



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 771/2020

In the matter between:

THE PREMIER OF THE WESTERN CAPE PROVINCE APPELLANT

and

THE PUBLIC PROTECTOR FIRST RESPONDENT
THE SPEAKER OF THE WESTERN
PROVINCIAL LEGISLATURE SECOND RESPONDENT

Neutral Citation: *Premier of the Western Cape Province v The Public Protector & Another* (771/2020) [2022] ZASCA 16 (7 February 2022)

Coram: VAN DER MERWE, MOLEMELA, SCHIPPERS,
NICHOLLS and MABINDLA-BOQWANA JJA

Heard: 22 November 2021

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Summary: Administrative law – Review of the findings and remedial action of the Public Protector – findings and decision of public protector materially

influenced by errors of law – findings and remedial action reviewed and set aside.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Habedi AJ sitting as court of first instance):

1. The appeal is upheld with costs, including the costs occasioned by the employment of two counsel.
2. The order granted by the high court is set aside and substituted as follows:
 - 1.1 'The findings and the remedial action in paragraphs 5.2.22, 5.2.27, 5.2.37, 6.2, 7 and 8 of the Public Protector's Report No. 5 of 2018/19 entitled "Report on an investigation into allegations of breach of the provisions of the Executive Ethics Code by the Premier of Western Cape Provincial Government, Honourable Helen Zille" are reviewed and set aside.
 - 1.2 The first respondent is ordered to pay the costs of this application, including the costs of two counsel.'

JUDGMENT

Molemela JA (Van der Merwe, Schippers, Nicholls, and Mabindla-Boqwana JJA concurring):

Introduction

[1] Words matter. This case concerns certain tweets made by the appellant, Ms Helen Zille (Ms Zille), about the impact of colonialism on South Africa. The tweets in question were made on 15 March 2017, when Ms Zille was still the Premier of the Western Cape Provincial Government.¹ A complaint² about the

¹ Ms Zille held the office of the Premier until 22 May 2010.

² In terms of s 4(1)(b) of the Executive Members' Ethics Act 82 of 1998 (the Act), '[t]he Public Protector must investigate, in accordance with section 3, an alleged breach of the code of ethics on receipt of a complaint by-

tweets in question resulted in the respondent (the Public Protector) conducting an investigation³ and subsequently compiling and submitting a report⁴ in terms of which certain remedial action⁵ was recommended. Ms Zille's discontent with the finding that she had breached various prescripts and the consequent remedial action gave rise to the litigation that culminated in this appeal. The principal issue is whether Ms Zille's tweets violated the Executive Ethics Code⁶ (Ethics Code), as contended for by the Public Protector, or whether they enjoyed the protection of free speech enshrined in s 16(1) of the Constitution, as contended for by Ms Zille.

[2] Before setting out the factual matrix that gave rise to this appeal, I deem it appropriate to interpose to mention that colonialism is widely considered to be abhorrent. It is therefore unsurprising that, the Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum and Another*⁷ lamented the divisive and harmful effects of colonialism and apartheid and how they 'continue to plague us and retard our progress as a nation more than two decades into our hard-earned constitutional democracy'.⁸ In a minority judgment, it was observed that 'the wounds of colonialism, racism and apartheid run deep.... And insensitivity to the continuing wounds by many of us who were not subject

(a) the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; and

(b) The Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.'

Notably, s 136 of the Constitution provides that members of the Executive Council of a province must act in accordance with a code of practice prescribed by national legislation.

³ In terms of s 3(1) of the Act, '[t]he Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in terms of section 4'.

⁴ In terms of s 3(2) of the Act, the Public Protector must submit a report on the alleged breach of the ethics code of ethics within 30 days of receipt of the complaint: (a) to the President if the complaint is against a Cabinet member, Premier or Deputy Minister; (b) to the Premier of the province concerned if the complaint was against an MEC.

⁵ The relevant part of the remedial action reads:

'The Speaker of the Western Cape Provincial Legislature must, within 30 days from the date of the report, table it before the Western Cape Provincial Legislature for it to take appropriate action to hold the Premier accountable as contemplated in sections 114(2), 133(2) & (3)(a) and 136(1) & (2)(b) of the Constitution.'

⁶ Section 136 of the Constitution provides that members of the Executive Council of a province must act in accordance with a code of practice prescribed by national legislation. The Executive Members' Ethics Act 82 of 1998 is the national legislation envisaged in s 136.

⁷ *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016(6) SA 279 (CC).

