does not focus on whether a legislative provision provides for a "transfer" or similar wording, but determines the effect that a particular law has on the transfer of such ownership. It will also help, in future cases, to determine the importance of registration to transfer of ownership of an immovable property, where such property already vested in the owner in terms of the an agreement or by operation of law. Whenever a court is asked whether transfer of an immovable property by registration, in terms of the saving provisions in section 16 is essential where a person is already vested with ownership, the main test is to consider the effect of such legislative provisions on the transfer of the property in question.

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"CALL ME NAMES", BUT DOES UGLY MAKE ME HATEFUL?

THE UNJUSTIFIABLE RESTRICTION ON FREEDOM OF EXPRESSION UNDER THE PRETENCE OF COMBATTING HATE SPEECH

Qwelane v SAHRC & Others (686/2018) [2019] ZASCA 67

OPSOMMING

Noem my name, maar maak lelik my haatdraend?

Die onregverdigbare beperking van vryheid van uitdrukking onder die voorwendsel van haatspraak-bestryding

Die Hoogste Hof van Appèl het op 29 November 2019 in die saak van *Qwelane v SAHRC & Others* (686/2018) [2019] ZASCA 67 artikel 10 van die Wet op die Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie (PEPUDA) ongrondwetlik verklaar, synde strydig met artikel 16, meer bepaald artikel 16(2)(c) van die Grondwet van die Republiek van Suid-Afrika, 1996. Die uitspraak spruit voort uit 'n artikel van John Qwelane in die *Sunday Sun* van 20 Julie 2008, waarin hy skerp teen homoseksuele mense te velde getrek het. Dele van Qwelane se artikel is in 'n laer hof as haatspraak kragtens artikel 10 van PEPUDA besou. Dié hof het in die saak ook Qwelane se aanval op die grondwetlikheid van die artikel verwerp. In hoër beroep het die Hoogste Hof van Appèl hierdie uitspraak ter syde gestel en in 'n eenparige uitspraak beslis dat artikel 10 van PEPUDA teen artikel 16 van die Grondwet indruis, aangesien dit in etlike opsigte uitdrukking verbied wat deur die Grondwet toegelaat word. Die Hof het die wetgewer agtien maande gegun om regstellende wetgewing aan te neem. Tot tyd en wyl dit gebeur, het die Hof 'n tussentydse bewoording gelas, wat finaal sal word indien die wetgewer versuim om die vereiste verbeterde wetgewing aan te neem. Die uitspraak word verwelkom vanweë die beperking wat artikel 10 van PEPUDA op die grondwetlike reg op vrye uitdrukking meebring, veral teen die agtergrond van 'n groeiende tendens in Suid-Afrika om juis vryheid van uitdrukking te verskraal, soos dit onder andere blyk uit die huidige Prevention and Combating of Hate Crimes and Hate Speech Bill. Dis te hope dat die Grondwetlike Hof die Hoogste Hof van Appèl se bevel sal bekragtig.

1 Introduction

On 29 November 2019, in the case of *Qwelane v SAHRC & Others* (686/2018) [2019] ZASCA 67 the Supreme Court of Appeal (SCA) ruled section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) unconstitutional owing to its incompatibility with section 16 of the Constitution of the Republic of South Africa, 1996 (the Constitution) – the right to freedom of expression. This judgment is welcomed because, in our view, section 10 of PEPUDA constitutes a dreadful display of legislative malfeasance. We view section 10 as repugnant to the very essence of democratic society, and consider it inimical to the rule of law. It is hoped that the Constitutional Court will confirm the SCA's ruling.

Whenever in this note reference is made to section 16 or any of its subsections, the reference is to section 16 of the Constitution. When reference is made to section 10 it is to section 10 of PEPUDA.

2 Factual background

Ironically the wholesome outcome of the case – the ruling of unconstitutionality of section 10 of PEPUDA – has quite a virulent background: a bellicose article published more than a decade ago, authored by columnist (appellant in this case), Johanthan Dubula Qwelane, a well-known journalist and erstwhile activist against white minority government. In his article published in the *Sunday Sun* of 20 July 2008, Qwelane emphatically disapproved of homosexual people. The offensive part of the article, titled "Call me names – but gay is NOT okay . . ." reads:

> "The real problem, as I see it, is the rapid degradation of values and traditions by the so-called liberal influences of nowadays; you regularly see men kissing other men in public, walking holding hands and shamelessly flaunting what are misleadingly termed their "lifestyle" and "sexual preferences". There could be a few things I could take issue with Zimbabwean President Robert Mugabe, but his unflinching and unapologetic stance over homosexuals is definitely not among those. Why, only this month – you'd better believe this – a man, in a homosexual relationship with another man, gave birth to a child! At least the so-called husband in that relationship hit the jackpot, making me wonder what it is these people have against the natural order of things. And by the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views . . . Homosexuals and their backers will call me names, printable and not, for stating as I have always done my serious reservations about their "lifestyle and sexual preferences", but quite frankly I don't give a damn: wrong is wrong! I do pray that some day a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the constitution of this country, to excise those sections which give licence to men "marrying" other men, and ditto women. Otherwise, at this rate, how soon before some idiot demands to "marry" an animal, and argues that this constitution "allows" it?" (para 4).

A cartoon on the same page as the column depicts a man on his knees alongside a goat, in front of a priest to be married with the caption "[w]hen human rights meet animal rights". The appellant was not the author or creator of the cartoon, and the cartoon was not shown to him for approval before it was published (para 5).

The article met with outrage by large sections of the public. The press ombud investigated complaints against Qwelane and the *Sunday Sun* and against *Media24* (the public company that owns the *Sunday Sun*). The South African

Human Rights Commission (SAHRC), the first respondent in the present case, received 350 complaints concerning the article and the cartoon (para 6).

A common refrain in these complaints was that both the cartoon and the article amounted to hate speech aimed at the gay community and that it attacked their right to choose their sexual orientation and marital status. It was said that the article was intended to be hurtful, harmful, incite harm and promote or propagate hatred by drawing a comparison between homosexuality and bestiality, and by implication dehumanising and 'criminalising' homosexuals (para 7).

The ombud found the *Sunday Sun* in breach of section 2.1 of the South African Press Code. It further held that the newspaper had to some degree make amends by publishing a poster in its next edition stating that Qwelane had "taken a beating". Moreover, the paper had to publish a flag on the front page to the same effect, as well as a page containing an extract of letters from the public condemning Qwelane for the article. The newspaper had to conclude its amends by publishing an appropriate apology provided by the ombud's office. The apology was duly published by the newspaper (para 8).

The SAHRC instituted proceedings in the Equality Court against Qwelane and *Media24*. The SAHRC did so in pursuance of section 184 of the Constitution enjoining it (the SAHRC) to promote the protection, development and attainment of human rights, as well as its powers and functions as provided in section 184(2) of the Constitution and as prescribed by national legislation (the SAHRC Act 40 of 2013). These additional powers are partly set out in section 20(1)(f) of the PEPUDA, which confers on the SAHRC the power to institute proceedings in the Equality Court. This must be read with section 2(f) of PEPUDA, which provides as one of the Act's objectives to "(p)rovide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed" (para 9).

In the Equality Court the SAHRC alleged that Qwelane's article contravened section 10(1) (read with sections 12 and 1 and section 11) of PEPUDA. Qwelane and *Media24* subsequently launched an application to the High Court (Gauteng Local Division) moving for section 10 of PEPUDA to be declared unconstitutional on account of its inconsistency with the provisions of section 16 of the Constitution (para 13).

The SAHRC withdrew its proceedings in the Equality Court against *Media24* after a settlement was reached in terms of which *Media24* withdrew its application to the High Court (para 13). The proceedings in the Equality Court against Qwelane continued (para 13), but was subsequently consolidated in the High Court before Moshidi J (para 14). In view of the constitutional challenge – the alleged unconstitutionality of provisions of PEPUDA – the Minister of Justice and Correctional Services was cited and participated in the proceedings. *The Freedom of Expression Institute* participated as an *amicus curiae*, as did the *Psychological Society of South Africa* (para 14).

Extensive evidence was led before by the SAHRC (para 15-17). The deputy editor of the *Sunday Sun* at the time (Ben Viljoen) testified in support of Qwelane stating that the article was published in the "conversation pages", which are intended to deal with current events and to promote debate. The success of the pages was measured by responses, positive or negative. He also testified that the headline of the article was not provided by Qwelane, who also had no say in the cartoon (para 18). A week after the article appeared, a headline banner for the

newspaper relating to the article's uproar indicated that Qwelane had taken a beating. Viljoen also testified that the *Sunday Sun* published a full page of complaints adamant that Qwelane was guilty of hate speech and calling for action against him (para 19). The *Psychological Society of South Africa* presented evidence (paras 22–32) regarding depression and the vulnerability of lesbian and gay people resulting from sustained taunting and hate-victimisation they suffer from.

