

REPUBLIC OF SOUTH AFRICA



IN THE EQUALITY COURT, JOHANNESBURG

CASE NO: 20968/2010

DATE:12/09/2011

REPORTABLE

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

AFRI-FORUM

First Complainant

TAU SA

Second Complainant

and

JULIUS SELLO MALEMA

First Respondent

AFRICAN NATIONAL CONGRESS

Second Complainant

VERENIGING VAN REGSLUI VIR AFRIKAANS

Amicus Curiae

J U D G M E N T

LAMONT, J:

[1] This is a matter which comes before me in the Equality Court. It concerns social conflict arising out of alleged hate speech. To understand the social interaction of the groups within society it is necessary to briefly set out some historical facts. The legislation is initially set out in general terms to provide the legislative foundation within which the hate speech legislation operates.

THE BOERS

[2] Several centuries ago people commenced and since then have continued emigrating to the Republic from Europe and elsewhere. They brought with them their languages, cultures, moralities, laws and customs. Immigrants from Europe gained control of the country. They were able to and did to a large extent impose the norms customs and morality of their former societies upon other inhabitants of the Republic. The recognised laws in the Republic became their laws.

[3] Their morality did not recognize others as having rights of any significance. They proceeded to trample upon the rights of others and seize control of the assets of the Republic for themselves.

[4] A faction of the immigrants who had their origin in Holland, France and Germany banded together at a point in time in consequence of conflict between European factions. This faction (known as Boers) in the pursuit of

freedom left the community of European settlers and went to live on their own. They established independent republics in which it was proposed by them that they would express and pursue their economic, political and social ambitions. Those republics at a point in time were compelled to surrender to European forces. Notwithstanding their defeat, the zeal of that band and their ideal of pursuing their freedom remained intact. The Boers were able to seize control after the elections held during the late 1940's and today are identified as a community or set of persons calling themselves Boere or Afrikaners.

[5] Demonstrating excessive zeal and rigid in their demands for freedom the Boere pursued a policy of apartheid so as to maintain their political freedom. That policy at the time the community commenced practising it had deep-seated longstanding recognition in the Republic. Ever since the first immigrants had arrived from Europe they had had no regard for the rights, social, political, economic or otherwise of other persons inhabiting the Republic. The Boer numbers were fewer than those of other communities. They would have been defeated at democratically held elections. Apartheid was the only way to retain control and power. This policy was pursued without regard for the growing clamour worldwide that it be discontinued and that the rights of others be recognised. It was pursued ruthlessly and with violence sanctioned by the regime. The violence involved violence to dignity, freedom and economic standing of people. Every facet of life was affected and tainted. Its pursuit involved the conferring of privileges upon other Boere. Ultimately the regime became identified with the Boere who virtually, exclusively, controlled the implementation of the policy.

THE ANC

[6] During the early part of the twentieth century, members of the oppressed groups began banding together. They banded together under the auspices of organisations which broadly speaking became united as the present African National Congress (ANC).

[7] The ANC represented what has colloquially been referred to as the suppressed majority. The suppressed majority largely comprised black persons who were disenfranchised politically; economically stripped of wealth and subjected to ill-treatment at the hands of the government of the day.

[8] The policy of the ANC originally was non-violent. With the passage of time and the increasing frustration of its members, the ANC eventually formulated a policy which included violence as an option. At all times the policy was that, as far as possible, the violence be directed to the actual oppressor (the physical manifestation of the government) and that civilians be spared attack. The members of the ANC, who were involved in violence, euphemistically referred to it as the struggle. The members of the ANC who participated in the struggle were drawn from all walks of life and comprised civilians. There was no known army wearing a uniform. In consequence of this, the government directed its attacks against civilians. Not all civilians were however participants in the struggle. Any member of the oppressed group was perceived as "*the enemy*" by the government. With the passage of time, the frustrations and anger of persons belonging to the suppressed majority,

the members of the ANC and non-combatants who suffered attacks, increased.

[9] In *Dutoit v Minister of Safety and Security* 2010 (1) SACR 1 para 17 the period was described as a time when there was a deeply divided society characterised by gross violations of fundamental human rights.

Langa CJ referred to the words of Mahomed DP in *Azapo v President of the RSA* [1996] ZA CC 16.

“Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding obscuring of our history. Records are not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.” [18] What followed was a negotiated transition premised on the need for the transformation of society and the building of bridges across racial, gender, class and ideological divides. The epilogue to the interim Constitution identifies it as an ‘historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence’. It goes on to state that:

‘The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.’

By adopting that Constitution the nation signalled its commitment to reconciliation and national unity, and its realisation that many of the

unjust consequences of the past can never be fully reversed but that it would nevertheless be necessary to 'close the book' on the past”.

THE AGREEMENT

[10] The agreement between the various communities became the Constitution of the Republic. The preamble to the Constitution which sets out the intention of the parties to the settlement provides:

“Preamble

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.”

THE CONSEQUENCE

[11] Consequent upon the agreement between the groups, people who had lived lives separately from each other, who had hurt, tormented and degraded each other and who in particular, were not accustomed to each other in any way commenced associating and interacting with each other. Persons

previously comprising the privileged essentially white grouping were suddenly, as equals, compelled to associate with persons who they neither know nor had interest in, persons they did not understand; persons from whom they had been isolated by force and law; persons who had been derided and degraded by them previously. Persons who had been oppressed similarly were, as equals, entitled and required to interact as equals with people who had previously abused them, stripped them of their dignity and denied them their rights. All persons were compelled to interact as a unified society at social, political and economic levels. The re-adjustment of society required individuals of the groups to reprogram themselves and their conduct. They had to deal with each other on a different basis. Historic customs and practices had to be reconsidered and re-adjusted to accord with the newly introduced requirements which the State imposed on society in the form of the Constitution. All facets of life were affected.

[12] Certain members of society readily embraced the concept of a new society and sought actively to comply with its demands. Others found it difficult to re-adjust and difficult to give up practices and customs which they held near and dear. Extreme social conflict resulted from the transformation. It continues till this day and on the evidence before me will continue for some time. Notwithstanding the conflict occasioned by transformation there has been little physical violence in the process. There can be no transformation without pain. Individuals transform at different rates. Anger and discontent feed on change and pain. The Constitution has recognised the need to put in place mechanisms to overcome reluctance to change and conduct regarded

as inappropriate in the new society. The Constitution needed to do this as many members of society in the course of transformation of rights, lost the foundation of history which guided their judgment. They found themselves unable to rely on their existing customs and morality as founding the basis upon which they could exercise their judgment to determine appropriate conduct in the new society.

[13] The Constitution and the related legislation it invokes provide the framework to be used to alleviate and overcome the friction resulting from change. It does this in the present context by providing the standards society is to adhere to as also the mechanism in the form of *inter alia* the Equality Act to assist society to determine conduct which is acceptable.

THE PROVISIONS OF THE CONSTITUTION TO BE CONSIDERED

[14] The Constitution provides in section 2 that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid. The obligations imposed by it must be fulfilled. The Constitution in Chapter 2 contains a Bill of Rights setting out the various rights of application within the Republic. Section 8 provides for the Bill of Rights to be applicable to all law and to be binding on the legislature, the executive, the judiciary and all organs of State. The Bill of Rights binds, in terms of section 8(2) of the Constitution, a natural or juristic person if and to the extent that it is applicable taking into account the nature of the right and the nature of any duty imposed by the right. Section 8(4) of the Constitution provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the

rights and the nature of that juristic person. A Court is enjoined in section 8(3) of the Constitution to apply or if necessary develop the common law to the extent that legislation does not give effect to the right in question. It permits a Court to develop rules of common law to limit the right in certain circumstance.

[15] In applying the Constitution, the Court must have regard to all the various bodies of law which contribute towards intercommunity peace and harmony and which lay the basis for a democratic dispensation. Each community within society, ethnic, religious, commercial or otherwise, is regarded as a permanent and valuable segment of the plural society in which South Africans live. The domestic law must be applied. To the extent that domestic law incorporates provisions of Treaties concluded by the Republic, such law must be considered.

FOREIGN AND INTERNATIONAL LAW

[16] The Court is required by the Constitution itself also to have regard to foreign and international law. Sections 231 to 233 of the Constitution read as follows:

“231. International agreements.—(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds

the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

232. Customary international law.—Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

233. Application of international law.—When interpreting any legislation, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

Section 39(1) of the Constitution provides that when the Bill of Rights is interpreted the Courts may consider foreign law.

[17] When Courts rely on foreign law, they must be careful to recognise the differences between the South African law and the foreign law in question. See *S v Mamabolo (ETV and Others Intervening)* 2001 (3) SA 409 (CC) paras [40] and [41].

