Demystifying Hate Speech under the PEPUDA

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Abstract

The factual matrix that is considered in each hate speech case differs from that in the next. However, certain factors always remain key in the process of balancing the different constitutional rights at play: who the victim is, who the perpetrator is and the nature of the expression. Additional factors to be considered in deciding whether an expression constitutes hate speech include: historical associations; who the utterer is as against the victim(s); the audience that is addressed and where the utterance is made; and the prevailing social conditions. How South African courts and the South African Human Rights Commission factor in these specific issues in assessing whether an utterance constitutes hate speech is examined in this contribution. Applicable international law principles and comparable foreign law reveal certain areas of the South African hate speech protection requiring refinement.

Keywords

Equality Court; freedom of speech; hate speech; factors to assess hate speech; South African Human Rights Commission.

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1 Introduction

In 2012 the Legal Resource Centre of South Africa (the LRC) cited as reason for taking guidance from other jurisdictions in interpreting and applying the hate speech protection in the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (the PEPUDA) that South Africa's jurisprudence was still "in its infancy".[1] Little appears to have changed since then. In March 2019, almost two decades after the enactment of the PEPUDA, the South African Human Rights Commission (the SAHRC) in an official report[2] commented that divergent views exist in the various Equality Courts as to what would constitute hate speech. The SAHRC proceeded to explain that no consensus exists on how section 10 of the PEPUDA ought to be interpreted[3] and that this area of the law is still in a developmental phase.[4] The SAHRC emphasised that even the legislature is still grappling with the issue and that the Department of Justice has repeatedly advised that it is in the process of reviewing and amending the PEPUDA in order to provide clarity.[5] The purpose of this contribution is to peel back some of the layers of complexity surrounding the application of the hate speech protection in the PEPUDA in its current state.

The surrounding circumstances or factual matrix in which racial utterances are made is important in the assessment of whether an utterance is judiciable and sanctionable as hate speech. But what significance is

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1 Oxford Pro Bono Publico 2012 https://www.law.ox.ac.uk/sites/files/oxlaw/1._comparative_hate_speech_-_lrc.pdf (the LRC Memorandum) para 5.

2 SAHRC 2019 https://www.sahrc.org.za/home/21/files/SAHRC%20Finding%20Julius%20Malema%20&%20Other%20March%202019.pdf (hereafter SAHRC Findings).

3 Different interpretations are afforded to s 10(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (the PEPUDA) by different authors. For the latest commentary see Marais and Pretorius 2019 *PELJ*. The relationship between ss 10(1), 7(a) and 12 of the PEPUDA has been discussed sufficiently. See Botha and Govindjee 2017 *PELJ* 5; Botha and Govindjee 2016 *SAJHR* 304; Kok and Botha 2014 *Litnet Akademies* 208-209.

4 SAHRC Findings para 13.3.

5 SAHRC Findings para 13.3. Also see *South African Human Rights Commission v Khumalo* 2019 1 SA 289 (GJ) (hereafter the *Khumalo* case) paras 115-116. Sutherland J expresses his concerns regarding the fact that the amendments are set to be completed only in about 5 years.

attached to the different factors? And how does the hate speech protection offered in terms of the PEPUDA as applied by the SAHRC and the Equality Court measure up to international standards? This contribution, which is made against the backdrop of decided cases and recent factual scenarios that have been reported on in the media,[6] in particular in newspapers and via social media, answers these questions.

2 The factors that are considered

2.1 Introduction

The contextual factors to be considered in a hate speech case depend on the facts of a particular matter. Consequently, it is impossible to provide a closed list of factors that must be assessed in each hate speech case.

The PEPUDA was enacted to ensure that South Africa complies with its international obligations.[7] The PEPUDA must be interpreted in accordance with the Constitution, in a manner that abides by international law[8] and where appropriate having regard to foreign law.[9] Moreover, the legislation must be interpreted keeping in mind the context of the particular case and the purpose of the PEPUDA.[10] Section 233 of the Constitution requires that the court "must prefer any reasonable interpretation that is consistent with international law" over a possible construct of the provision that contradicts international law principles.[11] The interpretation afforded to the PEPUDA's hate speech protection, therefore, should not be out of kilter with the construct of comparable hate speech provisions in foreign jurisdictions, particularly those having shared international law obligations.[12] The hate speech protection in section 10(1) of the PEPUDA must be interpreted in a manner that balances the right to dignity, to equality and to freedom of

6 Although the contents of media reports and posts on social media may at times be one-sided, exaggerated or even misleading, we refer thereto in instances where the hate speech cases referred to have not been reported.

7 Section 3 of the PEPUDA and s 233 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

8 Section 39(1)(b) of the Constitution; *Nelson Mandela Foundation Trust v AfriForum* 2019 4 All SA 237 (EqC) (hereafter *Mandela Foundation* case) paras 108-109.

9 Sections 3(1) and 3(2) of the PEPUDA. S 39(1)(c) of the Constitution determines that the court "may consider foreign law" when interpreting the rights contained in the Bill of Rights. *Mandela Foundation* case paras 116, 118-120.

10 Sections 3(3) of the PEPUDA; *Mandela Foundation* case para 121.

11 *Mandela Foundation* case paras 110-113.

12 The importance of aligning the interpretation afforded with international and foreign law is illustrated in the *Mandela Foundation* case para 19.

expression.[13] These rights contained in the Bill of Rights[14] are implicated in the application of the hate speech provision in the PEPUDA. Therefore, it is apt to consider foreign law when interpreting section 10(1) of the PEPUDA in relation to its scope of application and in determining how it should be applied.[15]

In the Memorandum 2012 the LRC had examined and compared hate speech provisions and jurisprudence in ten different jurisdictions.[16] The inquiry therefore covered the principles of international law and foreign law.[17] However, the LRC noted that a direct comparison between South Africa's hate speech provision and the hate speech protection in any other jurisdiction is problematic.[18] First, different ideologies, and historical and social circumstances inform the adoption of different hate speech provisions.[19] Secondly, "hate speech" is not a universally defined concept.[20] This means that countries regulate hate speech in different ways: some recognise hate speech as a crime,[21] while others, including South Africa, consider it to be a civil offence.[22] In some jurisdictions the intention of the utterer is considered key to determining liability,[23] whereas in South Africa it is considered to be of no significance.[24] In most jurisdictions the hate speech prohibitions require proof that the utterance is likely to cause harm. However, what the harm is that must ensue differs from jurisdiction to

13 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) para 45; also see LRC Memorandum para 8.

14 Chapter 2 of the Constitution.

15 This was expressly stated in the *Mandela Foundation* case para 117.

16 See the LRC Memorandum para 3. Australia, Canada, the European Court of Human Rights (ECtHR), Germany, India, Ireland, Slovenia, South Africa, the United Kingdom (UK) and the United States.

17 LRC Memorandum para 3.

18 LRC Memorandum para 5.

19 LRC Memorandum para 5; also see Currie and De Waal *Bill of Rights Handbook* 356-357; *Khumalo* case para 99.

20 LRC Memorandum para 5.

21 For instance, in Canada and Slovenia. LRC Memorandum fn 6.

22 For instance, in Ireland and the UK. LRC Memorandum fn 6. Notably, the South African Parliament has considered adopting an instrument to criminalise hate speech, namely the Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016. The second draft was published in March 2018, but it lapsed before being adopted. See Bill B9 of 2018 and the Explanatory Summary in Gen N 167 in GG 41543 of 29 March 2018.

23 This is usually the case in countries where hate speech is regulated as a crime. Examples include Canada and Slovenia.

24 LRC Memorandum para 5. The UK prohibits utterances made with the intention to or which are likely to "stir up" hatred. See s 18 of the *Public Order Act*, 1986. In Germany hate speech must be likely to cause public disorder (*volksverhetzung*). See s 130 of the German *Strafgesetzbuch*, 1998. In Australia the speech must be "reasonably likely in all the circumstances to offend, insult, humiliate or intimidate." Refer to s 18C of the *Racial Discrimination Act* 52 of 1975.

jurisdiction. Some jurisdictions require proof of incitement to violence, or of hatred, the causing of insult or hurt and/or of humiliation.[25]

The LRC noted that much as in South Africa, the European Court of Human Rights (the ECtHR) does not have a framework for how the contextual factors must be weighed up in the assessment of hate speech.[26] Instead, a "common-sense" approach is followed.[27] However, three contextual facts are usually considered to be incremental in the weighing up of the right to freedom of expression and the rights to equality and dignity: the nature of the utterance; who the victims of the hate speech are;[28] and the identity of the alleged perpetrator.[29] The LRC further identifies factors that play a pivotal role in the assessment of whether an utterance constitutes hate speech, but stresses that the list is not exhaustive. The factors are: historical associations and in relation thereto who the utterer is as against the victims; where and to whom the utterance is made; and the socio-political circumstances at the time of making of the utterance.[30] The Committee on the Elimination of Racial Discrimination (hereafter the CERD) *General Recommendation 35: Combating Racist Hate Speech* (2013)[31] (hereafter the Recommendation), which the SAHRC is required to uphold,[32] indicates similar contextual factors that must be considered in deciding whether or not an utterance is sanctionable as hate speech.[33]

2.2 The nature of the utterance

Section 10(1) of the PEPUDA, which regulated hate speech, read:

25 LRC Memorandum para 5.
26 LRC Memorandum para 26.
27 LRC Memorandum para 26.
28 The courts appear to be more inclined to assist groups who are historically or currently oppressed. Also see LRC Memorandum para 10.
29 The court and the SAHRC are more lenient if the perpetrator falls into a group that is or has been oppressed or marginalised. LRC Memorandum para 10.
30 LRC Memorandum para 29. These factors overlap largely with those put forward by Botha and Govindjee 2017 *PELJ* 17.
31 OHCHR 2013 https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralrecommendationNo35Combatingracisthatespeech(2013).aspx (the Recommendation).
32 Section 13(b)(vi) and (vii) of the *South African Human Rights Commission Act* 40 of 2013.
33 Paragraph 35 of the Recommendation lists: the content and form of speech; the economic, social and political climate; the position or status of the speaker in society and the audience at which the utterance is directed; and how widely the utterance is disseminated, but then adds also the objectives of the speech.

> Subject to the proviso in section 12,[34] no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds,[35] against any person, that could reasonably be construed to demonstrate a clear intention to –
>
> (a) be hurtful;
>
> (b) be harmful or to incite harm;
>
> (c) promote or propagate hatred.

