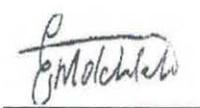


REPUBLIC OF SOUTH AFRICA



IN THE EQUALITY COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: EQ 04/2020

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED:
25 august 2022	
	

In the matter between:

AFRIFORUM

Complainant

and

ECONOMIC FREEDOM FIGHTERS

1st Respondent

JULIUS SELLO MALEMA

2nd Respondent

MBUYISENI NDLOZI3rd Respondent

Summary: The Complainants launched two complaints against the respondents in terms of sections 10(1) and 7(a) of the Equality Act read with section 16 of the Constitution. The court striking a balance between freedom of speech under the Constitution with the prohibiting of hate speech under the Equality Act. The first complaint relating to the song/chant translated as “kill/kiss the Boer” and the second translated into “Call the fire brigade.”

Restated the standard applicable to a person testifying as an expert witness. The contention that the standard required of expert witnesses in civil litigation does not apply in Equality Act cases rejected.

The expert witness of the Complainant found not to qualify as an expert witness because he is employed by the Complainant and has a vested interest in the outcome of the case.

The objective test applied to determine whether the two songs constitute hate speech. The two impugned songs interpreted in their context and found not to constitute hate speech.

JUDGMENT

Molahlehi J

Introduction

[1] The complainant, Afriforum NPC (Afriforum), seeks an order declaring the singing of two songs by the respondents (EFF) to constitute hate speech and unfair discrimination in terms of sections 10 and 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Equality Act).

[2] Afriforum contends that the first song, sung by the respondents, includes in it the chant: "Kill/Kiss the Boer/ Kill/Kiss the farmer" and the second song also sung by the respondents is "Biza a ma'firebrigade; "Call the fire brigade." The chant in the first song was led by the second respondent, Mr Malema and the second song was led by the third respondent, Dr Ndlozi. It focused in terms of evidence and submission on the song sung by Mr Malema. The relevant evidence and submission concerning the second song is concerned is very brief.

[3] In its founding affidavit, Afriforum alleges that the complaint against EFF (the Kill/Kiss the boer) emanates from engaging in acts of hate speech and unfair discrimination that occurred between 2016 and 2020. They further aver that this was in contravention of section 10(1) of the Equality Act in that the respondents chanted the songs and statements that "advocated hatred on the grounds of race and ethnicity, and constitute and incitement to cause harm." They further aver that the conduct of the respondents amounted to contravention of section 7(a) of the Equality Act in that they are alleged to have committed acts of unfair discrimination on "the grounds of race by disseminating racist propaganda and inciting racial violence."

[4] In addition to the above, Afriforum sought to link this matter to the case it had instituted against Mr Malema and the ANC in 2010 before the Equality Court under case number 20968/2010.¹ The judgment in that case, per Lamont J found in favour of Afriforum and made the following order²:

- “1 The words ("the words") set out below, constituted hate speech on the occasions the first respondent, (Mr. Malema) sang them: –
- 1.1 awudubula ibhunu.
 - 1.2 dubula amabhunu baya raypha.
- 2 The first and second respondents (Mr. Malema and the ANC) are interdicted and restrained from singing the song known as Dubula Ibhunu at any public or private meeting held by or conducted by them.
3. The words in the song constitutes hate speech.
4. the morality of society dictates that the persons should refrain from: –
- 4.1 using the words,
 - 4.2 singing the song. . .”

[5] Aggrieved by the outcome of the case, Mr Malema and the ANC launched an appeal in the Supreme Court of Appeal (SCA). At the hearing of the appeal the parties accepted the suggestion made by the President of the SCA to refer the matter to mediation. On 30 October 2012 the parties in the mediation process concluded an agreement which included amongst others, the following terms:

- a) “The parties agree that it is crucial to mutually recognize and respect the right of all communities to celebrate and protect their cultural heritage and freedom.
- b) The parties recognize that certain words in certain struggle songs may be experienced as hurtful by members of minority communities.
- c) Therefore, in the interest of promoting reconciliation and to avoid intercommunity friction, and recognizing that the lyrics of certain songs often inspired by circumstances of the particular historical period of struggle, which in certain instances

¹ *Afri-Forum and Another v Malema and Others* 2011 (6) SA 240 (EqC)

² *Id* at 279.

may no longer be applicable, the ANC and Mr. Malema commit to counselling and encouraging their respective leadership and supporters to act with restraint to avoid the experience of such.

- d) The parties commit to deepening dialogue among leaders and supporters of their respective organizations information to promote understanding of their respective cultural heritages and for the purpose of contributing to the development of a future common South African heritage.
- e) The parties commit to continued formal dialogue amongst leaders of the ANC and leaders of Afriforum and TAU – SA and other role players to promote understanding of their respective cultural heritage and aspirations.
- f) The ANC and Mr Malema undertake upon the signing hereof to withdraw their Appeal to the SCA with no order as to costs.”

[6] The above agreement was, on 1 November 2012, made an order of the Court by the SCA under case A 815/2011. The parties further agreed that the order making the mediation agreement would substitute the earlier order made by the Equality Court. They also agreed to approach the Equality Court and request that its order be substituted by that of the Supreme Court Appeal. In addition, Afriforum and TAU-SA undertook to abandon the order made in their favour in the event that the Equality Court was to refuse to substitute its order with that of the Supreme Court Appeal.

[7] Afriforum further seeks the following orders, should it be found the songs constitute hate speech and unfair discrimination:

- (a) the respondents be ordered to pay damages in the sum of R500 000.00 to an organisation that combats racial hatred;
- (b) the respondents be ordered to apologise; and

(c) the respondents be interdicted from committing acts of hate speech and unfair discrimination.

[8] The other relief sought by Afriforum is that the matter be referred to the Director of Public Prosecutions to investigate whether the conduct of the respondents warrants the institution of criminal proceedings on, amongst others, contempt of court, the crime of incitement in terms of Section 18(2)(b) of the Riotous Assemblies Act, *crimen injuria*, and perjury.

[9] The other issue that arose following the testimony of Mr Malema relates to the allegation of perjury. In this regard, Afriforum alleges that Mr Malema committed perjury when he said that he did not have money in response to the claim for damages consequent the singing of the song. The request is that this should also be referred to the Director of Public Prosecutions to instituting the appropriate charges against the respondents.

