REPUBLIC OF SOUTH AFRICA

IN THE EQUALITY COURT
HELD AT THE GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: EQ 01/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

29/6/2012
DATE SIGNATURE

SOUTH AFRICAN HUMAN RIGHTS COMMISSION Applicant

on behalf of:

SOUTH AFRICAN JEWISH BOARD OF DEPUTIES

and

BONGANI MASUKU First Respondent

CONGRESS OF SOUTH AFRICAN TRADE UNIONS Second Respondent

SUMMARY

Equality Court – hate speech – sections 10, 11 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) – hate speech – what constitutes – defences thereto – whether speech targeted specifically at Jewish community is protected by the right to freedom of expression entrenched in section 16 of the Constitution – the first respondent (Masuku) delivering speech to audience at University of the

Witwatersrand Campus consisting of Jewish students and anti-Israel and Jewish community disparaging about Jewish community, race on religion amounts to hate-speech as envisaged in section 10(1) of the Equality Act – the main objects, powers and functions of the Equality Act – Equality Courts – the nature of the proceedings instituted in terms of the Equality Act – the *onus* of proof – the traditional approach of courts to contrasting expert testimony.

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] This enquiry, which essentially proceeded on a trial basis (where evidence was led), concerns the delicate balancing exercise of the right to freedom of expression as enshrined in the Constitution, on the one hand, and the regulation of such right by National Legislation, on the other hand, as described more fully below. More specifically defined, the issue for determination, is the question whether political speech made under circumstances alleged by the evidence led, does offend members of the Jewish Community in the form of hate speech.

THE BASIS OF THE COMPLAINT

[2] The complaint is launched in this Equality Court by the South African Human Rights Commission (the Commission) against the respondents, and on behalf of the South African Jewish Board of Deputies (the SAJBOD). In terms of the provisions of s 10(1) of the Promotion of Equality and Prevention of Unfairly Discrimination Act 4 of 2000 (the Equality Act). The Equality Act, which came into operation in the middle of June 2003, is also colloquially referred to as PEPUDA.

THE PARTIES

[3] The Commission is one of the institutions established in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996.[1] Its functions include to: promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in the Republic.[2] On the opposing side, Mr Bongani Masuku (Masuku) or (the first respondent), at the relevant time was the International Relations Secretary of the Congress of South African Trade Unions (COSATU) or (the second respondent). The first respondent only is involved in these proceedings.

[1] See section 181 of Constitution.
[2] See section 184 of Constitution.

[4] The Commission complains that in about four statements made by the first respondent, the contents thereof were aimed towards Jewish people and to propagate hatred and violence towards them.

THE IMPUGNED STATEMENTS

[5] For proper context, the impugned statements, indisputably uttered in reference to the protracted feud in the Middle East, particularly between Israel and the Palestinians, and made by the first respondent during a series of remarks on the website supernatural.blogs.com, are reproduced hereunder almost *verbatim*:

> '... As we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity. Every Palestinian who suffers is a direct attack on all of us! Cosatu is a tri-partite alliance with the ruling ANC party. A vote for the ANC is a vote for Bongani.' (*sic*)

The statement was made on 10 February 2009 (hereinafter 'the first statement').

[6] On 5 March 2009 and during a rally convened by the Palestinian Solidarity Committee (the PSC), at the University of the Witwatersrand (Wits), the first respondent made the statement:

> '... Cosatu has got members here even on this campus; we can make sure that for that side it will be hell ...'

This was with reference to what COSATU'S intentions were regarding those who supported Israel (hereinafter 'the second statement'). On the same occasion and venue, the first respondent said that:

> '... The following things are going to apply: any South African family, I want to repeat it so that it is clear for anyone, any South African family who sends its son or daughter to be part of the Israel Defence Force must not blame us when something happens to them with immediate effect ...' (hereinafter 'the third statement').

The final statement made by the first respondent was that:

> '... Cosatu is with you, we will do everything to make sure that whether its at Wits, whether its at Orange Grove, anyone who does not support equality and dignity, who does not support rights of other people must face the consequences even if it means that we will do something that may necessarily cause what is regarded as harm ...' (hereinafter 'the fourth statement').

For purposes of the judgment, all the above statements, collectively, shall be referred to as 'the offending statements'.

THE PROCESSING OF THE COMPLAINT

[7] The Commission, acting in accordance with its constitutional mandate, considered the complaint, and invited the first respondent to respond thereto. On the invitation, the Commission stated, *inter alia*, as follows:

> 'The Commission has assessed this complaint and is of the opinion that *prima facie* (on the face of the complaint and without your version) such utterances amount to hate speech that is prohibited in terms of section 16(2) of the Constitution of the RSA Act 108 of 1996 and prohibited in terms of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000. Furthermore, the complainant's right to equality as guaranteed in section 9 of the Constitution, Act 108 of 1996 may well have been violated by your utterances.'[3]

Indeed, in the present proceedings, the Commission persists in the above contention.

THE FIRST RESPONDENT'S RESPONSE

[8] In response to the complaint, and under cover of the second respondent's letterhead,[4] the first respondent, admits that he was invited to

[3] See index to trial bundle – consolidated p 67.
[4] See index to trial bundle – consolidated p 68.

deliver a lecture at Wits 'on the plight of the Palestinian people'. He says he was hackled repeatedly mainly by a particular section of the audience, most of whom seemed to be members of the South African Union of Jewish Students, and that part of the audience even shouted pro-Nazi slogans in a deliberate attempt to provoke him. On his version, which he later confirmed in oral evidence, this is the context in which he made the offending statements. However, the utterance of the offending statements is not in dispute although the first respondent attempts to justify them in one way or another, including that he did not single out the Jewish race, ethnic gender, or religious group. The only group that he made specific reference to is the Zionists and that Zionism is a political ideology which is inclusive of various religious groupings.[5] The first respondent's contention is that none of the offending statements, individually or collectively, constitute hate speech or incite harm or physical violence or propagate hatred, as contended for by the Commission. He, in essence, relies on the right of freedom of expression as enshrined in the Bill of Rights.

COMMON CAUSE FACTS AND ISSUES FOR DETERMINATION

[9] From the above exposition, it is plain that the making of the offending statements is common cause. The only divergence of the versions is the context in which the offending statements were uttered and, their proper interpretation. Thankfully, I am not called upon, in any way, to pronounce on the question whether Israel or Palestine is correct, which is indeed a matter

[5] See index to trial bundle – consolidated p 71.

for international debate. However, sight cannot be lost of the ongoing conflict in the Middle East. Unlike the other matter before this court (*SAHRC v Qwelane Dubula Jonathan* (Case No 44/2009 EQ, Johannesburg)), there is no constitutional challenge here; nor on the question whether s 10(1) of the Equality Act passes constitutional muster. The essential issue for determination remains whether the offending statements fall within the purview of s 10(1) of the Equality Act, when having regard, objectively, to all the relevant circumstances and complete factual matrix in the proper context. It follows, ineluctably, that the contentions of the first respondent to the effect, not only that he relies on s 16 of the Bill of Rights, but also that the offending statements constitute fair comment on matters of public interest; the first respondent's *bona fide* beliefs in Zionism; and the plight of the Palestinian people, must equally be examined.

