IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: A.815/2011

In the matter between:

JULIUS SELLO MALEMA	FIRST APPELLANT
AFRICAN NATIONAL CONGRESS	SECOND APPELLANT
and	
AFRIFORUM	FIRST RESPONDENT
TAU –SA	SECOND RESPONDENT

HEADS OF ARGUMENT FILED ON BEHALF OF SECOND RESPONDENT

INTRODUCTION

1. Respondent as complainants instituted action against appellants (as respondents) for relief sought as set out in the amended particulars of claim, and in particular for a declaratory order that certain utterances of the first appellant be declared to be hate speech within the contemplation of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 referred to in paragraph 2 hereunder. Furthermore an interdict was also sought by second respondent, in terms of prayer b and costs in terms of prayer c. Hereinafter the parties will be referred to as “Mr Malema”, the “ANC”, “Afriforum” and “TAU”.

2. It was agreed that TAU would proceed on the basis of the pleadings of Afriforum. Afriforum in argument abandoned the interdictory relief but TAU did not. Copies of the last two pages

of the heads of argument of TAU in the court *a quo* are annexed hereto. The complete bundle C will be filed shortly, and references thereto herein are to the original page numbers.

3. An order was granted by Lamont, J as reflected in the appeal record, to which the applicants have filed an appeal, after having been granted leave to appeal by Lamont, J.

4. The matter is brought and is to be dealt with in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (hereinafter referred to as "the Act") and in particular section 10 thereof, that deals with the prohibition of hate speech. We point out that the question whether that section is unconstitutional or not, never formed part of the dispute between the parties, and that issue will therefore not be addressed by us herein. Any attempt to make that an issue in this matter will be opposed, as the case was never presented and argued on the basis of that issue being a dispute in the matter.

THE LAW APPLICABLE

5. The Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as "the Constitution") was born as a result of negotiations between the previous government and the liberation struggle parties, through negotiations, and it should therefore be regarded as a settlement of the disputes between the parties. This appears clearly from the preamble of the Constitution and in particular the founding provisions in chapter 1 thereof, namely sections 1 to 6. We point out in particular, that the Constitution was adopted so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. Issues pertaining to hate speech fall directly within this description.

6. The fact that specific reference is made to certain forms of expression in section 16(1) of the Constitution means that these forms of expression enjoy a higher degree of protection than other forms not specifically mentioned.[1]

7. All fundamental rights are limited by common law rules, public policy interest, democratic values and any other grounds upon which they may be limited in terms of the general limitations clause, namely section 36 of the Constitution.

8. However, the right of freedom of expression is limited internally in terms of section 16(2) of the Constitution, which limitation operates independently of section 36. It constitutes an exception to the right of freedom of expression which must be interpreted restrictively.[2]

9. Section 16(2) defines certain boundaries beyond which the fundamental rights do not extend. This includes certain forms of hate speech which are removed from the ambit of constitutional protection. By excluding the advocacy of hatred from constitutional protection, South Africa has implemented various international documents which demanded that hate speech should be prescribed. It is therefore not necessary to debate if hate speech places a limitation on the right of freedom of expression, as it is expressly provided for in section 16(2). Hate speech legislation or regulation is therefore not subject to a challenge that it would infringe freedom of expression, as there is no constitutional right to hate speech. Hate speech has been moved beyond constitutional scrutiny and the general limitation analysis, and has been moved into the area of parliamentary primacy. [3]

10. The Constitutional Court has in fact emphasised that it is in the interest of the State to regulate hate speech in South Africa, as hate speech may pose harm to the constitutionally

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1 See section 16 of the Constitution

2 See Christa van Wyk – www.stopracism.ca/content/hate-speech-south-africa Hate Speech in South Africa, 16th Congress of the International Academy of Comparative Law 2002.

3 Van Wyk *supra*.

mandated objective of a non-racist and non-sexist society.[4] According to section 16(2)(c) of the Constitution, the right to freedom of expression does not extend to advocacy of hatred, but is based on race, ethnicity, gender, religion and that which constitutes incitement to cause harm.

11. The concept of harm should be interpreted as a broad concept which includes physical, financial and emotional harm. Last mentioned would include broad psychological and social harm on the targets of hate speech.[5]

12. The Canadian Supreme Court's decision in R v Keegstra (1990) (3) SCR 697; (1990) 61 CCC (3RD) 1 (SCC) should be followed and adopted. In that case the court stated that emotional damage caused by words may have grave psychological and social consequences such as humiliation, degradation, the loss of self worth, and impairment of dignity. It affects groups and individuals. According to academic writers this concept of harm was adopted by the Broadcasting Complaints Commission of South Africa.[6]

13. The legislation envisaged pertaining to hate speech was enacted as part of the Act and in particular section 10(1) thereof, which prohibits the publication, propagation, advocacy or communication of words based on one or more of the prohibited grounds against any person, which could reasonably construed to demonstrate a clear intention to be harmful or to incite harm, and promote or propagate hatred.

14. It is important to have regard to the pre-amble of the Act. The Act was promulgated to give effect to section 9 read with item 23(1) of schedule 6 to the Constitution, so as to prevent

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4 The Islamic Unity Convention v The Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at para 33.
5 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 2000 p 54.
6 Van Wyk *supra* p 8 and Human Rights Commission of South Africa v SABC, case no 31/2002, as referred to by Van Wyk

and prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination, to prevent and prohibit hate speech, and to provide for matters connected therewith.

15. "Prohibited grounds" are and include race, ethnic or social origin, culture, language, birth and any other ground as defined in part b of the definition.[7]

16. The remedies that could be considered by a court are dealt with in section 21(2) of the Act and include declaratory orders, directing specific steps to be taken to stop hate speech and an appropriate order as to costs.

17. According to Van Wyk the section sets out two requirements for hate speech, namely it must be based on a prohibited ground and an intention as required must be construed reasonably from the facts.[8]

18. There is also South African legal authority that has determined the slogan *of "kill the farmer kill the boer"* to constitute hate speech. In Freedom Front v South African Human Rights Commission and Another, the South African Human Rights Commission came to exactly that conclusion.[9]

19. In that decision the court referred to and accepted *inter alia* the wide definition of harm, meaning psychological, emotional and social harm, as set out in the Canadian decision of R v Keegstra, as referred to above.[10]

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7 Section 2 of the Act provides for the objects of the Act, and section 3 contains provisions relating to interpretation of the Act.

8 Van Wyk *supra* p 8. Van Wyk refers to certain decisions *inter alia* of the Constitutional Court, and also certain unreported decisions, to indicate the approach in South Africa pertaining to hate speech. These are important illustrations indicating how hate speech should be approached in South Africa, and how it has been approached by the Constitutional Court and by the Durban and Coast Local Division.

9 Freedom Front v South African Human Rights Commission and Another 2003 11 BCLR 1283 (SAHRC).

10 P 1293 of the judgment.

20. It was also pointed out that section 16(2)(c) of the South African Constitution is based on article 20 of the International Covenant on Civil and Political Rights (ICCPR) which provides as follows:

"advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

(We refer to further international law hereunder)

21. Consideration was also given to the balance that must be created between freedom of expression on the one hand and a limitation thereof with reference to hate speech on the other hand. It was pointed out that there must be an adequate nexus between the advocacy of hatred based on race, ethnicity, gender or religion and the harm that is caused as a consequence.

