Case note

From 'Kill the Boer' to 'Kiss the Boer' – has the last song been sung?

Afri-Forum v Julius Sello Malema 2011 12 BCLR 1289 (EQC)

1 Introduction

Sticks and stones may break my bones, but words will never hurt me.

Unfortunately, words *do* hurt. So too do other forms of expression that are used to convey messages in both the private and public spheres of society. Few forms of expression, since the cartoon controversies depicting the Prophet Mohammed with a bomb-shaped turban, have captured the media's attention to soaring heights and caused national frenzy in what has come to be known as the 'Kill the Boer' song. The lyrics are part of a well-known freedom song '*Ayesaba Amagwala'* which regained prominence when it was adopted by former African National Congress Youth League (ANCYL) leader, Julius Malema, just a few years ago. The song rapidly polarised the country into factions on the basis of race, ethnicity and language. Within days, the South African Human Rights Commission (SAHRC) received hundreds of complaints over the singing of the song. The song rose to further notoriety when it elicited claims by some that it was to blame for the savage murder of far rightwing separatist supremacist and Afrikaner Weerstandsbeweging (AWB) leader, Eugene Terre'Blanche, on 3 April 2010 by two black farm workers as well as a number of other farm murders.

It is therefore explicable that the judgment of *Afri-Forum v Julius Sello Malema* (*Vereniging van Regslui vir Afrikaans* as *Amicus Curiae*)[1] was anxiously waited upon. It was anticipated that the hotly debated question of whether or not the song amounted to hate speech would finally be put to rest. From a jurisprudential perspective, it was also anticipated that the Equality Court would address the critical issues arising from the potential discord between the constitutional right to freedom of expression,[2] the constitutional hate speech

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[1]2011 12 BCLR 1289 (EqC).

[2]Section 16 of the Constitution of the Repubic of South Africa, 1996 (hereafter referred to as 'the Constitution').

clause,[3] and sections 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

In this article, I will consider the extent to which the Court (per Lamont J) fulfilled the expectation of using this prime opportunity to develop South Africa's hate speech laws as well as offer much needed clarity on this disconnect between PEPUDA's hate speech provisions and section 16(2)(c) of the Constitution. After outlining the factual background to the case, and setting out the statement of the case, I will analyse the Court's treatment of the hate speech clauses focussing particularly on PEPUDA; South Africa's first attempt to legislate against hate speech.

2 Overview of background and facts

The facts of the case were as follows. The first complainant, Afri-Forum, is a section 21 company (in terms of the Companies Act 61 of 1973) and an active non-governmental non-profit organisation involved with the protection and development of civil rights, including a focus on minority rights.[4] The second complainant, the Transvaal Agricultural Union of South Africa (TAU), is a voluntary non-governmental organisation which cites as its main goal the protection of private property rights and the safety of South African farmers, many of whom have been victims of violent attacks in recent years.[5] Both parties raised an objection to the Zulu song '*Dubul'ibhunu'* which was sung and recited on various occasions by the respondent, Julius Malema, who needs little introduction.

Extracts of the song, along with English translations, are available online.[6] The objectionable lyrics of the song included the following words:

> Shoot the Boer
> The cowards are scared
> These dogs are raping
> The cowards are scared

According to the video evidence, Malema added the following words to the song on one of the above-mentioned occasions:[7]

> Shoot the Boer.
> Shoot to kill.

It was common cause that the objectionable utterances were made on 3 March 2010 at the respondent's birthday party, on 9 March 2010 at the University

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[3] Section 16(2)(c) of the Constitution.
[4] See http://www.afriforum.co.za/english/about/ (accessed 2012-02-07).
[5] See http://www.tlu.co.za/ (accessed 2012-02-07).
[6] See http://www.mopanetree.com/news-politics/77999-shoot-boer-lyrics-zulu-english.html (accessed 2012-02-07).
[7] Paragraph 60.

of Johannesburg, on 22 March 2010 at a public address at a Human Rights Day celebration in Mafikeng and on 26 March 2010 in Rustenburg.

The complainants alleged that the recital of the song was intended to symbolise the form of exploitation and oppression of black people in the country, and it targeted white Afrikaners as being the enemy who must at the very least be shunned or at the very most be killed. They further alleged that the objectionable utterances perpetuated systemic disadvantage to Afrikaners, undermined their human dignity, affected their equal enjoyment of constitutional rights and freedoms and further constituted hate speech on the grounds of ethnicity, social origin, culture or language.[8]

The respondent claimed the right to sing the song (with the words '*Dubul'ibhunu'*) as a historical liberation song that was sung during the struggle against apartheid, and which is sung with or without all or some of the objectionable utterances depending on the context, occasion and setting. The song, in its original language, held a particular meaning for the particular group of people that were present on the above-mentioned occasions and it holds the same meaning for all persons who are familiar with the song. He clarified that the song is intended to merely symbolise the destruction of the former white apartheid regime and that it does not indicate the literal intention to shoot the farmers and Boers. Malema and the African National Congress (ANC), who was the second respondent to the case (the original copy of the judgement erroneously listed the ANC as the second complainant), further contended that the song forms part of the country's heritage and should thus be retained. The respondents submitted that, as a liberation song, it is a powerful expression of emotion and unites people who share a common experience, and should be retained to preserve the country's history.[9] The *Vereniging Van Regslui Vir Afrikaans* (VRA) appeared *amicus curiae* in the matter.

The background to the present case is far more procedurally and politically complex than can be dealt with in these pages. The skeletal facts are as follows.

The song was first popularised by the then ANCYL leader, Peter Mokaba, when it was sung at a memorial rally for anti-apartheid activist and Communist Party leader, Chris Hani, just months before South Africa's first democratic elections in 1994. The song was sung in an effort to galvanize the organisation's deep-seated anger at rightwing members who murdered Hani into something concrete: a song that aptly communicated that anger. During 2002-2003, the song rose to notoriety when it was chanted at a meeting of the ANCYL in Kimberley and thereafter at Mokaba's funeral in Polokwane and then broadcast on television. In *Freedom Front v SAHRC*,[10] the Freedom Front political party lodged a complaint with the SAHRC arguing that the song constituted hate speech under section 16(2)(c) of the

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[8]Paragraph 49.
[9]Paragraphs 51-54.
[10]2003 11 BCLR 1283 (SAHRC).