[10] The respondent opposed the complaint on various grounds. The essence of the opposition is that the songs do not constitute hate speech or unfair discrimination. They also challenged the qualification of Afriforum's first expert witness, Mr Roets.

The parties

[11] The complainant, Afriforum, is a civil rights organisation registered in 2005 as a non-profit company in terms of the laws of South Africa. Its main objectives are the advancement and protection of minority rights and mainly those in the Afrikaans speaking communities. It is estimated that of its 265 members the majority are people

classified as white people. It mobilises membership mainly amongst the Afrikaners communities.

[12] The first respondent is the Economic Freedom Fighters (EFF) a self-proclaimed radical and militant economic emancipation movement, formed in 2013 with the aim of bringing together revolutionary, militant activists, community-based organizations as well as lobby groups under the umbrella of the political party pursuing the struggle for economic emancipation of black people in South Africa.

[13] The second respondent, Mr Julius Sello Malema, is the President of the EFF and the member of Parliament of the Republic of South Africa. The third respondent is Dr Mbuyiseni Ndlozi, also a member of the EFF and the member of Parliament of the Republic of South Africa.

Case management

[14] The parties agreed in the first case management meeting held on 13 May 2021 that this matter be determined by way of trial proceedings with oral evidence being led. They further agreed that the papers filed on record would constitute pleadings.

[15] In the pre-hearing meeting held on 31 May 2021, the parties proposed that the hearing be conducted over five days. It was agreed in that meeting that the approach to dealing with the matter would involve first oral evidence and upon completion the matter would stand down for the production of the transcript of the proceedings. After that the parties would each file written heads of argument which would later be presented orally in the open court.

[16] The parties also agreed that Rule 36 of the Uniform Rules of Court would be followed regarding the calling of expert witnesses. On 10 August 2021, a certificate on the trial readiness of the matter was issued in terms of which it was certified that this matter is ready for hearing and that the parties are at liberty to apply for a date of the hearing. Ultimately, the matter was set down for an oral hearing for a two weeks (ten court days) period from 7 to 11 and 14 to 18 February 2022.

The proceedings before this court

[17] As the record of these proceedings will reveal most of the evidence led was irrelevant and most of the times hearsay. Due to the nature and the context of the dispute between the parties, the court adopted a flexible and less formal approach to the presenting the evidence. However, that did not detract from ensuring compliance with basic rules and principles of evaluating evidence.

[18] The proceedings commenced on 7 February 2022. At the commencement of the hearing the following day, 8 February 2022, Afriforum complained about what happened to its members and its legal team after the adjournment of the court the previous day. Afriforum's Counsel alleged in this regard that he and his clients were subjected to harassment the previous day as they were leaving the court precinct. It was in this respect alleged that members of the EFF pushed and shovelled members of the Afriforum and their legal team at the court's gate. It was further alleged that the members of the EFF sang the impugned song.

[19] After presenting what happened the previous day, Afriforum's Counsel sought

to immediately present a video footage and evidence about what happened the previous day.

[20] Before the evidence could be presented and the video footage shown, I ruled that EFF and its members, who may be the subject of the complaint, be afforded an opportunity to consider the complaint and consult with their legal representatives. The ruling included the directive that the media would refrain from recording the deliberations between the parties during the consultation with their respective legal representatives during the adjournment.

[21] The court reconvened after a short adjournment with the view of proceeding to hear the complaint of Afriforum which was opposed by EFF. However, soon after reconvening EFF raised an issue concerning the recording of what happened during the adjournment. It alleged that Mr Roets contravened the court order in that he was seen using his phone to record as members of the EFF were walking back into the court. It then moved an application from the bar to have Mr Roets tried for contempt of the court.

[22] Mr Roets did not dispute having used his phone as members of the EFF were entering the court. He contended that he was capturing those of the EFF members who were involved in the harassment incident the previous day. He wanted to use the photos for identification.

[23] He testified that although he was in court when the order prohibiting recording processes during the adjournment was made he could not hear properly what the court

said because he was seated at the back seat, which is far from the bench.

[24] After considering the evidence and the submission by Counsel the application was dismissed. EFF's Counsel noted the order and indicated that his client intended bringing an application to rescind the same because it was erroneously issued in that the court did not take into account the prejudice that EFF suffered consequent the conduct of Mr Roets. After that, the court proceeded to hear evidence about the allegation of what happened the previous day.

[25] Afriforum presented the footage of what happened at the gate of the court the previous day and led Mr Roets as the only witness. EFF opposed the application and presented the testimony of one witness who essentially denied the alleged harassment and the singing of the impugned song by EFF members the previous day.

[26] At the conclusion of the hearing of the complaint the court inquired from Afriforum's Counsel as to what relief he was seeking in relation to this complaint. He indicated that the relief they sought was for the court to reprimand the EFF for their conduct and direct that everyone involved in the proceedings should conduct themselves in a manner that ensures free access to the court and participation in the proceedings. He further applied to have record of the proceedings relating to the complainant about what happened on 7 June 2022 incorporated into the main proceedings.

Afriforum's testimony

[27] Afriforum called three experts and two lay witnesses. The three expert

witnesses were Mr Ernst Alex Roets, Mr Hendrik Pieters Human and Mr Gabriel David Crouse. The two lay witnesses were Ms Muller and Mr Prinsloo.

Mr Roets' evidence

[28] The first expert witness of Afriforum was Mr Roets an employee of Afriforum and the deponent to the founding affidavit in these proceedings. He is employed as the head of policy and action by Afriforum. He is also CEO of Forum Films, a film production company owned by Afriforum. He is a qualified non-practising attorney, with LLB and an LLM in Constitutional law which he obtained *cum laude*, and the focus of his thesis was on minority rights. His work with Afriforum involves, amongst others, campaigning against farm murders; and since August 2012 he has been organising protest marches, conducting research and working with victims of farm murders and attacks.

[29] The testimony of Mr Roets was mainly based on his book, "Kill the Boer: Government Complicity in South Africa's Brutal Farm Murders," published after a three years' research in 2018. His testimony in brief focused on various sections of his book which included the prevalence of farm attacks; the brutal nature of these attacks with reference to specific farm attacks and murders. These included the different motives behind the attacks; the political climate that promotes the attacks; the connection between the singing of songs and the chanting of slogans which call for the killing of farmers and the attack on them.

