

FOR SA Presentation to KwaSizabantu Conference

“Speaking the truth in love – a legal perspective”

March 7th, 2023 – 15:00 – 17:00

Slide 1 - Greetings:

Good afternoon! My name is Michael Swain and I am the Executive Director of Freedom of Religion South Africa (or *FOR SA*). I have entitled this presentation “Speaking the truth in love – a South African legal perspective” and I will be sharing about the law surrounding religious freedom with a particular focus on the threats to SAY and to DO what we believe posed that are currently in force – and also by various proposed laws that are in the process of becoming law. We will end with a heads-up of some of the issues that we are about to face, which have serious religious freedom implications.

Slide 2 & 3 - Introducing FOR SA:

FOR SA is a legal advocacy organisation that focuses solely on protecting and promoting the right to religious freedom. We are doctrinally neutral, which means that *FOR SA* does not promote or defend a particular doctrine or interpretation of the Bible, but the right of everyone to make up their own minds without interference by the State. Our rallying point is this: While as Christians, we can disagree with one another on the interpretation of various Scriptures in the Bible, we can agree on this: it is not for the State or anyone else to tell us what we may and may not believe.

Disclaimer:

Please note that *FOR SA* is not currently registered as an attorney’s firm or legal resource centre, and that the information and tips we will be sharing, are therefore pointers or guidelines rather than legal advice in the strict sense of the word. Such guidance cannot replace specific legal advice and *FOR SA* can’t be held liable in respect of any claims that may follow as a result of reliance thereon, nor do we accept any responsibility for reliance placed upon it, because every different opportunity to share faith will have its own context and nuances. It remains the best option to obtain specific legal advice in relation to each particular situation.

Slide 4 – areas FOR SA works in:

FOR SA works with many different Government Departments where most policies and draft laws have their origin. Once these draft laws (known as bills) are handed over by the Departments to Parliament, we sit in on Parliament's meetings, make presentations and submissions to Parliament on how believers' rights will be affected by the bills, and help equip the public to participate in Parliament's public participation process.

We are also involved in matters brought before the various commissions, such as the Human Rights Commission, the Commission for Gender Equality and the CRL Rights Commission where increasingly, complaints are being laid against Christians for saying what they believe and living what they believe.

Lastly, we also work before the courts – examples include the **OGOD** case (that was about religious observances in public schools) and the **Constitutional Court case on parental rights**.

Slide 5 & 6 - Religious Freedom as understood in SA law:

I want to begin this presentation by examining how religious freedom is understood in the South African legal system.

Section 15 of South Africa's Constitution, entrenches religious freedom as a fundamental and inalienable human right. This right that attaches to you as a human being, i.e. simply by virtue of you being human. You take this right with you everywhere you go. You do not leave it behind you when you close your front door in the morning, just like you do not leave your right to dignity or equality behind you when you close your front door.

Section 15. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion

(2) Religious observances may be conducted at state or state-aided institutions provided that—

- (a) those observances follow rules made by the appropriate public authorities;
- (b) they are conducted on an equitable basis;
- (c) attendance at them is free and voluntary.

When considering the text of the religious freedom clause in the Constitution, the following becomes apparent immediately, and speaks to how South African law interprets and upholds religious freedom:

1. Section 15 of the Constitution goes much wider than religion as normally understood – i.e. Islam, Christianity, Judaism, Buddhism, etc. – the section also explicitly protects thought, belief, conscience and even opinion.
2. This means belief systems such as atheism and agnosticism are also included and, importantly, constitutionally protected.
3. Unlike the USA, South Africa is not a secular state. The Constitution, expressly provides for the conducting of religious observances at state and state-aided institutions (such as our public schools). This allows, even welcomes, civil servants, learners and teachers to practise their religion in these public places, subject to certain rules to ensure fairness.

Slide 7 – a landmark case in this regard, where FOR SA was involved, was the OGD case, where we established that religious observances are welcome in public schools in terms of a policy developed by the School Governing Body.

The South African Constitution even goes one step further, and in **section 31** – which concerns the rights of cultural, religious and linguistic communities – entrenches the right of religious communities to practise their religion together and to form, join and maintain religious associations.

In addition, **section 9** of the Constitution, which enshrines the right to equality, entrenches religion, conscience and belief as grounds on the basis of which neither the State nor any other person may unfairly discriminate against you. This section has been enacted into civil law in the form of the Promotion of Equality and Prevention of Unfair Discrimination Act (sometimes called PEPUDA or simply as the Equality Act).