UBUNTU

[18] In the epilogue to the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) the concept of ubuntu was recognised. This concept was not repeated in the current Constitution. This notwithstanding, there are a number of ubuntu-based judgments. An ubuntu-based jurisprudence has been developed particularly by the Constitutional Court. Ubuntu is recognised as being an important source of law within the context of

strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases. Ubuntu is a concept which:

1. is to be contrasted with vengeance;
2. dictates that a high value be placed on the life of a human being;
3. is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another;
4. dictates a shift from confrontation to mediation and conciliation;
5. dictates good attitudes and shared concern;
6. favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant;
7. favours restorative rather than retributive justice;
8. operates in a direction favouring reconciliation rather than estrangement of disputants;
9. works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant;
10. promotes mutual understanding rather than punishment;

11. favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful;
12. favours civility and civilised dialogue premised on mutual tolerance.

See *S v Makwanyane and Another* 1995 (3) SA 191 (CC) (para [131], [225], [250], [307]); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 517 (CC) at para [37]; *Dikoko v Mokotla* 2006 (6) SA 235 (CC) at paras [68]-[69], [112] and [115]-[116]; *Masethla v President of RSA* 2008 (1) SA 566 (CC) at para [238]. See also *Union of Refugee Women v Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) (para [38]); *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (para [50]); *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) at paras [45] and [163].

THE CONSTITUTION ON THE ISSUE

[19] The Constitution provides for equality:

“9. Equality.—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

- (4)* *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

[20] The Constitution in section 16 provides for freedom of expression:

"16. Freedom of expression.—(1) Everyone has the right to freedom of expression, which includes—

- (a) freedom of the Press and other media;*
- (b) freedom to receive or impart information or ideas;*
- (c) freedom of artistic creativity; and*
- (d) academic freedom and freedom of scientific research.*

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

- (a) propaganda for war;*
- (b) incitement of imminent violence; or*
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

[21] Section 12(1)(c) of the Constitution provides for freedom and security in these terms:

"12(1) Everyone has the right to freedom and security of the person, which includes the right –

- (c) to be free from all forms of violence from other public or private sources."*

[22] The legislation provided for in the Constitution with regard to hate speech is to be found in the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 (the Equality Act).

The preamble to the Equality Act provides:

“Preamble.—The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people; Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy; The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish; South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination; Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality; This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences; This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.”

[23] The domestic law in the Equality Court Act prohibits hate speech.

[24] Section 10 provides:

“10. Prohibition of hate speech.—(1) ... 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.*

(2) Without prejudice to any remedies of a civil nature under this Act, the Court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”

[25] Section 15 of the Equality Act provides that with regard to hate speech and harassment the question of fairness does not apply.

“15. Hate speech and harassment not subject to determination of fairness.—In cases of hate speech and harassment section 14 does not apply.”

In balancing the rights and obligations contained within the Constitution in regard to hate speech the Court is obliged to seek the solution which is just not that which is fair.

[26] The prohibited grounds referred to in section 10 of the Equality Act are defined in section 1 as being:

“prohibited grounds” are—

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or*

- (b) *any other ground where discrimination based on that other ground—*
- (i) *causes or perpetuates systemic disadvantage;*
 - (ii) *undermines human dignity; or*
 - (iii) *adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);"*

TREATIES ON THE ISSUE

[27] The Republic is both a party to and has ratified certain treaties which are of application. The laws contained within these treaties are of application to questions concerning hate speech. The Republic in consonance with its obligations under the Constitution and its international undertakings in internationally recognised treaties has promulgated appropriate legislation to deal with what is colloquially known as hate speech. These treaties which set certain social guidelines as to acceptable conduct include:

1. the Convention on the Prevention and Punishment of the Crime of Genocide (1948) which should be read with the Rome Statute of the International Criminal Court. Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as follows:

“... Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national ethnic racial or religious group, as such:

 - (a) killing members of the group;
 - (b) causing serious bodily or mental harm to members of the group;
 - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

Genocide is created as a punishable crime and includes direct and public incitement to commit genocide. Genocide includes amongst others killing members of a group with intent to destroy in whole or in part the national ethnic racial or religious group as such and also includes as a crime against humanity murder when it is committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.”

2. the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965);

“CERD provides that states who are parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin or which attempts to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures designed to eradicate all incitement to or acts of such discrimination and to this end with due regard to the principles embodied in the universal declaration of human rights and the rights expressly set forth in article 5 provide inter alia that participating states

- (a) declare an offence punishable by law of all dissemination of ideas based on racial superiority or hatred incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin and also the provision of any assistance to racial activities including the financing thereof;
- (b) declare illegal and prohibit organisations and also organised and all other propaganda activities which promote and incite racial discrimination and further that such states recognise participation in such organisations or activities as an offence punishable by law;
- (c) not permit public authorities or public institutions national or local to promote or incite racial discrimination.”

3. the International Covenant on Civil and Political Rights (ICCPR) (1966).

The ICCPR provides in section 20 that any advocacy of national racial or religious hatred that constitutes incitement to discrimination hostility or violence shall be prohibited by law.

POWERS OF EQUALITY COURT

[28] The Equality Act provides a forum to deal with hate speech and has conferred powers and functions upon it in section 21. Section 21 of the Equality Act reads:

“21. Powers and functions of equality Court.—(1) The equality Court before which proceedings are instituted in terms of or under this Act must hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.

(2) After holding an inquiry, the Court may make an appropriate order in the circumstances, including—

- (a) an interim order;*
- (b) a declaratory order;*
- (c) an order making a settlement between the parties to the proceedings an order of Court;*
- (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;*
- (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;*
- (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;*
- (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;*

- (h) *an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;*
- (i) *an order directing the reasonable accommodation of a group or class of persons by the respondent;*
- (j) *an order that an unconditional apology be made;*
- (k) *an order requiring the respondent to undergo an audit of specific policies or practices as determined by the Court;*
- (l) *an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;*
- (m) *a directive requiring the respondent to make regular progress reports to the Court or to the relevant constitutional institution regarding the implementation of the Court's order;*
- (n) *an order directing the clerk of the equality Court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;*
- (o) *an appropriate order of costs against any party to the proceedings;*
- (p) *an order to comply with any provision of the Act."*

WHY PROHIBIT HATE SPEECH?

[29] Hate speech at a social level is prohibited for four reasons:

- "1. *To prevent disruption to public order and social peace stemming from retaliation by victims.*
- 2. *To prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in the community and contribute to society.*
- 3. *To prevent both visible exclusion of minority groups that would deny them equal opportunities and benefits of ... society and invisibly exclude their acceptance as equals.*
- 4. *To prevent social conflagration and political disintegration."*

See *Democracy Off Balance* by Stefan Braun page 62.

[30] Hate speech at a personal level as experienced by individuals comprising the group affected by the speech ("the target group") is a direct

invasion of dignity and infringement on the rights of association of an individual.

THE TENSION BETWEEN THE PROHIBITION AND FREEDOM OF SPEECH

[31] Inevitably there is a tension between the right of the speaker to freedom of expression and the obligation of the speaker not to use words constituting hate speech.

[32] The American jurisprudence must be cautiously approached by reason of the exaggerated role which freedom of expression is given to play in their legislation. See *S v Mamabolo supra*:

“The balance which our common law strikes between protection of an individual’s reputation and the right to freedom of expression differs fundamentally from the balance struck in the United States. The difference is even more marked under the two respective constitutional regimes ... The fundamental reason why the test evolved under the first amendment cannot lock onto our crime of scandalising the Court is because our Constitution ranks the right to freedom of expression differently. With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. ... the Constitution in its opening statement and repeatedly thereafter proclaims three conjoined reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. ... freedom of expression does not enjoy superior status in our law.” (paras [40] and [41])

Walter Chaplinsky v State of New Hampshire (315) US 568-574 holds that the right of free speech is not absolute and does not include amongst others utterances that inflict injury or intent to incite an immediate breach of the

peace. This authority in my view in no way lessens the care with which American authorities are to be approached.

[33] Speech that is political and that takes place in public is intended, and must be considered, to be communicated to the public at large not merely to those who are present at the time. As citizens, target group members have both a right and a duty to attend the political speeches of others, while as the targets of such speech; they have a compelling interest in doing so. Such persons, even if they do not attend the event in question, can hardly avoid the impact of the speech. Public speech involves a participation in political discourse with other citizens, in a manner that respects their own correlative rights. Hate speech has no respect for those rights. It lacks full value as political speech. Hate speech does not address the community in general but merely a portion of it; those who are the target group. Hate speech should not be protected merely because it contributes to the pursuit of the truth. If it denies recognition of the free and reasonable rights of others it makes no direct contribution to the process. See *Hate Speech and the Constitution* Vol 1 page LXVII.