22. The issue, in respect of section 16(2)(c) of the Constitution is whether a reasonable person assessing the advocacy of hatred on the stipulated grounds within its context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm.[11]

23. The Commission came to the following finding as set out on page 1299C-E:

"The slogan, under consideration in this appeal, was chanted at high profile functions organized by the African National Congress, the ruling party in this country. These events and the chanting of the slogans were widely publicized. There can be no doubt that the

[11] See in particular p 1299 C-E

slogan, given its content, its history and the context in which it was chanted, would harm the sense of wellbeing, contribute directly to a feeling of marginalization, and adversely affect the dignity of Afrikaners. The slogan says to them that they are still the enemy of the majority of the people of this country. It contributes to the alienation of the target community and conveys a particularly divisive message to the majority community that the target community is less deserving of respect and dignity. This generalized slogan is directed against an entire community of people. Words convey meaning and do cause hurt and injury. There is a real likelihood that this slogan causes harm."

24. The statements of Mr Malema have also been considered by the Equality Court in Sonke Gender Justice Network v Malema 2010 7 BCLR 729 (EQC).

25. The Equality Court in that decision followed the interpretation set out above pertaining to the meaning of harm in the sense that it is not limited to direct physical harm, but also extends to an attack on dignity.[12]

26. The court came to the conclusion in that matter that the comments made by Mr Malema pertaining to females and rape constituted hate speech. There should be no difference in the approach by any other court to this issue as the approach in the cases referred to above.

27. The court furthermore, on the argument and evidence of Mr Malema that his audience did not perceive his utterances harmful or hurtful, found that he was an "*influential public figure on whose utterances are widely reported and on the day in question was not only addressing an audience but the broader public. Therefore, even if the specific audience he*

[12] See para 14 and 15 of the judgment.

was addressing did not perceive his utterances hurtful or harmful he should have been mindful that such uttered words were not just meant for that audience". In the light thereof the court found that he was guilty of hate speech.

28. His lordship Mr Justice Bertelsmann in the Gauteng North High Court also considered the singing of the song and words by Mr Malema, under consideration in this matter, and came to the conclusion that it constitutes hate speech.[13]

29. In Human Rights Commission of SA v SABC 2003 (1) BCLR 92 (BCCSA), a song composed and sung by a black artist criticizing the Indian community in Natal, was considered. Reliance was placed in that judgment on the approach in R v Keegstra (1990), 61 CCC (3rd) 1 (SCC), a judgment of the Supreme Court of Canada.[14]

30. In paragraph 27 of that judgment the Court dealt with evidence that must be judged within the context, the effect of the words and the song, on those who were targeted. The fact that Indians are a minority and the effect thereof was also dealt with in detail in the judgment.[15]

31. In Freedom Front v South African Human Rights Commissioner & Another 2003 the South African Human Rights Commission considered the slogan "*kill the farmer, kill the boer"* which gave rise to the complaint. The ANC, through Mr Kgalema Mothlante, disavowed that it was a slogan of the ANC, which is referred to in that judgment.[16] It was also found that the harm referred to in the Constitution, should not be restricted to physical or actual harm, but that it includes an expression that may adversely impact upon a person's dignity.

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13 Afriforum and Another v Malema 2010 (5) SA 235 (GNP).
14 See para 16 of R v Keegstra
15 See in particular paras 27, 28, 29, 31, 32, 34 – 39 as well as 41 that deals with the irrelevance of the intention of the broadcaster or the writer
16 11 BCLR 1283 (SAHRC) See p 1286G – 1287C and footnote 3

32. It was made very clear that the context and content of the expression was considered, including whether the speech advocating hatred was directed at minorities or vulnerable groups in society, and whether viewed in context, it was likely to have an impact of a sufficiently serious and substantial nature.[17]

33. Section 3 of the Act deals with the interpretation if the Act. It provides that any person applying the Act must interpret its provisions to give effect to the Constitution, the provisions of which include the promotion of equality through legislative and other principles incorporated to protect the disadvantaged against past and present unfair discrimination. The pre-amble sets out the objects to be applied, and the principles of the Act. Section 3(2) provides that any person interpreting the Act may be mindful of any relevant law or international law particularly international agreements and comparable foreign law. Section 3(3) provides as follows:

"Any person applying or interpreting this Act must take into account the context of this dispute and the purpose of this Act." (our underlining)

34. In the light of the aforegoing, it is therefore submitted, that any evidence to establish the context within which the words have been uttered and sung, will be admissible evidence. That includes the evidence of the specific events where the words were sung, the publication and broadcast of the words, and also evidence pertaining to persons who had heard the words, by being at the specific occasion, or having heard it through any broadcast. Such evidence should include *inter alia* the history of the song or chant and its words, where, when and how the song or chant was sung, and within the South African social and political context of today, with reference to South Africa's high crime rate, farm

[17] See p 1297E to F and p 1298A to B

murders, attempts to achieve reconciliation, attempts to apply the Constitution in South African society, threats to democracy the views, thoughts and impressions of minority groups like Afrikaners and the farming community, and all similar related issues.

35. It is submitted that the above Honourable Court should be placed in the best position possible, from a factual and evidentiary point of view, to determine the dispute in this matter within its context. It is furthermore therefore necessary to have due regard to the effect of the words upon the target group, the reaction of the target group, the infringement of their rights, their perception of infringement of their rights, and their views regarding the specific words. The probability of the words being taken seriously and acted upon should be considered by the Court as part of the broad context. Similarly, South Africa's crime statistics and in particular statistics pertaining to farm murders and farm attacks are important, because the target group herein is also the target group for farm murders. The views of different segments of South African society pertaining to the words should also form part of the broad context.

36. A court can only place itself in a position to determine whether the words that were pronounced, could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, or to promote or propagate hatred, if all these issues are dealt with in evidence. It is for this reason that the evidence that TAU presented, was presented with a view to place all the relevant facts in context, before the court. It should be regarded as relevant, and should be considered.

37. It appears from the aforegoing that there is ample South African authority for a finding that the particular song in this matter, and the words uttered, constitute hate speech.

38. In some of the decisions and judgments referred to above, the context was taken into

account, also with reference to factual evidence surrounding the dispute between the parties.[18]

39. In these heads of argument therefore submissions will be made on the basis of the approach of the existing authorities, as well as with reference to the context and background to the songs and the words and the utterance of the words, should the above Honourable Court find that the reference to context in section 3(2) of the Act also includes evidence of the background and surrounding facts. Evidence by TAU was presented in accordance with these principles.

APPLICATION OF SECTION 10

40. An analysis of section 10 shows that the following must be proved by a claimant:

40.1 that words were published, propagated, advocated or communicated;

40.2 that the words were based on one or more of the prohibited grounds;

40.3 that the words were communicated to and against any person, which includes a juristic person, and a non-juristic entity, or a group or a category of persons as defined in the Act.

40.4 that the words could reasonably be construed to demonstrate a clear intention;

40.5 that the intention so construed should be directed towards hurt, harm, incitement of harm, promotion of hatred or propagation of hatred.

