



**FINDINGS OF THE SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

**REGARDING CERTAIN STATEMENTS MADE BY MR
JULIUS MALEMA AND ANOTHER MEMBER OF THE
ECONOMIC FREEDOM FIGHTERS**

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1. Introduction

1.1. The South African Human Rights Commission (Commission) had several complaints of alleged hate speech uttered by Mr Julius Malema and other members of the Economic Freedom Fighters (EFF) pending before it. The complaints relate to five statements made by Mr Malema and another member of the EFF. The Commission accordingly took a decision to consolidate the complaints regarding the five impugned statements.

1.2. The Commission wishes to ensure that legal analyses of the impugned statements are sound. In particular, the Commission is mindful of its constitutional mandate and the obligation for it to be independent and impartial. It therefore wishes to deal with the matters in a manner that is fair and consistent. Ultimately, the Commission must be seen to promote and protect both the constitutional rights to equality and freedom of expression. In addition to the constitutional rights implicated by utterances of hate speech, legislation prohibits hate speech and thereby limits the right to freedom of expression.

1.3. From experience, it is clear that issues of race, especially discrimination based on race, is an emotive issue in South Africa. It is also quite a divisive matter. The Commission strongly condemns discrimination and race discrimination in particular wherever it comes from but has to bear this emotive and divisive nature in mind when dealing with such issues.

- 1.4. Further, in dealing with all complaints and in dealing with all investigations, including those that the Commission does on its own initiative, the Commission must be guided only by the Constitution and the law.
- 1.5. The mandate of the Commission is to promote, protect and monitor the observance of all rights. No right should therefore be protected or promoted in a way that negates other rights, which means that where it appears that there are two or more rights implicated in a case that the Commission is dealing with, a careful weighing and balancing of those rights, aided by the facts and the context, needs to be done.
- 1.6. In this case the right to free speech also requires protection while the Commission also protects dignity and the right to equality through enforcing the law against hate speech.
- 1.7. In dealing with issues of hate speech, any one interpreting and / or applying the provisions of the Promotion of Equality and Prevention of Discrimination Act, (PEPUDA) is obliged to take into account the context of the dispute / complaint and the purpose of the Act.
- 1.8. This is the approach that the Commission has taken in considering the complaints lodged by various complainants against Mr Malema and another member of the EFF. The Commission painstakingly considered each impugned statement, looking at the facts, the context, the applicable law and the Constitution.

2. Constitutional provisions relating to hate speech

2.1. The Constitution of the Republic of South Africa, 1996 (Constitution) is founded on the values of equality, human dignity and freedom. The right to equality is guaranteed in section 9, which further prohibits unfair discrimination on various grounds. The right of freedom to expression is guaranteed in section 16(1) of the Constitution. The value of human dignity informs both the rights to equality and freedom of expression.

2.1.1. In ***DA v ANC (2015 (2) SA 232 (CC) paras 122-124***, the Constitutional Court emphasised the intrinsic and instrumental value of the right to freedom of expression. The right is intrinsically valuable given its centrality to human agency and dignity. The right is instrumentally important for its ability to encourage open debate. According to the court, **'[i]f society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values'**.

2.1.2. In ***S v Mamabolo (2001 (3) SA 409 (CC) para 37*** the Constitutional Court underscored the importance of the right to freedom of expression in South Africa's relatively young democracy, given 'our recent past of thought control, **censorship** and enforced conformity to governmental theories'. The court went on to caution that **'we should be particularly astute to outlaw any form of thought control, however respectably dressed'**.

2.1.3. In *De Reuck v Director of Public Prosecutions (2004 (1) SA 406 (CC))* the Constitutional Court endorsed an approach whereby expression that **shocks, offends or disturbs** should enjoy constitutional protection.

2.1.4. However, the right to freedom of expression is not a paramount value that trumps other constitutional values. Instead, a **balance** should be struck between the right to freedom of expression and the right to equality (*Khumalo v Holomisa 2002 (5) SA 401 para 25*). Whereas robust political speech is central to the right to freedom of expression, other types of expression may hold less societal value and can therefore be more easily and justifiably limited (*De Reuck v Director of Public Prosecutions (2004 (1) SA 406 (CC) para 59*).

2.2. The right to freedom of expression enshrined in section 16(1) of the Constitution does 'not extend to' certain forms of harmful expression listed in section 16(2) that have the potential to adversely affect the dignity of others (*Islamic Unity Convention v Independent Broadcasting Authority 2002 4 SA 294 (CC) para 10*). This means that harmful expression in terms of section 16(2) does not form part of the right to freedom of expression in section 16(1), and therefore does not enjoy constitutional protection. Consequently, the forms of expression listed in section 16(2)(a)-(c) can be regulated without limiting the section 16(1) right, and any legislation purporting to regulate these forms of expression need not be justified in terms of the section 36 limitations analysis.