THE ORAL EVIDENCE

[10] I turn briefly, where relevant, to the oral evidence presented. A great deal of evidence was led, especially by the Commission. The evidence included that of Dr David Hirsch, a lecturer in Sociology, Goldsmiths, University of London. He was called as an expert in Judaism and Zionism. His evidence covered topics such as identifying racism; identifying anti-Semitism; criticism of Israel and anti-Semitism; the meaning of Zionism; the connection between Jews and Israel; and the analogy between Zionism and Nazism. Dr Hirsch has admittedly published scholarly peer reviewed journals and articles and book chapters on anti-Semitism. One of his books is *Law*

against Genocide: Cosmopolitan Trials, which was awarded the 2003 British Sociological Association Philip Abrams Prize.

[11] The Commission also led the evidence of Dr Gregory Stanton, a Research Professor in Genocide Studies and Prevention at the School for Conflict Analysis and Resolution, George Mason University, Arlington, Virginia. Dr Stanton testified extensively on the processes that lead to genocide based on his model called: *The Ten Stages of Genocide*. He has analysed most of the genocides in recent history and has discovered a predictable pattern. More significantly, he said that genocide starts with words, which have consequences. Further that hate speech, repeated hundreds and thousands of times, becomes incitement to commit genocide.[6] The opinions of Dr Hirsch and Dr Stanton will be referred to later, where necessary, in the course of this judgment.

[12] The Commission also called as a witness, Mr Benjamin Shullman (Shullman). His evidence extends over some 141 pages of the transcript.[7] For present purposes, Shullman, a Jewish person himself, was a student at Wits from about 2005 to 2009. During the time of the incidents under discussion, he was present and doing a Master's Degree in Geography. At the time of his testimony, he was, however, employed by the South African Israel Forum, and at the time of the offending statements, his involvement in politics included being the Chairperson of the South African Union of Jewish Students (SAUJS), which is a representative organisation of Jewish students

[6] See index to Expert Notices and Summaries pp 79-83.
[7] See pp 26-167 of the transcript.

in South Africa. SAUJS is an affiliate of the South African Jewish Board of Deputies (SAJBD). In brief, the role of SAUJS is to deal with the needs of the Jewish students on campus. On the other hand, the SAJBD is an organisation that deals specifically with anti-Semitism and representing issues concerning the larger Jewish community, to the government. One of the several active interest groupings on campus is the Palestinian Solidarity Committee (the PSC). The PSC is an activist group concerned largely with the Israel Palestinian conflict.

[13] Shullman testified about an incident of a march on the Jewish Community Affairs offices by various groups such as COSATU, the PSC, Muslim Groups and other civil societies, during February 2009. The Jewish Community Affairs offices house Shullman's employer, the SAUJS students, the SAJBD, the Union of Jewish home in the Jewish environmental services, and the Jewish library. The Jewish Community Affairs offices are situated in a mainly Jewish suburb, between Orange Grove and Linksfield. He testified that the marchers were aggressive and violent. Shullman himself felt threatened and intimidated.

[14] For the respondents, Professor Steven Friedman of Johannesburg, a Director of the Centre for the Study of Democracy, University of Johannesburg (Friedman) as well as the first respondent, Masuku, testified. Friedman, also a Professor of Politics and International Relations, Rhodes University, testified extensively and mainly countering and withering the opinions of the Commission's expert testimony. He testified, and rendered an

overview of Zionism, anti-Semitism and Silencing of Dissent; identifying racism and anti-Semitism; Israel and anti-Semitism; the opinion of the European Union Monitoring Convention (EUMC); and Zionism and Racism, all based on elaborate authorities.

THE TESTIMONY OF THE FIRST RESPONDENT

[15] As is the case with the Commission's expert witnesses, the opinions of Friedman will appropriately be referred to later in the judgment. First, and briefly for now, the evidence of the first respondent is set out. His evidence in large measure mirrored his initial response to the complaint detailed above (see paragraph [8] above of the judgment).

[16] He was born in Swaziland and relocated to South Africa in 1998. He was employed by COSATU (second respondent) up to now as its Head: International Affairs. In broad outline, the first respondent's duties included international policy for the second respondent, supporting political leadership, providing advice on global trends, co-ordinating international activities, and advancing campaigns on international solidarity, justice and workers' rights as a trade union's federation.

[17] In line with his stated functions, when Israel engaged in war in the Gaza, in December 2008, his employer took a principled decision to render solidarity support to Palestine. The support, in collaboration with other trade unions and interested parties, would take the form of pickets, marches, press

releases, putting pressure on our government to take decisive action, and pressurising the Israeli Embassy to account for the attack in the Gaza. The PSC would also be part of the solidarity support. The South African Board of Jewish Deputies and the South African Zionist Federation were particularly targeted during the March of 6 February 2009. In his view, Zionism is a movement which lays claim to exclusivity or supremacy over other groups, while really being another form of apartheid. The first respondent attended the meeting at Wits on 5 March 2009 during a week titled 'Israel Apartheid Week'. COSATU was invited. The venue was sizeable. The audience consisted of Wits students, including Jewish students; South African Students Congress (SASCO); the Young Communist League; and the Progressive Youth Alliance. The first respondent attended the meeting in the place of COSATU's then General Secretary, Mr Z Vavi. When he was invited to the podium to deliver his speech, he was booed, and called a friend of Hitler and other derogatory names. During his speech he was hackled which made it difficult to convey his intended message properly. However, the principled decision of COSATU for the campaign in solidarity with Palestine was that of a struggle for equality of all nations for justice, against occupation by colonialism and apartheid in and outside Palestine. The campaign took the form of marches, pickets, public debates, and all forms of pressure on Israel to withdraw from the occupied territories in order to ensure freedom for the Palestinian people in the Middle East.

[18] As stated before, the contention is premised on the Commission's argument that the impugned statements constitute hate speech within the

meaning of s 10(1) of the Equality Act, read with the provisions of ss 1, 11 and 12 thereof, and that the context in which the statements were made, undoubtedly referred to members of the Jewish Community. On the other hand, the respondents submit that the impugned statements were based on facts, are true, constitute fair comment on matters of public interest, and in any event, constitute *bona fide* beliefs on Zionism and the plight of Palestinians which the respondents were entitled to express. In addition, the respondents argue that the statements constitute the legitimate expression of the right to free speech as enshrined in s 16 of the Constitution.

THE EQUALITY LEGISLATION

[19] For the sake of completeness, s 10(1) of the Equality Act provides as follows:

> (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –
>
> *(a)* be hurtful;
>
> *(b)* be harmful or to incite harm;
>
> *(c)* promote or propagate hatred.

The long title of the Equality Act states, *inter alia*, that it is intended:

'To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution ..., so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech ...'

In part, the Preamble to the Equality Act provides that:

'Although significant progress has been made in restructuring and transforming our society and its institutions, systematic 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 equalities 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 promote the achievement of equality.'

This is the case even though the prevention and prohibition of hate speech is not provided for in s 9,[8] but in s 16 of the Constitution, as demonstrated below. The Equality Act is therefore the national legislation referred to in s 9(3) of the Constitution.

[20] The prohibited grounds as defined in s 1 of the Equality Act are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or any other ground where discrimination based on that other ground – causes or perpetuates systematic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground described above.[9]

[21] What is of particular significance, are the objects of the Equality Act.[10] In addition to those objects related to s 9 of the Constitution, the objects include:

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[8] In whole, section 9 of the Constitution provides as follows:

> '(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 any 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 any one 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.'

[9] See section 1 of Equality Act under 'prohibited grounds'.

[10] See section 2 of the Equality Act.

