



FILE REF. NO.: GP/2009/0362

SOUTH AFRICAN

JEWISH BOARD OF DEPUTIES

Complainant

RE: STATEMENT BY BONGANI MASUKU OF COSATU

Respondent

FINDING

INTRODUCTION

1. This finding is in response to a complaint lodged by the South African Jewish Board of Deputies (referred hereinafter as "SAJBD") on 26th March 2009 against 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 on 5th March 2009.

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 at Wits University, whether its 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 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 email that Mr Masuku wrote to a certain 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 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 email to multiple recipients on the 13th of 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 has 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 No. 4 of 2000 (hereinafter referred to as the “Equality Act”) which give 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 (s15), the right to dignity (s10), as well as the right to freedom of association (s18), the right to vote and the right to stand for public office (s19) and the right to assembly (s17). 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.

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:

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

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

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.
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.

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

⁶ Note 1 above at 1290

⁷ *R v Keegstra* [1990] 3 S.C.R. 697

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 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 of 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;
- (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:

⁸ Note 1 above at 92

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
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.

⁹ See Note 1 above at 1283

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

19. In terms of section 16 (2) of the Constitution the first inquiry in determining whether 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 violence based on religion, an area which 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 whom seemed to be members of the South African Union of Jewish Students". This statement leave 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 intimidatory 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 emails sent by him, Mr Masuku fails to deal with the context in which he used the words "...whether Jew or

whomsoever does so, must not just be encouraged but forced to leave...”
These words in effect come across 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 emails 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, 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 as the statements and comments by Mr. Masuku are offensive and unpalatable to society.

Finding:

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

Recommendation

29. It is recommended that this matter would best be resolved through litigation before the Equality Court to seek a public apology from Mr. Masuku.

Ursula Nyar
Legal Officer
Gauteng Provincial Office
28 September 2009

¹¹ See Note 1 above at 92