In South Africa, our law understands religious freedom as freedom *of* religion, and not freedom *from* religion. Its protection applies to how you speak, express and live out your faith – whatever that may be - whether in private or in the public. Furthermore, the State is required to treat all belief systems (religions, conscience and beliefs) equally and to uphold all the rights guaranteed by the Constitution – including freedom of religion.

Slide 8 – Constitutional Court judgments

When considering the **scope** of the right to freedom of conscience, religion, thought, belief and opinion, the South African Constitutional Court, has said that it is:

- a. *“the right to entertain such religious beliefs as a person chooses”;*

- b. *“the right to declare religious beliefs openly and without fear of hindrance or reprisal”;*
- c. *“the right to manifest religious belief by worship and practice or by teaching and dissemination”;* and that
- d. *“freedom [of religion] implies an absence of coercion or constraint and ... may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs”.*

Simply put, the constitutional right to practise one’s religion *“is one of the hallmarks of a free society.”*

Our courts have also gone further, by saying that this right extends even to beliefs that are *“bizarre, illogical or irrational to others, or are incapable of scientific proof”*, and have made a clear link between **religious freedom** and related rights – seeing it as being central to **dignity** which is in turn central to **equality**.”

What theoretically should happen when the right to religious freedom clashes with other rights:

Resolving conflict – vertical:

What happens when the right to religious freedom comes in conflict with the laws of the state? Our Constitutional Court has said that *“the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law... The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity... For many believers, their relationship with God or creation is central to all their activities...”*

Consequently, when a law infringes on the right to religious freedom by effectively requiring people to violate their either **conscience, religion, thoughts, beliefs, or opinions**, that law must pass the Constitution’s section 36 limitations test. This test is applied whenever a law limits any right enshrined in the Bill of Rights.

Resolving conflict – horizontal:

But what happens when the right to religious freedom comes in conflict with, not a piece of legislation, but with other fundamental rights?

The Constitutional Court has confirmed numerous times that there is no hierarchy of rights. This means that no single right trumps another. The starting point in a conflict is to recognise that the rights should be harmonised (by

employing a proper reconciliatory interpretation) rather than pitted against each other in a “winner takes all” contest. As the Court has said: “*A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions, and give effect to all of them.*”

The Constitution envisages a South Africa where **diversity is celebrated** as the **primary treasure of our nation**, and not merely tolerated. Which brings me to tolerance as a **constitutional virtue**:

“The test of tolerance as envisaged by the Bill of Rights comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is 'unusual, bizarre or even threatening'.” In other words, the test is not by how you find space for people and/or practices with whom you feel comfortable, but how you are able to accommodate the expression of that which is discomforting to you. “*The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that the same time enables government to function in a way that shows equal concern and respect for all*”.

Reasonable accommodation as a way to achieve tolerance:

One of the ways to achieve tolerance and reconcile rights to one another is through the proper application of the constitutional principle of reasonable accommodation. Since South African society values dignity, equality, and freedom as foundational values of our Constitution, it **requires people to act positively to accommodate diversity**. At the core of this principle is the notion that sometimes the community – whether it is the State or individuals – must take positive measures and possibly even incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. (This is also the essence of any meaningful right to equality.)

We have now considered how both the rule of law and the right to religious freedom are understood in South African law as well as when the State may (or may not) limit religious freedom, and how conflicts between religious freedom and other rights should be resolved. We will now turn to discussing specific and practical examples of where religious freedom (as a fundamental right) has come under threat and how this could have and/or has, affected the rule of law in South Africa.

Slide 9 – Threats to SAY what we believe:

We have seen that the right to religious freedom in South Africa entails being able “*to declare religious beliefs openly and without fear of hindrance or reprisal*” and to manifest such beliefs through, for example, dissemination and teaching. It is therefore immediately apparent that the rights to freedom of religion and freedom of expression are irrevocably intertwined and mutually supportive of one another. Both are foundational to any healthy democracy.

Once you start attempting to (or worse still, actually succeed) in limiting what people feel they should be able to say freely in public – such as their particular beliefs – you run the very real risk of eroding the legitimacy of the law in citizen’s eyes. If you impair their sense of fairness and justice, you will erode respect for the rule of law. This has the potential to remove a critically important barrier that keeps a citizenry from taking the law and justice into their own hands.

That said, it should be borne in mind that freedom of expression is not an absolute right - the Constitution expressly excludes 1) **propaganda for war**, 2) **incitement of imminent violence** and 3) the **advocacy of hatred** (based on someone’s race, ethnicity, gender or religion) that **constitutes incitement to cause harm** (commonly referred to as hate speech) from protection.