⁸ Ibid. These remarks appear at para 4 of the majority judgment penned by Mogoeng CJ.

to these indignities can only exacerbate the fraughtness.⁹ Although these remarks were mentioned in passing and not in the context of interpreting s 16(2)(b), the sentiments expressed in that judgment loudly attest to the deep-seated hurt that was caused by colonialism.

Background facts

[3] It appears that Ms Zille made the colonialism tweets at the end of an official trip to a summit in Singapore in March 2017. Ms Zille shared her reflections on Singapore in a tweet which read as follows:

‘Much to learn from Singapore, colonised for as long as SA, and under brutal occupation in WW2. Can we apply the lessons in our democracy?’

‘Singapore had no natural resources and 50 years ago was poorer than most African countries. Now they soar. What are the lessons?’

‘I think Singapore lessons are: 1) Meritocracy; 2) multiculturalism; 3) work ethic; 4) open to globalism; 4) English. 5) Future orientation.’

‘Other reasons for Singapore’s success: Parents take responsibility for children, and build on valuable aspects of colonial heritage.’

[4] This tweet evidently elicited various responses which were posted on Ms Zille’s Twitter feed, such as:

‘South Africa would be better if all your people left and we drive forward Africa instead of embracing colonialism heritage.’

‘There was nothing valuable in the colonization of South Africa. . . NOTHING!’

Ms Zille responded to these comments with a series of further tweets, which appear to have prompted the complaint to the Public Protector:

‘For those claiming legacy of colonialism was ONLY negative, think of our independent judiciary, transport infrastructure, piped water etc’

‘Would we have had a transition into specialized healthcare and medication without colonial influence? Just be honest, please.’

‘Getting onto on aeroplane now and won’t get onto the Wi-Fi so that I can cut off those who think EVERY aspect of colonial legacy was bad.’

⁹ Ibid. This observation was made in para 79 of the minority judgment of Froneman J and Cameron J.

[5] Following the aforesaid series of tweets, an intense debate ensued on Twitter concerning Ms Zille's tweets. A wide variety of views were expressed including disagreement, anger and offence. The following day, on 16 March 2017 at 12h59 (while the Twitter conversation was ongoing), Ms Zille tweeted: 'I apologise unreservedly for a tweet that may have come across as a defence of colonialism. It was not.'

On 28 March 2017, in an address to the Western Cape Provincial Legislature, Ms Zille said that 'if there was anyone who genuinely thought I was praising, defending or justifying colonialism, I apologise unreservedly and stressed that this was not so. I do so again'.

[6] On 13 June 2017, Ms Zille published a further apology at a Democratic Alliance press conference. The text of the apology was published on the website of the Democratic Alliance and is couched as follows:

'After a period of debate and reflection, I recognise the offence caused by my tweet on the 16th March 2017 with regards to the legacy of colonialism. I therefore apologize unreservedly to the South African public who were offended by this tweet and my subsequent explanation of it.

In South Africa colonialism and apartheid subjugated and oppressed the majority and benefited a minority on the basis of race. This is indeed indefensible and I do not support, justify, praise or promote it in any way.

I realize the wounds of history that my tweet and subsequent defense of it has opened up. In particular I recognize that my actions were insensitive to South Africans who suffered under colonial oppression.

For this, I am genuinely sorry.

During this period, I have made public utterances that have had the effect of undermining the leader of the Democratic Alliance and the project that he is leading. I greatly regret this too. Mmusi Maimane is the democratically elected leader of the DA and we must all get behind his leadership.

My intention now is to do everything I can to restore public trust that has been eroded. Now, more than ever, we need to unite behind a shared vision of one nation with one future.'

[7] The Public Protector's report mentioned that she had conducted an investigation as a result of a complaint which was lodged with her office by Mr Magaxa, a member of the African National Congress party and a member of

the Western Cape Provincial Legislature, on 7 July 2017. A copy of the complaint was not part of the appeal record. The gist of the complaint, as gleaned from the Public Protector's report, was that Ms Zille's tweets had violated s 2.1(c) and (d) and 2.3(c) of the Ethics Code.

[8] In her report, the Public Protector identified two issues for investigation: whether Ms Zille had indeed made the tweets on colonialism in the media, and whether they contravened the provisions of the Ethics Code. The specific provisions of the Ethics Code that received the attention of the Public Protector were clause 2.1(d), which enjoins Members of the Executive to 'act in all respects in a manner that is consistent with the integrity of their office or the government' and clause 2.3(c), which provides that Members of the Executive may not 'act in a way that is inconsistent with their position'. The stipulation of clause 2.2 of the Ethics Code is also worth noting. It provides that in deciding whether Members of the Executive complied with the provisions of clause 2.1, the President (or the Premier, as the case may be), 'must take into account the promotion of an open, democratic and accountable government'. This clause thus echoes the foundational values of our democratic state as set out in s 1 of the Constitution.

