CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 174/18 and CCT 178/18

Case CCT 174/18

In the matter between:

GENERAL ALFRED MOYO	First Applicant
CENTRE FOR APPLIED LEGAL STUDIES	Second Applicant
and	
MINISTER OF POLICE	First Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS SOUTH GAUTENG	Third Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
THE RIGHT2KNOW CAMPAIGN	Amicus Curiae

Case CCT 178/18

In the matter between:

NOKULUNGA PRIMROSE SONTI	First Applicant
SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA	Second Applicant
and	
MINISTER OF POLICE	First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

DIRECTOR OF PUBLIC PROSECUTIONS NORTH WEST PROVINCE Third Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Fourth Respondent

Neutral citation:	*Moyo and Another v Minister of Police and Others* [2019] ZACC 40
Coram:	Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J
Judgment:	Ledwaba AJ (unanimous)
Heard on:	19 February 2019
Decided on:	22 October 2019
Summary:	Intimidation Act 72 of 1982 — constitutionality of section 1(1)(b) and section 1(2) — provisions are unconstitutional

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

Under CCT 174/18 General Alfred Moyo and Another v The Minister of Police and Others:

1. Leave to appeal is granted.
2. The appeal is upheld.

3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "It is declared that section 1(1)(b) of the Intimidation Act 72 of 1982 is unconstitutional and invalid."

4. The order of invalidity is retrospective to the extent that it operates in trials or pending appeals based on contravention of section 1(1)(b) of the Intimidation Act 72 of 1982 where the right of appeal has not yet been exhausted.
5. The first respondent (the Minister of Police) is ordered to pay the first and second applicants' (General Alfred Moyo and the Centre for Applied Legal Studies) costs, including the costs of two counsel.

Under CCT 178/18 Nokulunga Primrose Sonti and Another v The Minister of Police and Others:

1. Condonation is granted.
2. Leave to appeal is granted
3. The appeal is upheld.
4. It is declared that section 1(2) of the Intimidation Act 72 of 1982 is unconstitutional and invalid.
5. The order of invalidity is retrospective to the extent that it operates in trials or pending appeals where the onus was based on section 1(2) of the Intimidation Act 72 of 1982.
6. The first respondent (the Minister of Police) is ordered to pay the first and second applicants' (Nokulunga Primrose Sonti and the Socio-Economic Rights Institute of South Africa) costs, including the costs of two counsel.

JUDGMENT

LEDWABA AJ (Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring):

Introduction

[1] This is a consolidated application concerning the constitutionality of sections 1(1)(b) and 1(2) of the Intimidation Act (the Act).[1] The applicants seek leave to appeal against the judgment of the Supreme Court of Appeal.

[2] Case CCT 174/18 (the Moyo matter) and CCT 178/18 (the Sonti matter) have been consolidated and were also heard together in the High Court of South Africa, Gauteng Division, Pretoria (High Court) and in the Supreme Court of Appeal.

[3] The applicants have filed an application for leave to appeal and an application to declare section 1(1)(b) of the Act unconstitutional. They also seek confirmation of the order of the Supreme Court of Appeal declaring section 1(2) of the Act unconstitutional and invalid.

The parties

[4] The first applicants in each application are respectively General Alfred Moyo (Mr Moyo), a community leader of an informal settlement near Germiston and Ms Nokulunga Primrose Sonti (Ms Sonti), a Member of Parliament.

[5] The second applicants in each application, the Centre for Applied Legal Studies (CALS) and the Socio-Economic Rights Institute of South Africa (SERI), are public

[1] 72 of 1982.

interest organisations. The second applicants join the proceedings in the public interest.

[6] In each application the first respondent is the Minister of Police and is cited as the Minister responsible for the administration of the Act. The second respondent is the National Director of Public Prosecutions and is cited in his capacity as the Head of the National Prosecuting Authority with the power to direct and control the institution of criminal proceedings. The third respondents in each matter are, respectively, the Director of Public Prosecutions, South Gauteng and the Director of Public Prosecutions, North West, and are cited in their capacity as the Directors of Public Prosecutions in each province. The fourth respondent in both matters is the Minister of Justice and Correctional Services and is cited in his capacity as the Minister that is ultimately responsible for the administration of the criminal justice system. Only the Minister of Police elected to participate in this matter.

[7] The amicus curiae is the Right2Know Campaign (R2K). R2K is a non-profit organisation that works to raise public awareness, mobilise communities, and undertakes research and targeted advocacy campaigning with the aim of ensuring the free flow of information necessary to meet people's social, economic and political needs. R2K was admitted as amicus curiae having shown a direct and substantial interest in the matter. The Court is indebted to R2K for their submissions.