[30] His testimony included the effect of singing songs like "Kill/Kiss the Boer, Kill/Kiss the farmer" (the impugned song); the respondents' history of using words that

are harmful, promote hatred, incite harm on the grounds of race, ethnicity, and language; the effect of speech which seeks to dehumanise and delegitimise groups on the grounds of their race, ethnicity, and language; the effect of speech which creates a toxic climate that makes it easier to target racial, ethnic and language groups with acts of physical violence.

[31] At the beginning of his evidence in chief, he was led through a series of videos, which showed Mr Malema singing the impugned song. He then presented the three parts of his book.

[32] The first part of the book deals with the phenomenon of farm attacks and farm murders which he contended is a unique crime phenomenon for four reasons namely, (a) the frequency of the attacks, (b) the unique levels of brutality, (c) the unique role that farmers play in society, and (d) the practical realities in the society.

[33] The frequency of the attacks is illustrated with a graph in page 33 of the book including the statistics of the murders. The data, according to him, was obtained from various sources such as the Committee of Inquiry to Farm Attacks; the South African Police Service; POW, SA Agricultural Union, Afriforum; and KwaZulu Natal Agricultural Union. He also testified that he monitors the media for news about such events and do a verification including keeping contact with the affected families. According to him the statistics presented were conservative as there is underreporting and thus the incidents of farm murders are higher compared to those that were reported to the police. He also referred to the book, 'The Land of Sorrow, which narrates farm murders

in South Africa.' It is not an analytic book but rather provides a list of the names of the victims and what happened in the various cases listed in the book.

[34] He testified that the purpose of including in the book the nature and the extent of the violence used against the victims of the farm attacks is to explain his contention that the crime is of a particular phenomenon and manifest in unique levels of brutality, and torture. He testified about various incidents of farm attacks involving violence and brutality. According to him the method of torture was not only physical but also psychological. He illustrated this with an example of a case of an elderly woman who was beaten to death with a golf club stick whilst trying to hide under the bed.

[35] Mr Roets attributes the problem of the farm murders and attacks on the politicians for their alleged denialism attitude. He, as an example, referred to the answer given by President Ramaphosa when asked about the issue whilst he was in New York in 2018. According to him, President Ramaphosa denied in an interview that there were farm murders in South Africa.

[36] As concerning the motive or motives for the attacks, he testified that 56.9% of the victims believe that the main motive is robbery, 11.8% believe the motive is racial hatred, and 9.8% believe they are being paid for by a third party, and 7.8% say they believe the motive is revenge. He does not agree with the conclusion of the Committee of Inquiry into Farm Attacks (31 July 2003),³ that 89% of the farm attacks are motivated

³ The committee was appointed by the National Commissioner of Police in terms section 34 (1) of the South African Police Service Act no 68 of 1995. The terms of reference of the committee did not define the term farm attacks. The National Operational Committee defined farm attacks as follows: 'Attacks on farms and smallholdings refer to acts aimed at the person of residents, workers and visitors to farms and smallholdings, whether with the intent to murder, rape, rob or inflict bodily harm. In addition, all actions aimed at disrupting farming activities as a commercial concern, whether for motives related to

by the intention to steal. He contended that the problem is made worst by the political climate. He only conceded that only 2% of the farm murders were politically or racially motivated. He further accepted that the 2% does not reflect the racial demographics of the assailant or victim. He accepted that it might well be that the percentage included a white person attacking a black person on the farm and that nothing is said in this regard about the impugned song.

[37] He contended that the singing of the song contributes significantly to the political climate especially when sung at political meetings. The political climate that developed since the early 1990's, according to him, was that white people and Afrikaner farmers in particular are continuously presented as the source of evil in South Africa. It is a climate in which white farmers are depicted as racist criminals who stole the land and exploit the workers. It is a climate in which the white farmer has become the personification of everything that is wrong with South Africa.

[38] Furthermore, Mr Roets testified that violence towards white farmers is frequently romanticised especially in struggle songs. He asserted that these songs are not merely sung by fringe groups but by government and political leaders. The situation that could develop from this approach, if allowed to continue, could, according to him, result in the same situation as that in Rwanda which resulted in genocide and

ideology, labour disputes, land issues, revenge, grievances, racist concerns or intimidation, should be included. Cases related to domestic violence, drunkenness, or resulting from commonplace social interaction between people - often where victims and offenders are often known to one another - are excluded from this definition. Specific crimes that are included in the definition are murder, attempted murder, rape, assault with the intent to do grievous bodily harm, robbery, vehicle hijacking, malicious damage to property where the damage exceeds R10 000, and arson. This is also the definition used by the Crime Information Analysis Centre (CIAC) of the SAPS, which also collects statistics on farm attacks.

Germany in the run up to the second world war. He conceded, however, that the killing of farmers does not amount to genocide.

[39] Mr Roets traced the history of the impugned song to only after 1990 when it was popularised by the then ANC Youth League leader Peter Mokaba. He contended that the popularity of the song subsequent to being sung publicly by Mr Mokaba saw an increase in farm murders in 1993. In support of this contention he referred to what happened during the Truth and Reconciliation Commission where Ntuthuko Chuene, confessed to the murder of a farmer and how the song had strong political influence on him. He also testified that the issue of land was a ruse used by the EFF to justify the singing of the impugned song. He contended in this regard that “there is no hunger for land” amongst black people and that is why most people migrate to the urban areas in search of housing. This statement was not backed by any scientific evidence nor statistical analysis. He further accused Mr Malema for being undemocratic in his leadership of the EFF, and when asked to substantiate his answer was; “because you can see.”

[40] As indicated earlier, EFF challenged the role of Mr Roets as an expert witness. They in particular contended that he could not be an independent and objective witness because of his relationship with Afriforum.

[41] In response to the challenge of the expert testimony of Mr Roets, Afriforum’s Counsel contended that the court should not apply the standard of expert witnesses applied in the formal litigation processes because that is not what was envisaged by the legislator in the Equality Act. He contended that what was envisaged by the

legislation was an informal approach to dealing with the issue of an expert witness. In other words, the well-known approach to dealing with the issue of the standard of expert witnesses would not apply in matters of this nature.

[42] It is well established that the role of an expert witness is to assist the court and not to be partisan with the party that called him or her to testified.⁴ Thus the value of the opinion expressed by an expert witness is largely influenced by the witness's neutrality. In *Stock v Stock*⁵ the court held that the evidence of an expert witness who is partisan is of little value.