2.3. Section 16(2)(c) of the Constitution excludes the '**advocacy of hatred** that is based on **race, ethnicity, gender or religion, and that constitutes incitement to cause harm**' from constitutional protection (emphasis added).

2.3.1. ‘**Hatred**’ connotes an **extreme emotion**, while ‘advocacy’ implies promoting or ‘making a case for’ hatred (*R v Andrews* (1988) 65 OR (2d) 161, 179 cited in *R v Keegstra* [1990] SCR 697; Currie & De Waal *Bill of Rights Handbook* 6 ed (2013) 357; *SAHRC v Qwelane* 2018 (2) SA 149 (GJ) para 47; *SAHRC obo South African Jewish Board of Deputies v Masuku and Another* 2018 (3) SA 291 (GJ)).

2.3.2. Importantly, advocacy of hatred must be based on the **closed list** of grounds, namely ‘race, ethnicity, gender or religion’, in order to fall outside of the ambit of constitutional protection. Hate speech based on other grounds, such as sexual orientation or nationality, thus enjoy constitutional protection under section 16(1), but can be limited in terms of the section 36 limitations clause.

2.3.3. In order to fall outside the scope of the constitutionally protected right to freedom of expression, hate speech must both constitute ‘advocacy of hatred’ on a listed ground **and** ‘incitement to cause harm’.

2.3.4. The Commission has held in an appeal decision that ‘harm’ includes physical, psychological and emotional harm (*Freedom Front v SAHRC* 2003 (11) BCLR (SAHRC)).

2.3.5. Section 16(2) of the Constitution thus defines hate speech and excludes it from constitutional protection, but does not prohibit it.

3. The statutory prohibition of hate speech

3.1. Section 10 of PEPUDA prohibits hate speech, while significantly extending the boundaries of what will constitute hate speech:

10 Prohibition of hate speech

(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

3.2. Section 10 of PEPUDA therefore differs from section 16(2) in various respects:

3.2.1. First, section 10 constitutes a prohibition of hate speech whereas section 16(2) of the Constitution merely excludes hate speech from the ambit of the right to freedom of expression.

3.2.2. Second, the constitutional exclusion is limited to the grounds of race, ethnicity, gender and religion. In contrast, section 10 of PEPUDA is much broader and refers to the full list of prohibited grounds and includes grounds that are not listed but that would cause or perpetuate systemic disadvantage, undermine dignity, or adversely affect the equal enjoyment of rights in a serious manner that is comparable to the listed prohibited grounds for discrimination.

3.2.3. Finally, for expression to be excluded from constitutional protection, it must amount to 'advocacy of hatred' on one of the four listed grounds which simultaneously constitutes 'incitement to cause harm'. This sets a high threshold for speech to constitute hate speech. In comparison, section 10 of PEPUDA prohibits speech that is 'hurtful', 'harmful' or that 'incites harm', and/or that 'promotes or propagates hatred'. Section 10 of PEPUDA thus sets a much lower threshold for speech to amount to hate speech than the Constitution does.

3.3. Section 10 may be read to attempt to prohibit all forms of discriminatory speech – as opposed to only hate speech as constitutionally defined. However, section 12 of PEPUDA in fact fulfills this function. Section 12 further contains a proviso to which the prohibition of hate speech in section 10 is subject. Section 12 provides:

12 Prohibition of dissemination and publication of information that unfairly discriminates

No person may-

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: *Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.* (Emphasis added)

4. Interpreting section 10 of PEPUDA

4.1. Section 10 of PEPUDA limits the constitutional right to freedom of expression where 'hate speech' exceeds the bounds of the constitutional exclusion of 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.

4.1.1. This limitation of the section 16(1) right must therefore be reasonable and justifiable in an open and democratic society in terms of the section 36 limitations clause:

36 Limitation of rights

(1) 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;
- (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.

4.1.2. The objects of the limiting law, namely PEPUDA, are manifold, and include the promotion of equality; the eradication of unfair discrimination, hate speech and harassment; and 'to give effect to the letter and spirit of the Constitution, in particular... the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16 (2) (c) of the Constitution' (**section 2 of PEPUDA**).

4.1.3. To the extent that section 10 goes beyond prohibiting hate speech as constitutionally defined, the nature and extent of the limitation may therefore be challenged in terms of section 36(1)(c) of the Constitution.

4.1.4. The objects of promoting equality and dignity through the prohibition of hate speech may be achieved through 'less restrictive means' in terms of section 36(1)(e) of the Constitution, for example by reflecting the constitutional language of section 16(2)(c) more closely in section 10 of PEPUDA and thereby setting a similar threshold for hate speech in the statute.

4.1.4.1. Alternatively, section 10 of PEPUDA should be interpreted and applied so as to more closely align it to the constitutional definition of hate speech. Section 39(2) of the Constitution requires that '[w]hen interpreting any legislation...

every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

4.1.4.2. Currently, various High Courts sitting as Equality Courts have ascribed different interpretations to section 10 of PEPUDA.