Factual background

Moyo matter

[8] The events surrounding the Moyo matter took place on 18 October 2012 during a meeting at the Primrose Police Station, Germiston. Mr Moyo's organisation, the Makause Community Development Forum, had sought to obtain permission to march to the Ekurhuleni Metropolitan Police Department in terms of the Regulation of

Gatherings Act.[2] Upon the request to march being denied, Mr Moyo allegedly made statements and conducted himself in a manner described by the complainants, Lieutenant Colonel Nkwashu and the station commander Lieutenant Colonel Shiburi, as threatening and violent.[3]

[9] As a result of the above conduct, Mr Moyo was arrested and charged with contravening section 1(1)(b) of the Act. Mr Moyo contended that the charges levelled against him were intended to frustrate the organisation's legitimate right to protest and criticise what he considered to be biased policing policies sanctioned by the complainants. Mr Moyo further denied that he did or said anything with the intent of intimidating the complainants.

Sonti matter

[10] Ms Sonti was charged under sections 1(1)(a)(ii) and 1(1)(b)(i) of the Act. Section 1(2) of the Act relates to the onus of proof for any prosecution brought under section 1. The charge emanated from telephone calls and text messages of a threatening nature that the complainant, Ms Nobuhle Zimela, alleged were sent to her by Ms Sonti on 17 and 18 December 2012. The allegation was that the communications were an attempt to compel the complainant to withdraw a criminal complaint she had laid against Mr Anele Zonke. The text messages and telephone calls were alleged to contain threats to kill the complainant and burn her house down.

[11] The allegations were, however, denied by Ms Sonti. According to Ms Sonti, her text messages and telephone calls came as a result of a request made by a relative of Mr Zonke. Ms Sonti states that she was asked to contact the complainant to find

[2] 205 of 1993.

[3] *Moyo v Minister of Justice and Constitutional Development* [2018] ZASCA 100; 2018 (2) SACR 313 (SCA) (Supreme Court of Appeal judgment) at para 18. The charge sheet described Mr Moyo's conduct on the day in question as follows: he threatened to make sure that the complainants were removed, he threatened a repeat of Marikana, he stated that there will be bloodshed, he pointed fingers at the complainants, he charged towards the complainants, and he said that the complainants will not last at Primrose Police Station.

out the reason behind Mr Zonke's arrest and whether the dispute between the complainant and Mr Zonke could not be resolved by the families.

[12] The facts and allegations in which these applications arose have no weight in determining the constitutionality, or otherwise, of the impugned sections. That is because both Mr Moyo and Ms Sonti, opting to first mount their constitutional challenge, are still awaiting their respective trials. A trial court is the appropriate forum in which to decide whether their alleged conduct in fact occurred and constituted a statutory crime. This Court will thus not deal with the validity or otherwise of the allegations concerning the conduct of Mr Moyo or Ms Sonti.

Litigation history

High Court

[13] The High Court dismissed both applications for declarations of constitutional invalidity. In the Moyo matter, the Court found that the section was constitutionally permissible as, although it infringed speech falling within section 16(1) of the Constitution, such an infringement was reasonable and justifiable, due in part to the necessity of criminal sanction for intimidatory conduct. Similarly, in the Sonti matter, section 1(2) was held as a justifiable infringement of an accused's fair trial rights, as without the section it would be near impossible for the State to secure a competent conviction.

Supreme Court of Appeal

[14] In the Moyo matter, the majority of the Supreme Court of Appeal found that section 1(1)(b) passed constitutional muster. The Court held that the applicants' submissions ignored fundamental rules regarding the constitutional approach to the interpretation of statutes and other well established principles of statutory interpretation.

[15] The principle was reaffirmed that, wherever possible and without straining the language of a statutory provision, legislation should be given an interpretation that falls within constitutional bounds in preference to one that involves an infringement of constitutionally protected rights.

[16] The Court found that if section 1(1)(b) is properly interpreted, the State is required to prove the elements of *mens rea* and unlawfulness. Further, it held that the section was only concerned with intimidatory conduct that induced or would induce a reasonable fear in another. The upshot being that conduct that was otherwise lawful in terms of the Constitution and other legislation was not criminalised by the section. The offence of intimidation should also not be measured by appealing to the subjective feelings of the most timorous amongst us. Instead, the section requires an objective as opposed to subjective determination of the effect of the conduct complained of.