However, on 29 November 2019 the Supreme Court of Appeal in the appeal to the *Qwelane* Equality Court case[36] handed down a pivotal judgment declaring section 10(1) of the PEPUDA unconstitutional and invalid.[37] In the court's view the provision as it stood contradicted the right to freedom of speech as envisaged in section 16 of the Constitution.[38]

The result of the judgment is that Parliament must within eighteen months of the judgment amend the wording of section 10(1) of the PEPUDA in order to remedy the defect.[39] In the interim the Supreme Court of Appeal ordered that courts must apply the following amended wording of section 10(1):

> No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.[40]

In order to succeed in hate speech claims the victims must on a balance of probabilities prove that the offending statement qualifies as hate speech.[41]

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34 The proviso in s 12 of the PEPUDA excludes "*bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with s 16 of the Constitution" from the ambit of s 10(1). The proviso is a defence available to an utterer whose speech would otherwise fall foul of s 10(1). If the respondent can prove that the utterance falls within the ambit of s 12, the utterance must be absolved from scrutiny despite meeting the s 10(1) threshold test. *South African Human Rights Commission v Qwelane* 2018 2 SA 149 (GJ) (hereafter the *Qwelane* Equality Court case) para 65.

35 Section 1 of the PEPUDA enumerates: "(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or (b) any other ground where discrimination based on that other ground
(i) causes or perpetuates systemic disadvantage;
(ii) undermines human dignity; or
(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground set out in (a)."

36 *Qwelane v South African Human Rights Commission* 2020 2 SA 124 (SCA) (hereafter Qwelane SCA).

37 *Qwelane* SCA paras 1, 36.

38 *Qwelane* SCA para 96.

39 *Qwelane* SCA para 96.

40 Section 10(1) of the PEPUDA as amended in the interim.

41 *Qwelane* Equality Court case para 53.

South Africa's hate speech protection, at least as it was applied before *Qwelane* SCA, was peculiar in two ways. First, there was no need for the victim to prove that actual or likely harm might follow from the making of the utterance. Secondly, the requirement that a "reasonable person should understand" the utterance to demonstrate a "clear intention" to harm was not used in other jurisdictions.[42]

The test that was used to assess whether an utterance could be interpreted as conveying a clear intention to do harm as envisaged in section 10(1) of the PEPUDA, in its original form, was an objective test, and the speaker's subjective intention was irrelevant.[43] The test was whether the utterance "could be reasonably construed to demonstrate a clear intention to 'incite harm'".[44] The standard of the reasonable person as it was applied was: "whether a reasonable person could conclude (not inevitably should conclude) that the words mean the author had a clear intention to bring about the prohibited consequences."[45] This test has not in our view been affected by the amendment pursuant to the *Qwelane* SCA judgment. To succeed in a claim under the common law *actio iniuriarum*, it must be proven that the conduct was objectively and subjectively demeaning.[46] The reason for requiring objective insult is that not doing so would result in the court's being inundated with referrals from "hypersensitive persons".[47] This is also the reason why the test for hate speech must even under the amended interim definition in our view be an objective one.

The impact that the utterance has on the person/s to whom it is addressed, and the fact that he or she felt offended remains relevant. However, the victim cannot also be the reasonable audience in the assessment of whether the utterance has the effect of advocating hatred and inciting harm to the victim group.[48] A clear distinction should be drawn between the assessments to determine whether an utterance is hurtful or harmful, and whether it is likely to advocate (incite) hatred.[49]

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42 LRC Memorandum para 6.
43 *Khumalo* case para 100.
43 *Khumalo* case para 98; also see *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2018 3 SA 291 (GJ) (hereafter the *Masuku* case) para 7.
44 *Khumalo* case para 88.
45 *Khumalo* case paras 88, 90.
46 *Delange v Costa* 1989 2 SA 857 (A) 860-861; *Le Roux v Dey* 2011 3 SA 274 (CC) para 143.
47 Currie and De Waal *Bill of Rights Handbook* 256.
48 LRC Memorandum para 47.
49 LRC Memorandum para 48.

In the *Mandela Foundation* case[50] it was held that displaying the old South African land flag constituted hate speech.[51] The lobby group AfriForum had argued that different people have different intentions in displaying the flag, and that the intention is not always to cause harm.[52] The court dismissed this argument on the basis that the "clear intention" in section 10(1) of the PEPUDA does not depend on the subjective intention of the person who is displaying the flag. Whether there is malice in the expression that is under scrutiny, therefore, in the view of the Equality Court, cannot be determined on a case-by-case basis.[53]

2.2.1 Words or expressions of hate speech

Section 10(1) of the PEPUDA, in its original format, referred to hate speech in the form of "words". An utterance which can potentially qualify as hate speech can take on several forms: it can consist of a verbal expression;[54] be reduced to writing;[55] or be contained in the lyrics of songs.[56] Hate speech can even consist of symbols or take the form of other types of expression, such as waiving, burning or saluting a flag.[57] This is illustrated by the recent hate speech case concerning the old South African flag. Mojapelo DJP in the *Mandela Foundation* case considered section 10(1) in its original format and held that "words" must be interpreted generously[58] to extend beyond verbal representations.[59] The Equality Court accepted that the old flag is a

50 Notably, this case was decided before *Qwelane* SCA.

51 *Mandela Foundation* case para 1. For a discussion of the case, see Herd 2019 *PSLR*.

52 *Mandela Foundation* case para 167.

53 *Mandela Foundation* case paras 167-168.

54 In the *Masuku* case the equality court found that Anti-Zionist statements made by Masuku while he was delivering a speech at the University of the Witwatersrand qualified as hate speech. However, on appeal the Supreme Court of Appeal held that Masuku's right to freedom of expression ensured in s 16 of the Constitution trumped the statements made. Even though his statements were hurtful of people's feelings, or wounding, offensive, politically inflammatory or blatantly offensive, they did not constitute hate speech given the circumstances that prevailed at the time and the place where they were made. Therefore, he could not be deprived of his constitutional protection. *Masuku v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 2 SA 194 (SCA) paras 27 and 31; also see the discussion in fn 263.

55 For instance, in the *Qwelane* case the offending utterances were made in an article in the *Sunday Sun* newspaper.

56 See for instance *Duncanmec (Pty) Limited v Gaylard* 2018 6 SA 335 (CC) (hereafter the *Duncanmec* case); *Human Rights Commission of South Africa v SABC* 2003 1 BCLR 92 (BCCSA); *AfriForum v Malema* 2011 6 SA 240 (EqC) (hereafter the *Afriforum* case).

57 *West Virginia State Board of Education v Barnette* 319 US 624 1943 632.

58 *Mandela Foundation* case para 128.

59 *Mandela Foundation* case para 141.

demeaning symbol, the embodiment of the oppression of black South Africans by whites and of racial segregation during apartheid.[60] The court noted further that the old flag is used internationally as a symbol of white supremacy.[61] In the result the Equality Court held that gratuitously[62] displaying the old South African flag constitutes hate speech,[63] harassment[64] and unfair discrimination[65] as intended in the PEPUDA.

The fact that so many different types of acts can qualify as an utterance that can potentially be hate speech is a consequence of the wide construction afforded to "words" as used in the initial version of section 10(1) of the PEPUDA. Botha and Kok contend that in order for that version of section 10 to pass constitutional muster, non-verbal communication should not be considered as falling under the hate speech prohibition.[66] However, the wide construction that is preferred is aligned with international and foreign law regulating hate speech that bans not only words but also all *expressions* that expose target groups to hatred.[67] Therefore, Botha and Govindjee are correct that "words" in section 10(1) of the PEPUDA ought to be replaced by or interpreted as "expressions".[68] The interim amended version of section 10(1) omits the term "words" and merely provides "[n]o person may *advocate*". This is more open-ended, potentially embracing all qualifying expressions. This amendment is better aligned with international and foreign law.

2.2.2 The value attached to the expression

From a foreign law perspective, not all expressions are considered equal. In each case the court must assess whether the expression (a) advances democratic discourse, and/or (b) has been expressed in the process of truth-finding and/or (c) is made as a means of self-fulfilment.[69] The more of these purposes an expression is found to advance, the more value should

60 *Mandela Foundation* case paras 84-89.
61 *Mandela Foundation* case para 90.
62 The old flag may still be displayed in instances where it would serve a journalistic, academic or artistic purpose in the public interest. *Mandela Foundation* case para 56.
63 In terms of s 10(1) of the PEPUDA.
64 Section 11 of the PEPUDA.
65 As envisaged in s 7 of the PEPUDA.
66 Botha and Kok 2019 *SAPL* 33-34.
67 Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1969); the Recommendation para 7.
68 Botha and Govindjee 2017 *PELJ* 28.
69 These criteria were laid down by the Canadian Supreme Court in *Grant v Torstar Corporation* 2009 3 SCR 640 para 47; also see *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) fn 120, where they were cited with approval.

be attached to it.[70] A "valuable form" of expression should carry more weight in the balancing of the constitutional rights at play.[71]

However, in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*[72] the Constitutional Court indicated that the right to freedom of expression in the Constitution is subject to the rationality test in section 36 of the Constitution only, and not also to a threshold test considering the traditional value attached to the expression, as mentioned above, that is viewed as forming the basis of the right.[73] The PEPUDA forbids "categories of expression" that fall beyond the constitutional protection in section 16.[74] Consequently, to prove that an expression constitutes hate speech as envisaged in section 10(1) of the PEPUDA, it must be proven that the expression oversteps the bounds of the right to freedom of expression.[75]

In the *Qwelane* Equality Court case[76] the court concluded that the contents of Qwelane's article in the *Sunday Sun* entitled "Call me names - but gay is not okay" constituted hate speech in terms of section 10(1) of the PEPUDA in its original formulation. In the statement concerning homosexuals,[77] Qwelane had compared their sexual conduct to bestiality.[78] The court held that inviting homophobia had no constitutional value.[79] The court based this finding on the fact that the utterance had not on the face of it, or on the evidence presented to the court, been made to spark a debate on lesbians and gays.[80] Rather, in the view of the Equality Court Qwelane had made the utterance to persuade the readers to support his homophobic views. The Equality Court found that the utterances against homosexuals were hurtful, incited harm and propagated hatred and accordingly amounted to hate

70 LRC Memorandum paras 11-12.
71 LRC Memorandum para 17.
72 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC).
73 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 48. The court cites: "truth-seeking, free political activity and self-fulfilment" (sic).
74 Section 16(1) of the Constitution determines: "Everyone has the right to freedom of expression, which includes - (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research."
75 LRC Memorandum para 11.
76 *South African Human Rights Commission v Qwelane* 2018 2 SA 149 (GJ) (*Qwelane* Equality Court case).
77 *Qwelane* Equality Court case para 9.
78 *Qwelane* Equality Court case para 10.
79 *Qwelane* Equality Court case para 52.
80 The potential that an utterance can spark meaningful and necessary discourse is cited as an important consideration in determining whether it should enjoy constitutional protection. See Herd 2019 *PSLR* 131.

speech. Therefore, it could not be argued that the utterance fell within the realm of the protection of freedom of speech.[81] On appeal, the Supreme Court of Appeal[82] declared section 10 of the PEPUDA unconstitutional and invalid.[83] In terms of the interim section 10 Qwelane's utterances did not constitute hate speech. Accordingly, the judgment of the Equality Court was overturned.[84]

Generally, it can be said that if an utterance is made to spark a debate, it would be protected. Moreover, in terms of the Recommendation[85] if the purpose for the making of the utterance is to protect or to defend human rights, the conduct should not be sanctionable as hate speech.