3 Judgment of the Gauteng Local Division of the High Court

The Gauteng High Court held that the offending statements against homosexuals in Qwelane's article were hurtful, incited harm and propagated hatred, and therefore amounted to prohibited speech envisaged in section 10(1) of PEPUDA (para 33). More important for the present discussion is that the High Court rejected the challenge to the constitutionality of section 10 of PEPUDA in that it was incompatible with section 16 of the Constitution.

Section 16(1) of the Constitution in general terms provides for the right to freedom of expression, while section 16(2) lists three internal qualifications or limitations; these are scenarios not covered by the protection rendered by section 16. Section 16(2)(c) is most pertinent in the present context. It excludes hate speech (more correctly the wider phenomenon of hate expression) from the protection provided for in section 16(1). Section 10 of PEPUDA, read with sections 1 and 12 (quoted below), purports to deal with the same subject matter as the Constitution. Hence, they must be measured against section 16, particularly section 16(2)(c) of the Constitution. PEPUDA (the mentioned provisions) encompasses much more than section 16(2)(c). It prohibits certain modes of expression that section 16(2)(c) would countenance. Precisely because of this, section 10 was argued (and eventually held by the SCA) to be unconstitutional for its incompatibility with section 16, in particular section 16(2)(c) of the Constitution.

Section 16 of the Constitution reads as follows:

> "(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; and
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (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."

Section 10(1) of PEPUDA provides for a comprehensive prohibition of hate speech, even though the phrase "hate speech" does not feature in the provision. It reads as follows:

> "Subject to the proviso in section 12, 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."

Section 12 of PEPUDA, to which section 10 refers, provides:

> "No person may –
>
> (a) disseminate or broadcast any information;
>
> (b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section."

Section 10 of PEPUDA applies to "prohibited grounds". Section 1 of PEPUDA outlines these grounds, providing that:

> "1 (1) In this Act, unless the context provides otherwise –
>
> . . .
>
> "prohibited grounds" are –
>
> (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
>
> (b) any other ground where discrimination 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 and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

The Gauteng High Court dismissed Qwelane's constitutional challenge, holding that the above-mentioned provisions of PEPUDA were not incompatible with section 16 of the Constitution. According to the Court the test postulated by section 10(1) of PEPUDA was objective. It rejected the contention that section 10 of PEPUDA is unconstitutional owing to its vagueness. The Ccourt further held that section 10(a), (b) and (c) had to be read conjunctively (and not adjunctively) and that, thus read, it would be consonant with section 16 of the Constitution. Lastly, the court held that the section was not overbroad (para 34).

4 Decision of the Supreme Court of Appeal

Before the Supreme Court of Appeal it was contended that section 10(1) of PEPUDA was unconstitutional for its alleged unjustifiable restriction of the right to freedom of expression as contained in section 16 of the Constitution (para 36). It further was submitted that the provisions of section 10(1) of PEPUDA impermissibly extended far beyond the kind of expression that is excluded from protection by section 16(2) (in effect section 16(2)(c) of the Constitution (para 36)).

The SCA referred in detail in its judgment to the *locus classicus* on the present issue, namely, the Constitutional Court's judgment in *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) (paras 38–50). It was clear to the SCA that the provisions of section 10(1) of PEPUDA restrict the right of freedom of expression provided for in section 16(1) and, moreover, that their scope extends far beyond the provisions of section 16(2)(c) of the Constitution (paras 52–53).

On behalf of a unanimous court Navsa JA overturned the decision of the High Court. The SCA held that section 10 of PEPUDA could not on any reasonable

interpretation be equated with section 16(2)(c) of the Constitution. It was clear that section 10 extends far beyond the limitation of freedom of expression allowed in section 16 of the Constitution (para 77). Moreover, it was also impossible to read down section 10 to be in conformity with section 16, because the shortcomings in the section were simply too far-reaching to allow for a reading that was consistent, instead of inimical to the Constitution (para 88). Very important for the present discussion and further comment is that section 10 of PEPUDA was held to be incompatible with section 16 of the Constitution viewed from a variety of vantage points and with reference to several aspects of the wording of the section.

