

“DIP ME IN CHOCOLATE AND THROW ME TO THE LESBIANS”

Homophobic hate crimes, the state and civil society

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This article describes some of the shortcomings in the prosecution of a homophobic hate crime as well as a non-governmental organisation's attempt to influence the sentencing of the perpetrators. The fact that an NGO believed it was necessary to intervene in a criminal case, was allowed to lead evidence, demonstrated the harmful effects of homophobic hate crimes and made arguments that these effects should be used in aggravation of sentence, suggests that NGOs may take on a new proactive roll in the prosecution of crimes involving some forms of prejudice. The NGO was unsuccessful in that the magistrate ultimately passed a lenient sentence, in the form of correctional supervision. The sentence included a condition that the perpetrators participate in 'awareness programmes of gays and lesbians', conducted by civil society rather than the state. In so doing, the court missed an opportunity to respect, protect, promote and fulfil the rights of gays and lesbians.

On 7 October 2007, a young black gay man, Deric Duma Mazibuko, was severely assaulted in a tavern in Germiston, South Africa.¹ He was punched, kicked, and hit over the head by a group of patrons with chairs and a metal spanner. The assault began with a homophobic incident. One of the perpetrators had questioned a friend of Mazibuko's, asking why she was hanging out with 'moffies'/'faggots', and asked her if he could 'have' one of them. The assault was accompanied by homophobic hate speech. During the assault one of the perpetrators said Mazibuko was gay and had 'no reason to live'. Mazibuko had a series of

fits during the onslaught of blows to his body and head and was then knocked unconscious. Had it not been for his group of friends, who managed to stop the assault and take Mazibuko to hospital, he would probably be dead and would be another name on the long list of gay and lesbian people who have been killed as a result of homophobic attacks.²

Mazibuko approached a non-profit organisation, OUT LGBT Wellbeing (OUT), which serves the lesbian, gay, bisexual, transgender and intersex community. The organisation provides health services, conducts research, and engages in advocacy and lobbying. Mazibuko sought psychological support as a result of the assault and

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was adamant that justice needed to be done. None of the perpetrators were arrested even though the assault was reported to the police.

OUT then approached Webber Wentzel attorneys both on Mazibuko's behalf and on behalf of its constituency. Gays and lesbians within OUT's constituency were increasingly becoming victims of such crimes and were receiving little or no redress from the state.³ OUT requested that Webber Wentzel assist in ensuring the perpetrators were brought to justice, and in developing the common law in a way that would combat homophobic hate crimes.

In many respects this was the 'perfect' hate crime test case: the victim survived and was intent on seeking justice; the homophobic motive of the crime could not be placed in dispute; and there were a number of witnesses who could identify the main perpetrators. Moreover, if the perpetrators were convicted, common law principles could be used to persuade the judicial officer to consider the 'hate' motive as an aggravating factor in sentencing, as a result of the particular deleterious effects of homophobic hate crimes.⁴

This is part of the story of how, over a period of five years, Mazibuko, his partner, his friends, and a small handful of activists and lawyers from Webber Wentzel (myself included) patiently pursued the elusive possibility of justice in a system that is failing gays and lesbians who are victims of hate crimes.

The case unfolded in a context where the South African legislature has not passed legislation comprehensively addressing hate crimes. Breen and Nel have pointed out that South Africa has no hate crime legislation and have argued that there is a serious need for such legislation in order to promote equality.⁵ On the other hand, Dixon and Gadd have argued that South Africa should take a cautious approach to developing hate crime legislation, as international experience has shown a host of unexpected consequences, not all of which contribute to promoting equality or to the project of diverse nation building.⁶ These

authors did not, however, make reference to the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000). This Act arguably includes the type of hate crime legislation that Breen and Nel describe as sentencing enhancing legislation. Section 28(1) provides that 'if it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence'. It is clear that the Act was intended to encourage harsher sentences for hate crimes, where certain types of discrimination played a part in the commission of the crime. Yet what is striking about the law is that it does not refer to discrimination based on sexual orientation and would not therefore, without legal challenge, require a harsher sentence for a homophobic hate crime.

