

IN THE MATTER BETWEEN

BONGANI MASUKU OF COSATU

Appellant

AND

THE SOUTH AFRICAN JEWISH BOARD OF DEPUTIES

Respondent

BACKGROUND

This matter was investigated by the Gauteng Provincial Offices of the South African Human Rights Commission (Commission) and was concluded as follows:

FINDING

"INTRODUCTION

1. This finding is in response to a complaint lodged by the South African Jewish Board of Deputies (referred hereinafter as "SAJBD") about utterances made by Bongani Masuku of COSATU (Congress of South African Trade Unions) at a rally held by the Palestinian Solidarity Committee at the Wits University campus.

During his speech at the rally Mr Masuku uttered numerous anti-semitic remarks which were seen to have incited violence and hatred amongst the students who were present.

2. The following are examples of the remarks made by Mr Masuku at the rally at Wits University campus:

"COSATU has got members here even on this campus; we can make sure that for that side it will be hell"

"COSATU is with you, we will do everything to make sure that whether its (sic) at Wits University, whether its (sic) at Orange Grove, anyone who does not support equality and dignity, who does not support the rights of other people must face the consequences even if it means that we will do something that may necessarily cause what is regarded as harm..."

"...The following things are going to apply: any South African family who sends its (sic) son or daughter to be part of the Israeli Defence Force must not blame us if something happens to them with immediate effect..."

3. The SAJBD also complained about comments made by Mr Masuku on the internet. The following comments were left on supernatural.blogs.com/ on the 6th of February 2009:

"...as we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity..."

4. An objection was also raised by the SAJBD to an e-mail that Mr Masuku wrote to Mr Anthony Posner which read as follows:

"... all who have not accepted or woken up to the reality that we now live in a democratic South Africa where racism or promotion of it is a crime, are free to leave the country. I repeat whether Jew or whomsoever (sic) does so, must not just be encouraged but forced to leave, for such a crime is so heinous it can't be tolerated..."

5. Another objection was made to an e-mail message sent to multiple recipients on the 13 February 2009 which read as follows:

"...all those who deny that occupation is wrong must be encouraged to leave South Africa before they infect our society with much more racism..."

6. Mr Masuku, in response to a letter from the South African Human Rights Commission, dated 11 May 2009, outlining the allegations made by the SAJBD, denied that his remarks were tantamount to hate speech and stated that the "constant cry of 'hate speech' from the South African Jewish Board of Deputies against criticisms of Israel had become extremely tiresome, wasteful of resources, and is trivialising the serious charge of 'hate speech' ".

INTERPRETATION OF PROVISIONS REGULATING FREEDOM OF EXPRESSION

1. Section 16 of the Constitution states:

1. Everyone has the right to freedom of expression which includes-

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;
- (d) Academic freedom and freedom of scientific research.

2. The right in subsection (1) does not extend to:

- (a) propaganda for war;
- (b) incitement of imminent violence;
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

2. The above constitutional provision should be read together with the provisions of the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (hereinafter referred to as the Equality Act) which gives expression to section 16 of the Constitution.

3. Section 10 of the Equality Act provides as follows:
 1. Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person that could reasonably be construed to demonstrate a clear intention to-
 - (a) be hurtful;
 - (b) be harmful or incite harm;
 - (c) promote or propagate hatred.

JURISPRUDENCE

4. In the findings of the Commission in *Freedom Front v South African Human Rights Commission*¹ the importance of the freedom of expression in our society was emphasised:
*freedom of expression constitutes one of the essential foundations of any democratic society.*² ... Its centrality to a constitutional democracy and the extent to which it supports other rights was expressly recognised by the Constitutional Court in *South African National Defence Force Union v Minister of Defence*.

The Court³ held that

... freedom of expression lies in one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and the right to stand for public office (s 19) and the right to assembly (s 17). The rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions, whether individually or collectively, even when these views are controversial.

¹ *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 at paragraph 16

² *Handyside v United Kingdom* A.24 (1976) 1 EHRR 737 at para 49

³ *South African National Defence force Union v Minister of Defence* 1999 (4) SA 469 (CC) at para 8

5. Any constitutional democracy is dependent on the robust exchange of ideas and opinions. Thus the right to freedom of expression is vital to the constitutional state. The right to freedom of expression is not unqualified as it can be limited as envisaged in section 16 (2) of the Constitution which is colloquially known as the “hate speech” qualification, though only one of its components encompasses hate speech.
6. The Constitutional Court considered the effect and impact of section 16 (2) in *Islamic Unity Convention v Independent Broadcasting Authority and Others*⁴. Langa J, as he was then, held:

“How is section 16 (2) to be interpreted? The words ‘the right in subsection (1) does not extend to...’ imply that the categories of expression enumerated in section 16 (2) are not to be regarded as constitutionally protected speech. Section 16 (2) therefore defines the boundary beyond which the right to freedom of expression does not extend. In that sense the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom and these objectives should be given effect to.”
7. Two elements must be present before an expression can be considered hate speech. Firstly the expression must constitute advocacy of hatred on one of the listed grounds and secondly the advocacy must constitute incitement to cause harm.⁵
8. The Commission found in the *Freedom Front*⁶ case that the expression will amount to hate speech if it is advocacy of hatred that is based on race, ethnicity, gender or religion and that constituted incitement to cause harm. The harm must be caused by the advocacy of hatred on the stipulated grounds.

⁴ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC)

⁵ Currie & De Waal: The Bill of Rights Handbook, 5th Edition, 375

⁶ Note 1 above at 1290

9. It is necessary to analyse the concept of hatred in the context of hate speech. In the Canadian case of *R v Keegstra*⁷ the Court stated:

Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.

10. It is also relevant to consider whether the statements and comments can be deemed hate speech in terms of section 10 of the Equality Act. The definition of hate speech in section 10 is broader than the constitutional definition – the listed grounds upon which advocacy of hatred is prohibited is extended to all seventeen and other prohibited grounds and is not restricted to race, gender, ethnicity and religion as in section 16 (2) of the Constitution.

11. Furthermore section 10 of the Equality Act is broader in that it prohibits speech on one or more of the prohibited grounds that could reasonably be construed to demonstrate a clear intention to be hurtful. Harm does not only comprise physical harm but also includes psychological and emotional harm as confirmed in the *Freedom Front*⁸ decision. Expression cannot be classified as hate speech viewed subjectively; rather it is an objective test employed by our courts.

12. Section 36 of the Constitution provides that:

The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;

⁷ *R v Keegstra* [1990] 3 S.C.R. 697

⁸ Note 1 above at 92

- (b) the importance and purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purposes;
- (e) less restrictive means to achieve the purpose.

13. Section 16 (1) has to be limited by the limitation clause of section 36 in order that a balance is struck between freedom of expression and the prevention of hate speech. The requirement is that there must be a clear intention to be hurtful, harmful or to incite harm or promote or propagate hatred on the part of the persons advocating the expression.

Analysis:

14. Central to this enquiry is the intention of the person making the utterances and statements. Was the speech in question made in the public interest? Did the contents of the speech ensure fairness and a diversity of views? Did Mr Masuku, when making the statements in question, subjectively intend to be hurtful, harmful or incite harm or promote or propagate hatred to the recipients?

15. The context, content and tone of the expression become important to determine whether the impugned expression is intended to promote hatred or not.

16. On the question of whether the expressions amount to 'incitement to cause harm' the Commission has on numerous occasions found that for the expression to amount to such, a number of elements have to be examined, namely:

- (1) the context in which the utterance is made;
- (2) the correlation between the utterance and any direct harm;
- (3) the evidence or manifestation of imminent harm; and
- (4) the evidence or manifestation of incitement to cause harm.⁹

⁹ See Note 1 above at 1283

17. The Commission's analysis concurs with the Constitutional Court jurisprudence that the 'harm' referred to in section 16 (2) (c) should be broader than 'actual harm' (i.e. physical harm) and should include an expression that adversely impacts upon the dignity, which could be physical, psychological and emotional harm.
18. This finding is based on the statements and comments made by Mr Masuku on different occasions as outlined above.¹⁰ The finding will be based on an analysis of both section 16 (2) of the Constitution and section 10 of the Equality Act. This is so because the Equality Act is an extension of the provisions in section 16 of the Constitution and intended to give meaning to it.
19. In terms of section 16 (2) of the Constitution the first inquiry in determining whether the speech amounts to hate speech is to check whether it is an advocacy of hatred based on race, ethnicity, gender or religion.
20. The second inquiry is to determine whether the speech constitutes an incitement to cause harm, which does not only amount to physical harm but may also constitute psychological and emotional harm.
21. On the day in question Mr Masuku was speaking to students who included both Jewish Zionists and Palestinian supporters. There appeared to already have been noted tension between these two groups. Therefore by Mr Masuku making those remarks he surely intended to incite violence and hatred that was already potentially imminent amongst these two groups. COSATU members of Palestinian supporters present at this rally could easily have been incited to hate, and even attack their Jewish counterparts. This is exactly what Section 16 (2) of the Constitution seeks to prevent.
22. Mr Masuku's heated statements made amidst an already tense audience appeared to advocate hatred against Jews and all other supporters of Israel. This is inciting

¹⁰ See Introduction Paragraph 2, 3,4 ,5 ,6 above

violence based on religion, an area which the freedom of expression does not protect.

