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**‘HURTFUL, OFFENSIVE AND DISTURBING SPEECH’ MAY LEND ITSELF TO UNINTENDED AND SEVERE CONSEQUENCES FOR SOCIAL COHESION IN SOUTH AFRICA**

By Terrance M. Booyesen and peer reviewed by Kerry Gantley (Partner: Cowan-Harper-Madikizela Attorneys)

We all know that hate speech and free speech are entirely different concepts, yet in South Africa what you can and cannot say as a responsible citizen or public figure remains a divisive issue.

Vicki Momberg, Adam Catzevelos, Penny Sparrow, Kessie Nair, Velaphi Kumalo, Julius Malema, Edward Zuma and Andile Mngxitama are all recent examples of people from different ethnic backgrounds, whether as ordinary citizens or public figures, who have either fallen foul of or perceived to have fallen foul of hate speech laws.

Through the centuries, societies across the world have experienced their fair share of extremists who are usually linked to radically opposed political systems or far-left organisations. True to form, these individuals typically stand out in a crowd and their oratory skills are normally honed, well-constructed and captivating and their messages are designed to fall upon sympathetic audiences.

In South Africa, examples of such persons include Julius Malema (Commander in Chief) of the Economic Freedom Front (‘EFF’) and Black First Land First’s leader, Andile Mngxitama. Notably, these two public figures have not only become household names, they are featured regularly in the media, with their growing supporters adorning their faces on t-shirts and other memorabilia in an almost cult-like fashion.

Both of these leaders have been accused of hate speech, which in South Africa, and similar to many other countries in the world, is a human rights violation and criminal offence. Malema and Mngxitama have both publically made reference to the “killing of white people” at their respective political gatherings, and whilst there has been a degree of public outrage, these two individuals have seemingly not been severely chastised or held to account for their possible breach of local and international legislation and the human rights declaration that prohibits such behaviour.

The recent ruling of the South African Human Rights Commission (‘SAHRC’) in favour of EFF leader Julius Malema has received wide criticism yet in other instances the ruling has been declared justified.

In the case of Mngxitama, the SAHRC made a preliminary assessment that the statements made by him to “*kill five white people for every black person killed, including women and children*” constitutes hate speech and it has instituted litigation against Mngxitama in the Equality Court.

*"We came to the conclusion that while the acts forming the subject of the complaints may be offensive, they do not meet the legal threshold to qualify as hate speech."*

***Advocate Bongani Majola (Chairman: SAHRC)***

27 March 2019

### **Confusing parameters of hate speech; double standards?**

In the most recent of complaints presented to the SAHRC -- which include Malema saying to a crowd of supporters in 2016 that *"the party [the EFF] is not calling for the slaughter of white people, "at least for now" --* the SAHRC responded saying that although his remarks were "offensive" and "problematic to us in a democratic society", they did not meet the legal threshold to qualify as hate speech. Further comments made by Malema in 2018, *"that the majority of Indian people are racist"*, were also dismissed.

Whilst the SAHRC chairman, Advocate Bongani Majola said the complaints against Malema were adjudicated according to the context and merit of the events, and guided by South Africa's Constitution and existing legislation, Malema's utterances did not exceed the parameters of the legal threshold that would qualify as hate speech. Arguably, the SAHRC's findings may be considered an extremely fine line between *what is* and *what is not* legally permissible and what constitutes hate speech. According to the SAHRC, there must also be a threat of imminent violence for such complaints to find traction.

SAHRC Senior Researcher Shanelle van der Berg said *"although Malema's utterances about "not wanting to slaughter white people for now" could be construed as hurtful by a white audience, the reasonable listener of the speech would have recognized that the topic of the speech was land reform, not the intention to harm white people. The historical context in which the speech is made is one of unjust land dispossessions by both colonialists and the apartheid government. Reference to slaughtering is made within this context. The statement calls for the peaceful invasion of land. Malema explicitly stated that he is not calling for the slaughter of white people"* she added.

What is extremely alarming to the reasonable listener is the effect of the statement "at least for now". Surely the threat is implicit in this utterance taking into account the power that Malema yields as a public figure on any reasonable listener.

In its ruling, the SAHRC further stated that *"the additional responsibility on public figures to promote social cohesion has long been recognised by the Commission. Even where divisive or offensive statements do not meet the threshold for hate speech, the Commission still bears a responsibility to foster social cohesion. The Commission will continue to promote social cohesion through its promotional mandate, as envisaged by the National Development Plan and the recently finalised National Action Plan to combat racism, racial discrimination, xenophobia and related intolerances."*

The question that remains is how the Commission will discharge its responsibility to foster social cohesion.