Therefore, at the outset of the case my clients and I decided to attempt to create a legal precedent in ensuring that the homophobic aspect of the assault on Mazibuko would be treated as an aggravating factor in sentencing the perpetrators.⁷

THE FOCUS

This article focuses on the questions that the case raised about the relationship between the state and civil society in the prosecution and punishment of homophobic hate crimes.

It does not focus on the apparent injustices in the criminal process. These include the prosecutor's initial decision not to prosecute the case, as the crime was framed as a 'tavern fight' and as such did not warrant prosecution. This decision was subject to a successful internal review after an application by OUT to the National Prosecuting Authority. This, and the deleterious behaviour of the accused, resulted in a delay of two years between the commission of the crime and the commencement of the trial. The trial then took three years to reach a conclusion (despite its simplicity), and for the accused to be convicted of assault with intent to do grievous bodily harm.

The article discusses the role of OUT in the criminal process and what it suggests with regard to the relationship between the state and civil society in the development of a constitutional democracy in South Africa. The article also considers the insights or lessons this case offers about the role civil society may play (or may wish not to play) in the criminal justice system, a system in which civil society ordinarily has not featured at all.⁸

I have chosen to refer broadly to the 'state' rather than name the individual organs of the state (such as the investigator, prosecutor or magistrate). The insights or lessons that I will focus on, as outlined above, depend on thinking about both the state and civil society in this monolithic way, as the observations are grounded in constitutional law rather than criminal procedure.⁹

OUT AS *AMICUS CURIAE*

When the perpetrators, Khanyesa Madubaduba, Buhle Mapekula and Zuke Mapekula, were convicted, OUT launched an application to intervene as an *amicus curiae* (a friend of the court). The organisation wished to lead evidence and make legal submissions in the sentencing phase of the trial to show the effect that homophobic hate crimes have on the victim, the victim's community, and society at large. The purpose of this intervention was to persuade the magistrate that these harmful effects should be treated as an aggravating factor in sentencing the perpetrators. The hope was that they would accordingly receive a harsher sentence. OUT was concerned that gays and lesbians were experiencing serious hate-based victimisation, and that criminal cases were not being investigated and therefore not prosecuted.

Since civil society plays no formal role in the investigation and prosecution of crimes (this is exclusively the domain of the state), the case offered an opportunity to see if it was possible to influence the way in which the magistrate sentenced the perpetrators and, if successful, to set a precedent for the future sentencing of perpetrators of homophobic hate crimes.¹⁰

OUT was admitted as a friend of the court.¹¹ The organisation made both legal submissions and led three witnesses to demonstrate the detrimental effects of this hate crime on the victim; and the effects of homophobic hate crimes on the gay and lesbian community and South African society as a whole. Despite this evidence, and legal argument, the magistrate did not impose a harsher sentence on the perpetrators, instead opting to impose a more lenient one. In doing so, the magistrate failed to treat the homophobic aspect of the crime as an aggravating factor in sentencing the perpetrators.

The case suggests some interesting ways of thinking about the relationship between the state and civil society in combating hate crime and promoting equality.

- First, the case demonstrates how difficult it can be for civil society to hold the state to account in criminal matters. It was necessary to overcome several legal hurdles in order to be admitted as a friend of the court, and to be allowed to make both legal submissions and lead evidence.¹²
- Secondly, the case shows how the value of being admitted as a friend of the court was undermined by the state's retreat from responsibility. In this case the prosecutor abdicated some of her responsibilities, allowing OUT to make the case for harsher sentencing; and the magistrate crafted the sentence such as to place the burden of rehabilitation on civil society.