2.2.3 Political statements

In most of the jurisdictions that were evaluated in Memorandum 2012, political speech is viewed as carrying more value in the process of balancing free speech and the rights to equality and dignity.[86] Particular value is also attached by the ECtHR to political speech which is viewed as an important vehicle for democratic discourse.[87] However, whether these types of utterances will be absolved from scrutiny in relation to constituting possible hate speech depends on whether they add value to truth-finding, or whether they in fact bear no truth.[88]

The SAHRC found that the "white slaughter" remark of the leader of the Economic Freedom Front (the EFF), Julius Malema,[89] did not qualify as hate speech and reasoned that the statement had been made by Malema in the context of the land debate.[90] The SAHRC's ruling in Malema's favour rested at least in part on the fact that there was a measure of truth to the premise that white South Africans still occupy land belonging to black South Africans,

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81 *Qwelane* Equality Court case para 53.

82 *Qwelane* SCA.

83 See the discussion in 2.2.

84 *Qwelane* SCA para 96.

85 OHCHR 2013 https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralrecommendationNo35Combatingracisthatespeech(2013).aspx.

86 LRC Memorandum para 51.

87 LRC Memorandum para 13.

88 So, for instance, denying the holocaust is not viewed as a protectable historical representation. See *Garaudy v France* App No 65831/01 (ECtHR 3 July 2003); also see LRC Memorandum para 16.

89 He had stated: "We [the EFF] are not calling for the slaughter of white people, at least for now … The rightful owners of the land are black people. No white person is a rightful owner of the land here in SA and the whole of the African continent."

90 SAHRC Findings para 16; also see the discussion under 2.2.4.

and that whites enjoy substantial economic power.[91] The other reason for finding the statement to be permissible[92] was that it did not according to the SAHRC contain a threat of imminent violence.[93]

However, in the *Masuku* case the Equality Court rejected the defence against the hate speech charge that the utterance was true, fair comment or in the public interest.[94] Truth and public interest are defences accepted against charges of defamation, not to avoid liability against hate speech.[95] We agree with the finding in the *Masuku* case that it is inappropriate to excuse hate speech on the basis that an utterance holds a measure of truth. The purpose of the protection offered by section 10(1) of the PEPUDA differs significantly from the protection against defamation, which is to address the injury to the plaintiff's reputation. If the defendant in a defamation case made a statement which is true and if it is in the public interest that he made the statement, the utterance can be viewed as merited and deserved.[96] The same cannot be said in a hate speech case.[97] The SAHRC appears to have introduced a defence that is out of place in the context of hate speech, which is not recognised in the same way by the Equality Court.

The fact that the "white slaughter" remark made by Malema did not convey a threat of imminent physical harm would also not exclude liability based on hate speech. The "harm" envisaged in the PEPUDA is not restricted to physical violence only. Other legislation caters for threats of physical harm, besides the PEPUDA.[98] Harm can also be emotional harm,[99] but its impact would need to be "more than merely 'hurtful' in the dictionary sense".[100] As was held in the *Khumalo* case, the rehabilitative objective of the PEPUDA suggests that harm could also relate to the reaction to the utterances,[101] i.e.

91 SAHRC Findings para 16.

92 SAHRC Findings para 16.2; *Hotz v University of Cape Town* 2017 2 SA 485 (SCA) (hereafter the *Hotz* case) para 67.

93 SAHRC Findings para 17.

94 *Masuku* case para 45; Botha and Govindjee 2017 *PELJ* 28.

95 *Masuku* case para 45; Botha and Govindjee 2017 *PELJ* 28 for similar reasons do not support importing a "truth" defence for use in hate speech cases.

96 *Borgin v De Villiers* 1980 3 SA 556 (A); also see Iyer 2018 *Speculum Juris* 126, 130.

97 For an opposing view to the effect that truth seeking and self-fulfilment are incremental considerations in assessing an utterance, see Herd 2019 *PSLR* 134-135.

98 *Khumalo* case para 93.

99 *Freedom Front v South African Human Rights Commission* 2003 11 BCLR 1283 (SAHRC).

100 *Qwelane* SCA para 70.

101 *Khumalo* case para 94. Also see *Qwelane* SCA para 70, where the court agreed that the "harm" envisaged s 10(1) of the PEPUDA (as also is the case in s 16(2)(c) of the Constitution) need not necessarily be physical but may include psychological harm.

the negative effect it has on the nation-building project in that it does not promote non-racialism.[102] The Labour Appeal Court in *Crown Chickens (Pty) Ltd t/a Rockland Poultry v Kapp*[103] made it clear that the courts must conspicuously safeguard the fragile relationships between the different population groups in South Africa.[104] This duty extends to the SAHRC too. The amended wording of section 10(1) of the PEPUDA as formulated in *Qwelane* SCA still supports the premise in the *Qwelane* Equality Court case that to qualify as hate speech an utterance must "be hurtful *and* harmful *and* have the potential of inciting harm and plainly propagating hatred."[105] In our opinion the "white slaughter" remark ticks all the boxes to qualify as hate speech under either version of section 10(1).

2.2.4 Historical value

In South Africa, as in other jurisdictions, if the alleged perpetrator is a member of a previously disadvantaged group which was subject to historical oppression, offensive speech is tolerated more readily, for reasons explained below. Offensive utterances that can be viewed as venting frustration with historically dominant groups is considered as a "form of self-fulfilment".[106] The LRC also indicated that struggle songs, like *Dubula ibhunu* (Xhosa: "Shoot the *Boer*") are arguably political expression bearing a historical value. Singing them remains relevant to vulnerable groups. They are used to invoke solidarity and courage to face current challenges too.[107]

In the *Duncanmec* case,[108] black workers, members of a trade union, during an unprotected strike sang an *isiZulu* struggle song. The lyrics translated into English are: "Climb on top of the roof and tell them that my mother is

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102 *Khumalo* case para 102.

103 *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* 2002 6 BLLR 493 (LAC) para 35.

104 Also see the *Duncanmec* case para 7.

105 *Qwelane* Equality Court case para 53. However, the proposal in the *Qwelane* Equality Court case to read the requirements as "hurtful and harmful and promote hatred" has not been applied in this manner by the SAHRC. The SAHRC in 2019 noted that no precedent exists as to whether a conjunctive reading or a disjunctive reading is preferable. See SAHRC Findings 7-15.

106 LRC Memorandum paras 22-24.

107 LRC Memorandum para 17.

108 Even though this case was not a hate speech case under the PEPUDA and other considerations may apply in the employment context, it provides valuable insight. The PEPUDA expressly excludes considerations of fairness from the test for hate speech (see ss 14 and 15 of the PEPUDA). However, the fact that the expression in this case was not hate speech based on race was argued to be a reason why the dismissal of the workers for singing the struggle song was unfair. *Duncanmec* case para 24.

rejoicing when we hit the *boer.*"[109] Following a disciplinary enquiry, they were dismissed for misconduct.

In the Bargaining Council where the workers challenged their dismissal,[110] the arbitrator concluded that although the singing of the song was inappropriate, it did not constitute racism.[111] Having looked at a video of the singing and dancing workers, she remarked that the singing was not violent, but rather "peaceful and short-lived".[112] She found the employees' dismissal substantively unfair and ordered the employer to reinstate them.[113]

On review, the trade union acting on behalf of its dismissed members explained to the Labour Court that the song was not hate speech against whites, but a struggle song that black workers had sung during apartheid.[114] The Labour Court accepted this explanation, and the factual finding which had been made by the bargaining council arbitrator that singing a struggle song is different from making a crude racist remark to someone.[115] The workers conceded that the singing of this song was more appropriate in the currency of apartheid, and that the Constitution currently affords workers rights that they were denied under the old order. Notwithstanding, they argued that the effects of apartheid continue to affect them in the workplace. They explained that the economic structure had not changed, and that in many instances whites fulfil management functions whereas black workers are employed in the lower ranks.[116] They contended that the motivation for singing struggle songs was to achieve "solidarity and defiance of the authority of the employer" and not racial hatred.[117]

The court agreed, noting that a distinction ought to be drawn between the singing of struggle songs and making other racially loaded utterances because of the history attached to struggle songs. The court found unconvincing the reasoning that the singing of struggle songs should be

109 *Duncanmec* case paras 1, 10.
110 *Duncanmec* case para 16.
111 *Duncanmec* case para 17.
112 *Duncanmec* case para 18. This serves as an example of how the manner in which the expression is made is considered in assigning meaning. See the discussion under 2.5.
113 *Duncanmec* case paras 18-19.
114 *Duncanmec* case para 21.
115 *Duncanmec* case para 17.
116 *Duncanmec* case para 24.
117 *Duncanmec* case para 25.

sanctionable as hate speech because it infringes on the victim/s right to dignity.[118]