Constitution. The SAHRC rejected this contention on the basis that while the slogans were distasteful and hurtful and the ideas behind the song may offend the rights to dignity and equality, the slogans did not fall explicitly into section 16(2) of the Constitution. However, on appeal, the SAHRC found that the slogans did constitute hate speech. In a well set out and fully comprehensive judgment, the Commission found that there can be no doubt that the song, given its history and the content and context in which it was chanted, would directly contribute to a feeling of marginalisation and adversely affect the dignity and sense of well-being of the Afrikaners as a minority group.[11] In short, there is a real likelihood that the song causes harm.[12]

A new wave of litigation began on 26 March 2010, when Willem Harmse, a farmer from Mpumalanga, brought an urgent application against Mohammed Vawda seeking an order declaring the publication and chanting of the lyrics of '*Dubul'ibhunu'* to be unconstitutional and unlawful, and declaring that the publication and chanting of the said words *prima facie* satisfies the crime of incitement. Both parties were friends and fellow members of an anti-crime organisation, The Society for the Protection of our Constitution. The respondent, along with others, intended to display a banner containing the contentious words as slogans on a banner during a peaceful anti-crime march which was scheduled for 9 April 2010. He also intended that the group would, in addition, chant the same words, with the understanding that the term meant 'kill apartheid'. However, the applicant contended that the words meant 'shoot the white man' or 'shoot the Boer', and alleged that the slogan was discriminatory towards white people, provoked hostility, constituted incitement and put his personal safety at risk. Halgryn AJ granted the order. Unfortunately, being an urgent application, the Court did not provide reasons for the order.

Soon thereafter, the ANC, who was not a party to the initial proceedings, saw fit to approach the Court requesting reasons for the declaratory order and seeking to appeal the order in the interests of the public. While both Harmse and Vawda had agreed not to appeal the order, the order was not limited to them as the litigating parties nor to their march. Adding to the procedural complexity of the case, the VRA and Afri-Forum filed an application for leave to intervene and sought to challenge the ANC's *locus standi*, as well as the application for leave to appeal. In short, on 9 May 2011, Halgryn AJ dismissed the ANC's application on the basis that it had failed to substantively and procedurally prove its grounds, and amended the original order made on 26 March 2010 to reflect that the 'publication and chanting of the words "*Dubul'ibhunu" prima facie* satisfies the crime of incitement to commit murder'. (The amendment was made in the acknowledgement by the Court that there was no generalised 'crime of incitement' and that it had erred in the earlier proceedings.[13])

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[11] *Freedom Front v SAHRC* 1299.
[12] *Ibid*.
[13] *African National Congress v Harmse: In re Harmse v Vawda (Afri-Forum Intervening)* 2011 12 BCLR 1264 (GSJ).

Both decisions by Halgryn AJ received conflicting responses from various sectors of society all of which were dramatically portrayed by the media and added to the already heightened racial tensions. The decision was criticised for meting a fatal blow to freedom of expression in our budding democracy, one which would have potentially very dangerous long-term consequences.[14] The question of whether the personal backgrounds of judges influence their decisions was raised; this is in the face of Halgryn AJ not providing reasons in the earlier proceedings.[15] It was also criticised for having imposed an absolute prohibition on the lyrics of the song without regard to factors of time, manner, place and context.[16] The effect of the ban was that the song and any part thereof could not be used for academic discussions (which would also make the citing of the song in this article unconstitutional and unlawful) or for educational purposes nor could it be sung by anti-apartheid war veterans during private gatherings.[17] The ANC openly criticised the judgment calling it an attempt to erase its history through the courts and the party was accused of showing dangerous disregard for the ruling.[18] De Vos asserted that the singing of the song by Malema was causing people's logic and reason to be overshadowed by fears, prejudices, ignorance and hatred, and that Lamont AJ's ruling was based on an 'essentialistic and simplistic division' along racial lines and stereotyping.[19] It was no surprise that Malema came under attack, and he was, in short, accused of making a mockery of the legacy of the apartheid struggle.[20] For others, the decision to ban the song was welcomed with a victorious sigh of relief and seen as a positive step towards non-racialism and upholding the Constitution.[21] Halgryn AJ strongly defended his ruling stating that replacing the word 'Boer' for 'kaffir', 'faggot' or 'Jew' would ultimately still render the song to be hate speech and unconstitutional.[22]

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[14] See http://www.businessday.co.za/articles/Content.aspx?id=104791 (accessed 2012-02-10); see http://www.news24.com/SouthAfrica/Politics/Hate-speech-ruling-problematic-expert-20110915 (accessed 2012-02-15).

[15] See http://www.businessday.co.za/articles/Content.aspx?id=104791 (accessed 2012-02-10).

[16] See http://www.businessday.co.za/articles/Content.aspx?id=109302 (accessed 2012-02-10).

[17] See further http://www.therightperspective.org/2011/05/16/kill-the-boer-ruled-incitement-to-murder/ and http://www.news24.com/SouthAfrica/News/No-ruling-in-shoot-the-boer-appeal-20101129 (accessed 2012-02-15).

[18] See http://mg.co.za/article/2010-03-31-anc-showing-dangerous-disregard-for-courts and http://www.iol.co.za/news/politics/anc-shocked-at-banning-of-shoot-the-boer-1.477653 (accessed 2012-02-12).

[19] See http://constitutionallyspeaking.co.za/is-everyone-going-completely-mad/ and http://www.news24.com/SouthAfrica/Politics/Hate-speech-ruling-problematic-expert-20110915 (accessed 2012-02-15).

[20] See http://www.news24.com/SouthAfrica/Politics/Malema-making-mockery-of-struggle-20100314 (accessed 2012-02-10).

[21] See http://www.news24.com/SouthAfrica/Politics/Malema-ruling-a-step-against-racism-Afrikaner bond-20110912 (accessed 2012-02-15).

[22] See http://www.therightperspective.org/2010/11/30/anc-kill-the-boer-ban-appeal-heard-in-court/ and http://www.news24.com/SouthAfrica/News/No-ruling-in-shoot-the-boer-appeal-20101129 (accessed 2012-02-15).

