A tale of two judgments dealing with free speech and hate speech

By Ivor Heymam

Two recent judgments have revealed a schism in our law in its approach to free speech versus hate speech. Before analyzing the judgments, it is worth providing the legislative framework that governs free speech and hate speech in South Africa. Section 16 of the South African Constitution protects free speech in general. Section 16(1) protects free expression and specifically includes freedom of the press and media, the freedom to impart and receive information and ideas, the freedom of artistic creativity and academic freedom and freedom of artistic research. Section 16(2)(c) removes hate speech from the protection of Section 16(1) by excluding any "advocacy of hatred, based on race, ethnicity, gender or religion that constitutes incitement to cause harm." (emphasis is mine).

The legislature subsequently passed the Promotion of Equality and Prevention of Unfair Discrimination Act (No 4 of 2000) (henceforth the "Equality Act") to give effect to the hate speech provisions in the Constitution. In particular, Section 10(1) of the Equality Act provides that "… no person may publish, propagate or communicate words based on one or more of the prohibited grounds [race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, disability, religion, conscience, belief, culture, language and birth] against any person that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; or (c) promote or propagate hatred.

What emerges from Section 16(2) of the Constitution is that advocacy of hatred, however offensive, does not become hate speech unless the element of "incitement to cause harm" is present. For example, in **Van Loggerenberg v 94.7 Highveld Stereo** 2004 5 BCLR 561 (T), a comment on the radio, despite being objectionable, offensive and ill-conceived was held not to be hate speech because it did not advocate hatred based on religion or incite the causing of harm. In contrast, in **Freedom Front v South African Human Rights Commission** 2003 11 BCLR 1283 (SAHRC) 1290, the appeal committee of the South African human rights commission found that the slogan "kill the farmer, kill the boer" was advocacy of hatred because it included a threat of physical, psychological and/or emotional harm.

Up until 2018, our law seemed to be progressing logically in outlawing hate speech that incited harm and allowing free speech that did not incite harm. But then things took a turn with the judgment of the Supreme Court of Appeal in **Masuku v South African Human Rights Commission obo South African Jewish Board of Deputies** 2018 ZASCA 180 (4 Dec 2018). The case concerned a complaint lodged by the South African Jewish Board of Deputies at the South African human rights commission that certain statements made by a Mr Masuku, secretary of the International Relations Arm of the Congress of South African Trade Unions (COSATU), constituted hate speech and were proscribed in terms of South African law.

At the time, there was an escalation in the conflict between Israel and the Palestinian ruling political party in the Gaza strip, Hamas. These events raised the temperature between supporters of Israel and supporters of Palestinians across the world, including South Africa. In response to these tensions, Mr Masuku wrote on a blog on 10 February 2009 that "every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity."

A month later, Masuku addressed a rally organized by the Palestine Solidarity Committee at the University of the Witwatersrand. In his remarks he stated that " … any South African family who sends its son or daughter to be part of the Israel Defence Force must not blame us when something happens to them with immediate effect." He also stated that "Cosatu is with you, we will do everything to make sure that whether it is at Wits, whether it is at Orange Grove, anyone who does not support equality and dignity, who does not support rights of other people must face the consequences even if it means that we will do something that may necessarily cause what is regarded as harm …"

The human rights commission found that prima facie the statements made by Masuku did constitute hate speech against the Jewish community and were proscribed by Section 16(2) of the Constitution and Section 10(1) of the Equality Act. This finding was confirmed in a judgment of the equality court, which ordered Masuku to make an unconditional apology to the South African Jewish Board of Deputies.

On appeal to the SCA, the appeal court overturned the decision of the equality court. The SCA accepted the argument by Masuku that his blog statement did not focus on religion or ethnicity but rather on political ideology. In doing so, the court appeared to overlook the fact that an attack on an ideology places the proponents of that ideology at risk. However, even more astonishingly, the court held that, even if ethnicity or religion were implied in the blog statement, the words "bitter medicine" and "perpetual suffering" were purely metaphorical.

With respect to the comments he made in his Wits speech, the court found that nothing in the content of the speech shows that it was anything more than "a political speech." In reaching this conclusion, the court overlooked the implicit and explicit threats of harm that formed an integral part of Masuku's comments. The SCA concluded with the statement that "[t]he fact that particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection." (para 31).

The SCA judgment might be questioned because it casually overlooks the explicit and implicit threats of harm issued by Masuku in both his blog posting and his speech. This oversight undermines the entire legislative framework contained in Section 16 of the Constitution and Section 10 of the Equality Act. However, the opposite sentiment - an overly sensitive approach to speech and its effects - can be found in the recent judgment of **Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others** 2019 (6) SA 327 (GJ). This case dealt with the question whether the display of the old, pre-1994 South African flag amounted to hate speech prohibited by Section 10(1) of the Equality Act and Section 16(2)(c) of the Constitution.

The South Gauteng High court found that the gratuitous display of the old flag represented, as against black people, the publishing, propagating, advocating and expression of hatred on prohibited grounds and was therefore hate speech. The logic that the court used to reach this conclusion was: (i) the flying of the flag visually communicates a message in support of racism, white supremacy, and the subjugation of the black population (para 77); (ii) the Constitution does not confine itself to hate speech expressed in words, it applies to the advocacy of hatred by any means, whether by word or conduct (para 137); since the flag represents speech, the test is whether the speech objectively demonstrates a hurtful, harmful or hateful meaning (para 168); people who display the old flag are demonstrating a clear intention to be harmful, hurtful, and to incite and propagate hateful feelings (para 179).

This finding raises several difficulties. First, contrary to the court's finding that the flag demonstrates an intention to be hurtful, to be harmful or incite harm or promote or propagate hatred, there is no singular or objective interpretation to the "speech" inherent in the flying of the old flag. To some it represents a quaint cultural symbol and to others it represents an oppressive regime. Therefore, the idea that the flying of the flag, without any contextual words or actions to accompany it, represents hate speech is a stretch of immense proportions.

Second, even if the flag is considered to be offensive speech, the court in **Nelson Mandela** disregarded the SCA's finding in **Masuku** that, even though some expressions may be hurtful of people's feelings, wounding, distasteful, politically inflammatory or downright offensive, this does not automatically exclude those expressions from constitutional protection. Something more is required: to meet the requirements of Section 10(1) of the Equality Act, the applicant would need to lead evidence that the speech was intended to hurt people's feelings, incite harm, or propagate hatred. Without evidence of any intention on the flag bearer's part in the **Nelson Mandela** case, we are restricted to the conclusion in **Van Loggerenberg** that the speech, despite being objectionable, offensive and ill-conceived cannot be held to be hate speech.

Final Thoughts:
As we contemplate the nature of our democracy and our tolerance of different types of speech, the words of the Illinois Supreme Court in **The Village of Skokie v National Socialist Party of America, et al** 69 Ill. 2d 605 (1978) warrant our attention. In that case, the court had to decide whether a march by a group of neo-Nazis bearing swastikas should be allowed in a predominantly Jewish area near Chicago. In electing to allow the march, the court held that:

"The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."

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