



**IN THE EQUALITY COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

[REPORTABLE]

Case no: EC 16/2022 & 17/2022

In the matter between:

**THE SOUTH AFRICAN HUMAN RIGHTS
COMMISSION
DANTE VAN WYK**

First complainant
Second complainant

and

**JULIUS SELLO MALEMA
THE ECONOMIC FREEDOM FIGHTERS**

First respondent
Second respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 27 AUGUST 2025

SHER J:

1. I have before me two applications which were consolidated and heard as one, in which the complainants seek orders declaring that certain statements which were made by the first respondent constitute hate speech and unfair discrimination on the grounds of race and/or belief; alternatively harassment, in terms of the Equality Act.¹ By agreement between the parties the matter proceeded in respect of issues pertaining to the merits of the complaints only,

¹ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

with those pertaining to the relief which is sought standing over for later determination.

2. The first complainant is the SA Human Rights Commission ('the SAHRC') an independent body established in terms of Chapter 9 of the Constitution and the SAHRC Act,² which is tasked with the constitutional mandate³ of protecting and promoting respect for human rights. The second complainant is Mr Dante Van Wyk, an adult male whose further particulars have not been disclosed, who contends that he is the subject of threats contained in the statements which were made by the first respondent.
3. The first respondent is Mr Julius Sello Malema, a politician who is the founder, President and Commander-in-Chief of the second respondent, the Economic Freedom Fighters ('EFF'), a political party. The statements which are the subject of the complaints by the applicants were made during a speech which the 1st respondent delivered almost 3 years ago on 16 October 2022, at the occasion of the 3rd provincial People's Assembly of the 2nd respondent in the Western Cape.
4. The parties agreed that in presenting their cases they would not be confined to their affidavits but would also offer oral evidence. To this end the 2nd complainant tendered the evidence of Dr Karien Van Der Berg, a forensic linguist and senior lecturer at the University of the North-West, who conducted a linguistic analysis of the offending part of the speech, and the respondents called Prof Steven Friedman, a political scientist in the humanities faculty of the University of Johannesburg, who gave his interpretation and understanding of it. In addition, the 2nd complainant called his attorney Ms M Westley, and the respondents called Mr Luvuko Ntakana, a member of the EFF, to give evidence pertaining to certain events which transpired on 9 November 2020, parts of which were depicted on a video⁴ which was shown in evidence. The parties referred the witnesses to certain documents which were contained in a joint trial bundle (exhibit C), which included a series of photographs which were seemingly taken as stills from the video.⁵ At the conclusion of argument it was

² Act 40 of 2013.

³ In terms of s 184(a)-(c) of the Constitution.

⁴ The original of which can be found at <https://www.newsflare.com/video/434096/white-cape-town-community-attacks-black-members-of-south-africas-leftwing-eff-party>.

⁵ At pp 9-13 of the bundle, which were separately received into evidence as exhibits 3-7.

stipulated, by agreement, that the Court would be entitled to have regard to all of the documents in the trial bundle, including those not specifically referred to in evidence.

The background

5. The narrative which follows is drawn from the evidence which was tendered, the video, pleadings, and documents in the trial bundle. During September 2020 scholars at the Brackenfell High School were advised that its annual matric farewell function would not be held at the school due to the COVID-19 pandemic, which had led to a nationwide 'lockdown' and declaration of a state of disaster earlier in the year. The parents of one of the children then arranged for the function to be held at a wine farm on 17 October 2020. Invitations to the function were sent to all matriculants and teachers. Despite this, on 1 November 2020 the father of a child at the Brackenfell Primary School shared a YouTube video and posts about the event on Facebook, in which it was alleged that it had been held for white scholars only.
6. As a result of these and other social media posts members of the 2nd respondent resolved to hold a protest at the school, as they considered this to be an instance of racist behaviour. According to a report by the 2nd respondent's provincial deputy chairperson,⁶ on their arrival at the school on 6 November 2020 they were met by a group of 'heavily armed white people', who tried to block them from proceeding and provoked and threatened them, but they forced their way to the school gates. A police contingent arrived and asked them to disperse as their gathering was illegal, but the deputy chairperson contended that they had the right to picket without a permit. The police facilitated a meeting between the EFF group and a representative from the school's governing body, at which time certain demands were made, including that the teachers who attended the function and the principal should be sacked. The group then dispersed.
7. Three days later, on 9 November 2020, a larger group of EFF members arrived at the school for a second round of protests and a follow-up on their demands. At the time the matriculants were writing exams. They were met outside the school by a group of parents, local residents, and security guards ('the

⁶ Pages 24-25 of the trial bundle, exhibit C.

residents' group'), which the 2nd respondent's deputy chairperson described as a 'mob of whites' who were 'heavily armed'. From the video which was shown in evidence it is evident that there were not only whites in the group and, as in the case of the EFF group, there were not only men present but also women, and apart from the security guards only a few of the group were armed, mainly with sticks or baton-like instruments. The confrontation which took place between the two groups was captured on the video which was shown in evidence, albeit not in a continuous i.e. single, unbroken and complete stream of footage.

8. The video opens with the 2nd complainant, clad in a mottled grey and black T-shirt and black trousers, leading approximately 7 white males, a white female and a black male, as the vanguard of the residents' group, down a road outside the school towards the EFF members, who were advancing from the opposite direction. As the groups came face-to-face persons in the residents' group (including the 2nd complainant), can be heard shouting 'go home, you are in the wrong place', 'what do you want to do' and 'what are you here for'. The 2nd complainant then engaged Mr Ntakana, one of the leaders of the EFF group, who was wearing a red beret. Although this cannot be heard on the video footage, according to Mr Ntakana the 2nd complainant referred to members of the EFF group in derogatory terms, using the 'k' word, and told them they were not welcome in Brackenfell and should go back to the townships. Another white male allegedly also used the 'k' word. This evidence was contested during Mr Ntakana's cross-examination, but the 2nd complaint did not tender any evidence to refute it.
9. As the 2nd complainant confronted Mr Ntakana a hand reached over from behind him and grabbed Mr Ntakana's beret from his head and made off with it. From a frame-by frame analysis it appears that the hand belonged to a large white male dressed in black i.e. wearing a black cap, sunglasses, T-shirt, trousers, and a bandana or mask which covered the lower part of his face.⁷
10. As Mr Ntakana went after his beret someone shouted 'moer hom' ('hit him') and a melee ensued, during which he was manhandled and several blows were directed at him by persons in the residents' group, including the 2nd

⁷ The beret grab is captured on the photograph at p 43 of the trial bundle, exhibit C.

complainant, who can be seen holding Mr Ntakana by his T-shirt with his left hand, while striking out at him with his right fist, as he was struggling to break loose.⁸ After Mr Ntakana freed himself the 2nd complainant turned his attention to another EFF member, chasing and pulling at him from behind.

11. There is then a break in the footage which resumes with a scene where 3 males, including the 2nd complainant and the compatriot black male visible at the commencement of the video, are involved in a scuffle with an EFF member who is being held, whilst down on his knees, at the right-hand front side of a white LDV.⁹
12. The camera then moves to cover several white males advancing towards retreating EFF members. The large white male in black who snatched Mr Ntakana's beret is part of this group and can be seen pushing a retreating female EFF member and hitting her on her back and buttocks with a baton or baseball bat, and then viciously striking at someone who is lying on the ground. Stones are thrown at the EFF group by a white male wearing a yellow T-shirt and other white males, including the 2nd complainant.
13. There is another break in the footage and when it resumes members of the SAPS are on the scene and jostle with several persons, including a white male and the black male seen earlier (in the company of the 2nd complainant), who is pointing his finger angrily and shouting and swearing, and a coloured male. It then sounds as if 2 shots are fired. The 2nd complainant can then be seen amongst the residents' group, which consists of about 20-25 males and females. A white male wearing a blue long-sleeve T-shirt advances, swears, and shouts 'who do you think you are, you don't rule this country' and people can be heard shouting 'you are in the wrong area'. The 2nd complainant then comes forward and hurls an expletive, and his black male compatriot shouts to the EFF members to 'come here'. A coloured male, with a stick in each hand, advances and gesticulates threateningly, and a white male wearing a long-sleeved black top and grey bandana shouts 'go and pull your racial s..t somewhere else'. As the police try to intervene the large white male in black makes rude signs and gesticulates.

⁸ Id, photographs 43 and 44.

⁹ Photograph 40.

14. After a further break, the footage resumes with a confrontation between members of the residents' group and members of the police, who appear to have taken a position between the two groups. The coloured male with a stick in each hand again waves them threateningly at members of the EFF, and shouts at them. Once again there is a break in the footage. When it resumes, the 2nd complainant and the black male who was part of the vanguard group can be seen next to one another.
15. An unarmed police officer advances on the large white male in black, who is carrying a stick, and there is talk of arrest. People shout 'why do you want to arrest him' and rush forward to prevent the police from doing so. The 2nd complainant shouts to a black woman to 'come here'. There is a white woman standing on his left side. The police intervene and try to keep the groups apart. One of the EFF males who shouts and gesticulates at the residents' group is wearing a white T-shirt on the back of which appears the slogan 'In Revolution You Must Be prepared to kill or to be killed'. After another break in the footage the video ends with a group of police with shields and helmets advancing on the residents' group, which begins to disperse, in a cloud of what appears to be tear gas smoke.
16. Pursuant to this incident the 2nd complainant was arraigned in the Kuilsriver magistrate's court on a charge of assault of Mr Ntakana, and another white male was also charged with the assault and with discharging a firearm in a public place, to which he pleaded guilty and was given a fine. After standing trial the 2nd complainant was found not guilty on 10 November 2020.

