THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 163/2020

In the matter between:

SOLIDARITY	**FIRST APPELLANT**
BEREAVED FAMILIES AS PER ANNEXURE A	**SECOND APPELLANT**

and

BLACK FIRST LAND FIRST	**FIRST RESPONDENT**
LINDSAY MAASDORP	**SECOND RESPONDENT**
ZWELAKHE DUBASI	**THIRD RESPONDENT**

Neutral citation: Solidarity *and Another v Black First Land First and Others* (163/2020) [2021] ZASCA 26 (24 March 2021)

Coram: PONNAN, MOLEMELA and NICHOLLS JJA and GOOSEN and UNTERHALTER AJJA

Heard: 17 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 24 March 2021.

Summary: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – whether the order granted by the Equality Court declaring the proceedings a nullity is competent.

ORDER

On appeal from: Equality Court, Gauteng Division of the High Court, Johannesburg (Makgoathleng J sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court a quo is set aside.

3 The matter is remitted to the Equality Court to be finalised, either by the presiding judge or in the event that the presiding judge is, for whatever reason, unable to finalise the matter, any other judge as the Judge President may direct.

JUDGMENT

Nicholls JA (Ponnan and Molemela JJA and Goosen and Unterhalter AJJA concurring):

[1] On the morning of 1 February 2019 a walkway bridge collapsed at Hoërskool Driehoek, in Vanderbijlpark, tragically causing the death of four learners, aged between 13 and 17 years old. Twenty other learners were injured. All were white.

[2] On the same day, and once the incident became public, a certain Siyanda Gumede posted the following on his facebook page: *'Don't have heart to feel pain for white kids. Minus 3 future problems'*. Black First Land First (BLF), a registered political party[1] at the time, and the first respondent, commented on this post. Lindsay Maasdorp, the

[1] BLF was deregistered as a political party in November 2019 and re-registered a year later on 16 November 2020.

second respondent and the national spokesperson of the BLF, immediately responded to Gumede's statement on the official BLF twitter account as follows: '*Siyanda Gumede is correct! God is responding, why should we frown on the ancestors petitions to punish the land thieves including their offspring'*. Zwelakhe Dubasi was the deputy secretary general of the BLF and is the third respondent. He also commented on Siyanda Gumede's post on the official BLF twitter account stating: *'Ancestors are with BLF, as we fight they fight too. They shake the land and white buildings built on stolen land collapse. Keep fighting Zinyanya, you are fighting a good fight. Camugu!'*.

[3] These comments caused widespread outrage on various media platforms. When approached for clarification by The Citizen newspaper, Mr Maasdorp responded that he was 'not certain' whether the victims were white and he would mourn them if they were black. He added: '*If our God has finally intervened and our ancestors have petitioned and seen that these white land thieves have now died then I definitely celebrate it. I celebrate the death of our enemies, their children, their cats and dogs. That is our position*'.

[4] This led to Solidarity, a registered trade union of predominantly white members, launching an application in terms of s 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). Solidarity claimed to act in its own interests, on behalf of bereaved family members and in the public interest. It sought an order declaring that the comments constituted hate speech, as defined by ss 7, 10 and 11 of the Equality Act and were an affront to human dignity and white people in general. Further ancillary relief was sought, including the payment of damages to the families of the children.

[5] The application was opposed by BLF. The president of the BLF, Mr Andile Mngxitama, deposed to the answering affidavit and represented the party in person when the matter was heard on 22 August 2019.

[6] After the hearing, the parties were informed that judgment would be handed down on 3 December 2019. The events that took place on that day, though not confirmed on affidavit, were, as recounted by counsel for the appellants and confirmed by Mr Mngxitama, as follows. Mokgoathleng J requested the parties to address him on the effect of this Court's judgment in *Qwelane v SAHRC*,[2] which had been delivered on 29 November 2019 and which held that s 10 of the Equality Act was unconstitutional. It should be noted that this matter was subsequently appealed to the Constitutional Court and its judgment is awaited.

[7] After hearing oral submissions, the judge adjourned the matter to consider the submissions. What occurred thereafter we simply do not know. What we do know is that across the front page of what appears to have been the written 'judgment' prepared by the judge, he had written by hand, '[t]he judgment is a nullity in view of the SCA judgment of Jonathan Dubula Qwelane case No 686/2108'. The order that was subsequently issued by the registrar recorded: 'The proceedings in case EQ2/2019 are declared a nullity'.

[8] Whether the court a quo considered the entire proceedings or merely the judgment to be a nullity is, on the papers before us, unclear.

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[2] *Qwelane v South African Human Rights Commission and Another* [2019] ZASCA 167; 2020 (2) SA 124 (SCA).

However, what is apparent is that the judge had prepared a written 'judgment' in the matter before the *Qwelane* judgment was delivered by this court. In it the judge found in favour of the applicants. The offending comments were declared to amount to hate speech in terms of s 10(1) of the Equality Act. The second and third respondents were interdicted from repeating the comments and were ordered to publish an apology within 30 days, directed to all South Africans, and to be disseminated by the South African Human Rights Commission, in which they acknowledged that their comments were hate speech and that they were wrong to publish them. In addition, the second and third respondents were ordered, jointly and severally, to pay R50 000 damages, arising out of emotional and psychological pain, and humiliation to each of the families of the deceased within 30 days.

[9] The *Qwelane* judgment dealt with a newspaper article written by the late journalist Jonathan Dubula Qwelane in which he criticised homosexual relationships and gay marriages. After a detailed exposition of the interplay between hate speech and s 16 of the Constitution, which guarantees freedom of speech, this Court held that s 10 of the Equality Act unnecessarily limited freedom of speech and was therefore unconstitutional.

[10] One of the primary functions of a court is to bring to finality the dispute with which it is seized. It does so by making an order that is clear, exacts compliance, and is capable of being enforced in the event of non-compliance.[3] The court order in this matter did not achieve finality nor was it capable of being enforced. As it was put by Nugent JA in *Makhanya v University of Zululand*:

[3] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 73-74.

'The power of a court to entertain a claim derives from the power that all organised states assume to themselves to bring to an end disputes amongst their inhabitants that are capable of being resolved by resort to law. Disputes of that kind are brought to an end either by upholding a claim that is brought before it by a claimant or by dismissing the claim. By so doing the order either permits or denies to the claimant the right to call into play the apparatus of the state to enforce the claim.'[4]

[11] The high court simply failed to discharge its primary function. The order that it issued declared the proceedings a nullity, and hence declined to determine the dispute before the court. To like effect, the court, by rendering its own 'judgment' a nullity, left the parties without a binding decision. A court does not enjoy the power not to decide a case that is properly brought before it. Nor may a court declare its own proceedings to be a nullity.

[12] A court may lack jurisdiction or suffer from some other limitation of its powers. But a court, pronouncing on these matters nevertheless renders a decision that is dispositive of the case before it. But that is not what happened before the high court in this matter. The decision of this Court in *Qwelane* plainly had relevance for the decision that the high court was required to make. The high court should have taken time to consider *Qwelane*, and the parties' submissions, and then rendered its judgment so as to decide the case. More incautiously, the high court might have handed down the written judgment that it had prepared, without regard to *Qwelane*. In either event, an order would have been issued that determined the dispute before the court.

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[4] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) para 22.

[13] The high court took neither course of action. Instead, it pronounced its own 'judgment' to be a nullity or indeed the proceedings to be a nullity. It simply declined to resolve a dispute that was properly before it and left the parties with no decision. That state of affairs cannot be left undisturbed by this Court.

[14] Once that is so, the matter must be remitted to the court a quo to enable the dispute that was properly before it, to be finally resolved. The proceedings had reached an advanced stage. The judge had been addressed in argument by both parties, whereafter judgment had been reserved. All that remained was for the judge to deliver his judgment. That is where the proceedings must recommence. On that there seemed to be agreement before us. There was some concern that the presiding judge may have since retired. In that event, the parties appeared to accept that the matter could recommence before another judge, as directed by the Judge President of the division. Should another judge come into the matter, he or she would obviously be free to issue such directives as to the further conduct of the matter as appears meet, including but not limited to requiring further argument in the matter.

[15] As regards costs, it is not the fault of either party that they had to appear before this Court. The attorney representing the respondents withdrew shortly before the hearing of the matter. In those circumstances, Mr Mngxitama appeared before us, for the purposes, so he indicated, of applying for the appeal to be adjourned. Given that counsel for the appellants accepted in debate with him that: (a) the order could not stand; (b) there was no substantive order on the merits and that we therefore could not enter into the merits of the appeal; and (c) the matter consequently had to be remitted to the court below, Mr Mngxitama did

not persist in that application. It was thus not necessary to consider whether he could indeed represent the appellants in the appeal.[5]

[16] The appeal is with the leave of the court below. No reasons were given for the order. What prompted the grant of leave and in respect of what order, since there did not appear to be a judgment on the substantive merits, we simply do not know. However, both parties were compelled to appear to correct an obviously incompetent order. It thus seems unfair to mulct either party with costs. Consequently, there shall be no order as to costs.

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

1 The appeal is upheld.

2 The order of the court a quo is set aside.

3 The matter is remitted to the Equality Court to be finalised, either by the presiding judge or in the event that the presiding judge is, for whatever reason, unable to finalise the matter, any other judge as the Judge President may direct.

[5] *Manong and Associates (Pty) Ltd v Minister of Public Works and Another* [2009] ZASCA 110; 2010 (2) SA 167 (SCA).

C NICHOLLS

JUDGE OF APPEAL

APPEARANCES

For Appellants:	D J Groenwald
	Instructed by:
	Hunter Spies Inc., Centurion.
	Rossouw & Conradie Inc., Bloemfontein.
For First Respondent:	A Mngxitama
	Instructed by:
	Black First Land First, Johannesburg.