

SOUTH AFRICA MEDIA LAW UPDATE

RECENT DEVELOPMENTS

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[237] South Africa finds itself on the eve of the 10th anniversary of the advent of democracy and constitutional supremacy in 1994 after 40 years of apartheid rule. As a sovereign, democratic state, the Constitution of the Republic of South Africa (1996), declares it to be founded on the values of, amongst others, human dignity, the achievement of equality, non-racialism and non-sexism.² Considering the number of judicial decisions dealing with defamation, however, one is tempted to conclude that a true respect for these values is still far from fully developed in our society. On the other hand, though, one could also argue that these decisions display the realisation of yet another feature of a truly democratic society: the acknowledgement of freedom of expression — including, of course, a crucial component of such freedom of expression — freedom of the press.

What follows is a report on two of the latest decisions dealing with defamation, particularly by the printed media, on the one hand and their right to freedom of speech on the other. These decisions reflect the way in which courts deal with the competing rights to dignity (s 10) and freedom of expression (s 16) found in the Constitution. The courts' views on defamation also have due regard to the Constitution's instruction in s 39(2) (the interpretation clause of the *Bill of Rights*) to any court, tribunal or forum to develop the common law to promote the spirit, purport and objects of the *Bill of Rights*. In other words, the courts' decisions have to be informed by the foundational values articulated by the Constitution.

Although freedom of expression is recognised as a fundamental right under the Constitution (s 16), such freedom does not extend to any form of speech which amounts to 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.³ This limitation to freedom of speech is understandable given South Africa's history, and the reality of the plurality of the South

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² Section 1(a) and (b) respectively.

African society. 'How is s 16(2) to be interpreted?'⁴ and the views of both the court and the Broadcasting Complaints Commission of South Africa (BCCSA) on 'hate speech' form the second part of this update.

[238] **'Freedom of the Media': Does Freedom of Expression Trump the Right to Dignity?**

Khumalo and Others v Holomisa

This particular case⁵ came to the Constitutional Court as an application for leave to appeal against the dismissal of an exception by the Transvaal High Court. The applicants excepted to the respondent's particulars of claim. In *casu* they (the media defendants — the publishers of a newspaper, the Sunday World — in the court a quo) excepted to the particulars of claim of the plaintiff in the court a quo in that, given that the contents of the particular statements were matters in the public interest, the failure by the respondent (plaintiff in the court a quo) to allege in his particulars of claim that the statements were false rendered the claim excipiable in that it failed to disclose a cause of action. Putting it differently, the applicants argued that the common law of defamation, to the extent that it does require a plaintiff to plead that a defamatory statement is false, regardless of the circumstances, unjustifiably limits the right to freedom of expression enshrined in the Constitution. In short, the applicants raised the question whether the common law of defamation as developed by the South African courts is inconsistent with the Constitution.

The respondent was a well known South African politician and leader of a political party. He had sued the applicants for defamation arising from the publication of an article in their newspaper. In the article it was stated that the respondent was involved with a gang of bank robbers and that he was under police investigation for this involvement.

As to the procedural question whether an appeal may lie to the Constitutional Court against the dismissal of an exception, the Court concluded that the High Court's dismissal was indeed a decision on a constitutional matter and that the granting of leave

³ Section 16(2).

⁴ *Islamic Unity Convention v Independent Broadcasting Authority and Others* (2002) 4 SA 294 [32].

⁵ (2002) 5 SA 401.

to appeal to the Constitutional Court was in the interests of justice since '[t]he extent to which the Constitution requires a development of the law of defamation is a question which has been frequently asked'.⁶ As to the application of s 16 (the right to freedom of expression) when none of the parties to the defamation action is the state or any organ of state, the court held that the law of defamation undoubtedly affects the right to freedom of expression. The applicants, as members of the media, had expressly been identified as bearers of constitutional rights to freedom of expression. Given the intensity of the particular right, coupled with the potential invasion of the right by persons other than the state or organs of state, the court concluded that the right to freedom of expression has 'direct horizontal application' to the common law rules of defamation as envisaged by s 8(2) of the Constitution.⁷