In holding section 10 of PEPUDA unconstitutional, the court underscored the fact that section 16(2)(c) excludes from constitutional protection the advocacy of hatred that constitutes incitement to cause harm on any of the following four grounds: race, ethnicity, gender and religion. By contrast, section 10 excludes a vast array of additional grounds not mentioned in section 16(2)(c) – namely, the prohibited grounds listed in section 1 of PEPUDA. Section 10 of PEPUDA prohibits forms of expression that are applicable to the grounds of sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or any other ground described in the definition of "prohibited ground", listed in section 1 of PEPUDA and quoted above. This list clearly goes beyond the unprotected fields of expression defined in section 16(2)(c) of the Constitution and therefore restricts many forms of expression which are permitted by the Constitution.

The difference between PEPUDA and the Constitution additionally pertains to the gravity of the impugned expression complained of (and the effects of such expression). According to section 16 of the Constitution, the right to freedom of expression does not extend to the advocacy of hatred that is based on race, ethnicity, gender or religion, *and which constitutes incitement to cause harm*. In consequence it is evident that the test provided for in section 16(2)(c) of the Constitution is an objective one: it must objectively be established whether the expression complained of expression constitutes the advocacy of hatred on any of the four prohibited grounds and whether such advocacy of hatred constitutes incitement to cause harm (para 62). This stands in contrast to section 10 of PEPUDA which, aside from the advocacy of hatred, also prohibits the publication, propagation or communication of 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; or (c) promote or propagate hatred. PEPUDA therefore dispenses with the objective test of section 16(2)(c), replacing it with "(t)he subjective opinion of a reasonable person, hearing the words" (para 66).

Section 10 of PEPUDA goes further than that. It prohibits expression that results in any one of three alternative consequences, all of which would still be tolerated by section 16 of the Constitution. These consequences are that the impugned words in order to attract liability must (a) be hurtful; (b) be harmful or to incite harm; or (c) promote or propagate hatred. In this context, the court held that section 10 had to be read disjunctively. Hence, if the publication, propagation, advocacy or communication of words against any person, based on one or more of the prohibited grounds, could reasonably be construed to demonstrate a clear intention to achieve any one of the aforementioned three

consequences, it would be prohibited by section 10 (para 64). In holding that section 10 is to be read disjunctively, the SCA rejected the conjunctive interpretation of the court *a quo* as well as that of the High Court in *South African Human Rights Commission v Khumalo* (2018) ZAGP JHC 2019 (1) SA 289 (GJ) at para 82 (n 45). The bottom line of this is that effects lesser than that countenanced by section 16(2)(c) of the Constitution are prohibited and would draw liability under section 10 of PEPUDA.

The nature of the impugned deeds in section 16(2)(c) of the Constitution and section 10 of PEPUDA also differs. Section 16(2)(c) excludes from constitutional protection the *advocacy* of hate expression. By contrast section 10 strikes at and prohibits many lesser forms of expression; namely, the *publication, propagation or communication* as defined in the section (para 65). In this regard, PEPUDA is once again unjustifiably at variance with the Constitution.

That, however, is not where the deficiencies of section 10 of PEPUDA end. Besides all its other flaws, the section is vague and unintelligible too. In this context the SCA referred specifically to the difficulty in determining what "hurtful" in section 10 means. "Hurtful" in the final analysis pertains to the subjective emotions and feelings in response to utterances of the perpetrator (para 68). The point, however, is that utterances falling far short of advocacy of incitement to cause harm (as envisaged in section 16(2)(c)) of the Constitution) are uttered daily as part of normal human life. Daily human interaction, the court correctly pointed out, produces a multitude of instances where hurtful words are voiced. Most certainly there is no way in which all these can be visited with liability and punishment (para 69). The problem produced by the vagueness and virtual unintelligibility of section 10 is that average persons will be unable to guide their conduct in a way that will ensure that they stay on the right side of the law (para 68). One therefore does not know in advance what conduct is prohibited and citizens cannot be expected to know what is required of them (para 88). Referring to para 24 of *Investigative Directorate: Serious Economic Offences & Others: In re Hyundai Distributors (Pty) Ltd & Others v Smit NO & Others* and related judgments of the Constitutional Court, the conclusion of the SCA is that, in the case of PEPUDA, the legislature failed to pass legislation that is reasonably clear and precise enabling citizens to understand what is expected of them and that section 10(1) was therefore unconstitutional (para 88).