'(*a*) to enact legislation required by section 9 of the Constitution;

(*b*) to give effect to the letter and spirit of the Constitution, in particular –

(i) the equal enjoyment of all rights and freedoms by every person;

(ii) the promotion of equality, the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(iii) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

(iv) the prohibition of advocacy of hatred, based on race, ethnicity, gender, or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;

(*c*) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

...

(*e*) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment.'

[22] Section 3 of the Equality Act is also of significant relevance. It provides firstly that, any person applying the Acts must interpret its provisions in order to give effect to the Constitution, the provisions of which include the promotion

of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination; and the preamble, the objects and guiding principles of the Act, thereby fulfilling the spirit, purport and objects of the Act. Secondly, s 3 provides that, any person interpreting the Act, must be mindful of, any relevant law or code of practice in terms of a law; international law, particularly the international agreements referred to in s 2 and customary international law; and comparable foreign law. Thirdly, s 3 of the Equality Act provides that any person applying or interpreting this Act must, take into account the context of the dispute and the purpose of this Act.[11]

[23] On the other hand, and in opposition to the complaint, reliance is based on s 16 of the Constitution, which provides for freedom of expression in the following terms:

> '(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.

[11] See section 3 of the Equality Act in full.

(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.'[12] (emphasis added)

THE RIGHT TO FREEDOM OF EXPRESSION

[24] Now, much has been written about the right to freedom of expression both in our country and abroad. But first, some observations are made about the significance of the objects of the Equality Act enumerated above. In my view, in the context of the instant matter, the objects of s 2 of the Equality Act, as in any other legislation, particularly in our developing and democratic society, must always be accorded careful and close scrutiny, second to the Constitution only. The exercise will show undoubtedly that the only object of s 2 of the Equality Act which is compatible with the provisions of the Constitution is s 2(*b*)(v), which is the prohibition of expression which is already excluded from constitutional protection by s 16(2)(*c*) of the Constitution, namely 'advocacy of hatred that is based on race, ethnicity, gender or religion, and constitutes incitement to cause harm'. The exercise will also show that, s

[12] See section 16 of Constitution.

2 of the Equality Act mentions particularly the grounds of race, ethnicity, gender or religion or race gender and disability. This is when regard is had to the substantive provisions of the Act. On these observations alone, it can hardly be argued that the Equality Act evinces any incoherence within itself.

[25] Indeed, the interpretational approach in s 3 of the Equality Act, was adopted by the Constitutional Court in several instances. One of these cases is *Investigating Directorate: SEO v Hyundai Motor Distributors (Pty) Ltd*,[13] where the Court said:

> '... The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution ... In *De Lange v Smuts NO and Others*, Ackermann J stated that the principle of reading in conformity does "no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution" Accordingly, judicial officers must prefer interpretations of legislations that fall within Constitutional bounds over those that do not, provided that such an interpretation can be reasonably be ascribed to the section.' (footnotes omitted)

[13] 2001 (1) SA 545 (CC) paras [22]-[23].

See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd.*[14] Based on the above, I am accordingly enjoined to interpret the provisions of s 10(1), and related sections of the Equality Act by adopting the approach enunciated in the principles laid down above. However, prior to doing so, it is also instructive to first deal briefly with the approach of our courts in pronouncing on the provisions of s 16 of the Constitution, on which the respondents rely in the instant matter. At the same time, I bear in mind the contentions of the respondents that the impugned statements are based on facts, are true and constitute fair comment on matters of public interest (emphasis added).

[26] The settled and trite approach has been that, although the right to freedom of expression is inseparable from a normal democracy, it is however, neither an absolute nor limitless right nor is it a pre-eminent right. In addition, as shown below, our courts have also adopted a rather generous interpretation in holding that, *inter alia*, unless an expressive act is excluded by s 16(2) of the Constitution, it is a protected expression. See *LAWSA*.[15] In my view, all this immediately brings into question the veracity of the respondents' reliance on s 16 of the Constitution in this matter, more so that the targeted group is visibly identifiable.

[27] In *South African National Defence Union v Minister of Defence and Another,*[16] O'Regan J held that:

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[14] 2009 (1) SA 337 (CC) paras [46], [84] and [107].
[15] 2ed, vol 5, Part 4, paras [107]-[209].
[16] 1999 (4) SA 469 (CC) paras [7] and [8].

> 'Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters ... As Mokgoro J observed in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) ... in para [27].'

In addition, in defining the right to freedom of expression, the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority,*[17] said:

> 'South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as "one of the essential foundations of a democratic society; one of the basic conditions of its progress and for the development of every one of its members" ... As such it is protected in almost every international human rights instrument. In *Handyside v The United Kingdom* the European Court of Human Rights pointed out that this approach to the right to freedom of expression is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ... Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democracy society"'. (footnotes omitted)

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[17] 2002 (4) SA 294 (CC) para [28].

See also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*,[18] and *Phillips v Director of Public Prosecutions, Witwatersrand Local Division.*[19]

THE LIMITATION OF THE RIGHT

[28] Indeed, the above approach and interpretation of the right to freedom of expression, not only show the importance and indispensability of the right, but also that it is not without any limitation. In fact s 36 of the Constitution specifically limits the right in the following terms:

> '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including –
>
> *(a)* the nature of the right;
>
> *(b)* the importance of the purpose of the limitation;
>
> *(c)* the nature and extent of the limitation;
>
> *(d)* the relation between the limitation and its purpose; and
>
> *(e)* less restrictive means to achieve the purpose.

[18] 2004 (1) SA 406 (CC) para [48].
[19] 2003 (3) SA 345 (CC) para [23].

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.' (emphasis added)

[29] From the provisions of s 36 of the Constitution, the following is more than plain: the rights targeted therein, in particular the right to dignity, are more than critical in the evaluation of this matter, bearing in mind the interpretational instruction prescribed in s 39 of the Constitution; that the Equality Act is part of the national legislation anticipated in s 9(3) of the Constitution; and as referred to in s 2 (Objects of the Act) of the Equality Act; and finally, and most importantly, in the context of the matter, the provisions of s 10(1) as well as the related sections of the Equality Act, must be interpreted in such a manner that is consciously and especially circumspect, to avoid simply exchanging one type of thought regulation for another – and in order to achieve an equitable balance between the contrasting rights. In doing so, I must conclude, as I do, ultimately below, that the limitation of freedom of expression imposed by ss 10(1) and 11 and related provisions of the Equality Act under discussion, are not unreasonable and not unjustifiable in an open and democratic society based on human dignity, equality and freedom, when regard is had to all the relevant circumstances. The same should apply to s 12, which in its proviso essentially and potentially targets speakers who do not act *bona fide* and whose utterances have the damaging effects listed in s 10.

THE CIRCUMSTANCES UNDER WHICH THE STATEMENTS WERE MADE

[30] It is necessary, even at the risk of repetition, that the impugned statements: were made by the first respondent representing the second respondent (COSATU) at a rally held by the Palestinian Solidarity Committee (PSC) at the Wits University campus. The atmosphere was rather tense. The Commission maintains that the statements in their utterance, singularly or collectively, numerously amount to anti-semantic remarks which should be understood to incite violence and hatred against the Jewish community and the students present. The Commission's witness, Shullman, a Jewish person himself, testified and confirmed this. He said that he felt threatened and intimidated. More will be said about the evidence of Shullman below.