[17] The applicants' "subjective fear" argument was dismissed, as it was held to result in an illogical construction of the section. Properly interpreted, the section requires proof that the fear was reasonable in both circumstances postulated in the section.

[18] Finally, it held that there was a "lawfulness defence" to the crime of intimidation. The defence being that, while expressive acts that intentionally cause reasonable and genuine fear of imminent harm are criminalised, such acts will be lawful if they enjoy constitutional or statutory protection. So, while a person engaging in such constitutionally-protected expressive acts might not avoid arrest, being charged under the Act, or detention, they will nevertheless escape conviction.

[19] On the back of this interpretation, the majority of the Supreme Court of Appeal found that the section could be construed in a manner that was compatible with the Constitution and that would serve the valuable purpose of providing a protection in

criminal law against intimidatory conduct that is antithetical to an open democratic society.

[20] On the other hand, the minority held that section 1(1)(b) blurred the line between true threats and what can be considered "political hyperbole". In doing so, it directly infringes on the right to freedom of expression. Such a limitation was held as unjustifiable and the minority declared the section unconstitutional and invalid.

[21] With regard to section 1(2), the Supreme Court of Appeal held that the section was unconstitutional and that no basis existed upon which the constitutional infringement could be justified under section 36 of the Constitution.

[22] The majority held that the section infringed the presumption of innocence as enshrined in section 35(3)(h) of the Constitution in that it created an evidentiary burden that was constitutionally objectionable. The Supreme Court of Appeal further concluded that no purpose would be served by suspending the order of invalidity. The declaration of invalidity was to apply retrospectively to the extent that it affected trials or appeals where the right of appeal had not yet been exhausted.

[23] The minority differed only to the extent that they were of the view that section 1(2) created a reverse onus and not a mere evidentiary burden.

Condonation, jurisdiction and leave to appeal

[24] In the Sonti matter, condonation is sought for the late filing of the confirmation application. The application was filed on 13 July 2017. It was accordingly filed one day out of time. The reasons for this delay are accepted by this Court and, as there is no prejudice to the respondents, condonation is granted.

[25] This case is concerned with a frontal challenge to the constitutionality of section 1(1)(b) of the Act. The section aims to criminalise conduct and expressive acts which violate the rights to dignity, personal freedom and security. The Act is that

part of our legislative scheme which provides a shield against treatment that is cruel, inhumane or degrading.[4] Intimidatory conduct that negates these rights has no place in an open and democratic society that promotes democratic values, social justice and fundamental human rights.[5]

[26] The rights to dignity and security must, however, be balanced with the competing right to freedom of expression. Robust debate has rightly been called the "lifeblood of democracy".[6] The Constitution duly empowers everyone to speak their mind without fear of undue recrimination.

[27] The above indicates that this matter raises a constitutional issue that this Court should hear.[7]

[28] In *Savoi*, Madlanga J in holding that the Court had jurisdiction in the context of a constitutional challenge in the abstract, said:

> "This does not, however, make it irrelevant that this challenge is brought in the abstract. Courts generally treat abstract challenges with disfavour. And rightly so. Will hearsay, similar facts or evidence of previous convictions be led at the

[4] Section 12(1)(e) of the Constitution reads:

> "Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way."

[5] Section 1 of the Constitution reads:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[6] *S v Mamabolo (ETV Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at fn 48.

[7] It is a longstanding principle that if a constitutional issue is raised, this Court will grant leave to appeal if it is in the interests of justice to do so. See *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at paras 10-1 and *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* [2017] ZACC 15; 2017 (5) SA 9 (CC); 2017 (7) BCLR 916 (CC) at para 22.

> applicants' trial? At this stage we simply do not know. Abstract challenges ask courts to peer into the future, and in doing so they stretch the limits of judicial competence. For that reason, the applicants in this case bear a heavy burden – that of showing that the provisions they seek to impugn are constitutionally unsound merely on their face."[8]

[29] The question is whether this "heavy burden" rests on the shoulders of the applicants in the present matter. I think it does. This Court is now required to analyse the constitutionality of the crime of intimidation with neither the benefit of the context in which the crime was allegedly committed nor with an understanding of the interpretive approach that would have been adopted by the trial court. In such judicial twilight, if we are to be persuaded that the section is unconstitutional, then the applicants must present argument strong enough to light the path.

[30] With this in mind, the interests of justice and the need for finality dictate that the constitutionality or otherwise of section 1(1)(b) of the Act falls to be determined.