In the final round of litigation, the Constitutional Court pointed out as to the lyrics that the only word in the song that referred to race was "*boer*", which could mean "farmer" or a "white person", neither of which is racially offensive.[119] The employer argued that it was the context in which the word "*boer*" was used that could hurt or offend those who heard it.[120] As the employer and the trade union had both accepted the arbitrator's factual finding that the song did not contain racist words, but that singing it at work was inappropriate, the Constitutional Court accepted the arbitrator's finding that the employee's conduct was "racially offensive" but not racism justifying dismissal.[121]

In the *AfriForum* case Lamont J found that Malema, then president of the African National Congress Youth League, had acted in contravention of the hate speech provision in the PEPUDA for singing "Shoot the *Boer*" at political rallies. The court held that if he were to sing the song in future, he would face criminal charges and a potential prison spell. After the judgment Malema simply replaced the word "shoot" with the word "kiss" and sang "Kiss the *Boer*".[122]

The SAHRC has also received several other complaints of alleged hate speech made by Malema and other EFF members. On 27 March 2019 the SAHRC ruled on four comments made by Malema and one by the EFF's general secretary at the time, Godrich Gardee. The SAHRC found that, although the statements were "quite offensive", they did not qualify as hate speech.[123] Besides the contentious "white slaughter" comment[124] and the singing of "Kiss the *Boer*", Malema had made the following statement concerning Indians and Coloureds:[125]

118 *Duncanmec* case para 27.
119 *Duncanmec* case para 37.
120 *Duncanmec* case paras 17, 37.
121 *Duncanmec* case paras 38-39.
122 Laing 2011 https://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/8757630/Julius-Malema-found-guilty-of-hate-speech-for-singing-Shoot-the-Boer.html.
123 SAHRC Findings para 13.2; see also Naidoo 2019 https://city-press.news24.com/Voices/hate-speech-human-rights-commission-did-not-consider-malemas-influence-20190409.
124 Discussed under 2.2.3.
125 SAHRC Findings para 10.1.

> We were not all oppressed the same. Indians had all sorts of resources Africans didn't have, Coloureds as well... The majority of Indians hate Africans. The majority of Indians are racist. I'm not saying all, I'm saying majority.

Gardee on Twitter had referred to the former leader of the DA, Mmusi Maimane, as "a garden boy".[126]

As to the statement concerning Indians, the SAHRC again perceived some truth in Malema's utterance. It found that on an "objective and contextual assessment" the statements indicate that although both of the population groups mentioned were disadvantaged during apartheid, the African group was and remains more vulnerable than Indians. Moreover, the SAHRC remarked that under apartheid Indians had enjoyed certain political and economic privileges from which black Africans were excluded.[127] The SAHRC continued that "although a minority, the white population group is socio-economically powerful"[128] and that Malema belongs to the vulnerable black population group.[129] The SAHRC found that the statements made by Malema[130] may have been offensive and disturbing, but that they bore constitutional value for dealing with land reform and race relations. Likewise, the SAHRC found Gardee's statement on twitter "offensive and demeaning", but not constituting hate speech. The SAHRC ruled that there would be "no political or constitutional value" in affording a remedy for this statement.[131]

As to Malema's statement that the majority of Indians are racist, the SAHRC pointed out that he did not say that *all* Indians are racist. This finding is problematic. The SAHRC failed to indicate whether it would have been hate speech if Malema stated that *all* Indians were racists. If so, we agree with Naidoo. The SAHRC's ruling "sets a problematic precedent by adopting a hierarchical approach to the racial status of the alleged offender and the target of the speech."[132] Naidoo asks if this means that if the song "Kill the *Boer*" was sung by someone other than a black African it could be hate speech, or whether if a white person had made the statement concerning

126 SAHRC Findings para 5.7; Naidoo 2019 https://city-press.news24.com/Voices/hate-speech-human-rights-commission-did-not-consider-malemas-influence-20190409.

127 SAHRC Findings para 8.1.2.

128 SAHRC Findings para 9.4.2.

129 Naidoo 2019 https://city-press.news24.com/Voices/hate-speech-human-rights-commission-did-not-consider-malemas-influence-20190409.

130 SAHRC Findings para 12.1.

131 SAHRC Findings para 12.2.

132 Naidoo 2019 https://city-press.news24.com/Voices/hate-speech-human-rights-commission-did-not-consider-malemas-influence-20190409.

Indians it would constitute hate speech.[133] The SAHRC's chairperson explained that freedom of speech would be endangered if the SAHRC were quick to deem robust and offensive speech to be hate speech. Finding that Malema had contravened the prohibition against hate speech in the PEPUDA based solely on the hurt caused would threaten the constitutional right.[134]

A senior researcher of the SAHRC commented that although Malema's "white slaughter" utterance could be interpreted as hurtful by a white audience, the reasonable listener would have realised that the utterance concerned land reform, and that it was not intended to harm white people.[135] Her view is that[136]

> [t]he 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 a slaughter of white people.

While Malema's utterance was again viewed by the SAHRC to be a permissible "political statement",[137] the posting of Helen Zille, who was formerly the Western Cape Premier (now the chairperson of the federal executive) of the official political opposition party, the Democratic Alliance (the DA), was not for the same reason absolved from further scrutiny.[138] She had posted on Twitter:

> For those claiming that the legacy of colonialism was only negative, think of our independent judiciary, transport infrastructure, piped water etc.

133 Naidoo 2019 https://city-press.news24.com/Voices/hate-speech-human-rights-commission-did-not-consider-malemas-influence-20190409.

134 Feketha 2019 https://www.iol.co.za/news/politics/malema-hate-speech-ruling-furore-20131591.

135 Feketha 2019 https://www.iol.co.za/news/politics/malema-hate-speech-ruling-furore-20131591.

136 Feketha 2019 https://www.iol.co.za/news/politics/malema-hate-speech-ruling-furore-20131591.

137 Jana 2019 https://www.politicsweb.co.za/documents/malemas-white-slaughter-remarks-the-sahrcs-finding.

138 The Public Protector is currently investigating this matter further, even though Zille no longer holds office. Maughan 2019 https://www.businesslive.co.za/bd/politics/2019-08-07-helen-zille-and-busisiwe-mkhwebane-to-square-off-over-colonialism-tweets/.

Here the approach accepted in international law was preferred, i.e. to be stricter against politicians and individuals holding status positions in so far as statements that they make are racially divisive.[139]

This was not the last from Malema. Following the death of the previous president of Zimbabwe, Robert Mugabe, he posted on Twitter: "the only white man you can trust is a dead white man". The SAHRC has indicated its intention to refer the matter to the Equality Court as a possible instance of hate speech.[140]

The fact that the SAHRC is lethargic in acting against these types of serious and repeated utterances by certain politicians could have devastating consequences. In the *Masuku* case[141] the SAHRC led the evidence of a doctor, Dr Stanton, who has done extensive research on the topic of the prevention of genocide. In his research Stanton analysed the processes that lead to genocide. He has discovered that there is a pattern. The first stage of genocide starts with words having consequences. It is repetition of these utterances that incites genocide. The fact that Malema has been allowed to make repeated negative, racial utterances revolving around the same theme and that they have gone unpunished could in our view be considered the allowance of this first step of genocide against the race groups that he targets.

The identity and status of the perpetrator can potentially increase the likelihood, and the extent of the harm suffered.[142] How well known and influential the perpetrator is also impacts on the size of the audience who will take note of the expression and the value placed on it.[143] For these reasons, the ECtHR places a higher premium on utterances made by politicians.[144] The European Council's case law suggests that the court is more inclined to find politicians guilty of hate speech.[145] This principle does not appear to be consistently applied, particularly by the SAHRC. The "defences" that appear to be accepted by the SAHRC have syphoned through to the Equality Courts, where they are raised as defences against charges of having uttered hate speech.

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139 Maughan 2019 https://www.businesslive.co.za/bd/politics/2019-08-07-helen-zille-and-busisiwe-mkhwebane-to-square-off-over-colonialism-tweets/.

140 Eyewitness News 2019 https://www.msn.com/en-za/news/politics/sahrc-to-take-malema-to-court-for-hate-speech/ar-AAHt7Fp?li=BBqfP3n.

141 *Masuku* case para 11.

142 LRC Memorandum para 41.

143 LRC Memorandum paras 20-22.

144 LRC Memorandum paras 20-22.

145 Weber *Manual on Hate Speech* 37; LRC Memorandum paras 20-22.

Black First Land First (the BLF), a political party which has since been deregistered, often used slogans emanating from the apartheid era, including "kill the farmer, kill the *boer*", "one settler, one bullet" and "land or death".[146] Andile Mngxitama, the president of the BLF, answering to charges of alleged hate speech, observed that the slogans were responses to the historic and current land dispossession.[147] The Equality Court disagreed and declared the slogan "land or death" to be hate speech.[148]

On 8 December 2018 at a rally in Potchefstroom Mngxitama stated:[149]

> You kill one of us (black Africans), we will kill five of you (whites). We will kill their women, we will kill their children, we will kill their dogs, we will kill their cats, we kill anything that comes for us.

The BLF denied that this was hate speech, arguing that supporters were only being instructed to defend themselves should they be attacked and killed by whites.[150] Even if this is so, no provision is made in the PEPUDA for any defences besides the threshold test for the application of section 10(1) of the PEPUDA.

In 2019 a fatal tragedy occurred at the high school Driehoek in Vanderbijlpark. Four white pupils died after an overhead walkway caved in. Various other pupils, mostly white, were seriously injured. Following the tragedy, the BLF spokesperson posted on social media that the death of the young children should be celebrated.[151] Someone responded: "minus three land criminals - great news" and "[d]on't have heart to feel pain for white kids. Minus 3 future problems." The BLF spokesperson responded, "God is responding, why should we frown on the ancestors' petitions to punish the land thieves including their offspring."[152] The SAHRC received several complaints and indicated that it would refer the matter to the Equality Court.

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146 *Strydom v Black First Land First* 2019 ZAEQC 1 (6 May 2019).

147 Mabuza 2019 https://www.sowetanlive.co.za/news/south-africa/2019-01-29-blf-hate-speech-accusations-to-be-heard-in-equality-court/.

148 SAHRC 2019 https://sahrc.org.za/index.php/sahrc-media/news-2/item/1907-media-statement-the-south-african-human-rights-commission-welcomes-the-equality-court-s-decision-on-the-blf-and-hate-speech; Shange 2018 https://www.heraldlive.co.za/news/2018-07-19-blf-in-court-for-hate-speech-against-whites/; Lindeque 2019 https://ewn.co.za/2019/05/06/blf-ordered-to-remove-slogan-after-equality-court-hate-speech-ruling.

