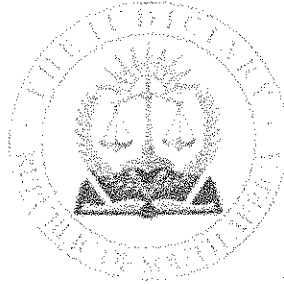


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: EQ44/2009 (EQ13/2012)
CASE NO: 36314/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	20/4/2018.
	DATE SIGNATURE

In the matter between:

QWELANE, DUBULA JONATHAN

Applicant

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Second Respondent

FREEDOM OF EXPRESSION INSTITUTE

First *amicus curiae*

PSYCHOLOGY SOCIETY OF SOUTH AFRICA

Second *amicus curiae*

In re: the consolidated matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Applicant

and

QWELANE, DUBULA JONATHAN

Respondent

FREEDOM OF EXPRESSION INSTITUTE

First *amicus curiae*

PSYCHOLOGY SOCIETY OF SOUTH AFRICA

Second *amicus curiae*

AND

QWELANE, DUBULA JONATHAN

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

First Respondent

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Second Respondent

FREEDOM OF EXPRESSION INSTITUTE

First *amicus curiae*

PSYCHOLOGY SOCIETY OF SOUTH AFRICA

Second *amicus curiae*

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MOSHIDI, J:

INTRODUCTION

[1] This is an application for leave to appeal against the whole of my judgment and order delivered on 18 July 2017. The applicant in the present application for leave to appeal is Mr Jonathan Dubula Qwelane, who was the applicant in the constitutional challenge and respondent in the Equality Proceedings before me. I shall henceforth and for convenience refer to Mr Qwelane as "*the applicant*", and the opposing parties as "*the respondents*".

[2] The grounds of appeal are as set out in the applicant's notice of publication for leave to appeal dated 7 September 2017. As shown later below, the application is not opposed by the respondents.

[3] In regard to the complaint launched by the South African Human Rights Commission (*"the Commission"*) against the applicant in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (*"the Equality Court Proceedings"*) several issues are involved. These are not only issues of fact or common law, or mixed and fact, but involve complex and controversial legal principles, and concern the correct and proper interpretation of certain provisions of the Equality Court Proceedings. The provisions dealing with the social conflict emanating from alleged hate speech, the yardstick of hate speech, include sections 1, 10, 11 and 12 of the Equality Court Proceedings. These are therefore more than factual considerations which include constitutional considerations. In regard to the applicant's constitutional challenge, which I dismissed, the applicant essentially challenged the constitutional validity of the provisions of sections 1, 10 and 11 of the Equality Court Proceedings. The applicant alleged that these provisions constitute an unreasonable and unjustifiable limitation of his right to freedom of expression as enshrined in section 16(1) of the Constitution. In this regard, it was contended that the constitutional challenge was competent by virtue of the operation of sections 167 and 169 read with section 172(1)(a) of the Constitution. Once more, it is more than plain that the determination of the issues involved here are not mundane factual considerations only, but the correct and proper construction and interpretation of the legislation involved in, the interest of justice. On proper reflection, I may have been incorrect in my construction and interpretation of the provisions of the Equality Court Proceedings, as well as the constitutional challenge, which led to my finding. The Equality Court Proceedings is

relatively novel in our democratic dispensation, and it is in the interest of justice that some level of certainty is achieved by appellate courts. For the above reasons, I conclude that there are reasonable prospects of success on appeal. This is my view, in spite of the consensus in this application, and for the additional reasons mentioned below.


[4] In the application for notice of leave to appeal, the applicant seeks leave to appeal to the Supreme Court of Appeal, alternatively, to the full court of this division. In spite of the agreement reached by the parties in the present application for leave to appeal in regard to the appropriate appellate forum, it remains my duty to determine such appropriate forum (see *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2003 (5) SA 354 (SCA) at paragraph [23]). On the basis of cases such as *Gardener v Whitaker* 1996 (4) SA 337 (CC), and *Member of Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157, and *S v Shongwe* 2003 (5) SA 276 (CC), and *Wallach v High Court of SA, Witwatersrand Local Division* 2003 (5) SA 273 (CC), I have come to the conclusion that leave to appeal ought to be granted to the Supreme Court of Appeal in this matter. This, on my finding based on the above nature of the matter, that there are reasonable prospects of success on appeal. This accords with the proposed draft order agreed to by the parties, which shall be made an order of court incorporated in order 1 below.

ORDER

[5] In the result the following order is made:

5.1 Leave to appeal is granted to the Supreme Court of Appeal.

5.2 The costs shall be in the cause.



D S S MOSHIDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Instructed by	Bowman Gilfillan Attorneys
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Instructed by	Ms M Xele Attorneys (Freedom of Expression Institute)
Counsel for the second <i>amicus curiae</i>	K Hofmeyr
Instructed by	Webber Wentzel Attorneys
Dates of hearing	29 March 2018 and 5 April 2018
Date of judgment	20 April 2018