The SCA made the following order:

First, that section 10 of the PEPUDA is inconsistent with the provisions of section 16 of the Constitution and therefore is unconstitutional and invalid. Second, that the complaint by the SAHRC against Qwelane in terms of section 10 of PEPUDA is dismissed; and, third, that Parliament is afforded a period of eighteen months from 29 November 2019 to remedy the defect. The SCA ordered that section 10 of PEPUDA will, in the aforesaid period, have a wording which is closely in keeping with section 16(2)(c) of the Constitution, as follows:

> "10(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.
>
> 10(2) 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 advocacy of hatred that is based on race, ethnicity, gender, religion or sexual orientation, and that constitutes incitement to cause harm, as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

This means that section 10 of PEPUDA, in the form set out above, will lapse once the constitutionally-appropriate amended provision of PEPUDA takes effect. If Parliament fails to pass amendments in step with the SCA's decision, section 10 in the form set out in the judgment will replace the current text.

Finally, the SCA confirmed that the order of invalidity is referred to the Constitutional Court in terms of section 172(2)(a) of the Constitution for confirmation. The Constitutional Court's hearing on this is set down for 7 May 2020.

5 Commentary and concluding remarks

We noted above that the SCA's judgment is to be welcomed. It vindicates the academic critique that has been levelled against section 10 of PEPUDA as well as our own caveats in undergraduate classes that this provision was offensive to section 16 of the Constitution in many respects. In fact, despite section 10 of PEPUDA purporting to have been enacted to give effect to the Constitution, it would be hard to find a legislative provision as repugnant to the Constitution and to the basic tenets of the rule of law.

Below we elaborate and cast some light on the reasons for the SCA's finding of section 10 as unconstitutional.

Section 16(2)(c) of the Constitution denies constitutional protection to the carefully-defined limited area of "advocacy of hatred that . . . constitutes incitement to cause harm". If an expression does not fall within this description it still enjoys constitutional protection under section 16. However, our legislature was not content with this.

(a) Hence, in contrast to section 16(2(c), section 10 of PEPUDA also prohibits a much larger collection of conduct, far beyond the advocacy of hatred, namely, the publication, propagation, or communication of words as described in section 10. It is important to point out that *advocacy* denotes a particularly vehement and forceful form of promotion, support or agitation, almost something with a religious fervour. This is aptly expressed by the Afrikaans translation of the word advocacy, namely, "verkondiging", "Verkondiging" precisely conveys the forceful connotation of proselytization, going far beyond section 10's propagation and beyond the notions of publication of communication.

(b) Section 10 of PEPUDA likewise prohibits conduct with evidently lesser consequences than the consequences of hate expression in section 16 of the Constitution. What does not enjoy the protection of the right to freedom of expression under section 16(2)(c) is only "(a)dvocacy of hatred . . . that constitutes incitement to cause harm". In contrast to that, conduct with less nocuous consequences, falling far short of advocacy of hatred that constitutes incitement to cause harm, are outlawed by section 10 of PEPUDA. That is conduct that is either hurtful or harmful or incites harm or promotes or propagates hatred. This constitutes a clear restriction of the constitutional right to freedom of expression envisaged in section 16 of the Constitution.

c) On the basis of the general principles of law liability for unlawful conduct follows only after compliance with the principle of legality, which is an

aspect of the principle of the rule of law in section 1(c) of the Constitution (and also well-established at common law). According to this principle, which really lies at the core of our legal system (and for that matter any civilised legal system), there can be no criminal liability for particular action in the absence of clearly-defined, pre-existing law, declaring such conduct unlawful and susceptible for any form of liability, either civil or criminal. However, section 10 of PEPUDA dispenses with this. Precisely this was an important reason for the SCA holding section 10 unconstitutional; namely, that it is so vaguely and unintelligibly formulated that people are not afforded legal certainty to know beforehand what conduct is prohibited and what not, thus making it impossible for the average person to guide his or her conduct in a way that will ensure that they will act lawfully and avoid liability (paras 68 and 88). This amounts in effect to the court holding that the section 10 of PEPUDA falls short of complying with the rule of law.

d) The Court's finding that section 10 of PEPUDA restricts freedom of expression in that it adds a vast array of additional "prohibited grounds" not included in section 16(2)(c) of the Constitution, is correct. The only suitable comment on this relates to the blatancy of PEPUDA in this regard. There was clearly no subtlety – not the slightest attempt on the part of the legislature – to come up with a formulation that seeks to conform to the formulation of section 16(2)(c) of the Constitution. It just rashly went beyond the wording of section 16. This rashness is in fact a salient feature of all of section 10, pertaining to all aspects of its inconsistency with section 16.