[9] There was no dispute about the first question, as Ms Zille admitted that she made the tweets. As regards the second question, Ms Zille asserted that her tweets were made in good faith with no intention to cause offence and were protected under the right to freedom of expression. She pointed out that she intended to raise a legitimate and important issue for public engagement. She asserted that transparent engagements were the hallmarks of good governance, which she considered to be consistent with the integrity of her office. It was on that basis that Ms Zille contended that her tweets did not contravene the Ethics Code.

[10] Having finalised her investigation, the Public Protector concluded as follows:

‘Regarding whether the alleged tweets on colonialism made by the [Premier of] the Western Cape Provincial Government, Honourable Helen Zille, violated the provisions of the Executive Ethics Code:

‘6.2.1 The allegation that the alleged tweets on colonialism made by the Premier violated the provisions of the [Executive Ethics] Code is substantiated.

6.2.2 It cannot be said that the Premier’s tweet sought to show concern and respect for those who were victims of apartheid and colonialism. The Premier “subsequently apologized for any harm perceived by any alternative interpretation” of her tweet. Her apology can be interpreted as recognition of the negative impact the tweet had on the dignity of a section of the South African population.

6.2.3 Although the tweet could have been made in the context of the Premier’s right to freedom of expression as provided in section 16 of the Constitution and in good faith, it was however, offensive and insensitive to a section of the South African population which regarded it as re-opening a lot of pain and suffering to the victims of apartheid and colonialism, particularly considering the position of influence she holds.

6.2.4 Section 16 of the Constitution was therefore not created to allow anyone, particularly those in positions of influence, to make such statements. Subsection 16(2)(b) was created to curb such statements.

6.2.5 Taking into account the negative responses to the Premier’s tweet, the statements were not consistent with the integrity of her office and position. The negative responses to the tweet imply that divisions of the past are still not healed.

6.2.6 The conduct of the Premier in the circumstances is in violation of sections 2.1(d) [and] s 2.3(c) of the [Ethics] Code and the Preamble of sections 10, 16, 136(1) and s [16](2)(b) of the Constitution.

6.2.7 The conduct of the Premier also constitutes improper conduct in terms of s 182(1)(a) of the Constitution.’

[11] In the course of determining the second question, the Public Protector also made the following findings of law or fact that are sought to be reviewed and set aside.

‘11.1 Such statements made by Professor Gilley and the Premier are likely to cause racial tensions, divisions and violence in South Africa. Section 16 of the Constitution was therefore not created to allow anyone, particularly those in positions of influence, to make such statements. Subsection 16(2)(b) was created to curb such statements.

11.2 Similarly, *in principle the Premier's tweet was protected by section 16 of the Constitution*, but its impact in South Africa where racial perceptions are still prevalent should not be overlooked. Subsection 16(2)(b) of the Constitution prohibits statements which could provoke public reaction, capable of stirring up racial violence. The reaction of the South African public towards the Premier's tweet is indicative of the likelihood of such tweets stirring up violence based on race and therefore in contravention of subsection 16(2)(b) of the Constitution.

11.3 Based on the evidence and legal prescripts obtained, analysed and evaluated, it can be concluded that the Premier's conduct did not comply with the provisions of the Constitution and Code.' (Own emphasis.)

[12] Ms Zille approached the Gauteng Division of the High Court, Pretoria (the high court) seeking to review and set aside the findings in the Public Protector's report. The review was brought under the principle of legality on the grounds of material mistake of law and/or fact in the application of the right to freedom of expression under s 16 of the Constitution; material mistake of law and/or fact in the application of the preamble and the right to dignity under s 10 of the Constitution; irrationality, specifically in that the findings were not rationally connected to the information before the Public Protector or the reasons given by the Public Protector for them; material mistakes of law in the application of s 136 of the Constitution and the Ethics Code; and as an unjustifiable limitation to the right of freedom of expression protected under s 16 of the Constitution. Ms Zille also challenged the remedial action taken by the Public Protector which directed the Speaker 'to take appropriate action to hold the Premier accountable', on the basis that the remedial action could no longer practically be implemented.