23. Mr Masuku in his response to the allegations put to him by the South African Human Rights Commission, states that he was heckled by what he refers to “as a particular section of the audience – most of who seemed to be members of the South African Union of Jewish Students”. This statement leaves little doubt that the references made by him referred to Jews.
24. The statement that “it will be hell” for any group of students, taken in its proper context is intimidating and threatening. It is conveyed as a warning to the effect that should one support Israel, one would suffer harm. Harm for the purposes of Section 16 (2), as confirmed in the *Freedom Front*¹¹ decision, is wider than mere physical harm.
25. In responding to the allegations relating to the e-mails sent by him, Mr Masuku fails to deal with the context in which he used the words “...whether Jew or whomsoever (sic) does so, must not just be encouraged but forced to leave...” These words in effect come across to mean that unless South Africans agree with his views they should be forced to leave South Africa.
26. In view of the content of the speech made and e-mails sent by Mr Masuku, it is clear that the expressions amount to the advocacy of hatred and thus would not fall under the protection of Section 16 (1) of the Constitution.
27. The comments and statements made are of an extreme nature that advocate and imply that the Jewish and Israeli community are to be despised, scorned, and ridiculed and thus subjecting them to ill-treatment on the basis of their religious affiliation. A *prima facie* case of hate speech is clearly established. The statements and comments by Mr Masuku are offensive and unpalatable to society.

¹¹ See Note 1 above at 92

Finding:

28. In light of the above, the Commission hereby finds that the statements made by Mr Bongani Masuku amount to hate speech.

Recommendation

29. It is recommended that this matter would be best resolved through litigation before the Equality Court.

Ursula Nyar

Legal Officer

Gauteng Provincial Office

28 September 2009

APPEAL

The respondent, now appellant, wrote a letter to the Chairperson of the South African Human Rights Commission and stated the follows:

" BE PLEASED TO TAKE NOTICE that the **CONGRESS OF SOUTH AFRICAN TRADE UNIONS** and Mr Bongani Masuku (COSATU International Secretary) intends appealing against a finding of hate speech made by the South African Human Rights Commission.

Before we do so we deemed it fit to draw your attention to the following provisions that have not been adhered to:

DETERMINATION OF THE PROCEDURE CONTEMPLATED IN SECTION 9 (6) (sic) OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION ACT. NO.54 OF 1994

Article 8 - Appeals

8.1. An appeal in terms of these procedures shall be in writing and shall be lodged within 45 (FORTY FIVE) days from date of posting, delivering, faxing or e-mailing, referral or finding. Appeals lodged after the period referred to above may still be considered provided that the complainant has showed good reason for failure to lodge an appeal within the prescribed time.

8.2 An appeal shall be lodged to the chairperson of the Commission.

The South African Human Rights Commission has set itself regulations and procedures that it is bound by (sic). The finding dated **28 September 2009** served on Mr Masuku on **03 December 2009** does not draw his attention to his right to appeal the finding and the procedure of giving effect to that right should he not be happy with the outcome as provided for in the above section (sic)

The Human Rights Commission has not adhered to its regulations giving effect to section 9 (6) of the Human Rights Commission Act 54 of 1994. This renders the finding legally defective.

Upon receiving a finding that complies with the above provision we will then accordingly lodge an appeal within 45 days as prescribed by the section above..."

The Chairperson of the South African Human Rights Commission responded to the letter of intention to appeal received from the appellant as follows:

"...Kindly be advised that the South African Human Rights Commission (Commission) has indeed adhered to its regulations and in this regard we draw your attention to the fact that same does not make provision for a respondent to appeal a finding of the Commission. There was therefore no need in the present matter for such a request to have been communicated by the Gauteng Provincial Office of the Commission in its findings.

Nonetheless the Commission shall accept any representations you may wish to make on behalf of the respondent in this matter on the merits or demerits of the finding and accordingly we call upon you, should you wish to make any such representations, do so within 45 days of receipt hereof.”

COSATU then responded:

“...We will accordingly make representations on the findings, within the 45 days stipulated in the letter...”.

The respondent intervened and stated that: “ ... may I ask whether there is in fact an appeal process available to the Respondent as referred to. I ask this as we have been informed that the Regulations to the SAHRC Act make no provisions for an appeal and to the extent that this is the case we certainly do not wish in any way to be seen to be condoning an appeal by the Respondent”.