[31] It is necessary to revert to the impugned statements and the prevailing circumstances in order to assess the proper context. In *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading NO 150 CC*,[20] it was said that 'in law context is everything'. It is not disputed that the statements were made during a series of events between February 2009 and March 2009. These statements are aptly captured in a letter of complaint addressed by the Commission to the first respondent, Masuku, on 11 May 2009.[21] The statements were made to an audience consisting of mainly students on campus, which included Jewish, Zionists and Palestinian supporters. From the credible evidence led by the Commission, there was already some amount of tension between the opposing groups. The audience also included

[20] 2005 (5) SA 186 (SCA) paras [24]-[25].
[21] See annexure 'LM1' attached to the Commission's complaint affidavit – index pp 14-15.

COSATU's members of Palestinian supporters. In addition, to the impugned statements, there ensued exchanges of emails between the first respondent and numerous other persons and institutions reacting to the statements. One of these exchanges was between the first respondent and one Steve, the owner of 'its supernatural blog' (Steve). On 11 February 2009, Steve emailed the first respondent, *inter alia*, as follows:

> '... The comment in question was removed as soon as I spotted it – which was 1 day after it had been posted due to the Jewish Sabbath, during which I refrain from using a computer, amongst many other things ... I only spotted the offensive comment after Sabbath came out which was February 07 – Saturday night. As soon as I saw the comment, I deleted it. I do this whenever I see comments that invoke hate-speech ...'

Immediately thereafter, and on the same day, the first respondent responded to Steve in an email, *inter alia*, (in relation to the march) in the following terms:

> '... I came to the conclusion, that Jews are arrogant, not from being told by any Palestinian, but from what I saw myself. No you blame me for making my conclusion. I owe no one an explanation and care not a bit, but want freedom of Palestinians and I am convinced no amount of being reasonable will resolve the real problem, because occupation is not reasonable itself and we know it ourselves, worst still when people come all the way from wherever they come from to tell us where and how to march, they can do that in their own country, not here. I repeat, there are Jews all over the world who have proven to be reasonable and human, but I have no doubt that all those who support Israel are just as evil as the actions of Israel and I am less concerned

> whether that is semantic or not, but I am interested in the end of human suffering caused by Israel.'

[32] Pursuant to the utterance of the statements, there ensued a plethora of correspondence between various parties, notably between the first respondent and others. There were also complaints directed to the Commission, including the SAJBOD. As stated above, the complaint was forwarded to the first respondent who responded thereto. The matter is therefore before this court as envisaged in s 21(1) of the Equality Act which provides as follows:

> '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.'

This court is established in terms of s 16 of the Equality Act. Although s 21(1) refers to an 'enquiry', the provisions of s 19 of the Equality Act provide, *inter alia*, that the provisions of the Supreme Court Act 59 of 1959, (now the Superior Courts Act 10 of 2013) and the rules made thereunder as well as the rules made under the Rules Board for Courts of Law Act, apply to the nature of enquiry under discussion. It can therefore be accepted that the present enquiry may be conducted as a civil trial, for all intents and purposes.

[33] The term 'hate speech' referred to in s 21 of the Act, is not defined under s 1 of the Act, although 'harassment' is defined as

> 'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to – *(a)* sex, gender or sexual orientation, or *(b)* a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group'.

For present purposes, this matter should be adjudicated upon having in mind the 'prohibited grounds' as contained in s 1 of the Act.

WHAT IS HATE SPEECH?

[34] I have already dealt with the legal principles and approach to be adopted in matters of this nature. Article 4 of the Elimination of All Forms of Racial Discrimination of 1965 (ICRD) describes hate speech as:

> 'Any speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates protected individual or group.'

Another source describes hate speech as:

> '[S]peech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground

> including race, nationality, ethnicity, country of origin, ethno-religious identity, religion, sexuality, gender identity or gender.'[22]

From the above, it is plain that the complaint in the instant matter falls into the definition above on more than one ground, including religion.

[35] Indeed, the Constitutional Court has repeatedly highlighted the interest of the State in regulating hate speech since it may cause harm to the constitutionally mandated objective of constructing a non-racial and non-sexist society which is based on common human dignity and attainment of equality. This is in *Islamic Unity Convention v Independent Broadcast Authority, supra,* where the Court said:

> 'Three categories of expression are enumerated in s 16(2). They are expressed in specific and defined terms. Section 16(2)*(a)* and *(b)* are respectively concerned with "propaganda for war", and "incitement of imminent violence". Section 16(2)*(c)* is directed at what is commonly referred to as hate speech. What is not protected by the Constitution is expression or speech that amounts to "advocacy of hatred" that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to "incitement to cause harm". There is no doubt that the State has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation that prohibits such expression. Any regulation of expression that falls within the

[22] See Linda Daniel 'Regulation of the Media: Hate Speech Essay'.

> categories enumerated in s 16(2) would not be a limitation of the right in s 16.'[23] (emphasis added)

See also the Canadian decision of *R v Andrews*,[24] where it was said that:

> 'Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another.'

When properly viewed, the principles enunciated in the above authorities, in essence show that: the expressions targeted in s 16 of the Constitution are specific and defined in definitive terms; what should be interpreted as hate speech; what is, and what is not protected by s 16 of the Constitution; what are intended by the prohibited grounds referred to in s 1 of the Equality Act; the justification accorded to the State for enacting legislation such as the Equality Act as envisaged in s 9(4) of the Constitution; the objects of the Equality Act referred to earlier in this judgment; what is entailed in promoting hatred; and more relevantly, whether the first respondent is entitled to raise the defence of freedom of expression, as he does in this case; more about this later in the judgment.

RESTATED OBJECTS OF EQUALITY LEGISLATION

[36] I have already dealt with the rationale for the enactment and objects of the Equality Act, and the regulations framed thereunder as mirrored in the

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[23] Para [33].
[24] 43 CCC (3rd) 193 at 211.

preamble. To recall, the purpose was to implement the provisions of s 9 of the Constitution in order to prohibit unfair discrimination and harassment, to promote equality and to prohibit hate speech which is the subject matter under discussion. There will, naturally, always be palpable tension between what is described as hate speech provisions in terms of the Constitution and the Equality Act. Interestingly, another source, namely Christa van Wyk,[25] quoted with approval in *ANC v Harmse*[26] said:

> 'This act implements and clarifies the constitutional hate speech provision. While the Constitution puts these forms of expression outside constitutional protection, the Act clearly prohibits hate speech and creates rights. It provides remedies to counter the harmful effects of hate speech.'

(See s 21 of the Equality Act dealing with the powers and functions of the Equality Act, quoted above.)