[13] The high court duly noted that the Public Protector had, in her report, acknowledged that Ms Zille was no longer the premier of the Western Cape and that the Western Cape Provincial Government could therefore no longer sanction her. It held that the remedial action recommended by the Public Protector fell away on account of Ms Zille no longer holding the position of premier. It considered the issues raised in the application to have become moot and pointed out that judicial review does not lie against moot matters. Despite

finding that a reasoned judgment would only be of academic significance with no practical effect, the court delved into the arguments that were raised.

[14] Distinguishing between an appeal and a review, the high court emphasised that since the application under consideration was one for a review, any mistakes of law and fact in the Public Protector's report did not necessarily warrant the setting aside of her decision. On the question whether the Public Protector wrongly held that s 16(2)(b) prohibits free speech, the high court concluded that even if the Public Protector's finding in relation to s 16(2)(b) was an error of law, it was nevertheless not reviewable under the principle of legality. It stated as follows:

'This is an argument against the public protector's conclusion, not an argument against her reasoning for the conclusion. To contravene the provisions of an Act of Parliament is to act contrary to / or not in accordance with those provisions. I do not see this is an unreasonable conclusion. To then argue that the findings of the Public Protector that the Premier contravened the provisions of an Act of Parliament is vulnerable to judicial review, is in fact arguing an appeal.'

[15] On the basis of the reasoning set out in the preceding paragraph, the high court declined to review the Public Protector's decision. Aggrieved by the high court's decision, Ms Zille sought and was granted leave to appeal to this Court. The Public Protector did not oppose the appeal. A letter from her attorneys informed this Court that she would abide this Court's decision. The letter also asserted that every party be ordered to pay its own costs. No heads of argument were submitted on behalf of the Public Protector and only Ms Zille's counsel made oral submissions in the appeal.

[16] Before us, it was contended that the Public Protector failed to apply the basic principles of interpretation in considering the tweets and fundamentally misconstrued the scope and application of the right to freedom of expression envisaged in s 16 of the Constitution. It was submitted that the report sets a dangerous precedent of limiting the right to freedom of expression, and political speech in particular. It is vital to democracy that all persons - and especially those who are elected to hold high public office - should not be deterred from

participating in open debate on issues of public interest and importance, even if their views may be considered to be controversial or offensive by some, so it was contended. It was argued that the Public Protector's findings would exert a chilling effect on the right to freedom of expression. It was submitted that findings which promote self-censorship by public office-bearers ought not to be countenanced in a constitutional democracy. I consider next the legal provisions which received some consideration from the Public Protector.

The applicable law

[17] Section 10 of the Constitution provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'. The importance of this right was underscored as follows in *S v Makwanyane*:¹⁰

'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. . . . Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.'

In relation to this matter, the question is whether, objectively considered, the tweets were demeaning.

[18] Section 16 of the Constitution provides that:

- '16. (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

¹⁰ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) paras 328-329.

(c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.’

[19] The importance of the fundamental right to speech as enshrined in s 16 of the Constitution has been emphasised in a plethora of judgments. In *Islamic Unity v Broadcasting Complaints Commission (Islamic Unity)*,¹¹ citing *S v Mamabolo (Mamabolo)*,¹² the Constitutional Court stated:

‘Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. 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. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.’

The Constitutional Court also held that:

‘Where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution.’¹³

[20] The same sentiments were recently echoed in the seminal judgment of *Qwelane v South African Human Rights Commission and Another (Qwelane)*,¹⁴ in the context of speech considered to be constituting hate speech. In that matter, the Constitutional Court opined that the right to ‘. . . freedom of expression has a particularly important role . . . given the historical stains of our colonial and apartheid past’. It endorsed the view that, given our country’s intolerant and suppressive past, the right to free speech must be ‘. . . treasured, celebrated, promoted and even restrained with a deeper sense of purpose and appreciation . . . ‘

¹¹ *Islamic Unity v Broadcasting Complaints Commission (Islamic Unity)* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) para 24.

¹² *S v Mamabolo* [2001] ZACC 17; 2001(3) SA 409 (CC) para 37.

¹³ *Islamic Unity*, fn 11 para 32.

¹⁴ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22.