The Chairperson of the SAHRC wrote to the respondent and stated that: “We confirm that our published Complaints Handling Mechanism does not make provision for an appeal by a respondent in a complaint, but does make a provision for such an appeal by a complainant.

In our letter to the respondent we did draw his attention to the fact that in terms of our regulations he does not have such a right. We however pointed out that we are nevertheless prepared to listen to whatever representations that he might desire to make to the Chairperson.

As a Human Right Commission we are non-partisan and we intervene as arbiters to resolve human rights disputes between parties and in appropriate circumstances to assist them to obtain remedies as a redress for such violations. In the premises, parties should as far as practically possible be afforded an equal opportunity to address us. There seem to be no cogent reason why only a complainant is given a right to appeal and a respondent is not accorded such an opportunity! We are convinced that a court of law, if approached for a

declaratory order to declare such a provision unconstitutional, such an order would be granted.

We must also state that our finding that was sent to parties was not signed by a commissioner but by a legal officer.

We thought, and perhaps even now, that in the present circumstances it is only fair to accept representations from any respondent so that one makes an informed decision. We appreciate your concerns and the desire to have this matter finalised speedily, we however, and without pre-empting the outcome that will follow after the representations, submit that we are making sure the matter is finalised in an appropriate manner that will stand equal to any challenge.

Be assured of our continued support at all times”.

The respondent later wrote: “At the outset, we wish to acknowledge the important role that the Commission plays in South African society and to confirm our faith in its ability to effectively arbitrate matters of alleged human rights violations without fear or favour. Our faith is, and continues to be, justified by our first-hand interactions with the Commission in dealing with Mr Bongani Masuku’s statements, culminating in its well considered ruling on the matter.

In reference to your above letter we do, however, wish to point out the following circumstances:

- 1) Both Mr Masuku and the SAJBD were afforded an equal opportunity to make representations to the Commission in this matter.
- 2) Mr Masuku exercised his right to answer the complaint and in fact filed a comprehensive submission in his defence.
- 3) The Commission found in favour of the complainant and held that Mr Masuku must offer an apology to the SAJBD by no later than 23 December 2009, failing which the

matter would be referred to the relevant Equality Court for final adjudication without further notice to him.

- 4) Mr Masuku has failed to offer an apology.
- 5) The matter has not yet been referred by the Commission to the relevant Equality Court
- 6) No mention of an appeal had been raised with the complainant until 22 February 2010, when we were advised that the respondent had indicated that he intended to appeal the Commission ruling and that the Commission had agreed to allow the respondent until Friday, 26 February, to do so.
- 7) We have to date not been advised whether Mr Masuku has appealed the ruling.
- 8) Notwithstanding the Commission's indulgence of the respondent's intention to appeal, the respondent in fact has no right of appeal under existing Commission regulations. It is and remains our view that should the respondent wish to appeal a ruling of the Commission, he should approach a competent court for such relief
- 9) We fail to understand the significance of the statement that the "finding was not yet signed by a commissioner but by a legal officer".

Given the above circumstances, and taking into account the respondent's words which formed the subject matter of the SAJBD's complaint, you will appreciate the concern that this matter is generating within the South African society.

We look forward to meeting with you on Monday so that we can work together to find a way to resolve this issue and move forward".

The forty five (45) days allowed for the submission of representations expired without COSATU or Mr Masuku making any submission of any representation as allowed by the Chairperson.

At a meeting between the chairperson and three members representing the Jewish Board, the latter were informed that the matter was going to be finalised at the Legal Committee meeting of the Commission which was scheduled to take place on 09 March 2010.

The chairperson reiterated his reasons for allowing COSATU and/or Mr Masuku to make representations. He said that it was not for the first time that a respondent was allowed to do so, and that it was previously allowed even before he took office. The representatives of the Jewish Board expressed their dismay at such an opportunity being given to COSATU and/or Mr Masuku.

The representatives requested the chairperson to mediate between them and COSATU with a view to having the matter between them being finalised without the need to referring it to the Equality Court. The chairperson accepted the request.

At the meeting of the Legal Committee of the Commission of which the chairperson is also a member, and in the absence of any further representations received from the respondent, the findings and recommendations made by the Legal Officer of the Commission's Gauteng Provincial Office were confirmed and made the decision of the Commission.

DATED IN JOHANNESBURG ON THIS THE 29TH DAY OF APRIL 2010.

A handwritten signature in black ink, enclosed within a hand-drawn oval. The signature is highly stylized and cursive, appearing to read 'Adv ML Mushwana'.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION.

Adv ML Mushwana, Chairperson