MINORITIES

[34] The test to be applied where majoritarian or minoritarian positions are involved must always be whether the measure under scrutiny promotes or retards the achievement of human dignity equality and freedom. See *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others Amicus Curiae; Lesbian and Gay Equality Project*

and Others v Minister of Home Affairs and Others) 2006 (1) SA 524 (CC) (para [94]). In balancing the various factors the Court will have regard to the fact that communities including minority communities hold beliefs, are entitled to practice their customs and conventions subject to same being lawful. *Prince v President Cape Law Society and Others* 2001 (2) SA 388 (CC) at para [26]; *Bel Porto School Governing Body and Others v Premier Western Cape and Another* 2002 (3) SA 265 (CC) (para [84]); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) (paras [25] and [136]).

[35] It must not however be forgotten that minority groups are particularly vulnerable. It is precisely the individuals who are members of such minorities who are vulnerable to discriminatory treatment and who in a very special sense must look to the Bill of Rights for protection. The Court has a clear duty to come to the assistance of such affected people. See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para [48]; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (*supra*) para [25].

[36] “A group which is numerically inferior to the rest of the population of a state and in a non-dominant position whose members possess ethnic religious or linguistic characteristics which differ from those of the rest of the population and who if only implicitly, maintain a sense of solidarity directed towards preserving their culture traditions religion or language” constitutes a minority. Minorities are not to be denied the right in community with other

members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. See: The School Education Bill case supra at para 60. See: F Capotorti Rights of Persons Belonging to Ethnic Religious and Linguistic Minorities (1977) cited In re: “The School Education Bill 1995 (Gauteng) 1996 (4) BCLR 537 (CC) at para 61. Minorities have no legislative or executive powers and are compelled to approach the Court to protect their rights. They are particularly at risk due to the expense involved in such approaches. The fact that they are minorities and experience such difficulties frequently results in them being driven to protect their identity by invoking and enforcing within their group, customs practices and conventions which are believed to be appropriate. In addition, they are fragile in that they are readily assumed by the mass and lose their identity. A Court which hears a matter must, while balancing the rights in question take into account in the construction of what hate speech is the fact that it is directed at a minority. See also *Freedom Front v SAHRC* 2000 (11) BCLR 1283 (SAHRC) at 1296.

THE ACTUAL PROHIBITION

[37] Section 10 of the Equality Act defines what may not be published.

1. A person may not publish,
2. against any person including a juristic person, a non-juristic entity, a group or category of persons,

3. words concerning race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,
4. or words concerning any other ground where the discrimination based on that ground:
 - (a) causes or perpetuates systemic disadvantage;
 - (b) undermines human dignity; or
 - (c) adversely effects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground referred to *supra* in para [37] [3].
5. If the words in para 37 [4] could reasonably be construed to demonstrate a clear intention to.
 - (a) be hurtful;
 - (b) be harmful;
 - (c) incite harm;
 - (d) promote hatred;
 - (e) propagate hatred.

[38] It is immediately apparent that the target group is widely defined and includes natural and juristic persons and associations as well as groupings of people and categories of people.

[39] The definition refers to words as being what is objectionable. This definition does not exclude the relevance of gestures which accompany the words. Those gestures form part of the context and will be relevant to determining the reasonable construction to be placed upon the words. See for example *Phillips v Director of Public Prosecutions* 2002 (5) SA 555 (W) at para 14-17, *Botha Eiendomme (Edms) Bpk v Ekple-Epoh* 2000 (4) SA 466 at 471 para 3.3 and *S v Seeshama* 1991 (2) SA 860 (SCA) at 879.

[40] The reasonable construction of words means the message the words deliver when decoded (or construed), reasonably. This will be dealt with below.

[41] The question of what words mean has been the subject of legal opinions throughout history. It is in my view instructive to consider the approach adopted in the law of defamation to ascertain the meaning of words. Words also mean what they imply.

“In the absence of an innuendo, the test [is] whether the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining whether this is the position the Court must take account not only of what the words expressly say, but also what they imply. The context within which the words have been used cannot be ignored. See: Argus Printing and Publishing Co Ltd v Esselen’s Estate 1994 (2)

SA 1 (A) at 20E-21B". Per: Kgomo J in *Selemela and Others v Independent Newspaper Group Ltd and Others* 2001 (4) SA 1001

[42] The publication of words includes the propagation advocating or communication thereof. This definition in my view encompasses secondary publication. In the ordinary course, secondary publication of information sourced from a reputable source is permissible without informed consent having independently verified the legitimacy of the right to publish the particular facts. See: *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) paras [186]-[188]. Persons who publish words should be aware that the Press will republish and add its gloss to them. This republication may be in a translated form. Words may acquire meanings in this way which differ from the original intended meanings. Intended meanings are not relevant to determine objectionability. What the words mean is what governs the position.

THE ROAD TO TRIAL

[43] The Equality Court Act and the regulations promulgated thereunder provide that the presiding officer is to follow the legislation governing the procedures in the Court in which the proceedings are being conducted. In the present case the High Court Rules provide for the regulation of the procedure. The presiding officer is given the right to make appropriate changes to the Rules for the purpose of supplementing the regulation and may, in the interests of justice, if no one is prejudiced, deviate from the procedure after hearing the parties. The presiding officer is required to resolve matters of an

administrative or procedural nature and is to give directions in respect thereof after consultation with the parties. A list of matters which should be discussed in the course of managing the matter is set out

[44] At an early stage during the proceedings, after consultation with the parties and with their consent, I made use of the powers vested in me, to issue a directive in which was set out the obligations of the parties. That directive was geared to achieving an isolation of the:

1. legal issues;
2. evidentiary and factual issues arising on each particular legal issue;
3. extent to which opinions of experts differed and the reasons why they differed.

[45] The pleadings would establish the legal issues to be decided and what was common cause between the parties. Once discovery had been made and the statements of experts and witnesses exchanged, the factual and evidential issues would be clear. Thereafter the parties were to try to reach agreement on issues and draw lists linking documentary evidence to factual issues and identifying the relevant portions of the statements.

[46] During the course of the run-up to the trial several parties sought leave to intervene. That leave was granted to them pursuant to a judgment handed down on 25 February 2011. That decision was primarily based on the

decision of *Gory and Colver NO and Others (Stark and Others Intervening)* 2007 (4) SA 97 (CC) at para [13] page 105. During the course of that judgment I expressed the view that the Equality Act was designed to create a procedure to eliminate gross sources of friction in society and that the creation of this Court was the mechanism to enable the sources of friction to be removed and/or ameliorated. This view founded my approach to the case and the rights of the public to participation.

[47] On the day of the hearing I granted leave to eTV (Pty) Ltd and eSAT (Pty) Ltd to record and broadcast the proceedings. The ruling followed the principles and procedures set out in the Practice Direction in the Supreme Court of Appeal concerning cameras. Live transmission was permitted. The witnesses who would testify were, in the main, accustomed to speaking in public and to the presence of the Press. The public was entitled to see the events transpiring in Court so as not only be able to form its own judgment but also to re-live events as part of a process of healing. I directed that any party including a witness could at any time request the process to be stopped; that it was then to stop immediately pending further orders. This never happened during the trial. In addition a big screen was attached to the railings at the outside entrance to Court. This enabled the public, the supporters of parties and passersby access to the proceedings without the need for them to physically be in my Court.

[48] Lara Johnstone, the sole member of an entity known as the Radical Honesty Culture and Religion delivered a number of documents by electronic

transmission. I tabled the documents at the hearing and they form part of the record.

THE ISSUES AT TRIAL

[49] The complainants complained that the respondent (Malema) while addressing various public meetings had recited and/or sung and/or chanted certain words (the objectionable utterances). The objectionable utterances were:

1. *“Awudubula (i) bhulu”.*
2. *“Dubula amabhunu baya raypha”.*
3. *“They are scared the cowards you should “shoot the Boer” the farmer! They rob these dogs”.*

The objectionable utterances which are not in English were translated as meaning *“shoot the Boer/farmer”, “shoot the Boers/farmers they are rapists/robbers”*. The objectionable utterances were alleged to have been made on or about 3 March 2010 at Polokwane on the occasion of the respondent’s birthday party; on 9 March at the University of Johannesburg; on 22 March 2010 during a public address during the course of a Human Rights Day celebration at Mafikeng and on 26 March 2010 at Rustenburg. The complainant pointed to these utterances as meaning that Malema literally referred to Afrikaans farmers and within the context of the utterances referred to white people generally, more particularly white Afrikaners, who he suggested were the enemy and were to at the very least be shunned and at

the very most be killed. Afriforum alleged that on 18 March 2010 Malema had, during a meeting with a representative of the complainant, stated that the word “*ibhunu*” referred not only to farmers but to Afrikaners in general and that that reference was intended to symbolise the form of exploitation and oppression of blacks in the Republic of South Africa. The complainants alleged that the objectionable utterances caused and/or perpetuated systemic disadvantage to Afrikaners and Afrikaans farmers at the very least and further undermined the human dignity of those targeted thereby and also adversely affected the equal enjoyment of rights and freedoms of Afrikaners and Afrikaans farmers. It was further alleged that the objectionable utterances propagated, advocated and/or communicated words based on an ethnic or social origin, culture, language and/or were words that could reasonably be construed to demonstrate a clear intention to be hurtful to particular ethnic groups and to incite or be harmful to certain ethnic groups and to promote and propagate hatred.