[43] In general, the practice is that an expert witness is called by a party that believes that the witness's opinion would advance his or her case. However, as the court observed in *Schneider NO v AA and Another*⁶

“But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purpose of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond logic which is dictated by scientific knowledge which that expert claims to possess.”

[44] The standard required of an expert witness was set out in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another*,⁷ in which the court had the following to say:

⁴ See *Jacobs and Another v Transnet Limited t/a Metrorail and Another* 2015 (1) SA 139 (SCA) at para 16.

⁵ 1981 (3) SA 1280 (A) at 1296F.

⁶ 2010 (5) SA 203 (WCC) at 211J- 212B.

⁷ [2015] 2 All SA 403 (SCA).

“The duties and responsibilities of expert witnesses in civil cases include the following: 1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation

These principles echo the point made by Diemont JA in *Stock* that:

‘An expert ... must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him...’

[45] Afriforum’s Counsel contended that the established and well-known standard of determining the qualification of an expert witness does not apply in considering complaints under the Equality Act. This proposition is in my view unsustainable. If that were to be the case the legislature would have expressly provided for that.

[46] It is clear even from the version of Afriforum that Mr Roets is disqualified from being an expert witness in this matter. He is, as indicated earlier, an employee of Afriforum, responsible for some of its strategic projects. He is responsible for coordinating its campaigns on farm attacks, a matter that is fundamental to this case. He is, on his own evidence, an advocate and an activist on issues related to socio-political affairs of the Afrikaner communities, a matter that is central to the issue in dispute in this matter. He, in this respect, stated during cross-examination that he has a vested interest in the outcome of the case. It is also important to note that he could not answer the question of whether he regarded himself as an expert witness. His response to the question during cross-examination was telling. He stated the following in his answer: “. . . I think the answer is both yes and no or it is neither.” He more importantly indicated during cross-examination that he has a vested interest in the outcome of this matter.

[47] The highest qualification that Mr Roets holds is an LLM degree. This qualification does provide him with the necessary qualification to be an expert on the subject matter and more particularly on the statistical analysis, an issue that formed the core of Afriforum's case.

[48] In light of the above, I find that Mr Roets does not meet the standard required of an expert witness in terms of his qualification, his neutrality and independence. His evidence was also based mainly on hearsay evidence. His version is that the singing of the impugned song led to the attacks and murder of farmers. In support of this proposition he referred to several cases where he imputed that the murders were consequent the singing of the song. He could not sustain this proposition under cross-examination. When asked, for instance, to provide examples of cases involving the correlation between the singing of the song and farm attacks and murders, he responded as follows:

“No, the only example I have of this particular song that, where there is very clear evidence in terms of someone testifying, ‘I committed this murder because of this song’ I am aware of one such case.”

[49] The contents of the book, which Mr Roets relied upon in his testimony, do not assist the case of Afriforum. There is no evidence in the book that links the song to the farm attacks and murders. The book is more about the political climate and racial tensions in the country which it suggests contribute to both the high rate of attacks and murders of farmers. These issues and the policies of the government and EFF are irrelevant for determining whether the impugned song contravened the provisions of the Equality Act.

Mr Human's evidence:

[50] The second witness of Afriforum, Mr Human, is a qualified pastor of the Dutch Reformed Church and holds a BA and BD degrees in theology. He is also qualified as a specialist pastoral counsellor with thirty-seven years' experience in the ministry. He was a chaplain with the Department of Correctional Services from 1989 to 2003 and during that period counselled prisoners, ex-prisoners and family members of prisoners. He also worked for Afriforum trauma unit where he focused on victims of farm attacks and farm murders. When asked about whether those he counselled said anything about the song he responded as follows:

“In the places that we have seen there was nobody who said they sang this song whilst they were busy with us or whatever or they were busy with their attacks.”

[51] The testimony of Mr Human did not assist the case of Afriforum. He was presented as an expert witness to testify on the impact that the farm attacks and murders had on the victims. His evidence was based on victims who were referred to him to counsel. This included those cases attended to by those supervised by him at the Trauma Unit of Afriforum. He testified on the bases that he would not disclose the identity of the victims of the attacks and murder for security reasons.

[52] Afriforum makes no case as to why, if indeed the security concern for the victims was genuine, other alternative methods could not have been used to ensure their security. An application for instance to present their evidence in camera or by way of

affidavit were options available to Afriforum.⁸ This is prejudicial to EFF as it was denied the opportunity to test the veracity of the evidence of Mr Human. His evidence was based on uncorroborated and untested hearsay evidence of unidentified victims. Be that as it may, he did not provide evidence of actual victims who suffered psychological harm consequent the farm attacks and murder from the singing of the impugned song. His evidence accordingly bears no relevance to the subject matter and thus lacks probative value to assist the court in coming to a fair and just outcome. Accordingly, his evidence stands to be rejected.

Mr Crouse's evidence

[53] The other expert witness for Afriforum was Mr Crouse, an employee of Institute of Race Relations (the Institute) and responsible, as head of campaigns, for mainly press releases and communication on behalf of the Institute.

[54] The testimony of Mr Crouse focused mainly on the song, "Bizani Fire Brigade" ("Call the fire brigade"), sung by Dr Ndlozi in Senekal on the day of the hearing of the case of the people who were charged with the murder of a young farm manager, Brendon Homer. Mr Crouse initially did not understand the words in the song and thus had to ask a person whose identity he never disclosed to translate it for him. The lyrics of the song are as follows:

"Bizani Fire Brigades
Bathi unmlilo lo
Bizani Fire Brigade
Shisa lamabhunu
EFF Ingene endaweni."

⁸ A similar situation was encountered in Qwelane and thus Ms MN testified in camera.

The song was translated as:

“Call the Fire Brigade
Burn these Boers
EFF enters in space/place.”

[55] Mr Crouse asserted that the impact of the impugned song was the following:

“The singing of the song is undoubtedly incitement to cause arson and damage to property by Dr Ndlozi. After the singing of this song, several farms were set alight during the last two weeks of October 2020.”

[56] During cross examination Mr Crouse was referred to an article in the Farmers Weekly magazine which reported about the “Raging wildfires that destroyed nearly 100 000 hectares in the Western Free State since Sunday 18 October are being fanned by strong winds.”