[21] Despite the importance of the right to free speech as set out in the authorities alluded to in the foregoing paragraphs, it is important to recognise that the right to freedom of expression is not as sacrosanct as it may sometimes be perceived; it is not an absolute right. In *Islamic Unity*, the court cautioned that even though s 16(2) merely sets out what does not fall under the protection of s 16(1), it implicitly acknowledges that certain expression does not deserve constitutional protection where it has the potential to impinge adversely on the dignity of others and cause harm.¹⁵ On that score, the court in *Mamabolo* held that ‘freedom of expression is not a pre-eminent freedom ranking above all others’.¹⁶ Similarly, in *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*,¹⁷ the court held:

‘It follows clearly that unless an expressive act is excluded by section 16(2), it is protected. Plainly, the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless.’

It is clear from the discussion in the foregoing paragraphs that when competing rights converge, a court adjudicating the matter must undertake a careful balancing exercise.

[22] *Qwelane* is helpful in illustrating how competing rights enshrined in the Constitution need to be carefully balanced. However, it is necessary to emphasise that the impugned speech that was the subject of the Public Protector’s investigation was considered to fall within the ambit of 16(2)(b) and was not categorised as hate speech, which falls within the ambit of s 16(2)(c).¹⁸ It therefore bears emphasising that since hate speech goes beyond mere offensive expression,¹⁹ not all the principles laid down in *Qwelane* will be equally apposite in this matter.

¹⁵ *Islamic Unity* fn 11 para 30 and 32.

¹⁶ *S v Mamabolo* [2001] ZACC 17; 2001(3) SA 409 (CC) paras 37 and 41. para 41.

¹⁷ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) para 47.

¹⁸ *Islamic Unity* fn 11 para 31.

¹⁹ *Qwelane* fn 14 para 81.

Discussion

[23] It is obvious from the Public Protector's report that in determining whether the Ethics Code had been breached as contended for in the complaint, she considered the Ethics Code through the prism of the Constitution and concluded that, in addition to being in contravention of the Ethics Code, Ms Zille's tweets infringed the widely acclaimed undertakings espoused in the preamble, breached the right to dignity enunciated in s 10 of the Constitution and fell within the scope of speech contemplated in s 16(2)(b) of the Constitution.

[24] There is no gainsaying the crucial role of the preamble²⁰ to our Constitution, which captures the essential principles by which the inhabitants of this country seek to be governed.²¹ The commitment set out in the preamble in pursuit of, inter alia, healing the divisions of the past and establishing a caring²² and just society based on democratic values and fundamental rights should therefore never be understated.²³ Although the preamble is not a self-standing source of rights, it serves as a useful backdrop against which constitutional provisions can be interpreted. In *Mhlungu and Four Others v The State*²⁴ the Constitutional Court described the role played by the preamble in the following terms:

'The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.'

²⁰ The Preamble to the Constitution of South Africa provides, in relevant parts:

'We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.'

²¹ *City of Tshwane Metropolitan Municipality v Afriforum and Another* fn 7 para 5.

²² *Minister of Finance and Other v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) para 23.

²³ *City of Tshwane Metropolitan Municipality v Afriforum and Another* fn 7 paras 5-10, 65 and 126; *Qwelane* fn 14 para 49 and 51.

²⁴ *Mhlungu and Four Others v The State* CCT 25 of 1994 [1995] ZACC 4 para 112.

[25] The difficulty that I have with the finding that Ms Zille's tweets were at variance with the commitment set out in the preamble is that that conclusion seems to have been predicated only on the contents of Ms Zille's apology. It was also on the same basis that the Public Protector concluded that the right to dignity enshrined in s 10 of the Constitution was also infringed. The consideration of an apology as proof of contravention was misplaced, in my view. This kind of reasoning impermissibly conflated the interpretation of the tweets with the recognition of their impact. Expressed differently, the unlawfulness of Ms Zille's tweets could not be established by the after-the-fact assessment of her apology. Clearly, the Public Protector's finding on that aspect was irrational as the conclusion reached was not supported by the reasons furnished. It follows that the findings in relation to the alleged breach of the preamble and s 10 of the Constitution falls to be set aside. It is to the Public Protector's findings in response to Ms Zille's invocation of s 16 as a defence that I now turn.

[26] It is noteworthy that the Public Protector remarked that 'in principle' Ms Zille's tweets were protected by s 16 of the Constitution, but proceeded to, without any basis, to find that they infringed s 16(2)(b) of the Constitution. The interpretation of s 16 determined in the judgment of the Constitutional Court in *Islamic Unity* is instructive.²⁵ The court held that the effect of the structure of s 16 of the Constitution is that all expression, except speech that falls under s 16(2), is constitutionally-protected speech under s 16(1). Thus, speech that falls within one of the categories in s 16(2) is 'unprotected speech'. Furthermore, it was observed that any limitation of protected speech under s 16(1) must be constitutionally justified under s 36²⁶ of the Constitution.