[50] It was common cause between the parties that Malema had on different occasions and at public meetings convened on behalf of the ANC Youth League sung the words referred to as comprising the objectionable utterances.

[51] Malema in his plea admitted singing “*Awudubele (I) bhunu*”; “*Dubula amabhunu baya raypha*”; “*they are scared the cowards you should “shoot the Boer/farmer they rob these dogs*”. The admission extended to singing the words in the colloquial language not the words as translated. This limitation of

the admission made in the pleadings was not apparent until the time of the trial when it became apparent that, that was the intention of the admission. I allowed the matter to proceed as if this had been the admission originally pleaded; the pleadings need to be read accordingly.

[52] The words which Malema sang on a literal translation into English, on a dictionary definition mean “*shoot the Boer/farmer*”; “*shoot the Boers/farmers. They are rapists/robbers*”; “*they are scared the cowards. You should “shoot the Boer/farmer. They rob these dogs*”. This meaning although not admitted in the pleadings was never seriously challenged during the hearing. The challenge was directed towards establishing that the words as sung by Malema in the original language had a particular meaning to the particular grouping present on each occasion that the song was sung and the same meaning to all persons who were familiar with the song.

[53] In the pleadings Malema claimed the right to sing the words “*Dubul’ibhunu*” as the words are contained within a liberation song which is sung with or without all or some of the particular words depending on the occasion, context and setting. One of the defences was that in the context of the song the words were intended to symbolise the destruction of white oppression (the former regime) rather than to indicate the literal intention to shoot “*ibhunu*” (the farmers and Boers). The ANC which was joined advanced the same defence and the case for both Malema and the ANC was advanced as being the defence of all.

[54] The submission was made on behalf of the ANC that the song forms part of the South African heritage and should be retained in the interests of the preservation of a complete history. Liberation songs fulfil the prime requirement of a people's song because they are easy to sing, convey a feeling of solidarity which emanates from a situation of common experience and use words which form a powerful expression of emotional feelings of the persons who sing it. Song is a form of verbal art which people use both for emotional release and also for manipulation of others.

[55] The issues to be determined became:

1. what was the meaning of the words in the appropriate context and audience,
2. did it make a difference if the audience was wider than the groups who heard the song at the time of its singing,
3. did it make a difference if different audiences ascribed different meanings to the words,
4. did the way in which the song was repeatedly sung by Malema after its translation in the Press make any difference,
5. do the words constitute hate speech,
6. if the words do constitute hate speech does the fact that they have a place in our heritage vest an overriding right in the singer to sing the song and make the gestures referred to below.

THE HEARING

THE VIDEO

[56] During the hearing a video was screened reflecting the respondent singing the song on various occasions. During the course of the singing the respondent executed rhythmic movements (hereafter “the gestures”) including movements with his forearm extended at approximately 45 degrees to the ground with his finger and hand making the shape of a firearm. I was asked to have regard to the gestures and although such gestures had not been expressly pleaded the complaint extends to those gestures. The defence in respect of the gestures was that such gestures were traditionally made during the singing of the song. Gestures are relevant when the meanings of words are considered. See: *S v Sheehama* 1991 (2) SA 879, *Phillips v Director of Public Prosecutions* 2002 (5) SA 555 (W) para 17.

GUNS

[57] At a point in time early in the hearing I noticed that people who were armed were present in Court. I was distressed that the Court security not only had allowed such persons to retain their weapons but also that they had been allowed in Court. I directed that no person in Court be armed. The reason for this is that I considered that an armed person is in a physical position of power; he is not controlled by me but by some third party; he represents a threat to witnesses, Court officials, counsel and the public. His presence constitutes an intimidation to each person in Court. Hence no person truly is

able to act independently, as he fears reprisal. It appeared to me to be grossly improper for armed persons to be in Court. This is not to say that appropriate steps were not taken by the appropriate government agency with my knowledge and consent to ensure the safety of every person present in my Court. Proper and adequate (mainly discreet and unnoticed) controls were put in place and maintained throughout the trial.

EVIDENCE

[58] During the hearing I allowed much evidence to be led which would not normally be permitted in a Court of law as it appeared to me that it was proper to allow the parties to the dispute to fully and completely ventilate the issues between them even if such ventilation involved the admission of evidence in the form of speeches which were made during the course of the trial; in the form of documents which contained hearsay matters and in the form of witnesses who gave evidence, the ambit of which, was far beyond the issues. It appeared to me that in the course of the trial the parties should, as it were, be allowed to scratch the wound open, re-experience the pain and search for a solution. Hopefully they would be able to find a way forward, thus enabling society, on its own to set the appropriate standard to be followed. I was also conscious of the fact that in the course of this process the public would be able to participate as the events were being screened live on TV and also on the big screen outside the Court.

THE SONG

[59] The conduct of Malema is common cause. He sang what is colloquially referred to as a struggle song on the occasions referred to. The song is known as “*Dubul’ibhunu*”. These songs and other struggle songs are sung in the normal course of ANC gatherings because they are part of the heritage and history of the struggle against the oppression experienced by the oppressed majority namely black people at the hands of the apartheid regime and also the colonial regime prior to that. The words of the song, which founded the words sung by Malema, are printed in www.mhambi.com. The words are:

Dubula! Dubula! Dubula nge s’bhamu

Dubul’ ibhunu

Dubula’ Dubula Dubula nge s’bhamu

Mama, ndiyeke ndidubul’ ibhunu

Dubula’ Dubula’ Dubula nge s’bhamu

Ziyareypa lezinja

Dubula! Dubula! Dubula nge s’bhamu

A literal translation of the words is:

Shoot! Shoot! Shoot them with a gun

“shoot the Boer”

Shoot! Shoot! Shoot them with a gun

Ma, let me “shoot the Boer”

Shoot! Shoot Shoot them with a gun.

These dogs rape us

Shoot shoot shoot them with a gun

[60] On one occasion (as is apparent from the video) when the song was sung Malema added the following words at the end:

“shoot the Boer/farmer. “shoot the Boer” the farmer. Shoot to kill. Shoot to kill.”

[61] The regime was represented by the persons who primarily were employed to and who did enforce its will. These people (although there were others who were involved) were perceived by all South Africans to be white Afrikaners to whom reference was made as Boers. This word is represented in the song by the word “*Ibhunu*”. The word appears to me to be a phonetic corruption of the word Boer. The use of the word in the context of oppression was a usage which was designed by the author of the song to reflect and refer to the regime: the oppressor. The author and persons singing the song intended to convey that the regime should be destroyed. Hence the word “Dubula” came to be joined with the word *Ibhunu*. It seems to me the sentence “destroy the regime” came into existence in the form of the words in the song. There is no dispute between the parties that the song, as it was originally sung, had the meaning to destroy the regime. The words also mean “shoot the Boer” on a literal translation. On a balance of probabilities it appears to me that the author was aware of the double entendre. The double meaning was intended by the author and cannot have been lost on the audience. The author and singers originally placed more emphasis on the

“destroy the regime” meaning. The fact they did so in no way detracts from the other meaning or removes it as an equally competent reasonably understood meaning.

[62] The song was sung by soldiers employed in the process of taking steps to overthrow the regime. Songs are often sung by soldiers when they are at war. The songs are usually designed to psychologically destroy the image of the enemy as a person in the mind of the soldier. The process of dehumanization is recognised in the seven steps to genocide as one of the steps leading to genocide. It is also so that soldiers when in battle are psychologically programmed not to treat the enemy as individual people but rather as things. This assists soldiers to overcome their natural repugnance of killing people.

[63] Liberation songs have a further function. They are intended to psychologically bond the group of soldiers together to encourage them as a unit to act against the enemy. Songs of this nature in South Africa are referred to as struggle or liberation songs. They are referred to internationally as “Jodies” and many examples of them can be found on the internet.

See e.g: forums.army.ca/forums/index.php?topic=47618,
www.b2501airborne.com/cadence.html,
www.lighthorseaircav.com/hum-jody-calls.html.

[64] There is no set of predetermined words to such a liberation song. The song mutates as and when different people sing it and as and when the mood or occasion which is celebrated changes. This flexibility allows the singer to change the lyrics of the song so as to use appropriate words for the appropriate occasion. This is completely natural and in accordance with the way in which these songs are used to express the feelings of persons who sing the song.

