mere possibility that the words can be construed as being hurtful, harmful or inciting harm, or as promoting or propagating hatred places

157 ibid para 17(b)(ix).
158 *Afri-forum v Malema* (18172/2010) [2010] ZAGPPHC 39 (1 April 2010) ('*Afri-forum NGHC*').
159 ibid 7.
160 ibid 1.
161 ibid 2.
162 ibid 8.
163 ibid 7.
164 ibid 9.

the threshold too low for a statement to constitute hate speech. The correct test is that employed in *Afri-forum*—whether a reasonable listener having the common knowledge and skill attributed to an ordinary member of society would regard the statement as hurtful, harmful, inciting harm or promoting and propagating hatred. In respect of De Vos, although we agree that an element of reasonableness must be taken into account to determine whether the speaker intended to make a hurtful or harmful statement, we submit that the element of reasonableness pertains to how the statement would be understood by a reasonable member of the targeted group. The characteristics attributed to De Vos's reasonable person, should be transposed and applied to the reasonable member of the targeted group. The identity of the speaker and the context in which the words were uttered will still be relevant in determining whether the intention was to hurt or to incite harm.

Constitutional issues arising from this part of the prohibition

Teichner states that the phrase 'that reasonably could be construed to demonstrate a clear intention to' is much broader than section 16(2) of the Constitution, which only requires 'advocacy of hatred… that constitutes incitement to cause harm.'[165] Teichner argues that in order for this aspect of section 10 to withstand constitutional muster, it must require more than negligence or recklessness, such as the subjective desire to promote hatred or the foresight of such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose.[166] He adds that the section as it stands may result in the prosecution of those who have no intention to harm.[167] Milo and others state that it is problematic that this section does not require intention of the speaker and that it is overly broad and vague.[168]

De Vos argues that one could imagine that while the speaker will not always have the intention to hurt the recipient of the speech, it would often be possible for a reasonable person to construe such an intention based on the context in which the words were uttered and that as section 10 potentially prohibits all such statements, it severely infringes our rights to freedom of speech as well as our freedom of religion and conscience.[169] It also has the potential to severely limit the expression of political ideas and deeply held personal views about morality, about the behaviour of others and about our vision about the good life.[170] Section 10 is so broad that it has the potential to diminish robust debate and to detract from the pluralism and broadmindedness that is central to our constitutional democracy.[171] An absurdity that might arise from this, for example, is if a priest were to be dragged before an equality court for hate speech

165 See Teichner (n 74) 354.
166 ibid 380.
167 ibid.
168 See Milo (n 30) 87.
169 See De Vos (n 103) 16.
170 ibid.
171 ibid.

because he stated in church that non-believers will burn in hell or that homosexuals are all sinners that need to repent. Words such as these might very well reasonably be construed as having the intention to hurt nonbelievers and homosexuals and hence might be found to have committed hate speech.[172]

Teichner's statement that the provision might lead to the *prosecution* of those who have no intention to harm is incorrect as section 10 does not create a crime of hate speech. Although the example cited by De Vos is context-specific in the sense that the rights to freedom of expression and religion can be violated, what all three authors agree on is that the absence in section 10 of a requirement of subjective intention on the part of the wrongdoer, constitutes an infringement on the right to freedom of expression. When comparing section 10 to the common law causes of action of defamation and insult, *Le Roux* affirms that both causes of action require *animus iniuriandi*—the intention to injure—to succeed.[173] In *Le Roux*, the court held that intention to injure includes direct intention and *dolus eventualis*, [174] i.e. whether the alleged wrongdoer foresaw and reconciled himself with the fact that his attempt at humour might be defamatory and still proceeded with it. In *Khumalo v Holomisa*[175] and in *The Citizen 1978 (Pty) Ltd v McBride*[176] the Constitutional Court held that the requirements of defamation under the common law were consistent with the Constitution in protecting a plaintiff's right to dignity without unjustifiably infringing on the right to freedom of expression and therefore strikes the appropriate balance in the application of these rights. As section 10 does away with the subjective requirement of intention, it creates an even greater infringement on the right to freedom of expression and in this respect section 10 constitutes an unjustifiable limitation on the right to freedom of expression. In our view section 10 should be redrafted to insist on (subjective) intent as a requirement for hate speech.