Amidst this web of litigation, less than one week after Halgyn AJ's initial decision in March 2010, Afri-Forum and the TAU approached the North Gauteng High Court, Pretoria on 1 April 2010 for an urgent interdict against Malema for singing the song.[23] This followed Malema's refusal to meet its ultimatum to apologise for singing the song at the University of Johannesburg in March 2010 as well as on previous occasions at high profile events. Bertelsmann J granted the application pending the outcome of the final adjudication of the matter by the Equality Court. The effect of this provisional decision was that Malema was interdicted from publically uttering and/or singing the words of the song in question or communicating lyrics of any other song using words of a similar nature, which can be reasonably construed as being capable of instigating violence, distrust and/or hatred along racial lines in the country.[24] The basis of the Court's decision was that the effect of the offending words contributes to the alienation of the entire Afrikaner community, they convey a particularly divisive message to the majority group that Afrikaners are less worthy of respect and dignity, and there is a real likelihood that the words cause harm.[25] Essentially, the offending utterances constitute hate speech for which there is neither justification nor constitutional protection.[26] The Court also highlighted that the country's democracy is still fragile and that those in the political and socio-political discourse should maintain an element of sensitivity to the feelings and perceptions of South Africans in the context of using words that were common during the struggle against apartheid.[27]

Adding fuel to the already blazing flames, Malema defiantly sang the 'Kill the Boer' song in Harare, Zimbabwe in April 2010.[28] While this incident was not placed before Lamont J for consideration in the present case as the incident occurred outside of the Republic, the Court nonetheless regarded it as being relevant to the dispute as the respondent was reported to have said that the song was a reminder of what remained to be done in South Africa.[29]

3 Statement of the case

The South Gauteng High Court, Johannesburg sat as the Equality Court and was called upon to adjudicate on the following legal issues in respect of the 'Kill the Boer' song:

- What was the meaning of the words in the appropriate context and audience;

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[23] *Afri-Forum v Malema* 2010 5 SA 235 (GNP).
[24] *Afri-Forum v Malema* 2010 5 SA 235 (GNP) 240-241.
[25] *Afri-Forum v Malema* 2010 5 SA 235 (GNP) 239.
[26] *Afri-Forum v Malema* 2010 5 SA 235 (GNP) 240.
[27] *Ibid*.
[28] See http://www.iol.co.za/news/politics/defiant-malema-sings-it-again-1.479492 (accessed 2012-02-15).
[29] Paragraph 81. See also Bailey and Moyo 'Zim gaga over Ju Ju' *Saturday Star* (2010-04-03) 1.

- Did it make a difference if the audience was wider than the groups who heard the song at the time it was being sung;
- Did it make a difference if different audiences ascribed different meanings to the words;
- Did the way in which the song was repeatedly sung by Malema after its translation in the press make a difference;
- Do the words of the song constitute hate speech; and
- If so, did the fact that the song holds historical value as a liberation song vest a right in the singer to sing it along with certain gestures?[30]

Overall, looking at the lengthy thirty-six page judgment (sixty-nine pages if one reads the original transcript), it must be noted at the outset that the judgment is flawed both structurally and substantively. Some parts were simply difficult to follow while others were repetitive. The content of some segments was also incongruous with their respective headings. It would not be possible to offer a statement of the case without pointing out some of these flaws.

The first five pages set out selected aspects of South African history, looking at the arrival of the Boers to the country and their violent pursuance of an apartheid policy[31] followed by the formation of the ANC and an outline of their struggle against oppression with a reference to extracts from *Du Toit v Minister of Safety and Security*[32] and *Azanian People's Organisation v President of the Republic of South Africa*.[33] This was clearly an attempt to contextualise the background of the song; however, the historical accounts provided are sketchy. The version put forward by Lamont J completely excluded the social, political and cultural complexities of the country's historical background. This gives one the distinct impression that this was the judge's personal account of the country's history. Evidence lies in the complete lack of authority or citation to motivate the judge's representation (or misrepresentation). This set the tone for the rest of the judgment.

The next two sections are merely two illustrations of the many euphemisms that are threaded throughout the judgement. 'The agreement' section which, comprises entirely of the Preamble to the Constitution without any further discussion, states that 'the agreement between the various communities became the Constitution'.[34] The next section headed 'The consequence' deals with the closing of a chapter with the enactment of the Constitution which provided the framework to be used to 'overcome the friction resulting from change'.[35]

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[30]These issues were listed by the Court at 1309; eighteen pages into the judgment.
[31]Paragraphs 2-5.
[32]2010 1 SACR 1 (CC) para 17.
[33]1996 8 BCLR 1015 (CC) (No page or paragraph reference was cited by the Court for this case.) Paragraphs 6-9.
[34]Paragraph 10.
[35]Paragraphs 11-13.

Over the next seven pages, the Court set out lengthy extracts from various sources of law.[36] The first observation about these sections is the lack of analytical engagement with these sources.[37] The second observation is that Lamont J made extensive use of headings; twenty-nine headings to be precise. In a number of instances, it is not clear why the Court did not make the logical move to merge certain segments. For example, instead of setting out all the relevant constitutional provisions in one coherent section, the Court spread these provisions out between two sections; 'The provisions of the Constitution to be considered'[38] and then 'The Constitution on the issue' which appears three pages further along and following two other segments.[39] Then in the latter section, the Court set out the Preamble to PEPUDA followed by relevant hate speech provisions from the Act.[40] Also, a few pages further along in another section, 'Powers of Equality Court', the Court set out section 21 of PEPUDA.[41]

Yet another instance of the Court's unnecessarily excessive use of headings (as well as the illogical structure thereof) lies in the section titled 'Foreign and international law'.[42] Here the Court simply sets out sections 231-233 and summarises section 39(1) of the Constitution, and in citing *S v Mamabolo (eTV, Business Day and the Freedom of Expression Institute Intervening)*,[43] briefly mentions the importance of being cognisant of the legal differences when relying on foreign law.[44] Also in this section, one would have reasonably expected the Court to include relevant provisions from international Treaties. Again, this was not the case. Instead, five pages down, following two other sections, is the section headed 'Treaties on the issue' where the Court refers to lengthy extracts from relevant international instruments governing hate speech.[45] The congruous use of headings throughout the judgement may have streamlined the content of the judgement as a whole and made it easier to follow. However, this would still not have remedied the lack of analytical engagement with the legal provisions that were cited verbosely.

A further illustration of the specious structure of the judgement is the section on '*Ubuntu*' which appears in the middle of the legislative sections.[46] Here the Court makes brief reference to the rich *ubuntu*-based jurisprudence that has been developed by the Constitutional Court, and highlights the concept of *ubuntu* as being:

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[36] 1296-1302.
[37] See the Comment section for further discussion.
[38] Paragraphs 14-15.
[39] Paragraphs 19-21.
[40] Paragraphs 22-26.
[41] Paragraph 28.
[42] Paragraphs 16-17.
[43] 2001 3 SA 409 (CC) para 40.
[44] Repeated at para 31.
[45] Paragraph 27.
[46] Paragraph 18.