A friend of the court fulfilling a state function

South African law allows for the intervention of a 'friend of the court' (*amicus curiae*) as a party to a dispute where such friend of the court is not the party involved in the dispute. This is a relatively recent development (post 1994), which was introduced when the court needed additional input and information that was not, or could not be, provided by the parties to the dispute.¹³ Interventions by friends of the court are most common and relatively uncomplicated in civil

disputes.¹⁴ They are far less common in criminal cases, which are disputes between the state and private parties where the state is vested with powers to investigate, arrest, detain, try and punish perpetrators of crimes; and the accused is protected from the exercise of such powers by a set of rights contained in section 35 of the Constitution.¹⁵

A cautious approach is adopted towards the admission of friends of the court in criminal matters. This resulted from a decision of the Constitutional Court which held that in criminal matters friends of the court should probably not be admitted if they 'stack the odds against the accused', as it is for the state alone to make out a case against the accused.¹⁶ It was as a result of these principles that OUT applied to be a friend of the court only after the perpetrators were found guilty. It was important that OUT played no role in the finding of guilt and thereby could not be seen to stack the case against the perpetrators.

However, once the perpetrators were convicted and OUT was admitted as a friend of the court, its role became more significant.

The organisation called three witnesses over a period of two days, and led expert and experiential evidence that it believed was crucial to a fair sentence. Included in the evidence was that:

- Victims of homophobic hate crimes experience particular psychological difficulties, such as feelings of depression and marginalisation, which lowers self-esteem.¹⁷
- Victims experience suicide ideation (thoughts of wanting to take one's life) as a result of the crime.¹⁸
- Victims also often have a post-traumatic stress disorder or reaction and as a result have a heightened sense of fear, anxiety, distrust and vulnerability, which leads to behavioural change (such as not going to public places).¹⁹ Mazibuko, the victim, experienced some forms of this trauma and did not want to come to court as a result of experiencing flashbacks of

the crime. (As a result a counsellor from OUT would accompany him to court).²⁰ Mazibuko also moved out of the Germiston area where he was living as a result of the crime.²¹

- Homophobic hate crimes send a message, not only to the individual victim, but to all gay and lesbian people, that they are less worthy and at risk of being attacked. The resultant fear and anxiety mean gays and lesbians limit their expression and movement as they are less likely to live openly and sometimes go into hiding for a period of time.²²
- Homophobic hate crimes undermine the efforts of South African society to create equality and dignity for all, and set back the advances that have been made towards equality and dignity for gays and lesbians.²³
- Homophobic hate crimes have longer effects on victims than ordinary crimes; additionally the psychological effects are often more severe than the psychological effects of ordinary crimes.²⁴ This is because homophobic hate crimes target vulnerable individuals because of their sexual orientation and are often accompanied by extreme levels of violence, which indicates an intention to demean or dehumanise the victim.²⁵
- The perpetrators were disrespectful, offensive and threatening towards gays and lesbians during the course of the trial as one of them (we argued, with the tacit consent of the other two) wore a T-shirt to the proceedings which read '*Dip me in chocolate and throw me to the lesbians*'.²⁶ We argued that this signified a disdain for the court process, and ongoing prejudice and a lack of remorse on the part of the perpetrators.²⁷

OUT's intervention as a friend of the court, the evidence it led and the arguments it made suggest that the state is failing to hold perpetrators of homophobic hate crimes to account²⁸ and is therefore failing to give effect to its constitutional duties to respect, protect, promote and fulfil the rights of gays and lesbians to equality.²⁹ Although OUT chose to intervene in this case it did so because it was the only legal remedy available to it. However, constitutional law, criminal law and criminal procedure require the prosecutor to prosecute a crime and motivate a particular

sentence, based on the circumstances of the crime and the effects it has on communities and society at large. The legal framework does not ordinarily contemplate civil society playing this role; equally civil society does not ordinarily have the resources or skills to perform what is primarily a state function. OUT's intervention signals the state's shortcomings in upholding the right to equality and preventing, investigating and prosecuting homophobic hate crimes.

Secondly, if viewed benevolently, the case demonstrates that the state may be struggling with how to prosecute homophobic hate crimes – but, if viewed malevolently, that the state does not have a particular interest in protecting minority groups.