[18] (In this regard reference is made to Human Rights Commission of SA v SABC 2003 (1) BCLR 92 (BCCSA) at paras 27 – 32 and para 41). See also in this regard Afriforum and Another v Malema where the court dealt with the true yardstick of hate speech being the effect of the words objectively considered upon those directly affected and targeted thereby; Human Rights Commission of SA v SABC, *supra*, para 41; Freedom Front v South African Human Rights Commission, p 1297 E - F

41. There is no doubt that the specific words in question in this case were published, propagated, advocated and communicated. It is submitted that there is also no dispute pertaining to the specific objectionable utterances, and the fact that they were uttered on the occasions referred to in paragraph 4 of the particulars of claim read with paragraph 3 of the particulars of claim. The dispute on the pleadings turns only on the question whether the utterances were objectionable utterances. There is no dispute on the pleadings as to the words having been uttered at or on the occasions referred to, and the meaning of such words.[19]

42. In the plea of the ANC, it is indicated that the words "ibhunu", "ibhulu" or "amabhunu" should not be understood as a reference to farmers. It is furthermore disputed that the words are reasonably capable of being construed as demonstrating a clear intention to be hurtful, harmful, incite harm, or promote or propagate hatred against farmers. The fact that the words were uttered at the occasions as pleaded in the particulars of claim was never placed in dispute.[20]

43. The following meanings described to Zulu words are important, with reference to the Witwatersrand University Press English and Zulu Dictionary dated 1977: Afrikaner – i(li)Bhunu; Boer – (i) (farmer) umlimi (1).(ii) i(li)Bhunu; i(li)gadasi; Farmer – umlimi (1), umninipulazi (1), i(li)fama; Injure – ona, bulala, khubaza, limza, onakalisa; Kill – bulala, bhubhisa, swahla, sitheza; Bhunu (i(li)Bhunu) – Dutchman, Afrikaner; Bulala – kill, murder,destroy, break to pieces, hurt injure, ill-treat, afflict; Dubula – give thudding blow,

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[19] Mr Malema's plea record (vol 1) p 14-15; ANC's plea record (vol 1) p 24

[20] The parties are bound by their pleadings. Dinath v Breedt 1966 (3) SA 712 (TPD) at 717E to 718B; Bellairs v Hodnett 1978 (1) SA 1109 (CPD) at 1150D to 1151B; Water Renovation (Pty) Ltd v Goldfields of SA Ltd 1994 (2) SA 588 (AD) at 605G to J; Amod v SA Mutual Fire & General Insurance Co 1971 (2) SA 611 (NPD) at 613H to 615F and in particular p 615E to F; p 616G to 617C; South British Insurance Co Ltd v Glisson 1963 (1) SA 289 (D) at 294

sweep off forcibly, shoot a gun[21]

44. In the plea of the ANC the meanings ascribed to the words in paragraph 5 of the particulars of claim are not denied. Reference is only made to the literal and contextual interpretation which is said to be wholly unreasonable and bereft of the proper context in which the song in question has been used and sung. [22]

45. The Collins Dictionary of the English Language gives the following definition of the word "boer" namely: *"a descendant of any of the Dutch or Huguenot colonists who settled in South Africa."*[23]

46. The Handwoordeboek van die Afrikaanse Taal defines "boer" as follows: [24]1*(rassisties) Skeld- of prysnaam vir 'n Afrikaner of vir die polisie. ² Landbouer; veeboer; plattelander."*

47. It is clear from the aforegoing that "Afrikaner" and "boer" are equated with "ibhunu". It appears furthermore that a "boer" in the English dictionary is a descendant of any of the Dutch or Huguenot colonists who settled in South Africa and in Afrikaans it constitutes a derogatory word for an Afrikaner or the police, and it can also mean a farmer. Use of the word "boer" also includes a farmer according to the Zulu dictionary.[25]

48. It follows therefore that the words used by Mr Malema can be interpreted to refer to "Afrikaners" and to "boers" and that the translation would constitute a meaning of a derogatory nature. It also can mean a reference to farmers and not only Afrikaners. Those who hear the translation therefore will understate it in that way. It is the translation that

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21 Trial bundle C p 488 - 501
22 Particulars of claim record p 3-4 read with p 24
23 Trial bundle C p 484
24 Trial bundle C p 486
25 Dictionary meanings may be used to determine the ordinary grammatical meaning of a word – Fundstrust (Pty) Ltd (in lig) v Van Deventer 1997 (1) SA 710 (A)

must be considered and not the Zulu words, because the target group is affected by the translation. However, the meaning in Zulu is similar, and there is no real difference. No expert evidence in this regard was presented by the ANC or Mr Malema.

49. The words must be directed towards “any person”. A person may include a group or a category of persons. It has appeared throughout the matter, and also from the pleadings of the ANC and Mr Malema, that they contend that the words must not be interpreted to refer to Afrikaners or farmers or a specific ethnic group in South Africa, but to the oppressive regime, the system of apartheid, and all the structures associated with it. As we have pointed out above, the meaning intended by the person who utters the words, and the meaning ascribed thereto by that person, cannot and should not be evaluated in the process of consideration of hate speech.

50. Certainly, the intention of section 10 could never have been that a person may hurl insults to another person, and then thereafter simply state that the meaning that should be ascribed to the words that he had uttered, is not the meaning that the other person understood, and that it is normally understood by. A person should therefore not be allowed to hurl insults and thereafter simply say that he did not mean it or ascribe a meaning to it, that suits him under the circumstances.

51. It is for this reason that it is submitted that the intention of the person who utters the words and the meaning ascribed thereto by that person should not be taken into account, and it should completely be disregarded. It is irrelevant. The focus is upon the words used, the effect of the words, and how the person or group that hear the words, react thereto, and interpret and understand the words, and whether such interpretation or understanding is reasonable. This is also the general approach internationally as is more fully dealt with

hereunder.

52. The words must further be based on one or more of the "prohibited grounds". The prohibited grounds are defined in the Act as referred to above. In this instance the reference to "ibhunu" is *inter alia* a derogatory term for boers or Afrikaners, and it therefore refers to ethnic or social origin, culture and also language and birth. Again, the intention of the person who utters the words, and his evidence in respect thereof, cannot and should not influence the determination whether the words are based on one or more of the prohibited grounds. The words should be regarded with reference to their true, ordinary and grammatical meanings and with reference to the context within which they are sung. This may be simply by objectively determining the meaning of the words, and/or having regard to the factual matrix and context within South Africa, of the dispute, in respect of which the words are uttered. Boers can mean Afrikaans, and it can mean farmers, in the normal use of the words.[26]

53. The words must furthermore be <u>reasonably construed</u> to demonstrate a clear intention. The question therefore arises on what basis this reasonable construction must be made by the above Honourable Court. In the cases referred to above the court simply, on an objective basis, and through an objective approach, came to a finding, with reference to certain surrounding facts. It is submitted that the context and the surrounding facts pertaining to the words, the circumstances, and the prevailing conditions in South Africa, should be applicable to the construction that the court must place upon the words and the effect thereof.

54. Therefore the test, again, is not a test with reference to the <u>person who utters</u> the words

[26] See expert notices of Van Zyl and Goosen, confirmed in their evidence record p 123–147; record Goosen p 578-595

and whether that category of person could reasonably be construed to demonstrate a clear intention to act in the way referred to in section 10. Rather it deals with the person who complains of hate speech, and who hears the offensive words and is affected thereby. It is that person or group that must be considered, and that must be tested against rationality and reason, to enable a court to come to a finding whether that person, objectively, is acting reasonably, to construe that the words demonstrate a clear intention to act as referred to in section 10.

55. Therefore it is submitted that the focus should be on the category of person or group and the kind of person or group that complained, and whether it is reasonable for that person or group to construe the words as conveying a specific intention.[27]

56. It is therefore important to consider and take into account who the complainants are and whether it is reasonable that they, within their community, and with reference to the context they live in that they perceive is applicable in South Africa, understand the relevant objectionable words. One cannot determine such an objective test with reference to the person who utters the words and the circumstances and environment within which he utters the words.

57. The context against which the above Honourable Court must determine whether it is reasonable for members of TAU to construe that the words demonstrate a clear intention as referred to in section 10, will be dealt with more fully hereunder. It is submitted that there can be no other conclusion, but that the understanding, as set out in the pleadings, and that was testified about through the witnesses called by TAU, clearly shows the reasonable and rational conclusions of the members of TAU. All the factors that the above Honourable

[27] See also the approach regarding group defamation in Mohammed and another v Jassim 1996 (1) SA 673 (AD) at p 703I to p 704G

Court should take into account for purposes of coming to that conclusion, will also be dealt with hereunder.