[31] In the Sonti matter, the applicants seek to confirm the order of the Supreme Court of Appeal that held section 1(2) as unconstitutional. This Court's jurisdiction is therefore engaged in terms of section 172(2)(a) of the Constitution. Leave to appeal should be granted.

[32] The path to the merits of each application is now clear. I shall deal first with the confirmation application in the Sonti matter. Following which, the constitutional challenge in the Moyo matter will be addressed.

Confirmation of declaration of constitutional invalidity of section 1(2)

[33] The section reads:

[8] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (1) SACR 545 (CC); 2014 (5) BCLR 606 (CC) at para 13.

> "In any prosecution for an offence under subsection (1), the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused, unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution."

[34] The applicants submit that both the majority and minority of the Supreme Court of Appeal were correct in holding that section 1(2) of the Act is constitutionally invalid. However, the applicants, agreeing with the minority judgment, take issue with the majority's conclusion that section 1(2) creates a mere evidentiary burden. This, they claim, is inconsistent with the words used in the Act where a full "onus" is placed on an accused to provide a lawful reason for their conduct. Furthermore, a mere evidentiary burden does not accord with the majority's own reasoning that the purpose of the section is to compel the making of incriminating admissions and to discourage the exercise of one's right to remain silent.

[35] Before confirming the order, this Court should be satisfied that the impugned section is indeed inconsistent with the Constitution and invalid.

[36] I do not think it necessary to elaborate on the conflicting views between the majority and minority judgments of the Supreme Court of Appeal in detail. It is clear that section 1(2) absolves the State from proving all the elements of the crime created in section 1 of the Act. This is an obvious and impermissible infringement of the right to be presumed innocent, to remain silent and the right not to be compelled to give self-incriminating evidence, as enshrined in section 35(3)(h) and (j) of the Constitution. For at least the past century our law has recognised that no one can be compelled to give evidence incriminating him or herself.[9]

[9] See *Rex v Camane* 1925 AD 570 at 575 where it was stated that—

> "it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial. The principle comes to us through the English law, and its roots go far back in history."

[37] I cannot agree with the majority of the Supreme Court of Appeal that section 1(2) creates a mere evidentiary burden. The text of the section refers to "the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused". It is unclear how this can be interpreted in any way other than creating a reverse onus by absolving the State from proving an element of the crime. In so doing, the section allows for an accused to be convicted in circumstances where there exists a reasonable doubt as to the unlawfulness of their conduct.[10]

[38] Unlike in the Supreme Court of Appeal, no justification was given by the State in this Court for the reverse onus created by section 1(2). It is not for this Court to speculate whether a reasonable justification exists for a right-infringing provision when the State has conceded that there is none. The confirmation should therefore succeed. Section 1(2) falls to be declared unconstitutional and invalid.

[39] The order of invalidity should operate immediately and be retrospective to the extent that it operates on pending trials and on pending appeals where the onus was based on section 1(2) of the Act.

The constitutional challenge to section 1(1)(b)

[40] Section 1(1) of the Act reads as follows:

> "Any person who—
>
> (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind of persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint—
>
> (i) assaults, injures or causes damage to any person; or

See further *S v Singo* [2002] ZACC 10; 2002 (2) SACR 160 (CC); 2002 (8) BCLR 793 (CC) at paras 25-9; *Osman v Attorney-General, Transvaal* [1998] ZACC 14; 1998 (2) SACR 493 (CC); 1998 (11) BCLR 1362 (CC); and *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 33.

[10] *Singo* above n 9 at paras 25-31.

(ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or

(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication—

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person.

(ii) . . . .

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

The key issue

[41] The key issue before us is whether section 1(1)(b) is constitutionally invalid for unjustifiably criminalising expressive conduct that is protected by section 16(1) of the Constitution. An evaluation of the interpretive approach undertaken by the majority of the Supreme Court of Appeal and the submissions raised by the applicants and amicus curiae are pivotal to this determination. Two aspects require careful consideration.

[42] First, it was common cause between the parties that on a literal reading section 1(1)(b) appears to be constitutionally invalid, in that it limits the right to freedom of expression. This is quite clearly correct. Absent any careful interpretive lens, the section can be read to criminalise any expressive act which induces any fear, of any kind, for one's own safety, or the safety of one's property, the security of one's livelihood, or the safety of another. As will be discussed in greater detail below, this cuts deep into the right to freedom of expression guaranteed in section 16(1) of the Constitution. It is inconceivable that an infringement of this kind could ever be justifiable in an open and democratic society based on human dignity, equality and freedom.