e) The last aspect of incompatibility of section 10 of PEPUDA with section 16 of the Constitution calls for some further comment. This pertains to the objective test for the advocacy of hatred that applies in section 16(2)(c). This is in contrast with section 10 which provides for a subjective criterion: If it *could reasonably be construed* that the kind of words referred to *demonstrate a clear intention* to be hurtful, be harmful or to incite harm, or promote or propagate hatred, the utterer of the words would be liable on the basis of the subjective opinion of a reasonable person hearing the words (para 66).

The implication of this is that the uttered words need not actually be hurtful, harmful or incite harm or promote or propagate hatred. All that is needed for liability is that the uttered words *could reasonably be construed to demonstrate a clear intention* to have any of these effects. What this test does is to shift the responsibility to any (group of) persons who reasonably construe such clear intention, even though such intention might in fact be entirely absent and even though many other people might judge otherwise.

Thus, section 10 of PEPUDA really goes a long way to stultify free expression. Amongst other things, it makes the boundaries of free expression dependent on the subjective feelings – the lived experiences – of even the most petulant members of society. If such people could show that uttered words could *reasonably be construed to demonstrate a clear intention* to be hurtful, be harmful or to incite harm, or promote or propagate hatred, liability under section 10 is established. That would be the case even if other groupings and the court would on well-founded grounds hold a different view. What this does is to pave the way for liability under section 10 on the basis of something like the

complainant's right to petulance and perpetrators' micro-aggressions. Instead of the maxim that the law not being concerned with trivialities, this subjective test removes the "non" from *de minimis non curat lex* and enlists the law's concern for trivialities in the service of the hyper-sensitive and the petulant to the clear detriment of freedom of expression, thus undoing what section 16 of the Constitution seeks to do. This is patently inimical to freedom of expression.

This judgment of the SCA is an important intervention into what we view as PEPUDA's grievous invasion into the right to freedom of expression. It also comes at a time when various restrictions have been imposed on the right to freedom of expression on the basis of section 10 of PEPUDA. Moreover, it comes against the backdrop of Parliament having considered the Prevention and Combating of Hate Crimes and Hate Speech Bill (the Hate-speech Bill) which, if passed, will add further chilling limitations to the right of freedom of expression. It is to be hoped that this judgment will help to turn around this ominous tide.

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DIALYSIS DENIED IN TERMS OF THE PROVISIONS OF THE NATIONAL HEALTH ACT 61 OF 2003

***A E v Chief Executive Officer Helen Joseph Hospital* (19/15448) [2019] ZAGPJHC 379 (7 October 2019)**

OPSOMMING

DIALISE GEWEIER IN TERME VAN DIE BEPALINGS VAN DIE NASIONALE GESONDHEIDSWET 61 VAN 2003

Die versuim van 'n openbare hospitaal om 'n onwettige asielsoeker in Suid-Afrika op hulle dialiseprogram te akkommodeer word bespreek. 'n Ethiopiese vrou het met die hulp van Regsgeleerdes vir Menseregte 'n dringende aansoek in die Suid-Gautengse Hoë Hof gebring om die hospitaal te dwing om haar deel te maak van hulle dialiseprogramme nadat sy nierversaking opgedoen het. Die hospitaal het egter geweier aangesien sy nie kwalifiseer vir 'n nieroorplanting in terme van die Nationale Gesondheidswet nie. Hierdie saakbespreking wys die foute en tekortkominge in die Hoë Hof se uitspraak uit en bespreek die tekort aan dialisefasiliteite ten spyte van 'n groot aanvraag daarna.

1 Introduction

The lack of adequate numbers of organs for transplantation to meet the existing demand has resulted in difficult decision having to be made in South Africa and the rest of the world. Particularly donated kidneys are in short supply. While waiting for a suitable kidney, patients often have to spend many years in dialysis programmes. *A E v Chief Executive Officer Helen Joseph Hospital and Others* (hereafter "*A E*"), an urgent application in the South Gauteng High Court, concerns "the provision of kidney analysis (*sic*)" to an Ethiopian asylum-seeker, assisted by Lawyers for Human Rights. A E brought an urgent application in the South Gauteng High Court to force a public hospital to accept her on its haemodialysis programme after her kidneys had failed. She argued that the