'Be hurtful;[177] **be harmful or to incite harm;**[178] **promote or propagate hatred'**[179]

In *Mdabe*[180] the court stated that these three phrases should be read disjunctively. Albertyn and others argue that the Equality Act is vague in that it provides no guidance

172 ibid 17.

173 Paragraphs 129–137 and 175.

174 Paragraphs 129–131. The court stated that *dolus eventualis* is present if the person only foresaw the harm that might ensue and omitted to add that a person must foresee and reconcile himself with the possibility that his statement is defamatory, which is incorrect. See for example *S v Makgatho* 2013 (2) SACR 13 (SCA) para 9, where the court states that the requirements for *dolus eventualis* are the subjective foresight that a certain consequence might ensue, reconciling oneself to that possibility and then still proceeding with that conduct.

175 2002 (5) SA 401 (CC) paras 35–45.

176 2011 (4) SA 191 (CC) para 79 (*'McBride'*).

177 The Equality Act, s 10(1)(a).

178 ibid s 10(1)(b).

179 ibid s 10(1)(c).

180 At 4.

on how the term 'hurtful' should be interpreted.[181] According to them, it appears that 'hurtful' does not rise to the level of 'harmful'.[182] De Vos argues that the use of the word 'hurtful', depending on the context, may render as hate speech the use of the words 'moffies' when referring to gay men or 'Boer' when referring to Afrikaners or 'k*****' when referring to black people.[183] An atheist telling a religious person that he or she is a fool for believing in God or that the God he or she believes in is a cruel and heartless one, or that God is in any case dead and the person was a fool for not realising this, could potentially constitute hate speech.[184] Telling a 10 year old that he or she is wet behind the ears and still needs to grow up, telling someone that their home language is ugly or was the language of the oppressor, telling a polygamist that polygamy was a backward and oppressive cultural practice and that he was an oppressor of woman for indulging in polygamy or telling someone that members from his or her ethnic group are lazy, cunning, dishonest or greedy could all constitute examples of hate speech on the basis of it being hurtful.[185] Milo and others argue that the phrase 'hurtful' creates difficulty as, if interpreted literally and particularly if used together with 'harmful', it would prohibit a wide range of expression such as robust opinions on racial issues or gender-insensitive jokes.[186] Pillay agrees with the views of Milo and others and adds that these words would have the effect of prohibiting for example, strong opinions on issues of race and religion or jokes that may be insensitive on the basis of culture and sexuality.[187]

In *Afri-forum* it was held that the singing of 'shoot the Boer' was hurtful, incited harm and promoted hatred against the white Afrikaans speaking community including the farmers who belong to that group and that the words are harmful.[188] In light of this finding, we submit that the order in which the words and phrases appear in subsections (a), (b) and (c) is also indicative of the degree of seriousness attached to them and provides an indication of how the words hurtful and harmful should be interpreted. A hurtful statement presupposes a less serious infringement on a person's human dignity than words that are harmful or that incite harm. This means that harmful words will always be hurtful as well. In *Freedom Front* it was decided that the word 'harm' in section 16(2)(c) cannot be restricted to physical or actual harm and must be interpreted to include psychological, emotional and other harm[189] and that such harm could take the form of feelings of humiliation or degradation; it could also have a severe negative impact on an individual's feelings of self-worth and acceptance.[190] This means that the

181 See Albertyn (n 6) 96.
182 ibid.
183 See De Vos (n 103) 15.
184 ibid.
185 See De Vos (n 103) 15–16.
186 See for instance the decision in *Collins v 5FM* [2012] JOL 28444 (BCCSA).
187 See Pillay (n 48) 239.
188 Paragraph 108 and 109.
189 At 1292.
190 At 1293, where the SAHRC cited the decision in *R v Keegstra*.

incitement of harm could also entail inciting others to hurl insults at a specific person(s) that have the potential to cause harm.