58. The court should further find (it is submitted) that the conclusion that the uttering of the words demonstrates a clear intention, is an intention to hurt, harm, incite harm, promote hatred or propagate hatred. In this regard reference is again made to R v Keegstra referred to above followed in all the South African decisions referred to above.[28] The harm is emotional, in that it is directed towards the reasonable fears of farmers and Afrikaners, against the background of South Africa today.

59. The hurt, harm and hatred relevant in this case is marginalisation of Afrikaners, pressure on them as a group that is not acceptable, treatment of them different from others, racial discrimination against them, cries committed against them and in particular farmers, polarisation of the community, their ideals of the new South Africa being threatened, loss of life, being injured physically, and economic loss.[29]

60. In Freedom Front v South African Human Rights Commission and Another, supra, the court considered the meaning of "harm" and came to the conclusion that harm cannot and should not be restricted to physical or actual harm. It found that the term harm was broader than physical harm. The reference to race, gender, ethnicity and religion, was meant to prevent unwarranted intrusion into the right of freedom of expression. Harm must also be interpreted to refer to impacts upon dignity, and psychological, emotional and social harm that can be caused by hate speech. It may therefore cause psychological harm and evoke a sense of hostility.[30]

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[28] See Human Rights Commission of SA v SABC, *supra*.
[29] See expert notices of Van Zyle and Goosen referred to in evidence record p 123-147; record Goosen p 589 line 9-25; Van Zyl p 623-630
[30] See p 1292A to 1295F; p 1298A to p 1298B; p 1299C to p 1299E

61. Even though in that matter the relevant words were “kill the boer, kill the farmer”, it was found by Bertelsman J that the words “shoot the boer” or “shoot the farmer” can hardly be distinguished from those words.[31] That must be the correct approach.

62. Obviously, the abovementioned legislation should also be interpreted, not only with reference to the Constitution and the Act itself, but also with reference to the principle of ubuntu.[32] It encompasses the values of compassion, respect, human dignity, humanity and morality. It emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa it has become an acceptable principle in the building of a new democracy.

63. The evidence as referred to as hereunder clearly shows that the words are interpreted by Afrikaners and farmers as meaning to be hurtful, that it intends to be harmful, and that it promotes and propagate hatred. The words are taken seriously, it instils a sense of fear, and it marginalises Afrikaners. It impacts negatively on their dignity and their perceptions of being acceptable as a minority in South Africa.

REASONABLY BE CONSTRUED TO DEMONSTRATE A CLEAR INTENTION TO HURT, HARM, INCITE HARM AND PROMOTE OR PROPOGATE HATRED

64. Most of the evidence that was presented by the parties during the hearing dealt with this issue and was relevant for purposes of this issue. The facts and evidence highlighted hereunder should be regarded as the factual context against which the abovementioned

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31 Afriforum and Another v Malema, supra, p 7

32 S v Makwanyane 1995 CSA 391 CC; Azanian People’s Organisation (AZAPO) v President of the Republic of South Africa 1996 (4) SA 671 (CC); Hoffmann v South African Airways 2001 (1) SA 1 (CC); Bhe and Others v Magistrate Khayelitsha and Others 2005 (1) SA 580 (CC); Dikoko v Mokhatla 2006 (6) SA 235 (CC); Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority 2007 (4) SA 395 (CC); Barkhuizen v Napier 2007 (5) SA 323 (CC); Masetlhla v President of the Republic of South Africa 2008 (1) SA 566 (CC)

determination must be made, with particular

65. It is submitted that the test should in fact focus on the views of those affected by the words, and the concern of persons who form the target group, namely persons who could be identified through the word “boer”. It should be evaluated with a view to determine whether their reaction to and understanding of the utterance of the words as being intentional to cause harm, be hurtful, to incite harm, or to promote or propagate hatred, can be described as reasonable. Therefore the context and the factual matrix within which they are exposed to the utterance of these words must be considered. The following facts and evidence were presented in this regard:

65.1 The song is applicable to the circumstances of today, and is directed against those who still form part of colonialism, who do not want to conform to the new democratic state, who do not want to support the national democratic revolution of the ANC, who do not subscribe to the views of the ANC, who do not want to participate in nationalisation of assets and land, and who do not support the taking of land without compensation.[33] At the relevant stage none of these issues had been clarified by the ANC, and formed part of the public debate.

65.2 The policy of the ANC Youth League and to a lesser degree the ANC that mines must be nationalised, land must be taken without compensation, and redistribution of property must take place without compensation.[34]

65.3 The national democratic revolution of the ANC which deals with the redistribution of land

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[33] Record Mantashe p 1049 line 2 – 15; 910 line 5 to 9114 line 5; Record Malema p 1270 – 1271, 1273 line 22 to 1274 line 5, p 1233 line 16 to 1234 line 15, 1239 line 7 – 15, 1190 line 10-15, 1216 line 18, 1217 line 20. He supports Jackson Mthembu who says that the song is directed to those whites who still supports apartheid. Record p 1214 line 10-22, 1082 line 6-20

[34] Record Malema p 1171 line 10 – 18, 1222 line 22, 1228 line 20 to 1229 line 25, 1231 line 20 to 1232 line 12, 1274 – 1276, 1280 line 22 – 25, 1283 line 20 to 1284 line 2, 1284 line 15-25,

including urban land, the redistribution of land without compensation, the policy of nationalisation of mines and other assets, and the objectives of the Freedom Charter in this regard.[35]

65.4 The fact that the ANC Youth League supports what had happened in Zimbabwe, that they refer to the process there as an example, and the fact that Mr Malema looks up to Mr Mugabe,[36] and his policies of removing white farmers from the land with no compensation, and his indigenisation policy.

65.5 The fact that Mr Malema regards Codesa as being something of the past and that the Constitution must be amended to make provision for expropriation of assets without compensation.[37]

65.6 The current situation in South Africa pertaining to crime, and the problems in respect thereof, with particular reference to a government report on armed violence.[38]

65.7 The high murder rate of farmers on farms, and farm killings as a specific crime, to the effect that a farmer has a 700% more risk of being murdered than any other person in South Africa.[39]

65.8 The views of members of the TAU and also students of Prof Bezuidenhout pertaining to the use of the words “shoot the boer” or “kill the boer”. The survey done by TAU was with reference to the words “shoot the boer”.[40] They overwhelmingly regarded the words as unacceptable and to constitute hate speech.

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35 Record Serote p 973 – 976; record Mantashe p 1048 line 5 to 1049 line 3; record Malema p 1231 line 20 to 1232 line 12, 1233 line 16 to 1234 line 10, 1239 line 7-15, 1270 - 1136
36 Record Malema p 1283 line 20 to 1284 line 2
37 Record Malema p 1284 line 15-25, 1285 line 12-22
38 Record Van Zyl p 624 line 15 to 625 line 15; Record Bezuidenhout p 548 line 22 to 549 line 10
39 Record Van Zyl p 625 line 10, 627 line 10; Record Bezuidenhout p 559 line 19, 554 line 25
40 Record Van Zyl p 627 line 16, 632 line 20; Bundle C p 415 – 422; Record Bezuidenhout p 697 line 8 to 698 line 19, p 555 -558

65.9 This is further supported by the survey done by Prof Kok for his doctorate degree in 1999, although that survey was with reference to "kill the boer, kill the farmer". It is submitted that there should be very little difference between the two versions, with reference to the reaction of people thereto.[41] People would not react differently if they hear "shoot" instead of "kill", or "farmer" instead of "boer".

65.10 The fact that a different survey done in the media which was referred to, and which was accepted by Van Zyl as correct. The conclusion was more or less the same as the surveys above.[42] Most people simply do not require the utterance of the words as acceptable.