[57] The fires apparently started consequent the burning of tyres on the public road R708 between Hertzogville and Christiana during a service delivery protest. In response to the question about the causal connection between the song and the fire, as alleged by Mr Roets, he indicated that there was no conclusive evidence that the fires were caused by the singing of the song. He further conceded that the song was less likely to have any relationship with the fire when regard is had to the distance between Senekal and Hertzogville. It is common cause that the distance between the areas is significant. It was estimated that the travel time between Senekal and Hertzogville is about three hours by a motor vehicle.

[58] As alluded to above, Mr Crouse's testimony focused mainly on the song "Bizan'ifire brigade." In my view, the other aspects of his evidence are irrelevant for determining the complaint and thus need not overburden this judgment. He sought to support his proposition that the singing of the song was hate speech by linking it to the fires that took place in the Free State in October 2020. He relied on a media report which indicated that the cause of the fire was the service protest by community members far away from where the song was sung by Dr Ndlozi. He conceded that on the facts as presented there was no link between the singing of the song and the burning of the farms. I may add that this evidence does not in any manner provides a context upon which it can be said that the song does not deserve protection of free speech.

[59] In my view, the testimony of Mr Crouse is of no assistance to the court neither did it advance in any manner the case of Afriforum. The evidence stands to be rejected, both because it was presented by a person who did not qualify as an expert and also because, even if it was to be accepted, it was of no probative value. There is no other evidence presented to show the harm that arose and may arise from the singing of the second impugned song. Accordingly, the complaint stands to fail.

Ms Muller's evidence

[60] The first lay witness to testify on behalf of Afriforum was Ms Muller, a teacher and a survivor of a farm attack. Her testimony was that she and her husband were on arrival at their house at around 00:30 on 24 September 2017 when they were attacked on their farm. The intruders demanded money from her but fortunately she managed

to press the panic button. They had, however, shot her husband who was after the arrival of the police taken to the hospital.

[61] Ms Muller testified about her personal experience about the attack on the farm. She testified during cross-examination that the attack was a robbery, meaning that it was not motivated by the singing of the impugned song. Her answer to the question which was put to her by Afriforum's Counsel was telling. She was asked what the effect of the attack (emotional or psychological) on her was. Her answer was; "no . . . I also coped quite well with it . . ." As to the impact on her children and her husband she testified that they also recovered after some time.

[62] It is thus my view that the evidence of Ms Muller provided no basis upon which it could be said that the singing of the impugned song had anything do with the attack on her and her family. In other words, her evidence does not show that the singing of the song incited the harm that she ultimately suffered and/or that she is a member of a group that was discriminated consequent the singing of the song.

Mr Prinsloo's evidence

[63] The second lay witness was Mr Prinsloo, a veterinary surgeon and also a survivor of a farm attack. He was attacked on 20 November 2008, whilst asleep by three young men who after shooting him dragged him out of the bed and demanded that he direct them to where the money was. He spent six weeks in hospital due to the injuries he suffered in the attack. He could not say whether the motive was robbery but wondered if that was the motive why did they shoot first and ask for money later.

[64] Mr Prinsloo was asked during evidence in chief how he feels when he hears members of EFF singing the impugned song. He did not give a direct answer to the question but rather a broad and generic answer. He stated the following in answering the question:

"...the thing that upsets me the most is that these people eat and live off the food that is produced by the farmer in this country and they can jump and jive on the energy of that food...I want to stress this, that it is the youngsters that are influenced by these things. As I said, the people that attacked us were 3 young men..."

[65] He failed to testify during cross-examination as to how he came to the conclusion that the three "young black boys" that attacked him were influenced by the impugned song. His answer to this question was "well I do not know." He conceded later during cross-examination that even though the men asked for money they were influenced by the impugned song.

[66] It seems to me that Mr Prinsloo's conclusion is that because the three men are black they must have been influenced by EFF singing the impugned song. It is important to note that the attack on Mr Prinsloo occurred in 2008 about five years before the formation of the EFF. As indicated earlier the EFF was formed in 2013. In this context the question is how could the song sung long after his attack have triggered the attack. There is no evidence that at the time the impugned song was sung it incited harm, promoted and propagated hatred against any specified group.

[67] In light of the above, I find the evidence of Mr Prinsloo to be of no probative value and accordingly does not assist this court in determining the issue in dispute.

EFF's testimony

[68] The respondents called one expert witness, Professor Liz Gunner, and one lay witness, Mr Malema.

Mr Malema's evidence

[69] Mr Malema, the president of the EFF and second respondent in the matter, testified how the EFF as a political party was formed in 2013 with the main objective of advocating for the struggle for economic emancipation of the previously disadvantaged South Africans. He testified about the seven pillars of the EFF which are non-negotiable and are set out in the manifesto which include, (a) expropriation of land without compensation, (b) the nationalisation of the mines, the banks and other strategic sectors of the economy (c) free and decolonised education, (d) the creation of jobs in South Africa. EFF, according to him, is a leftist-oriented party representing the working class and thus engaged in a class struggle with the aim of overpowering the white monopoly capital.

[70] Mr Malema did not dispute having chanted "Kill the boer /Kill the farmer" during the period when he was the president of the ANC Youth League. He, however, contended that in his current position as the president of the EFF he only chanted "Kiss the Boer/ Kiss the farmer." He testified further that he was taught not to take the songs in their literal meaning but to understand them to be referring to the oppressive state system. He did not dispute that he had during the chant displayed the gesture of a gun in his hands.

[71] In relation to the word “Boers” as used in the impugned song/chant, he testified that they understood that to be directed at the system of oppression. He went further to give an example that when black police drove into the black townships with police vans, they used to run and say there comes the “Boers” even when there were no white people in the vans. Asked about the impugned song, he testified that he understood that to be referring to farmers who represent the face of land dispossession. The song need not, according to him, be taken literally.

[72] The cross examination of Mr Malema focused on his political ideologies ranging from communism, revolutionaries, land ownership and custodianship of the land and why he described white people as visitors in South Africa. He was also questioned about his hate of white people and the killing of farmers. He was also cross examined on the use of the words, “Kiss the Boers/Kiss the farmer.” He did not dispute during cross examination having sung/chanted the impugned song as reflected in the video footage shown during the hearing.