The decision of the Constitutional Court in *Le Roux* sheds some light on the meaning of 'hurtful'. Briefly, the case related to images created by and distributed by the applicants, in which the respondent (the vice-principal of a Pretoria school at the time) and the principal of the school, were depicted as two naked men sitting next to each other in sexually suggestive and intimate circumstances.[191] The question in this case was whether the images were defamatory of the respondent and whether they impaired his dignity.[192] The majority judgment distinguished between jokes that constitute so-called legitimate jest and those that amount to illegitimate jest and held that the latter is impermissible and occurs where a person cannot share in a joke as it is *hurtful* and defames.[193]

Within the context of defamation, the majority in *Le Roux* held that even though a reasonable observer would accept that teachers are often the butt of jokes by their learners and that these jokes must not be taken too seriously, there is a line that may not be crossed and although the line is not always clear it is crossed in principle when a joke becomes *hurtful*.[194] It is notable that all three judgments in *Le Roux* stated that if the expression in question causes *hurt* the claim would succeed—the minority judgment and separate opinion of Froneman and Cameron JJ found this in the context of a claim for the impairment of dignity,[195] whereas the majority found this in the context of a claim for defamation[196] or impairment of dignity.[197] Within the context of the case, the court stated that a joke would be *hurtful* when it represents the teacher as foolish, ridiculous and unworthy of respect[198] and according to the separate opinion of Cameron and Froneman JJ that hurt could be experienced where a person is called something or portrayed as something that they have not chosen to be.[199] As the requirements for a claim of defamation and for a claim of impairment of dignity[200] are consistent with the rights in the Bill of Rights, this interpretation of the word 'hurtful' should be adopted for section 10.

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191 *Le Roux* (n 97) paras 12–20.

192 ibid paras 24–27.

193 ibid paras 117–119.

194 ibid paras 17–119.

195 ibid paras 71 and 154.

196 ibid para 119.

197 ibid para 144.

198 ibid para 119—'In the case of defamation the line might not be so bright and sometimes it might even be wavering. Nonetheless, it is there. In principle it is crossed when the joke becomes hurtful; when it represents the teacher as foolish, ridiculous and unworthy of respect.'

199 ibid para 154.

200 ibid para 175.

With regard to the definition of hatred, it was held in *Freedom Front* that 'hatred is not a form of causal connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies.'[201] In *Maphumulo*, the court defined the promotion or propagation of hatred as the occurrence where a group is generally incited to do something on the basis of race.[202] This is incorrect as there are 16 other prohibited grounds in the Equality Act or at least three other grounds in section 16(2)(c) of the Constitution on which such action can be based. We agree with the definition in *Freedom Front* and submit that it should be applied when determining whether a statement constitutes the promotion or propagation of hatred.

Constitutional issues arising from this component

Regarding the requirement of harm, section 10 is far broader than section 16(2)(c) of the Constitution as it allows for statements to be hurtful, harmful or to incite harm or promote or propagate hatred whereas section 16(2)(c) of the Constitution explicitly requires the statement to constitute the 'incitement to cause harm'. This means that the inclusion of the phrases 'hurtful', 'harmful' and 'promote or propagate hatred' all fall outside the scope of section 16(2)(c). Teichner argues that the effects of hate speech can be substantial, even if the hate speech does not go so far as to incite physical harm.[203] He goes on to say that as the focus on physical harm fails to take into account the more serious and common effects of hate speech, prohibiting expression that seeks to promote or propagate hatred will constitute a justifiable limitation of the right.[204] We agree with this argument and would merely add that the constitutional hate speech requirement of 'advocacy of hatred' is virtually identical to the promotion or propagation thereof and on this basis it constitutes a justifiable limitation of section 16(2)(c). Therefore, the remaining question is whether the inclusion of words that merely cause hurt or harm constitutes a justifiable limitation of the right to freedom of expression.