In South Africa the law of defamation is based on the Roman law remedy of *actio injuriarum*. The action afforded a person whose personality rights had been impaired intentionally by the unlawful act of another, the right to claim damages. The personality right the law of defamation protected was the right to reputation (*fama*).⁸ The elements at common law of the delict of defamation are the wrongful, intentional publication of a defamatory statement concerning the plaintiff. The plaintiff is, however, not [239] required to allege and prove that the defamatory statement is false. Once the publication of a defamatory statement concerning the plaintiff has been proven, it is presumed that the publication was both unlawful and intentional. In order to avoid liability, the defendant is required to rebut unlawfulness or intention.⁹ Although there is no *numerus clausus*, the most commonly raised defences are nevertheless that the publication was true, and in the public interest ('benefit'), the publication constituted fair comment, and that the publication was made on a privileged occasion.¹⁰ The court made reference to a

⁶ Ibid [16]. Note that the question as to what decisions may be appealed to the Constitutional Court, is governed by s 167(6) of the Constitution and the Rules of the Constitutional Court. The subsection enables a person 'when it is in the interests of justice and with leave of the Constitutional Court' (a) to either bring the matter directly to the Constitutional Court or (b) to appeal directly to the Constitutional Court from any other court.

⁷ Ibid [33]. Sections 8(1) and (2) (the application clause of the Bill of Rights) distinguishes between two categories of persons and institutions bound by the Bill of Rights. Section 8(1) binds the legislature, executive, judiciary and all organs of state in unqualifiedly terms to the Bill of Rights. Section 8(2) provides that natural and juristic persons are bound by provisions of the Bill of Rights 'to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.

⁸ Ibid [17].

⁹ Ibid [18].

¹⁰ Ibid. See also J Burchell, *Personality Rights and Freedom of Expression: The Modern Actio*

fourth defence articulated and adopted by the Supreme Court of Appeal after analysis of developments in Australia, England and the Netherlands, that is to allow media defendants to prove that the defamatory publication, although false, was nevertheless reasonable in all the circumstances.¹¹ As to the rebuttal of intention, again with reference to the approach of the Supreme Court of Appeal, the court held that media defendants could not escape liability merely by establishing an absence of knowledge of unlawfulness — '[t]hey would in addition have to establish that they were not negligent'.¹²

The crux of the applicants' pleadings was that the existing common law rules were inconsistent with the fundamental right to freedom of speech (s 16 of the Constitution). The particular section reads:

- (1) Everyone has the right to freedom of expression, which includes—
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity;
 - (d) academic freedom and freedom of scientific research.
- (2) The right in sub-s (1) does not extend to—
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The Court emphasised the importance of the right of freedom of expression in a democracy,¹³ as well as the role of the mass media. Not only are the mass media 'important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require', but they are also the bearers of an obligation to provide citizens 'both with information and with a platform

Injuriarum (1998) 207 who says that the flexible criterion of unlawfulness means that the list of defences excluding unlawfulness is not closed.

¹¹ *Khumalo and Others v Holomisa* (2002) 5 SA 401, [18]–[19], with reference to *National Media Ltd and Others v Bogoshi* (1998) 4 SA 1196; (1999) 1 BCLR 1.

¹² *Ibid* [20].

¹³ *Ibid* [21]. The court observed: 'Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be

for the exchange of ideas which is crucial to the development of a democratic culture'.¹⁴ Having said this, the Court none the less recognised the truisms that no right is ever absolute and that a right requires interpretation in the context of other values (rights) enshrined in the Constitution. [240] Of importance in this context are the values/rights of human dignity, freedom and equality.¹⁵ The Court re-affirmed that, under the new constitutional order, the recognition and protection of human dignity is a foundational constitutional value and explained the content of this value as follows:

The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. ... [It] ... therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.¹⁶