[37] In the Swedish case of *Vejdeland v Sweden*,[27] the complaint was against the Kingdom of Sweden under the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) by four Swedish nationals, including Mr Vejdeland (the applicants). There, the applicants alleged that the Court *a quo*, namely the Supreme Court judgment, constituted a violation of their freedom of expression under Article 10 of the Convention. The applicants had previously gone to an upper secondary

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[25] 'Hate Speech in South Africa' XVIth Congress of the International Academy of Comparative Law, Brisbane, 14-20 July 2002, para 7.
[26] 2011 (5) SA 460 (GSJ) para [36].
[27] App No 1813/07 ECoHR 9 February 2012.

school and distributed approximately 100 leaflets by leaving them in or on the pupils' lockers. The originator of the leaflets was an organisation called 'National Youth' and the leaflets contained, *inter alia*, statements disparaging against homosexuals. The applicants had advanced as their main defence the ground that, the purpose of the activity had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools. The applicants were subsequently convicted by a criminal court which found, *inter alia*, that the statements in the 'leaflets had clearly gone beyond what could be considered an objective discussion of homosexuals as a group and that the applicants' intention had been to express contempt for homosexuals'. This sounds, in large measure, similar to the defence raised by Masuku in the instant matter. In finally finding against the applicants, the European Court of Human Rights, stated, *inter alia*, at para 55 that:

> 'Moreover, the Court reiterates that inciting to hatred does not necessarily amount to a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. (See Vêret v Belgium, No 15615/07, S73, 16 July 2009.) In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based.' (emphasis added)

APPLYING THE PRINCIPLES TO THE PRESENT CASE

[38] In applying the above principles to the facts of the present matter, the following is of relevance: the evidence before me, in particular that of Shullman, does not show any significant violent conduct by the Jewish audience or population following the statements by Masuku; neither does it show any subsequent criminal activity; what the evidence does show, however, is that the impugned statements were offensive and targeted at the Jewish community present or not during the utterances. This, despite Masuku's reliance on the right to freedom of expression. In my view, the principles additionally show that, s 10(1) of the Equality Act is well in place to combat such utterances. See in this regard, *R v Keegstra*,[28] where it was stated that the harm that may result from hate speech covers emotional damage caused by words, which may have serious psychological and social consequences. The result is a response of humiliation and degradation from the individual targeted by hate speech. (See also Shaun Teichner)[29] To the extent that Masuku in the impugned statements made reference to 'Wits' or at 'Orange Grove' and facing the consequences, including causing what is referred to as harm, must also be regarded as constituting unprotected hate speech countenanced by the objects of the Equality Act. The contention of Mr Masuku that what he meant by 'harm' in the impugned statements was encouraging vigorous intellectual debate, as well as other forms of engagement, is extremely hard to accept in the circumstances of this matter. When considered properly in context, as expanded more fully below, the only

[28] (1990) 3 SCR 697.
[29] 'The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2004: The Good, the Bad and the Ugly' (2003) 19 *SAJHR* 349 at 352.

reasonable probability is that Masuku in fact meant that some form of 'harm' will befall the Jewish people if they do not conform, whatever it may have been. For present purposes, and for this finding (the finding) to prevail, it is truly unnecessary to identify with exact precision such harm. Neither is it necessary for the evidence led in the enquiry to establish on a balance of probabilities, that there ensued actual physical harm or violence to the targeted group pursuant to the impugned statements.

[39] It is, more than plain from the above authorities, and upon a proper contextual interpretation of the provisions of s 10(1) and the prohibited grounds in s 1 of the Equality Act, that at least two requirements for hate speech are created, namely; it must be based on a prohibited ground or any other ground where discrimination which is based on that other ground promotes or perpetuates systematic disadvantage, or undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner which is comparable to discrimination on a ground specifically listed. Secondly, the hate speech must be construed reasonably to indicate a visible or discernible intention to be hurtful, harmful or incite harm, or propagate hatred. See *Christa van Wyk, supra*, where it was also suggested that the harm contemplated in s 10(1) of the Act, probably has the same meaning as 'harm' contemplated in s 16(2)*(c)* of the Constitution. It was further suggested that s 10(1) of the Equality Act is, however, subject to an important proviso, namely the *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in public interest or

publication of any information, and advertisement or notice in accordance with s 16 of the Constitution, are not precluded by this section.

THE *ONUS* OF PROOF

[40] I mentioned in paragraph [1] of this judgment that this matter proceeded essentially on the basis of a trial. In this regard, s 13 of the Equality Act, which deals with the burden of proof, provides that, the complainant must make out a *prima facie* case of discrimination, and that the respondent, on the other hand, must prove, on the facts presented, that the discrimination did not take place as alleged; or that the respondent must prove that the conduct is not based on one or more of the prohibited grounds. For present purposes, and in matters of this nature, guidance must be sought in what Corbett JA said in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*:[30]

> 'As was pointed out by Davis AJA in *Pillay v Krishna* 1946 AD 946 AD at p 952-953, the word *onus* has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent, only the first of these concepts represents the *onus* in its true and original sense. In *Brand v Minister of Justice* 1959 (4) SA 712 (AD) at p 715 Ogilvie Thompson JA called it "the overall *onus*". In this sense the *onus* can

[30] 1977 (3) SA 534 (A) at 548.

> never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea v Godart* 1939 AD 16 at p 28; *Marine and Trade Insurance Ltd v Van der Schyff* 1972 (1) SA 26 (A) at p 37-9.").

Section 14 of the Equality Act also deals with the determination of fairness or unfairness, in matters such as under discussion. The view that proceedings in the Equality Court are essentially civil in nature, is further fortified by having regard to certain provisions of the Act. These include ss 16(1)*(c)* and *(d)* which provide that:

> 'The minister must, after consultation with the head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), or the magistrate at the head of a regional division established for the purposes of adjudicating civil disputes, by notice in the Gazette, ... designated any regional division established for the purposes of adjudicating civil disputes, as an equality court ...; and the head of an administrative region or magistrate at the head of a regional division contemplated in paragraph (c) must, subject to subsection (2), designate in writing any magistrate, additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, as a presiding officer of the equality court.' (emphasis added)

Section 16(2) provides, *inter alia*, that:

> 'Only a judge, magistrate, additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has completed a training course as a presiding officer of an equality court ...' (emphasis added)

Having sketched the nature of the *onus* of proof in matters of this nature, as well as the actual nature of the proceedings, it appears to me that, there is abundant scope to be less formal and procedural at the same time. I have already set out the objects of the Act (s 2), as well as the rules and court proceedings (s 19). However, s 20 of the Act, which deals with the institution of proceedings of this nature under the Act, provides, *inter alia*, that

> 'the proceedings may be instituted by any person acting in their own interest; or any person acting on behalf of another person who cannot act in their own name; or any person acting as a member of, or in the interests, of a group or class of persons or person; or any person acting in the public interest; or any association acting in the interests of its members; or finally, the South African Human Rights Commission ...',

as happened in the present matter. In this regard, in *Afriforum v Malema*,[31] the informality of the proceedings, at para [43] was indicated as follows:

> 'The Equality 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

[31] 2011 (6) SA 240 (EqC).

> 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 direction in respect thereof after consultation with the parties. A list of the issues which should be discussed in the course of managing the matter is set out.'

In addition, s 173 of the Constitution also enjoins this Court to exercise its inherent power to protect and regulate its own process, and to adopt the common law, taking into account the interests of justice. I endorse this approach. In my view, the observations made in this paragraph regarding the *onus* of proof, the nature of the proceedings under the Equality Act, as well as the flexibility during the proceedings, chiefly to achieve the objects of the Act, whilst complying with the constitutional imperatives, are rather profound for present and future proceedings under the Equality Act.

THE COMPLAINANT'S CASE

[41] I revert to the instant matter, having in mind all of the above approaches and principles. The complainant's case in this matter, by its nature, is limited to hate speech only as envisaged in the prohibited grounds under s 1 of the Equality Act, in the wake of the respondents' defences sketched above.