4.2. In order to save section 10 of PEPUDA from a finding of unconstitutionality based on the limitation of the right to freedom of expression, a **conjunctive interpretation** of section 10(1)(a)-(c) may be warranted. A **combination of a conjunctive and disjunctive approach** may also be appropriate, by requiring hate speech to be hurtful **and** harmful **or** to promote hatred.

4.2.1. A **conjunctive** reading of section 10(1) means that words must be hurtful **‘and’** ‘harmful’ **‘and’** promote hatred to constitute hate speech. A **disjunctive** reading means that words may be hurtful **‘or’** harmful **‘or’** promote hatred to constitute hate speech.

4.2.2. In *Herselman v Geleba* ((231/2009) [2011] ZAEQC 1, 18-19) a **disjunctive** approach was endorsed. The test according to this Equality Court judgment is therefore whether speech is hurtful **or** harmful **or** promotes hatred. The court held that a conjunctive reading would obviate the purposes of the Act, in that words may be hurtful and harmful, but may fail to promote hatred if not uttered in a group context. In using this example, the court therefore read ‘hurtful’ and ‘harmful’ conjunctively.

4.2.2.1. A disjunctive approach (‘or’) was implicitly endorsed by a different Equality Court in *SAHRC obo South African Jewish Board of Deputies v Masuku and Another* (2018 (3) SA 291 (GJ)), although the court ultimately held that

the impugned speech **satisfied all three requirements** and was hurtful **and harmful and** promoted hatred (**para 53**).

4.2.3. In **SAHRC v Qwelane (2018 (2) SA 149 (GJ) para 60)** the Equality Court held that '[t]he provisions of s 10(1)(a) to (c) **must be read conjunctively** to ensure that s 10(1) is consistent with section 16 of the Constitution' (emphasis added).

4.2.3.1. In this matter, the Respondent challenged the constitutionality of section 10 of PEPUDA on the bases of its purported over breadth and vagueness.

4.2.3.2. The Equality Court **held that a conjunctive reading of section 10 would save it from unconstitutionality**, and that section 10 read with section 12 was accordingly neither overly broad nor vague. Furthermore, the court found that a newspaper column authored by the Respondent amounted to hate speech.

4.2.3.3. The entire judgment is currently on appeal to the Supreme Court of Appeal. In granting leave to appeal, the presiding officer in the **Qwelane** matter noted that '[o]n proper reflection, I may have been incorrect in my construction and interpretation of the provisions of the [PEPUDA]' (**Qwelane v SAHRC and Others, In Re: SAHRC v Qwelane and Others; Qwelane v Minister of Justice and Correctional Services and Others (EQ44/2009) [2018] ZAGPJHC 67 (20 April 2018)**).

4.2.4. In **SAHRC v Khumalo (2019 (1) SA 289 (GJ) para 82)**, the High Court similarly held that section 10 must be read in line with section 16 of the Constitution and that the provisions must therefore be read conjunctively.

4.2.5. The **Prevention and Combating of Hate Crimes and Hate Speech Bill** (B9-2018) uses similar language to that used in section 10 of PEPUDA in creating an offence of hate speech:

4. (1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—
(i) be harmful or to incite harm; or
(ii) promote or propagate hatred,
based on one or more of the [listed grounds] is guilty of an offence of hate speech.

Textual differences should be noted. Crucially, any **reference to ‘hurtful’ has been removed**, while the **requirements for ‘harmful’ or hateful speech are disjunctive** (‘or’). This lends support to a **hybrid conjunctive and disjunctive reading** of section 10 of PEPUDA, in that to constitute hate speech words must be hurtful **and** harmful **or** promote hatred. However, since no precedent for such approach currently exists, the impugned statements of Mr Malema and another member of the EFF will be analysed using a conjunctive and disjunctive approach, respectively.

4.3. Where courts adopt a disjunctive reading of section 10 of PEPUDA, it is **essential that ‘hurtful’ be interpreted in such a manner as to not unjustifiably limit the right to freedom of expression**. Put differently, ‘hurtful’ must be interpreted so as to set a sufficiently high threshold for expression to amount to hate speech. In **SAHRC v Qwelane; Qwelane v Minister for Justice and Correctional Services (2018 (2) SA 149 (GJ) para 65)** the Equality Court interpreted ‘hurtful’ as connoting ‘**severe psychological impact**’. This interpretation, or one that acknowledges similar serious prejudice to the dignity interests of the target audience, is to be supported, lest the

prohibition of merely offensive or hurtful speech unjustifiably limit the right to freedom of expression.

4.4. Section 10 of PEPUDA implies an **objective test** to determine whether speech was intended to be hurtful; harmful or to incite harm; and/or promote hatred. A determination of hate speech is therefore made without regard to the subjective intentions of the person who utters the impugned words (**SAHRC v Qwelane; Qwelane v Minister for Justice and Correctional Services 2018 (2) SA 149 (GJ) para 41**; cf **Rustenburg Platinum Mine v SAEWA obo Bester and Others [2018] ZACC 13 para 38** where the test used to determine whether words are racist is similarly objective).

