**Fighting Antisemitic Hate Speech While Protecting Free Speech**

Mark Oppenheimer[[1]](#footnote-1)

**Free Speech and Hate Speech**

The South African Constitutional Court has held that:

Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.[[2]](#footnote-2)

Although freedom of expression is a fundamental right, its scope is expressly limited in the South African Constitution. Section 16(2)(C) of the Constitution states that the right to freedom of expression does not extend to: *“advocacy of hatred that is based on race, ethnicity, gender or religion,**and that constitutes incitement to cause harm.”*

In 2000 South Africa enacted legislation to outlaw hate speech through section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000) (“Equality Act”), which states that

‘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.’

**Antisemitic Hate Speech**

On **6 February 2009**, the Congress of South African Trade Unions (Cosatu) and the Palestine Solidarity Committee staged an anti-Israel march outside a prominent Johannesburg synagogue.[[3]](#footnote-3) The protesters held aloft banners comparing the Magen David with the Swastika and the war in Gaza with the Holocaust. They also burned Israeli flags. COSATU leader Bongani Masuku *exclaimed “we want to convey a message to the Jews in SA that our 1.9-million workers who are affiliated to Cosatu are fully behind the people of Palestine. Any business owned by Israel supporters will be a target of workers in South Africa."*[[4]](#footnote-4)

Later that day, Mr Masuku posted the following statement in the comments section of an article about the march:

'Hi guys,

Bongani says hi to you all *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.' [[5]](#footnote-5)

On **5 March 2009**, Mr Masuku gave a speech at the University of the Witwatersrand. The speech was part of the annual Israel Apartheid week event held at the University. He made the following statements:

”Cosatu has got members here on this campus, we can make sure that for that side it will be hell . . . the following things are going to apply: any South African family, I want to repeat it so that it is clear for everyone, any South African family who sends its son or daughter to be part of the Israeli Defence Force must not blame us when something happens to them with immediate effect . . . .”

And:

“Cosatu is with you, we will do everything to make sure that whether it is at Wits, whether it is at Orange Grove, anyone who does not support equality and dignity, who does not support the rights of other people must face the consequences even if we will do something that may necessarily be regarded as harm . . . .”[[6]](#footnote-6)

On **26 March 2009**, the South African Jewish Board of Deputies lodged a complaint against Mr Masuku with the South African Human Rights Commission (SAHRC). The SAHRC initiated a hate speech complaint against him, and the equality court held that his words amounted to hate speech.[[7]](#footnote-7)

The Equality Court’s finding was overturned by the Supreme Court of Appeal. The Court held that:

Threatening or unsavoury words in the statements such as ‘bitter medicine’, and ‘perpetual suffering’ are only metaphorical. Even if ethnicity or religion was implied in the blog statement, neither the offensive words nor the blog statement could be considered advocacy of hatred or incitement of harm for the purpose of s 16(2)(c) of the Constitution, particularly in the context in which they were made.[[8]](#footnote-8)

In other words, the Appeal Court concluded that Masuku’s words did not satisfy the definition of hate speech in section 16(2)(C) of the Constitution, because they regarded those words as merely metaphorical. The SAHRC proceeded to the Constitutional Court as the final court of appeal. That Court has yet to deliver judgement.

**Non-Racialism and the Rule of Law**

In the hearing before the Constitutional Court, I appeared on behalf of the Rule of Law Project as an *amicus curie*. We submitted to the Court that the right to freedom of expression is foundational and that legislation prohibiting speech should be interpreted to protect speech while prohibiting genuine hate speech. In our view the words uttered by Mr Masuku were not protected by the free speech clause in the South African Constitution. We expressed concern that a different standard may have been applied to Mr Masuku to excuse his words, because they were targeted at Jews.

Mr Masuku committed COSATU and implicitly himself to doing things that “may necessarily be regarded as harm” to people who do not share his political views. In this context, the group of people targeted by Masuku’s statement was the Jewish community in South Africa – a racial and religious group. The holding of the Supreme Court of Appeal that this element of Masuku’s speech was protected expression runs counter to the foundational value of non-racialism.