[42] In my view, in the adjudication of matters such as the present, it is extremely essential to observe that the Equality Act employs distinct categories of expression, which it explicitly forbid, and which extend beyond the forms of hate speech which s 16 of the Constitution place outside the confines of constitutional protection. Again, and at the risk of over-elaboration, according to *Van Wyk*, *supra*, at para [5], the inquiry into whether expression constitutes hate speech for which there is no constitutional protection under s 16 of the Constitution, involves two elements which should be present before an expression will be regarded as amounting to advocacy of hatred or hate speech. These are that, the advocacy of hatred which is based on race, ethnicity, gender or religion; and that which constitutes incitement to cause harm. In *Afriforum and Another v Malema and Others, supra*, Lamont J held the view that the analysis whether speech constitutes hate speech, requires a passionless and objective investigation into the actual words of the utterance under consideration, given their ordinary grammatical meaning, a comparison thereof with the internal limitations created in terms of s 16(2)(c) of the Constitution, and if the utterances fall foul of the internal limitations, that that should signify the end of the enquiry. I, respectfully, agree with this *dictum*.

THE DEFENCES OF THE RESPONDENTS

[43] I have already dealt with the offending statements. I turn briefly, and prior to concluding based on the above principles, to the defences raised. The defence, as described above, and in essence, is that the offending statements were true and constitute fair comment on matters of public

interest. Indeed, it is trite that the defences are recognised at our common law of defamation.

[44] In *Independent Newspapers Holdings Ltd v Suliman*,[32] the Court had to deal with a defamation case brought by the respondent against the appellants pursuant to the appellants having published newspaper reports to the effect that the respondent was the main suspect in a bombing incident. The appellants pleaded that the reports or articles were not defamatory, and that the defence of truth and public interest applied. The appellants also relied on what was referred to as the *Bogoshi* defence (*National Media Ltd and Others v Bogoshi*,)[33] and the constitutional right to freedom of expression, and the right to impart information conferred by s 16 of the Constitution. In the opinion of the Court, the articles were defamatory. In regard to the defence of public interest, the Court held that the test for public interest is objective, after drawing a distinction between public interest and mere curiosity. See also *Times Media Ltdv Niselow*,[34] where the Court held, *inter alia*, that in determining what meaning would be attributed to the article by the ordinary reader, regard was to be had to the context of the article as a whole, including the heading of the article, and that the requirement for justification of truth is substantial, not the absolute, truth (*Johnson v Rand Daily Mail*[35] followed).

[45] In short, in our law of defamation, Masuku had to simply contend and prove that the impugned statements are true; in the public interest; conveying

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[32] [2004] 3 All SA 137 (SCA) para [47].
[33] 1999 (1) BCLR 1 (SCA).
[34] [2005] 1 All SA 567 (SCA).
[35] 1928 AD 190.

to the public something of which they are ignorant, but in their best interest to know; the utterances are reasonable publication; that he had reason to believe in the truth of the impugned statements and took reasonable steps to verify their circumstances; that the impugned statements constitute a comment (opinion) and that it should be understood as a comment and that the utterance thereof should be understood as a comment by a reasonable hearer; the statements are fair and do not exceed certain limits; the impugned statements comment on the facts truly stated; and that the utterance is of public interest. See Amler's *Precedence of Pleadings*, 8th ed, pages 162 to 163. And compare *The Citizen 1978 (Pty) Ltd v McBride (Johnstone and Others, Amici Curiae)*.[36]

[46] In the sphere of foreign jurisdictions, and from which our courts often draw guidance, these appear to support the above approach. For example, and as argued by the Commission, in *Canada (Human Rights Commission) v Winnicki (FC)*, the matter concerned an injunction preventing hate speech based on the Canadian equivalent of s 10 of the Equality Act, the Court held as follows:

> 'Another factor to be taken into consideration is the fact that truth or fair comment is not a defence in cases of hate messages. It is now well established that the focus of human rights inquiries is on the effects and not on the intent (Ontario Human Rights Commission and O'Malley v Simpson Sears Ltd, et al, [1985] 2 S.C.R. 536; Bhinder et al v Canadian National Railway Co. et al [1985] 2 S.C.R. 561). Accordingly, there is no exception for

[36] 2011 (4) SA 191 (CC).

truthful statements in the context of subsection 13(1) of the CHRA, as found by Chief Justice Dickson in Taylor (at p 935). This is obviously another factor to be taken into account in framing an appropriate test for granting an interim injunction to restrain hate messages.'[37]

[47] The above approaches to cases of defamation, including foreign jurisdictions referred to in the preceding paragraph, are rather instructive in the circumstances of the instant matter. However, as stated earlier in this judgment, this court is not called upon to adjudicate on the ongoing conflict in the Middle East. Neither will it be appropriate to venture an opinion in regard thereto. It remains a matter of international debate for now. As a consequence, and for limited purposes only, s 3 of the Equality Act, ought to recede for now in the process of determining the truth, but to assess whether the utterance of the impugned statements was fair and honest. (See in this regard, *Shoot and Others v E-TV*.[38] In my view, and elaborated on more below, based on the above approaches and legal principles, the defences raised by Masuku, namely that the impugned statements are true, fair comment, and in the public interest, and based on Masuku's beliefs, have no merit at all, and the defences are untenable, in the circumstances of this matter. The defences are plainly not permissible under the Equality Act, and having regard to the provisions of s 16 of the Constitution. In so doing, I am fully conscious that this indeed amounts to a rather profound finding in matters of this nature. It may, or may not provide future guidance in respect of complaints broad under the Equality Act. It also appears to me that the

[37] [2006] 3 FCR 446 para [33]; [2005] F.C.J. No 1838 para [33].
[38] (2003) JOL 10918 (BCT SA) paras [6] and [7].

intention of Masuku when making the impugned statements, remains wholly irrelevant in this matter. It is not for the maker of the expression or utterance, nor for this court, to dictate how the maker thereof should perceive it.

ELABORATION ON FINDING

[48] I must elaborate further on the above finding. The impugned statements clearly constitute hate speech, in my view. The blog posted by Masuku on 6 February 2009, was unequivocally a reference to the Jews and their religion and/or origin. The witnesses called by both parties confirmed in evidence that most Jewish people in South Africa, and indeed worldover, regard themselves as Zionists. The blog further refers to Zionists as belonging to the era of their friend, Hitler. It is undisputed that the Hitler campaign had its main purpose the extermination of the Jews whether Zionists or not. In the circumstances of this matter, and viewed in proper context, it is hardly unreasonable that reference by Masuku to Hitler was intended to call up an association with Jews, as contended by the Commission.

[49] In addition, the said blog can equally and reasonably be interpreted as to indicate a plain aim to be hurtful, harmful or to propagate hatred in the particular circumstances of the matter. It is not disputed that at the time of the blog in question, Israel was involved in a war with Palestinians in the Gaza Strip. In the utterance, contextually considered, effectively and in essence, Masuku calls for every Zionist to be made 'to drink the bitter medicine they are feeding our brothers and sisters in Palestine'. In my view, not only does the

utterance transgress the purview of s 10(1) of the Equality Act, but it clearly makes reference to the persecution and harm that allegedly happened to the Palestinians during the Gaza war. It can, with ease of construction amount to direct incitement to cause some harm to South African Jews. Masuku goes further when he says that 'the Zionists must be targeted, exposed, and that all must be achieved to subject Jews to perpetual suffering until they withdraw from the land of others'. It is a clear manifestation and expression of his beliefs that the Israeli occupation of Palestinian territory is not in accordance with the law, as the Commission contends. In my view, this is precisely the evil which s 10(1) of the Equality Act aims to prevent. There is nothing to the contrary in the content or the context other than a clear intention to perpetrate hate speech as described in the persuasive authorities enumerated above. In essence, the post was made to instil detestation, enmity, ill-will and malevolence towards Jews in South Africa. It is distinct advocacy of hatred – nothing else. In my view the above accords in large measure with the evidence of the Commission's witnesses, in particular, Dr Hirsch and Dr Stanton, who rendered evidence as experts in their respective fields. The utterances, individually or cumulatively considered, amount to hate speech, and do not add any value to the public discourse or contribute to the greater debate in a meaningful manner, whatsoever.