EVALUATION

4.5. Currently, the weight of authority appears to favour a conjunctive reading of section 10 of PEPUDA to ensure its constitutionality. However, the issue of the constitutionality of section 10 of PEPUDA is currently headed to the Constitutional Court for an authoritative pronouncement.

4.6. A **hybrid conjunctive and disjunctive reading** of section 10 of PEPUDA would save it from a finding of unconstitutionality to the extent that the right to freedom of expression will not be unjustifiably limited through the prohibition of merely 'hurtful' speech. However, since no precedent for such approach currently exists, a disjunctive and conjunctive reading of section 10 will be applied to the impugned statements.

4.7. If a disjunctive reading of section 10 is adopted, it is crucial to **interpret 'hurtful' as connoting 'severe psychological impact'**. Such an interpretation is congruent with

the Constitutional Court's approach to the protection of the right to freedom of expression. Robust expression must be protected especially where expression lies at the heart of the right to freedom of expression, as is the case with political speech.

4.8. Section 10 of PEPUDA posits an **objective test** to determine whether expression constitutes hate speech. An objective test, and the requirement of 'reasonableness', requires an assessment of context (*Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) para 49).

5. The importance of context in establishing hate speech

5.1. Section 3(3) of PEPUDA provides that '[a]ny person applying or interpreting this Act must take into account the **context** of the dispute and the purpose of this Act'.

5.2. When determining whether expression amounts to hate speech, the **factual, social and historical context** in which the statement is made is of utmost importance (*SAHRC v Qwelane; Qwelane v Minister for Justice and Correctional Services* 2018 (2) SA 149 (GJ) para 41; *SAHRC obo South African Jewish Board of Deputies v Masuku and Another* 2018 (3) SA 291 (GJ) paras 30ff).

5.3. The fact that speech is communicated to **vulnerable groups**, will make a finding of hate speech more likely (*SAHRC obo South African Jewish Board of Deputies v Masuku and Another* (2018 (3) SA 291 (GJ) para 54).

5.4. In *Rustenburg Platinum Mine v SAEWA obo Bester and Others* ([2018] ZACC 13 para 48) the Constitutional Court stated that '[i]t cannot be correct to ignore the reality

of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary.’

5.5. In ***SARS v CCMA (2017 (1) SA 549 (CC))*** the Constitutional Court similarly recognised the significance of the identity of both the offender and target of racism, stating that ‘[i]t can never be over-emphasised that being called a kaffir is the worst insult that can ever be visited upon an African person in South Africa, **particularly by a white person**’ (emphasis added).

5.6. Where the offender of hate speech belongs to a vulnerable group, the Supreme Court of Appeal’s statement in ***Hotz and Others v University of Cape Town (2017 (2) SA 485 (SCA) para 67)*** that ‘[f]reedom of speech must be robust and the ability to express hurt, pain and anger is vital, if the voices of those who see themselves as oppressed or disempowered are to be heard,’ merits consideration.

EVALUATION

5.7. Context is crucial in assessing whether words constitute hate speech, although subjective intention is irrelevant. Regard must be had to the **factual, social and historical context** in which the utterances were made. The identity of the offender and target group as belonging to a **vulnerable group** will have an impact on any determination of hate speech, in line with Constitutional Court jurisprudence.

5.8. Robust speech must be protected for those who remain structurally marginalised to be able to express their moral agency through expression that conveys anger or frustration at persistent societal injustice.

6. Applying the tests for hate speech to the impugned statements

6.1. The following assessment of impugned statements made by Mr Malema and another member of the EFF is made with reference to the interpretation of section 10 of PEPUDA and tests for hate speech set out above.

6.2. First, it is asked whether, with reference to the context of the statements, the utterances objectively demonstrate an intention to be hurtful; harmful or to incite harm; and/or promote hatred.

6.3. Thereafter, it is assessed whether the statements do in fact amount to 'hurtful, 'harmful' or 'hateful' speech based on judicial interpretations of these standards, and upon applying a conjunctive or disjunctive reading of section 10.

7. Statement one

7.1. In November 2016, Mr Malema made the following statement about white people in the context of land dispossession:

They found peaceful Africans here. They killed them. They slaughtered them like animals. We are not calling for the slaughtering of white people, at least for now. What we are calling for is the peaceful occupation of the land and we don't owe anyone an apology for that.

7.1.1. The statement may be construed as 'hurtful' by a white audience. However, a consideration of context requires that the identity of both the target group and the offender should be taken into account. The white group is socio-economically powerful. In contrast, Mr Malema belongs to the vulnerable black population group, which remains predominantly poor and landless. Furthermore, 'hurtful' should be

interpreted as meaning 'severe psychological impact', which the statement viewed in its context would not have for most South Africans. To the extent that the statement might have a severe impact on a proportion of white South Africans, for example farmers who feel unsafe, it would still **fail the objective test** for hate speech.