[73] Mr Malema contended that “Kiss the Boers/Kiss the farmer,” is not a song but a chant, and thus the choice of words would always depend on the person leading the chant. The message intended to be conveyed by the chant is, according to him, very clear in that it says:

“Shoot to kill nyamazane, shoot to kill the enemy forces who are standing in between us and our freedom.” And the word “kiss” is deliberately chosen to offend the white racist who do not believe that a black person should be allowed to kiss a white person. He also explained that “nyamazane” is an animal, an antelope, a name used for freedom fighters.”

[74] He conceded that the impugned song or chant is a form of a speech and thus carries a message as would in any other form of speech. He described the consequences or implication of a chant in the following terms:

“Chants by their own nature they agitate, they are used for mobilisation, they are used for agitation. They are used to make sure that the youth become interested in the struggle. And then that is why there will be sounds like that. But to show that there is nothing literally even the shooting of the gun is not a real gun. So if it was everything meant in a literal sense, we would have taken guns and shot them in the air. That is why we are doing with our hands.”

[75] In support of his contention that the chant should not be interpreted literally he referred to the testimony of former President Thabo Mbeki when he testified before the Truth and Reconciliation Commission about the impugned song. He testified that the song should not be interpreted literally but in the context of struggle and African culture. President Mbeki testified that in the absence of an ANC policy to shoot farmers the song can only be understood in the context of culture and a struggle song.

Prof Gunner's evidence

[76] The only expert witness to testify for EFF was Prof Gunner, based at the School of Languages Faculty of Humanities University of Johannesburg. She holds a BA (hons), MA, and PhD in African Languages and Literatures and the title of her thesis in her PHD was *Ukubonga Nezibongo: Zulu Praising and Praises*. She also in addition to numerous publications published an article, “Song, identity and the State: Julius Malema's *Dubul inbhunu* song as a catalyst.”⁹

⁹ Journal of African Cultural Studies <https://doi.org/1080/13696815.1035701>.

[77] She testified that the impugned “song is not simply a decoration”. It “still carries huge weight as a historical statement and it shows how songs can move through time and cause inspiration through memory to a later generation.” It is true, she contended, that a political idea can be enacted through a song. In other words, according to her; listeners can enact a political idea and deduce messages through a song.

Afriforum’s case

[78] In support of its contention that it is entitled to the relief sought, Afriforum relied on the recent Constitutional Court decision in *Qwelane v South African Human Rights Commission and Another* (Qwelane),¹⁰ where the Court set out the test to apply in determining whether a statement is prohibited under the Equality Act. They further, based on the test set out in that case, contended that the ordinary meaning of the phrase ‘incitement to cause harm’, “suggests that one should not look to the harm caused by the speech itself but rather to the impact of the speech on third parties, i.e. does the speech encourage, stimulate or call for others to cause harm?” In order to amount to “incitement” the statement, according to them, ought to amount to an instigation or active persuasion of others to cause harm.

[79] The problem with the impugned song, according to Afriforum, is that it is sung in a climate or environment where farmers are frequently tortured, and murdered and thus that is good reason to believe that the words chanted by Mr Malema and EFF call on people to kill farmers and amounts to the promotion of hatred on the grounds of race and ethnicity and constitutes incitement to harm.

¹⁰ 2021 (6) SA 579 (CC).

[80] The other points raised by Afriforum in support of their complaint are that; (a) the impugned song constitute unfair discrimination in that it is a racist propaganda which incites racial violence, (b) the song is also directly harmful in that it causes severe trauma by reminding victims of farm attacks what they went through, as demonstrated by the evidence of Mr Human and Mr Prinsloo, (c) 'harm' is also expressed as harm to society, democracy and the nation building project, (d) song is inimical to reconciliation, and (e) the singing of the songs is harmful to both the targeted group and broader South African society.

[81] Regarding the broader version presented by EFF during the hearing, Afriforum argued that Mr Malema endorses violence and expresses extreme hatred for white people and accordingly he should be held accountable.

[82] As alluded to earlier Afriforum relied also on the Malema/ANC-2010 a case involving Mr Malema as the then leader of the African National Congress Youth League and member of the ANC.

Regulatory legal framework

[83] The issues raised in this matter are governed by the Equality Act whose aims are to comply with the specific obligation in section 9(4) of the Constitution. Section 9(4) requires the enactment of national legislation to prevent or prohibit unfair discrimination based on the non-exhaustive list of protected grounds in section 9(3), not only by the state but also by private persons. The Equality Act distinctly reflects the objective of substantive equality. Its preamble, in relevant parts, states:

“... Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality; This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences; This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.”

[84] The objects of the legislation are set out in section 2 of the Equality Act and includes, amongst others, giving effect to the letter and spirit of the Constitution in relation to the equal enjoyment of all rights and freedoms by every person; the promotion of equality; the values of non-racialism and non-sexism.¹¹ The other objects which are relevant in the consideration of the issues in this matter are the following:

- (i) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution; and
- (ii) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act.¹²

¹¹ See section 1 of the Constitution.

¹² Section 16 of the Constitution provides:

- “(1) Everyone has the right to freedom of expression, which includes—
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to—
- (a) propaganda for war
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

[85] It is clear from the reading of section 2 of the Equality Act that the purpose of the Act is to advance the constitutional values and reconcile members of the South African society following the devastating consequences of the apartheid system and to promote democracy.

[86] As indicated earlier, this matter concerns the provisions of section 10(1) and section 7 of the Equality Act. Section 7(a) of the Equality Act reads as follows:

- “(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;
- (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;
- (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;
- (d) the provision or continued provision of inferior services to any race group, compared to those of another race group;
- (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons”.

[87] Before the decision of the Constitutional Court in *Qwelane*, the test to apply in determining whether a statement was hate speech was that set out in section 10(1) of the Equality Act which reads as follows:

“Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.”

[88] In *Qwelane*, the Constitutional Court declared section 10(1) of the Equality Act unconstitutional and invalid. It suspended its operation pending an amendment by Parliament. The Court further held that pending the amendment section 10(1) of the Equality Act should read as follows:

“Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.”

[89] It is trite that the rights to equality and dignity have to be balanced with freedom of expression as provided for in section 16(1) of the Constitution.¹³ In this regard, the Constitutional Court in *Qwelane* held that the Constitution does not seek to protect the right to equality and dignity only, but also free speech is equally protected. The Court further said:

“The right to freedom of expression as enshrined in section 16(1) of the Constitution, is the benchmark for a vibrant and animated constitutional democracy like ours.”