Non-racialism, if it is to mean anything, must imply that government, including the judiciary, will not treat individuals of different races differently for that reason alone. The importance of this principle given South Africa’s racially discriminatory history cannot be overemphasised. Discriminatory treatment at the hands of the Apartheid state led to the systematic denial of rights. The constitutional prohibition of hate speech should protect all those in South Africa in equal measure. To achieve this objective, our courts should not countenance the distribution of license or silence on grounds of race, especially where prohibited hate speech is concerned.

**SECTION 16(2) OF THE CONSTITUTION IS FRAMED CONJUNCTIVELY**

One of the imperatives of the Rule of Law is legal certainty, otherwise stated as the ability of citizens to know what the law requires of them with reasonable clarity. This means the law itself must be clear, accessible and understandable.[[9]](#footnote-9) Furthermore, the Constitution establishes the standards of the legal system and in so doing provides impetus for legal certainty. All law must be consistent with its spirit and provisions, and this requirement of consistency allows many a reasonable expectation that if they accord their behaviour with the Constitution, they would be according their behaviour with the law in general.

The constitutional definition of hate speech is framed conjunctively. This means that expression must amount to advocacy of hatred, and be based on race, ethnicity, gender or religion, and constitute incitement to cause harm, to fall outside the ambit of protected expression.

**SECTION 10 OF THE EQUALITY ACT IS AMBIGUOUS**

The Equality Act contains no words explicitly indicating whether its definition of hate speech must be read and construed conjunctively or disjunctively. It has fallen to the High Court to determine whether the test in section 10(1) of the Equality Act should be read disjunctively or conjunctively.

**ONLY THE CONJUNCTIVE TEST FOR HATE SPEECH COMPLIES WITH THE CONSTITUTION**

The Eastern Cape Division of the High Court in *Herselman v Geleba* (**“the *Herselman* approach”**) held that the Equality Act’s definition of hate speech must be construed disjunctively for the following reasons:

If one has regard to the purpose of the Act, the object of the Act and the interpretation clause it militates against the acceptance of the conjunctive approach. If one were to adopt a conjunctive approach then racially discriminatory words which are clearly hurtful and even harmful, which are directed at an individual may not fall within the ambit of the Act simply because they may not per se promote or propagate hatred because they were not uttered in a group context. *[[10]](#footnote-10)*

In *South African Human Rights Commission v Khumalo* (**“the *Khumalo* approach”**) the equality court held that the decision in the *Herselman case* was clearly wrong and held that the list of requirements in S10(1)(a-c)of PEPUDA must be read conjunctively and not disjunctively, and that the factor of “incitement” must be present in the prohibited utterances. The court stated the following:

Plainly, section 10 of the Equality Act must be read consistently with section 16 of the Constitution. In order to achieve that result, all parties are agreed, that all three subsections of section 10(1) must be read conjunctively rather than disjunctively to achieve the alignment that produces that consistency. As a result the factor of "incitement' must be present in the prohibited utterances.

There are, however, decisions to the contrary. In *Herselman v Geleba [2011] ZAQC 1,*an appeal from a Magistrate's Equality court to the Eastern Cape High Court held that section 10(1) should read disjunctively. However that decision did not consider the impact of section 16(2)(c) of the Constitution. For that reason, in my view, having omitted an important factor that had to be considered, the decision is unsafe, and for further reasons, is with respect, clearly wrong. Furthermore. In *SAHRC v Qwelane 2018(2) SA 149 (GJ) at [53] P176E*it was held that incitement need not be proven for all of the Section 10(1) subsections because, ostensibly, section 10(1) is wider than section 16 of the Constitution. In my view this conclusion cannot be correct as the effect of Section 16 is to establish the perimeter of what may be proscribed in section 10(1).