7.1.2. Viewed in its **context**, the statement does not appear to amount to hate speech.

7.1.2.1. The **historical context** in which the statement is made is one of unjust land dispossession by white colonists and the apartheid government. Reference to the 'slaughtering' of people is first made in expressing an opinion as to the actions of colonialists.

7.1.2.2. The **social context** in which the statement is made is one of continued landlessness, poverty and inequality, giving rise to anger and frustration by the black majority. The statement should thus be read, bearing in mind the Supreme Court of Appeal's caution that vulnerable groups must be able to express anger and pain through robust speech (*Hotz and Others v University of Cape Town* 2017 (2) SA 485 (SCA) para 67).

7.1.2.3. The **factual context** of the statement shows that the subject of the statement was not perpetrating harm against white people, but the highly emotive and contested issue of land reform. The statement calls for the 'peaceful' occupation of land. Furthermore, Mr Malema explicitly states that he is **not** calling for the slaughter of white people. Mr Malema expanded the factual context by subsequently stating that 'not under my leadership will I call for the slaughter of white people, even though I cannot guarantee what will happen after me' (**Huffington Post 'Malema: 'We Have Not Called For The Killing Of**

White People... At Least For Now" (12-06-2018) Huffington Post
<https://www.huffingtonpost.co.za/2018/06/12/malema-we-have-not-called-for-the-killing-of-white-people-at-least-for-now-a-23456601/>).

7.1.3. Regardless of whether a conjunctive or disjunctive reading of section 10 is adopted, a determination of hate speech in this case hinges on whether the addition of 'at least for now' to the statement that Mr Malema is 'not calling for the slaughter of white people' can be reasonably construed to demonstrate a clear intention to incite harm at some indeterminate time in the future. Incitement connotes 'making a call for' certain action. The United Nations Committee on the Elimination of Racial Discrimination (CERD) has noted that 'States parties should take into account, as important elements in the incitement offences... the intention of the speaker, and the **imminent risk or likelihood** that the conduct desired or intended by the speaker will result from the speech in question' (***CERD General Recommendation 35: Combating racist hate speech, 26 September 2013 para 16***) .Mr Malema explicitly does 'not' call for the slaughtering of white people. Such incitement is not an incitement to 'imminent' violence as per the language of section 16(2)(b) of the Constitution, or foreseen at the time when the utterances are made. Moreover, viewed in its context, the statements deal with the subject matter of land dispossession and redistribution, and is not aimed at inciting harm to white people.

7.1.4. To the extent that Mr Malema's exposition of colonists' actions against Africans may promote hatred against white descendants, the proviso in section 12 of PEPUDA should be applied. Thus, where the statement refers to historical events and actions by colonists, it constitutes protected expression and the communication of information in accordance with section 16(1) of the Constitution. The United

Nations Committee on the Elimination of Racial Discrimination (CERD) has noted that opinions on historical facts should not be prohibited, and that 'measures to monitor and combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition' (***CERD General Recommendation 35: Combating racist hate speech, 26 September 2013***).

8. Statement two

8.1. In August 2017, Mr Malema stated the following:

Here in Durban, here in KZN, everything strategic is given to Indian families ... every big tender is given to Indian families... they are the ones who own everything strategic here in KZN.

We don't have a problem: We are saying share with our people.

We also want to call upon our fellow Indians here in Natal to respect Africans, they are ill-treating them. We don't want that to continue here in Natal. They are treating them worse than Afrikaners will do.

This is not an anti-Indian statement, it's the truth. If we tell whites the truth; if we tell blacks the truth, we can as well tell Indians the truth. They must treat our people properly here in Kwa-Zulu Natal.

- (Video recording of speech available at <<https://www.enca.com/south-africa/eff-wont-apologise-for-malemas-anti-indian-remarks>>).

8.1.1. In the early judgment of ***SAHRC v SABC (Case No: 31/2002 (BCCSA))*** the Broadcasting Complaints Commission of South Africa held that a song portraying Indians as mistreating Zulus constituted hate speech for inciting fear in a substantial portion of Indians. However, it is crucial to acknowledge jurisprudential development in the context of hate speech since delivery of this judgment in 2002. In particular,

the judgments of *Masuku* and *Qwelane*, read with the Constitutional Court judgments in *Rustenburg Platinum Mines* and *SARS*, have developed both the interpretation of section 10 of PEPUDA and the applicability of context in hate speech matters. The tests for hate speech as subsequently developed are accordingly applied below.

8.1.2. An **objective and contextual assessment** of the statements show that while both population groups were disadvantaged under apartheid rule, the **African group was and remains significantly more vulnerable** than the Indian group. Furthermore, the calling of Indians to 'share' economic prosperity, and the reference to 'fellow' Indians, show that, objectively interpreted, these statements do **not** demonstrate an intention to be hurtful, harmful or to promote hatred.

8.1.3. Taking the **context** of the statement into account further militates against a finding of hate speech:

8.1.3.1. The **historical context** of the statement is one in which, although oppressed and discriminated against, the Indian population group enjoyed more political and economic privileges during apartheid than the African group.