149 Pijoos 2019 https://www.timeslive.co.za/news/south-africa/2018-12-10-watch--you-kill-one-black-person-we-kill-five-white-people-blf-president/.

150 Pijoos 2019 https://www.timeslive.co.za/news/south-africa/2018-12-10-watch--you-kill-one-black-person-we-kill-five-white-people-blf-president/.

151 ANA Reporter 2019 https://www.iol.co.za/news/politics/driehoekhighschool-da-youth-reports-blf-to-sahrc-over-most-vile-remarks-19095305.

152 Pijoos 2019 https://www.timeslive.co.za/politics/2019-02-03-blf-to-be-reported-to-human-rights-commission-over-racist-horskool-driehoek-remarks/.

Mngxitama responded that the country should rather have an open dialogue about why people hold such views.[153]

In the Johannesburg Equality Court, facing charges of hate speech along with other members of the BLF, Mngxitama, argued that the utterances should not be viewed as hate speech. Instead, he argued, they were a spontaneous reaction emanating from a place of pain. He contended that the history of the country should be considered and that the statement should be viewed from the perspective that if a black child falls into a pit toilet there would not be as much publicity as in the case of these white children who died. He argued that the utterances were posted out of historical anger against whites.[154] Initially, Mokgoatlheng J found that the members' statements constituted hate speech, but this finding was nullified by *Qwelane* SCA in which section 10(1) of the PEPUDA was amended in the interim.[155]

It is not correct to apply the legislation differently to different population groups. It is also the incorrect position from which to start the assessment of whether or not an utterance constitutes hate speech. The PEPUDA expressly determines that in hate speech cases considerations of fairness, including the personal context of the victim and the perpetrator,[156] do not play a role.[157] However, the PEPUDA requires that the context in which an utterance is made should be considered. Factors that are considered part of the context are the social and historical context and whether on the facts the utterance was directed at a group or individual that is recognised as being vulnerable.[158]

In *Canada (Human Rights Comm) v Taylor*[159] the Canadian court approached the prohibition against hate messages from the point of view of those affected.[160] This orientation, that the court should view the equality guarantee from the view of the victim, appears to be correct. It makes sense

153 Penny and Nqola 2019 https://ewn.co.za/2019/02/05/sahrc-appalled-by-racist-comments-on-hoerskool-driehoek-tragedy.

154 Beukes 2019 https://www.pressreader.com/search?query=BLF%20vier%20die&languages=en&groupBy=Language&hideSimilar=0&type=1&state=1.

155 Unfortunately, the Equality Court case has not been reported. Consequently, we are reliant on news reports for information regarding the outcome of the case. See Mitchley 2019 https://www.news24.com/SouthAfrica/News/nullified-equality-court-judgment-against-blf-leaders-paves-way-for-criminal-case-solidarity-20191204.

156 Section 14 of the PEPUDA.

157 Section 15 of the PEPUDA.

158 SAHRC Findings 15; also see Grootboom 2019 *PSLR* 101.

159 *Canada (Human Rights Comm) v Taylor* 1990 13 CHRR D/435 (SCC).

160 Compare *Eatock v Bolt* 2011 FCA 1130 (*Eatock*) paras 243-252. The court follows a similar approach.

when considering the context in which the utterance is made to look at the act of alleged hate speech from the victim's point of view, taking into consideration the surrounding circumstances applicable to him or her at the time that the utterance is made. This approach conforms to the Critical Legal Theory which determines that in the context of equality one must deal with individuals in accordance with their true conditions of disadvantage.[161] Further, the PEPUDA explicitly requires taking into consideration the disadvantage and the context of the complainant.[162]

The appeal court in *Herselman v Geleba*[163] also preferred the view that "the perceptions of the receiver or listener" are determinative.[164] The court reasoned that the expressed purpose of the PEPUDA to protect victims of hate speech dictates this approach.[165] Similarly, in the *Masuku* case the court iterated that what is important is how the statement was perceived.[166]

2.3 The identity of the victim(s)

2.3.1 Individual v group protection

Section 10(1) of the PEPUDA, as it stood before *Qwelane* SCA, prohibited the communication of words "against any person" on a prohibited ground. These words are no longer contained in the interim amended provision. Nevertheless, no effort was made in the interim to clarify that protection against hate speech is not applicable to individuals as opposed to vulnerable groups. South Africa's legislation is not the only hate speech regulation that can be interpreted as providing individual protection.[167]

However, to use it as a mechanism for the protection of individuals does not appear to accord with the purpose of the PEPUDA as a remedial human rights statute with the transformation of the South African society in mind.[168]

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161 Bohler-Muller and Tait 2000 *Obiter* 406, 410.

162 Preamble and ss 3(1)(a), 4(2) and 14(2)(a) of the PEPUDA; also see Kok 2008 *SAJHR* 446 fn 26.

163 *Herselman v Geleba* 2011 ZAEQC 1 (1 September 2011).

164 See too *Eatock* paras 243-252, 273; LRC Memorandum para 39.

165 Carney 2014 *Language Matters* 330.

166 *Masuku* case para 3. Although the Supreme Court of Appeal in *Masuku v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 2 SA 194 (SCA) did not expressly deal with this aspect, it appears from its judgment that this line of argument may not hold up.

167 Section 18C of the Australian *Racial Discrimination Act* 52 of 1975 declares it unlawful "to offend, insult, humiliate or intimidate another person or a group of people" based on race.

168 For a discussion of the drafting history, see Gutto *Equality and Non-discrimination* 17-95.

The purpose of the PEPUDA is to promote democracy, to reconcile South African society and to uphold the constitutional values.[169] Moreover, to interpret section 10(1) as a mechanism to protect individual interests as opposed to group rights would be out of alignment with the hate speech regulation in other jurisdictions.[170] The Canadian Supreme Court declared unconstitutional section 14(1)(b) of the *Saskatchewan Human Rights Code*,[171] a provision which regulated offensive speech, but which was not aimed at the protection of a vulnerable *group*.[172] The Canadian Supreme Court in *Saskatchewan (Human Rights Commission) v Whatcott*[173] held:

> [H]ate speech must rise to a level beyond merely impugning individuals: it must seek to marginalize the group by affecting its social status and acceptance in the eyes of the majority.

In *Islamic Unity Convention v Independent Broadcasting Authority*,[174] the Constitutional Court confirmed that the purpose of regulating hate speech is to ban any expression which "reinforces and perpetuates patterns of discrimination and inequality" and undermines unity, tolerance and reconciliation.[175] In the *Qwelane* Equality Court case it was also acknowledged that section 10(1) of the PEPUDA is supposed to protect vulnerable groups, to give effect to their rights to equality, and to prevent unfair discrimination against them.[176] Although it is not irrelevant that individuals belonging to a group are offended and hurt, "[u]ltimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech".[177]

Lindsay Maasdorp, spokesperson of the BLF, posted on Facebook: "I really dislike Max Price! I want to deal with him. Please cadres, tell that clown I'm coming for him, and he should expect me!" On a different day he wrote:

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169 Section 2 of the PEPUDA.

170 Botha and Govindjee identify as a shortcoming of the hate speech protection in the PEPUDA that to "communicate" hatred is insufficient to establish liability. They suggest replacing "communicate" with "advocate" and that instead of banning the "communication" of "words" that are "hurtful" directed at "individuals" the hate speech protection should protect vulnerable groups against utterances that promote hatred against them, and which are likely to cause harm. Botha and Govindjee 2017 *PELJ* 27.

171 *Saskatchewan Human Rights Code SS* 1979, c S-24.1.

172 *Saskatchewan (Human Rights Commission) v Whatcott* 2013 1 SCR 467 para 92 *et seq*.

173 *Saskatchewan (Human Rights Commission) v Whatcott* 2013 1 SCR 467 para 80.

174 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC).

175 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) paras 29-30, 33, 46.

176 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) para 53.

177 *Saskatchewan (Human Rights Commission) v Whatcott* 2013 1 SCR 467 para 82.

"When will we kill them?" The next day he posted on Twitter and on Facebook: "I have aspirations to kill white people, and this must be achieved!" About two weeks later he posted: "Make sure the struggle implicates whiteness (white-power/white people)" and shortly thereafter: "Max Price must be dealt with personally!" and "The Price on your life has been set to Max!"[178]

The threats made against Max Price on social media by Maasdorp would in terms of foreign law and section 10(1) of the PEPUDA not qualify as hate speech. They were directed at Price as an individual and did not relate to one of the prohibited grounds enumerated in the PEPUDA.[179] However, the references to whites could qualify as hate speech. The statements are directed at a target group and relate to race, one of the prohibited grounds.

2.3.2 The vulnerability of the target group

It is an accepted principle in foreign jurisdictions that the more vulnerable the target group is to which the racial utterance is directed, the more likely it is that the group will be harmed by and because of the hate speech.[180] The potential harm that can be inflicted by a racial utterance also increases if a power disparity exists between the perpetrator and the victims.[181] However, the likely effect of the utterance is less important in South Africa, as section 10(1) of the PEPUDA does not require of the victims to prove actual or potential harm.

In recognition of the obligation to uphold international obligations and to have regard to foreign law when interpreting and applying the legislation adopted under the Constitution, the interests of all of the population groups in South Africa should be taken into account.

It is trite in international law and on a national level that minorities are often defenceless against racial discrimination. The Equality Court recently iterated that South African equality courts, in the fulfilment of the obligations under the Constitution and the PEPUDA, cannot allow hate speech against minority groups.[182] Therefore, it is incremental that the court must act in

178 GroundUp Staff 2016 https://www.groundup.org.za/article/max-price-Maasdorp-assault-claims/.
179 Section 1 of the PEPUDA.
180 Waldron 2010 *Harv L Rev* 1596, 1626; LRC Memorandum paras 18, 27.
181 LRC Memorandum para 7.
182 *Masuku* para 54.

protection of minority groups, particularly those which historically have fallen victim to hate crimes.[183]

During March 2019 the Equality Court heard a hate speech case concerning postings on Facebook. This followed a *Carte Blanche* episode concerning the slaughtering and skinning of donkeys for use in Chinese traditional medicine. A spate of negative individual comments directed at Chinese people followed. For instance, "[t]hey (Chinese people) are the most despicable things on the planet! Hate the Chings"; "[th]ere are no more disgusting humans than the Chinese people. I wish they all just die!"; "[ca]n we stop these slant-eyed freaks from coming into the country"; and also "we should start killing their children for a cure of the common babalaas."[184]

The Chinese Association lodged an application to declare the statements of eleven people to be hate speech. Historically, the Chinese as a minority population group in South Africa, like black South Africans, were subjected to legislation that was unfairly discriminatory based on race.[185] The Chinese were also required to fight a legal battle in order to secure recognition as falling within the "designated groups of employees" that are entitled to the benefits of affirmative action under the *Employment Equity Act* 55 of 1998 (the EEA).[186] In 2008 the High Court of South Africa declared Chinese South Africans who became citizens of the Republic before 1994 and their descendants as being eligible for the benefits of affirmative action.[187] The outcome of this pending hate speech case should provide meaningful insight as to the value that the Equality Court ascribes to the factor of the vulnerability and historical discrimination of a minority population group in South Africa.