The common law of defamation is but one aspect of the law supporting the protection of human dignity to the extent that it seeks to protect individuals' 'legitimate interest in their reputation'.¹⁷ What is required, therefore, in determining the constitutionality of the common law rules of defamation, the court held, is that an appropriate balance be struck between a fundamental value to our democratic society — freedom of expression — and the value of human dignity. The Court recognised, however, that proving the truth or otherwise of defamatory statements and burdening the defendant with the risk of failure to establish truth does indeed cause a 'chilling effect' on the right to freedom of expression and the publication of information.¹⁸ It is none the less possible to reduce this effect to some extent by permitting the defence of 'reasonable publication' adopted in the case of *National Media Ltd and Others v Bogoshi* since it allows any publisher who is uncertain about being able to prove the truth of a defamatory statement nevertheless to publish where he or she can establish that it is reasonable.¹⁹ Moreover, the 'defence of reasonable publication' strikes an appropriate balance between any plaintiff's right to human dignity and any defendant's right to freedom of expression by avoiding a 'zero-sum game' resulting from burdening either a plaintiff or a defendant

stifled'.

¹⁴ Ibid [23 and 24] respectively.

¹⁵ Ibid [25].

¹⁶ Ibid [27].

¹⁷ Ibid [28].

¹⁸ Ibid [39].

¹⁹ Ibid [39].

with proving the defamatory statement false or true respectively where proof is impossible.²⁰ The Court explained as follows:

The defence of reasonable publication avoids, therefore, a winner-takes-all result and established a proper balance between freedom of expression and the value of human dignity. Moreover, the defence of reasonable publication will encourage editors and journalists to act with due care and respect for the individual without precluding them from publishing when it is reasonable to do so.²¹

As a result of the development of the common law rules of defamation through the adoption of the defence of reasonable publication, the court concluded, the common law as currently developed is not inconsistent with the provisions of the Constitution. The appeal therefore failed per the unanimous decision of the eleven judges of the Constitutional Court.²²

The decision by the Constitutional Court serves as a reminder to the mass media that although they undoubtedly play a pivotal role in making available to civil society information and criticism about virtually every aspect of public and private life, words/speech can indeed injure an individual — hence the necessity for preserving a careful balance.

[241] *Sindani v Van der Merwe and Others*

The truism that speech can injure has led to the recognition that the mass media need to weigh their words carefully when publishing. This is particularly true of a country with a culturally diverse population and a history of deep divisions along racial lines.

The appellant in the case before the Supreme Court of Appeal²³ was the chief executive officer of Athletics South Africa, the body that controls and administers the sport of athletics in South Africa. The first respondent is a teacher and the coach of a prominent athlete who won a silver medal at the 1996 Olympic Games. The second respondent was the editor of an Afrikaans Sunday newspaper and the third respondent a journalist

²⁰ Ibid [42 and 43].

²¹ Ibid [43].

²² Ibid [45].

²³ (2002) 2 SA 32.

employed by the particular newspaper.

The action arose from an article written by the third respondent and published in the said newspaper. In the article it was alleged that the appellant had vilified the first respondent during a telephone conversation (after the first respondent had criticised Athletics South Africa in a letter to the press for not providing sufficient financial support to prominent athletes such as the athlete, who was coached by the first respondent) as a racist and to abuse him as ‘white trash’ who ‘should rather have left the country with his white pals’.²⁴

The appellant instituted action against the newspaper alleging that the article was defamatory of him (the appellant) in that it would be understood by its readers to mean that he was ‘a racist who conducted himself in a reprehensible manner’.²⁵ The respondents denied that the article was defamatory. If it were to be found that the article was indeed defamatory, they pleaded the defence that the imputations made in the article were true and that they were published in the public interest. In the court a quo the appellant’s claim for damages was dismissed with costs on the ground that the article was not defamatory of him, since the reasonable reader would not have looked on the appellant’s conduct as unacceptable. The appellant was granted leave to appeal to the Supreme Court of Appeal.

The question before the Supreme Court of Appeal was whether the particular imputation was defamatory of appellant. Or, as the court phrased the question: ‘Is it defamatory of a black man to impute to him that he abused a white man by calling him “white trash”?’²⁶

The Court held that the question whether the article is defamatory in its ‘ordinary meaning’ requires a two stage enquiry. The first stage requires the establishment of the natural or ordinary meaning of the article. The second stage is to establish whether that meaning is defamatory.²⁷

²⁴ Ibid [5].

²⁵ Ibid [6].