[65] A necessary corollary of this is that the sentiment of the song and the primary meaning of the words used in the song can change depending upon the mood of the singers and the occasion. This is so even if the same words are used and is particularly so if the words have dual meanings. The history of the song *Dubul'ibhunu* is difficult to trace by reason of the mutations of songs from time to time. Nonetheless, the song has been sung for a significant period of time.

[66] The words were put to music by Mr Collins Chabane many years ago. The song sounds very different when Malema sings it to what it sounds like on the recording of Mr Chabane. When Malema sings the song it is quite clearly a chant. Malema sings the first sentence, the audience sings the chorus. The words are sung in a rhythmic chant using a staccato. The effect is to produce clipped calls and clipped responses. When the song is heard on the recording of Mr Chabane, the song is played legato and sounds much like a gentle lullaby or hymn. The words remain the same. However, if the words are not understood, then the song appears innocuous from its tone and

delivery. Dr Grey explained that historically struggle songs had been developed by persons who formulated them making use of existing music. Often, for example, the melody of hymns was used. The person who wrote the song then adapted the words of the hymn by replacing them with his own words. A person who heard the singing but did not understand the words would think that a hymn was being sung if he was familiar with the tune of the hymn. However, in truth and in fact, the words were different and conveyed the message of the person who had written them.

THE REPORTS OF THE MEDIA AND THE REACTION OF THE PUBLIC

[67] To set the matrix it is worth setting out the chronology and the Press reaction. The song was sung:-

1. On or about 3 March 2010 at Polokwane on the occasion of Malema's birthday celebration.
2. On or about 9 March 2010 and at the University of Johannesburg.
3. On or about 22 March 2010 during a public address in the course of Human Right's Day celebrations at Mafikeng.
4. On or about 26 March 2010 and at Rustenburg.

[68] On 11 March 2010 and after the singing of the song at the University of Johannesburg a number of newspapers published that the song had been sung. Messrs Coetzee, Van der Walt and Dlangamandla wrote *inter alia*:

“Die vuurvreter Malema het eergister oor en oor saam met 250 studente by die Universiteit van Johannesburg se Doornfontein kampus gesing ‘Dubula amabhunu baya raypha’ (skiet die Boere, hulle is verkragters).”

and later in the same article:

“Die ANC verstaan nie hoe Suid-Afrikaners Malema vir ‘n rassis kan uitkryt nie. ‘Partykeer sing ons die lied want ons herinner onself aan waarvandaan ons kom’ het Mthembu gesê. Volgens hom verwys die amabhunu nie na Boere of witmense in die algemeen nie maar na dié wat swartmense steeds onderdruk en apartheid ondersteun het. Mthembu het daarop gewys dat die lied wat Malema gesing het nie die slagspreuk ‘kill the farmer kill the Boer’ is nie.”

On the same day the Mercury published:

“He sang the old struggle song Dubula ibhuna (shoot the farmer) harking back to the spirit of the chant ‘kill the Boer kill the farmer’. The trademark of the late ANC youth league leader Peter Mokaba. Complaints have been lodged with the S A Human Rights Commission and the Equality Court by among others the Freedom Front Plus, the Afriforum Youth and the Afrikanerbond.

On the same day The Star published a similar article.

[69] On the same day the Diamond Fields Advertiser published an article referring to the singing of the words referred to above at the University of Johannesburg and adding that Malema had indicated that blacks should never forget what was done to them. The article added that Malema had

sung the same song at his birthday party in Polokwane. Other papers published similar articles. The Beeld, on the same day, published prominently "*Malema mag sê: Skiet die Boere*" ... "*Tien klagte van haatspraak maar ANC staan by hom*". The Sowetan Newspaper on the same day published that Malema had sung the song and quoted Mr Roets (who gave evidence for Afriforum). The quote was "*These steps [complaints of hate speech] follow after Malema sang the song Dubula ibhunu ("shoot the Boer") at least twice at public occasions this past week*".

[70] On 12 March 2010, the Daily Dispatch published that a spokesperson for the ANCYL (of which Malema is the President) had said that the singing of the song had been blown out of all proportion. A spokesman for the ANCYL had stated according to the article that the song had been sung for years, even before Malema was born – it was a song against cowardice and oppressive forces. Mr Roets according to the article stated that he believed the song to be hate speech and wanted Malema to apologise for it and pay damages. The article appears to have linked the song to another song, "*Kill the Boer kill the farmer*". This was a song which used to be sung by Mr Mokaba and which had been found to be hate speech by the S A Human Rights Commission. Similar articles appeared in many other newspapers on March 12, 2010.

[71] On 13 March 2010 the Saturday Dispatch reported that the ANC had denied that Malema had sung the song "*Kill the Boer kill the farmer*" and had sought to distinguish it from the song which had actually been sung.

According to this article, the ANC sought to correct the impression which it believed had been created that Malema had sung "*Kill the Boer kill the farmer*" song and stated that he had sung the song in question which it referred to as "*Ayesaba amagwala*".

[72] On 14 March 2010, the Rapport published that Malema had called for the genocide of Afrikaners (menseslagting).

[73] On 15 March 2010 the Herald newspaper published that Malema had sung the "*Kill the Boer kill the farmer*" song. On 15 March 2010 the Times published a statement by Mr Mantashe who stated that Malema had sung a song which did not include the lyrics "Dubula ibhunu" but rather another verse of the song "Dubula dubula dubula nge s'bhamu". Mr Mantashe is reported to have placed the song in context namely that it was a struggle song and also that it should not be erased from history because people were sensitive. On 15 March 2010 the Citizen published that there had been a further farm attack and stated that this farm attack was the second within days of Malema singing "*shoot the Boer*".

[74] On 16 March 2010 the Witness published a comment concerning the place of the song in society and repeated Mr Mantashe's statement that society must never be seen to be oversensitive about white fears at the expense of black aspirations. The article further dealt with the steps which Afriforum was taking. On 16 March 2010 an article appeared in the Volksblad

concerning the singing of the song and various other matters concerning another issue around Malema.

[75] Articles in similar vein were published in many newspapers on a regular basis over the following days.

[76] On 19 March 2010 the complainant led a protest to Luthuli House. Prior to travelling to Luthuli House there was a gathering at which people carried posters. There are photographs of this gathering. The party went to Luthuli House and met the leaders there. The events which took place at Luthuli House are disputed as to material matters and I do not rely on same. On 23 March 2010, Die Burger published an article "*Skiet die Boere*" gesing om Menseregte te vier". Malema is recorded as having stated that white Afrikaans journalists did not know the ANC. They knew nothing of the freedom struggle and wrote about things which had not been said as they were unable to properly interpret what had been said. (This is my interpretation of the Afrikaans used which I believe expresses the intention of the words although is not an exact translation of them.) From March 23, 2010 a number of other newspapers for example the Volksblad, the Sowetan, Die Burger, published that Malema had sung the same song. In each case the song was rendered as being the "*Skiet die Boer*" struggle song. The Press continued to publish articles concerning Malema and his activities in relation to his singing of the song and steps being taken against him to prevent him singing it. Publications after Malema sang on 26 March 2010 are largely centred around the fact that an interdict had been granted by Halgryn AJ.

[77] It is apparent that:

1. there was a high degree of publicity around the song and Malema's singing of it,
2. the translation of the song was rendered in English as being "*shoot the Boer/farmer*",
3. in the public eye the wording as translated was linked to the statement and song which had previously been sung by Peter Mokaba "*Kill the farmer kill the Boer*",
4. a section of society was outraged by the fact the song had been sung and sung repeatedly.

[78] Whether or not the Press was justified in publishing its translation of the events in this manner is not relevant to the present matter. The important point is that at a time prior to the singing of the song, on 22 March 2010 and 26 March 2010, there was a public uproar about Malema singing the song. The public had interpreted the words which he sang as being an attack upon a sector of the community namely the Boer/farmer who were loosely translated as being the Afrikaans-speaking sector of the community. That sector of the community was angered about the use of words which they saw as an incitement to people who heard the words to attack them. It is also apparent, and this is the evidence before me, that at that time farmers and white Afrikaans-speaking members of society who lived in isolated areas (on plots and farms) felt themselves at threat. [There is no evidence that anyone

was in fact injured in consequence of the singing of the song. No one in fact appears to have suffered physical consequence as a result of the song being sung].

[79] On 30 March 2010 the Sowetan reported that Malema had said, (after a ruling made on 26 March 2010 to the effect that the song if sung could result in the singer facing charges of incitement to murder), that the song was not about killing individuals but about fighting the system of apartheid which still persisted even after the 1994 democratic elections.

[80] By that time singing of the song or similar songs appears to have become popular, as on 30 March 2010 it is reported that at the National Union of Metalworkers of SA Bargaining Conference delegates had sung a song which contains the words “*Go well mkhonto weSizwe*” and also “*We MK members are determined to kill these Boers*”. The right to sing this song had been justified by NUMSA President Cedric Gcina who had said:

“The singing of the song in memory of fallen members was not a desire to kill farmers. Struggle songs are part of our history and heritage. Revolutionary songs continue to play an important role ... Therefore Courts cannot be used to erase our memories and demobilise our revolutionary activism by banning struggle songs.”