65.11 The fact that international organisations perceive farm murders as bordering on genocide.[43]

65.12 The evidence of Van Zyl, Goosen and Bezuidenhout that Afrikaners including farmers, feel under threat, that they feel marginalised, and in particular the evidence referred to in the summaries of these witnesses, which were not contested, show that there is a minority group of people in South Africa who feel extremely concerned, who experience division, hostility and abuse, who experience the words as being discriminatory and harmful, and who feel that it affects their dignity, equality, freedom and security. This is applicable to Afrikaners and farmers.[44]

65.13 The gestures which go with the song and the fact that Mr Malema sometimes states,

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41 Record Kok p 647-658 and the annexure to his expert report.
42 Record Van Zyl p 632 line 5-25
43 Record Van Zyl p 617 line 20-25, 622 line 15 to 623 line 15; Record Malema p 1298-1301
44 Witness summaries of Van Zyl, Goosen and Bezuidenhout; Record Van Zyl p 624 line 1-18, 617-623 and the concessions in respect thereof by record Serote p 948 line 18, 949 line 5, 962 line 16-18 and the admission by Record Mantashe that the reaction is important enough to warrant talks to TAU about it p 1047 line 10, 1048 line 5

when it is chanted, “shoot to kill, kill a man” are interpreted as being threatening.[45] A chant is also more threatening than a song.

65.14 Both Van Zyl and Gray testified that even after they had heard the explanation of the ANC and Mr Malema pertaining to the song, they still feel uncomfortable and concerned.[46]

65.15 The fact that music may have an influence on young people to such an extent that they may act in accordance therewith and even commit murder as a result thereof.[47]

65.16 Afrikaners being a minority in this country have high expectations of how the country should be governed, but are concerned about the shocking state of the Government. They are negative, they feel sensitive about it and Prof Goosen testified that no Afrikaner he has met has supported the song.[48]

65.17 Afrikaners feel that instead of adhering to the understanding, as a result of Codesa, between the different parties, and adherence to the Constitution, and mutual respect to each other, the Constitution is currently undermined and under threat.[49]

65.18 The fact that the ANC always had a policy of restraint pertaining to violence but now supports this song, where they in the past, acted against Peter Mokaba in respect of “kill the boer, kill the farmer”, and also took steps to limit the singing of this song by Mr

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45 Record Malema page 1227 line 25 to 1228 line 4, page 1290 line 24 to 1291 line 5; record Gray page 523 line 12-20, 525 line 4-25, 526 line 1-20

46 Record Gray p 528 line 20, 529 line 18, 539 line 10 to 534 line 8;

47 Record Bezuidenhout’s summary and p 538 line 16 to 541 line 11, 542 line 20 to 543 line 20, 545 line 1 to 548 line 20; Record Gray p 523 line 12-20, 525 line 4-25, 526 line 1-20, 462 – 465 in respect of manipulation of music; Record Malema p 1226 line 23 to 1227 line 25, 1297 line 15-22 to 1298 line 10; Mr Malema admitted this point

48 Record Goosen p 579 line 4, 586 line 20 to 587 line 10, 586 line 8-18, 587 line 20 to 588 line 8, 588 line 4-8, 589 line 9-25, 589 line 20-25; Hanekom did not see himself as an Afrikaner record p 813 line 10-17

49 Record Goosen p 606 line 18-23; 588 line 4-8; 587 line 20 to 588 line 8, 586 line 8-18

Malema, is perceived as being of grave concern.[50]

65.19 The fact that Mr Malema appears to be prepared to use violence, to act violently, and to act contrary to the ANC and the policy of the ANC.[51] He appeared not to be subject to discipline or control, at the time of the hearing in the court *a quo*.

65.20 The restraint with which the ANC has always acted in respect of violence as opposed to the strange supporting of this song as dealt with and explained by, Prof Suttner. It is a deviation from the previous 100 years approach.[52] One song is chosen above more than 1000 liberation songs. No reason for this was advanced by the appellants in evidence.

65.21 The fact that there was such a huge reaction to the court case. It shows that reaction to the song through action is not unreasonable, and that it is reasonable to expect reaction. Steps of an extremist nature were taken as a result thereof, this causes alarm, and shows the extent and the effect of the song.[53] The incidents in and around the court, and the reaction of the press, clearly illustrate this.

65.22 The way in which Mr Malema arrived at court with bodyguards with M14 machine guns and his security issues in general, create concern and show the type of person he is – prone to violence.

65.23 The fact that Mr Malema had already been an armed youngster at 13 who was prepared to kill people, is of concern. The likelihood of him prepared to be resorting to violence is

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[50] Freedom Front judgment referred to above, and the letter of Mr Mothlante in respect thereof as well as the reaction of President Mbeki; Record Mantashe in respect of Mokaba p 1055 line 1-10; Record Malema p 1179-1181 line 19

[51] See the quotes of Mr Malema Bundle B p 4-66; and the evidence pertaining to his statements regarding the judiciary, threats of violence, threats against Roet of a massacre, and his disrespect towards any other opponents such as Mrs Zille and his frequent reference to killing for Zuma; Record Serote pertaining to the Youth League p 978 line 10 to 979 line 20. The disciplinary measures taken by the ANC against Mr Malema, Mantashe's evidence that Malema's words are not policy p 1058-1061, 1064-1065, 1067-1068; Record Hanekom p 856 line 20, 853 line 20-25, 857 line 15-20, 858 line 10-20

[52] Record Hanekom p 820-835, 837-839

[53] Bundle C p 457, 502-504, 512; Record Serote p 962

illustrated herewith.[54]

65.24 The fact that reasonable voices such as that of Prof Raymond Suttner are apparently not heard anymore in the ANC, in their support of Mr Malema and the song.

65.25 The fact that only part of the song is sometimes sung, namely with reference to the words "shoot the boer".[55] The whole song and the context gets lost, as Prof Suttner has explained. The focus is clearly on the "shoot the boer" part.

65.26 The fact that Mr Malema is a leader who will be able to influence people, and that he, notwithstanding the circumstances in South Africa, and the complaints, still continues therewith.[56]

65.27 The translation of the words "shoot the boer" has been heard frequently in the media and the focus has been on those words in the media. It is probably because the refrain "shoot the boer" is repeated often and is done in a chant.[57]

65.28 The fact that the song was recorded by Mr Chabane after bombings in the 2004 elections, gives a clear indication that the song is relevant to today.[58]

65.29 It must be taken into account that most of the white population has never heard these songs, do not understand the background thereof, and were not exposed to struggle songs.[59]

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54 Record Malema p 1153-1156, 1268 line 20 to 1269 line 5
55 Record Hanekom p 843 line 15 to 844 line 5
56 Record Bezuidenhout p 543 line 17 to 544 line 24; Record Malema p 1226 line 23 to 1227 line 25, 1297 line 15-22 to 1298 line 10
57 Record Van Zyl p 646 line 12 to 647 line 10, 646 line 12 to 647 line 10; Record Chabane p 1112 line 3
58 Record Chabane p 1094 line 20-25
59 Record Van Zyl p 646 line 1-10, Van Zyl's summary; Record Hanekom p 860-861

EXPLANATIONS OF THE ANC

66. It is clear from the aforegoing that the intention of the person who utters the words is not relevant at all. Therefore the explanation that it is a song sung for historical purposes and for historical reasons, and to celebrate the struggle, is irrelevant. In any event, that explanation of Mr Hanekom, was refuted by Mr Mantashe, and Mr Malema who admitted that the song is applicable to today and current circumstances, and not only as a celebration of history.[60]