Pillay argues that as section 10 'disengages hurt and harm from incitement to cause harm' section 10 dispenses with the causation requirement that is a key part of the constitutional test for hate speech and that these phrases do not even rise to the level of hatred in section 10.[205] Davis states that the combination of an extension of the prohibited grounds beyond those in section 16(2) as well as the dispensing of the requirement of causation creates potential for constitutional challenge.[206] We have already submitted above that the extended prohibited grounds in section 10 are a justifiable limitation of the right to freedom of expression in section 16 of the Constitution. Milo and others state that although the absence of a causation requirement

201 *Freedom Front* (n 11) at 1290 citing the decision in *R v Andrews* 43 CCC (3rd) 193 at 211.
202 *Maphumulo* paras 4–5.
203 See Teichner (n 74) 381.
204 ibid.
205 See Pillay (n 48) 239.
206 ibid.

in section 10 is wider than section 16(2)(c), which requires 'incitement' of harm, this extension would, in itself, be reasonable and justifiable and survive constitutional scrutiny.[207] We agree with the opinion of Milo and others.

Albertyn and others submit that the use of the word 'hurt' alone results in a severe limitation of the right to freedom of expression because a literal application of the word will result in the prohibition of wide categories of speech.[208] For example, the majority of jokes will be prohibited because they are based on prohibited grounds and cases of subtle sarcasm may also be caught in the web of the Equality Act.[209] They conclude that there are less restrictive means of achieving the aims of the Equality Act.[210] Milo and others argue that if the phrases hurtful, harmful etc. are given the meaning accorded to them in the context of section 16(2)(c) of the Constitution, they are not problematic, but that if they have the effect of prohibiting a wide range of expression such as robust opinions on racial issues or gender-insensitive jokes it would run counter to the constitutional commitment to freedom of expression.[211] According to Teichner, the word 'hurt' gives rise to images of highly sensitive individuals utilising the Equality Act to insulate themselves in their own intolerant world.[212] He argues that the word 'hurt' as it stands is far too broad, regulating a far too wide category of expression, which will of necessity incorporate elements of positive expression.[213]

According to Milo and others, one of the ways in which the use of 'hurtful' can survive constitutional scrutiny is if the phrases 'be harmful' or 'incite harm' are interpreted as referring to physical violence and maybe concrete forms of harm such as discrimination, and to interpret the phrase 'be hurtful' as capturing serious and significant psychological and emotional harm.[214] According to Milo and others, while this may not be the ordinary meaning of 'hurtful', any other interpretation would probably render section 10(1) unconstitutional.[215]

We submit that the constitutionality of hurtful speech is resolved by the judgment in *Le Roux* and through the distinction drawn by the court between legitimate and illegitimate jest. In terms of this distinction, the expression of robust opinions or insensitive jokes will be permissible unless it causes hurt to a reasonable member of the target group. *Le Roux* held that hurtful speech or conduct can be defined as speech that holds that a person is foolish, ridiculous and unworthy of respect and that hurtful conduct is sufficient to succeed with a claim for defamation or the impairment of dignity, which

207 See Milo (n 30) 87.
208 See Albertyn (n 6) 96.
209 ibid.
210 ibid 96–97.
211 See Milo (n 30) 87.
212 See Teichner (n 74) 380.
213 ibid.
214 See Milo (n 30) 87.
215 ibid.

protects a person's inherent right to dignity in section 10 of the Constitution. We submit that this renders the inclusion of 'hurtful' in section 10 of the Act as a justifiable limitation on the right to freedom of expression in protecting the right to dignity.