(See Sowetan March 30, 2010.)

[81] The public outcry continued unabated over the period. Malema honoured the order made concerning the song. (Whether or not it was an order which he was compelled to obey is not a matter with which I need deal.)

However, when Malema went to Zimbabwe he sang the song. The singing of the song on that occasion was removed as an issue before me as the singing took place in a foreign country. It is however relevant that Malema sang it. At the time, he said, according to the Saturday Star of 3 April 2010, that the singing of the song was a reminder of what remained to be done in South Africa.

[82] It is apparent that by this stage society had become polarised into two factions concerning the singing of the song. The factions were essentially based along language and racial lines. The factions were divided into those who had struggled, largely members of the ANC and its supporters, and those who perceived themselves to be the target of the song namely the White Afrikaners.

[83] It is also apparent from the evidence before me that that polarity persists to the present day. That polarity came about in consequence of the singing of the song coupled with its dissemination by the media in translation as "*shoot the Boer/farmer*". This is cogent evidence of the effect of singing and the reaction of the public as expressed in the various newspapers. These very words were at a point in time sung by Malema. See para 60 supra.

[84] Although Malema claimed to never have sung the words which were repeated in Afrikaans and in English he admitted to singing some of the words of the song. Malema's evidence (as was the evidence of the other persons who gave evidence for the ANC and Malema) is that the words are innocuous

in that the words refer to a regime which was to be destroyed. This was the accepted primary meaning of the words during the struggle. This meaning is only one of the possible meanings if one has reference to the dictionary alone. Another meaning is "*shoot the Boer/farmer*". This is the meaning which was interpreted by the newspapers as being the appropriate meaning and which was read by the various readers of those newspapers. The flames of the fire were fanned as the Press and members of the public linked the words of the song to the words of another song "*Kill the farmer kill the Boer*". (The latter song had been declared to be hate speech some time previously).

THE SONG PRE MALEMA AND PUBLICATION BY THE PRESS

[85] Until the media published the words as translated the words in the song had had no effect. No one complained. No one felt threatened. This could have happened either because:-

1. the song was innocuous and related to an incitement to destroy the regime in the originally accepted primary meaning,
2. the target group was ignorant of,
 - 2.1. the literal translated meaning,
 - 2.2. the fact the song had been sung at all.

THE ACTUAL AUDIENCES

[86] At the time the song was sung at Malema's birthday party on 3 March 2010, it was sung to a limited number of persons who represented a closed audience, who were friends of Malema and who had been invited to attend his

birthday. That audience, on the probabilities, consisted of persons who are likeminded to Malema and would know the meaning he ascribed to the words.

[87] When the song was sung at the University of Johannesburg on 9 March 2010 the audience, on the probabilities, was a multi-racial multi-facetted audience comprising largely young people in their late teens or early twenties. These persons had probably not participated directly to any great degree in the struggle. The audience was on the probabilities not necessarily likeminded to Malema. This audience must be approached as being a multi-racial cross-section of the public of South Africa who speak all of its languages and come from all its various social groupings. The only common feature they have is that they are intelligent people who seek further education.

[88] When the song was sung at the Human Right's Day celebrations at Mafikeng at 22 March 2010, on the probabilities, the audience included largely persons who had been involved in the struggle and who were likeminded to Malema.

[89] The same can be said for the rally held at Rustenburg on 26 March 2010.

THE TRUE AUDIENCE

[90] At all of the events, political rallies, save for Malema's birthday, the Press was invited. To the knowledge of Malema and others it would be

anticipated that the Press would publish events which took place, as indeed the Press did. These, after all, were rallies addressed by a senior member of the ANC Youth League.

[91] As I have set out earlier, there is good authority that the public at large, even those who did not attend the rallies, must be treated as being the audience at political rallies. The target group of white Afrikaners must be treated as being the audience even although it was not physically present at the rallies. There was publication to that audience in this sense and in the actual sense of publication by the Press.

WERE THESE APPROPRIATE OCCASIONS TO SING THE SONG?

[92] One of the defences was that the song as a liberation song, irrespective of the meaning of the words, should be permitted to be sung at an appropriate occasion. The song has been identified as a struggle song, namely a song sung by soldiers. The nature and extent of the struggle of the oppressed majority to obtain freedom involved the participation of the entirety of likeminded persons who formed the society irrespective of age and sex. Malema himself was recruited at an extremely young age, younger than ten years. It is apparent that soldiers are not readily identifiable as they would be in the case of a formal army which fights another formal army in uniform. In this country, persons who formed part of the struggle were all those who took steps and acted, in a way, as soldiers. They assisted their fighting members by providing them with support against the regime. The support consisted of emotional and financial support; support by way of providing provisions;

support by way of providing hiding places for both persons and arms. In this way, all members of families, to the very youngest members, were involved. These persons at any time were subject to attack by the arm of the regime which was seeking to suppress the struggle. It is common knowledge that in the course of that arm exercising power it acted violently, oppressively and indiscriminately to a variety of people of all ages. Any person who participated in the struggle was aware of the consequence of such participation and that such consequence could include physical, financial and other sanction. In a very real sense, all members of society who had family or other participants they supported in the struggle were themselves soldiers. The physically present audiences at rallies must be treated as being the soldiers and persons who were involved in the struggle.

[93] The submission is that the song was sung by soldiers to soldiers who knew the true meaning of the words and who were celebrating a particular event. Thus the singing was appropriate. The problem with this approach is that the audience is not limited to the actual attendees but includes the whole public. Accordingly, the appropriateness of the occasion when it concerns political rallies must be judged on that basis. See: *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA)

“It may be accepted that the reasonable person must be contextualised and that one is not concerned with a purely abstract exercise. One must have regard to the nature of the audience. In this case the main target was the school children at the particular school, but it also included at least teachers.”

See: *Mohamed and Another v Jassiem* 1996 (1) SA 673 (A)

“...the trial Court had to consider whether '(t)he fact that something like 98% of the South African population would not care a fig whether Jassiem is a traitor to Islam or not . . . 'deprived Jassiem of a cause of action based on defamation. That inquiry, as the learned Judge correctly pointed out, raised the issue 'whether it is correct to accept literally the allegation often made that for defamation to occur it is insufficient that the esteem of the object of the defamatory appellation question must tend to lower him in the estimation of "ordinary right-thinking persons generally". (Burchell at 95.)'

In considering this issue Van den Heever J pointed out in the course of her judgment that a man's reputation is not something which 'exists in void'. She proceeded to make the following perceptive observations:

a 'It consists of the esteem in which he is held by "society" or within "the community". How the community, society, is to be defined must, in my view, depend upon the facts and the pleadings in each particular case. Sometimes geographical borders of a country may define what society or community is relevant in a particular case; for example, where a member of Parliament of a government within those boundaries claims to be defamed as such. If a man's reputation within the scientific community of which he is a member, or within the financial community within which he operates, or within the black community within which he lives, is tarnished by an imputation within that community of conduct disapproved on the whole by that community, the Court will use its countrywide, or in a more limited particular society.

I do not understand anything in the Appellate Division decisions as barring such an approach, which is accepted in many other countries and urged here as a matter of common sense and fairness. Prosser Torts at 743, Burchell Defamation at 99, Street Torts 5th ed at 288, Salmon and Heuston Torts 18th ed at 134, Amerasinghe Defamation at 21-3, Ranchod Defamation at 156, Hahlo and Kahn The Union of South Africa - The Development of its Law and Constitution at 546. The only qualification, it seems to me, is that the particular society should not be one whose reasonably uniform norms are contra bonos mores or anti-social.”

Learning on the question of the audience in the law of defamation is relevant to the present matter to the question of whether, if, different sectors decode the message of words differently this makes any difference. The faction represented by the complainant decode the message one way the faction represented by the ANC decode them differently on the evidence. The authority cited supra resolves this problem.

[94] The concept of an appropriate occasion contemplates that words which would constitute hate speech for a portion of society will not constitute hate speech if that portion of society is shielded from the words and their meaning.

This form of justification is based on a claim to freely express sentiment which is familiar to and loved by a sector of society notwithstanding its effect on another portion of society. The submission as I understood it was that the Equality Act deals not just with words and their meaning but also with the effect those words have, absent any effect, absent any breach of the provisions of the Equality Act. In my view this approach is unjustified. All hate speech has an effect, not only upon the target group but also upon the group partaking in the utterance. That group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers. In addition, to the extent the words are inflammatory; members of the group who hear them might become inflamed and act in accordance with that passion instilled in them by the words. If it is claimed that the conduct was acceptable at a point in time and that a vested right exists to persevere with it on the basis of a legitimate expectation the simple answer is that times have changed. Change or transformation is hurtful. That hurt encompasses the loss of the exercise of rights which constitute violations of the Equality Act. All conduct by more than one person has as its source the words of at least one person. It is the words of one person motivating others that leads to action by those persons. All genocide begins with simple exhortations which snowball. Words provide the stimulus for action, the means to numb the natural repugnance against hurting humans and the reward which is to be harvested after action. Words are powerful weapons which if they are allowed to be used indiscriminately can lead to extreme and unacceptable action.