Absent consistency with section 16 of the Constitution, the section 10(1) provisions would be unconstitutional. Section 2(b)(v) of the Equality Act expressly subordinates the Equality Act to section 16(2)(c). The view that section 10(1) be disjunctively read is also espoused by authors of Constitutional Law of South Africa: (Juta) (CLOSA) OS 06- 08 ch 42 p87, but they too, assume a disjunctive reading without explaining why it is consistent with section 16. As a result, in my view, the contentions on behalf of the parties in this matter are therefore well made and I endorse them and do not follow these decisions.[[11]](#footnote-11)

On the meaning of the term “incitement”, the authors of Constitutional Law of South Africa state that:

The use of the word 'incitement' indicates that the speech must instigate or actively persuade others to cause harm.[[12]](#footnote-12)

As a result, there is an inconsistency in precedent between two divisions of the High Court. As the law stands, speech that does not offend the constitutional definition of hate speech may still fall short of the requirements of the Equality Act and attract civil sanction, this inconsistency undermines legal certainty.

The *Khumalo* approach is the only constitutionally compliant interpretation of section 10(1) of the Equality Act. This is so, as Sutherland J observed, because the constitutional definition of hate speech is framed conjunctively. What is more, the Equality Act itself contemplates a conjunctive construction in section 2(b)(v) of the Act, which provides:

[T]he objects of this Act are to give effect to the letter and spirit of the Constitution, in particular] the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the constitution […]

The *Khumalo* approach implies necessarily that a positive finding of hate speech requires that there must be advocacy of hatred, and that the hatred must be based on race, ethnicity, gender or religion, and the advocacy must constitute incitement cause harm. If the Equality Act’s definition of hate speech is construed disjunctively, it will plainly infringe upon constitutionally protected expression.

**THE FOUNDING VALUES ARE ESSENTIAL TO THE ADJUDICATIVE EXERCISE**

Section 1 of the Constitution entrenches non-racialism and the rule of law as the founding values of South Africa.

The principle of non-racialism was a potent rallying cry against the Apartheid regime. It permeates the text of the Freedom Charter, which includes the following proclamations:

“South Africa belongs to all who live in it, black and white...”; “The rights of the people shall be the same, regardless of race...”; “ALL NATIONAL GROUPS SHALL HAVE EQUAL RIGHTS!”; “All national groups shall be protected by law against insults to their race and national pride”; “ALL SHALL BE EQUAL BEFORE THE LAW!”; and “All laws which discriminate on grounds of race...shall be repealed”.[[13]](#footnote-13)

In 1991 the ANC produced a document entitled “Constitutional Principles for a Democratic South Africa”, which proclaimed that:

A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all.

As its pedigree shows, non-racialism is framed as the absence of its opposite — racialism or racial prejudice. Thus, non-racialism cannot be achieved without the acknowledgment that its opposite, racialism, actually exists; that its effects should be countered and its power neutralised. Non-racialism cannot imply some form of judicially imposed collective amnesia or feigned blindness. Rather, it must imply that the Constitution is founded on the imperative to counter and surmount racialism by all lawful means.

The Constitutional Court has held that:

These founding values have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid. *[[14]](#footnote-14)*

The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights. *[[15]](#footnote-15)*

The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:

The absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;

Equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts;

The legal protection of certain basic human rights. [[16]](#footnote-16)

Whilst there is no enforceable ‘right to the Rule of Law’ or ‘right to non-racialism’ on which relief may be sought directly, the courts must draw on these values in the adjudicative exercise, including in the contextualisation of facts and interpretation of legislation.

As Albert Venn Dicey, the jurist most associated with the idea of the Rule of Law wrote in his *Law of the Constitution*:[[17]](#footnote-17)

[The Rule of Law] means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the ‘rule of law’ in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens […]

This commitment to equal application of the law regardless of the inborn characteristics of citizens is not only stated as founding values but is expressed in terms of section 9(1) of the Constitution, which states that *“everyone is equal before the law and has the right to equal protection and benefit of the law.”*

**NON-RACIALISM IN THE PROPER ASSESSMENT OF HATE SPEECH**

In Khumalo, Sutherland J expressed the prevailing social dynamics in the following terms:

South African society is, manifestly, a community that exhibits significant social strain in which, amongst other distinctions, we are marked off and categorised by race and personal appearance. A significant inter-racial tension exists, derived from several circumstances, not least from inequality and the persistence of some degree of inter-racial hostility. This unhappy and regrettable condition is our historical legacy. The Constitution has proclaimed that we recognise the fractured character of our community and set about transforming our society towards the goal that unequivocally repudiates inter-racial hostility so that we may build a nation upon a consensus that every South African deserves dignity and that our whole community, through sharing resources and through respect for one another, can experience social cohesion.[[18]](#footnote-18)

Sutherland J adopted an expressly non-racialist approach to the assessment of hate speech. The learned judge considered “among the more complex and controversial value choices” the differential treatment of hate speech by a “person from a marginalised community” compared to a “person who is understood to be a member of a dominant community”, and the notion to condone the former and condemn the latter.[[19]](#footnote-19)

The court in Khumalo held that:

In South Africa, however, our policy choice is that utterances that have the effect of inciting people to cause harm is intolerable because of the social damage it wreaks and the effect it has on impeding a drive towards non-racialism. The idea that in a given society, members of a ‘subaltern’ group who disparage members of the ‘ascendant’ group should be treated differently from the circumstances were it the other way around has no place in the application of the Equality Act and would indeed subvert its very purpose. Our nation building project recognises a multitude of justifiable grievances derived from past oppression and racial domination. The value choice in the Constitution is that we must overcome the fissures among us. That cannot happen if, in debate, however robust, among ourselves, one section of the population is licensed to be condemnatory because its members were the victims of oppression, and the other section, understood to be, collectively, the former oppressors are disciplined to remain silent.[[20]](#footnote-20)

**CONCLUSION**

The Constitutional Court has yet to deliver Judgment in what will be a landmark ruling on the line between free speech and genuine hate speech. I have argued that the guiding principles of non-racialism and equality before the law should assist the Court in its finding.

1. Mark Oppenheimer is a practicing advocate at the Johannesburg Bar. He appeared on behalf of the Rule of Law Project in the Constitutional Court case of *South African Human Rights Commission v Masuku and Another.* [↑](#footnote-ref-1)
2. *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC), at para 37 [↑](#footnote-ref-2)
3. https://supernatural.blogs.com/weblog/2009/02/cosatu-psc-march-against-jewish-community.html [↑](#footnote-ref-3)
4. https://supernatural.blogs.com/photos/cosatu\_and\_psc\_march\_agai/ [↑](#footnote-ref-4)
5. *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 (2) SA 194 (SCA), para 6 [↑](#footnote-ref-5)
6. *Masuku and Another v South African Human Rights Commission* 2019 (2) SA 194 (SCA), at 197 [↑](#footnote-ref-6)
7. *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2018 (3) SA 291 (GJ), at para 65 [↑](#footnote-ref-7)
8. *Masuku and Another v South African Human Rights Commission* 2019 (2) SA 194 (SCA), at 203 [↑](#footnote-ref-8)
9. In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), Mokgoro J noted, at para 102 of her concurring judgment, that “[t]he need for accessibility, precision, and general application flow from the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law.” [↑](#footnote-ref-9)
10. [2011] ZAEQC 1 at page 18. [↑](#footnote-ref-10)
11. 2019 (1) SA 289 (GJ), at 314-315 [↑](#footnote-ref-11)
12. D Milo, G Penfold & A Stein ‘Freedom of Expression’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* Chapter 42, at page 75-6. [↑](#footnote-ref-12)
13. Adopted at the Congress of the People at Kliptown, 1955. [↑](#footnote-ref-13)
14. *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* *(No 2)* 2003 (1) SA 495 (CC) at para 19. [↑](#footnote-ref-14)
15. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC). [↑](#footnote-ref-15)
16. *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317, at para 65 [↑](#footnote-ref-16)
17. LibertyClassics reprint of 1915 edition, p120 [↑](#footnote-ref-17)
18. 2019 (1) SA 289 (GJ), at 315-316 [↑](#footnote-ref-18)
19. 2019 (1) SA 289 (GJ), at 320 [↑](#footnote-ref-19)
20. 2019 (1) SA 289 (GJ), at 320 [↑](#footnote-ref-20)