Constitutionally speaking, any other speech is fair game, including offensive or “politically incorrect” speech. The Constitutional Court has held that the right to freedom of expression must be interpreted broadly, and even applies to ideas that “*offend, shock or disturb*”. As the South African Supreme Court of Appeal has said, quoting Mokokoma Mokhonoana, “*Freedom of speech gives us the right to offend others, whereas freedom of thought gives them the choice as to whether or not to be offended.*”

South Africa’s current laws:

This brings me to the Equality Act I mentioned earlier. The Equality Act is the premier piece of legislation dedicated to giving effect to the constitutional right to equality enshrined in section 9 of the Bill of Rights.

The Equality Act prohibits *hate speech* – and significantly the Act’s definition of hate speech has recently been re-written by the Constitutional Court. The reason for this was that the original definition in the Equality Act was much wider than the Constitution’s definition of hate speech, and had effectively **even prohibited speech that could be subjectively (i.e. not necessarily objectively) hurtful**. It is both important and alarming to note that the Equality

Act's definition of hate speech, which is a central definition in that Act, was in force for no less than 21 years before it was challenged and changed.

The Equality Act does not **criminalise** hate speech. Rather than criminal sanctions, it prescribes civil remedies, such as having to render a public apology, paying compensation to a human rights related organisation to make good for the wrong, etc.

Slide 10 – Chetty case

We will now turn to the recent case of Simeon Chetty to illustrate how the Act's wide definition of hate speech – the one that prohibited speech that could be subjectively hurtful – caused problems by setting up a conflict between the wide definition and the right to religious freedom.

Chetty was taken to the Equality Court by (amongst others) the South African Hindu Dharma Sabha, for publicly sharing how his family became Christian after his brother was raised from the dead at an open-air church service. The Sabha had asked the Chatsworth Equality Court to rule that what Chetty said (i.e. his testimony) amounted to "hate speech" in terms of the Equality Act. The Sabha asked the Court, amongst other things, to order Chetty to pay R1 million (which was later reduced to R200,000) in damages.

FOR SA was admitted as a friend of the court in this case, specifically for the purpose of making submissions on the importance of protecting the rights to religious freedom and freedom of expression. We are grateful to report that the case was settled by mutual agreement between the parties with the help of *FOR SA*.

The agreement between the parties was a good outcome – not only for Chetty, but for people of all faiths. It confirmed that, in terms of the Constitution, people have the right to publicly share their religious beliefs without fear of sanction, even if others do not like it, do not agree with it, or find it offensive. Religious tolerance is a two-way street. If we expect others to be tolerant of our (sometimes contrary, or even offensive) views, we ourselves have to be equally tolerant of their views. Thus, the agreement in the Chetty case was a victory for freedom of religion and speech, and confirmed the intention and spirit of the Constitution, whereby all South Africans should be able to live alongside each other in a diverse and pluralistic society.

The Chetty case illustrates the very real detrimental impact that badly drafted speech laws have on the lives of real people. Once people become liable for civil (or criminal sanctions) for something as simple and ordinary as sharing how they came to believe in something, the very foundation of the rule of law is

quickly eroded (namely citizens' sense of the inherent justice and fairness of their legal system) and the strength of our democracy undermined.

Slide 11 – Hate Speech Bill

This brings me to the **Prevention and Combatting of Hate Crimes and Hate Speech Bill**, which is currently before Parliament – and also one of the most controversial pieces of legislation since the advent of South Africa's democratic dispensation.

The Bill proposes criminalising hate speech – which the Bill (in simple language) defines as an expression that is (1) incites *harm*, and (2) promotes or propagates *hatred* against (3) a *group* of specifically listed people in the Bill. For this crime, the Bill is proposing a maximum sentence of eight (8) years' imprisonment.

One of the primary concerns with the current version of the Bill, is its definition of hate speech. As said, in simple terms, the Bill defines hate speech as expression that is (1) harmful or incites harm, and (2) promotes or propagates hatred against (3) a group of people (specifically listed in the Bill).

Consequently, much depends on how the Bill defines (1) harm and (2) hatred and (3) on which groups are listed.

This is exactly where the pawpaw hits the fan: the Bill's current definition of ***harm includes substantial emotional, psychological, physical, social or economic harm/detriment.***

Since this is quite a mouthful, let's break it down:

Turning to the first element – **harm**:

Firstly, a major problem is the **types** of harm which will make you guilty of this crime. It includes vague terms such as emotional harm – i.e. hurt feelings – and undefined terms such as social harm. Emotional harm is not psychological harm, which, objectively would require a medical practitioner to evaluate you and give a diagnosis that your words caused this person to suffer from this psychological condition. Emotional harm is feelings. So, we are talking about finding someone guilty of a crime and sending them to jail for up to eight years for words that theoretically could have substantially hurt someone's feelings.