The speech

17. On 16 October 2022, some 2 years after these events took place, the 1st respondent addressed the 3rd provincial People's Assembly of the 2nd respondent, in the Western Cape; at which time the statements which are the subject of the complaints were made. According to a YouTube video¹⁰ of the day's proceedings his speech was a lengthy one, as it was delivered over a period of about 1½ hours.¹¹ It will accordingly not be appropriate to set it out

¹⁰ At <https://www.youtube.com/watch?v=BhViykMXKM>. A copy of a video recording of the speech on a memory stick was attached to the 2nd complainant's founding affidavit as annexure 'B'.

¹¹ The full video of the day's proceedings is 2hrs 44mins long. The speech commences at 1hr 19mins i.e. about halfway into it.

verbatim, in its entirety. The SAHRC attached a transcript of the first hour thereof, to its papers.¹² For the purposes of the judgment it is not feasible reciting even this piece, and I will simply set out the offending portion, in which the impugned statements appear, which took about 5 minutes to deliver.¹³ Reference will be made to the speech as a whole, by way of a summary thereof, in due course, when the offending portion is evaluated contextually.

18. The transcribed portion in which the offending statements appear reads as follows:

‘You went to a school here to protest the other time, and you were beaten by white people, and there is a white man who is visible on camera. If I were to ask you, what have you done in terms of follow-up, after being beaten by that white guy, why have you not as a revolutionary organisation followed up on that guy, him alone, to check that guy in an isolated space and attend to the guy properly? What type of revolutionaries get beaten and they don’t have a follow-up? And then they pride themselves of being beaten and they repeat videos of themselves being beaten and we must vote for them because they were beaten by a white man that they’ve never followed up, or the same white man that has beaten them up. Tell that white man to try me. I’ll come many times here in Western Cape, appearing (in) a court case, because no white man is going to beat me up and (I) call myself a revolutionary the following day.

You must never be scared to kill. A revolution demands that at some point there must be killing because the killing is part of a revolutionary act. Why did Mandela take up a gun? He was the first soldier of Umkhonto we Sizwe. Why did he take up a gun, was he taking a gun to distribute roses? He took up a gun because the revolution had reached the point where there is no longer an alternative but to kill. Why are you scared? That anything that stands in the way of the revolution, it must be eliminated in the best interest of the revolution, and we must never be scared to do that. The founding manifest of the EFF says we will take power by all means necessary and therefore revolutionaries, when confronted by that situation, should never think twice. Cowards are not for the revolution. The EFF must be known that it is not a playground for racists, that any racist that plays next to the EFF and threatens and beats up the membership and the leadership of the EFF, that is an application to meet your maker with immediate effect. You were beaten by a racist and you never did anything, let’s hope this new leadership will make a follow-up on that racist, because there must be a follow-up on that racist.

I’m not asking you to do what I’ve not done, when a racist confronted me at Winnie Mandela’s funeral I did what I was expected to do, because I was not scared of a white man. You get beaten by white people here and you call yourself an organisation of Fanon. Racism is violence and violence can only be ended by violence, not any other necessary means, it must be

¹² Annexure FA1, pp 29-47 of the record.

¹³ It runs on the video (n 10) from 1:44:13 to 1:49:58 and can be found at pages 8-9 of the transcript, pages 36-37 of the record.

confronted by how it is. You are a racist, therefore you are a violent person, and you shall be treated as such. Do not create an impression that we are the most understanding organisation, when it comes to racists we have no understanding for violence, you come with violence, we shall respond with violence. This is a war between white supremacy and black consciousness, you must know the two will never meet. We are in a permanent war with white supremacists. As a black conscious person when a white supremacist raises his or her ugly head you ought to stand up immediately and say this is what we do not tolerate as black consciousness people. We don't accept dominance of the white race over a black race. So Fighters, the Western Cape should be at the centre of the confrontation of white supremacy, because racism is rife here in this province.'

The issuing of papers

19. Following the speech the SAHRC received hundreds of complaints from members of the public. It was also contacted by attorneys acting for the 2nd complainant, who informed them that he was the person referred to in the offending portion of the speech, and he and his life partner had been inundated with thousands of messages on social media emanating from EFF supporters, many of which were of an aggressive and threatening nature, as a result of which he had gone into hiding in the Northern Cape. In his founding affidavit the 2nd complainant confirmed these averments.
20. After considering the speech the SAHRC was of the view that there were statements therein which constituted hate speech and on 9 November 2022 it accordingly addressed a letter to the respondents in which it called upon them to provide a written public retraction and an apology in respect thereof, together with an undertaking that they would desist from making any future statements which exhorted or encouraged EFF members or supporters to kill or physically inflict violence, or harm, on any person or group, and which promoted or propagated an incitement to hatred, unfair discrimination or harassment. The SAHRC also issued a media statement advising of the step it had taken.
21. The 2nd respondent responded with a media statement in which it said the SAHRC had 'incorrectly and ignorantly' labelled the comments which 1st respondent had made as incitements to violence and hate speech, thereby failing to appreciate political commentary in its 'metaphorical, literary and historical' sense, and falling into a 'trap' at the 'altar of the egos and fragility of whiteness'. Had the SAHRC taken the opportunity of engaging literature which was widely publicised and part of the curricula of institutions of higher learning,

it would have been able to place the 1st applicant's comments in their 'literary and academic context'. In this regard the respondents said that in his seminal text *The Wretched of the Earth* Frantz Fanon had 'correctly' reflected on the necessity of violence, to destroy the violent systems of white supremacy and colonialism. Thus, when the 1st respondent had said that violence could only be ended by violence, and by any means necessary, he had 'operated correctly within the logic that the system of white supremacy i.e. the anti-blackness witnessed in Brackenfell where white people had assaulted peaceful protesters, and the monopoly of wealth by a white minority at the expense of the black majority', was violence. The experience of post-1994 had shown that to confront violence with peace and reconciliation did not resolve injustice, and that was the context within which the 1st respondent's utterances had been made, and they could accordingly never constitute incitement.

22. The media statement was followed on 11 November 2022 by a letter from the respondents' attorneys, in which they averred that the SAHRC had acted outside of its statutory powers and had failed to afford the respondents an opportunity to respond to the complaints it had received, before issuing its media advisory and letter of demand, and they queried whether, in the light of the findings of the courts in the *Afriforum/EFF* and *Gordhan* matters, where 1st respondent's comments were held to be acceptable political rhetoric in the exercise of his right to freedom of expression, a reasonable listener would objectively conclude that he had a clear intention to cause harm. Consequently, they contended that the SAHRC had impermissibly sought to limit their constitutional rights and had misdirected itself in relation to the application of the law to the facts, and demanded that it retract its letter of demand by no later than 15 November 2022, failing which they reserved the right to launch an application for the review of the SAHRC's decision and/or an interdict.
23. On 15 November 2022 the SAHRC's attorneys responded that it considered that it had at all times acted in the due and proper discharge of its statutory powers, and a week later it instituted the instant application, in which urgent interdictory relief was sought (in part A) together with final relief in due course (in part B). On 3 December 2022 the 2nd applicant lodged his application in which he sought final relief, on similar grounds and terms to that which was sought by the SAHRC.

24. In their answering affidavits the respondents chose not to engage with the merits of the complaints which were raised by the applicants in their founding affidavits viz. that in numerous respects the statements complained of constituted hate speech and an incitement to harm and violence, on the prohibited grounds of race and/or political belief. Instead, they raised several technical and procedural objections only, in relation to the interim relief which was sought.
25. On 27 February 2023 the two applications were consolidated and, given that the respondents no longer sought urgent, interim relief and the respondents had complained that the applicants had failed to consider mediation, it was directed that the parties should engage one another with a view to attempting to resolve the dispute in a mediation process. After the process failed, further directions were made to refer the matter to trial, including that the parties were entitled to file supplementary affidavits, followed by replying affidavits.
26. In their supplementary answering affidavit the respondents said the complainants had 'cherry-picked' isolated statements in the 1st respondent's speech, which were taken out of context. It was 'ignorant' of the SAHRC to take the speech literally and its interpretation was that of an unreasonable, uninformed person who disregarded the context and history of SA. The speech was a nuanced, political one made at a political event, in the exercise of the 1st respondent's right to freedom of expression, which was fundamental to a democratic society, and was not hate speech which constituted the incitement of violence or hatred against white people. In this regard the respondents had engaged Prof Friedman, a leading expert on hate speech, who was of the opinion that the speech did not constitute hate speech.
27. The respondents said they subscribed to the Marxist-Leninist and Fanonian schools of thought in their analysis of the state, imperialism, and class and race contradictions in society. Marxist-Leninist ideology was premised on socialism and the belief that the means of production should not be controlled by private individuals or through communism, but by the state. The fundamental principles of Fanonian theory espoused anti-racism, black consciousness and black liberation, and decolonisation; and denounced racism and white supremacy, and the speech should be interpreted in this context. The 1st respondent's speech sought to highlight racial inequalities which remained pervasive in the

Western Cape and dealt with various issues concerning the EFF and its members, including land dispossession, poverty, racial discrimination and increasing EFF membership.

28. In addition, the respondents again alleged that there were procedural flaws and irregularities in the 1st complainant's case in that it had failed to afford them the right to *audi alteram partem*, had failed to do a proper investigation, and had misconstrued and acted outside of its powers.