Although OUT played an essential role in ensuring that the crime was framed as a homophobic hate crime and prosecuted as such, OUT's intervention during the sentencing phase of the trial may have had an unintended consequence. After OUT's intervention the prosecutor did not call any witnesses of her own in aggravation of sentence, not even Mazibuko himself. This suggests that the prosecutor relied on the NGO to make her case, rather than seeing the organisation's evidence as supplementary to the state's argument. In other words, instead of holding the state to account, the intervention may have had the consequence of enabling the prosecutor to shy away from her prosecutorial duties.

SHIFTING THE BURDEN OF PUNISHMENT TO CIVIL SOCIETY

This abdication of responsibility was also evident in the imposed sentence.

OUT led its three witnesses in the sentencing phase. The organisation made the argument that the 'hate element in this case must be perceived and accepted as an aggravating factor and [...] ought to translate into a harsher sentence'.³⁰ The defence then led evidence in mitigation of sentence. Two correctional supervision reports for Khanyesa Madubaduba and Zuko Mapekula were

submitted. The latter took the stand and briefly explained that he was employed and had three dependants. The perpetrators requested that they be sentenced to a period of correctional supervision 'coupled with anger management programmes', (suggesting that they believed anger was the problem, rather than prejudice). The prosecutor led no witnesses and requested direct imprisonment.

The magistrate started her sentencing judgment by stating that she was required not to over- or under-emphasise the 'interests of the community'.³¹ She incorrectly suggested that the evidence that OUT placed before the court was intended to express the outrage of the community. But OUT had in fact placed evidence before the court about the *harmful effects* of hate crimes on the victim, his community and society as a whole, not evidence of the outrage of the community. In assessing the expert and experiential evidence led by OUT, the magistrate explained that she was not bound to accept views of experts and the court was required to decide whether an expert opinion was correct.³² She rejected OUT's unchallenged evidence that hate crimes have a particularly detrimental effect, and held rather that 'any form of crime has a negative impact on the community'.³³ She gave no reasons for rejecting the evidence beyond her own sense of the effect of ordinary crimes. She also incorrectly found that although she had information from experts on the effects of this type of attack she did not have 'direct information which specifically dealt with the complainant'.³⁴ The magistrate did, however, have hearsay evidence (which may be used for sentencing purposes) from one of OUT's witnesses regarding the trauma Mazibuko experienced, how he was fearful of coming to court, and how he eventually moved house as a result of the assault.

The magistrate did not treat the homophobic hate aspect of the crime as an aggravating factor in sentencing and imposed the following sentence:

- Khanyesa Madubaduba and Zuko Mapekula were sentenced to correctional supervision for three years, subject to various conditions,

including performing community service and taking part in 'treatment, development and support programmes.'

- Buhle Mapekula received a fine of R1 500 or four months imprisonment, which was wholly suspended on condition that he was not convicted of assault with intent to do grievous bodily harm during the period of suspension.
- All three perpetrators were required to participate in 'awareness programmes of gays and lesbians' or 'awareness programmes of the LGBT group,' and to submit a certificate of attendance to the clerk of the Germiston Magistrates Court.³⁵

It was in her choice of punishment that the magistrate abdicated further responsibilities of the state. As far as we are aware, neither civil society organisations nor the state provide awareness programmes 'of gays and lesbians' or 'of the LGBT group.' However, since the majority of programmes for convicted offenders are offered by NGOs, the implication of the sentence was that NGOs would develop and run such programmes. But if lesbian and gay awareness programmes for perpetrators of homophobic hate crimes are run by civil society, it means the state is not required to take moral responsibility for this form of rehabilitative punishment, which may involve sensitising prejudiced people to difference, educating them about how to manage a diverse society, and sensitising them to the harms of homophobia. Employees of the state in the department responsible for offering rehabilitation programmes will therefore not engage with these issues. And finally, on the most pragmatic level, organisations within civil society (many of which are currently struggling to finance themselves) may now have to carry the additional burden of financing such lesbian and gay awareness programmes for the very people that have physically harmed their constituency (and even at times during the court proceedings threatened and showed disrespect for gays and lesbians).