²⁶ Ibid [1].

As to the first stage of the enquiry, the Court stated that the ordinary meaning of the particular words did not necessarily correspond to their dictionary meaning. The test to be applied to determine their meaning is an 'objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole'.²⁸ It had to be kept in mind that the ordinary reader was likely 'to skim through an article casually and not give it concentrated attention on a second reading'.²⁹ The Court found that the [242] appellation 'trash' is clearly derogatory and abusive. When it is coupled with the word 'white' and used with reference to a white person, it becomes 'racially charged'.³⁰ The racial connotation became even more evident when reference was made to the respondent's 'white pals'.³¹ Consequently, the words attributed to the appellant in the article would be understood by the ordinary reader as 'racially derogatory language'.³² The court held further that there was no reason for the alleged accusation stated in the article. A reader would have understood from a single perfunctory reading of the article that the appellant used racially derogatory language without any apparent justification for doing so.³³

As to the second stage of the enquiry, that is whether the particular article (meaning) was defamatory of the appellant, the court found that it was indeed defamatory. The article attributed to the appellant 'gratuitous use of racially derogatory language and racial vilification'.³⁴ Moreover, such conduct is not only regarded by right-minded South Africans as reprehensible, but must also be eradicated under constitutional imperatives.³⁵ Thus the imputation of such conduct to another was clearly defamatory.³⁶ The appeal succeeded.

The Right to Freedom of Expression — 'Advocacy of Hatred' ('Hate Speech') Dichotomy in the Broadcasting Sphere

Islamic Unity Convention v Independent Broadcasting Authority and Others

²⁷ Ibid [9].

²⁸ Ibid [11].

²⁹ Ibid: the court quoting from *Morgan v Odhams Press Ltd and Another* [1971] 2 All ER 1156, 1184 (Lord Pearson).

³⁰ Ibid [12].

³¹ Ibid.

³² Ibid.

³³ Ibid [14].

³⁴ Ibid [15].

³⁵ Ibid [15].

This decision of the Constitutional Court³⁷ serves as a reminder of the country's emergence from a:

... severely restricted past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa.³⁸

In contrast, the present commitment of South Africa is to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'.³⁹ Freedom of expression is crucial to the realisation of these values.⁴⁰ The commitment to freedom of speech notwithstanding, it is, however, also true that such freedom of speech has the potential to impair, even weaken, the 'pluralism and broadmindedness that is central to an open and democratic society' by impacting negatively on other rights, as well as other state interests, such as [243] the pursuit of national unity and reconciliation.⁴¹ Hence the importance of determining the parameters of the right to freedom of speech in any given case, particularly where the exercise of the right might intersect with other interests. In short, the right to freedom of speech, like other rights, is not absolute and is subject to limitation under s 36(1) (the limitation clause) of the Constitution.

Clause 2(a) of the Code of Conduct for Broadcasting (Sch 1 to the *Independent Broadcasting Authority Act*)⁴² provides that:

... broadcasting licensees shall ... not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of the population or likely to prejudice the safety of the State or the public

³⁶ Ibid.

³⁷ (2002) 4 SA 294, 37.

³⁸ Ibid [27].

³⁹ Ibid [27] quoting *Shabalala and Others v Attorney-General, Transvaal and Another* (1996) 1 SA 725; (1995) 12 BCLR 1593 [26].

⁴⁰ The court quoted the following: 'It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way': [26], citing *S v Mamabolo (E TV and Others Intervening)* (2001) 3 SA 409; (2001) 5 BCLR 449, [37].

⁴¹ Ibid [29]–[30].

order or relations between sections of the population.