WHAT THE WORDS SUNG MEAN

[95] The song as originally sung and later recorded had no effect on the general public. The evidence of this is the fact that there was no complaint over a period of many years regarding it being sung. It was only after the song was sung by Malema and translated and published as the “*shoot the Boer*” song that the song had an effect. That effect is evidenced in the series of publications referred to earlier and also in this trial by the statements of a variety of members of society who act for large constituencies and who say that their constituencies are affected in that they perceive the song to be harmful and/or hurtful towards them. Part of this reaction initially was due to the Press translation of the words sung. The ultimate reaction was due, as will be set out below, to the context and manner in which Malema repeatedly sang the song and exploited the publicity his singing the song had in translation as well as in the original language.

[96] The meaning of the words uttered by Malema was in issue. In order to understand the meaning of the words it is necessary to place the words in their proper context. Words individually have meanings which are elastic in that the meanings they convey can vary substantially. Groups of words similarly have elastic meanings. The permutations increase as one adds to the equation, the context in which the words were uttered, the circumstances under which the words were uttered, the way in which the words were uttered, the gestures which accompanied the words and what the words imply. In this whole equation sight must not be lost of the fact that, notwithstanding the

words used, the speaker, when he composes the message he wishes to deliver to the audience, is so able to compose it as to simultaneously convey multiple meanings to the whole audience and constituent parts of it. See: *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA) at para 67,8, *Argus Printing and Publishing Co (Ltd) v Esselins Estate* 1994 (2) SA 1 (A) at 20 E, *Tsedu and Others v Lekota and Another* 2009 (4) SA 377 para 13.

[97] When the words are sung with a chorus supplying additional words, then the addressor, albeit that the addressor does not manufacture the response, invites the addressee to utter the words contained within the chorus. The context of the words is constituted in this respect by the entirety of the words sung. The words must be decoded with reference to all the acts and words. The words were consistently sung. To the extent that there was evidence that songs mutate and the words change from time to time I find, on the probabilities, that the responses given to the words uttered by the addressor (Malema) on each occasion were the anticipated responses and were the responses he sought to obtain. While the words may not have been exactly reproduced, the sentiment remained constant. For purposes of this judgment I ignore the mutations and do not deal specially with them.

[98] The occasion, the history of the conduct and the response of the public and Press, gesture and physical movement, crowd interaction, the words including the expression and delivery of the words in a chant-like manner, are relevant to determine the context of the song. They, all together, contribute to form the manner in which the message was delivered.

[99] In order to find the meaning of the words the audience must decode the words. When each individual comprising the audience decodes the message such individual makes use of all elements constituting the context as he perceives them. Hence it is perfectly reasonable for different messages to be received by different people. This is a well known fact. Some members of the audience may be unable to decode the message as they do not speak the language used to deliver the message. Other members of the audience may inaccurately decode the message as the language which they use, attributes different meanings to the words used by the speaker than the language he used. The permutations are infinite.

[100] An important feature within the ambit of the range of permutations is the ability of the speaker to so structure the delivery of the message as to cause the audience to attribute different meanings to the words than the meanings which are ordinarily attributed to them. This elasticity of meaning has been manipulated by persons who are skilled in the art of words since time immemorial. Literature is filled with parody and innuendo to name but a few of the forms. See for example: - *Laugh it off Promotions CC v SAB International (Finance) BV* 2006 (1) SA 144 CC.

[101] 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.

[102] It is appropriate to consider more deeply a matter touched on earlier. The evidence was that at the time the song originated the words “*Dubula ibhunu*” were words which meant destroy the regime. The word “*bhunu*” was used to identify the regime, as it was descriptive of the persons who implemented the will of the regime. Those persons were the white Afrikaans-speaking members of society. Although the words originally were directed towards the regime, the coding carried with it an underlying message concerning the representatives of the regime namely the “*ibhunu*”. The word used for destroy namely “*Dubula*” also has as a meaning the word shoot. Primarily the way in which the regime could be destroyed was by injuring the

proponents of the regime namely those who enforced its will namely the white South African Afrikaans-speaking members of the community. The way in which those persons would be injured would be by shooting. The primary message which was encoded by the person who formulated the verses is destroy the regime. That encoded message carried with it, however, a secondary message which was implicit in the primary meaning and established the mechanism by which that would take place namely shooting the white Afrikaners. In the context of the song as originally sung this is the message one would expect to find. The entirety of the message dehumanises the enemy by referring to it as dogs and describing its conduct in unsavoury terms. Such description in a struggle song is to be expected. Simultaneously, the song is an exhortation to a band of brothers to bond in the pursuit of that activity. It is expected, in the context of a struggle song which seeks to bind soldiers together, to give them comfort and dehumanise the enemy in their eyes. These observations cannot but have been present in the mind of the author and the audience. The words need no stretching to embrace both meanings. The meaning comes naturally both by using the literal and contextual approach. There is much corroborative evidence available in the form of the translation by the Press who believed they were acting responsibly and by the audience-society that the average member of society perceives the meaning this way.

[103] I assume that portion of the audience included persons who did not understand the meaning until it was translated. None of these limitations on the audience capacity to decode the words makes any difference for the

reasons set out earlier [in para 93]. The meaning of the words is what the reasonable man would ascribe it to be. See: *Tsedu and Others v Lekota and Another* 2009 (4) SA 377 (SCA)

[104] When the gestures made by Malema are added to the context then it is clear that the words concern the use of a weapon – a gun. Whether the verb alone means destroy or shoot makes no difference. The verb contains an exhortation to violence. The gesture imports the weapon. Hence the mechanism by which the exhortation is to be implemented is by the use of the weapon, a gun. In reaching this conclusion, I am conscious that there are many ways by which destruction can take place, shooting is but one of them. In the context of the song the gesture provided the limitation on the words. The person to be shot is the object of the verb namely the regime. The regime included the Boere or white Afrikaans speaking sector of society. This sector might also include farmers.

[105] There is one probability concerning this issue which corroborates this finding. The regime was destroyed at the time of the transformation of the country into a democracy. It is no more. Post democracy the song was none the less sung, seeking its destruction. The response of Malema to this conundrum was to say that the regime lives on in the form of the untransformed person who holds benefits conferred upon him by the regime and which he has not relinquished. He accepts that there is an object to the verb and that that object is alive and well and living in South Africa. It is a simple matter to identify the object. It is those persons who received benefit

from and who promoted the regime. These persons are, broadly speaking, the white Afrikaans speaking members of society.

[106] Subsequent to the audience having received the decoded message and having understood it, Malema continued singing the song he had sung previously and which previously had had no effect. The words remained unchanged. The reaction of the audience however was different. By that time, the target group was able to see and did see the video-recordings which I have seen which demonstrate Malema making the sound of a gun and singing in a staccato rhythm leading a crowd chanting the verses of the song. The audience received the version decoded and saw the circumstances and context in which the words were sung. It seemed to them, as is apparent from the effect the song had upon them, that the decoding given to them by the Press was correct namely that Malema was encouraging persons to “*shoot the Boer*”. Thereafter the words, notwithstanding the primary meaning they originally had, had a new primary meaning for the audience – “*shoot the Boer*”. On the latest occasions when Malema sang the song he knew the song would be published as “*shoot the Boer*”. He is responsible for the publication and consequences of that singing as if he had sung the translated words.

[107] During the course of the trial the focus was primarily on the words which were translated to mean “*shoot the Boer*”. While the focus was not on the remaining words those words must not be forgotten. There is no dispute concerning those words, their translation and meaning. Those words are derogatory, dehumanizing and hurtful.

[108] The message which the song conveys namely destroy the regime and “*shoot the Boer*” may have been acceptable while the enemy, the regime, remained the enemy of the singer. Pursuant to the agreements which established the modern, democratic South African nation and the laws which were promulgated pursuant to those agreements, the enemy has become the friend, the brother. Members of society are enjoined to embrace all citizens as their brothers. This has been dealt with more fully above in the context of the written laws and agreements. It must never be forgotten that in the spirit of ubuntu this new approach to each other must be fostered. Hence the Equality Act allows no justification on the basis of fairness for historic practices which are hurtful to the target group but loved by the other group. Such practices may not continue to be practised when it comes to hate speech. I accordingly find that Malema published and communicated words which could reasonably be construed to demonstrate an intention to be hurtful to incite harm and promote hatred against the white Afrikaans speaking community including the farmers who belongs to that group. The words accordingly constitute hate speech.