The law

(i) The relevant provisions of the Equality Act

29. In its heading the Equality Act proclaims that it aims to give effect to the constitutional right to equality, so as to prevent and prohibit unfair discrimination, harassment, and hate speech. To this end its stated objects are, amongst others, to give effect to the equal enjoyment of all rights and freedoms by every person¹⁴ and the values of non-racialism and non-sexism,¹⁵ the prevention of unfair discrimination and the protection of human dignity,¹⁶ (as contemplated in ss 9 and 10 of the Constitution); and the prohibition of the advocacy of hatred based on race, ethnicity, gender or religion, which constitutes an incitement to cause harm ¹⁷ (as contemplated in s 16(2) of the Constitution).
30. When interpreting its provisions, a court is enjoined¹⁸ to give effect to the constitutional provisions pertaining to the promotion of equality and the Act's stated aims (as set out in its preamble) and its listed objects and guiding principles.¹⁹ In doing so it must be 'mindful' of international law²⁰ and must facilitate compliance with SA's international obligations in terms of treaties and conventions to which it is bound, including the Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²¹ which was ratified by SA in 1998. ICERD requires ²² member States who are bound to it to proscribe incitements

¹⁴ Section 2(b)(i).

¹⁵ Section 2(b)(iii).

¹⁶ Section 2(b)(iv).

¹⁷ Section 2(b)(v).

¹⁸ Section 3(1)(a).

¹⁹ Section 3(1)(b).

²⁰ Section 3(2)(b).

²¹ Id, read together with s 2(h)

²² Article 4(a).

to racial discrimination or violence and the dissemination of ideas based on racial superiority or hatred.

31. In its exposition in *Qwelane*²³ the Constitutional Court referred to other instruments of international law²⁴ and legislation in various foreign states, which aim to prohibit and regulate hate speech, including that which applies in Canada,²⁵ Germany,²⁶ Denmark²⁷ and France, which outlaw it in their criminal codes, as well as its more limited forms in Belgium and Chile.
32. Although it has been proposed that hate speech should also be criminalised in SA (a draft Bill to this effect was prepared in 2016 but has not been passed)²⁸ it currently exists in our law as one of a trilogy of so-called 'statutory delicts'²⁹ provided for by the Act, the others being unfair discrimination (on the specific grounds of race,³⁰ gender,³¹ disability³² or generally³³) and harassment,³⁴ which must be established objectively, on a balance of probabilities.³⁵
33. Section 10 of the Act contains the prohibition of, and requirements for hate speech. Subsequent to its declaration of constitutional invalidity in part, in *Qwelane*,³⁶ the section reads³⁷ that no person may publish, propagate, advocate or communicate words which are based on one or more of the grounds prohibited by the Act (which are listed in s 1) 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.

(ii) The constitutional context

²³ *Qwelane v SA Human Rights Commission* 2021 (8) SA 579 (CC) paras 87-90 and fn 125.

²⁴ Such as the Universal Declaration of Human Rights (articles 19 and 20) which make it mandatory for member states to prohibit hate speech and the International Covenant on Civil and Political Rights (ICCPR) which provides (in article 20) that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

²⁵ Section 319(1) of the Canadian Criminal Code.

²⁶ Section 130(1)(b) of the German Criminal Code.

²⁷ Section 266b of the Danish Criminal Code.

²⁸ The Prevention and Combatting of Hate Crimes and Hate Speech Bill.

²⁹ *Qwelane* n 23 para 95; *Afriforum v Nelson Mandela Foundation* ('Afriforum 1') 2023 (4) SA 1 (SCA) para 60.

³⁰ Section 7 of the Act.

³¹ Section 8.

³² Section 9.

³³ Section 12.

³⁴ Section 11.

³⁵ *Afriforum* n 29 para 60.

³⁶ Note 23 para 198.

³⁷ Sections 10(1)(b) and (c), section 10(1)(a) having been struck down as unconstitutional.

34. The starting point for an analysis of the meaning and effect of s 10 is the Bill of Rights.³⁸ As the provision is located at the 'confluence' of the three primary, fundamental rights of equality, dignity and freedom of expression,³⁹ it involves a delicate balance between them,⁴⁰ and one is required to interpret it in a manner which is congruent with them.⁴¹
35. As to the importance of these rights and their interplay, against the position they occupy in our constitutional dispensation, it has been said that the right to equality lies at the heart of our constitutional order and is a core foundational value,⁴² as is the right to dignity.⁴³ In *Qwelane* it was noted⁴⁴ that in order to give meaning to the right to dignity, the notion of equality which underpins our constitutional order is not merely formal but substantive in nature, and so aims to deal with systemic patterns of unfair discrimination.⁴⁵ Thus, the constitutional prohibition against unfair discrimination provides a 'bulwark' against invasions of the right to dignity.⁴⁶ At its heart, it aims to establish a society in which all persons in this country will be accorded equal dignity and respect.⁴⁷ In this regard, some 32 years ago in *Makwanyane*⁴⁸ the CC warned that, given our discriminatory past where people of colour were denied respect and dignity, respect for these foundational values is particularly important.
36. To give effect to the right to equality, s 9 of the Constitution sets out a list of grounds,⁴⁹ which in turn are repeated as prohibited grounds in the Equality Act,⁵⁰ on which no person may unfairly discriminate, directly or indirectly, against anyone. These include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

³⁸ *Afriforum v The Economic Freedom Fighters ('Afriforum 2')* [2024] 3 All SA 319 (SCA) para 52.

³⁹ *Qwelane* n 23 para 49.

⁴⁰ *Afriforum 2* n 38 para 52.

⁴¹ *Qwelane* n 23 para 54.

⁴² *Qwelane* n 23 para 56 (following *The Minister of Finance & Ano v Van Heerden* 2004 (6) SA 121 (CC) para 22.

⁴³ *S v Makwanyane & Ano* 1995 (3) SA 391 (CC) para 328, cited in *Qwelane* n 23 para 64.

⁴⁴ Note 23 para 58.

⁴⁵ *Id.*

⁴⁶ *Id.*, para 62.

⁴⁷ *President of the Republic of SA & Ano v Hugo* 1997 (4) SA 1 (CC) para 41; *Qwelane* n 23 para 62.

⁴⁸ Note 43.

⁴⁹ In ss 9(3) and (4).

⁵⁰ With the addition of HIV status.

37. As far as freedom of expression is concerned, which is guaranteed in terms of s 16 of the Constitution, the CC has held that it is of the utmost importance in the kind of open and democratic society to which we aspire, because it is an 'indispensable facilitator' of a vigorous and necessary exchange of ideas.⁵¹ As was noted in *Democratic Alliance*⁵² our Constitution recognises that citizens must be able to hear, form and express opinions freely, for freedom of expression assists in the protection of our democracy by informing the public, encouraging debate, and enabling 'folly and misgovernance' to be exposed, thereby fostering accountability. In this regard, in *Afriforum 2*⁵³ the SCA held that, given the right which every citizen has (in terms of s 19 of the Constitution) to make political choices, to participate in the activities of a political party, and to campaign for a political cause, it is through the free expression of political ideas that our system of government ultimately operates. In *Islamic Unity*⁵⁴ the CC held that encouraging a free and open exchange of information, ideas and political views in a democratic society based on pluralism, tolerance and broad-mindedness, must accordingly allow for the expression not only of inoffensive material, but also that which may offend, shock or disturb. Given the 'historical stains' of our colonial and apartheid past, our constitutional democracy therefore requires a degree of tolerance towards the expression of speech or political ideas which shock or offend,⁵⁵ and freedom of expression ought to be 'treasured' and promoted, given our highly intolerant and suppressive history.⁵⁶ As was explained in *Hotz*,⁵⁷ freedom of speech in our country must be robust, and the ability to express hurt, pain and anger is vital, if the voices of those who see themselves as oppressed or disempowered are to be heard.
38. That said, although it is fundamental to our democracy, the right to freedom of expression is not a 'paramount value' nor does it enjoy 'superior status' in our law.⁵⁸ Thus, whilst s 16 of the Constitution provides that everyone has the right

⁵¹ *Qwelane* n 23 para 68; *EFF & Ano v Minister of Justice & Correctional Services & Ano* 2021 (2) SA 1 (CC) para 1.

⁵² *Democratic Alliance v ANC & Ano* 2015 (2) SA 232 (CC) paras 122-123, cited in *Qwelane* n 23 para 72.

⁵³ Note 38 para 53.

⁵⁴ *Islamic Unity Convention v Independent Broadcasting Authority & Ors* 2002 (4) SA 294 (CC) para 26; *Qwelane* n 23 paras 73-74.

⁵⁵ *Qwelane* n 23 para 75, referring to *EFF* n 51 para 2.

⁵⁶ *EFF* id.

⁵⁷ *Hotz & Ors v University of Cape Town* 2017 (2) SA 485 (SCA) para 67.

⁵⁸ *Qwelane* n 23 para 74; *Khumalo & Ors v Holomisa* 2002 (5) SA 401 (CC) para 25.

to it, which includes the freedom to receive or impart information or ideas, it also provides that it does not extend to the propagation of propaganda for war, the incitement of imminent violence, or the advocacy of hatred based on race, ethnicity, gender or religion, which constitutes an incitement to cause harm.⁵⁹ Consequently, hate speech is the antithesis of the constitutional values that have been outlined: whereas freedom of speech and expression serve to advance democracy, hate speech is destructive of it.⁶⁰ As was noted by the Canadian Supreme Court in *Whatcott*,⁶¹ whilst political speech or expression contributes to democracy by encouraging the exchange of opposing views, hate speech shuts down dialogue by making it difficult or even impossible for members of a targeted group to respond, thereby stifling discourse, and history has shown that some of the most damaging hate rhetoric was sought to be justified on the basis that it constituted ‘moral, political or public policy’ discourse. Consequently, the fact that a speech or expression is political in nature does not immunize it.

(iii) Hate speech: a conceptual definition and principles of interpretation

39. What then, constitutes hate speech and how is it to be determined? Given the wide latitude afforded to freedom of expression our highest courts⁶² have endorsed the approach which has been followed in Canadian jurisprudence, as set out in *Taylor*,⁶³ *Andrews*⁶⁴ and *Keegstra*,⁶⁵ a trilogy of cases which were decided by its Supreme Court in 1990, and endorsed in its later decision in 2013 in *Whatcott*,⁶⁶ that it comprises speech which is not simply offensive, but which expresses ‘extreme detestation and vilification’ and thereby risks provoking violence or discriminatory activities against its target.⁶⁷ As was elucidated in *Andrews*, to promote hatred via hate speech is to instil ‘detestation, enmity, ill-will and malevolence’ in others, and (as per *Keegstra*) it is ‘predicated on

⁵⁹ Sections 16(2)(a)-(c) of the Constitution.

⁶⁰ *Qwelane* n 23 para 78.

⁶¹ *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467 paras 116-117.

⁶² *Qwelane* id paras 80-82 and 103; *Afriforum 1* n 29 para 52.

⁶³ *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR at 892 at 928.

⁶⁴ *R v Andrews* [1990] 3 SCR 870.

⁶⁵ *R v Keegstra* (1990) 3 CRR (2d) 193 (SCC); [1990] 3 SCR 697.

⁶⁶ Note 61 p 471, where it was held that hate speech excludes expression which although ‘repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects’.

⁶⁷ *Qwelane* n 23 para 81.

destruction' and 'thrives on insensitivity and bigotry'.⁶⁸ As such, it is speech that goes beyond merely 'discrediting, humiliating or offending' its victims.⁶⁹

40. As is apparent, there are two requirements that need to be met, in terms of s 10 of the Act, for speech to be classified as hate speech by our courts: it must be 'based' on one or more of the prohibited grounds of discrimination, as set out in s 1 of the Act, and it must contain an expression which 'could reasonably be construed to demonstrate a clear intention to be harmful' or to incite harm, and to promote or propagate hatred. The CC confirmed, in *Qwelane*,⁷⁰ that the second requirement postulates an objective, reasonable person test, not a subjective one which is based on an interpretation of the expression as advanced by either the speaker/author, or the target. If the test were to be the subjective perception of the latter it would be too wide and would unduly encroach on the right to freedom of expression, and encourage claims based on trivial actions by hypersensitive persons. Conversely, if it were to be the subjective perception of the former, the threshold for civil liability would be set too high.⁷¹ And given the requirement in relation to demonstration of the likely incitement of harm and the propagation of hatred, it is the effect of the expression and not the intention of the speaker/author that is to be determined.⁷² To this end, as the test is an objective one the court is required to consider the facts and circumstances surrounding the expression, which give context to it, and not merely the expression on its own and inferences and assumptions made by the target.⁷³
41. The question the court must answer is whether a reasonable person hearing or reading the words used *could*, not *would*, conclude that they demonstrate i.e. show that the speaker/author had a clear intention to bring about the prohibited consequences of likely harm and the propagation of hatred.⁷⁴ In order to succeed there is no need for the applicant to show that actual harm ensued pursuant to the utterance, for likely harm (or as it was put in *Whatcott* ⁷⁵ – a

⁶⁸ *Keegstra* n 64, cited in *Afriforum 1* n 29 para 52.

⁶⁹ *Whatcott* n 61 para 41.

⁷⁰ Note 23 para 96.

⁷¹ *Id* para 99.

⁷² *Id* para 97, referring to *SAHRC v Khumalo* 2019 (1) SA 287 (GJ) para 89.

⁷³ *Id* para 96.

⁷⁴ *Id*.

⁷⁵ Note 61 paras 132-135

reasonable apprehension of harm ensuing) will suffice, and there is no need to prove a causal link between the expression/utterance and any harm that befell the target.⁷⁶ Furthermore, the harm does not have to be physical and includes its emotional and psychological manifestations, and can extend beyond the target thereof to harm which may be done to the 'society at large'.⁷⁷ This includes harm to 'social cohesion' which can 'undermine our nation-building project'⁷⁸ and incitements to discrimination and the fostering of hatred against persons or groups.⁷⁹

42. Ultimately, the criterion is what meaning the person of 'ordinary' (*Qwelane*⁸⁰) or 'reasonable' (*Afriforum 2* ⁸¹) intelligence, would attribute to the words used in their context. Such a person would have regard not only for what is expressly stated in the expression or statement but also for what is implied thereby. This would include the meaning and ideas i.e. the message behind the words used, which is imparted by them.⁸² Having regard for the need to consider the words used in their proper context, this has resulted in them not always being given their plain, literal or ordinary grammatical meaning, in hate speech cases.⁸³ As for context, it includes the identity and status of the speaker and the audience and the circumstances in which the speech or expression was uttered.⁸⁴
43. Determining the meaning of the words used is a function which falls within the exclusive aegis of a court, as it resorts within its expertise, competency and responsibility.⁸⁵ However, insofar as the meaning to be afforded the words used

⁷⁶ *Qwelane* n 23 para 109; *Afriforum 2* n 38 para 62.

⁷⁷ *Qwelane* para 154, following the Canadian jurisprudence (vide *Whatcott* n 61 paras 132-135, which referred to 'societal' harm) and *SAHRC v Khumalo* 2019 (1) SA 289 (GJ) paras 95-97.

⁷⁸ *Qwelane*, Id.

⁷⁹ Id para 107; *Afriforum 2* n 38 para 62.

⁸⁰ Id para 97, with reference to *Le Roux & Ors v Dey (Freedom of Expression Institute)* 2011 (3) SA 274 (CC) para 89.

⁸¹ Note 38 para 61.

⁸² *Qwelane* paras 113-115; *Afriforum 1* n 29 paras 37-38.

⁸³ *SAHRC obo SA Jewish Board of Deputies v Masuku & Ano* 2022 (4) SA 1 (CC) para 154; *Afriforum 2* n 38 para 92. Vide the meaning which was given to the 'Dubula ibhunu' ('Kill the Boer') protest song and associated gestures in *Afriforum 2* (paras 92 and 98-99), where it was held not to be a literal call for white farmers of Afrikaner descent to be shot; *Gordhan v Malema* 2020 (1) SA 587 (GJ) paras 15-16 where the reference to the former Minister of Finance as a 'dog of white monopoly capital' who was to be beaten, was considered to be metaphorical, and not advocating actual violence to be done to him, and *Hotz* n 57 para 69 where it was held that 'whatever' the phrase 'F..k White People' (which was written on a T-shirt), was intended to mean, it was nothing more than a crudely worded slogan which indicated that the writer 'disliked' or 'rejected' white people (sic).

⁸⁴ *Qwelane* para 176.

⁸⁵ *Masuku* n 83 paras 143-144.

depends on the context in which they were uttered, evidence that ‘shines a light’ thereon, including expert evidence, may be admitted if it assists the court with such an exercise.⁸⁶

An evaluation

(i) The expert evidence

44. In her evidence Dr Van Der Berg confirmed the contents of her expert report. What follows is an attempt to set out a summary of the salient features thereof and her *viva voce* testimony.
45. She testified that, from a linguistic perspective, words used in expressions of speech can have 3 different meanings: 1) Locution, which is their literal meaning 2) Illocution, which refers to their intended i.e. ‘speaker/author’ meaning and 3) Perlocution, which is their understood i.e. recipient meaning.
46. Given her understanding of the treatment of hate speech in SA law, as she understood it her linguistic analysis required a consideration of the words uttered in their context, the linguistic and ‘social’ intention of the utterance, and the impact or likely effect of it on the target/members of society. Linguistic intent, as in the case of the legal notion of intent, is a technical concept which refers to the purposive communication of an expression and the result it aims to achieve.
47. To conduct her analysis she had regard for the whole of the 1st respondent’s speech, which she transcribed from the full video text to word format, and from there to plain text format, so that it was compatible with the software packages she used.
48. She considered both the semantics and pragmatics of the language used in the speech. Semantics are concerned with the language and grammatical structures used and reflect the speaker’s tone and message. Pragmatics consider how the words and structures are used from a functional perspective.
49. She made use of different, accepted linguistic principles and tests or techniques including Systemic Functional Linguistics (SFL), Speech Act Theory (SAT) and Co-operative Maximums. SFL analyses the language used and the functions it serves, in the context of field, mode and tenor, which provides an insight into the purpose of the communication, the audience and the social dynamics.

⁸⁶ Id paras 144-145; *Afriforum* 2 n 38 para 97.

- 'Field' relates to the terrain in which the speech resorts, 'mode' to its form i.e. whether it is written or spoken and 'tenor' to its tone in relation to the audience.
50. SAT examines how the speaker used language to perform various 'speech acts' such as making assertions, giving commands, asking questions, making promises etc. It explores the relationship between the speaker's intention, the form of the utterance, and the intended effect on the listener. 'Co-operative maxims' pertain to the expression's quality (truthfulness) quantity (sufficiency), 'relation' (relevancy) and manner (clarity).
 51. From the application of these principles and tests/techniques she arrived at the following findings and conclusions. The speech fell within the field of political activism and aimed to challenge the audience and to inspire action on its part. In this regard the 1st respondent criticised EFF members and leaders for their failure to attract unemployed individuals and to gain power in the Western Cape and questioned the organisation's ability to create jobs and address land ownership patterns. The speech also focused on the organisation's response to racism and violence. The 1st respondent criticised the organisation for not addressing instances of violence by white males and emphasised the need for a strong response and commitment to confronting racism. He emphasised the importance of standing up to white supremacy and suggested that violence was necessary to end racism. As far as its tenor was concerned the speech was confrontational and provocative. It aimed to incite the audience to act and to bring about change, in response to its content.
 52. In delivering his speech the 1st respondent adopted a formal register and spoke authoritatively, in language that was clear and easily understandable, which increased the likelihood that his address would be clearly understood and would elicit the required response.
 53. The speech was not metaphorical in nature, nor was it nuanced, but phrased in direct, clear and strong terms. Hence the 1st respondent's use of the modal verb 'must' in his statement that members of the EFF 'must never be afraid to kill because killing is part of a revolutionary act'. Read in its context, this served as an instruction which members were to carry out i.e. to kill, in furtherance of the 'revolution'. The 1st respondent was asserting that a revolution required killing and revolutionary change could only be brought about if killing took place. Although the object of this killing was not expressly identified, read in the light

of the earlier co-text, it was (at least) intended to refer to the 'white man' who was visible 'on camera' i.e. in the video. In this regard, a few sentences earlier in the text, 1st respondent gave his followers an instruction to 'follow up' on the 'white man' who was identifiable on the video and to take him to an 'isolated space' and 'attend' to him 'properly'. The action intended i.e. the 'follow up' clearly did not envisage a legal action being taken but one of violence.

54. In numerous instances the text of the speech incited the infliction of violence and death. The persons on whom this was to be inflicted were white men, who were referred to as 'racists'. From the number of repeated references to the men/man being white, it was apparent that the 1st respondent was emphasising their race, and that he associated this with them being racist.
55. In addition to conducting a macro analysis Dr Van Der Berg also conducted a micro-linguistic analysis of the 1st respondent's speech, which supported her findings. From this she was able to identify the 40 most used words in the speech. Included amongst these were 'us', 'them', 'racism' and the adjective 'white', in relation to people i.e. men and women. A consideration of the location and use of these words, and associated terms and emotive language surrounding them in the speech, indicated or suggested strong stances and extreme positions in relation to the topics discussed.
56. In concluding, Dr Van Der Berg expressed the view that the average reasonable listener would interpret the statements which had been made by the 1st respondent in the offending portion of his speech as a deliberate incitement to violence towards white males, who were racists.
57. Inasmuch as Dr Van Der Berg's analysis was concerned with a linguistic interpretation of the language of the offending statements in the context of 1st respondent's speech, and was one undertaken on the basis of interpretative principles which are analogous in certain respects to those which a court is enjoined to follow, I found her evidence to be illuminating and of some assistance. The same, unfortunately, cannot be said for the evidence of Prof Friedman, who I found to be an unsatisfactory witness, an assessment with which the respondent's counsel agreed, during argument. In this regard it may be useful to set out some general remarks in substantiation, before proceeding to illustrate these by way of examples drawn from his testimony.

58. As a political scientist Prof Friedman's principal area of expertise is the study of the political theory of democracy, a topic on which he has published several academic articles and book. However, despite being a political scientist, save for a reference in a single paragraph of his report to 'black consciousness' (a philosophy espoused in this country by Steve Biko, which he said seeks to instil a sense of pride in black people and to motivate them to free themselves from domination), an explanation of the term 'whiteness' (a condition pertaining to the belief and behaviour that whites are superior to others) and a trite note that SA has a history of racial oppression, division and inequality which did not end with the adoption of the Constitution in 1994, in his report and in his evidence in chief he made no effort to provide an exposition of the political and ideological context in which the 1st respondent's speech was made and was to be adjudged. In this regard there was not even a reference to the central tenets of the EFF's political ideology and philosophy, based as it is on the Marxist-Leninist and Fanonian schools of thought. Prof Friedman only referred to the political and social context which needed to be considered when this was raised with him during cross-examination. It transpired, during cross-examination, that he was not even aware of what the purpose of the 'meeting' (sic) was, at which 1st respondent delivered his speech and it seems that the opinion he provided was based simply on a consideration of the text thereof. In his view the purpose of the 'meeting' i.e. the occasion at which 1st respondent made his speech was not relevant to the analysis he conducted of it. Thus, the political context in which the speech was made was not considered.
59. Ironically, although he made no attempt in his report, or his evidence in chief, to assist the court by providing it with the context he was qualified to provide, he was wholly dismissive of the views and opinions of Dr Van Der Berg, which he considered 'entirely invalid'. When pressed to explain he said that it was akin to someone claiming they had invented a mathematical formula which could tell whether someone was racially prejudiced or not, which they elegantly set out over several pages, but which could not be comprehended. When it was pointed out that inasmuch as linguistics concerns the study of language and its structures (including the use of grammar, syntax and phonetics), an exercise relevant to that which the court was to engage in to arrive at the proper meaning to be afforded to the words that were used, he was still not willing to concede

the relevance thereof. In his view, the question of whether the text constituted hate speech was a political and legal question and he failed to see how linguistics could shed any light thereon. On being pressed further he said that whilst it may have some value it could not provide the historical, political and social context in which the speech was to be interpreted, which he was able to do. In his view it was very important that those who were called to give expert evidence restricted themselves to doing so on issues and aspects on which they were qualified.

60. Notwithstanding this injunction, and although he often remarked that he was not a lawyer or scholar of the law and was not qualified to do so, he repeatedly made authoritative and definitive pronouncements as to what constituted hate speech and that portions of the 1st respondent's speech did not, a function which the court was required to perform and not him. And he did so when, by his own admission, he had no real knowledge of what the legal requirements of hate speech in SA law are, or the test that needs to be met. In this regard he seemingly did not even know what the formal requirements of hate speech in terms of s 10 of the Act are. Unlike Dr Van Der Berg he had not attempted to consider the case law on the subject and did not even know what the objective test, as it was applied in *Masuku*,⁸⁷ a matter in which he gave evidence as an expert on behalf of the Jewish Board of Deputies, entailed.
61. As will be apparent from what follows, some of his pronouncements were predicated on incorrect understandings or assumptions that are not part of our law pertaining to hate speech, and at times his evidence came across as contrived, even disingenuous, and cynical. In this regard, his evidence was premised on his understanding that speech or expression is only hate speech if it is directed at a whole group and not when it is directed at an individual (who is, or may be, a member of a group), and only when it is targeted at a person's 'identity' or as he put it, 'who they are' (which he seemed to base on some attributes such as race and gender but not others, such as one's beliefs), and not when it is directed at 'what they do' i.e. their actions. He also was of the view that unless the speech in question is based 'purely' (sic) on a person's race (being the ground in issue in this matter), it could not qualify as hate

⁸⁷ Note 83.

speech. When his understanding and application of these assumptions was explored in evidence, by reference to certain hypothetical situations or circumstances, his testimony became convoluted and inconsistent. Examples of this will be set out in the paragraphs that follow.

62. On several occasions during his cross-examination he became evasive and failed to answer questions that were put to him, or deflected them, and had to be warned of the adverse consequences that could follow. After being apprised of this he said that whatever the cost and whatever the consequences, he was not prepared to be drawn into a situation in which he was asked to respond to questions about issues which he had not been asked to testify about. That then by way of general remarks.
63. Prof Friedman commenced his evidence by pointing out that the principle of equality viz that all human beings are entitled to equal treatment and should not be discriminated against on the basis of their race, gender or belief, was central to democracy. Equally, the principle of free speech was cardinal to it. Because it was impermissible to discriminate against people based on 'who they are' (as pointed out he seemed to consider this to mean certain personal attributes or characteristics such as a person's race and gender), it was legitimate for democratic societies to outlaw speech which targeted people and threatened harm to them 'purely'(sic) because of their 'identity', and therefore hate speech legislation was 'valid' in democracies. However democratic principles also required that this control over free speech should be limited as far as possible, as there was a danger that it could be used to restrict or outlaw legitimate political speech and expression, including speech which sought to oppose discrimination and racial injustice, and it could be used to inhibit efforts to achieve racial equality.
64. In his view, most of the 1st respondent's speech was no more than an assertive and vigorous way of opposing what 1st respondent saw as racial domination and white privilege, and did not express hatred, nor did it clearly incite harm, to white people. None of the speech could be classified as hate speech.
65. In his speech 1st respondent had referred to 'whiteness' and 'white supremacy'. 'Whiteness' is a term that is frequently used in scholarly discussions of racism and refers not to the condition of being white but to beliefs and behaviours which reflect the assumption that whites are superior to persons of colour. The 1st

respondent identified with and referenced 'black consciousness', a philosophy espoused by Steve Biko and others in SA, which sought to instil a sense of pride in black people and to motivate them to free themselves from domination. The 1st respondent's comments in relation to 'whiteness' and white supremacy were not attacks on white people as a whole, or as a group. In this regard 1st respondent had said that every white person who did not own the means of production 'belonged' to the EFF. Thus, he had said 90% of white people belonged to the EFF, as only 10% of whites owned the means of production. He also expressed support for white women and white 'hobos' who did not own land. This was a clear indication that he considered the vast majority of whites to be allies, not enemies. On this ground alone none of what the 1st respondent had said could constitute hate speech, as it did not include all whites.

66. The only exception to this pattern in the speech was a reference to white people who violently attacked blacks. He had taken his audience to task for not doing anything about this and was explicit in his view that violence should be met with violence. He was accordingly urging his listeners to respond violently if they were the victims of violence. Although many people might find this to be unacceptable this did not constitute hate speech.
67. Likewise, it was not hate speech to say that one racial group (whites) was dominating another (blacks). Criticising racial domination required, of necessity, the use of racial language to identify the groups involved. It only became hate speech if the remedy suggested for the domination was 'collective punishment' of the group. In the same vein, it was not hate speech to say whites were still privileged. It would only become hate speech if 1st respondent had, for example, said that whites should 'all' be imprisoned because they were privileged, for then he would be saying that the entire group should be punished.
68. According to him, a 'key feature' of the law's definition of hate speech was that it targeted a person's 'identity' and not their actions. Hostility to groups of people prompted by what they do rather than what they say or 'what they are' was thus not hate speech. So, if one were to say that white people who own factories are 'exploiters' this would not be hate speech as one is referring to a very specific group, and if they want to be on the wrong side of the law they can remedy this by ceasing to exploit people. If one were to say we must discriminate against all whites because some own factories and exploit people, that would be hate

speech, because one is implicating all whites, simply because they happen to be of a particular racial group, not only those who own factories. If one were to say that one hates Jews as they are Zionists who have killed many people in Gaza that would be hate speech. However, if one were to say that a particular Zionist Jew should be taken round the corner and be 'attended to', because one hates Zionists for what they have done in Gaza, that would not be hate speech. The rationale for distinguishing this from the previous example was that one 'chooses' to be a Zionist (i.e. to believe in Zionism) and is not 'born' as one, unlike a Jew, Muslim, or black or white person, and the Zionist in the second example was being singled out for what he had done and not for 'who he was'. In like vein, If one were to say that one hates Christians, but not all Christians, only Pentecostals, and a Pentecostal should be taken round the corner and 'attended to' that would be hate speech, but if one were to say if you find any Pentecostal that stole my money they should be killed, that would not be, as one was 'concentrating' on what the Pentecostals had done rather than their religious identity. If one were to say that a white should be taken to an isolated place and 'attended to' because they stole my money that would not be hate speech, but if one were to say take their sister or 'some other white', that would be. But it would be hate speech if you said someone was a bad person because they were a Muslim and Muslims had destroyed the World Trade Centre.

69. Similarly, it is not hate speech to denounce the actions of some members of a racial group, even if racial language is used to do this, if the purpose is to oppose the behaviour and not the group. Thus, to say that white people who behave in a particular manner or way should face certain consequences is not hate speech as long as one did not implicate everybody, or anybody, simply because they were a member of that group. To express the view that whites who mistreat blacks should be punished is not hate speech as it does not target an entire group but only those who engage in certain types of behaviour, and they could ensure that no harm was done to them by simply refraining from continuing with their actions.
70. Thus, 1st respondent's urging of his followers to respond violently to whites who violently attack them did not constitute hate speech, as it was not directed at white people as a group. It was directed at 'very few' white people and in any event those who were doing so could just 'stop beating up black people' and

the 'problem would go away'(sic). The 1st respondent's comments were clearly directed at people's actions rather than their membership of a racial group. By targeting whites who beat up EFF members he was therefore not guilty of hate speech as he was targeting specific white people and not whites as a group.

71. Likewise, where comments are directed at a subset of a group as opposed to the whole/entire group they also cannot constitute hate speech. So, 1st respondent's comments that they were in a war with white supremacists rather than with white people as a group, could not possibly constitute hate speech. If 1st respondent was wanting to target white people as a group, he would not have spoken about white supremacists but would have spoken about whites as a whole, or generically.
72. As he understood the concept of hate speech it consists of attempts to blame all members of a group for the behaviour of some, and to urge that they all be punished, as a group. In this case 1st respondent had targeted a very specific group of people and it was therefore 'quite insulting' to whites to claim that this was hate speech directed at whites. It could only be hate speech if one was implying that there were a large number of white people who were racists and who beat up members of the EFF, which was clearly false, as 99.9% of white people did not do such a thing.
73. Labelling 1st respondent's statements as hate speech would suppress lawful political expression and violate core democratic principles of the Constitution.
74. When pressed, during cross-examination, on his stance that one cannot be guilty of hate speech when you target an individual, he contradicted his earlier evidence by conceding that an individual could be the victim of hate speech, but only if they were singled out as a member of a group.
75. He conceded that 1st respondent's statement that the white man who was visible on the video should be taken to an isolated spot and 'attended to properly', in the context of the surrounding remarks, was an unequivocal and clear instruction that violence should be meted out to him. He agreed with Dr Van Der Berg that there was nothing nuanced in the language 1st respondent used, which was clear and direct. He nonetheless maintained that whilst this might be unacceptable and could constitute an incitement to commit a criminal act, it was not hate speech, as it was directed at the white male because of what he had done, and not because of 'who he was' i.e. a white, and was not

directed at all whites, but only him. The reference to the male's race was crucial because he beat up members of the EFF as he was a racist i.e. he believed he was superior to blacks.

(ii) The ideological, political and contextual context

76. The meaning to be afforded to the offending portion of the 1st respondent's speech must be derived at by considering the text in its political, ideological and textual context.
77. As to the ideological and political context the following. According to its constitution the 2nd respondent is a political party which styles itself as a radical, left, anti-capitalist and anti-imperialist movement with an internationalist outlook, which subscribes to the 'Marxist-Leninist and Fanonian schools of thought' in its analysis of the SA state and class and race contradictions in its society. In its manifesto it says it provides a cogent alternative to the post-colonial economic system, which perpetuates colonial domination and suppression.
78. As far as Marxist-Leninist ideology is concerned, it is trite that it is based on the theories propounded by Karl Marx (a German philosopher best known for his works *The Communist Manifesto* and *Das Kapital* in which he analysed and critiqued the political economy of capitalism) and Vladimir Lenin (the leader of the Bolsheviks in the Russian revolution which overthrew the Tsarist government in 1917, and first head of Soviet Russia), which postulates a revolution whereby the working class ('the proletariat') overthrows the capitalist state and substitutes it with a one party 'communist' state, which controls the means of production and the economy.
79. As far as Fanonism is concerned, it refers to the philosophy and works of Frantz Fanon, a West Indian/Algerian psychiatrist who wrote several works on colonialism and its connection with racism, which analysed the dehumanising effects caused by the physical and psychological violence meted out on colonised populations by their colonisers. In his writings Fanon advocated a revolutionary approach to decolonisation, to achieve political and psychological liberation. As pointed out by the respondents, in *The Wretched of the Earth* (which was published in 1961 shortly before his death), Fanon defended the right of a colonised people to use violence to achieve freedom and independence, arguing that persons who are not treated as, and considered to

be, human beings by their colonisers, are not bound by principles that ordinarily apply. Thus, in the opening chapter of the work (titled 'Concerning Violence') he contended that, as violence is a fundamental element of colonisation which is visited upon the colonised as part of colonial oppression, it is necessary and legitimate to use it, in return, to overthrow the colonial state.

80. In section 3 of the 2nd respondent's constitution (as amended in 2024), which is headed 'The Character of the EFF', it says that its basic program is 'the complete overthrow of the neo-liberal, anti-black state as well as the bourgeoisie and all other exploiting classes, the establishment of the dictatorship of the people in place of the dictatorship of the bourgeoisie, and the triumph of socialism over capitalism', as a vanguard mass organization which is to lead the 'revolutionary masses against the capitalist class enemy', and in section 4 it declares that its aims and objectives are to capture political and state power 'through whatever revolutionary means necessary'.
81. As its President and Commander-in-Chief, 1st respondent is the political head of the party and leader of all its activities, which he may 'orientate and direct', and is empowered to make pronouncements for and on its behalf.
82. The 2nd respondent's constitution provides for various organizational structures and assemblies, including a provincial People's Assembly, which is to be held once every 4 years in every province in which it has members. The purpose of the Assembly is to receive a political report from its chairperson, an organizational report from its secretary, and a financial report from its treasurer, and to adopt a programme of action for the next 4 years, and the necessary resolutions to give effect thereto.

(iii) The textual context

83. At the commencement of his speech 1st respondent noted that those in attendance had come to the assembly to seek alternative solutions to the economic crises that were facing the people of the Western Cape and South Africa, which was struggling with land dispossession which had started in 1652. They had come to discuss what peaceful constitutional processes could be used to reclaim the land which had been stolen from the Khoi, San and African people. They also sought solutions to the poverty in which they were living, in a province where the richest of the rich were living next to the poorest of the poor, and the lack of employment, schooling and proper housing.

84. He noted that when one travelled from the airport one found people living 'like sardines' in shacks, in 'dumping areas' and squatter camps, whilst the racists lived on the other side of the road, and one need not have recourse to literature to experience racism, one could simply come to the Cape Metro. This was the consequence of colonial and apartheid spatial planning which had directed that blacks should not live in cities and towns, which were reserved for the whites. Whilst people were living like 'animals' in the Western Cape, they were told that it was the best run province under the DA. This was true for the whites, but not for the majority who lived in the province.
85. He spoke of the high crime rate in a province where hundreds of mass shooting cases were reported to the police, of which 90% involved black people. He contended that only the EFF could offer a solution to the crime that affected people on the Cape Flats, Nyanga, Phillippi and elsewhere.
86. He enquired what needed to be done to win the coloured vote and said they wanted people to live amongst them who appreciated their challenges and worked to find solutions for them, not persons who would be co-opted by gangsters and drug dealers. That was why the DA was unable to deal with the problem of gangsters and criminality, because its councillors were financed by drug dealers and gangsters. Black people living in the Western Cape were referred to as immigrants, by Helen Zille and others who had no regard for black lives and wanted the Western Cape to become an independent country, so that it could be an exclusive area for white people.
87. He noted that despite the conditions in which people lived the EFF was unable to attract the vote of the landless and queried whether this was because the leadership of the EFF in the Western Cape was lazy. He queried why, with such high unemployment and a government that did not have a plan to create jobs or to change the patterns of land ownership, the organisation was not able to attract people to join it, when it had a clear program for creating jobs.
88. He said that the land occupation programme which was being followed was one that mimicked the spatial planning of the colonial and apartheid state in that it sought land that was outside of the metros. He queried whether there had been any attempt to occupy land in prime areas, or whether it was only land that was 'rotten' and which washed away when it rained, and on which there were no basic services, which was occupied, which did not bother the white minority. He

called for the occupation of land in white suburbs or areas next to them, because if people moved in there, basic services and proper housing would be provided as 'whiteness' would be threatened.

89. He asked why an 'organisation of Frantz Fanon', which prided itself on black consciousness and which existed amongst racists and white supremacy, was not able to attract victims of racism, and whether it had sought to help them and to confront racism in the Western Cape. Then followed the offending portion of the speech, which is set out verbatim above, to which I will revert.
90. Thereafter his speech continued with him asking how the organisation could move from winning only 3% of the provincial vote to 51% thereof, without going into coalitions with the ANC or DA white racists. He said that anyone who did not own the means of production, monopoly industries, banks, and insurance and finance companies, and white women who were excluded by their white Afrikaner husbands (who had no regard for them and beat them every Friday and then made them 'cancel' their criminal cases on the Monday), and white 'hobos' who did not own land, which included 90% of whites, 'belonged' to the organisation and should be recruited to join it.

(iv) The offending portion and its meaning

91. I now turn to deal with the offending portion of the speech, which must be construed in the political, ideological and textual context referred to. It is noticeably incongruous with the rest of the speech.
92. It was not concerned with an analysis of the state of the 2nd respondent as an organisation in the Western Cape and its political aims and objectives, or how it could be grown to attract a larger share of the vote, or the abject living conditions of people in the province.
93. It was concerned with avenging a past wrong which had been done to members of the party 2 years earlier, which 1st respondent described as an act of racist violence and which therefore (in terms of the Fanonian/Marxist-Leninist ideology to which the respondents subscribed), required that it be met with the infliction of violence in return.
94. It commenced with a reminder that the incident was one where members of the organisation were beaten by 'white people' and nothing had been done to exact retribution for this. It pointed out that there was a 'white man' visible on a video of the event, who had not been 'followed up on' by being taken to an 'isolated

space' to be 'attended to properly'. Those listening were derided for calling themselves revolutionaries, as they had allowed themselves to be beaten by 'a white man' who they had never 'followed up (on) - 'or the same white man that had beaten them up' (sic). The 1st respondent was thus indicating that the white *men* who had beaten EFF members in the assault should be the object of the retribution.

95. The listeners were then told that they should never be scared to kill as they were engaged in a revolution, and a revolution demanded that at some point there should be killing, because killing was part of the act of revolution. The reference to killing was clearly a reference to those who had beaten them up. Thus, those listening to the speech were told who the targets of the retribution which was to be exacted were, how they were to be identified, and what form the retribution should take i.e. that they should be killed.
96. They were reassured by being reminded that at some point Nelson Mandela (a revered national leader), had taken up a gun 'because the revolution had reached the point where there was no longer an alternative but to kill'. They were told not to be scared to kill and that anything which stood in the way of the revolution was to be 'eliminated'. Thus, they were being told that now was the time for killing. They were reassured that they were not being asked to do anything which the speaker, their leader, had not done, when he had reacted to a racist act at the funeral of Winnie Madikizela-Mandela, the former wife of Mr Mandela.
97. They were reminded that the organisation's founding manifesto proclaimed that it will take power 'by all means necessary' and therefore, when confronted by 'such a situation' members should never think twice, 'as cowards are not for the revolution'. It should 'be known' that the organisation was not a 'playground' for racists and that if any racist 'plays' next to it and 'threatens and beats up its membership and leadership', this would constitute 'an application to meet your maker with immediate effect'. The message that was being conveyed in this passage, in the context of what preceded it, was that when members of the organization were confronted by an act of racist violence in the future, they were to respond to it with the ultimate response: the killing of those responsible.
98. They were adjured, again, to 'follow up' on 'the racist' who had beaten them, as racism was violence and violence could only be ended by violence, not any

other 'necessary means': a racist was a violent person and should therefore be treated as such. Once again, they were clearly being told that violent retribution should be exacted for what had been done to them. This was no figure of speech but a clear instruction.

99. The offending portion ended with a declaration that the organisation was in a (metaphorical) 'war' between white supremacy and black consciousness and when a white supremacist raised their 'ugly head' members ought to stand up and say that this would not be tolerated, as they would not accept dominance by the white race over the black race, and the Western Cape should be at the centre of the confrontation of white supremacy, as racism was rife in the province.
100. To argue, as Prof Friedman does, that as the offending portion of the speech targeted persons for what they had allegedly done in the past or might do in the future, as opposed to 'who they were', it therefore could not be hate speech, is facile. To enlist the support of a mob and incite it to commit acts of violence, victims of hate speech are routinely accused of all manner of repugnant behaviour by those who vilify them. One only needs to recall what Jews, Muslims and Tutsis were accused of doing, so that hatred and genocide could be fomented against them.
101. In addition, accusations that victims of hate speech have engaged in behaviour which is repulsive or repugnant, are often used as a smokescreen to mask that what they are actually being targeted for, is some attribute, which, as Prof Friedman puts it, goes to 'who they are', such as their race, gender, religion, beliefs, or sexual orientation. This was the case in *Whatcott*⁸⁸ where the respondent had expressed virulent disapproval of homosexual conduct, in flyers which he distributed, in which he advocated that it should be kept out of public schools and universities, as homosexuals were sodomites, paedophiles and 'filthy, dirty, sex addicts'. In answer to a complaint that his statements constituted hate speech he claimed that he was not targeting sexual orientation (which is also a prohibited ground of discrimination in Canada), but sexual conduct. The Supreme Court of Canada rejected this argument. It noted that his speech was directed only at homosexuals who engaged in certain sexual

⁸⁸ *Whatcott* n 61.

acts, and not at heterosexuals who engaged in them.⁸⁹ Thus, the claim by the Saskatchewan Human Rights Commission that the object of the speech was the sexual orientation of the target group, was upheld, and Mr Whatcott was found guilty of hate speech. In my view, the same attempt to mask the target of the speech holds true in this matter.

102. In his opening remarks in the offending portion of his speech 1st respondent pointed out that members of the 2nd respondent were beaten by 'white people' and asked them what they done to 'follow up' on the 'white man/white guy' who was visible on the video. He remonstrated with his audience for not having attended to the 'white man' and asked why they had not taken him to an isolated space and attended to him. The 1st respondent's first, and continued reference to those who were responsible for this act, which was to be avenged, was to white persons.
103. As is evident from the account which was set out of what can be seen on the video, the assault on members of the EFF was not one perpetrated only by whites, and people of colour also participated therein. And not only males were present. Yet, those who were identified as being responsible for it and who were singled out were not people of colour, but only those who were white and male, and the targets of the violence that was to be meted out, as a 'follow-up', were males who were selected on the basis of their race. In terms of the accusation which was levelled in the speech it could not be otherwise, for the target was referred to as a racist because of the assault which had been perpetrated. One would not expect a black man who had participated in the assault of a fellow black, to be labelled a racist who was guilty of an act of racist violence. The designation of the 'white man' as a racist followed on the nature of the attack and how it manifested and was perceived, as is apparent from the evidence which was elicited from Mr Ntakana in relation to how the 2nd complainant behaved and what he said, by referring to members of the EFF group in racially derogatory terms and querying what they were doing in the area, and telling them that they should go back to the townships.
104. As for Prof Friedman's contention that what was said was not hate speech as it was not based 'purely' on the race of the persons who were targeted, the

⁸⁹ Id paras 122-123, 176.

following. The ordinary, dictionary meaning of the requirement that the words must be ‘based on’ a prohibited ground means that they must be ‘founded’, ‘grounded’ or ‘focused’ on it i.e. that it constitutes the basis or foundation for what was said, as is the case in this matter. The primary basis for singling out targets for retribution were that they were white and male. Both race and gender are prohibited grounds in terms of the Act.

105. As to the contention that because 1st respondent referred to ‘a white man’ in the singular and not to white people as a whole or group, and his comments therefore did not meet the requirements of hate speech, it is evident that Prof Friedman has misunderstood not only what the formal requirements of hate speech are in our law, but also what its essential nature and ambit entail.
106. Section 10(1) of the Act stipulates that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against ‘any person’, and does not require that it be against ‘any group’. In his opening remarks in *Qwelane*⁹⁰ Majiedt J noted, as was said in *Whatcott*, that hate speech subverts the dignity and self-worth of human beings because it marginalises and delegitimizes *individuals*, based on their membership of a group, thereby diminishing their social standing in the broader society, which can ‘ignite’ exclusion, hostility, discrimination and violence. Thus, hate speech may clearly have as its target, individuals, as opposed to the group to which they belong or with whom they identify. Hate speech is commonly directed at specified persons *because* of their membership of a group, rather than directly at the group, but to say that if it is directed at them and not at the group to which they belong, as a whole, the speech vilifying them cannot be hate speech, is plainly wrong. As is evident even from a cursory examination of the prohibited grounds on which hate speech may not be based, as set out in s 1 of the Act, many of them refer to attributes, characteristics, or conditions which are personal to an individual (e.g. pregnancy, age and disability) as opposed to those which may attach to a group (e.g. race, ethnic origin, gender and sexual orientation).

⁹⁰ Note 23 para 1.

107. As was pointed out in *Qwelane*⁹¹ there is often a complex relationship between these grounds, which relate to 'immutable biological attributes or characteristics', the 'associational life' of human beings, or the 'intellectual, expressive and religious dimensions of humanity', and some cases may feature a combination of one or more of these features. Thus, whilst it is so that, as was noted in *Qwelane*,⁹² hate speech prohibitions are aimed at the negative impact which is caused by it on groups and the greater societal harm, as opposed to the specific impact it may have on a single individual, it may be directed at individuals but have an impact which extends beyond them, to the group to which they belong, or to the broader society.
108. There is in any event the further aspect that, from a careful reading of what was said (to which I previously alluded), in the context of the pleadings and the evidence the attack which the 1st respondent launched in the offending portion of his speech was not in fact directed at a single, specific white man, which was assumed to be the 2nd complainant, and therefore at only a single individual.
109. It is so that, in his speech, 1st respondent referred to 'a white man/guy' who was 'visible' on the 'camera' i.e. video, who had beaten EFF members, on whom retribution was to be visited. But a little further on he spoke of revolutionaries who were beaten by 'a white man' that they had never followed up on 'or the same white man' (sic) who had beaten them up. This was clearly a reference to the white men (plural) who had beaten up members. It seems to me wholly implausible and improbable, if not ludicrous, that revenge was only to be exacted on a single white man who had assaulted members of the EFF in a racist attack, and not the others. In this regard, as is apparent from the video footage of the incident several white men participated in the assault.
110. In his founding affidavit 2nd complainant alleged that he was the person who was being referred to by 1st respondent in his speech as 'the white man/guy', an averment seemingly based on the fact that, in response to the speech, he was singled out by EFF members and supporters and threatened on social media. However, it is notable that in their answering affidavits the respondents did not deal with this averment and did not pertinently admit or deny it. In

⁹¹ Id para 132.

⁹² Paras 121-122.

paragraph 6 of his answering affidavit 1st respondent stated that anything which he did not specifically traverse should not be taken as admitted, and his position in relation thereto should be 'deciphered' from the response he gave to the averments in the founding affidavit. In this regard, his only reference to the 2nd complainant was in paragraph 46 of his answering affidavit, where he said that together with a 'grouping' that was seemingly affiliated to him, he had advanced on and assaulted EFF members and was on trial for this. For purposes of 'identification' (for the video no doubt) he was wearing a grey and black T-shirt and black pants, the clothing which 2nd complainant can be seen wearing on the video. In keeping with this non-admission that the 2nd complainant was the person referred to by 1st respondent in his speech, this was expressly contested by the respondents' counsel when the 2nd complainant's attorney, Ms Westley, gave evidence in this regard. To put it simply, 1st respondent denied that the 2nd complainant was the person who he referred to as the 'white man/guy' in his speech. Who then, was he referring to? It was never put to Ms Westley that the 'white man/guy' was a reference to any other white man who was visible on the video.

111. As a result, it seems to me that, when referring to 'a white man/guy' who was visible on the video who should be 'followed up on' or 'the same white man' that had beaten members, 1st respondent was not referring to a *specific* white man but to any, or all, of the white men who participated in the assault, and who could be identified on the video. If this is correct, it means that the reference to 'a white man' was a reference to the group of white men who participated in the assault.
112. Either way, it seems to me that even if the reference to 'a white man' was a reference to a single person, he was selected because of his membership of a group i.e. white people and he was targeted on the ground of his race, a ground prohibited by the Act. Furthermore, his identification as a 'white' man was not racially neutral but, as was the case in *Rustenburg Platinum Mines*⁹³ (where the speaker had referred to 'the black man' who occupied a parking space next to his), was racially loaded, so that he could be identified as a racist who had used violence, thereby justifying the use of violence in return on him.

⁹³ *Rustenburg Platinum Mines v SAEWA (obo Bester) & Ors* 2018 (5) SA 78 (CC).

113. To call someone a racist in South Africa is, given our racially oppressive past, inevitably to invoke detestation, enmity, ill-will and malevolence against such a person. Whilst calling out someone who behaves as a racist may be acceptable, calling for them to be killed is not. And calling for someone to be killed because they are a racist who has acted violently, is an act of vigilantism and an incitement of the most extreme form of harm possible. It is not acceptable in our society, which, in terms of the noble aims set out in the Equality Act, is trying to heal from a racially oppressive and violent past and to encourage and foster reconciliation, social cohesion and goodwill amongst all races. When such a call emanates from the leader of the then 3rd (now 4th) largest political party in the country it has the potential to foment racial violence on a large scale. There are several lawful options and remedies available in our law, to deal with racists, including the remedies and procedures provided for in the Equality Act and, if warranted, the criminal law.
114. As was pointed out in the Canadian cases, even if there is truth in an assertion that a person has acted in a reprehensible (in *casu* racist) manner, (which seemingly was the point of the evidence which was elicited from Mr Ntakana in relation to the 2nd complainant), this cannot *per se* serve as a defence to a complaint of hate speech. In *Keegstra*⁹⁴ Dixon CJ said he found it difficult to accept that circumstances could exist where factually accurate statements could be used for no other purpose than to stir up hatred against a racial or religious group, and in endorsing this statement in *Whatcott*⁹⁵ the Canadian Supreme Court confirmed that to the extent that truthful statements are used in a manner or context which exposes a vulnerable group to hatred, their use risks invoking the same potential harmful effects that false statements can provoke, and in not providing for a defence of truth the legislature has envisaged that even truthful statements can be expressed in language which exposes a group to hatred. Likewise, even a sincerely held belief as to the truth of what was said does not constitute a defence.

Conclusion

⁹⁴ Note 65 at 781.

⁹⁵ Note 61 paras 137-138, 140-143.

115. In summary therefore the offending statements referred to in the 1st respondent's speech, as set out in the preceding discussion, constituted an exhortation to kill white males who had participated in the incident of 9 November 2020 at the Brackenfell High School and to kill, or respond violently, to any other persons who engaged in racist behaviour towards members of the 2nd respondent in the future. They were based on grounds prohibited by the Act and constituted hate speech, contrary to the provisions of s 10, as they demonstrated a clear intention to incite harm and to promote or propagate hatred. A declaratory order to this effect must accordingly issue.
116. Insofar as the statements were made by the 1st respondent as the President, Commander-in-Chief and leader of the 2nd respondent, at an assembly that was held by it, in his capacity as its political head and leader of all its activities and in the exercise of his constitutional power to make pronouncements for and on its behalf, and the 2nd respondent endorsed and supported these statements in the media advisory which it issued and in these proceedings, it should be held jointly liable for them.
117. Given that I have found in favour of the complainants in respect of the first and main complaint of hate speech, it is not necessary, nor is it tenable, to make any finding in respect of the alternative complaint of harassment. As regards the submission that I should also find in their favour on the second complaint of unfair discrimination, such a finding seems to me to be at odds, conceptually, with the scheme and tenor of the Act and what is envisaged by it. In this regard its foremost and principal aim, as is evident even from its titular heading, is to prevent and prohibit unfair discrimination. It seems to me that the Act could hardly have intended that someone should be found to have unfairly discriminated against another by calling them a racist, if their behaviour was indeed racist or had racist features to it, which may have justified the statement. However, in my view, given that what was said was combined with an incitement to commit harm and violence and to propagate hatred, and my finding to this effect on the first complaint, it is neither necessary nor would it be appropriate for me to express any view on this, or to make a finding in respect of the second complaint.
118. Finally, although counsel for the complainants acted *pro bono* they requested that, if the applications were to be upheld, costs should be awarded. In my view,

given their efforts and the nature and complexity of the matter and its importance, it is fair and appropriate that the complainants' counsel and attorneys should be compensated for their services, and that the order should include costs consequent upon the employment of two counsel for each of the complainants.

119. In the result I make the following order:

1. It is declared that statements in the speech which was made by the 1st respondent at the occasion of the holding of the 3rd provincial People's Assembly of the 2nd respondent in the Western Cape on 16 October 2022, constituted hate speech, contrary to the provisions of s 10 of the Equality Act 4 of 2000, in that they were based on grounds which are prohibited in the Act and demonstrated a clear intention to incite harm and to promote or propagate hatred.
2. The respondents shall be liable, jointly and severally (the one paying the other to be absolved), for the complainants' costs of suit, which costs shall include the qualifying fees, travelling costs and costs of attendance of the expert witness Dr K Van Der Berg, and the costs of two counsel (with one counsel on scale C and one on scale B).



M SHER
Judge of the High Court

Appearances:

First complainant's counsel: K Pillay SC, S Khoza and T Masvikwa
 First complainant's attorneys: Norton Rose Fulbright (Cape Town)
 Second complainant's counsel: A Albertus SC and L Van Zyl
 Second complainant's attorneys: Thompson Wilks Inc (Cape Town)
 Respondents' counsel: M Ka-Siboto, F Sangoni
 Respondents' attorneys: Ian Levitt Attorneys (Sandton)