The fourth respondent (the South African Jewish Board of Deputies) had lodged a formal complaint in terms of this clause with the Head: Monitoring and Complaints Unit (second respondent) following a broadcast by the applicant's community radio station. An interview with a historian was featured in the broadcast. The historian questioned the legitimacy of the State of Israel and Zionism as a political ideology. The complaint lodged was to the effect that the broadcast had been 'likely to prejudice ... relations between sections of the population, ie Jews and other communities'.⁴³ The second respondent then referred the complaint to the third respondent, the chairperson of the Broadcast Monitoring and Complaints Committee (the BMCC), who decided that the matter should be dealt with by the BMCC by way of a formal hearing. However, the second respondent had failed to comply with the correct IBA's procedures to notify the applicant that the complaint had not lapsed, but had been referred to the third respondent.⁴⁴ Review proceedings were instituted in the court a quo and the court decided in favour of the applicant that both the referral by the second respondent to the third respondent and the decision by the third respondent to hold a formal hearing were fatally flawed. In the light of this finding the court held that it was not necessary for him to consider the constitutional issue — to grant an order declaring that cl 2(a) is unconstitutional and therefore invalid because it is inconsistent with the right to freedom of expression (s 16) of the Constitution. (The court a quo advanced two reasons for the refusal: first that the issue had become academic since it was decided to review and set aside the decisions and secondly, that the prayer for constitutional invalidity is a prayer for a declaratory order in terms of s 19(1)(a)(iii) of the *Supreme Court Act 1959*. The particular subsection grants the judge a discretionary power to enquire into and determine any existing, future or contingent right. On the basis of this subsection the court held that 'this was not an appropriate case to decide so important an issue'.)⁴⁵ The applicants thereupon sought leave to appeal directly to the Constitutional Court against the decision of the High Court not to deal with the constitutionality of the impugned provision. The procedural question before the Constitutional Court was whether it was an appropriate matter for such leave to appeal

⁴² Act 153 of 1993.

⁴³ (2002) 4 SA 294, [2].

⁴⁴ *Ibid* [4].

to be granted.⁴⁶ The Court held that the judge erred in his refusal on both grounds and should have dealt with the [244] constitutionality of the provision that formed the basis of the dispute. An application for a declaration of constitutional invalidity is not a prayer for discretionary relief in terms of the *Supreme Court Act*, but one in terms of s 172(1)(a) of the 1996 Constitution (the section grants a high court the power to declare law or conduct that is inconsistent with the Constitution invalid).⁴⁷ The matter was also not merely academic: ‘The dispute is a burning issue and one that is necessary in the public interest to resolve, involving as it does a provision that is fundamental to the regulation of broadcasting and, more particularly, what may be broadcast and what may not.’⁴⁸

As to whether leave to appeal should be granted, the Constitutional Court held that the case before it involved a comparison of a piece of legislation with a provision of the Constitution and an evaluation of their compatibility; it was not concerned with the development of the common law but with the direct application of the Constitution. Not only would the resolution of the particular dispute have distinct implications for the interests of justice (going beyond the immediate needs of the applicant and the respondents), but it would also contribute to certainty, on the part of both the general public and the independent regulating authority, as to what is legitimate conduct in relation to the part of the provision presently in dispute.⁴⁹ The application for leave to appeal directly was therefore granted.

The Constitutional Court proceeded to adjudicate on the constitutionality of cl 2(a) of the Code in the abstract and objectively. The Court took pains to state emphatically that the contents of the particular statement were not relevant to the enquiry.⁵⁰ The court concentrated on the portion of cl 2(a) that refers to material ‘likely to prejudice ... relations between sections of the population’ and declared it to be the focus of the judgment and posed the question whether it represented an undue limitation of the right to freedom of expression.⁵¹

⁴⁵ Ibid [8].

⁴⁶ Ibid [7].

⁴⁷ Ibid [10 and 12] respectively.

⁴⁸ Ibid [13].

⁴⁹ Ibid [19].

⁵⁰ Ibid [21].

⁵¹ Ibid [24].