The approach that the magistrate took in sentencing the three perpetrators undermines the efforts of civil society to put cogent and persuasive evidence before the courts to enable

judicial officers to respect, protect, promote and fulfil the right to equality. The approach also enabled the state to evade the moral responsibility of meting out punishment (which is one of the ways in which it legitimises itself). It shifted a part of the financial and operational burden of punishing offenders to civil society. Sadly, symbolically, the criminal process, instead of protecting gays and lesbians, in fact caused the perpetrators to be 'thrown back to the gays and lesbians' without considering that these awareness programmes do not exist, and that it is insensitive to ask the people who are being subjected to prejudicial violent crime to rehabilitate the very perpetrators of such crimes.



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NOTES

1. Germiston is a town east of Johannesburg in the Ekurhuleni Metropolitan Municipality.
2. The One in Nine Campaign, in October 2012, released a list of murdered gays and lesbians: Ivan Johannes, Zoliswa Nkonyana, Madoe Mafubedu, Simangele Nhlapo, Sizakele Sigasa, Salome Masooa, Thokozane Qwabe, Waldo Bester, Eudy Simelane, Khanyiswa 'Lhoyie' Hani, Desmond 'Daisy' Dube, Neil Daniels, Sibongile Mphelo, Girly 'S'Gelane' Nkosi, Noxolo Magwaza, Nqobile Khumalo, Nontsikelelo Tyatyeka, Thapelo Makhutle, Phumeza Nkolonzi, Sasha Lee Gordon, Andritha Thapelo Morifi, Sanna Supa, Ntombana Desire 'Deezay' Mafu, Dineo, Gugu 'George' Mazibuko, and countless more, unnamed and unknown, (<http://www.oneinnine.org.za/iptoint>, accessed 17 November 2012).
3. OUT had conducted research which showed, amongst other things, that gay, lesbian, bisexual and transgender people who were victimised were unlikely to report such incidents to the police for reasons which included that the police wouldn't take the matter seriously and that the victims feared being abused by the police (see: Levels of empowerment among lesbian, gay, bisexual and transgender [LGBT] people in Gauteng, South Africa, research initiative of the joint working group conducted by OUT LGBT Well-being in collaboration with UNISA Applied Psychology, 6-7), (http://www.out.org.za/images/library/pdf/Gauteng_GL_Empowerment_Report.pdf, accessed 17 November 2012). In OUT's experience this meant that homophobic hate crimes were not being investigated and prosecuted (and courts were not being given the opportunity to impose appropriate sentences on the perpetrators of homophobic hate crimes).
4. The common law on sentencing perpetrators requires a judicial officer to consider a range of factors when deciding on a perpetrator's sentence. These factors include the nature and effect of the crime, the circumstances of the accused and the interests of society

- (see: *S v Zinn* 1969 (2) SA 537 (A)). This enables evidence to be placed before a court on the effects that hate crimes have on the victim, his or her family, his or her community and society at large – which may be used by the judicial officer in aggravation and would justify a harsher sentence. Additionally, in *S v Combrink* 2012 (1) SACR 93 (SCA) the Supreme Court of Appeal required judicial officers to ‘be conscious and sensitive to cases which on the facts appear to have a racial or discriminatory connotation, especially when dealing with the question of sentence’, at para 24.
5. Duncan Breen and Juan Nel, South Africa – A home for all? The need for hate crime legislation, *South African Crime Quarterly*, 38, November 2011, 33-43.
 6. Bill Dixon and David Gadd, Look before you leap, hate crime legislation reconsidered, *South African Crime Quarterly*, 40, June 2012, 25-30.
 7. It is important to explain that strategic litigation is one-dimensional. Legal remedies (as opposed to other forms of social intervention) are limited in their effect. Strategic litigation does not lend itself to engaging with some of the more complex issues that are raised when thinking about how to address hate crimes. We accordingly adopted an approach which supported enhancing sentencing for hate crime perpetrators with an awareness that there is some debate about whether enhanced sentences have the desired effect of creating a more equal society in the long term. Perry, in a global survey of the writing on hate crimes, makes the point that it is an open question as to whether sentencing enhancement will lead to greater tolerance of minorities by the general non-minority public. (Barbara Perry, *The more things change ... post-9/11 trends in hate crime scholarship*, in Neil Chakraborti, *Hate Crime, Concepts, policy, future directions*, Devon, Oregon: Willian Publishing, 2010, 17). She argues that ‘[m]ost offenders are youth, and especially young men responding to what they see as a threat – to their community, to their neighbourhood, or to their self-esteem. Often, these threats are more imagined than real. It may be more effective, then, to challenge those myths, and to thus ‘humanise’ the victims and their communities. Incidents of hate crimes can be taken as a starting point for education and healing rather than simply punishment. Consequently, community-based responses represent valuable alternatives. We have not come very far at all in creating such alternatives, let alone evaluating them.’ (Perry, *The more things change*, 31).
 8. Although there are numerous cases in which *amicus curiae* (friends of the court) have successfully intervened in civil cases there are only a handful of cases in which *amici* have attempted to intervene in criminal cases. There are no reported judgments in which a magistrates court has admitted an *amicus curiae* in a criminal matter and only one reported case where a high court admitted an *amicus curiae* (see *S v Engelbrecht* (Centre for Applied Legal Studies intervening as *Amicus Curiae* 2004 (2) SA 391 (W)). An attempt by the Institute for Security Studies to be admitted as an *amicus curiae* in the Constitutional Court in a criminal matter failed in *Ex Parte Institute for Security Studies: In Re S v Basson* 2006 (6) SA 195 (CC).
 9. The lessons or insight that may be drawn from the case are as much about the criminal process as they are about the way in which the Constitution of the Republic of South Africa, 1996, divides power between the three branches of government. Where civil society is compelled to intervene in criminal cases it demonstrates not only particular failings of the actors in the criminal process but also a constitutional change in that civil society takes on a role (and requests and assumes power), which challenges the conventional constitutional separation of power divide between the three branches of government. Civil society becomes another mechanism (like the media, which is sometimes referred to as the ‘fourth estate’) and is able to hold each of these branches to account.
 10. In some respects OUT’s intervention came from a place of desperation and frustration. Civil society organisations working in the gay and lesbian community, including OUT, had been campaigning for years to try and ensure the state recognised that homophobic hate crimes took place, that they were considered to be a special category of crime which warranted investigation that took account of the discriminatory aspect of the crime, and that these crimes were then prosecuted as such to ensure that perpetrators and the public knew that they could not be countenanced because of the damaging effects it had on gays and lesbians, their communities and society at large. Despite these campaigns the state had done little to address these crimes: investigators, prosecutors and magistrates had been given no direction or training in relation to hate crimes and hate crime legislation had not been drafted, debated or passed.
 11. The magistrate admitted OUT on the basis that rule 28 of the Magistrate Court Rules allows such admission, and even if she was incorrect in relation to this interpretation of rule 28, Section 186 of the Criminal Procedure Act, 1977 allows her to subpoena a witness if the evidence of a witness is essential for a just verdict. Interestingly, the approach adopted by the magistrate has to some extent been confirmed in a recent decision of the Constitutional Court in which it was decided that the High Court Rules, properly interpreted, allow friends of the court to make submissions and lead evidence (see: *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp* and others 2012 ZACC 25).
 12. The difficulty of holding the state to account was also illustrated by the original decision not to prosecute, which was then internally reviewed by OUT.
 13. Originally, friends of the court would appear if they were either asked to appear for a particular party or interest at the request of the court. A friend of the court could also be an advocate requested by the court to provide assistance in developing a novel question of law that arises in a matter. It is only more recently that the rules of court and the common law have been developed to allow the intervention by parties who wish to be friends of the court on their own volition and because of their own interests (see Geoff Budlender, ‘*Amicus Curiae*’ in *Constitutional Law of*

South Africa (Juta & Co, Second Edition, Revision Service 1, 2009), at 8-1).