2.4 The identity of the perpetrator

Who the perpetrator is plays a role in different ways. The more powerful the utterer is relative to the target group, the greater the threat of harm. How much value is attached to the expression is also linked to the perpetrator's identity. The ECtHR is stricter when it comes to hate speech perpetrated by

183 Jana 2019 https://www.politicsweb.co.za/documents/malemas-white-slaughter-remarks-the-sahrcs-finding para 10.

184 Ho 2019 https://www.dailymaverick.co.za/article/2019-03-14-hate-speech-case-a-message-about-racism-discrimination/.

185 Refer to the *Cape Chinese Exclusion Act*, 1904 and the *Transvaal Immigration Restriction Act*, 1902.

186 See the definition is s 1 of the *Employment Equity Act* 55 of 1998 (the EEA).

187 *Chinese Association of South Africa v Minister of Labour* 2008 ZAGPHC 174 (18 June 2008).

politicians.[188] Office bearers, governmental employees and politicians, because of their status in society and their obligation to the country's tax payers, ought to be subjected to closer scrutiny and to more severe punishment if they are found liable for hate speech. They are under a duty to act in the best interest of all citizens, regardless of their race.[189] The Recommendation also determines that office bearers and opinion makers have more of a responsibility to foster harmonious race relations than members of the general public and that they ought to be dealt with more strictly by institutions responsible for the regulation of hate speech. However, this principle appears not to be applied consistently in relation to hate speech in South Africa.

In *Dagane v SSBC*[190] (hereafter the *Dagane* case) it was noted that Dagane had been dismissed for posting racist statements[191] on Malema's Facebook page. The Labour Court held that dismissing him for doing so was fair because Dagane had made the racist utterances in his capacity as a police officer, and police officers are responsible for the safety of all citizens.[192]

On the other hand, the SAHRC apparently absolved the utterances made by Zindzi Mandela-Hlongwane, the daughter of the late Winnie Madakizela Mandela and Nelson Mandela, from scrutiny. While serving as the ambassador of South Africa to Denmark Mandela-Hlongwane had, among other things, on her Twitter account referred to white South Africans as "trembling white cowards", "thieving rapist descendants of Van Riebeck (*sic)*" and "shivering land thieves". The spokesperson of the EFF, Mbuyiseni Ndlozi, stated that the EFF supported Mandela-Hlongwane's tweets and her views.[193] AfriForum requested the Minister of International Relations and Cooperation, Dr Naledi Pandor, to dismiss Mandela-Hlongwane, arguing that as an ambassador of South Africa there rested a duty on her to act in the interest of all the country's residents without prejudice.[194] She was not recalled or dismissed. Rather, her contract was extended for a further six

188 LRC Memorandum para 21.
189 LRC Memorandum para 20.
190 *Dagane v SSSBC* 2018 7 BLLR 669 (LC) (the *Dagane* case).
191 His utterances included: "F*** this white racist s**t! We must introduce Black apartheid. Whites have no ROOM in our heart and mind. Viva MALEMA" and "When the Black Messiah (NM) [Nelson Mandela] dies, we'll teach whites some lesson, We'll commit a genocide on them. I hate whites".
192 *Dagane* case para 49; also see Botha 2018 *THRHR* 671, 673.
193 Maroela Redaksie 2019 https://maroelamedia.co.za/nuus/sa-nuus/eff-beaam-zindzi-mandela-se-uitlatings/.
194 AfriForum 2019 https://allafrica.com/stories/201906170365.html.

months. AfriForum lodged a complaint with the SAHRC.[195] In an official response the SAHRC declared that "the history of Zindzi Mandela and her family needs to be taken into account during any investigation into her tweets on land reform."[196]

2.5 Historical associations

The words that are used may bear cultural or historical associations that qualify them as hate speech. Some expressions are viewed as being manifestly heinous by the SAHRC and the Equality Court alike, and they are inclined to be viewed as hate speech. Examples include calling a black South African a "baboon" or likening him to a monkey,[197] calling the members of a population group "cockroaches"[198] and using the k-word.[199] Referring to a black person using the k-word is always hate speech, even if the perpetrator is black.[200] It was recently confirmed that the k-word, when used by one black individual to address another, is not considered by the

195 Cornelissen 2019 https://maroelamedia.co.za/nuus/sa-nuus/klagte-teen-zindzi-mandela-by-menseregtekommissie-ingedien/.

196 Jacaranda FM 2019 https://sahrc.org.za/index.php/sahrc-media/news/item/2030-sahrc-will-consider-probe-into-zindzi-mandela-tweets.

197 Sparrow on Facebook had compared black holiday-makers on the beach to "monkeys". eNCA 2016 https://www.enca.com/south-africa/penny-sparrow-feels-twitter-wrath. Also see *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC) paras 12, 41, 58; and Kok 2009 *SAPL* 655.

198 This is considered an epithet that led to the Tutsi genocide in Rwanda. O'Grady 2015 https://foreignpolicy.com/2016/04/15/rwandan-who-called-tutsis-cockroaches-in-1992-gets-life-sentence/. Morota posted on his Facebook account: "I hate white people and must go back wherever they come from or alternatively to hell (sic)." He also referred to white people as white cockroaches. Burger 2016 https://nuus.info/dosent-na-wit-kokkerotte-nog-ongestraf; Burger 2016 https://www.netwerk24.com/Nuus/Politiek/ernstig-gewaarsku-oor-wit-kakkerlakke-20161022; Natasha Stop White Genocide 2016 https://stopwhitegenocideinsareports.blogspot.com/2016/06/black-unisa-lecturer-who-called-white.html.

199 *South African Breweries (Pty) Ltd v Hansen* (unreported) case number CA6/2016 of 25 May 2017; *SAEWU v Rustenburg Platinum Mines LAC* (unreported) case number JA 45/2016 of 3 May 2017; *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 38 ILJ 97 (CC) paras 4, 7-9, 53; *Thembani v Swanepoel* 2017 3 SA 70 (ECM); *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* 2002 6 BLLR 493 (LAC) para 35.

200 Khumalo agrees that uttering the k-word is "inherently racist irrespective of the context." Khumalo 2018 *SA Merc LJ* 392.

court to be part of the culture of black South Africans.[201] "Boer" has in some cases been recognised as pejorative, but this is not always the case.[202]

In assigning meaning to words, South African courts generally use dictionary definitions and refer to meanings assigned to words in previous court cases.[203] However, in some cases even if the wording does not state what is meant, the true meaning of the utterance has been deduced. For instance, in *Dyonashe v Siyaya Skills Institute (Pty) Ltd,*[204] even though the expression did not expressly refer to Whites but rather to "*Boers*", which could be viewed as a neutral race descriptor,[205] the commissioner was satisfied that objectively viewed the reasonable person would read "Kill the *Boe*r" to mean kill white people. In the *AfriForum* case,[206] the court had held that the struggle song "Kill the *Boer*" is understood by the reasonable person to mean kill white people.[207] In the *Hotz* case the court declared that a T-shirt with the inscription "Kill all whites" was racist even though from less than a meter away a tiny "s" is visible. In other words, the caption read "skill all whites".[208]

Expressions can also be ambiguous, bearing more than one possible meaning. While saying one thing you may be implying something else.[209] Speech acts can be divided into three parts: "locutionary (what is said), illocutionary (what is meant) and perlocutionary (the effect)".[210] According to the principles of pragmatics, it is often not *what* you say, but *how* you say something that matters in determining the level of politeness of a verbal exchange.[211] Carney posits convincingly that when a court in a hate speech case assesses whether an utterance is hurtful or harmful, it would assist to

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201 Khumalo 2018 *SA Merc LJ* 392. Jordaan 2019 https://select.timeslive.co.za/news/2019-08-23-final-word-on-the-k-word-its-not-ok-whether-youre-black-or-white/; Maphanga 2019 https://www.netwerk24.com/Nuus/Hof/man-wat-skuldig-is-na-k-woord-wil-appelleer-20190822. Compare *Hagan v Trustees of the Toowoomba Sports Grounds Trust* 2000 FCA 1615 para 7.

202 *Freedom Front v South African Human Rights Commission* 2003 11 BCLR 1283 (SAHRC) 1290; *Makhanya v St Gobain* 2019 7 BALR 720 (NBCCI). However, in contrast, see the *Duncanmec* case para 37.

203 Carney 2014 *Language Matters* 328.

204 *Dyonashe v Siyaya Skills Institute (Pty) Ltd* 2018 3 BALR 280 (CCMA).

205 The Constitutional Court in the *Duncanmec* case para 37 held that "boer" is not racially offensive. However, compare *Freedom Front v South African Human Rights Commission* 2003 11 BCLR 1283 (SAHRC) 1290, in which the court held that "boer" is derogative.

206 *AfriForum* case para 108.

207 *AfriForum* case para 108.

208 *Hotz* case para 55.