[50] In my view, the above, based on the legal principles and approaches, local or foreign, set out above, this should not be countenanced by our courts when dealing with complaints brought under the auspices of the Equality Act. This, on the basis of a proper balance and interpretation of the evil targeted

by the Equality Act, on the one hand, and the right to freedom of expression protected by s 16 of the Constitution, on the other hand, particularly when having regard to the extremely significant right to dignity.

[51] I have already dealt with the evidence of the Commission's witness, Shullman, who was present at Wits University when the impugned statements were made. The evidence requires no extensive repetition. It suffices that the credible evidence shows that the only members in the audience, who held a different view to Masuku would have been Jewish. Masuku's target group was therefore clearly identified by him. Furthermore, the reference by Masuku to 'hell' is particularly worrisome. For example, *Webster's New World Dictionary*, defines the word 'hell', as '... the state or place of total and final separation from God and so of internal misery and suffering, arrived at by those who die unrepentant in grave sin', whilst the *Concise Oxford Dictionary* defines the word as

> 'a place regarded in various religions as a spiritual realm of evil and suffering, often depicted as a place of perpetual fire beneath the earth to which the wicked are consigned after death'.

[52] From the above definitions, and in the context of the instant matter, the reference to the word 'hell' by Masuku demonstrates an unequivocal threat whereby these persons on the other side, namely Jews, would be subjected to treatment by COSATU on the Wits campus in a manner similar to anyone who goes to hell. Furthermore, even though the worldover there may be people who do not support the rights of others, Masuku elected in this case to

limit his remarks to two geographical locations, namely Wits campus and Orange Grove. In particular, Wits was chosen as Masuku knew there were Jewish students present there. On the other hand, Orange Grove is traditionally a Jewish location which would make a reasonable reader to interpret the statement to have been a reference to Jews. In this regard *Le Roux v Dey* states:[39]

> '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.'

Additionally, and as correctly argued by the Commission, the threat of harm is self-evident. It is not to be understood as some kind of metaphor for the purposes of intellectual engagement, but must be accorded its plain meaning- injury either physically or psychologically or deliberately inflicted. Once more, this conclusion is in accordance with the views of Dr Hirsch called by the Commission.

[53] In my view, the statement by Masuku, containing the threat with reference to Jews, is not only hurtful but also harmful in that the target group is threatened with harm, and at the same time promotes and propagates hatred. This alone is in my view, more than reasonably sufficient to bring the statements within the purview of s 10(1) of the Equality Act.

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[39] 2010 (4) SA 210 (SCA) para [7].

THE EXPERT OPINIONS AND FINDINGS

[54] It is my finding that the content and context of the impugned statements, when assessed properly, individually and collectively, prove that Masuku overstepped the mark in the circumstances. It is unnecessary to even traverse fully the individual statements to the effect that any South African family that sends its son or daughter to be part of the Israeli Defence Force must not blame COSATU and Masuku and others of like mindedness, should something happen to such families, with immediate effect. It suffices to observe that no credible evidence was tendered by any other groups having joined the Israeli Defence Force. The bottom line is that the last-mentioned statement, objectively assessed, based on the principles and approaches mentioned above, must readily be understood to be concerning Jews. It too, *prima facie*, falls foul of the provisions of s 10(1) of the Equality Act. The contentions of Masuku, as mirrored in the heads of argument, and as expanded on in closing argument, that the impugned statements are not based on ethnicity or religion, but that if they do, the words 'consequences' and 'harm' do not clearly connote the propagation of hatred or incitement or violence, are without merit at all. I make the finding even though the Constitution protects and recognises rather strenuously, freedom of expression. When properly viewed, interpreted contextually, and having due consideration to all the relevant circumstances, the statements undoubtedly amount to hate speech. The statements clearly fall outside the right to freedom of expression, and are consequently, to be separated from the protection of constitutional protection since the statements infringe,

negatively, on the right to dignity of the Jewish and Israeli community, and probably cause harm. To recall, the content of the statements is rather profound, and not merely mundanely offensive. The statements were made to an extremely tense audience and in a tense political climate. The statements conveyed more than ordinary detestation for the Jewish and Israeli community and their origin and religion, and were accompanied by threats of potential violence, and aim to subject this minority targeted group to probable mistreatment, based purely on their religious and ethnicity affiliation. Indeed, the protection of minorities and vulnerable members of our society has repeatedly been endorsed and promoted by the Constitutional Court. See for example, *Christian Education South Africa v Minister of Education*[40] and *Prince v President Cape Law Society*[41]. See also *Afriforum v Malema*, *supra*, at paras [33] and [34]. The Appeal Committee in *Freedom Front v The South African Human Rights Commission*[42] held that:

> 'A relevant factor in this determination is whether the speech advocating hatred is directed at minorities or vulnerable groups in society. The more vulnerable the group, the more likely it is that it will be harmed by the advocacy of hatred.'

In my view, this is precisely what occurred in the matter before me. This, our Equality Courts, in the fulfilment of the obligations imposed on them by both the Constitution and Equality Act, should not countenance in a democratic society. It is reasonably conceivable that, in the context of the present matter,

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[40] 2000 (4) SA 757 (CC).
[41] 2002 (2) SA 794 (CC).
[42] 2003 (11) BCLR 1283 at 1296.

a reasonable person in the Jewish community, in particular a Wits University student or associate, or an ex-student, such as the witness, Shullman, would probably have been driven out of sheer fear and intimidation for their security. It is irrelevant, in my view, whether any actual attack became likely or ensued. It is equally irrelevant whether the impugned statements, individually or cumulatively, were aimed at Zionism when regard is had to persecution and discrimination inflicted on the Jewish community historically. The protection of their rights, especially to equality and religion, remain crucial.

[55] Based on the entirety of the above findings, it is my view that, the impugned statements historically, do not even persuasively traverse the internal limitations in s 16(2)*(c)* of the Constitution, which makes it unnecessary, for present purposes, to consider the balancing enquiry envisaged in s 36 of the Constitution which provides, *inter alia*, as follows:

> 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom ...'[43]

In my view, it is further unnecessary to consider the question in detail whether the hate speech under discussion, resides in any one or more of the prohibited categories envisaged in s 10 of the Equality Act. It is rather difficult to perceive how it does not in this case. In any event, I was unable to discern

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[43] Section 36 is quoted in para [28] above.

anything of significance in Masuku's heads of argument dealing with the provisions of s 36 of the Constitution.

THE NATURE OF THE EXPERT TESTIMONY

[56] There is one more issue I need to deal with prior to concluding. This is the nature of the expert evidence presented by Dr Hirsch and Dr Stanton on behalf of the Commission, on the one hand, and Professor Friedman on behalf of Masuku, on the other hand. The evidence is rather extensive. It covered, as mentioned earlier in this judgment: what is meant by the concept Zionism; and what would, in the context of this enquiry, constitute anti-Semitism. Dr Hirsch and Dr Stanton, in particular, testified extensively, and I must observe, on genocide worldwide. Indeed, these are hefty local, national and international aspects for proper and detailed consideration in the matter of this nature, and to adjudicate upon in these proceedings. As mentioned in the heads of argument of Masuku, the evidence of the experts, reveal in large measure the contrasting debate between academics as to precisely what the topics 'Zionism' and 'anti-Semitism' factually entail.