²⁵ *Islamic Unity* fn 11 paras 29-32.

²⁶ Section 36(1) provides:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;

[27] The afore-stated principle was reiterated as follows in *Qwelane*:

‘Turning to how section 16 ought to be interpreted, it is well accepted that Islamic Unity is the lodestar for the interpretation and application of section 16. In that case, this Court outlined the contours of the right enshrined in section 16 of the Constitution. Section 16(1) entrenches the right to freedom of expression and demarcates the scope of the right. Section 16(2) is definitional in that it sketches what does not form part of the scope of the right in section 16(1) and is expressly excluded from constitutional protection.’²⁷

[28] It is of equal significance that in *Tsedu v Lekota (Tsedu)*²⁸, this Court emphasised that when determining whether impugned speech enjoys the protection of s 16(1) of the Constitution, an objective meaning of the impugned statement must be established. It said that:

‘. . . Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal.’

[29] In *Le Roux v Dey (Dey)*,²⁹ the Constitutional Court described these principles of interpretation in the context of defamation claim and held that the applicable test is an objective one. Explaining the application of the objective test, it pointed out that the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. It held that the reasonable reader would understand the statement in its context and not only have regard to what is expressly stated. In *Qwelane* the Constitutional Court endorsed the approach set out in *Dey*, pointing out that ‘an objective standard gives better effect to the spirit, purport and objects of the Bill of Rights.’³⁰ The applicability of the objective standard in relation to the assessment of whether a statement

(c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.’

²⁷ *Qwelane* fn 14 para 76.

²⁸ *Tsedu and Others v Lekota and Another* [2009] ZASCA 11 para 13.

²⁹ *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC) para 89.

³⁰ *Qwelane* fn 14 para 99.

is protected speech or falls within a category of unprotected speech under s 16(2) of the Constitution is therefore beyond question.³¹

[30] Applying the principles set forth in the above authorities to this matter, it is clear that the Public Protector's approach does not pass muster. In the first place, she failed to determine the objective meaning and applied a wholly subjective approach in terms of which she interpreted the tweets based on what she perceived to be the public's reaction. The only evidence of the public's reaction in the rule 53 record was a small selection of tweets in the twitter conversation that unfolded and a few newspaper articles. The Public Protector considered Ms Zille's tweets to be similar to the statements published in an article on colonialism, authored by a certain academic from the USA, Prof Gilley, which received widespread backlash. She also included some pictures depicting horrific human rights abuses caused by colonialism. Although Ms Zille's tweets, like Prof Gilley's article, evidently sparked controversy, the contents of her tweets are not the same as those in Prof Gilley's article. Her tweets must be interpreted on their own terms and in their own context.

[31] An important consideration is that not every instance of harmful and/or hurtful speech will result in imminent violence.³² In this matter, the Public Protector did not take into account the context in which the tweets were made, which was that there were lessons that could be drawn from the Singapore experience as it, too, had previously been colonised. Without any attempt to objectively interpret the impugned tweets, the Public Protector concluded that the reaction of those who responded to Ms Zille's tweets sufficed to indicate the likelihood of Ms Zille's tweet stirring up racial violence in South Africa. In my view, there was no basis for that finding. Objectively considered from the point of view of a reasonable reader, the message conveyed by the tweets is that Ms Zille's perception was that, though bad and unfortunate, colonialism yielded some beneficial aspects.

³¹ See *Qwelane* fn 14 paras 96-100.

³² *Ibid* para 111.

[32] In the second place, the Public Protector interpreted the provisions of s 16(2) incorrectly. By concluding that s 16(2) ‘prohibits’ or ‘curbs’ speech, she failed to discern that s 16(2) is a definitional provision that excludes propaganda for war, incitement of imminent violence and advocacy of hatred constituting incitement to cause harm, from protected speech under s 16(1). She misconstrued the application and effect of s 16(2) of the Constitution and considered the impugned speech from a wrong premise, as she believed that Ms Zille had committed a violation by engaging in conduct that was expressly prohibited by s 16. It behoved the Public Protector to proceed from the premise of the correct interpretation of s 16, to understand what test had to be applied to determine whether there had been a violation, and finally, to pronounce a conclusion that was in line with that test.³³ Clearly, the Public Protector’s approach was fatally flawed.