67. The evidence of the ANC is that the song is sung against the "system", which system apparently constitutes those who are still remnants of colonialism, those who still support apartheid, those who oppose the ANC's policies, those who oppose the NDR, and those who oppose change and transformation. It was an attempt to refer to something that cannot be regarded as a "group of persons". This approach can simply not be correct, and it was in fact refuted by Mr Malema's evidence, wherein he referred to specific types of persons in particular, being the subject of the new struggle, of which the song forms part.[61]

68. Mr Malema also gave the concession at the end of his evidence that, if refraining from singing the song would save one life, it would be worth not singing the song or using the words. In the light of the whole of the evidence of TAU, the possibilities of what may happen as a result of the words or the song, and the hearsay evidence about the Koekemoer incident, the concession made should be regarded as extremely important. It illustrates that it is possible or foreseeable that somebody may be hurt and even killed as a result of the song and that the song is not worth a life. In the light of the fact that the killing

[60] See, however, Hanekom who steadfastly refused to make this concession
[61] Record Malema p 1214 line 10-22, 1222 line 6-20, 1273 line 22 to 1274 line 5

of someone is foreseeable as a result of the words, the words should not be used.[62]

69. The concession that most white people do not understand the song, have not heard the song and only understand the translation thereof, and mainly the words “shoot the boer”, which have been broadcast and televised frequently, is important to consider.[63]

70. Mr Chabane made an important concession in that he could not confirm or deny that this song has in fact led to violence, attacks or killings.[64] He left open the possibility that it could happen, and did not disavow such a possibility.

71. The attempt to differentiate between “shoot” and “kill” makes no difference whatsoever to the matter, as shoot may also have a hurtful or harmful consequence, as meant in section 10. Therefore there should be no real difference in respect of evidence pertaining to “kill the boer” as opposed to “shoot the boer”. This was also confirmed in evidence of witnesses of TAU.[65]

72. The concession given by Mr Mantashe that the ANC still supports ubuntu must be an influencing factor against the case of the ANC and Mr Malema, and their extremely uncompromising approach.[66]

73. It is also important to determine how the evidence was dealt with pertaining to the song and the origins of the song. Firstly it must be stated clearly that the true version, or whatever version one wants to accept, was never properly put to any of the witnesses of the claimants. Mrs Gray was, for instance, never made to listen to the recording of Mr

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62 Record Malema p 1313 line 22 to 1314 line 15
63 Record Van Zyl p 646 line 12 to 647 line 10, 646 line 1-10; Record Hanekom p 860-861
64 Record Chabane p 1119 line 21-24
65 Record Bezuidenhout p 695-696; Record Van Zyl page 637 line 3-10
66 Record Mantashe p 1080 line 15-25; Record Hanekom p 871-872

Chabane. There was never any version of the song or of the words put to Mrs Gray for her to react thereto.

74. Mrs Gray testified that she only heard the words “shoot the boer” in the form of a chant and that she only heard it recently for the first time.[67] She also testified that she heard it as a chant and not a song. She testified that she did recognise the song “ayesaba amagwala”.[68]

75. Her view was that the chant and Peter Mokaba’s chant was not unrelated and that they sounded the same.[69]

76. She had, however, not heard the chant or the song, (even though there was doubt about what chant or what song was dealt with in cross-examination) before very recently.[70]

77. She testified that in her research she never found the song in any source and it was put to her that amongst all the sources placed before the court the song was not reflected in any important source. The song was only reflected in media reports.[71] This casts some doubt on the version of the ANC and Mr Malema (whatever version that may be).

78. It was, however, put to her in cross-examination that the chant “shoot the boer” <u>was infused into certain songs</u> and that songs can be varied depending on how the song is sung.[72] This does not concur with the evidence of Mr Chabane or Mr Malema.

79. At the end of her evidence it was not clear at all, through what was put to her, exactly what it was that Mr Malema had sung, namely a chant “shoot the boer” or a song sung such as

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67 Record Gray p 427 line 10-20, 458-460
68 Record Gray p 457-458
69 Record Gray p 457-460
70 Record Gray p 426 line 2-10, 427 line 1-10
71 Record Gray p 430 line 2 to 431 line 20, 434-452
72 Record Gray p 489 line 1-22 to 504 line 10-25

"ayesaba amagwala" which has other words, and which may have a different meaning. That was never cleared up in later evidence of the appellants.

80. Mr Hanekom testified that he had never heard the song or the chant and that as far as he was concerned sometimes only parts of songs were sung.[73]

81. Dr Serote testified that he could not remember whether he had heard the song before or after 1990 but that there were different versions of the song.[74]

82. He testified that the words "dubula ibhunu" were in fact transposed into the song (what that song is, is not clear). This appears from his witness statement as well as his evidence.[75]

83. When confronted with a song "dubula dubula dubula nghesibham" he testified that, that was a different song and that it is the same as another song of the ANC.[76]

84. It was put to him that the chant of Mr Malema actually came from and originated with the PAC. He testified that there was overlapping between the different movements in respect of songs.[77] He was unsure and did not know where the song had originated.

85. Thereafter, Mr Collin Chabane testified that he had recorded "the song" after the 2004 elections. He could not explain where "the song" came from and he did not know if the words "dubula ibhunu" were interposed into the song.[78] He provided "the song" on CD, but as a melodious calm version.

86. He testified that the melody played in the court was his own, and that only the words form

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[73] Record Hanekom p 843 line 15 to 844 line 5
[74] Record Serote p 934 line 22 to 935 line 11, 936 line 18-25
[75] Record Serote p 937 line 10-20
[76] Record Serote p 966 line 10-20
[77] Record Serote p 968 line 8-25
[78] Record Chabane p 1094 line 20-25, 1101-1102, 1111 line 10 to 1112 line 3

part of the song. He testified that the song the ANC had played in court was the same song with the same words as the one reflected in the PAC Book of Songs which refers to "dubula dubula dubula nghesibham".[79] It appears therefore that he does not refer to "ayesaba amagwala" as "the song". Neither he, nor the ANC, nor Mr Malema, made the words of the song he had recorded available to court or the respondents.

87. He testified that he had never heard Mr Malema sing the song and that he could not say if his song is the same as Mr Malema's song. His evidence pertaining to the relevant song or chant is therefore of no value.[80]

88. After reference had been made in cross-examination to the chant "shoot the boer", the song "ayesaba amagwala", Prof Suttner's interpretation thereof, and the song in the PAC Book of Songs, which are completely different versions of songs, (He was present in court when each of the other witnesses of the appellants testified, which was obviously not acceptable, and which must have influenced his evidence. He had heard all the questions and debates before he testified. This is not normal practice, and his evidence must thus be regarded with circumspection). Mr Malema came up with evidence to the effect that the two songs are actually the same song. He testified that his song was different to that of Mr Chabane, but that the words are similar to the words used in "ayesaba amagwala" as well as those in the chant in the PAC Book of Songs.[81]

89. It was put to him in cross-examination that this version was made up as the case went along and that it was never put to any of the witnesses of the claimants. In fact the version of Mr Chabane as well as the version of Mr Malema was never put to any witness at all. The versions of the other witnesses were also not put properly to respondents' witnesses.