Defences contained in section 12

The hate speech prohibition is subject to the proviso in section 12 of the Equality Act. The proviso allows for '*bona fide* engagement in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution.' The general fairness defence in section 14 of the Equality Act does not apply to hate speech.[216]

Milo and others and Pillay argue that the proviso in section 12 is vague.[217] Although Milo and others welcome the exclusion of 'fair and accurate reporting in the public interest', they argue that phrases such as '*bona fide* engagement in artistic creativity' are uncertain as notions of art are subjective and changeable over time.[218] They argue that the phrase 'any information, advertisement or notice in accordance with section 16 of the Constitution', suggests that any hate speech that falls within the constitutional right to freedom of expression is permissible in terms of section 10 of the Equality Act provided that it takes the form of 'any information, advertisement or notice'.[219] This would collapse the enquiry under the Equality Act into an enquiry as to whether hate speech falls within section 16(2)(c) of the Constitution, which would be bizarre as the wording of this section differs vastly from the wording in section 10.[220] Alternatively, 'any information, advertisement or notice' can be understood as excluding constitutionally protected speech, but only to the extent that the infringement of that speech would not amount to a reasonable and justifiable infringement of the right to freedom of expression under section 36(1) of the Constitution.[221] This is also an unsatisfactory position as it would lead to great uncertainty and would mean that the legislature would effectively have put in place an overbroad definition on expression and then require courts to draw the boundaries of the prohibition.[222]

According to Albertyn and others '*bona fide* engagement in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest' can be read as an expanded version of section 16(1)(a), (c) and (d) of the Constitution, which protects freedom of the press and media, artistic freedom and academic and scientific enquiry.[223]

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216 Equality Act, s 15.
217 See Milo (n 30) 87; Pillay (n 48) 239.
218 See Milo (n 30) 87–88.
219 ibid 88.
220 ibid.
221 ibid.
222 ibid.
223 See Albertyn (n 6) 93.

They argue that 'publication of any information, advertisement or notice' is similar to section 16(1)(b) of the Constitution, which protects the freedom to receive or impart information or ideas.[224] Finally, they argue that both clauses in section 12 must be read in conjunction with section 16(2) of the Constitution in that if an expression is not in line with section 16(2) of the Constitution, it will be prohibited in terms of section 10.[225]

Nienaber analyses section 12 from a plain legal language perspective and suggests that the provision can be rewritten in simpler language as follows:

> a. No one may communicate publicly information intending to discriminate unfairly against anyone or may reasonably be taken to have such an intention.
>
> b. But people can sincerely take part in artistic creativity; and academic and scientific inquiry.
>
> c. A person can report information that is fair, accurate and in the public interest.
>
> d. A person can publish information in line with section 16 of the Constitution.[226]

In her analysis, the proviso to section 10 is constituted by points (b), (c) and (d) above.

In *Sonke Gender Justice*, the only reported case that we are aware of that has dealt explicitly with the defence in section 12, the court held that if the words in question were used in good faith in the exercise of an activity mentioned in the proviso to section 12, they will still constitute justifiable hate speech as the proviso can be raised as a defence.[227] The court then set out the steps that should be followed when applying section 12. The court identified four requirements which need to be met to succeed with the section 12 defence:[228] (1) The words must be stated as a comment (opinion) and that it was or would have been understood as a comment by the reasonable hearer; (2) the comment must be fair and need not necessarily be impartial or well-balanced so that it does not exceed certain limits; (3) the facts commented on must have been truly stated and (4) it must be a matter of public interest.

These four requirements were also set out in *The Citizen 1978 (Pty) Ltd v McBride*[229] where the court stated that the defence of protected or 'fair' comment 'protects criticism, comment or expressions of opinion on facts which are true, and relate to matters of public interest, and if they are such as any fair man might make on those facts.'[230]

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224 ibid.

225 ibid 94.

226 Annelize Nienaber, 'Two Cheers for Equality: A Critical Appraisal of Act 4 of 2000 from a Plain Language Viewpoint' (2002) 27 (1) JJS 1 at 11.

227 Sonke Gender Justice (n 28) para 16.

228 ibid para 19.

229 *McBride* (n 176) para 80.

230 *McBride* (n 176) para 80; *Roos v Stent and Pretoria Printing Works Ltd* 1909 TS 988 at 998.