[57] By way of example Dr Hirsch for the Commission, expressed the view that while Zionism historically referred to a political or ideological movement for the establishment of a Jewish state, it no longer has this meaning from 1948.

[58] The evidence of the respondents' expert witness, Friedman, is of course, opposing that of the Commission's witnesses. I deal with the contrasting views below. First, the trite approach to such opposing views. Expert witnesses are usually required to assist the Court, and not the party for whom he/she testifies. See *P v P*.[44] It is equally so that an expert witness must be neutral and advance opinions founded on logical reasoning. Partisanship of an expert witness will affect the credibility of such witness. See *Stock v Stock*,[45] and *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd*.[46] Finally, Bryce Wray states:

> 'It is safe to say that a judge in a civil or criminal trial cannot play the role of an expert. The parties to an action will call an expert whose function in a trial is to assist the court to reach a conclusion on matters in which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of special skill, and training or experience, the reasons for the opinion which he expresses are acceptable. It is therefore for the court ultimately to decide whether an expert's opinion is to be relied on or not and to determine what weight (if any) has to be given to it.'[47]

[59] Bearing in mind the above approach, and without any comprehensive finding on the debate between the expert witnesses, especially on Zionism, and more so that the Equality Act does not provide definitions of concepts like

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[44] 2007 (5) SA 94 (SCA) paras [18] and [21].
[45] 1981 (3) SA 1280 (A) at 1296E-F.
[46] 2004 (6) SA 66 (SCA).
[47] 'South Africa: Expert Evidence' 23 January 2012 http://www.mondaq.com/southafrica/x/155964/Trials+Appeals+Compensation/Expert+Evidence (accessed 20 June 2017).

'Zionism', I find on the probabilities: that it is difficult, in the circumstances of this matter, to accept the evidence of Friedman. I say this for the following brief reasons: the opinion does not demonstrate convincingly that Friedman is indeed an expert on the issue of anti-Semitism, and its proper inter-relationship with anti-Zionism in the context of the broader Israeli-Palestinian conflict. Although the evidence shows that Friedman has immense interest in these matters, these have not been the focus of his academic career. In addition, he somewhat showed that he is partisan which on its own, offends the approach and principles to expert testimony described in the preceding paragraph of this judgment.

CONCLUSION

[60] For all the above reasons, I reiterate the finding made that the impugned statements constitute hate speech since they fall foul of the provisions of s 10 of the Equality Act. The statements are not protected by the provisions of s 16 of the Constitution. The statements are therefore declared as such. The contrary argument advanced on behalf of Masuku to the effect that the statements have nothing to do with Jewish people, and that they are based on a certain political or ideological stance or conduct, is without credence. The same applies to the argument that the reference to Wits and Orange Grove, properly and contextually construed, simply mean that this is where the event took place, and Orange Grove is probably the locality where COSATU marched to and which houses the head of the South African Zionism Federation.

REMEDY

[61] Based on the above finding, I turn to what would be an appropriate remedy in the circumstances of the matter. Indeed, s 21 of the Equality Act, under: 'Powers and functions of equality court' enjoins the Court, within its discretion, to impose a variety of remedies, commencing from imposing certain court orders (interim orders and declaratory orders) and an order for an apology. Section 21(2)*(f)* in particular, provides for: 'An order that an unconditional apology be made'. Significantly, s 21(3) provides that an order made by this court under the Equality Act, has the effect of an order made in a civil action, where appropriate. This is the kind of remedy contended for by the Commission. There was no submission from Masuku in this regard.

[62] It is equally significant to observe that, s 21 of the Equality Act, expressly gives a rather wide range of remedies and orders, in a particularly and relative piece of legislation – to accord properly with its aims and objectives. This, in my view, is befitting in our new democratic dispensation. Furthermore, in my view, an order for an unconditional apology is by no means lenient, and should not be viewed in the light of the proverbial slap on the wrist. It remains vital to the victims of hate speech. Its effect should be restorative. Even if it is so that such apology will plainly not erase the contents of the impugned statements here, it should, most importantly, recognise the fact that the statements are found to be hurtful and hate speech, and for that reason, should constitute a notable move towards compensating the target groups, in this case, the Jewish community. In my view, it is indeed extremely

important that, in the light of developing equality jurisprudence in our country, the nature of remedies imposed by the Equality Courts, should be seen by both the victims, the offenders, and the broader society as sufficiently and appropriately effective, equitable and just. I would go as far as suggesting that Equality Courts, in appropriate circumstances, should properly be used as a model on which the effectiveness of the Equality Courts may be tested in future. Proper and effective mechanisms should be put in place in effecting compliance with orders made by these courts. The orders granted ought to properly, and in suitable cases, change the mindset of our society, and certain unrepenting people or groups of people, that we are in a new dispensation which should advocate actively for fairness through equality. There is, as I see it, an obligation on Equality Courts to impose effective remedies which practically will translate to equal enjoyment of all rights and freedoms as enshrined in our law and the Constitution. There is no doubt in my mind that the establishment of Equality Courts should breathe new life into our justice system and the protection of entrenched rights. In addition to changing mindsets, the Equality Courts have a statutory and constitutional obligation to detect unfair discrimination and to determine its legitimacy. The fact that complaints under the Equality Act are still streaming into our courts, and for such courts to develop an appropriate jurisprudence for the future, that fact alone, in my view, should not mean that unfairness, especially of discrimination, does not exist in our society. The Equality Courts should obligatorily, create awareness, and indeed, in line with the totality of the objectives of the Equality Act, even though presently it appears to be an insurmountable challenge. The consolidation of democracy in our society, as

suggested in some circles, requires the eradication of social and economic inequalities, especially those that are systemic in nature, and which were, or are, generated in our historical background by colonialism, apartheid and patriarchy, and which concomitantly, inflicted untold pain and suffering on the majority of our society.

[63] For all the reasons sketched above, and the fact that the impugned statements in this case received wide publication, in a tense atmosphere, and immense response, I deem it fair, proper and equitable that an order for an unconditional apology should be issued. The details of such apology must be negotiated by the parties and agreed to.

THE COSTS

[64] I must deal with the issue of costs. It too, is a discretionary matter. The issues raised are of great public interest. The litigation and the trial involved extensive evidence, including that of expert witnesses from overseas. The parties chose to litigate luxuriously. The trial was of long duration, with the court permitting it, in the interest of promoting the advancement of the objectives of the Equality Act. However, in general, complainants who approach the courts in constitutional matters, and of public interest, should not readily be mulcted with costs, especially meritorious litigation. See *Biowatch Trust v Registrar, Genetic Resources.*[48] In my considered view, and in the

[48] 2009 (6) SA 232 (CC).

exercise of my discretion, the respondents should pay the costs of this litigation.

ORDER

[65] In the result the following order is made:

65.1 The impugned statements are declared to be hurtful; harmful, incite harm, and propagate hatred, and amount to hate speech as envisaged in s 10 of the Equality Act No 4 of 2000;

65.2 The complaint against the respondents succeeds with costs;

65.3 The respondents are ordered to tender an unconditional apology to the Jewish Community within thirty (30) days of this order, or within such other period as the parties may agree. Such apology must at least receive the same publicity as the offending statements.

DSS MOSHIDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING:	6 FEBRUARY 2017 TO 14 FEBRUARY 2017
DATE OF JUDGMENT:	29 JUNE 2017