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[79] Record Chabane p 1112 line 8-14
[80] Record Chabane p 1113 line 12 to 1114 line 20, 1115 line 1-8
[81] Record Malema p 1125 line 10-15, 1210 line 15-25, 1149 line 10 to 1150 line 15, 1204 line 9-20, 1150 line 10

It is still today as at date hereof, not clear from the evidence whether Mr Malema sings a song with all the words, or only sings parts of a song, or only sings a chant from time to time.[82]

90. It is also unclear whether the relevant song is the one reflected in the PAC Book of Songs or the song "ayesaba amagwala" referred to by Prof Suttner, or a combination. The version of Prof Suttner and the one in the media, obviously also contradict the different versions given of the song. It was therefore clear that the ANC and Mr Malema do not know:

90.1 when and where the song originated;

90.2 who wrote the song;

90.3 were the words "shoot the boer" or a similar chant imposed into the song;

90.4 whether Mr Malema chants part of the song or sings the song completely;

90.5 which song does Mr Malema sing or chant;

90.6 how the song or chant sounds when Mr Malema does it himself (and not the newly composed song by Mr Chabane).

91. In the light of the aforegoing, it appears that there is huge confusion about the song, the words and its origins. Therefore the defence of the ANC, that the "song" or "chant" is in fact one of their most important songs, that it is a song that must be sung today above all other songs, and that it should be given superstar status, and that it is an old historical song, is simply not illustrated by the evidence. That defence, even if the above Honourable Court

[82] Record Malema p 1292

should take cognisance thereof, and consider it, (which we submit is irrelevant), can therefore in any event on the evidence before the court, not be accepted. No finding can be made on which song with which words, the ANC and Mr Malema have relied upon. Their evidence of the historical nature and importance thereof, is therefore of little, if any, value.

92. On the probabilities therefore, a finding can be made that Mr Malema chants the words "shoot the boer", that the emphasis is on those words, and those are the words that are offensive. The words are taken out of context according to Prof Suttner, they are used with the emphasis on "shoot the boer", and they are used with a view to today's circumstances, not with a view to celebrating history, but with a view to incite and propagate the use of violence, and hatred. They are used with an aggressive pistol-like hand sign, and are sometimes accompanies by the words "shoot to kill", "kill a man".

THE TARGET GROUP

93. The group that is being targeted, and who interprets the song as being directed towards them, consists of two parts namely, Afrikaners and farmers. The meaning of "boer" was confirmed in evidence by Prof Goosen as well as Genl van Zyl.[83]

94. The meaning of the word "boer" in Afrikaans means a person of Dutch or Huguenot descent living in South Africa, who speaks Afrikaans, and whose forefathers were part of the Anglo-Boer War. The meaning has, in today's terms, a heroic gloss. The word also means in the Afrikaans language, "farmer", and it is reasonable to interpret the translation of "shoot the boer" to include a farmer. Very few whites, including probably those that understand Nguni languages, would understand that farmers are in fact excluded from the meaning of the

[83] Record Van Zyl p 619 line 15-20; Record Goosen p 579 line 9 to 584 line 4

word “boer”, as used in English and Afrikaans (However, as we illustrated hereunder, farmer and “boer” can be understood under the Nguni words used). In so far as “boer” refers to whites, and the white oppressive apartheid system, the evidence was that it is directed towards those who still support colonialism, apartheid and who oppose change in South Africa. Such people would obviously be whites which would include Afrikaners, and will include farmers. Therefore on the case that the ANC and Mr Malema attempted to present, members of TAU will satisfy that definition. Farmers who do not want to agree to nationalisation of their farms without compensation, fall, according to appellants, in this category.

95. Prof Goosen testified that he represents Afrikaners and in so far as he was a witness for TAU, he represents Afrikaner members of TAU.[84]

96. General van Zyl testified that farmers were members of TAU and that a large number of them are Afrikaners. Mr Hanekom could not testify on behalf of Afrikaners as he admitted himself that he was not an Afrikaner.[85] No Afrikaner or farmer was called as a witness, who explained that he does not feel affronted by the song. Surely that must have been possible, if there is one such person.

97. It must therefore be accepted that there could be no evidence whatsoever to be presented by the ANC, of one of Afrikaner or farmer, who does not feel threatened by the song or who disagrees with the evidence presented by the witnesses of TAU. There can and should therefore be no doubt that TAU represents Afrikaners and farmers, who are concerned about the song. Therefore any attempt to discredit the *locus standi* of TAU must fail. It must also be accepted that those who feel aggrieved constitute a substantial group. TAU

[84] Record Goosen p 597-599
[85] Record Hanekom p 813 line 15-17

has 6000 members. More than 1000 participated in the survey of TAU.

98. Therefore, an Afrikaner who hears this song perceives the song to be focused upon farmers, Afrikaners and whites, that it has a relation with crime and farm murders in South Africa, that it is used in that context, and against that background, and that it is part of the execution of the NDR by the ANC, which intends to remove whites from their land without compensation, which intends to nationalise assets, primarily of whites (It includes urban and farm land). It is perceived as being racist, a threat to the physical security of Afrikaners and farmers, security in respect of their assets, and the economy of South Africa as a whole. It is clearly reasonable that such a person would be concerned when hearing the words uttered by Mr Malema, in particular where they are taken out of context from a song, where the words "shoot the boer" are focused upon, and where this song is chosen to be the most favoured song out of thousands of liberation songs. The lack of compassion, willingness to consider the viewpoints of Afrikaners, and the clear attack upon white Afrikaners and farmers, leads to a reasonable conclusion that hurt, harm and hatred is intended. The concession by the ANC in the evidence that the song is applicable to today's circumstances, makes the reasonable conclusion more probably and acceptable.

ARGUMENTS OF APPELLANTS

99. The appellants argue that there was uncontradicted evidence regarding the history about the context of liberation songs. However relevant and important evidence pertaining to the history in context of liberation songs have not been addressed by the appellants.

100. We point out that Mr Hannekom could not testify to the background and origin of the song and the words and that he could not remember that he had heard it in the time of a struggle.

Dr Wally Serote could not confirm that he had heard the song before 1990 and also could not confirm the origin of the song. Dr Collins Chabane testified that he had heard the song during the liberation period but that songs evolve through time.

101. It is important to point out that the question whether the song had originated with the PAC after 1990, that the song had a completely different meaning from the meaning expressed by Mr Malema, and that Mr Malema only took certain parts of the original song, could not be explained properly.

102. We submit that there is sufficient doubt, about the origin and the words of the song, and whether the words were derived from a song at all.

103. It is therefore not correct to present evidence about the history and context of liberation songs in this particular song as uncontradicted.

104. The nature of the interdict is attacked by the appellants, and it is submitted by the appellants that an interdict was not asked for by the respondents. That is simply not correct. TAU at all relevant times sought an interdict, and argued that an interdict should be granted. Afriforum abandoned relief pertaining to an interdict and only sought a declaratory order.

105. An interdict of this nature cannot and should not be curtailed. If the utterance of the words and singing of the song constitutes hate speech, it should be prohibited, and no exception should be made pertaining to the use thereof. It is in the public interest to do so, it is in the interest of reconciliation, and avoidance of further polarisation of different nationalities and groups in South Africa. Furthermore, the ANC has more than 1000 other songs that they can sing which means that they are not curtailed in celebrating their cultural and struggle history.

106. In any event the court has always reserved for itself the power to amend an order by either incorporating clarity into the order or restricting the ambit of the order.[86]

107. It is submitted that nothing prohibits the appellants from making application to court for purposes of being authorised to use and sing the song on a specific occasion should there be a reason to do so. There is no reason why the order should be curtailed or limited in any way whatsoever. It is furthermore impossible to foresee all the possible circumstances that may arise, should the order be curtailed or limited.

108. It is therefore submitted that the court did not err in granting the interdict sought, and that it had not erred in imposing a prohibition on the song in all the circumstances of this case.

109. Furthermore, it is incorrect to argue, such as the appellants do, that the granting of the order imposed a blanket ban on the singing of liberation songs. It imposed a prohibition on the use of the words and singing of the song by Mr Malema, in the form and with reference to words that he used.