Regarding the requirement of fairness, the court added that it is not necessary for the opinion to be 'just, equitable, reasonable, level-headed and balanced'.[231] Therefore, criticism will be protected even if it is 'extreme, unjust, unbalanced, exaggerated and prejudiced' as long as it is an honestly-held opinion said without malice, based on truly stated facts which relate to a matter which is in the public interest.[232] The requirement of facts being truly stated means that it must be clear to those reading the publication, or in the case of speech those hearing the words, what the facts are and what comments are made upon them.[233] It is also possible that the comments are based on notorious facts that are 'incorporated by reference'.[234]

We agree with Milo and others that section 12 cannot be interpreted in a way which collapses the proviso into section 16 of the Constitution as legislation should not be interpreted in a way that renders parts thereof superfluous. However, we disagree with the view expressed by Milo and others regarding '*bona fide* engagement in artistic creativity' as this phrase is very similar to section 16(1)(c) of the Constitution and therefore the phrase 'artistic creativity' in section 12 can be interpreted in the same way it has been in the context of section 16(1)(c). An example of this is the decision in *J Coetzee v YFM*[235] where it was held that playing a song on the radio was of an artistic nature and although the song contained words normally constituting hate speech, did not constitute hate speech as it was played in jest and therefore constituted a *bona fide* artistic broadcast. Because of the similarity between the phrase 'academic and scientific inquiry' and section 16(1)(d) of the Constitution, the interpretation of section 16(1)(d) can be used to assist in interpreting the meaning of 'academic and scientific inquiry'.

Constitutional issues arising from this prohibition

Just as section 16(2) of the Constitution aims to strike a balance between the rights to freedom of expression and human dignity by placing certain forms of expression outside the scope of the right, section 12 has been included in the Equality Act in order to strike a balance between these rights, but from the opposite perspective, i.e. in order to ensure that the right to dignity is not promoted inappropriately at the expense of the right to freedom of expression. The main difference between the proviso in section 12 of the Equality Act and section 16(1) of the Constitution is that section 12 also contains the common law defence of 'fair' or protected comment, which was held to be constitutional in *McBride*. If the phrase '*bona fide* engagement in artistic creativity, academic and scientific inquiry' in section 12 is smaller in its scope than the phrases 'freedom of artistic creativity' and 'academic freedom and freedom of scientific research' in section 16(1), it means that the right to freedom of speech is limited through the defence in section 12. However to strike the appropriate balance between the rights to equality,

231 *McBride* (n 176) para 82.
232 ibid para 83.
233 ibid para 88.
234 ibid para 89.
235 2010 JOL 25811 (BCCSA).

dignity and freedom of expression, all the common-law defences to claims of insult and defamation should have been taken up in section 12.

Conclusion

In conclusion we propose the following redrafted section 10, to cure the possible constitutional complaints:

10 Civil prohibition of hate speech

(1) This section creates a civil cause of action termed 'hate speech'.

(2) No person may communicate words, images, symbols or the like, related to a prohibited ground, against any person, which were intended to –

(a) hurt or insult or degrade (where a reasonable person, informed by the values of the Constitution, would also have been hurt or felt insulted or degraded in the same circumstances); or

(b) harm; or

(c) incite harm; or

(d) promote or propagate hatred.

(3) A respondent may raise any of the following defences to a claim based on this section:

(a) *bona fide* engagement in artistic creativity;

(b) *bona fide* academic or scientific inquiry;

(c) fair and accurate reporting in the public interest; or

(d) any of the common law defences available to a defendant in claims based on defamation and insult

(4) 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 communication of hate speech as contemplated in subsection (2), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

Proposed addition to the definitions section

'harm' and 'harmful' includes physical, psychological and emotional harm.

Proposed criminal prohibition of hate speech

A criminal prohibition of hate speech that follows the wording in section 16(2) of the Constitution very closely is very likely to pass constitutional muster. If this approach is followed, a criminal prohibition of hate speech could for example read as follows:

Anyone who by words, signs, symbols or the like, whether in public or private, intentionally communicates:

(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 [physical or emotional] harm

is guilty of an offence and liable to imprisonment of up to [two] years, a fine, or both.

Consideration should be given to at least include sexual orientation in the list of grounds listed in (c) above, based on the particular prejudices that sexual minorities are experiencing in South African society.

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