¹³ See *S v Mamabolo* 2001 (3) SA 409. Where the court held that: “The right to dignity is at least as worthy of protection as is the right to freedom of expression.”

[90] In *S v Mamabolo*,¹⁴ the Constitutional Court 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.”

[91] The broad principle underlying the concept of freedom of expression and its associated rights is tolerance of different views by the society. Difficult as it may be to uphold, the society has a duty in terms of this principle to allow and be tolerant of both popular and unpopular views of its members.¹⁵

[92] The test to apply in determining whether a speech is prohibited as required by *Qwelane* is an objective one that requires an assessment of whether a reasonable reader or in this instance a reasonable listener’s view would regard the statement as harmful.¹⁶ The Constitutional Court in that case set out the test in the following terms:

“Before this Court, the parties debated whether the phrase “that could reasonably be construed to demonstrate a clear intention” postulates a subjective or objective test. In my view, it is plainly an objective standard that requires a reasonable person test. This is based on the gloss “reasonably be

¹⁴ 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC).

¹⁵ See *Islamic Unity Convention v Independent Broadcasting Authority* 2002 [5] BCLR 433 [CC] paragraph 26.

¹⁶ See also *Afriforum v Malema* 2011 (6) SA 240 (EqC) at para 109 and *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) at para 11.

construed” and “to demonstrate a clear intention”, implying an objective test that considers the facts and circumstances surrounding the expression, and not mere inferences or assumptions that are made by the targeted group.

This approach accords with the interpretation advanced in *SAHRC v Khumalo* that “[t]he objective test in section 10(1) implies in the terminology used to articulate it, that an intention shall be deemed if a reasonable reader would so construe the words. Because the objective test of the reasonable reader is to be applied, it is the effect of the text, not the intention of the author, that is assessed.” I endorse this approach. It is consistent with our jurisprudence concerning similar issues.”

[93] In *South African Human Rights v Khumalo*,¹⁷ the court opined that the test for hate speech was whether the utterance “could be reasonably construed to demonstrate a clear intention to ‘incite harm.’” The court further held that the test entailed a determination of “whether a reasonable person could conclude (not inevitably should conclude) that the words mean the author had a clear intention to bring about the prohibited consequences. Words obviously mean what they imply.”

[94] In the *South African National Editors' Forum and Others v Economic Freedom Fighters and Another (SANEF v EFF)*,¹⁸ the court stated that even if the prohibited utterances in question could qualify as hate speech on its terms but fail to incite, or reasonably construed as inciting harm, no liability could arise in respect of section 10 of the Equality Act.

[95] The enquiry to be conducted in applying the objective test, is what meaning a reasonable reader or reasonable listener of ordinary intelligence would attribute to the

¹⁷ 2019 1 SA 289 (GJ).

¹⁸ [2019] ZAEQC 6 (24 October 2019) at para 36

statement in its context?¹⁹ In *Khumalo* the court having had regard to the historical context within which section 10(1) has to be applied opined:

“The reality is that, given our history, White South Africans collectively have a lot to answer for. However, being relaxed about vituperative outbursts against Whites, on those grounds, contributes nothing of value towards promoting social cohesion. Reference has already been made to the risk of spiralling invective with uncertain but frightening possibilities. There can never be an excuse that absolves any one of us from accountability in terms of section 10(1). There may be surrounding circumstances which aggravate the utterances or mitigate the likelihood of incitement to cause harm; these are matters fall to deal with when remedies are considered.”²⁰

[96] In *Hotz v University of Cape Town*,²¹ the court held that a statement with an aggressive tone of hostility and overtones of race or ethnicity does not necessarily fall within the prohibition of section 10 of the Equality Act. It seems to me that in statements of such a nature it may be tempting for the court to treat the same as hate speech.

[97] In *SANEF v EFF* the court cautioned against readily declaring unpopular, offensive or even controversial statements as hate speech. The Constitutional Court further explained further in *Qwelane* that:

“... it would appear that hate speech travels beyond mere offensive expression and can be understood as “extreme detestation and vilification which risks provoking discriminatory activities against that group”. Expression will constitute hate speech when it seeks to violate the rights of another person or group of persons based on group identity. Hate speech does not serve to stifle ideology, belief or views. In a democratic, open and broad-minded society like ours, disturbing or even shocking views are tolerated as long as they do not

¹⁹ See *Le Roux v Dey* 2011 (3) SA 274 (CC).

²⁰ *Id* at para 102.

²¹ 2017 (2) SA 485 (SCA) (20 October 2016).

infringe the rights of persons or groups of persons. As was recently noted, “[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced”.²²

Is the Malema/ANC-2010 case binding on this court?

[98] In my view, for the reason set out below, the judgement in *Afri-Forum and Another v Malema and Others*,²³ has no binding effect on this court. The judgment is not binding on this court for the simple reason that the test it applied in determining whether the impugned song was hate speech is one that has subsequently been declared unconstitutional by the Constitutional Court in *Qwelane*. The test which the court applied was that the singing of the impugned song was hurtful.²⁴ As indicated earlier the test of “hurt” has been expunged from section 10 (1) of the Equality Act.

Analysis and evaluation

[99] I have already somewhere in this judgment dealt with the complaint relating to the second impugned song, led by Dr. Ndlozi. It is clear in this regard that Afriforum has failed to make a case that Dr Ndlozi infringed the provision of the Equality Act in singing the impugned song

[100] I proceed to evaluate the first impugned song led by Mr Malema. It is not in dispute that the impugned song is a form of speech.

²² *Qwelane v South African Human Rights Commission and Another* 2011 (6) SA 579 (CC) at para 81

²³ 2011 (6) SA 240 (EqC).

²⁴ *Id* at para 108

[101] In my view, Afriforum has in its evidence and submission failed to show that EFF contravened the provisions of the Equality Act in singing the impugned songs. In other words, they have failed to show that the lyrics of the impugned songs are based on prohibited grounds set out in the Equality Act. They have also failed to show that the lyrics in the songs could reasonably be construed to demonstrate a clear intention to harm or incite to harm and propagate hatred.

[102] I have already found that the expert witnesses of Afriforum were of no assistance to the court regarding the determination of the complaint. Equally the testimony of the lay witnesses did not advance the proposition that the impugned song amount to hate speech.