Section 16 (the right to freedom of expression) has two parts. While subs (1) relates to expression that is protected under the Constitution, subs (2) deals with categories of expression specifically excluded from the protection of the right. (The exclusion is expressed in specific and defined terms.) The categories of speech enumerated in the particular subsection are therefore not to be regarded as 'constitutionally protected speech'. The court held that in the sense that the subsection defined the boundaries beyond which the right to freedom of expression does not extend, the particular subsection not only constitutes a definition, but also implicitly acknowledges that certain expression does not deserve constitutional protection 'because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm'.⁵² (Subsection 2(a) is concerned with propaganda for war and (b) with incitement of imminent violence. Subsection (2)(c) is directed at 'hate speech'.) Concerning 'hate speech' the Court held that any expression or speech that amounts to 'advocacy of hatred' based on the enumerated grounds of race, ethnicity, gender or religion, and which constitutes 'incitement to cause harm' would be unprotected by the Constitution. As a result, any regulation of expression falling within the three mentioned categories (such as the enactment of legislation that prohibits such expression) does not constitute a limitation on the right to freedom of expression in s 16.⁵³

Turning to cl 2(a) of the Code the court held that the prohibition of material that is 'likely to prejudice relations between sections of the population' not only self-evidently limited the right to freedom of expression but also clearly went beyond the categories of constitutionally unprotected expression [245] enumerated in s 16(2).⁵⁴ The question arose whether such limitation was justified.

Section 192 of the Constitution specifically mandates the regulation of broadcasting, but in fulfilling this regulatory function the broadcasting authority is not only bound to respect the provisions of the Bill of Rights, but is also allowed to limit the protected rights only as permitted by the Constitution:

In the context of broadcasting, freedom of expression will have special relevance. It is in

⁵² 'Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to': Ibid [32].

⁵³ Ibid [33].

the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas. It is also in the public interest that reasonable limitations be applied, provided that they are consistent with the Constitution.⁵⁵

The problem is that the phrase ‘likely to prejudice relations between sections of the population’ is cast in absolute terms; no material that fits the description may be broadcast. The effect of this wide and vaguely phrased as well as far-reaching prohibition is such that ‘[i]t would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects’.⁵⁶ The wide ambit of the prohibition may also impinge on other rights, such as the right to freedom of religion, belief and opinion guaranteed in s 15 of the Constitution.⁵⁷ In the light of the far too extensive inroads on the right to freedom of expression made by the prohibition the court accordingly declared the phrase ‘likely to prejudice relations between sections of the population’ unconstitutional.⁵⁸

As to the appropriate relief upon the declaration of unconstitutionality, the court observed that, given that s 192 specifically mandated the regulation of broadcasting, striking down the portion of cl 2(a) in its entirety without anything to replace it, would have left a gap that was neither just and equitable nor in the public interest.⁵⁹ As a solution to the problem the court formulated a ‘notional severance’ to render the relevant portion ineffective in its application to protected expression. However, a prohibition remained in place to prevent the broadcasting of expression which was unprotected in terms of s 16(2) of the Constitution.⁶⁰ Such an order should also serve as a guiding principle for the determination of the Board’s complaint against the application.⁶¹

Human Rights Commission of SA v SABC

A few months after the Islamic Unity Convention decision was handed down by the

⁵⁴ Ibid.

⁵⁵ Ibid [37].

⁵⁶ Ibid [44].

⁵⁷ Ibid.

⁵⁸ Ibid [51].

⁵⁹ Ibid [56].

⁶⁰ Ibid [58].

Constitutional Court, an occasion arose to apply the Constitutional Court's ruling on the constitutionality of cl 2(a) of the *Broadcasting Act*. The crisp question before a tribunal consisting of three commissioners of the Broadcasting Complaints Commission of South Africa (BCCSA) was whether a song, broadcast by a radio station which falls under the umbrella of the public broadcaster (the South African Broadcasting Corporation (SABC)), in which racial aspersions were cast, constituted 'advocacy of hatred' as proscribed by s 16(2)(c) of the Constitution.⁶²

[246] The song, composed by a celebrated South African songwriter, Mbongeni Ngema, entitled *AmaNdiya* ('Indians') was broadcast during the particular radio station's current affairs programme in which the particular song was discussed. In passing, Ngema played an important role in the struggle against apartheid and his play, *Asinamali* (roughly translated: 'We have no money') is a famous example of protest theatre during the struggle years. He is also the author of the musical *Sarafina*. The song targeted Indians living in the province of KwaZulu-Natal and suggested that Indians 'were a cause of the poverty of Zulus', were 'worse than the Whites had been', had 'dispossessed' and 'suppressed' them, 'played the fool with them' and that the Zulus were 'homeless and squatted in shacks as chattels of Indians, whose numbers were constantly increasing'.⁶³

