

DISPUTES

“Death and Life are in the Tongue”* – A Case of Hate Speech

21 February 2022 6 min read

by Dakalo Singo, Director and Harold Jacobs, Director

“This country is still grappling with identifying where the bounds of freedom of expression lie, with the meaning of hate speech, and with the extent to which speech of an offensive and harmful nature can be tolerated.” – Justice Khampepe (Para 96)

On 16 February 2022, the Constitutional Court handed down judgment in the case of **South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another** (2022) in which the rights to equality, human dignity, and the right to freedom of speech and expression were under consideration.

In March 2009, the South African Jewish Board of Deputies (“SAJBD”) lodged a complaint of hate speech with the South African Human Rights Commission (“SAHRC”). This followed a series of remarks made by Mr Bongani Masuku (“Mr Masuku”) while representing the Congress of South African Trade Unions (COSATU). The first remark was a written statement published on a website on 6 February 2009, which read:

“[A]s 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.” (“First Statement”).

On 5 March 2009, he made three additional oral statements at a rally addressing the Israeli-Palestine conflict.

The SAHRC agreed that the statements constituted hate speech. They therefore referred a complaint to the Equality Court on behalf of the SAJBD alleging that Mr Masuku’s statements constituted hate speech which is prohibited by section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”).

In the Equality Court, Mr Masuku disputed the complaint, arguing that his comments were directed at Zionists in particular, and not Jewish people in general. He argued that a distinction exists between anti-Semitism and legitimate criticism of the State of Israel (anti-Zionism). He further argued that the complaint unduly limited his right to free speech. The SAHRC contended that despite Mr Masuku’s assertions the relationship between Judaism and Zionism was too closely linked to be distinguished in the way he alleged. The Equality Court considered the respective arguments and held that the remarks constituted hate speech.

Aggrieved, Mr Masuku approached the SCA. Inexplicably, the SCA was of the incorrect view that the SAHRC had disavowed its reliance on section 10(1) of PEPUDA during oral arguments. The remainder of its judgment was based on this alleged concession, and centered on whether the remarks constitute hate speech in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996. Ultimately, the SCA found that the statements did not constitute hate speech as none of the statements contravened section 16(2) of the Constitution. It therefore overturned the Equality Court judgment.

The SAHRC appealed to the Constitutional Court. The principal issues for determination were: (a) whether the SCA erred by relying on section 16 of the Constitution instead of section 10 of PEPUDA; (b) if it did err, what the proper and constitutionally compliant interpretation of section 10(1) of PEPUDA is; and (c) whether Mr Masuku’s statements constituted hate speech in terms of section 10(1) of PEPUDA.

In its judgment, the Constitutional Court held that the SCA had wrongfully adjudicated Mr Masuku's statements against section 16(2) of the Constitution instead of section 10(1) of PEPUA. This was because doing so contravened the principle of subsidiarity, in terms of which *"neither litigants nor courts can sidestep an Act of Parliament that has been enacted to give expression to a constitutional right, if that Act exists, and instead rely directly on the Constitution itself"* (para 34). The Constitutional Court explained that in the absence of a direct constitutional challenge to section 10, the provision was binding law, meaning that the SCA could not disregard it (as it had done) and was compelled to interpret it.

In interpreting the statements, the Constitutional Court considered and endorsed the judgment in ***Qwelane v South African Human Rights Commission and Another* (2021)**. In *Qwelane*, the Constitutional Court found section 10(1) of PEPUA unconstitutional insofar as it included the word "hurtful" and deleted that word from the provision to make it constitutionally compliant. Additionally, it held that the provision should be read conjunctively, and that evaluating whether a statement constitutes hate speech entails an objective assessment. It then ordered that section 10(1) of PEPUA should read as follows:

"No person may publish, propagate or advocate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm."

Adopting the approach in *Qwelane*, the Constitutional Court in the present matter found that the Equality Court had correctly determined that due to the reference to "Hitler", amongst other things, it was clear that the first statement was directed at all Jewish people (and not just Zionists, as Mr Masuku had argued), as *"Hitler's anti-Semitic extermination campaign was not limited to people of the Jewish faith or ethnicity who identified as Zionists"* (para 156). It held that the Equality Court had correctly found that a reasonable reader would have found the first statement to be directed at people of Jewish ethnicity and identity, and not on anti-Zionism, and that it had been *"intended to be harmful to those who heard it and to society, and to have sought to incite others to harm Jewish people and promote hatred"* (para 159). Consequently, it held that Mr Masuku's first statement contravened section 10(1) of PEPUA and therefore constituted hate speech.

The Constitutional Court found that while the remaining statements were seditious, the factual circumstances did not conclusively establish that they constitute hate speech as they did not appear to target members of the Jewish faith or ethnicity.

The Constitutional Court then ordered Mr Masuku and COSATU to tender an unconditional apology to the Jewish community within 30 days of the order.

** Para 171 of the judgment.*



Dakalo Singo

Head of Pro Bono

[View Profile](#)



Harold Jacobs

Director

[View Profile](#)