8.1.3.2. The **social context** of the statement is one in which 66% of Africans remain poor, compared to approximately 6% of Indians (**Stats SA Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015 (2017) 58**).

8.1.3.3. The **factual context** shows that Mr Malema does not begrudge the Indian community economic prosperity, but calls for the Indian community to 'share' its

wealth with Africans. The statements referring to ill-treatment of Africans by Indians expresses the lived experience of Africans in the province. Referring to his 'fellow' Indians, Mr Malema suggests the promotion of comity. Mr Malema furthermore notes that 'truth' must be expressed to all racial groups, and ultimately merely calls for the 'proper' treatment of Africans by Indians in Kwa-Zulu Natal.

8.1.4. This statement does not amount to hate speech on a conjunctive reading of section 10 of PEPUDA, since it cannot be interpreted as intended to be harmful, to incite harm, or to promote hatred. The question arises as to whether, on a disjunctive reading, the statement can be **objectively** construed as 'hurtful' when viewed within its context. Although stating that Indians treat Africans worse than Afrikaners do may be hurtful to certain Indians if interpreted as referring to treatment meted out by Afrikaners under the apartheid regime (***City of Cape Town v Freddie and Others (CA13 /14) [2016] ZALAC 8; [2016] 6 BLLR 568 (LAC)***) the statement merely makes a generic reference to bad treatment by Afrikaners. Read as a whole, the statement does not meet the threshold for hate speech. By adopting the interpretation of 'hurtful' espoused in ***Qwelane*** matter as connoting 'severe psychological impact', this statement cannot be construed as 'hurtful'.

9. Statement three

9.1. On 21 March 2018, Mr Malema sang the song 'Kiss the Boer' at the end of a speech made during an EFF Human Rights Day rally in Mpumalanga.

9.2. In ***Freedom Front v South African Human Rights Commission (2003 11 BCLR 1283 (SAHRC))*** an appeal committee of the Commission held that singing of the song

'Kill the Boer' constitutes hate speech. The Commission endorsed an objective test for the establishment of hate speech, and emphasized the need for a causal connection between the words uttered and resultant harm.

9.3. In *Afri-Forum and Another v Malema and Others* (2011 (6) SA 240 (EqC) para 101)

the Equality Court observed that changing the words of the impugned song from 'Kill' to 'Kiss' the boer did not change its nature as hate speech:

It is possible to illustrate this point by recalling that at a point in time Malema sang "Kiss the Boer". On the face of it these words are innocuous. It is only when consideration is given to the range of knowledge available to the audience and which the audience will use to decode the words that the true meaning becomes apparent. At the time the words were uttered, the words "Kill the farmer / Kill the Boer" were controversial and could not be used as they had been recognised as hate speech. The fact that the words "Kill the farmer / Kill the Boer" were hate speech was well-known to all members of the audience as it had been widely publicised. At a superficial level, the word "kiss" is sufficiently close in sound to the word "kill" for the audience to make the link between "kiss" and "kill". Once the audience makes the link, it becomes apparent that the coded message is that to which the link refers namely "Kill the Boer / "Kill the farmer". There can be little doubt that it was no coincidence that the speaker used the word "kiss" when he encoded the message he wished the audience to receive. The elasticity of the meaning to be attached to "kiss" is that it means "kill". Hence the word actually used, a word demonstrating love and affection, is in fact a word which is intended by that use to produce the image of the exact opposite.

9.3.1. The Equality Court further pronounced a related struggle song, 'Shoot the Boer', to be hate speech. The court based its finding on the literal translation of the song and its meaning according to the Afrikaner segment of society.

9.3.2. The court further acknowledged that factions as to the singing of the song had emerged (**para 82**), with ANC supporters who had been part of the liberation struggle supporting the singing of the song on its **figurative meaning** of destroying a regime as opposed to killing anyone (**para 53**), and the white Afrikaner group opposing the singing of the song on the **literal meaning** and direct translation of the words sung.

9.3.3. The court correctly held that an objective test is applicable in that '[w]hat the words mean is to be determined by applying the test of what the words would mean to a **reasonable listener** having the common knowledge and skill attributed to an ordinary member of society' (**para 91**). However, the court went on to apply this objective test to the meaning ascribed to words by different segments of society, which approach seemingly negates the essence of an objective test (**para 91**).

9.3.4. The court ultimately held that the literal translation of the song and the meaning ascribed to it by white Afrikaners trumped the figurative and historically significant meaning ascribed to it by the black majority.