After the broadcast the South African Human Rights Commission (SAHRC) lodged a complaint with the Registrar of the BCCSA. The BCCSA decided in terms of its procedural rules to appoint a tribunal to hear argument and to decide on the matter.⁶⁴

The tribunal took, as its point of departure the *Islamic Unity Convention* decision which was to the effect that the exemption to the right to freedom of expression as far as broadcasters are concerned, is limited to the three categories of speech enumerated in s 16(2) of the Constitution — '[i]n fact, the Islamic judgment explicitly limits the grounds in the Broadcasting Code (insofar as hate speech and the like are concerned) to s 16 of the Constitution, as justified under s 36 of the Constitution'.⁶⁵ In reaching a

⁶¹ Ibid [57 and 58].

⁶² (2003) 1 BCLR 92.

⁶³ Ibid [1], [36]–[39].

⁶⁴ Ibid [4].

⁶⁵ Ibid [12], [9] (also see *Islamic Unity Convention v Independent Broadcasting Authority and Others*

finding the tribunal regarded it ‘informative’ to consider foreign law decisions by the European Court of Human Rights, as well as American and Canadian decisions.⁶⁶ The tribunal also set out the history of the guarantee of freedom of expression in detail ‘so as to afford it significant weight in deciding whether the hate speech provision is applicable’ to the song under consideration.⁶⁷

In its finding the tribunal acknowledged that the song under consideration is a form of art and that it should be given the protection which s 16(1) affords the right to artistic creativity. But the tribunal emphasised that the Constitution in no way ruled out the possibility that artistic creations can also ‘advocate hatred’ — ‘[t]he problem is, of course, to determine where art ends and hate speech commences’.⁶⁸ The tribunal found that as far as the song under consideration was concerned art does not ‘soften the effect of the words or save the material from s 16(2)(c) of the Constitution’.⁶⁹

The tribunal re-affirmed the emphasis of the Constitutional Court in the Islamic decision that freedom of expression does not enjoy superior status in South African law and therefore that it should not be allowed to impinge on the exercise and enjoyment of other rights, such as the right to dignity, or other state interests and the pursuit of values such as national unity and reconciliation.⁷⁰ Moreover, the recognition of diversity and the protection of the rights of minorities are crucially important in the pursuit of national unity and reconciliation.⁷¹

The tribunal applied an objective test (which does not take note of the intention of the broadcaster or the writer) in its scrutiny of the broadcast song objected against and whether ‘the song as broadcast’ amounts to ‘advocacy of hatred’.⁷² The tribunal found that the song, objectively judged, indeed constituted ‘hate speech’ as defined in s 16(2)(c) of the Constitution. The broadcasting of the song was [247] in contravention

(2002) 4 SA 294).

⁶⁶ *Human Rights Commission of SA v SABC* (2003) 1 BCLR 92, [12]–[19].

⁶⁷ *Ibid* [27] (the history is set out in [20]–[23]).

⁶⁸ *Ibid* [28]. The tribunal made specific mention of the fact that when art (in whatever form) was used as a ‘vehicle for change’ during the apartheid years, it was often banned.

⁶⁹ *Ibid* [29].

⁷⁰ *Ibid* [31].

⁷¹ *Ibid* [32].

⁷² *Ibid* [41].

of the Broadcasting Code as well.⁷³ The reasons advanced were that the song caused a clear polarisation between Zulus (the 'poor and oppressed') and Indians (the 'oppressors and dispossessors').⁷⁴ The song was demeaning to Indians and degraded them as a race in South Africa. Such demeaning of the Indians contained a strong element of hatred.⁷⁵ Moreover, the song's demeaning accusations constituted incitement to harm and indeed caused harm.⁷⁶ However, the tribunal did not uphold the complaint against the radio station. The reason advanced was that the song was broadcast to inform the debate and content of a bona fide current affairs programme.⁷⁷

⁷³ Ibid [40].

⁷⁴ Ibid [39].

⁷⁵ Ibid [35].

⁷⁶ Ibid [38] and [39] respectively.

⁷⁷ Ibid [42].