Another very loose category being criminalised is "social harm", but the Department of Justice has not yet come up with a definition for this to include in the Bill. Essentially, it boils down to something that undermines the social cohesion of South African society. However, we are talking about iffy, hard to define, impossible to prove (hence why no direct causal link is required)

concepts of harm being included in a criminal law which can send people to prison for many years.

Secondly, the degree of harm that is being proposed is also problematic. It is not gross, which one might expect, given the heavy jail sentence being proposed. Eight years in prison for something you said is a harsh sentence.

Thirdly, of great concern is that the Bill does not require that the State prove your words caused any actual harm in reality, contrary to the UN's Rabat Plan of Action's recommendations. Thus the entire question becomes a theoretical one: "*Could your words possibly have resulted in substantial e.g. emotional harm?*"

Turning to the second element – **hatred**:

the Bill fails to define what to promotes or propagate *hatred* actually means – perhaps because hatred is a notoriously difficult concept to define. Nevertheless, Parliament is proposing making it ***a crime to say / display / share anything that could potentially result in substantially hurt feelings*** that promotes or propagates some undefined hatred against a group of people specifically listed in the Bill.

This brings us to third element of the - ***group of people*** who are specifically listed in the Bill: These include some highly controversial ones, such as sexual orientation, gender identity or expression and sex characteristics, all of which are also undefined in the Bill.

As should be clear, this wide definition of hate speech, with penal sanctions, is setting itself up for a conflict with a variety of expressions of thoughts, beliefs and opinions, not just religious ones. This is especially concerning given that the Bill also criminalises the distribution and display of "hate speech".

After much work and lobbying by the religious community in South Africa, the Bill includes narrow grounds for religious exemption, along with providing exemption for artists, academics and journalists. However, because of how these exemptions are drafted, they nullify themselves as they say something along the lines of: "A person who in good faith shares a religious belief is not guilty of the crime of hate speech unless what he says advocates hatred (which our Constitutional Court has said can be understood to be the same as promoting or propagating hatred) that constitutes incitement to cause harm against a group of people specifically listed in the Bill. This also happens to be the three elements we've just discussed for the crime of hate speech.

Thus, all the exemption clauses really say is that you are not guilty of hate speech unless what you say is hate speech as defined by the Bill.

Our main concerns with the Bill, which we have told Parliament and which we have tried to mobilise the public to tell Parliament, is that it is **unconstitutional**. It is much wider than the Constitution, and therefore effectively criminalises speech that the Constitution sees as free speech and which should be protected by the Government, not prosecuted by it.

Parliament's first house, the National Assembly, assigned its Justice Committee to consider the Bill, which they voted on and passed at the end of last month. It will now proceed to the second house, the National Council of Provinces (NCOP) for consideration – when there will again be an opportunity for public comment. Thereafter it will proceed to the President for assent, after which it becomes law.

Slide 12 & 13 - Threats to live out what you believe in public:

Another very real and potential threat to religious freedom is the PEPUDA Amendment Bill which proposes to amend the Equality Act. Importantly, the Equality Act is second only to the Constitution itself, i.e. after the Constitution, it is the **primary piece of legislation in South Africa**, because all other legislation must comply with it.

While *FOR SA* fully supports government's efforts to promote equality and to prevent unfair discrimination, our legal analysis of the Amendment Bill made it clear that if adopted in its current version, it would have devastating and negative consequences for all people and organisations of faith – and ironically, undermine equality and encourage unfair discrimination.

When this Bill was first published for public comment by the Department of Justice, *FOR SA* mobilised to oppose it because, in its current form, it will effectively amount to State regulation of religion, which will have the result of violating various rights and freedoms guaranteed by our Constitution and international freedom of religion and belief law, and also undercut the well-established doctrine of entanglement in our law (which prohibits the state from becoming involved in doctrinal matters).

The other threat is that people and institutions of faith could be dragged before Court simply because somebody else does not like, does not agree with, or is offended by that person's or institution's religious convictions and beliefs – and the person or institution will effectively have no defence in law. This is unacceptable and a real threat to our constitutional democracy.

FOR SA specifically **recommended that the Department of Justice include a clause to prohibit unfair discrimination on religious grounds**, and that the Act's test for "fair" discrimination be amended to consider whether the exercise of any human right was germane to the discrimination. The problem with the section 14 test (the purpose of which is to establish whether the discrimination was fair or unfair), is that the test is biased – it focuses almost exclusively on the complainant (including the complainant's position in society, whether he suffers from patterns of disadvantage, and whether he is part of a group that suffers from such patterns of disadvantage). It fails, however, to explicitly take the respondent's position into account at all – i.e. whether and to what extent, for example, the respondent's fundamental rights (for e.g. to freely share and live out his/her religious convictions and beliefs) were relevant to the discrimination. As such, it effectively creates a hierarchy of rights, with the right to equality trumping other fundamental rights. This fails to recognise that may fundamental rights – including the right to freedom of religion – have an inseparable equality right component.

FOR SA estimates that well over 100,000 submissions were received by the Department of Justice. The vast majority of these requested the Bill to be scrapped in its entirety. Thanks to this exceptional level of public support for religious freedom rights.

FOR SA has requested (and been granted) two opportunities to meet with the Deputy Minister of Justice, the Honourable John Jeffery – one in July 2021 and recently in February 2023. He has stated that **"it is not the intention of government to regulate or to interfere with religious institutions, what they believe and how they put it forward"**, and that this was something that the Department could "look at making clearer" in the Bill. He also informed us that this Bill will not be reintroduced to Parliament until after the 2024 election.

Slide 14 - Practical Wisdom

Against this background, it may be wise for those who may be presenting a viewpoint based upon their religious or faith convictions to – at the outset – specifically and respectfully affirm the equal value, worth and dignity of LGBT persons as human beings and their constitutional right to hold to their own convictions, beliefs and opinions in this regard. (This is not the same as endorsing their beliefs or choices, which no Court can, or should, force a person or organisation to do).

Specifically, it may be wise to draw a clear distinction between the secular, legal position, and the religious position of the person or organisation making the statements. One of the reasons why Qwelane's article was found to be hate speech, was because it advocated a denial of the LGBT community's

established legal rights, for example, to legally get married. Thus, when presenting a religious perspective on LGBT matters, it may be wise to stick to the religious text as closely as possible.

You can also further shelter yourself when sharing your religious beliefs, by saying that your opinion is the result of your personal religious beliefs, but that leaves it open for people to determine their own opinions. For example: *“this is my personal conviction based on how I have read and interpreted the Bible when it comes to this topic, but you go read and see for yourself. Make up your own mind and form your own opinion.”*

Slide 15 – Practical tips

- PRAY for wisdom, the right words.
- Don't just drop bombs to be provocative, controversial. The more controversial the issue, the greater the risk.
- Be as informed as possible about all sides of the issue; understand why people are on different sides of the controversy.
- Be careful of politically loaded speech / unhelpful stereotypes.

Slide 16 – Practical tips

- Stick to the Bible / Statement of Faith. (Hide behind the Scriptures).
- It is loving to speak the truth, but only if you speak the truth lovingly.
- A church should be the safest place for a homosexual / transgender person. STAND UP for their dignity, STAND AGAINST violence being perpetrated against them.
- Make sure to record.

Writing and/or speaking in this way will assist with sheltering what you express behind these exemption clauses for protection, **but they are by no means bullet proof.**

MOST IMPORTANTLY, if you get into trouble – know that there is help available! FOR SA is only a phone call or e-mail away.

Slide 17 – What's next?

Slide 18 - United Nations CSE Hijack

In October 2022, Governments from South Africa and nine other African nations – Benin, Cameroon, Eswatini, Gabon, Gambia, Lesotho, Malawi, Sierra Leone and Uganda – ratified an agreement to give the United Nations the authority to overhaul and roll out its very liberal, secular CSE content into public schools.

Slide 19 – SOGI draft guidelines for public schools

Sexual Orientation and Gender Identity (SOGI) guidelines have been formulated by the South African Department of Basic Education, with a plan to roll them out into the public school system in March 2023

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- There is also DBE's Discrimination Protocol;
- and
- DBE's ECE Toolkit;

There is a sustained global agenda to influence the perception and understanding of sex and sexuality to drive a wedge between them and the values of their parents. This amounts to the Government pushing a specific (and arguably harmful) ideology using the public school system, which is unlawful and needs to be vigorously resisted before it takes effect.

FOR SA is objecting to the over-riding of parental rights since these Guidelines are squarely based upon transgender and LGBTIQ+ ideology and interfere with the rights of parents to pass on their values to their own children.

Slide 20 – Any questions?

Slide 21 – Support FOR SA financially

Should you be interested in religious freedom, we encourage you to follow FOR SA (Freedom of Religion SA) on Facebook, and sign up for our newsletter on our website at www.forsa.org.za.

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