110. It is submitted that, even though the court *a quo* did not consider the evidence as comprehensively set out in these heads of argument, and in such detail, the court *a quo* correctly came to the same conclusion it would have, come to if it had dealt with the evidence in more detail in the judgment.

111. The argument referred to in paragraph 1.10.9 of the heads of argument of the appellants namely that the remedy constitutes an infringement of Mr Malema's constitutionally enshrined right to freedom of expression, was never a point in dispute in the court *a quo.* It

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[86] See Schultz v Butt 1986 (3) SA 665 (A) at 687H; Prest The Law and Practice of Interdicts 1996, p347

was expressly not made part of the disputes between the parties, by agreement between the parties, and the constitutionality of section 10 was never a dispute before the court *a quo.* We therefore refrain from dealing with any such issues, and will object to any attempt by any party to deal therewith in an improper fashion. The only question before the court *a quo* was whether the song words and utterances complained of, fell within section 10 of the Act or not.

112. Lastly we point out hereunder that international law, with the exception of American law, which is the only international law relied upon by the appellants, sanctions the regulation and enforcement of hate speech, and that regulation of hate speech, and enforcement of hate speech law, is generally recognized in all other developed and developing countries, and even to a limited extent in the USA.

113. Therefore, the conclusion must be that, on the probabilities, it can reasonably be construed that the song and the words are used and understood as intending to demonstrate a clear intention to be harmful, to incite harm, and to promote or propagate hatred against farmers and Afrikaners. No valid defence thereto was raised by appellants. The declaratory order and the interdict were therefore justified.

INTERNATIONAL LAW

114. There is furthermore extensive international law that would support a finding that this kind of utterance constitutes hate speech. There is, however, a distinct difference between the USA, where freedom of expression is paramount, and the rest of the world, where hate speech principles are more strongly enforced.

115. Because of a lack of space the principles of hate speech as applied in the rest of the world, will not be dealt with fully herein. However, the above Honourable Court is referred to the "Authorities Bundle" of TAU, wherein some relevant text books, articles, legislation and other publications have been collated. Relevant parts are referred to hereunder.

116. Hate speech is regulated widely in particular the western world, as appears from the foreign legislation contained in TAU's bundle of authorities, as well as an overview from Wikipedia.[87]

117. The general principles applied in South Africa, including the question whether intention should be tested with reference to the perpetrator, or the target group, has been addressed fully in two Canadian judgments. We have already referred to *R v Keegstra (1990) 3 SCR 697*, and in particular the approach to the kind of harm, hurt and prejudice that must be shown. In that decision the issue of freedom of speech as opposed to curtailment thereof was considered in detail.[88]

118. In *Canada (Human Rights Commission) v Taylor (1990) 3 SCR 892* consideration was given in particular to the requirement of intent, and the question whether a subjective intent requirement should be entertained as opposed to an objective test pertaining to intention.

119. The judgment makes it clear that, with reference to the Canadian law, hate propaganda presents a serious threat to society, that it should be regulated, and that an intent to discriminate by perpetrator, is not a precondition of a finding of discrimination under the relevant human rights codes. The effect of the hate speech rather than intent is focused

[87] See Authority bundle, p1 to 39 and p214 to 234
[88] Authority bundle, p112 to 213

upon.[89]

120. In two reported decisions in the USA, the law applicable to hate speech, intimidation and threats of violence were discussed. Intimidation, also referred to as "fighting words", which by their very utterance inflict injury or attempt to excite an immediate breach of the peace, constitutes a narrow category of speech which does not fall within the ambit of the protection of the first amendment to the USA Constitution.

121. It is submitted that due regard should be had to these two decisions, as they deal with this exception, rather than the authorities quoted by the appellants, which deal with the normal principles applicable to freedom of speech in the US.[90] The American law is also discussed in two articles dealing with the American and Canadian law.[91]

122. We reiterate that the American approach is not in accordance with the approach in the rest of the world and therefore we submit that the American approach should not be followed. This is in particular the case, taking into account South Africa's history, its developing democracy, the polarisation of different ethnic groups, and the political background in South Africa.

123. It is important to note that in ***Brandenburg v Ohio***[92], as quoted in the article of Dubick in the bundle of authorities, the Supreme Court of the United States held that, where advocacy for the use of force is directed to inciting or producing imminent lawless action, and where it is likely to incite or produce such action, it is not protected under the freedom of speech

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89 See Authority bundle, p99 to 100; p106 to 107

90 See Vietnamese Fishermans Association v The Knights of the Ku Klux Klan 543 F.SUPP 198; Planned Parenthood of the Columbia / Willamette Inc. v American Coalition of Life Activists, 2001 USA Court of Appeal for the Ninth Circuit

91 See Authority bundle, p260 - 307

92 395 US 444 at 447 (1969),

protection in terms of the first amendment.[93] Therefore this exception in US law, rather than the general principles, is applicable to this matter.

124. The arguments in favour of regulation of hate speech are to be found in certain parts of text books contained in the bundle of authorities.[94]

125. In the text books the legal position of various countries have been discussed, which provide an overview of the approach in various jurisdictions. [95]

126. In conclusion, with reference to international law, it appears that hate speech is extremely relevant today, and that it is being regulated and controlled all over the world, even to a limited extent in the United States. South Africa should follow the same approach, and should apply the international law principles that may be applicable to the South African legal system. In this regard, in particular, it is suggested that Canadian law is extremely helpful, as well as the approach in international law, and the approach in the Netherlands and Britain.

RELIEF SOUGHT

127. TAU sought an order in terms of the amended particulars of claim, and in particular a declaratory order as requested, an interdict as requested, and costs of the matter, including the costs of two counsel one of which is a senior counsel, in respect of these proceedings, the proceedings before the Magistrate's Court sitting as an Equality Court, and the proceedings before his Lordship Mr Justice Bertelsmann. It is submitted that TAU

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93 See Authority bundle, p289 to 297; the situation in Canada is discussed on p297 to 304.

94 See in this regard Bundle of Authorities p308 to 324; p395 to 405; p407 to 424

95 See Authority Bundle, p361 to 373 for the approach in the Netherlands, and p373 to p394 for the approach in the United Kingdom and Wales. The United States' position appears from p412 to p423; p454 to p496; p498 to p549, and p607 to p624. Hate speech law in Europe in general is addressed in the authority bundle on p624 to p636. International hate speech principles are addressed on p325 to p360. Canadian hate speech law is addressed in the Bundle of Authority on p440 to p453 and in respect of group defamation under British, Canadian, Indian and Nigerian law, See p549 to p576. In respect of Israel see p432 to p439

presented extremely important evidence pertaining to context and also the attempted defence of the ANC and Mr Malema pertaining to the song. The evidence of TAU was limited and had a minimal effect on the time period of the trial. Less time with cross-examination was utilised by TAU, than by Afriforum.

128. The evidence, including cross-examination, of TAU witnesses can be found in the record at the following pages: Page 535-698 (163 pages). The evidence for Afriforum can be found from page 237 to 534 (297 pages). The evidence of the ANC and Mr Malema is from page 699 to 1318 (619 pages). TAU's case therefore utilised ± 16% of all court time.

129. Most of the documents in Bundle C of TAU were used in the matter and therefore TAU cannot and should not be penalised in any respect pertaining to costs in its participation of the matter. It should rather have been awarded costs. The ANC and Mr Malema should not have opposed this matter.

130. The appeal should be dismissed with costs including the costs of senior and junior counsel, and the costs in the court *a quo* as sought by TAU as well as costs of the appeal should be granted.

THUS DATED AT PRETORIA ON THIS THE ____ DAY OF JULY 2012.

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R DU PLESSIS SC
RJ DE BEER
COUNSEL FOR TAU