[43] This leads to the second aspect. At the heart of this issue is whether the interpretive exercise conducted by the majority of the Supreme Court of Appeal is sustainable. To this end the following questions arise—

(a) was the interpretive exercise undertaken by the majority in the Supreme Court of Appeal unduly strained, and if so;

(b) is another permissible interpretation available which renders section 1(1)(b) constitutional?

Interpreting section 1(1)(b)

[44] Our courts have rightfully referred to the framing of section 1(1)(b) as "tortuous".[11] But that alone is not enough to render the section unconstitutional. On a plain reading, the section criminalises any person who acts in a manner that has the effect of causing another to fear for their own safety, or the safety of their property or livelihood. This, in my view, casts the net of liability too wide as it depends simply on the experience of fear by another. For example, the act of handing out fliers advocating for expropriation of land without compensation in a known libertarian suburb could, all things considered, lead to a charge of intimidation. This is because such an activity would, in all likelihood, be fear-causing. It is unlikely that such an infringement on freedom of expression and the adjacent political rights could ever be justified under a section 36 analysis.

[45] The question then turns to whether the section can nevertheless be interpreted in a manner that renders it constitutionally compliant, as the majority of the Supreme Court of Appeal found.

[46] The main thrust of the applicants' argument is that the interpretive exercise conducted by the majority strains the text of section 1(1)(b). The applicants argue that

[11] *Holbrook v S* [1998] 3 All SA 597 (E) at 600.

this amounts to an impermissible "reading-in" and they further submit that the section was "read-down" in a manner that did not accord with the text.

[47] The amicus curiae takes the argument further. They submit that even if such a reading-in were permissible, to accept the qualifications provided by the majority of the Supreme Court of Appeal would exchange the problem of overbreadth for one of vagueness. Moreover, the reading of numerous qualifications amounts not to interpreting but legislating, and so implicates the separation of powers doctrine.

[48] I will now briefly deal with the arguments raised by the applicants.

[49] A proper characterisation and analysis of the interpretative exercise undertaken by the majority of the Supreme Court of Appeal is required. The qualifications adopted by the Supreme Court of Appeal are as follows—

(a) the Act only applies to intimidatory conduct understood in the context of the statute;
(b) *mens rea* is required;
(c) the fear relied upon must be objectively genuine, reasonable and one based on a fear of imminent harm; and
(d) the conduct must be unlawful.

[50] The question at the heart of this matter is whether these qualifications can be sourced in the text, context or purpose of section 1(1)(b).

[51] In order to dispense with this issue, the appropriate approach to interpretation, specifically in light of a constitutional challenge to a provision that creates criminal liability, needs to be discussed.

[52] In *Endumeni* our jurisprudence on statutory interpretation was made clear.[12] A few points bear repeating. The process of interpretation is not undertaken in a stepwise fashion, but involves the attribution of meaning to a particular provision, drawing on the ordinary rules of grammar and syntax, in light of the context in which the phrase appears. The language and context must be considered together. Internal inconsistency should be avoided so as to render the statute coherent with its purpose. The interpretive process is objective and not subjective.

[53] In stating the above, *Endumeni* also re-affirmed that our courts no longer adopt a slavish adherence to the plain meaning of a particular provision. Further, our courts do not seek to uncover the subjective intention of the legislature in the interpretive process. As eloquently put by the Supreme Court of Appeal: "to characterise the task of interpretation as a search for such an ephemeral and possibly chimerical meaning is unrealistic and misleading."[13]

[54] Instead, what is sought is the purpose for which the statute was enacted. The relevant context in which the provision rests is to be understood by identifying the mischief that the statute seeks to address.

[55] The general approach given in *Endumeni* is further shaped in the context of a constitutional challenge. No less than the Bill of Rights serves as an overarching framework when interpreting any statute in this regard. Section 39(2) of the Constitution requires of courts that they promote the spirit, purport and objects of the Bill of Rights in the interpretive process. This Court has repeatedly stated that if a provision is open to multiple, plausible, interpretations, then the one that best conforms with the Constitution should be preferred.[14]

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[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18.

[13] Id at para 21.

[14] *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*NCGLE*).

[56] The interpretation of legislation in conformity with the Constitution, often called "reading-down", is to avoid inconsistency between the law and the Constitution. It is limited to what the text is reasonably capable of meaning.[15] This method of statutory interpretation must be distinguished from the reading in of missing words from a statutory provision. "Reading-in" is a constitutional remedy that may be granted after a court has concluded that a statute is constitutionally invalid.[16]

[57] When attempting to interpret legislation by "reading-down" a section in order to bring it into conformity with the Constitution, care should be taken to stay within the boundaries of a reasonable and plausible construction that does not rewrite the text. To overstep this mark would be tantamount to the actual "reading-in" of words into the statute. To do so would be a clear breach of the separation of powers. So much was said in *Abahlali*, where an approach that sought to add at least six qualifications to the text was held to be "an intrusive interpretation" that "offends requirements of the rule of law and the separation of powers."[17]

[58] The reference to the rule of law is particularly apposite to this matter. That is, as a consequence of an invasive interpretation and reliance on numerous canons of statutory interpretation, it may become impossible, notwithstanding legal guidance, for a person to know how a given provision will operate. This concern is all the more pressing in cases, such as this, where the provision can result in the denial of that person's liberty and freedom of expression.

[59] A statutory offence should be sufficiently clear so that the person who is charged, especially an unrepresented accused, may understand the details of the

[15] *Hyundai* above n 14 at para 24 and *Zuma* above n 9 at para 18.

[16] *NCGLE* above n 14 at para 24.

[17] *Abahlali Basemjondolo Movement SA v Premier of the Province of KZN* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) (*Abahlali*) at para 123.

charge.[18] The presumptions that flow from our canons of construction of criminal statutes which are not apparent on the text should be clarified so that the person who is charged shall sufficiently be informed and understand that charge against him or her.[19] An accused's right to be informed of the charge with sufficient detail is important. The details of the charge should be crafted from the statutory offence. If the statutory offence is not clear, the charge sheet should not be used as a tool to remedy that. Moreover, in the absence of clarity regarding its requirements, the deterrent value of a statutory offence would be diluted.

[60] In terms of criminal statutes, a constitutionally compliant interpretation should protect the affected rights of both the accused and the complainant. A court should prefer an interpretation that best promotes the liberty of a subject over one which does not.[20]

[61] Accordingly, our law recognises certain canons of construction of criminal statutes. Two are particularly germane to the present case. The first is that there can be no criminal liability without fault.[21] The second is that any conduct that is subject to criminal sanction necessarily must be unlawful.[22] It is immediately apparent that these two canons of construction deal specifically with the qualifications that the applicants contend are impermissibly "read-in". That is the unlawfulness requirement

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[18] This does not mean that our law requires absolute certainty. As stated by Madlanga J in *Savoi* above n 8 at para 20: "What the rule of law requires is reasonable certainty, not absolute or perfect lucidity."

[19] Section 35(3)(a) of the Constitution.

[20] *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (1) SACR 105 (CC); 2004 (4) BCLR 333 (CC) at para 18; *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA) at para 10; and *R v Sachs* 1953 (1) SA 392 (A) at 399-400.

[21] *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC), O'Regan J quoting with approval *S v Arenstein* 1967 (3) SA 366 (A) at 381D–E, where the then Appellate Division remarked:

> "In view of such general maxims as *nulla poena sine culpa* [no punishment without law] and *actus non facit reum nisi mens sit rea* [the act is not wrongful unless the mind is guilty], the Legislature, in the absence of clear and convincing indications to the contrary in the enactment in question, is presumed to have intended that violations of statutory prohibitions would not be punishable in the absence of *mens rea* in some degree or other."

[22] See Burchell *Principles of Criminal Law* 4 ed (Juta & Co Ltd, Cape Town 2013) at 114-7 and Snyman *Criminal Law* 6 ed (Lexis Nexis, Durban 2014) at 95-102.

and the *mens rea* requirement. It will become apparent from the discussion that follows that these canons are not qualifications that are "read-in" at all. They instead flow from the legally permissible manner in which a criminal statute is to be read.

[62] It is in light of the above that the interpretive approach undertaken by the Supreme Court of Appeal must be tested. To borrow from *NCGLE,* the process undertaken "being an interpretive one, is limited to what the text is reasonably capable of meaning."[23] It is on this ground that the judgment of the majority of the Supreme Court of Appeal must either stand or fall and it is to this which I now turn.

Was the majority of the Supreme Court of Appeal's interpretation unduly strained?

[63] The majority of the Supreme Court of Appeal adopted a common-sense approach to what "intimidation" means within the context of a criminal statute.[24] Intimidation in this setting refers to conduct that instils fear of a certain kind, acts that intend "to discourage, restrain or silence illegally or unscrupulously; as by threats of blackmail".[25]

[64] I understand the majority of the Supreme Court of Appeal to have held that by this definition, intimidation means some kind of incitement to imminent harm or an inculcation of a reasonable fear for imminent harm.[26] The majority invoked this purported connection to imminent harm in an attempt to place all intimidation criminalised under section 1(1)(b) within the ambit of section 16(2) of the Constitution.[27] In other words, intimidation would only ever constitute the incitement of imminent violence or hate speech.

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[23] *NCGLE* above n 14 at para 24.

[24] To intimidate in this context is not to refer, for example, to the experience of a junior advocate appearing before a judge for the first time.

[25] Supreme Court of Appeal judgment above n 3 at para 122.

[26] Id at paras 121-4 and 138.

[27] Section 16(2) of the Constitution reads:

> "The right in subsection (1) does not extend to—

[65] This addresses the central issue, namely whether section 1(1)(b) is constitutionally invalid for unjustifiably infringing upon freedom of expression, specifically expressive conduct that does not incite imminent violence. On the Supreme Court of Appeal majority's understanding of what is meant by intimidation this problem is avoided. If the section merely criminalises conduct that creates objectively reasonable fear of imminent violent injury to person, property or security of livelihood, it becomes easier to argue that it does not infringe on the constitutional guarantees of freedom of expression or peaceful protest. Incitement of imminent violence is not protected as free expression and it would be difficult to argue that conduct creating objectively reasonable fear of imminent violence to person, property or security of livelihood would qualify as peaceful protest.[28] If, however, intimidation does not carry this broad meaning under the section, and it is held that any intentional conduct that creates objectively reasonable fear of harm to person, property or security of livelihood is covered, then it is overbroad because it would criminalise protected free speech that does not incite imminent violence and probably also peaceful forms of protest.

[66] But this understanding of intimidation does not equate to the "incitement of imminent violence" under section 16(2)(b) of the Constitution. This is not the same as intimidation because (a) intimidation may incite harm that is distinct from violence (particularly with regard to property); and (b) intimidation may not "incite" any violence or harm because incitement assumes the participation or presence of a third party. Instead, intimidation can threaten violence by the intimidator, without inciting a third party to cause imminent harm.

(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."

[28] Section 17 of the Constitution reads:

"Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

[67] The difficulty with the imminent harm qualification is that it appears neither in the text nor context of the Act. The mischief that the Act seeks to correct is intimidatory conduct. Section 1(1)(b) speaks to intimidatory conduct of a certain kind. The text merely states that kind to be "fear for one's safety" or the "fear for the safety of one's property or security of one's livelihood". It does not support the notion that the fear is related to actual harm or that the threat of such harm should be imminent.

[68] The context of the provision lends even less support to the notion of an "imminent harm" qualification. In the legislative scheme itself, harm seems to be accounted for in section 1(1)(a). There the specific classes of physical harm of death, injury or damage are listed. Section 1(A)(1) further deals with acts of violence as they relate to the general public or a particular portion of the population.[29] It is apparent that the purpose section 1(1)(b) serves is something other than the classes of harm listed elsewhere in the Act.

[69] In my view, the majority's definition of intimidation amounts to an unjustified "reading-in" of meaning that unduly strains the text. The section itself contains no mention of imminent violence. And if the proper reading of the section does not

[29] Section 1(A)(1) reads:

> "Any person who with intent to put in fear or to demoralise or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere—
>
> (a) commits an act of violence or threatens or attempts to do so;
>
> (b) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act;
>
> (c) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (a) or act referred to in paragraph (b), or to aid in the commission, bringing about or performance thereof; or
>
> (d) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,
>
> shall be guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment."

include incitement of imminent violence, but only covers intentional conduct that creates an objectively reasonable fear of harm to person, property or security of livelihood, then it would criminalise protected free speech and probably also peaceful forms of protest.

Justified limitation?

[70] Very little was put up in the papers as justification under section 36 of the Constitution for this limitation of the rights to freedom of expression and protest. Mention was made of the countervailing right of security of the person,[30] but nothing further.

[71] That makes it unnecessary to deal in any detail with any of the other "qualifications" the majority read into the section. Even assuming their correctness will not cure the constitutional defect.

Remedy

[72] Section 1(1)(b) of the Act falls to be declared constitutionally invalid. However, section 172(1)(b) of the Constitution provides that a court may make any order that is just and equitable. The section confers a number of constitutional

[30] Section 12 of the Constitution reads:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

remedies that are available following a declaration of invalidity.[31] Are any available in the present case? I think not.

Suspension of declaration of invalidity?

[73] In declaring that section 1(1)(b) is unconstitutional and invalid, it is open to this Court to suspend the declaration of invalidity so that the legislature may correct the defect. The majority of the Supreme Court of Appeal would have opted for this route had they found in the alternative.[32]

[74] Notwithstanding the importance of regulating the conduct in question, it is my view that the suspension of the declaration of invalidity will cause more trouble than it would solve. The test for whether a declaration of invalidity should be suspended was authoritatively stated in *Mlungwana.*[33]

[75] A declaration of invalidity should be suspended only if—

> "(a) the declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship;
> (b) there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and
> (c) the right in question will not be undermined by suspending the declaration of invalidity."[34]

[31] Section 172(1)(b) of the Constitution states that a court—

> "may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[32] Supreme Court of Appeal judgment above n 3 at para 147.

[33] *S v Mlungwana* [2018] ZACC 45; 2019 (1) SACR 429 (CC); 2019 (1) BCLR 88 (CC).

[34] Id at para 105.

[76] A factor in support of suspension is that a legal lacuna would result upon a declaration of invalidity. Apart from the Act, there is no other legislative scheme that criminalises intimidatory behaviour of the kind envisaged in section 1(1)(b). This would, however, not lead to any uncertainty or administrative confusion. In fact, in its present state, even read in light of the reasonable fear qualification and the presumptions, section 1(1)(b) is itself a cause of uncertainty and administrative confusion.[35]

[77] It is likely, should the declaration be suspended, that an accused will simply apply for a stay of prosecution pending the re-enactment of section 1(1)(b) by the Legislature. While in *Sanderson* this Court has called such relief "radical", it would not be unwarranted.[36] In the present case, it is impossible to arrive at an interpretation of section 1(1)(b) that is neither over broad nor hopelessly vague. It is highly possible then that an accused who is charged after this judgment is handed down might be convicted of a crime that no longer exists when section 1(1)(b) is corrected by the Legislature. This is surely the kind of "significant prejudice" that was held to be a suitable reason for granting a stay of prosecution in *Sanderson*.

[78] It is also apparent, from what has already been said above, that the rights in question will be undermined if the declaration of invalidity is suspended. Even if suspension was granted it is difficult to see what order would be given. To read-in "imminent harm" would render the provision nugatory. Any other reading-in would leave the provision hopelessly vague and so undermine the right to freedom of expression further.

[35] See *Holbrook* above n 11; *S v Cele* 2009 (1) SACR 59 (N) and *S v Gabatlhole* 2004 (2) SACR 270 (NC).

[36] *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC) at paras 38-9.

[79] The order of invalidity will therefore operate immediately on hand-down of this judgment. The order shall apply retrospectively to any pending matter involving a charge under section 1(1)(b) of the Act that has not been finalised on appeal.[37]

Costs

[80] The applicants have both been successful. There is no reason to depart from the general rule that costs follow the result.[38] There is also no good reason to depart from the general rule that the amicus curiae is not entitled to their costs.[39]

Order

[81] The following orders are made:

Under CCT 174/18 General Alfred Moyo and Another v The Minister of Police and Others:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "It is declared that section 1(1)(b) of the Intimidation Act 72 of 1982 is unconstitutional and invalid."
4. The order of invalidity is retrospective to the extent that it operates in trials or pending appeals based on contravention of section 1(1)(b) of the Intimidation Act 72 of 1982 where the right of appeal has not yet been exhausted.

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[37] See *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1995 (2) SACR 748; 1995 (12) BCLR 1579 (CC) at para 32 where O'Regan J stated that:

> "As a general principle, therefore, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity."

[38] *Mlungwana* above n 33 at para 111.

[39] See *Jeebhai v Minister of Home Affairs* [2009] ZASCA 35; 2009 (4) SA 662 (SCA) where a party unreasonably opposed the admission of an amicus curiae and in doing so was mulcted with costs.

5. The first respondent (the Minister of Police) is ordered to pay the first and second applicants' (General Alfred Moyo and the Centre for Applied Legal Studies) costs, including the costs of two counsel.

Under CCT 178/18 Nokulunga Primrose Sonti and Another v The Minister of Police and Others:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. It is declared that section 1(2) of the Intimidation Act 72 of 1982 is unconstitutional and invalid.
5. The order of invalidity is retrospective to the extent that it operates in trials or pending appeals where the onus was based on section 1(2) of the Intimidation Act 72 of 1982.
6. The first respondent (the Minister of Police) is ordered to pay the first and second applicants' (Nokulunga Primrose Sonti and the Socio-Economic Rights Institute of South Africa) costs, including the costs of two counsel.

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