209 Saeed *Semantics* 242.

210 Saeed *Semantics* 242.

211 Goffman *Interaction Ritual* 5; Carney 2014 *Language Matters* 334.

employ principles of pragmatic linguistics focussing in particular on "speech acts" and principles of "politeness".[212] Utterances may for instance have different meanings to different population groups and cultures.[213] The skills of communication are often culture-bound, a fact which may result in misinterpretations of expressions by individuals not belonging to the utterer's cultural group.[214] For instance, the lyrics of songs and what the intention is in singing them often do not correlate with the literal meanings.[215] In the Memorandum 2012 the LRC posited that interpreting what a song means and why a song was composed and ultimately sung in an assessment of whether the singing thereof constitutes incitement to harm or of hatred would require "insider" knowledge.[216]

This principle is well illustrated by the case concerning the old land flag. As to the meaning of the expression, the *Federasie van Afrikaanse Kultuurvereniginge* in the *Mandela Foundation* case argued that the old land flag is a cultural symbol of reconciliation between the *boers* and the English.[217] The *dictum* in the *Mandela Foundation* case contrasts with the findings of the ECtHR. In *Vajnai v Hungary*[218] the ECtHR acknowledged that whereas the red star was a symbol that signified Soviet totalitarianism for some, in other sections of the Hungarian society it was a sign of solidarity and social justice. The court emphasised the importance of not imposing unduly narrow restrictions on expressions that may have multiple meanings.[219] Making representations of history is also acknowledged by the ECtHR as intrinsic to permissible democratic discourse.[220] Moreover, a narrow limitation in an instance where an expression has different meanings as in this case is contrary to article 1 of the *Declaration of the Rights of Persons belonging to National, Ethnic, Religious and Language Minorities*, which was adopted by the United Nations General Assembly on 18 December 1992. It reads:[221]

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212 Carney 2014 *Language Matters* 327, 329.

213 LRC Memorandum para 33.

214 Janney and Arndt "Intracultural Tact versus Intercultural Tact" 25.

215 LRC Memorandum para 53.

216 LRC Memorandum para 60.

217 *Mandela Foundation* case paras 62, 79.

218 *Vajnai v Hungary* App No 33629/06 (ECtHR 8 July 2008) (hereafter the *Vajnai* case) paras 52-53.

219 *Vajnai* case paras 51, 54, 57; also see *Fratanolo v Hungary* App No 29459/10 (ECtHR 3 November 2011) para 25. LRC Memorandum paras 33-34. In these cases the court banned the display of the red start only in so far as it was used to propagate totalitarian ideology.

220 LRC Memorandum paras 14-16.

221 *Declaration of the Rights of Persons belonging to National, Ethnic, Religious and Language Minorities* (1992) 5. Also see Brink and Mulder 2017

> States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

2.6 The audience to whom the utterance is made and where it is made

Where and to whom the utterance is made may determine whether it constitutes hate speech or only rude or distasteful speech.[222]

Whether it makes a difference if an utterance that qualifies as potential hate speech occurred in the workplace or outside of the workplace is an issue in the PEPUDA that requires clarification through legislative amendment. Section 5(3) of the PEPUDA apparently excludes "employees" from the protection offered by this piece of legislation, ostensibly leaving them remediless.

Whether witnesses were present when a verbal utterance was made is an important consideration in the assessment of whether an expression is derogatory.[223] The testimony of witnesses is important to confirm that the words were indeed uttered, and to convey to the court the manner in which the utterance was made. For instance, recently, after a black licensing department official allegedly made aggressive racist utterances to a young white male client, the witness who had reported the incident described the manner in which the official had treated the young man as "berating, insulting and humiliating".[224]

The potential harm is also dependent on the way the hearers interpret the speech.[225] However, whether *all* the witnesses considered the utterance to be racist is not the test to determine whether the expression qualifies as hate speech. The correct question to ask, according to the Constitutional Court,[226] is whether objectively the words were reasonably capable of conveying to the reasonable hearer a pejorative meaning.[227]

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https://solidariteit.co.za/wp-content/uploads/2017/10/Racism-hate-speech-and-double-standards-by-no-means-a-mere-matter-of-bla....pdf.

222 LRC Memorandum para 43.

223 *Rustenburg Platinum Mine and SAEWA obo Meyer Bester* 2018 8 BLLR 735 (CC) (hereafter the *Bester* case) para 50.

224 Njilo 2019 https://www.timeslive.co.za/news/south-africa/2019-06-04-racist-licensing-official-in-viral-video-has-been-dismissed/?utm_campaign=recommendation&utm_medium=banner&utm_source=newsroom.

225 LRC Memorandum para 46.

226 *Bester* case para 50.

227 *Bester* case para 50; *Mohammed v Jassiem* 1996 1 SA 673 (SCA) 711.

In the *Dagane* case the fact that Dagane had posted the racially loaded utterance on Malema's Facebook page is significant. As a member of the EFF and by posting the statement where many likeminded individuals were likely to read it, Dagane showed his intention to incite hatred and violence.[228] Moreover, the likelihood that the audience would share his ideology increased the likelihood that his utterance would incite hatred or harm.[229]

2.6.1 Private or public utterances

In terms of foreign jurisprudence, it is evident that hate speech regulation is not intended to censor ideas. Consequently, it is required that the utterance must be made in public to be sanctionable.[230] To regulate hate speech which occurs in public sets a benchmark of what is acceptable behaviour and may assist in changing the mind-set of individuals too.[231] Unfortunately, the PEPUDA is not clear that "publicity" of the expression is required for it to qualify as hate speech, as is the case in other jurisdictions.[232]

In terms of the Recommendation, if a racial utterance is disseminated via the mainstream media, or via the internet, or if it is repeated, it must be viewed as the fruit of a deliberate plan to instil hostility. It appears that the Equality Court considers how widely the utterance is publicised as a factor counting against the perpetrator. For instance, in the *Dagane* case the Labour Court considered the fact that the police officer had posted the racially loaded statements on a quasi-public forum [which is] accessible to potentially thousands of Facebook users.

However, the amount of publicity that hate speech attracts does not always depend on who the perpetrator is. Neither is it necessarily connected to his relative social standing and importance.

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228 LRC Memorandum paras 44-46.

229 LRC Memorandum para 47.

230 *R v Ahenakew* 2006 SKQB 17-18; *R v Bahr* 2006 ABPC 360 para 30.

231 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 138.

232 Compare s 319(1) of the *Canadian Criminal Code* RSC 1985, c C-46, which sets as a requirement for hate speech that the statements must be communicated "in a public place". In s 319(7) "public place" is defined as somewhere that the public has the right to access or where someone is in attendance by invitation, whether the invitation is expressed or implied. Section 18C of the Australian *Racial Discrimination Act* 52 of 1975 makes it an offense "otherwise than in private" to make offensive, insulting or humiliating statements.

There is a public interest dimension to hate speech cases.[233] The PEPUDA requires that these cases must be heard in open court.[234] In *Khumalo* the Roodepoort proceedings which had been instituted by the ANC were conducted *in camera* to evade publicity.[235] Moreover, no press statement was made after these proceedings.[236] The Johannesburg Equality Court lamented the fact that contrary to the prescripts of the PEPUDA the Roodepoort proceedings were not conducted in public.[237] In the light of the lack of publicity, the Johannesburg Equality Court was not convinced that the public interest had been served.[238]

The research conducted by Brink and Mulder in 2017[239] suggests that utterances made by whites against blacks enjoy more media coverage than those made by blacks against whites, even if what is said by the black perpetrators appears to be much more malignant.[240] The black case studies referred to in the survey enjoyed markedly less media coverage than those of white transgressors. In fact, the largest number of media reports for a black transgressor (Malema, with 163) was reported on nearly 100 times fewer than the lowest number of reports concerning a white transgressor.[241]

Although one would expect that utterances made by individuals in influential positions would receive more media attention, this is not always the case. Angelo Agrizzi had made the utterance in which he referred to two Bosasa directors by the k-word, in the privacy of his home with only a few members of his family and a colleague present. The SAHRC stated in a newspaper report that this fact made no difference. A secret recording which was played at the 2019 Zondo Commission of Enquiry into State Capture was publicised widely.[242] Penny Sparrow had posted her utterance on her private Facebook account, for the attention of a few of her personal friends

233 *Khumalo* case paras 20, 69.

234 Section 19 of the PEPUDA.

235 As mentioned above, this is a contravention of s 19(2) of the PEPUDA as highlighted under 2.3. *Khumalo* case para 20.

236 *Khumalo* case para 69.

237 *Khumalo* case para 24.2.

238 *Khumalo* case para 69.

239 Brink and Mulder 2017 https://solidariteit.co.za/wp-content/uploads/2017/10/Racism-hate-speech-and-double-standards-by-no-means-a-mere-matter-of-bla....pdf.

240 Brink and Mulder 2017 https://solidariteit.co.za/wp-content/uploads/2017/10/Racism-hate-speech-and-double-standards-by-no-means-a-mere-matter-of-bla....pdf.

241 There were 251 reports concerning the utterance by Justin van Vuuren. Brink and Mulder 2017 https://solidariteit.co.za/wp-content/uploads/2017/10/Racism-hate-speech-and-double-standards-by-no-means-a-mere-matter-of-bla....pdf.

242 Daniels 2019 https://www.iol.co.za/news/south-africa/gauteng/agrizzi-sahrc-in-settlement-talks-over-k-word-slur-24348287.

and family only. However, someone got a screenshot of it and disseminated the utterance further, and hers became the most thoroughly publicised case of hate speech in South Africa to date.[243] Likewise, Adam Catzavelos' cases enjoyed a lot of publicity. His video went viral.[244] Whereas Agrizzi was an executive businessman, Sparrow and Catzavelos were relatively unknown, working as an estate agent and in a family business respectively.[245]

The skewed numbers of media reports along racial lines could possibly emanate from the fact that it is not widely accepted that blacks can be guilty of racism against whites.[246] It could also be attributable to the fact that the vast majority of South Africans are black and that reports concerning racism against blacks could increase newspaper sales.[247] Whatever the reason, it is contrary to the Recommendation that the media coverage on hate speech should be so one-sided. It requires "[i]nformed, ethical and objective media" which “does not refer to race in a manner that may promote intolerance."[248] The "Concluding observations on the combined fourth to eighth periodic reports of South Africa"[249] indicate that the CERD is concerned about the governing party's racist pronouncements and that the media chooses to ignore them, which contributes to the general racial polarisation in South Africa.

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243 An online search for "Penny Sparrow" and "monkeys" generated 27500 results. Sparrow's matter featured in 4501 media reports.

244 Catzavelos had stated on a video while on holiday in Greece: "Not a f***en [k-word] in sight. Heaven on earth". Lindeque 2018 https://ewn.co.za/2018/08/22/adam-catzavelos-fired-from-family-business-after-racist-video.