> an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases.[47]

The Court then enumerated the values that underlie *ubuntu* and ended with an extensive citation of case law.[48] The concept of *ubuntu* is inarguably an important one in the adjudication on the 'Kill the Boer' song, however, a proper analysis and application of its principles, including the relevant case law, would have been better placed in the discussion of whether the song still had a place in the post-apartheid democracy.[49] The extent of the Court's application of *ubuntu* was to state that this 'new approach' where '[m]embers of society are enjoined to embrace all citizens as their brothers' must be 'fostered' 'in the spirit of *ubuntu*'.[50]

The next section on 'Why prohibit hate speech' provided a useful list of four reasons to prohibit hate speech:

> 1 To prevent disruption to public order and social peace stemming from retaliation by victims.
> 2 To prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in the community and contribute to society.
> 3 To prevent both visible exclusion of minority groups that would deny them equal opportunities and benefits of … society and invisibly exclude their acceptance as equals.
> 4 To prevent social conflagration and political disintegration.[51]

The next segment dealt with the 'The tension between the prohibition and freedom of speech'.[52] This was just one of a number of headings that created a high expectation of the level of discussion that one anticipated would follow. However, again, this was not so. The Court issued the warning of caution with which American jurisprudence should be approached,[53] and cited a lengthy extract from *S v Mamabolo*[54] in support of this approach and emphasised that the right to freedom of expression does not enjoy superior status in South African law.[55] Lamont J then stated that political speech made in public must be taken to be communicated to the public at large.[56] This point was repeated throughout

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[47] *Ibid*.
[48] *Ibid*.
[49] Paragraphs 105 and 108.
[50] Paragraph 108.
[51] Paragraph 85.
[52] Paragraphs 31-33. It is not clear why the Court also did not deal with this section and the next one together.
[53] Paragraph 31, see also para 17.
[54] Paragraphs 40-41.
[55] Paragraph 32.
[56] Paragraph 33.

different segments of the judgment.[57] The Court pointed out that hate speech lacks value as political speech, and overrides the 'pursuit of truth' process in that it makes no direct contribution to it and denies the recognition of rights.[58] Again, the brevity of this section, which ought to have formed an integral part of the discussion, left one wanting for more.

In the next section on 'Minorities', the Court cited case law heavily but which, apart from one extract, included no discussion or application thereof.[59] Of importance, nonetheless, is the principle that the promotion of dignity, equality and freedom are pivotal to the enquiry when minority interests are involved.[60] Lamont J also emphasised that minority groups are especially vulnerable to discriminatory treatment, and that the judiciary has a duty to protect such groups particularly when hate speech is directed at them.[61]

I read the next section on 'The actual prohibition' with zeal anticipating that this would surely be the section where the Court would tackle critical issues arising from section 10 of PEPUDA, however, the Court did not.[62] One third of this segment consisted of that part of section 10 which defines what may not be published.[63] The Court then pointed out that, in terms of the definition, the target group is widely defined.[64] The Court discussed what a reasonable construction of words means taking into account their express and implied meaning, any accompanying gestures and context.[65] In support of this, the Court cited an extract from *Selemela v Independent Newsarticle Group Ltd*.[66] In this section, the Court also considered what the publication of words means.[67] The Court stated that this includes the propagation, advocating or communication thereof and includes secondary publication.[68] This republication of words may lead to words taking on a meaning different from their original meaning, and to this end, the original intended meaning of the words is irrelevant when determining the 'objection-ability'.[69]

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[57]See, for instance, paras 91 and 93.
[58]Paragraph 33.
[59]Paragraphs 34-36.
[60]Paragraph 34.
[61]Paragraphs 35-36.
[62]Paragraphs 37-42.
[63]Paragraph 37.
[64]Paragraph 38.
[65]Paragraphs 39-41.
[66]2001 4 SA 987 (NC) (no page or para reference was cited by the Court for this case) para 41. The Court repeated its discussion of what a reasonable construction of words means. See, for instance, paras 39, 56, 96, 98-100, 104.
[67]Paragraph 42.
[68]*Ibid.*
[69]*Ibid.*

The sections, 'The road to trial', 'The issues at trial' and 'The hearing' were largely procedural, evidentiary and descriptive in nature.[70] One would have expected the details of the factual background and the issues that were to be determined by the Court to be set out at the beginning of the judgment. The section headed 'The reports of the media and the reaction of the public' offered a detailed account of the various occasions on which the song was rapaciously reported on by the media.[71] It included a repetition of some of the factual background that was already covered in the preceding sections. Albeit important, what was also out of place in this section was the discussion of the polarisation of society into two factions along language and racial lines; into those who are largely members of the ANC and its supporters and those who perceived themselves to be the target group of the song, that is, white Afrikaners.[72] Lamont J attributed this polarity to not only the singing of the song by Malema but also to the media's dissemination of the translation of the song into the words 'shoot the Boer/farmer'.[73] Malema and the ANC led evidence that the words are innocuous in that they refer to a regime which was to be destroyed.[74] According to the Court, this was just one possible meaning, and another possible meaning was indeed 'shoot the Boer/farmer'.[75] In the Court's view, 'the flames of the fire were fanned' when the press and public linked the words to that of the song 'Kill the farmer, kill the Boer'.[76]

The sections on 'The song', 'The song pre Malema and publication by the press', 'The actual audiences', 'The true audiences', 'Were these appropriate occasions to sing the song' and 'What the words sung mean' dealt with pivotal issues raised by the case.[77] Parts of these segments were again repetitive and lacked substantively in certain areas of law.[78] Here the Court considered the heritage of the song as a liberation song which was sung against the oppression of the black majority by the apartheid regime which was perceived by all South Africans to be white Afrikaners.[79] The song was also sung by soldiers. The Court discussed the role and function of liberation songs during combat.[80] Such songs are designed to fuel a process of dehumanisation whereby the song psychologically destroys the image of the enemy as a real person in the mind of the soldiers as well as serving to create a psychological bond of unity among the

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[70]1306-1310.
[71]1313-1316.
[72]Paragraph 82-83.
[73]4Ibid.
[74]Paragraph 84.
[75]*Ibid.*
[76]*Ibid*.
[77]However, like other segments, these were not only illogically ordered but were also illogically structured. See, for instance, paras 59–66, 85, 86-91, 92-94 and 95-108.
[78]See Comment section below for further discussion.
[79]Paragraphs 59-60.
[80]Paragraphs 62-63.

soldiers.[81] The effect is that the songs encourage soldiers to overcome their instinctive repugnance towards killing people.[82]