9.3.5. This judgment has been widely criticized for focusing on the meaning ascribed to a historically significant struggle song by a socio-economically powerful group (whites), and for interpreting the meaning of the song from outside of its cultural positioning. Furthermore, the court arguably wrongly replaced an objective test for hate speech with the subjective perspective of only one segment of society. This suggests that the black majority, which understood the song according to its figurative meaning and historical significance, does not constitute a 'reasonable listener'. (**J Modiri 'Race, realism and critique : the politics of race and Afriforum v Malema in the (in)equality court' (2013) SALJ 274; P de Vos 'Malema judgment: A re-think on hate speech needed' (12 September 2011) Constitutionally Speaking <<http://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speechneeded/>>; JC Botha & A Govindjee 'Hate Speech Provisions and Provisos: A Response to Marais and Pretorius and Proposals for Reform' (2017) PER 14.**)

9.4. If the test for the **context** of statement later developed in *Masuku* and *Qwelane* (read with Constitutional Court jurisprudence) is applied, a finding of hate speech would be unlikely:

9.4.1. The **historical context** shows that, **objectively**, the song is intended to make a political statement and does not call for the incitement of harm against individuals.

9.4.2. The **social context** demonstrates that although a minority, the white population group is socio-economically powerful.

9.4.3. The **factual context** in which Mr Malema sang the song shows that the singing of the song was preceded by a speech in which Mr Malema was at pains to emphasise that he is not calling for the murdering of anyone, and that the audience's ancestors are peaceful people. (see <<https://www.youtube.com/watch?v=nTZUiXUcG5M>> from, *inter alia*, the 9th to 12th minute mark and 30th to 33rd minute mark.)

9.4.3.1. Early precedent holds that the introductory remarks and peaceful sentiments expressed by Mr Malema throughout the speech are irrelevant. In the context of a Zulu song that criticized Indians' treatment of Zulus, the Broadcasting Complaints Commission of South Africa held that '[o]bjectively judged the song amounts to hate speech, in spite of the reconciliatory introduction of the writer. The song itself does not convey the same message' (***SAHRC v SABC Case No: 31/2002 (BCCSA) para 40***). However, the Films and Publications Board later merely restricted the song to listeners over the age of 18, whereas the High Court found that the **song did not amount to hate speech** in declining to extend an interim interdict against the song (***Ramesh Dharamshee Jethalal v Mbongeni Ngema and Universal Music Case No:***

3524/2002 (28 June 2002)). The court based its decision on the language of section 16(2) of the Constitution, which requires both advocacy of hatred and incitement to cause harm for expression to amount to hate speech. The court held that since no Indians had been harmed by black persons as a result of the song, the fact that the song was racist did not render it an instance of hate speech.

9.4.3.2. It is important to note that the development of a more contextual test for hate speech occurred in subsequent case law including *Masuku* and *Qwelane*. Furthermore, the later Equality Court judgment are more authoritative than the early decision by the Broadcasting Complaints Commission. It is accordingly opined that the contextual test developed in *Masuku* and *Qwelane* should supersede the 2002 administrative decision.

9.5. On an objectively construed meaning of the song as **figurative and political**, it can accordingly not be held to evince an intention to have a severe psychological impact on white Afrikaners, to harm or incite harm against them, or to promote or propagate hatred against them.

10. Statement four

10.1. On 16 June 2018, Mr Malema made the following statement in the North West:

We were not all oppressed the same. Indians had all sorts of resources Africans didn't have, Coloureds as well... The majority of Indians hate Africans. The majority of Indians are racist. I'm not saying all, I'm saying majority.

10.2. An **objective and contextual assessment** of the statements show that while both population groups were disadvantaged under apartheid rule, the **African group was**

and remains significantly more vulnerable than the Indian group. Furthermore, Mr Malema is careful to qualify his statement to make it clear that not all Indians are racist.

10.3. Given the importance of freedom of expression – and particularly robust political speech – to facilitate debate and thereby potentially expose divisive statements as wrong, space must be left for controversial opinions to be aired in our relatively new democracy (***Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC) paras 122-123; S v Mamabolo 2001 (3) SA 409 (CC) para 37***). In addition, vulnerable groups that were the most disadvantaged during apartheid, and who continue to suffer most under poverty and inequality, must be allowed a space to share their lived experience and anger, even if the public ultimately exposes their opinions as unacceptable. As stated *obiter* by the Supreme Court of Appeal, '[f]reedom of speech must be robust and the ability to express hurt, pain and anger is vital, if the voices of those who see themselves as oppressed or disempowered are to be heard (***Hotz and Others v University of Cape Town 2017 (2) SA 485 (SCA) para 67***).

10.4. The analysis in paragraph 6.3 above is again applicable to the analysis here, and will not be repeated in full. As mentioned above, the **historical and social context** shows that Indians were and continue to occupy a relatively advantaged position in society and the economy compared to the African group. The **factual context** shows that Mr Malema is again engaged in robust political speech, and does not stereotype all Indians as a blanket proposition.

10.5. On a **conjunctive** reading of section 10 of PEPUDA the statement cannot be reasonably construed to be harmful or incite harm, or to promote hatred (as that term is judicially defined) against the Indian community. If a **disjunctive** reading is adopted,

and on the interpretation of 'hurtful' adopted by the court in *Qwelane*, it is doubtful that Mr Malema statements would cause 'severe psychological impact' on the dignity interests of Indians. Holding that unpopular, divisive or controversial opinions constitute hate speech would ultimately stifle freedom of expression, and thereby cast further doubt on the constitutionality of section 10 of PEPUDA.