[33] Section 16(2)(b) has two critical requirements: first, objectively considered, there must have been an intention to incite violence; and second, the speech must entail the incitement of imminent violence - that is, violence that is impending or close at hand. It is plain that none of these requirements were considered by the Public Protector; they simply do not feature in her report.

[34] Conduct constituting incitement was considered by the full bench in *Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another*.³⁴ Having reviewed various judgments of this Court, that court concluded that an intention to influence another’s conduct is a fundamental component of incitement. As stated before, the Public Protector did not apply her mind to any of the threshold requirements of s 16(2)(b) of the Constitution. This failure amounted to a material error of law. Considering the materiality of this error, the high court was enjoined to review

³³ Compare *Qwelane* fn 14 paras 62-63.

³⁴ *Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another* [2019] ZAGPPHC 253; [2019] 3 All SA 723 (GP); 2019 (2) SACR 297 (GP) at paras 19-34; *S v Nkosingiyana* [1966] 4 All SA 456 (A) at 458-459.

and set aside the finding that Ms Zille's tweets breached s 16 of the Constitution.³⁵

[35] The Public Protector purported to place reliance on *Leroy v France* (*Leroy*),³⁶ a judgment of the ECHR for her conclusion that the impact of Ms Zille's tweets should not be overlooked as they were capable of provoking race-based violence. In *Leroy*, the applicant, a cartoonist, had submitted for publication a drawing showing the terrorist attack that resulted in the collapse of the twin towers in New York on 11 September 2001 with a caption: 'We have all dreamt of it... Hamas did it'. Following the publication of that drawing, the applicant and the newspaper were criminally charged with complicity in condoning terrorism. They were subsequently convicted and fined. All appeals were rejected, culminating in the applicant approaching the ECHR. Relying on Article 10 of the European Convention, he asserted that the drawing and the inscription constituted free speech. A perusal of that judgment reveals that in that matter, the ECHR undertook the exercise of considering various factors. In its consideration of the context, it, among others, took into account the volatility of the area in which the publication was made and the timing of the publication, which was a mere two days after the incident. Having followed that interpretive exercise, the ECHR found that the applicant had condoned terrorism.

[36] It bears mentioning that what is undeniable is that Ms Zille continued to post further tweets despite realising that a number of twitter users were affronted by her initial tweets. This might well be indicative of insensitivity on her part. The fact of the matter is that insensitive speech still falls under the purview of protected speech. Despite Ms Zille's tweets having clearly offended some sensibilities, I am unable to find anything that takes her tweets out of the

³⁵ *Public Protector and Others v The President of the Republic of South Africa and Others* para 63.

³⁶ *Leroy v France* No 36109/03, ECHR (Fifth Section), 2 October 2008, para 42. The court held that 'by making a direct allusion to the massive attacks in which Manhattan was the theater, by attributing these events to a notorious terrorist organization, and by idealizing this disastrous project by the use verb dream, giving an unequivocal valuation to an act of death, the applicant justifies the use of terrorism, adhering by the use of the first person in the plural ("we" to this means) of destruction, presented as the outcome of a dream and indirectly encouraging ultimately the potential reader to positively appreciate the success of a crime'.

realm of protected speech. The view that Ms Zille's tweets were protected under the right to freedom of expression is fortified by the following passage in *Qwelane*:

'The right to free speech is equally protected. The right to freedom of expression, as enshrined in section 16(1) of the Constitution, is the benchmark for a vibrant and animated constitutional democracy like ours. . . . Freedom of expression "is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm". This is because it "is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability". . . . In addition, this Court has highlighted that "[t]he corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."³⁷

[37] Equally forceful is the observation articulated by the European Court of Human Rights (ECHR) in *Handyside v the United Kingdom*³⁸ and endorsed as follows in *Islamic Unity*:

'Freedom of expression is applicable, not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.'³⁹

[38] In similar vein, the court in *Qwelane* endorsed the same observation in relation to the South African setting and stated that the 'dictates of pluralism, tolerance and open-mindedness require that our democracy fosters an environment that allows a free and open exchange of ideas, free from censorship no matter how offensive, shocking or disturbing these ideas may be'.⁴⁰ It follows that the Public Protector's conclusion that the tweets violated s 16(1) of the Constitution on the grounds that they were 'offensive and

³⁷ *Qwelane*, fn 14 paras 67 and 73.

³⁸ *Handyside v the United Kingdom*, (1976) 1 EHRR 737, [1976] ECHR 5493/72, [1976] ECHR 5.

³⁹ *Islamic Unity* fn 11 para 26, quoting *Handyside v The United Kingdom* at 754.

⁴⁰ *Qwelane* fn 14 para 74.

insensitive' constitutes an unjustifiable limitation of the right of freedom of expression protected under s 16 of the Constitution.

[39] There can be no doubt that had the Public Protector correctly interpreted s 16(2)(b), she would have embarked on a proper investigation of whether, in making the tweets, Ms Zille intended to incite violence and whether the existence of imminent violence was shown. The Public Protector did not engage in that exercise. An error of law is not material if on the facts, the decision-maker would have reached the same decision despite that error.⁴¹ However, if on the application of the right interpretation, the facts do not support the impugned decision, the erroneous interpretation is taken to have materially influenced the decision⁴². In this matter, the rule 53 record did not point to any evidence that suggested that Ms Zille's tweets fell within the category of unprotected speech envisaged in s 16(2)(b) of the Constitution. It follows that her conclusion that s 16(2)(b) was implicated constitutes a material error of law.

[40] What remains is to consider the finding that the impugned tweets breached the Ethics Code. I am of the view that the Public Protector's conclusion that the tweets did not fall under the category of protected speech, and her erroneous finding that s 16(2)(b) was implicated, are factors that pervaded her reasoning and led her to wrongly conclude that the Ethics Code was breached. In any event, she could only have come to the conclusion that the Ethics Code was breached if there were sufficient facts to support it. The relevant factual foundation is not manifest from the rule 53 record. There was nothing to suggest that the tweets resulted in the office of the Premier being undermined. Without those facts, it is difficult to find a basis for concluding that the Ethics Code was breached.⁴³ Based on the same reasoning, I am of the view that there was no basis for finding that Ms Zille had violated the provisions of s 136 of the Constitution, which enjoins members of the Executive Council to act in accordance with a code of ethics and prohibits them from conducting

⁴¹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) para 91.

⁴² *Ibid* para 92.

⁴³ Compare *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd & Another* 2015 (3) SA 1 (SCA) paras 44-45.

themselves in a way that is inconsistent with their office.⁴⁴ On the whole, the available evidence plainly does not support the Public Protector's findings and remedial action. There is therefore no rational connection between the Public Protector's decision and the reasons for the decision. The high court's decision to decline to review the Public Protector's decision on the grounds of irrationality was therefore erroneous.

[41] It is plain from the tenor of the judgment of the high court that it did not properly consider the materiality of the errors of law. Insofar as the high court found no basis to set the Public Protector's findings aside on account of its conclusion that there were no material errors of law, it erred.⁴⁵ It follows that the judgment of the high court must be set aside.

[42] As regards costs in the appeal, it must be borne in mind that even though the remedial action recommended by the Public Protector fell away on account of Ms Zille no longer holding the position of premier, Ms Zille was still entitled to persist with the appeal in order to have the baseless findings reversed and the high court's order set aside. It matters not that the Public Protector abides the decision of this Court. The appeal resulted from the findings made in the Public Protector's report against Ms Zille. There is therefore no basis for a departure from the general rule that costs follow the result. Given the complexity of the matter, the employment of two counsel was justified. We were urged to grant an order of court on an attorney and client basis. However, having due regard to all the facts of this case, there is no basis for the punitive costs order sought by Ms Zille.

⁴⁴ Section 136 of the Constitution provides:

'136. (1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.
(2) Members of the Executive Council of a province may not –
(a) undertake any other paid work;
(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.'

⁴⁵ *The Public Protector v The President of the Republic of South Africa and Others (Freedom under Law as amicus curiae)* [2021] ZACC 19; 2021 (9) BCLR 929 (CC) para 63.

Order

[43] The following order is made:

1. The appeal is upheld with costs, including the costs occasioned by the employment of two counsel.
2. The order granted by the high court is set aside and substituted as follows:
 - 1.1 'The findings and the remedial action in paragraphs 5.2.22, 5.2.27, 5.2.37, 6.2, 7 and 8 of the Public Protector's Report No. 5 of 2018/19 entitled, "Report on an investigation into allegations of breach of the provisions of the Executive Ethics Code by the Premier of Western Cape Provincial Government, Honourable Helen Zille", are reviewed and set aside.
 - 1.2 The first respondent is ordered to pay the costs of this application, including the costs of two counsel.'

M B MOLEMELA
JUDGE OF APPEAL

Appearances:

For appellant: S Rosenberg SC (with him J Bleazard)

Instructed by: State Attorney, Cape Town

State Attorney, Bloemfontein