[103] The approach adopted by Afriforum in its proposition that these songs are a hate speech is premised on the literal interpretation of the lyrics of the songs. It is important to note in this regard that its witnesses could not speak to the philosophy and the history of the song. Mr. Roets came to know the song after the 1990s when it was apparently translated by the media into English.

[104] As indicated earlier, the EFF presented its case through one expert witness and one lay witness. The most important aspect of Mr Malema's (the lay witness) testimony is that the song has a significant relationship to both the issues of land and economic empowerment of the previously disadvantage members of the society. Before democracy, the song was directed at the apartheid regime and more particularly to the dispossession of the land of the majority of the members of the society by the colonial powers. Since the dawn of democracy, the song is directed, according to him, still at

the issue of land justice and in this respect more towards highlighting the failures of the current government. He insisted that the lyrics of the impugned song, similar to other freedom songs, should not be interpreted literally but within the context of the struggle and the political message that is sought to be agitated. He testified that the issue of land justice cuts across racial demographic to include white women who have been excluded from the economy by the system to benefits mainly white males. He did not deny chanting "Kiss the boer/ Kiss the farmer." He also accepted that the chant was intended to agitate and mobilize the youth to be interested in the struggle for economic freedom. He insisted that the agitation is not to deprive one sector of the society of the land, but rather that the land be owned by the state for the benefit of the citizenry in general. I found no reason to reject his evidence.

[105] Equally there is no basis to reject the expert evidence of Prof. Gunner, who unlike Mr Roets, set out her opinion in clear terms as to why the impugned song has a: "political role in the public life of the state, particularly in African state because of the long cultural matrix in history of politics, song and performance of African society. She interpreted the song as "not literally agitating an attack but as a tool to advance the interest of the land justice."

[106] In emphasizing that the songs such as the impugned song should not be interpreted literally, she referred to another song sung at an EFF election manifesto launch. The lyrics of the song went as follows:

"Malema o tshela thupa, Thupa oa ebona, Thupa e yetla, Thupa oa e bona."
The English translation is "Malema is wielding a stick, the stick, do you see the stick? The beating is coming, the beating do you see. The beating is coming?"

[107] The literal meaning of the song would be that Malema is holding a stick and is ready to assault. This was in reference to former President Zuma and members of his administration. In its proper political interpretation, the song does not agitate the assault on President Zuma and members of his administration but rather as a song pointing to the failures and inadequacies of the ANC government. She explained:

"...there was a sense of song uniting a gathering and being part of a moment of political defiance. The song was making a statement about the inadequacies of President Jacob Zuma and his ANC government. Its 'beating' promised a victory to come for the EFF and a hiding for the ANC. The song as metonym for the defiant presence of youth in an African gerontocracy... . In the case to hand, song assisted Malema in his dialogue with the state. It helped him carve out positions vis-a-vis economic policy..." ...it is part of a debate, it actually has a role as speech"

[108] Another song used by Prof. Gunner to illustrate the importance of interpreting political songs in their context is the song that used to be regularly sung by former President Zuma whose lyrics are as follows:

"Leth'uMshine Wam." (bring my machine- meaning bring my gun).

[109] The proper analysis of Prof Gunner's opinion is that the impugned song has to be located within the political context in which Mr Malema is pushing for the land reform and radical economic policy.

[110] In explaining the value of songs, like the impugned song, Prof Gunner stated the following:

"...there was a sense of song uniting a gathering and being part of a moment of political defiance. The song was making a statement about

the inadequacies of President Jacob Zuma and his ANC government. Its 'beating' promised a victory to come for the EFF and a hiding for the ANC. The song as metonym for the defiant presence of youth in an African gerontocracy...

In the case to hand, song assisted Malema in his dialogue with the state. It helped him carve out positions vis-à-vis economic policy... it is part of a debate, it actually has a role as speech.”

[111] As understand the impugned song in its political and cultural context it has traversed time in the history of South African politics and projects the political vision of EFF in a new dimension of a strategy of achieving radical economic transformation of the society. It is in the current political situation a song directed at articulating the failure of the current government in addressing the issues of economic power, land reform and distribution. If anything this calls for a generous delineation of the bounds of the constitutional guarantee of freedom of expression.²⁵ Thus, in my view, declaring the impugned song to be hate speech would significantly alter or curtail freedom of expression. However, it may well be that under a different inquiry, it may be found that the song is offensive, and undermining of the political establishment. It may well be heard as a song that fails to celebrate the achievements made by democracy and the need for unity in the country. In that respect, it would be expressing a view different to those who belief that the image of democracy need not be tainted by what they regard as an offensive song.

[112] As matters stand, in my view, the singing of the impugned song and its lyrics

²⁵ *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (8) BCLR 743 (CC) at 47

should be left to the political contestations and engagement on its message by the political role players. Accordingly, a reasonable listener, would conclude that the song does not constitute hate speech but rather that it deserves to be protected under the rubric freedom of speech.

[113] As indicated earlier, the other issue that arose during the hearing relates to the issue of whether Mr Malema committed perjury when responding during cross-examination to the issue of the payment of damages. I am not in the circumstance of this matter persuaded that a proper basis has been made to refer the complaint to National Prosecuting Authority to consider prosecution.

[114] I agree with Afriforum that the resolution of the first issue is determinative of the remainder. It is for this reason that I have not dealt with each and every issue raised in the papers.

[115] In light of the above I find that Afriforum has failed to make out a case that the lyrics of the impugned songs constitute hate speech as envisaged in section 10(1) and 7(a) of the Equality Act.

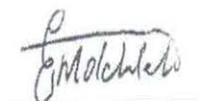
Order

[116] In the circumstances the following order is made:

- (1) The complaint that the first impugned song, "Kiss the boer/ Kiss the farmer" constitutes hate speech and unfair discrimination is dismissed.
- (2) The complaint that the second impugned song, "*Bizan'ifire brigade*" ("*call the fire brigade*") constitutes hate speech and unfair

discrimination is dismissed.

- (3) The Complainant is to pay the costs of the suit.



Molahlehi J

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

FOR THE COMPLAINANT:

Adv. M Oppenheimer

INSTRUCTED BY:

Hunters Spies Attorneys

FOR THE RESPONDENT:

Adv. MM Ka-Siboto

INSTRUCTED BY:

Ian Levitt Attorneys

DATE OF THE HEARING: 7 to 11 and 14 to 18 February 2022; 13 June 2022.

DATE OF JUDGMENT: 25 August 2022