

Hate speech - beware

17 May 2018 marks 28 years since the decision was taken to remove homosexuality from the International Classification of Diseases of the World Health Organisation.

Section 9 of our Constitution protects all persons from unfair discrimination based on sexual orientation. Furthermore, section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the “Equality Act”) provides 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 be hurtful, harmful or incite harm, promote or propagate hatred.

In the case of *South African Human Rights Commission v Qwelane*, Qwelane had made certain offending statements directed at the LGBTI community in an article published by Sunday Sun on 20 July 2008, titled “Call me names but gay is not okay!”. In his article Qwelane expressed his disapproval of the gay and lesbian community and praised former Zimbabwean President Robert Mugabe’s “unflinching and unapologetic stance” over homosexual persons. He went further and suggested that the next step for South Africa would be to allow people to marry animals.

After receiving some 350 complaints the South African Human Rights Commission instituted proceedings, in terms of section 10 of the Equality Act, against Qwelane in relation to the offending statements. It was held that the offending statements amounted to hate speech, were based on the prohibited grounds of discrimination based on sexual orientation and marital status, advocated hatred against homosexuals, were hurtful, harmful, incited harm and promoted or propagated hatred.

Qwelane’s defence was that he was entitled to make such utterances, based on his right to freedom of expression as entrenched in section 16 of the Constitution. He also challenges the constitutionality of section 10(1) read with sections 1, 11 and 12 of the Equality Act on the basis that they were vague and overbroad.

The Court, sitting as both the High Court and Equality Court, rejected Qwelane’s defence and found that his offending statements, when evaluated objectively,

incited hatred of the LGBTI community. His statements had no constitutional value, were produced to persuade readers of Qwelane's own views to position his homophobia and to invite others to join in it.

The Court declared Qwelane's offending statements as hate speech. He was ordered to tender an unconditional written apology to the LGBTI community to be published in a national Sunday newspaper. Qwelane's constitutional challenge was dismissed with costs and he was ordered to pay the costs of the Equality Court proceedings including the costs of postponement and the costs of senior counsel.

In April 2018 Judge Moshibi granted Qwelane leave to appeal to the Supreme Court of Appeal. The appeal matter has not yet been heard and it will indeed be interesting to see what the Appeal Court's decision will be.

[Pamela Lebelo, Van Velden-Duffey Inc.](#)