245 In the 2017 survey the persons who had made the offensive utterances in the black case studies were mostly highly placed individuals. Among them was the previous President of the Republic of South Africa, a leader of a political party, the rector of the University of the Free State, and the spokesperson of the Ngwathe Municipality. In the cases in which the alleged transgressor was white, media coverage was relatively extensive, even though besides Mabel Jansen, a judge, and Chris Hart, a senior economist, the utterers in the white category of the survey were not particularly influential. Brink and Mulder 2017 https://solidariteit.co.za/wp-content/uploads/2017/10/Racism-hate-speech-and-double-standards-by-no-means-a-mere-matter-of-bla....pdf.

246 In *Vodacom (Pty) Ltd v Byrne* 2012 33 ILJ 2705 (LC) para 15 Van Niekerk J noted that it is believed that a black person cannot be racist. Also see Dlula 2014 https://m.news24.com/MyNews24/Black-people-cant-be-racist-20141124; Mzwakali 2015 https://www.pambazuka.org/governance/black-people-can%E2%80%99t-be-racist.

247 Black South Africans form an overwhelming majority. StatsSA 2019 http://www.statssa.gov.za/publications/P0302/MYPE%202019%20Presentation_final_for%20SG%2026_07%20static%20Pop_1.pdf.

248 The Recommendation paras 39-40.

249 The Recommendation para 12.

2.7 The social conditions at the time of making the utterance

The Recommendation indicates that the socio-economic and political circumstances at the time of the making of the utterance must be considered by South African institutions in assessing whether an utterance constitutes hate speech. The assessment into whether the intention of the utterer of alleged hate speech is to be hurtful, harmful and to propagate hatred requires a scrutiny of the content of the offending utterance in its social context.[250] The meaning of an utterance and whether it constitutes hate speech may be affected by the social conditions at the time that the utterance is made.[251]

The current unemployment rate in South Africa stands at a staggering 29 per cent.[252] The StatsSA "Quarterly Labour Force Survey for Quarter 2 of 2019" indicates that black South Africans still account for the biggest segment of the unemployed group at 32,7 per cent, followed by coloureds (22,5 per cent), Indian/Asians at 11,2 per cent and whites at 7,4 per cent.

Although many measures have been introduced since 1994 to promote participation in the economy by those who were during apartheid deprived of the opportunity,[253] vast inequity remains.[254] These measures do not necessarily address the interests of the vast majority of indigent black South Africans[255] and where there are successes, change is considered to be too slow.[256] The country is currently caught up in a land debate threatening the property rights on which the economy rests, while holding promise for black South Africans that they will be afforded land that they believe to belong to them.[257] This has raised racial tensions even further.

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250 *Qwelane* Equality Court case para 53.

251 LRC Memorandum para 49.

252 Trading Economics 2019 https://tradingeconomics.com/south-africa/unemployment-rate.

253 Including the EEA and the *Broad-Based Black Economic Empowerment* Act 53 of 2003.

254 Pike, Purchert and Chinyamurindi 2018 *Acta Commercii* 3.

255 Pike, Purchert and Chinyamurindi 2018 *Acta Commercii* 3; also see De Lange 2019 *Rapport* 7.

256 Munnik date unknown https://labourguide.co.za/recent-articles/50-new/most-recent-publications/2660-mere-compliance-with-the-employment-equity-act-results-in-no-or-insignificant-ee-transformation; also see Department of Labour 2019 https://www.labourguide.co.za/workshop/1692-19th-cee-annual-report/file 7,10, 25-29. See also Merten 2019 https://www.dailymaverick.co.za/article/2019-08-28-employment-equity-20-years-down-the-line-a-marginal-movement-to-diversity/.

257 Friedman 2018 https://mg.co.za/article/2018-03-05-land-debate-in-south-africa-is-about-dignity-and-equality-not-the-constitution.

In *Modikwa Mining Personnel Services v CCMA*[258] the employee had been dismissed for saying: "we need to get rid of the whites" at a meeting at which both white and black employees were present. The court considered the utterance to be overtly racist.[259] However, having considered the social, political and historical context, Gaibie AJ noted that the utterer as a black employee may have felt that he was being discriminated against unfairly in the workplace. Notwithstanding, the court held that the proper grievance channels ought to be followed instead of resorting to making racist statements.[260] The SAHRC appears to take into consideration the social conditions of different population groups in different ways.[261]

3 Conclusion

Given the uncertainties surrounding the proper interpretation and application of section 10(1) of the PEPUDA, in its initial as well as interim amended format, it is appropriate to consider international and foreign law for guidance.

In the hate speech provision as it was before the judgment in *Qwelane* SCA, the PEPUDA did not make it clear that the utterance must incite hatred or be likely to cause harm to qualify as hate speech. The Equality Court recently confirmed that the "clear intention" requirement must be separated from the subjective intention of the utterer.[262] The objective test that has been laid down to establish hate speech should remain unaffected by the amended wording.[263]

A wide construction was afforded to "words" in the initial version of section 10(1) of the PEPUDA so that the term covered any expression, although some commentators have disagreed with this interpretation. The amended version of section 10(1) by *Qwelane* SCA completely omits the term "words" and simply provides "[n]o person may *advocate*", thereby removing any uncertainty that its meaning is limited to words only. The version is broad enough also to embrace any qualifying expressions. This broad interpretation accords with international and foreign law.

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258 *Modikwa Mining Personnel Services v CCMA* 2012 ZALCJHB 61 (29 June 2012).

259 *Modikwa Mining Personnel Services v CCMA* 2012 ZALCJHB 61 (29 June 2012) para 35.

260 *Modikwa Mining Personnel Services v CCMA* 2012 ZALCJHB 61 (29 June 2012) para 33; *cf* Khumalo 2018 *SA Merc LJ* 388.

261 See the discussion of the hierarchic approach it followed under 2.2.4 and in dealing with the postings of Mandela-Hlongwane under 2.4.

262 *Mandela Foundation* case paras 167-168.

263 See the discussion under 2.2.

Whereas in foreign law additional criteria are set for measuring the value of expressions, this is not done in South Africa. The protection in section 10(1) of the PEPUDA is subject only to section 16 of the Constitution and the limitation clause in section 36.[264] The Equality Court[265] and the SAHRC[266] appear to interpret this as meaning that if the utterance has constitutional value or is made in the protection of a constitutional right, it would not constitute hate speech.

In foreign jurisdictions value is placed on political speech as part of democratic discourse. The SAHRC also applies this principle, but inconsistently along racial lines. In the process, it appears as if the SAHRC has created certain defences that are not provided for in the legislation.

South Africa, like other jurisdictions, is more lenient to perpetrators belonging to groups which have suffered previous disadvantage. However, it appears that in South Africa this leniency is abused and even raised as a defence against hate speech charges. Moreover, the SAHRC appears to have created an untenable hierarchy of disadvantage in applying the hate speech protection.

In South Africa protection against charges of hate speech is available in instances where inter-personal speech directed at individuals is offensive, whereas in foreign and international law the purpose is to protect victim groups.

South Africa's population consists of various population groups. It is incumbent on the SAHRC and the Equality Courts in terms of the principles of international law to pay specific regard to the protection of the interests of minority groups.

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264 Section 10 of the PEPUDA is a limitation of the right to freedom of speech as enunciated in s 16 of the Constitution. In order to strike a balance between the different constitutional rights at play, s 16(2) of the Constitution expressly excludes harmful expressions from constitutional protection. Notably, s 16(2)(c) of the Constitution excludes the "advocacy of hatred" from the constitutional protection of freedom of speech. The boundaries of the protection of the right to freedom of expression are demarcated in s 16(2). The fact that a specific "expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection." See *Masuku v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 2 SA 194 (SCA) paras 14-15, 19 and 31. Also see Grootboom 2019 *PSLR* 100-101. Any limitation of the right to freedom of expression not contemplated in s 16(2) must meet the requirements of the limitation clause in s 36 of the Constitution. See *Phillips v DPP, Witwatersrand Local Division* 2003 3 SA 345 (CC) para 17.

265 *Qwelane* Equality Court case para 53.

266 SAHRC Findings para 12.2.

In relation to hate speech perpetrated by politicians, public officers and other highly placed individuals, the ECtHR is stricter in applying the hate speech provisions. This principle has not been implemented consistently in South Africa, a fact which has contributed to the repetition of hate speech by certain political figures.

Certain words are recognised in South Africa as hate speech by historical association. However, the meaning assigned to expressions may not necessarily be the same for all cultures. Whereas the ECtHR has accepted that where an expression has more than one meaning it should be scrutinised further to assess its possible constitutional value, this is apparently not done in South Africa.

Where the utterance is made can on a literal interpretation of the PEPUDA potentially exclude the possibility of its qualifying as hate speech. It also affects how many people will be exposed to the utterance, and the likely effect thereof. In terms of foreign jurisprudence only public utterances are accepted as hate speech. However, section 10(1) of the PEPUDA appears to cover utterances made in private also.

International law requires fair and equitable reporting of hate speech incidents. However, in South Africa the tendency is to report instances widely in the media where the perpetrator of the alleged hate speech is white, but not if he or she is black. The CERD has recognised this ostensible condonation of hate speech against whites by blacks as a concern which has the effect of entrenching the extant racial polarisation.

The socio-economic circumstances in South Africa dictate that the SAHRC and the Equality Courts must take a productive stance. It is important that they address the issue of hate speech, particularly when it is perpetrated by individuals holding status positions, in an equitable and consistent manner. Failure to do so may have dire consequences for the country and its inhabitants.

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List of Abbreviations

BLF	Black First Land First
CCMA	Commission for Conciliation, Mediation and Arbitration
CERD	Committee on the Elimination of Racial Discrimination
DA	Democratic Alliance
EEA	Employment Equity Act
ECtHR	European Court of Human Rights
EFF	Economic Freedom Front
Harv L Rev	Harvard Law Review
LRC	Legal Resource Centre of South Africa
OHCHR	Office of the United Nations High Commissioner for Human Rights
PEPUDA	Prevention of Unfair Discrimination Act 4 of 2000
PELJ	Potchefstroom Electronic Law Journal
PSLR	Pretoria Student Law Review
SAHRC	South African Human Rights Commission
SAJHR	South African Journal of Human Rights
SAPL	Southern African Public Law
SA Merc LJ	South African Mercantile Law Journal
SCA	Supreme Court of Appeal
StatsSA	Statistics South Africa
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
UK	United Kingdom