The fact that the song was a liberation song and, as such, should be allowed to be sung on appropriate occasions was raised as one of the defences by Malema.[83] Part of this submission was that the song was sung by soldiers *to* soldiers who understood the true meaning of the words, and was thus appropriate.[84] In considering the 'actual audiences' and the 'true audiences' to the song on the various occasions that it was sung, the Court speculated that on the occasions of Malema's birthday party on 3 March 2010, the Human Rights Day celebrations on 22 March 2010 and the rally on 20 March 2010, the audiences comprised of people who were like-minded to Malema, who would be familiar with the meaning ascribed to the words of the song and some of whom were involved in the struggle.[85] However, when the song was sung on the 9 March 2010, the audience was comprised of multi-racial, multi-cultural young people who had probably not been involved in the struggle.[86] The Court pointed out that the press were invited to all of these events (except for Malema's birthday party), and as such, it was anticipated that the events would be published and thus it must be taken that even those who did not attend these public events, must be treated as being part of the audience to the song.[87] The Court, in referring to *Le Roux v Dey*,[88] stressed that when judging the appropriateness of the occasion when it concerns political events, the true audiences must always be borne in mind.[89]

The Court raised the conundrum of the struggle song being sung post democracy and Malema's response that 'the regime lives on in the form of the untransformed person who holds benefits conferred upon him by the regime and which he has not relinquished'.[90] In answering the question of whether the song has a place in post-apartheid South Africa, the Court made reference to the 'agreements which established the modern, democratic South African nation and the laws which were promulgated pursuant to those agreements' and the fact that PEPUDA does not allow justification 'on the basis of fairness for historic practices which are hurtful to target group but loved by the other group'.[91] The Court added:

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[81]Paragraphs 62-63, see also para 102.
[82]Paragraphs 62-63.
[83]Paragraph 92.
[84]Paragraph 93.
[85]Paragraphs 86, 88-89.
[86]Paragraph 87.
[87]Paragraphs 90-91.
[88]2010 4 SA 210 (SCA).
[89]Paragraph 93.
[90]Paragraph 105.
[91]Paragraph 108.

> The Equality Act does not seek to prohibit conduct. It seeks in the very prohibition to open avenues of conciliation; to confer dignity upon all members of society by assisting them to find the building blocks necessary to shape their ability to make judgments which will regulate their future conduct. The Equality Act seeks to drive this process forward by setting the moral standard to which members of society must adhere.[92]

The Court briefly raised the negative impact of hate speech on the dignity of the target group and the group partaking in the hateful utterances and the effect of incitement of such speech on both these groups.[93] In finally answering the question of whether there is an appropriate occasion to sing the song on the basis that it is a liberation song and creates a vested right in those who were part of the struggle, the Court stated:

> If it is claimed that the conduct was acceptable at a point in time and that a vested right exists to persevere with it on the basis of a legitimate expectation the simple answer is that times have changed.[94]

In examining the meaning of the words in the song, the Court emphasised the importance of understanding the meaning of words in their proper context.[95] Words, both individually and in groups, have meanings which are elastic.[96] The Court stated:

> The permutations increase as one adds to the equation, the context in which the words were uttered, the circumstances under which the words were uttered, the way in which the words were uttered, the gestures which accompanied the words and what the words imply.[97]

It must also be borne in mind that the speaker is in the position to compose the message so as to convey multiple meanings to the audience.[98] The Court also found that when words are sung with a chorus to an audience, the addressor is in a strong position to influence and elicit the desired responses from the audience, and that the words sung by both the addressor and the audience (including all accompanying actions) are important when decoding the context and meaning of the words.[99]

The Court looked at the word '*ibhunu'* as a phonetic corruption of the word 'Boer', which in the context of apartheid, was designed to refer to the oppressor, and thus the words '*Dubula ibhunu'* came to mean 'destroy the regime'.[100] There was no dispute between the litigating parties on this primary meaning of the words

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[92]Paragraph 110.
[93]Paragraph 94.
[94]*Ibid.*
[95]Paragraph 96.
[96]*Ibid.*
[97]*Ibid.*
[98]*Ibid.*
[99]Paragraph 97.
[100]Paragraph 61.

of the song. However, there is a secondary message encoded in the words and that is to shoot white Afrikaners.[101] The messages of the song were to both destroy the regime and shoot the Boer.[102] Adopting a contextual approach as well as taking into account the literal dictionary translation of 'shoot the Boer', the Court found that, on a balance of probabilities, this dual connotation was intended by the author of the song and could not have been lost on the audience and society at large.[103] These meanings of the words of the song are those that a reasonable man would ascribe to it.[104]

Quite significant is that by its very nature, the liberation song has no predetermined words; the sentiment and primary meaning of the song is capable of change allowing the singers to use the appropriate words for the appropriate occasion.[105] The Court stated that the permutations of the song are infinite and it is therefore reasonable that different messages are received by different people depending on the language used.[106] The Court pointed out that the difficulty in tracing the history of the song is attributable to this very reason.[107] The Court also considered that, since time immemorial, the elasticity of the meaning of words has been manipulated by persons who are skilled in the art of words, and that literature, for example, is filled with parody and innuendo.[108] This elasticity in the meaning of words is illustrated by the singing of 'Kiss the Boer' by Malema at the time when the words 'Kill the Boer' were controversially and publically recognised as hate speech.[109] The word 'kiss' is sufficiently close to 'kill' in the context of the song for the audience to decode the true meaning and establish the link.[110] The intended irony was that a word denoting love and affection was used to create an image of the exact opposite.[111]

The Court also considered the vast contrast between the musical nature of the song in its original form and its form in the present day.[112] When it was originally put to music many years ago, the song sounded more like a hymn or a lullaby whereas, when sung by Malema in recent years, it sounded more like rhythmic chant in a staccato tone.[113] According to the Court, this is important when considering the effect the song has on the audience of the song.[114]

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[101]Paragraph 102.
[102]Paragraph 108.
[103]Paragraphs 61 and 102.
[104]Paragraph 103.
[105]Paragraphs 64-65.
[106]Paragraph 99.
[107]Paragraph 65.
[108]Paragraph 100.
[109]Paragraph 101.
[110]*Ibid.*
[111]*Ibid.*
[112]Paragraph 66.
[113]*Ibid.*
[114]*Ibid.*

The Court was of the view that the words of the song had no effect on the general public prior to Malema singing the song and before it was so voraciously published by the press.[115] The Court attributed this to either the song being innocuous or the target group being ignorant of the song's literal meaning or even that the song had been sung at all.[116] Apart from the media's rampant reporting of the song, the Court ascribed the public's reaction to the context and manner in which Malema sang the song and exploited both the original language of the song and the media's translations of the song.[117] The Court stated:

> The occasion, the history of the conduct and the response of the public and press, gesture and physical movements, crowd interaction, the words including the expression and delivery of the words in a chant-like manner, are relevant to determine the context of the song. They, all together, contribute to form the manner in which the message was delivered.[118]

In summary, Lamont J held that the words of the song constitute hate speech, undermine the dignity of the target group, and are discriminatory and harmful. The first and second respondents were interdicted from singing the song at any private or public meeting held or conducted by them. The order also extends to members of society generally who should refrain from using the words or singing the song. The Court found that this was in keeping with the moral standards of conduct in terms of PEPUDA.

4 Comment

This case dealt with an important issue; one of national interest that pertained to questions that are both emotive and complex, and as such, there was a high expectation on the Equality Court to deliver a well-reasoned and jurisprudentially sound judgment. Although not the primary focus of this section, a few preliminary comments must be made about the judgment as a whole as they impact on the overall soundness of the Court's analysis.

In light of the tumultuous background involving the song, a comprehensive exposition of the historical background, prior legal proceedings, judicial precedent, legislation and analysis thereof was anticipated. However, while the judgement was indeed lengthy, it was fragmented, disjointed, poorly constructed and lacked substantively in many respects.[119] Some sections epigrammatically addressed pivotal legal issues to the point of being vague while others were simply convoluted, cyclical and confusing. The judgment was also not without grammatical errors.[120]

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[115]Paragraphs 85 and 95.
[116]Paragraph 85.
[117]Paragraph 95.
[118]Paragraph 98.
[119]Some of these problems were illustrated in the preceding section.
[120]20See, for instance, paras 34C-D, 42F-G, 109J and 109A.

The Court's treatment of case authority also added to the impression that the judgment is jurisprudentially flawed. The general trend of the Court was to simply cite cases in volume with no discussion or applicability in the sections cited; which was particularly disconcerting in those segments that ought to have formed core parts of the Court's analysis.[121] In other instances, the Court simply did not deal with relevant hate speech cases. *Freedom Front v SAHRC*, which also dealt with the 'Kill the Boer' song, for example, got no more than a brief reference to support the judicial approach of protecting minorities in hate speech matters.[122] Lastly, the Court painstakingly emphasised the caution with which American jurisprudence on freedom of expression should be approached,[123] yet made absolutely no reference to or reliance on key Canadian hate speech jurisprudence which has played an instrumental role in shaping South Africa's hate speech laws.[124]

While I do not challenge the correctness of the Court's conclusion that the song can amount to hate speech, the inherent flaws in the judgment ultimately obscured the sequence of reasoning in the judgment. While the judgment raised pertinent issues, it is argued that the high expectations created by the long list of issues for determination were not met. While this opens the door for the judgment to be critiqued on various levels, I will focus on the extent to which the Court analysed PEPUDA's hate speech provisions, as this ought to have formed the foundation of the Court's final decision of whether or not the lyrics of the song constituted hate speech. Also, there is a jurisprudential lacuna on hate speech in South African law, specifically in the application of PEPUDA's hate speech provisions and the potential constitutional challenges posed by these provisions, and it was anticipated that the Equality Court would take the opportunity to tackle these issues, and in so doing, provide some certainty to this area of law.

Section 16(2)(c) of the Constitution states:

> (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.

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[121]See, for instance, paras 18, 34, 36, 39, 96 and 100.
[122]Paragraph 36.
[123]Paragraphs 17 and 32.
[124]See, for instance, *R v Andrews* 1990 3 SCR 870, *Canada v Taylor* 1990 3 SCR 892, *R v Zündel* 1992 2 SCR 731 and *R v Keegstra* 1990 3 SCR 697.

Section 10 of PEPUDA provides as follows:

> (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –
>
> (a) be hurtful
>
> (b) be harmful or to incite harm;
>
> (c) promote or propagate hatred;
>
> (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with s 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

Section 12 of PEPUDA provides as follows:

> No person may –
>
> (a) disseminate or broadcast any information;
>
> (b) publish or display any advertisement or notice,
>
> that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

While the over-arching purpose of PEPUDA is to give effect to the constitutional right to equality, it also bans hate speech and prohibits the dissemination and publication of discriminatory information. In its objective to give effect to the letter and spirit of the Constitution, PEPUDA specifically deals with the issue of hate speech as a special form of unfair discrimination.[125] The ban on hate speech is set out in section 10 and the prohibition of the dissemination and publication of discriminatory information is set out in section 12. Section 15 of the Act also makes reference to hate speech by stating that cases of hate speech are not subject to the determination of fairness in terms of section 14.

In principle, the ban on hate speech is to be welcomed, however, it is argued that the hate speech prohibition is so badly drafted that it begs more questions than it answers. This raises a number of critical issues about the application of PEPUDA's hate speech provisions. Currie and De Waal state that the main problem with section 10 is that it contains a great deal of 'nomenclature'.[126] The section is so verbose that some of its terms appear to be redundant. Of greater

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[125] PEPUDA also deals with other special forms of unfair discrimination, namely; harassment and the dissemination of discriminatory information.

[126] Currie and De Waal *Bill of Rights handbook* (2005) 378.

concern, however, is the fact that the language used in section 10 strayed so far from the language used in section 16(2)(c) of the Constitution. The section on 'The actual prohibition'[127] is where one would have reasonably expected the Court to grapple with some of the essential issues arising out of section 10. In this respect, some of these issues that ought to have been raised by the Court are highlighted below.

First, section 10 refers to 'publish', 'propogate', 'advocate', or 'communicate' instead of simply using the word 'advocate'. Although not directly addressed, the Court did make the following statement amidst the discussion on what words mean and leading up to the brief discussion on the republication of the song by the media:

> The publication of words includes the propagation (*sic*) advocating or communication thereof.[128]

One can glean from this that even though section 10 makes use of the word 'publish', it should be interpreted to mean 'advocate'. The Court added that this definition encompasses secondary publication, and that secondary publication of information from a reputable source is:

> permissible without informed consent having independently verified the legitimacy of the right to publish the particular facts.[129]

Second, section 10 refers to 'reasonably be construed to demonstrate a clear intention to' instead of 'incited'. In comparison to the constitutional standard, these words appear to place a much heavier burden on a complainant to discharge.[130] This ultimately appears to make PEPUDA a less desirable recourse.[131] According to Milo *et al*, this test is overly broad and vague.[132]

Third, section 10 radically broadens the scope of the four prohibited grounds of advocacy listed in section 16(2)(c) of the Constitution. This is because section 10 includes all the grounds of non-discrimination listed in the equality clause of the Constitution. Section 10 makes hate speech into a prohibition of discriminatory speech, which leaves one questioning what the further prohibition of discriminatory speech in section 12 is meant to serve.[133] On this point, it is submitted that the extension of the prohibited grounds beyond what is contained

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[127]Paragraphs 37-42.
[128]Paragraph 42.
[129]Paragraph 41.
[130]See further Currie and De Waal (n 126) 378 and Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 5.
[131]See also 'Discussion document: Freedom of expression' South African Human Rights Commission (2002) 5.
[132]Milo *et al* 'Freedom of expression' in Woolman (ed) *et al Constitutional law of South Africa* (2008) 42-87.
[133]See also Currie and De Waal (n 126) 379.

in section 16(2)(c) can certainly be justified in terms of a limitations analysis in section 36 of the Constitution.[134]

Fourth, section 10 not only prohibits 'harmful' expression, but also the much more subjective notion of 'hurtful' expression. While it is far from clear what exactly the terms 'hurtful' and 'harmful' is intended to mean, it does appear as if section 10 prohibits forms of expression that need not even rise to the level of hatred, which is an important element in the test for hate speech under section 16(2)(c) of the Constitution. If these words are afforded their literal interpretation, then there can be no doubt that the effect thereof would be to proscribe a wide range of robust expression (for example; strong opinions on issues of race and religion or jokes that may be insensitive on the basis of gender, culture or sexuality) and that, it is argued, ought to be allowed in a thriving democracy. Milo *et al* assert that disallowing such expression would 'run counter to the constitutional commitment to freedom of expression, and should be avoided', and that one way of minimising the harsh impact of section 10(1) on section 16 is to interpret 'be harmful' or 'incite harm' as referring to physical violence and possibly other material forms of harm such as discrimination, and to interpret 'be hurtful' as capturing serious physiological and emotional *harm*.[135] This, in my view, would be an appropriate approach, one which is necessary to save section 10(1).

Fifth, section 10 not only distinguishes expression that is hurtful from expression that is harmful, but also disengages hurt and harm from incitement to cause harm. This means that the formulation in section 10 dispenses with the requirement of causation which is a key element in the constitutional test for hate speech. This means that making critical comments about a person's privileged social origin, for example, despite falling short of being incitement to cause harm will nonetheless fall within the scope of section 10 because it may cause hurt.[136] It is argued that this constitutes an unjustified limitation on the right to freedom of expression in a thriving democracy. Davis states that the combination of an extension of the prohibited grounds beyond those in section 16(2) as well as the dispensing of the requirement of causation creates potential for constitutional challenge.[137]

Lastly, while the proviso to section 12 is meant to limit the scope of the definition of hate speech in section 10 by allowing certain expressions that would otherwise be prohibited by section 10 to be protected, it is unfortunately not an easy task to interpret the proviso to section 12 as it is itself vague.[138] Kok adds

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[134]See also Davis 'Freedom of expression' in *South African constitutional law – Bill of Rights* (2010) 11-19.

[135]Milo *et al* (n 132) 42-87*;* see also Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the controversy?' (2001) *TSAR* 294 at 299-300.

[136]See further Davis (n 134) 11-19.

[137]Davis (n 134) 11-19; see further 'Discussion document: Freedom of expression' South African Human Rights Commission 4.

[138]See further Milo *et al* (n 132) 42-87 – 42-88.

that it is difficult to envisage what type of conduct the Legislature had in mind when it enacted section 12, and it should have been equivocal about the kinds of conduct it wanted to include in the scope of this provision.[139]

In light of the points set out above, section 10 of PEPUDA appears to have lowered the threshold and significantly widened the scope of the prohibition of hate speech. The cumulative effect of this tortuous piece of legislation is that it appears to create an absurd and harsh limitation on the right to freedom of expression.[140] The next stage ought to be to evaluate the legislation under the limitations clause in section 36 of the Constitution to determine whether it is a reasonable and justifiable limitation on the right to freedom of expression.

Unfortunately, the Equality Court did not speak to these issues in its judgment. The judiciary is under a constitutional duty to interpret any legislation in accordance with the 'spirit, purport and objects' of the Bill of Rights.[141] The area of hate speech invokes tension between the fundamental rights of dignity, equality and freedom of expression and it is submitted that there was a reasonable expectation on the Court to produce a comprehensive analysis of the relevant hate speech provisions. However, the extent of the Court's treatment of the relevant legal provisions was to set out in full the preamble to the Constitution, sections 2, 8, 9, 12(1)(c), sections 16, 39(1), 231 and 233 of the Constitution, the preamble to PEPUDA, sections 10, 15, 21 of PEPUDA and the selected articles of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention on the Elimination of All Forms of Racial Discrimination (1965) and the International Covenant on Civil and Political Rights (1996).[142] As illustrated in the statement of the case, not only were these provisions scattered speciously throughout various sections of the judgment, but the Court's analysis thereof was altogether limited.

There were only four substantive statements among these protracted constitutional sections. First, the Court mentioned the importance of having regard to all the various bodies of law which lay the foundation for democratic dispensation when applying the Constitution, and, second, the need to consider Treaties where provisions thereof are incorporated in domestic law.[143] The third statement appears in the middle of this paragraph:

> Each community within society, ethnic, religious, commercial or otherwise, is regarded as a permanent and valuable segment of the plural society in which South Africans live.[144]

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[139]Kok (n 135) 299.
[140]See Albertyn (n 130) 94, where a test for hate speech is suggested.
[141]Section 39(2) of the Constitution.
[142]Paragraphs 10, 14-16, 19-28.
[143]Paragraph 15.
[144]*Ibid*.

Last is the following lone statement which incongruously appears amidst the provisions of PEPUDA:

> In balancing the rights and obligations contained within the Constitution in regard to hate speech, the Court is obliged to seek the solution which is just not that which is fair.[145]

While one cannot argue with the correctness of these statements, it is not clear how they fit into the segments in which they appear as a whole. It is also difficult to fathom why the Court even concerned itself with citing section 16 of the Constitution if it was not in any way going to engage with the elements for the test for hate speech in section 16(2)(c) and its correlating relationship with sections 10 and 12 of PEPUDA in the context of the song. The same can be said for the international Treaties that were volubly cited.

Where the Court did raise certain important factors for consideration in an allegation of hate speech, they were not to be easily gleaned from the judgment nor were they adequately linked to the statutory principles. For instance, what was particularly relevant in respect of the Court's treatment of PEPUDA was the pertinent issue of whether gestures, when accompanying words, as a form of expression is relevant in the test for hate speech under PEPUDA. Under the constitutional right to freedom of expression, there can be no doubt as to the answer. Section 16(1) protects free 'expression'. The Constitutional Court in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*,[146] in debating whether pornography is a form of expression, held that expression is an all-encompassing concept which does not warrant an inflexible construal. According to Currie and De Waal, 'every act by which a person attempts to express some emotion, belief or grievance' should qualify as 'expression' for the purposes of section 16(1).[147] This means that the question to be asked when determining whether an action qualifies as expression is whether that action seeks to communicate. As such, nude dancing,[148] flag-burning,[149] and a publication of photographs[150] would all qualify as 'expression'. This broad approach seeks to avoid interpretive difficulties that might otherwise arise from the use of the word 'speech'.[151]

Section 10 of PEPUDA, however, has a much narrower scope than section 16 in that the latter provision only applies to expression in the form of 'words' which creates a further disconnect from section 16 of the Constitution. The effect of this limited application of section 10 is that it renders the provision completely

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[145]Paragraph 25.
[146]2004 1 SA 406 (CC) para 48.
[147]Currie and De Waal (n 126) 362.
[148]*Phillips v Director of Public Prosecutions* 2003 3 SA 345 (CC) para 15.
[149]Marcus and Spitz 'Expression' in Chaskalson *et al Constitutional law of South Africa* (1999) 20-21.
[150]Currie and De Waal (n 126) 362-363.
[151]See also Milo *et al* (n 132) 42-32 and Barendt *Freedom of speech* (2005) 78-86.

worthless as a hate speech law in the face of a wide range of other forms of expression that could constitute hate speech. This narrow and futile application of section 10 to words only has been evident in recent cases where hate speech was alleged. See for example; *Jamiat-Ul-Ulama v Johncom Media Investment Ltd*[152] and *Manamela, Buti v Jonathan Shapiro*;[153] both of which involved drawings as a form of expression. In the latter case, the SAHRC found that even though the controversial cartoon was accompanied by words, PEPUDA did not apply to the expression as a whole.[154] The SAHRC, however, followed the approach in *S v Mamabolo* and agreed with the Constitutional Court that 'every act (including a poster) by which a person expresses one's emotion or belief is an expression and can amount to hate speech'.[155] It is submitted that the approach of the Constitutional Court (and the SAHRC) is the correct one. The application of section 10 to hate speech in the form of words only is illogical and incongruous with the purpose of the Act as a whole; more so when other forms of expression form an integral part of the connotation and context of the expression as a whole.

The Equality Court in the present case had to decide whether or not to consider certain gestures that were made whilst the song was chanted. Even though the issue had not been expressly pleaded, the Court gave due consideration to it as the complaint extended to the gestures. According to the video evidence before the Court, the respondent executed certain rhythmic gestures which included moving his forearm at approximately a forty-five degree angle to the ground, and with his finger and arm forming the shape of a firearm.[156] It was common cause that these motions were traditionally made during the singing of the song. Lamont J boldly asserted that the definition in section 10:

> [D]oes not exclude the relevance of gestures which accompany words. Those gestures form part of the context and will be relevant to determining the reasonable construction to be placed upon the words.[157]

Further on in the judgment, Lamont J again asserted that '[g]estures are relevant when the meanings of words are considered'.[158] This was also echoed in the section on 'What the words sung mean'.[159] The Court states that when gestures used were added to the context of song, it was clear that the words of the song concerned the use of a weapon.[160] Whether the verb used in the song means destroy or shoot was irrelevant; the gestures import the gun by which the

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[152]Case number 1127/06, 2006-02-08, unreported.
[153]Case number GP/2008/1037/E Mokonyama, unreported.
[154]*Ibid*.
[155]*Ibid*.
[156]Paragraph 56.
[157]Paragraph 39.
[158]Paragraph 56.
[159]Paragraph 98, quoted above in the statement of the case.
[160]Paragraph 104.

exhortation to violence is to be implemented.[161] As such, the gestures provided the limitation on the meaning of the words.

The implication of the Court's decision on this issue is that it has to some degree widened the scope of the definition of section 10. In light of the potential constitutional challenges that the definition already poses, a rigid interpretation would not have been correct. While the questions of whether other forms of expression could now fall within the scope of section 10 or whether other forms of expression, other than gestures, would only be considered when accompanied by words remains unanswered, the Court's decision in this case is nonetheless a small step in the right direction.

In December 2011, Malema filed a notice of appeal at the Supreme Court of Appeal. The case was expected to be on the roll in November 2012. The Freedom of Expression Institute and Section 16 had applied to be admitted as friends of the court in the matter.[162] However, the parties opted to bury the hatchet in an out-of-court settlement at the eleventh hour before it was due to be heard in the Supreme Court of Appeal. In terms of the settlement, Afro-Forum and TAU agreed to abandon the Equality Court order that banned the song and the ANC and Malema agreed to abandon the appeal to the Supreme Court of Appeal, and in doing so, committed to continued formal dialogue 'to promote understanding of their respective cultural heritages and for the purpose of contributing to the development of a future common South African heritage'.[163]

Supreme Court of Appeal President, Lex Mpati, confirmed the mediation agreement as an order of court on the 1 November 2012.[164]

5 Conclusion

PEPUDA, as an auxiliary piece of legislation intended to prohibit hate speech and so prevent unfair discrimination, has unfortunately proven to create more problems than to serve its purpose. It is argued that in a young democracy like South Africa's, one which places a premium on respecting difference and diversity – including diversity in opinion – in the context of its historical background, PEPUDA constitutes an unreasonable limitation on the constitutional right to freedom of expression, and detracts from any commitment that South Africa has towards allowing a level of robust deliberation in its flourishing democratic order. The judgment in this case was indeed an opportunity glaringly missed by the Equality Court to lend some certainty to the interpretation and application of the

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[161] *Ibid.*

[162] 1See http://www.timeslive.co.za/thetimes/2012/06/19/anc-malema-back-in-trenches-to-fight-song-ruling (accessed 2012-06-25).

[163] http://www.archivalplatform.org/news/category/News/P28/ (accessed 2013-06-13).

[164] http://www.news24.com/SouthAfrica/News/Shoot-the-Boer-agreement-a-court-order-20121101 (accessed 2013-06-13).

relevant hate speech provisions. Following the out-of-court mediation agreement, ANC general-secretary, Gwede Mantashe, commented that the importance of the agreement was that it educated society that litigation should be the last resort, and that it 'removed the impact of actually banning the song'.[165] He added that the ANC's leadership would educate its membership 'that this phase of the struggle warrants different words'.[166] Jurisprudentially, this means that the last song has by no means been sung as yet.

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[165] http://www.citypress.co.za/news/shoot-the-boer-litigation-should-be-the-last-resort-mantashe-20121031/ (accessed 2013-06-13).
[166] *Ibid*.