In SAHRC v Khumalo [2019], the Equality Court had to determine if social media postings by Kumalo that *"we [black people] must act [against white people] as Hitler did to the Jews"* constituted hate speech. The test for hate speech was whether the utterances could be reasonably construed to demonstrate a clear intention to incite harm. It postulated what a reasonable reader could think about the speech and if they could understand

it to mean an incitement to cause harm, the test was met. As an objective test of the reasonable reader applied, it was the effect of the text and not the intention of the author that was assessed. In other words, one

needs to ask if harm could be incited by the effect of the utterances on readers. The harm envisaged derived from interracial hostility and was not to be limited to physical harm to the category of persons against whom the hatred was directed. The risk of harm existed in several forms, including conduct that would harm social cohesion, and so undermine the nation building project.

It is important to note that our own Equality Court, as well as international courts and other regulatory human right authorities, have yet to determine exactly how to legally govern hate speech. Complicating matters yet further, the various Equality Court rulings in South Africa pertaining to hate speech have not been consistent and therefore it is plausible that these matters may also be adjudicated not purely on the events themselves, but also upon the parties involved. Clearly, as ambiguity continues to dominate the manner of interpreting and determining hate speech, and until such time as clarity is obtained -- hopefully in the Constitutional Court -- tension across racial lines, including public anger and confusion will simply continue to escalate amongst racial groups and human rights communities; and this may lead to a series of unforeseen and unintended consequences.

In the case of Andile Mngxitama -- a past expelled member of the EFF and now leader of the Black First Land First political party -- it remains to be seen how the Equality Court will review his racial utterances when he said at a 2018 political rally, *"You kill one of us, we will kill five of you. We will kill their children, we will kill their women, we will kill anything that we find on our way."*

With these few recent examples, what is clear is that this is no way for a civilised society to behave. It is high time that the South African authorities urgently clamp down upon any public gathering that remotely incites hate and violence, especially if songs of war or uprising is promoted and where the citizens of the country will be negatively impacted or harmed.

### **Approving the South African Prevention and Combatting of Hate Crimes and Hate Speech Bill**

As there is still great uncertainty in South Africa surrounding the parameters associated with the 'freedom of speech', and when this freedom is abused and becomes a 'hate speech' transgression; it is becoming critical for the South African legislators to finalise the Prevention and Combatting of Hate Crimes and Hate Speech Bill ('the Bill') and pass it into law. Once the Bill is enacted into law, unlike the Promotion of Equality and Prevention of Unfair Discrimination Act, any acts that constitute a hate crime or hate speech that is harmful will be a criminal offence.

The Bill further provides that an act of hate speech is perpetrated by an individual who intentionally publishes, propagates or advocates anything or communicates to any person in a manner which could reasonably be construed to demonstrate *inter alia*, a clear intention to be harmful, or incite harm. Hopefully, making harmful statements

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against a particular racial group or person, or brandishing assault rifles, or singing about machine guns and killing farmers (boers) will not be tolerated. This Bill has been criticised as going too far and it is argued that it will not pass constitutional muster as it infringes the right to freedom of expression. The challenge is finding a healthy balance between encouraging free speech and curtailing hate speech.

*"The purpose of the Prevention and Combating of Hate Crimes and Hate Speech Bill is, among other things, to give effect to the obligations in terms of the constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations."*

**Justice and Correctional Services Portfolio Committee chairperson Madipoane Refiloe Moremadi Mothapo**

**(10 January 2019)**

We all remember that the racist Kulula passenger, Alochna Moodley, lost her job after her racist remarks. As organisations stand to be held vicariously liable for their employees who contravene the provisions of the Bill, they will need to be on high alert in respect of their own internal policies, to ensure that their employees are not involved in any criminal activities which may transgress the requirements of the Bill. This will include strict measures over all forms of electronic communication during the course of their employment, as well as their employee's after hour activities, for example on Facebook, LinkedIn, Twitter and similar social media platforms. As the Bill currently stands, a first round conviction will attract a fine and/or imprisonment not exceeding three years. Overstep this mark, and the imprisonment could be five years, plus a fine.

As a country, we need to call on our leaders, public figures, organisations, stakeholders and our people, to act responsibly and to denounce hate speech and prejudices expressed on social media, racism, racial hatred, xenophobic and related intolerances. In addition, a more robust legal framework with clarity on the legislative requirements and an impartial regulatory body is required.

Whilst the utterances by Malema may not have met the threshold for hate speech, such utterances clearly harm social cohesion and undermine nation building, which is so desperately needed in South Africa.

### ENDS

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#### **For further information contact:**

CGF Research Institute (Pty) Ltd  
Terrance M. Booysen (Chief Executive Officer)  
Tel: +27 (11) 476 8264 / Cell: 082 373 2249  
E-mail: [tbooysen@cgf.co.za](mailto:tbooysen@cgf.co.za)  
Web: [www.cgf.co.za](http://www.cgf.co.za)

Cowan-Harper-Madikizela Attorneys  
Kerry Gantley (Partner Employment Law, Benefits & Industrial Relations)  
Tel: +27 (11) 783 8711 / Cell: 083 373 3116  
E-mail: [kgantley@chmlegal.co.za](mailto:kgantley@chmlegal.co.za)  
Web: [www.chmlegal.co.za](http://www.chmlegal.co.za)