[109] To sum up:-

1. Publication of words at a political rally must be treated as publication to the nation.
2. The intention of the person who utters the words is irrelevant.

3. The first question to be decided is what the words mean.
4. What 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.
5. The fact that portions of society do not know the meaning of words either because they are unable to decode the words to find the meaning (they do not understand what is being said) or are not exposed to them is irrelevant. If the words have a meaning to a portion of society that is sufficient.
6. Words can simultaneously:
 - (1) have different meanings;
 - (2) mean different things to different people.
7. If the words have different meanings, then each meaning must be considered and be accepted as a meaning. The search is not to discover an exclusive meaning but to find the meaning the target group would reasonably attribute to the words.
8. If the words mean different things to different portions of society then each meaning, for the reasonable listener in each portion of society, must be considered as being the appropriate meaning.

9. Once the meaning is ascertained a decision must be made as to whether or not the meaning is reasonably capable of demonstrating an intention to commit hate speech.
10. If words constitute hate speech they cannot be justified on the basis of a claim of right to sing them. Justification is not a defence as it does not change the character of the words as hate speech.
11. The singing of the song by Malema constituted hate speech.
 - 11.1. The words whether sung in the original language or not mean.
 - 11.1.1. shoot the boer farmer,
 - 11.1.2. they rape us,
 - 11.1.3. they are scared the cowards,
 - 11.1.4. they rob these dogs,
 - 11.2. The words are published of, and concerning a recognizable, if not precisely identifiable grouping in society.
 - 11.3. The words undermine their dignity, are discriminatory and harmful.
 - 11.4. No justification exists allowing the words to be sung.
 - 11.5. The words were in any event not sung on a justifiable occasion.

[110] It was submitted that the law might be unable to enforce its order in the form of an interdict as people are passionate about the right to sing the song and will ignore the order. They will sing the song in private or in circumstances where it is difficult or impossible to prevent its singing (e.g. where people unexpectedly and spontaneously burst into song). The answer is that such people must pursue new ideals and find a new morality. They must develop new customs and rejoice in a developing society by giving up old practices which are hurtful to members who live in that society with them. The Equality Act does not only seek to prohibit conduct. It seeks in the very prohibition to open avenues of conciliation; to confer dignity upon all members of society by assisting them to find the building blocks necessary to shape their ability to make the judgments which will regulate their future conduct. The Equality Act seeks to drive this process forward by setting the moral standard to which members of society must adhere. The wide powers the Equality Act provides enable a Court to craft its order so as to meet this difficulty. Court orders must be strictly enforced and obeyed. There is a criminal sanction for breach in the form of contempt. Section 8.2 of the Equality Act grants powers to direct:

1. specific steps be taken to stop hate speech (8.21 (2) (f))
2. special measures be implemented to address the hate speech in question (8.21 (2) (h)),
3. compliance with its provisions (8.21 (2) (p)).

[111] Parties to the proceedings can be directed to comply with provisions of the Equality Act. Such parties can be dealt with by way of contempt proceedings for non compliance. Persons who are not parties to the proceedings must be dealt with by way of structuring the order so that society knows what conduct is acceptable. Persons who are aware of the line which has been drawn by the Court are as a matter of both law and ubuntu obliged to obey it. There may be no immediate criminal sanction. Their breach of the standard set by this Court will however surely result in the appropriate proceedings under the Equality Act being taken against them. Non participants are bound by orders setting such standards. The Equality Act contemplates that they will be so bound. The orders of the Court which set the law are no different from any order of any Court which determines what the law is. The course open to a non participant who is aggrieved is to try to persuade the Court hearing his particular matter that the order of the other Court is clearly wrong.

[112] I propose to:-

1. direct the standard which society must meet,
2. interdict breach of that standard by the participants,
3. publish to society that it is expected of each member both as a matter of law and in the spirit of ubuntu, that he or she comply with the order
4. direct Malema to pay the costs.

COSTS

[113] The discretion exercised by a Court in making a costs order is a discretion in the strict or narrow sense. See: *Manong and Associates v City of Cape Town* 2011 (2) SA 90 at 115. The primary consideration of an award of costs in constitutional litigation is the way such order hinders or promotes the advancement of constitutional justice. See: *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 para 16.

[114] In the present matter the repeated conduct of Malema in singing the song which he knew had been translated to mean something which injured the target group, leads me to direct him to pay some of the costs of the proceedings. The role of the ANC was limited to an attempt to protect the right of singing the song. It was misguided in its belief that it should be allowed this right. It was not misguided to the extent it sought a ruling concerning the singing of the song otherwise than by Malema, i.e. to the extent it sought to assist me to appreciate the perspective of its constituents.

[115] Parties should feel free to approach this Court to lodge complaints. A fear that costs may be awarded against them inhibits such persons from taking steps to implement their rights. Parties who wish to defend their rights must similarly feel free to place their defence before Court. Costs orders must give due cognisance to this fact. Parties (such as the ANC in the present matter) join in litigation to express the views of their constituencies. Such parties form a vital part of the process as they bring the norms and customs of the sectors of society which they represent to the attention of the Court. These parties do not necessarily act in a morally blameworthy manner by

doing so. By their conduct in opposing and joining with other defendants they may be perceived to be identifying themselves with a cause. This is not necessarily so and care must be taken not to simply award costs against them for the reason that they happen to end up on the “losing side”.

[116] In the present matter the hate speech had its origin in the repeated conduct of Malema whose words in translation drew the attention of the target group to the song. Malema well knowing of the translation persisted in singing the song knowing of the impact it would have on the target group.

[117] The meaning of the words is such a gross infringement of the target group’s rights that it cannot be that Malema did not know he was acting wrongfully towards them. His moral culpability when measured in this fashion warrants an appropriate costs order against him.

[118] The ANC on the other hand sought after the event, to justify the continued active existence of the song as an item which has historical value, social and cultural relevance. The song it sought to protect was un-translated and had until the singing by Malema on the occasions referred to been uncontroversial. It seems to have genuinely occupied an innocuous niche. The song will never again on the probabilities be innocuous. This notwithstanding, the ANC was entitled to express the views of its constituency and explain the role the song played in that constituency. It is in my view not culpable in participating in the proceedings and no order should be made against it insofar as costs are concerned. Orders must be made against it

dealing with the singing of the song as it has control over the conduct of the persons who hold rallies in its name and on its behalf.

[119] The applicants chose to litigate luxuriously, no doubt as they sought orders on matters near and dear to them. The trial was of long duration and much evidence was allowed in the interests of society as much as in the interest of the parties. Malema in my view should not be made to pay for all these costs. This matter could have been dealt with on the basis of the known facts at the commencement of the hearing and the video. Little if any other evidence made any difference to the outcome. Malema in my view should pay the costs limited to a hearing of three days.

[120] I wish to express my gratitude to all counsel who appeared, for their useful and instructive input. Their extensive research and insightful submissions have afforded me the luxury of exposure to all facets of this matter. Many of the matters raised by them have not been dealt with in this judgment expressly, I have however throughout had due regard to all submissions made to me. I must in particular thank the amici curiae who attended Court each day and who at no cost to anyone except themselves provided me with valuable inputs. I must also compliment all counsel who throughout in a competent and professional manner managed a long, difficult and sensitive matter in which passions from time to time ran high.

THE ORDER

1. The words (“the words”) set out below constituted hate speech on the occasions the first respondent sang them:-
 - 1.1. awudubula ibhunu,
 - 1.2. dubula amabhunu baya raypha.
2. The first and second respondents are interdicted and restrained from singing the song known as Dubula Ibhunu at any public or private meeting held by or conducted by them (“the song”).
3. The words and the song constitute hate speech.
4. The morality of society dictates that persons should refrain from:-
 - 4.1. using the words,
 - 4.2. singing the song.
5. The first respondent is to pay the costs of the first and second claimants as if the trial had run for three days and no experts had been called.
6. Save as aforesaid each party shall pay its own costs.

C.G. LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Attorneys for First Claimant : Hunter Spies Inc
Counsel for First Claimant : Adv. MSM Brassey SC
Adv. MJ Engelbrecht

Attorneys for Second Claimant : Loubser van der Walt Inc

Counsel for Second Claimant : Adv. R. du Plessis SC
Adv. RJ de Beer

Attorneys for First & Second

Respondent : Mkhabela Huntley Adekeye Inc

Counsel for First and Second

Respondent : Adv. I.V. Maleka SC
: Adv. M. Sikhakhane
: Adv. V. Ngalwana

Attorneys for Amicus Curiae : Len Dekker Inc

Counsel for Amicus Curiae : Prof. JJ Malan
Adv. N. Hartman

Date of hearing : 7 April 2011

Date of judgment : 12 September 2011