14. A party wishing to intervene in a civil case as a friend of the court would have to comply with the procedural rules of the particular court as well as the requirements of the common law in relation to admission of friends of the court. Currently the rules regarding the admission of friends of the court differ depending on the court in which the matter is being heard. On the whole a friend of the court is required to show its interest in the matter, the nature of the submissions it wishes to make, the relevance of the submissions to the issues before the court and how the submissions differ from the submission already before the court (see, for example: Constitutional Court Rule 10, Supreme Court of Appeal Rule 16, Labour Appeal Court Rule 7, High Court Rule 16A, Labour Court Rule 19) and *S v Engelbrecht (Centre for Applied Legal Studies intervening as Amicus Curiae)* 2004 (2) SACR 391 (W)).
15. Section 35 of the Constitution of the Republic of South Africa, 1996 for example, includes that arrested persons have the right to remain silent, detained persons have the right to be informed of the reason for being detained and accused persons have the right to be informed of the charge with sufficient detail to answer it.
16. *Ex Parte Institute for Security Studies: In Re S v Basson* 2006 (6) SA 195 (CC), para 15.
17. Evidence of Professor Nel (9 December 2011), transcript of court proceedings, 45-46.
18. Evidence of Professor Nel, 44, Evidence of Melanie Judge (27 January 2012), transcript of court proceedings, 84.
19. Evidence of Professor Nel, 47-48, Evidence of Melanie Judge, 83-84.
20. Evidence of Mmapaseka Emily Letsike (27 January 2012), transcript of court proceedings, 66.
21. Evidence of Mmapaseka Emily Letsike, 67.
22. Evidence of Professor Nel, 51-52, Evidence of Melanie Judge, 91-93.
23. Evidence of Professor Nel, 56-57, Evidence of Melanie Judge, 94.
24. Evidence of Professor Nel, 58-59.
25. Evidence of Melanie Judge, 90-91.
26. Evidence of Mmapaseka Emily Letsike, 69, Evidence of Melanie Judge, 96.
27. Advocate Kate Hofmeyr's argument (27 January 2012), transcript of court proceedings, 103-104. Advocate Hofmeyr explained that '[w]e submit that the wearing of that T-shirt represents a number of things, it represents a disdain for this process and a refusal to be remorseful about the conduct that accused 3 and indeed the other accused perpetrated. We submit that it is deeply offensive to wear such a T-shirt in this public setting where the purpose for us all gathering together is to assess the guilt of three men accused of brutally attacking a man because he was gay. It is also, we submit, a confirmation of the very prejudice that motivated that attack, it is a confirmation that those were not just words that crept into accused 3's mouth when he said, he is gay he does not deserve to live. Those words were representative of a view that certain people are less worthy than others and that certain people do not deserve as much respect as others and the T-shirt simply confirmed that prejudice.'
28. Civil society has documented some of these failings. See, for example, Human Rights Watch, 'We'll show you you're a woman' – violence and discrimination against black lesbians and transgender men in South Africa, 2011, 46-56 <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed 29 October 2012).
29. Section 7(2) of the Constitution.
30. Advocate Kate Hofmeyr's argument, 104. Advocate Hofmeyr continued to explain that a harsher sentence is appropriate to repair both the damage done to Mazibuko, his community and society at large and to send a counter-message that the perpetration of hate crimes is unacceptable (104-105).
31. Magistrate Monaledi's sentencing judgment (9 March 2012), transcript of court proceedings, 120.
32. Magistrate Monaledi's sentencing judgment, 123.
33. *Ibid.*
34. Magistrate Monaledi's sentencing judgment, 125.
35. Mr Khanyesa Madubaduba and Mr Zuko Mapekula were required to attend these programmes for three years and Mr Buhle Mapekula was required to attend for two years.