11. Statement five

11.1. In May 2018, EFF Member of Parliament, Mr Godrich Gardee, posted a statement on twitter that referred to fellow DA Member of Parliament, Mmusi Maimane, as a 'garden boy' during a parliamentary sitting. Although Mr Gardee's original tweet has been deleted, widespread and predominantly negative response to the tweet can still be viewed on twitter. Many reactions noted the hypocrisy in the use of a word meant to belittle black people, by a member of a mainly black party that ostensibly protects the interests of garden workers, domestic workers and the like.

11.2. The statement can objectively be construed as demonstrating a clear intention to be offensive and demeaning. However, the fact that the statement was uttered by a black Member of Parliament to a fellow black Member of Parliament shows power symmetry between the offender and the target audience.

11.3. The **context** of the statement further shows that it is offensive:

11.3.1. The **historical context** shows that terms such as 'garden boy' and 'tea girl' were used to demean black persons.

11.3.2. The **social context** shows the persistence of inequality in class and professions based on race.

11.3.3. The **factual context** shows that the comment was meant to insult the recipient thereof.

11.4. However, on a conjunctive reading of section 10 of PEPUDA, the statement cannot be reasonably interpreted as intending to harm or incite harm against the target audience, or to promote hatred. **In the light of the identity of the offender and the recipient of the statement**, it is further unlikely on a disjunctive reading of section 10 that the use of the term by a black man is objectively intended to be 'hurtful' in the sense of visiting 'severe psychological impact' on the target audience.

11.5. It is noteworthy that a court is yet to pronounce on whether a statement uttered by a white person to a black person and that constitutes hate speech, would also constitute hate speech if uttered by a black person to another black person.

11.6. It should further be noted that the recipient's remedy may lie in the common law of defamation or *crimen iniuria*, rather than in PEPUDA, or could be brought to the attention of the Parliamentary Ethics Committee.

12. FINDINGS

12.1. The impugned statements made by Mr Malema constituted robust political speech, which enjoys special protection as expression that lies at the heart of the right to freedom of expression. **It is found that although offensive and even disturbing, the statements – viewed in their full context – do not amount to hate speech.**

These statements enjoy some constitutional value in dealing with matters such as land reform and inter racial relations. The Commission nevertheless notes that although not passing the legal threshold for hate speech, public figures should refrain from making statements that erode social cohesion.

- 12.2. The statement made by Mr Gardee on twitter is offensive and demeaning, but it is found that it does not meet the threshold of hate speech on the interpretation of 'hurtful' espoused in **Qwelane**. However, the statement holds no political or constitutional value. The remedy for this statement may lie in the law of defamation or *crimen iniuria*.

13. Way forward

- 13.1. Unpredictability and inconsistency surround the issue of judicial discretion at any level. Given the dearth of authoritative case law concerning the interpretation and application of section 10 of PEPUDA in the light of the constitutionally guaranteed right to freedom of expression, the Commission continues to carefully consider its own contribution to the development of equality law and particularly the area of hate speech. Where appropriate, the Commission pursues litigation in egregious cases of hate speech, including **Qwelane**, **Masuku** and **Khumalo**. The Commission has further made a preliminary assessment that statements made by Mr Andile Mngxitama to kill five white people for every black person killed, including women and children, constitute hate speech and has accordingly instituted litigation in this regard in the Equality Court.

- 13.2. On the basis of the above mentioned analysis and other considerations, the Commission came to the conclusion that while the acts forming the subjects of these complaints may be quite offensive, they do not meet the legal threshold to qualify as

hate speech. In this regard, the Commission sought the legal opinion of one of the top advocates in the country because it did not want to exclude the possibility that there might perhaps be another way of evaluating the facts and interpreting the applicable law. The Senior Counsel's legal opinion took the same view that the Commission took internally. One must mention that in requesting the outside legal opinion the Commission did not reveal to the Senior Counsel that the Commission had already formulated its own view of the matter

13.3. The Commission notes that various Equality Court decisions do not have unanimity on how to interpret the provisions of section 10 of PEPUDA, which seems to indicate that this is still a developing area of law. The matter is now destined for the Constitutional Court and the Commission hopes that a significant measure of clarity will be added to this issue. The legislature itself is still grappling with the issue. The Department of Justice has repeatedly advised that it is reviewing and amending PEPUDA. The Hate Speech Bill is still on the road to approval.

13.4. The additional responsibility on public figures to promote social cohesion has long been recognised by the Commission. Even where divisive or offensive statements do not meet the threshold for hate speech, the Commission still bears a responsibility to foster social cohesion. The Commission will continue to promote social cohesion through its promotional mandate, as envisaged by the National Development Plan and the recently finalised National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances.