



## **SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT**

File Ref No: FS/1415/0253

In the matter between:

**Elsie Magdalena Du Preez**

**Complainant**

And

**Steve Naale**

**Respondent**

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### **INVESTIGATIVE REPORT**

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#### **1. Introduction**

1.1. The South African Human Rights Commission ("**Commission**") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 ("**the Constitution**").

1.2. The Commission is specifically required to:

- a) Promote respect for human rights;
- b) Promote the protection, development and attainment of human rights; and
- c) Monitor and assess the observance of human rights in the Republic.

1.3. Section 184(2) of the Constitution empowers the Commission to *investigate and report on the observance of human rights* in the country.

1.4. The South African Human Rights Commission Act, 40 of 2013 ("**the SAHRC Act**"), provides the enabling framework for the powers of the Commission.

1.5. Section 15(6) of the SAHRC Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

## **2. Parties**

2.1. The Complainant in this matter is Elsie Magdalena Du Preez, an adult female residing in the Western Cape ("**Complainant**").

2.2. The Respondent is Steve Naale, an adult male employed by Ngwathe Local Municipality as a Communications Officer residing at Tumahole, Parys, Free State Province ("**Respondent**").

### 3. Background to the Complaint

3.1. On Monday, 16 February 2015, the Commission received a complaint from the Complainant.

3.2. In her complaint, the Complainant makes the following allegations against the Respondent:

3.2.1. He posted the following photograph on the Facebook group "Ngwathe Online" with the caption: "Unless we want this under a white man's rule, AGAIN".



3.2.2. He used an American photograph depicting the lynching of black men by the Ku Klux Klan (KKK) with the direct insinuation that whites in South Africa should be feared.

3.2.3. According to the Complainant, this representation is untrue and misleading as uninformed people who believe the Respondent could be instigated to harm white people or hate them.

3.2.4. The Respondent holds an authoritative and responsible position as a Communications Officer of the Ngwathe Local Municipality, which further aggravates the situation.

3.2.5. His conduct amounts to a violation of sections 10 (dignity), 12 (freedom and security of persons) and 16 (prohibition of the incitement of violence and advocacy of hatred) of the Constitution and the rights of fellow white South Africans.

3.2.6. The Complainant alleges that the aforesaid photograph, which purports to portray the attitude of white people in South Africa, amounts to hate speech.

3.3. The Complainant requested the Commission on the basis of its constitutional mandate to intervene and investigate this matter.

#### **4. Preliminary Assessment**

4.1. The Provincial Office of the Free State ("**Provincial Office**") made a preliminary assessment of the complaint. The preliminary assessment of the Provincial Office was:

4.1.1. That the alleged incident constituted a *prima facie* violation of the human rights of the Complainant and white persons. In particular, the assessment determined that Sections 9 (the right to equality), 10 (the right to dignity) and 16 (freedom of expression) of the Constitution had *prima facie* been violated;

4.1.2. That the alleged violation fell within the mandate and jurisdiction of the South African Human Rights Commission; and

4.1.3. That the alleged violation merited a full investigation in terms of the Complaints Handling Procedures of the Commission.

## **5. Steps Taken by the Commission**

The methodology used by the Provincial Office in conducting the investigation involved transmitting an allegation letter to the Respondent and providing the Complainant with an opportunity to comment on the Respondent's response to the allegations.

### **5.1. Correspondence to Respondent**

5.1.1. On Friday, 6 March 2015, the Provincial Office sent an allegation letter to the Respondent.

5.1.2. On Tuesday, 31 March 2015, the Provincial Office received a response from the Respondent.

5.1.3. In his response to the allegations, the Respondent stated the following:

5.1.3.1. His participation in the post was in defence of the democratic system which is constantly under attack.

5.1.3.2. He posted the photograph after a racially offensive post was made by someone on the same Facebook page "Ngwathe Online".

5.1.3.3. According to him, the post was not intended to cause any harm to white individuals or to mean that white people should be feared, but it served as a reminder about South Africa's divided past.

5.1.3.4. The post served to provoke debate that would ensure that people from different races become more sensitive in situations where "a black government" is constantly under attack by individuals who continue to undermine democratic gains.

- 5.1.3.5. If the Complainant lived in Parys, she would attest to the fact that the area is racially divided and would make a contribution towards bringing about change in the area.
- 5.1.3.6. He believes that his authoritative position at the Municipality allows him to engage in robust discussions with the intention of correcting narrow mind-sets that are not benefitting our democracy.
- 5.1.3.7. He wished to have further engagements with the Complainant to understand her thinking behind this matter and have a clear picture of how she would have handled the situation (the racial aspect), which is the crux of her complaint.
- 5.1.3.8. He expressed remorse towards the Complainant and stated that he would never want to make other citizens uncomfortable with his participation on social media, as this is the platform he uses to defend the gains of our democracy.
- 5.1.3.9. Lastly, he stated that it was never his wish to violate the rights of any fellow resident.

## **5.2. Correspondence to Complainant**

- 5.2.1. On Monday, 13 April 2015, the Commission sent the Respondent's response to the allegations to the Complainant for comment.
- 5.2.2. On 20 April 2015, the Commission received the Complainant's comments. The Complainant replied as follows:
- 5.2.2.1. White people in South Africa are directly attacked on a daily basis – e.g. by songs such as "Kill the Boer, kill the

farmer”; being called racists for standing up for what they believe; and by “defacing our heritage”, etc.

- 5.2.2.2. Furthermore, during 2 weeks of xenophobic violence, 5 people were killed in savage attacks by black people in South Africa and it has since been the headline on every TV channel and every newspaper in the country as well as internationally.
- 5.2.2.3. During the same period, 8 white people were killed:
  - 5.2.2.3.1. Three elderly men were murdered. One was shot, another was suffocated and strangled, and one was bludgeoned to death.
  - 5.2.2.3.2. Three men aged 46, 47 and 59 were shot dead in front of their families.
  - 5.2.2.3.3. A 70-year old lady was stabbed to death in her home.
  - 5.2.2.3.4. A 15-year old girl was raped and beaten to death in her home. However, you do not see white people instigating violence by using posts such as that of Mr Naale (Respondent).
- 5.2.2.4. Mr Naale’s post can under no circumstances be justified.
- 5.2.2.5. The post is not related to South Africa and is not at all related to our history or our society.
- 5.2.2.6. Every citizen in this country has a democratic right, and responsibility, to question their government. This ensures honesty, integrity and clean governance.

- 5.2.2.7. In her opinion, if Mr Naale does not understand and realise that the chaos in this country is the direct result of poor governance, he is completely oblivious or in total denial. Nevertheless, according to the Constitution of this country, all persons have the right to do their utmost to keep government on the right track, irrespective of the race of such government. The Democratic Alliance (DA) is an example of this as it is brought to book by citizens in the Western Cape on a daily basis and she does not see them lashing out with hate speech on social media. People cannot continue to use the colour of their skin as an excuse for intolerance, of which she believes the post made by Mr Naale was a prime example.
- 5.2.2.8. Being in a position of authority gives no person the right to spread false information (the picture depicting the American Ku Klux Klan with comments about white people in South Africa) about a minority group in this country. This constitutes abuse of power.
- 5.2.2.9. People should be able to look up to people in positions of authority, and trust that they have the integrity to not instigate violence by spreading false information and inciting hate speech.
- 5.2.2.10. It cannot in any way be denied that his remark "Unless we want this under a white man's rule, AGAIN" is misleading as it did not take place in South Africa and therefore amounts to a clearly deliberate deception.
- 5.2.2.11. She does not find the Respondent's explanation acceptable and requested that the matter continue and Mr Naale be charged with hate speech and incitement of



violence against white people in terms of sections 10, 12 and 16(2)(c) of the Constitution of South Africa.

### 5.3. Mediation Proposal

5.3.1. After careful review of the correspondence from the parties, the Commission deemed it appropriate to suggest a mediation process between the parties wherein the Commission would facilitate the process.

5.3.2. Subsequent to this, a letter was sent to both the Complainant and Respondent on 23 April 2015 and 11 May 2015 respectively suggesting mediation to resolve this matter.

5.3.3. Both the Respondent and the Complainant were at first amenable to a mediated settlement of this matter.

5.3.4. In terms of section 14 of the SAHRC Act, the Commission may by *mediation, conciliation or negotiation* endeavour to resolve any dispute or to rectify any act or omission emanating from or constituting a violation of or threat to any human right. (Own emphasis)

5.3.5. This notwithstanding, on 15 May 2015, the Complainant furnished the Commission with a response indicating that the Respondent must:

5.3.5.1. Acknowledge that he used a picture depicting the *KKK* insinuating that those were white South Africans; and

5.3.5.2. Acknowledge that he spread false information about white people in that they should be feared.

5.3.6. Furthermore, in her response, she indicated that:

- 5.3.6.1. This could be considered to be hate speech and incitement of violence;
  - 5.3.6.2. Posting on Ngwathe Online, he abused his power as a public official; and
  - 5.3.6.3. His post was in contravention of sections 10, 12 and 16(2) (c) of the Constitution.
- 5.3.7. She also demanded that he commit himself publicly to refrain from spreading similar false information.
- 5.3.8. The Complainant further stated that should the Respondent agree to the above terms, he should submit his response for review before it is posted on Facebook.
- 5.3.9. Upon review of the aforesaid correspondence, the Commission decided to proceed to make a finding in the matter as the Complainant couched her response in a manner that would likely render the mediation process futile. This decision is also based on further communications that transpired between the Commission and the Complainant. The Complainant displayed an attitude of insistence in regard to her proposed terms of the settlement agreement.

## **6. Applicable Legal Framework**

### **6.1. International instruments**

Section 39(1) of the Constitution provides that a court, tribunal or forum must consider international law and may consider foreign law when interpreting the Bill of Rights. Similarly, section 233 of the Constitution instructs our courts to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with

international law” when interpreting legislation. These stipulations similarly bind the Commission in its adjudication of a complaint which implicates rights contained in the Bill of Rights.

### **6.1.1. International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination**

6.1.1.1. South Africa has signed and ratified both the International Covenant on Civil and Political Rights (Covenant)<sup>1</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (Convention)<sup>2</sup> which both impose obligations on the State to prohibit hate speech.<sup>3</sup> These instruments are, therefore, directly binding on the State and all State institutions.

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<sup>1</sup> 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 26 August 2015].

<sup>2</sup> 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> [accessed 26 August 2015].

<sup>3</sup> See in particular, article 20(2) of the Covenant which provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. Article 4 of the Convention, in turn, provides that:

“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end. . . :

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) . . .

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

Article 5 of the Convention imposes an obligation on States Parties to “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.”

## 6.2. Regional instruments

### 6.2.1. The African Charter on Human and People's Rights (1982)<sup>4</sup>

6.2.1.1. Article 2 of the Charter underlines that the rights enshrined therein may be invoked without discrimination, providing that individuals are entitled to those rights "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

## 6.3. Constitutional framework

The preliminary assessment of the Provincial Office indicated that the rights that have been *prima facie* violated are sections 9, 10 and 16 of the Constitution. Each of these rights are discussed hereunder.

### 6.3.1. Section 1(a) – Foundational values

6.3.1.1. Section 1(a) of the Constitution recognises respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, as being the foundational values of the Constitution and thereby forming the bedrock upon which the Constitution is based.

### 6.3.2. Section 9 – The right to equality and protection from discrimination

6.3.2.1. Section 9(1) enshrines the right to equality of all citizens, while section 9(2) gives content to that right by providing that "[e]quality includes the full and equal enjoyment of all rights and freedoms."

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<sup>4</sup> 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 26 August 2015].

6.3.2.2. Section 9(4) states that:

“No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).”

6.3.2.3. Further, section 9(5) recognises that “[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

### **6.3.3. Section 10 – The right to human dignity**

6.3.3.1. Section 10 recognises the right of everyone to have their inherent dignity respected and protected.

### **6.3.4. Section 16 – Freedom of expression**

6.3.4.1. Section 16 confers everyone the right to freedom of expression. However, this right does not extend to “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

## **6.4. Domestic legislative framework**

### **6.4.1. Promotion of Equality and Prevention of Unfair Discrimination Act<sup>5</sup> (PEPUDA)**

6.4.1.1. This Act seeks to give effect to the Constitution’s equality clause, and one of the aims of the Act is to “facilitate the transition to a democratic society, united in its diversity... and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom”.

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<sup>5</sup> Act 4 of 2000.

6.4.1.2. The Act defines *discrimination* as follows:

“any act or omission ... which directly or indirectly

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.”

6.4.1.3. The *prohibited grounds* include race, ethnic or social origin, colour and culture, as well as “any other ground where discrimination based on that ground causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner.”

6.4.1.4. Section 7 of the Act prohibits unfair discrimination on the specific ground of race. This includes such conduct as–

“the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in any form of racial violence.”

6.4.1.5. One of the purposes of the Act is “to prevent and prohibit hate speech.” In particular, section 10(1) provides that:

“[N]o 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;<sup>6</sup>
- (b) be harmful or to incite harm; and
- (c) promote or propagate hatred.”

6.4.1.6. Moreover, section 12 of the Act is a proviso to section 10 and reads as follows:

“No person may—

- (a) Disseminate or broadcast any information
- (b) Publish or display any advertisement or notice,

That could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person . . .”

## 7. The Test for Hate Speech

### 7.1. Section 16 of the Constitution

7.1.1. In *Islamic Unity Convention v Independent Broadcasting Authority and Others*<sup>7</sup> the court set out the structure of the hate speech analysis as follows:

“Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2)

<sup>6</sup> There is some debate regarding whether the concept of hurt is subsumed in the concept of harm. See Shaun Teichner *The hate speech provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: the good, the bad and the ugly* 2003 SAJHR 349. This is a matter to be determined by our courts.

However, for the purposes of this report, the Commission accepts that it is.  
<sup>7</sup> 2002 (4) SA 294 (CC).

deals with expression that is specifically excluded from the protection of the right.”<sup>8</sup>

7.1.2. Subsection 16(2) qualifies the scope of the rights that are given in subsection 16(1). The words “[t]he right in subsection (1) does not extend to” clarify that three listed categories of expression in subsection 16(2) are not to be regarded as constitutionally protected speech. It has been pointed out that the categories of speech in subsection 16(2) do not deserve constitutional protection because they have the potential to impact adversely on the dignity of others and cause grave harm.<sup>9</sup>

7.1.3. In *Freedom Front v South African Human Rights Commission*<sup>10</sup> the Appeal Committee of the Commission pointed out that once an expression has been found to constitute hate speech—

“[t]he State, in this instance, does not have to justify the limitation in terms of the limitation clause as such regulation or proscription would not amount to an infringement of a constitutionally protected right. Thus the finding that any particular expression amounts to hate speech would in most instances be determinative of the constitutional enquiry.”

7.1.4. Section 16(2) clearly sets out two requirements for an expression to be regarded as constituting hate speech. It only applies where the expression amounts to advocacy of hatred *and* constitutes incitement to cause harm.

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<sup>8</sup> *Islamic Unity Convention* at para 31.

<sup>9</sup> Woolman and Bishop *Constitutional Law of South Africa*, 2ed (Juta, Cape Town 2014) at 42.3.

<sup>10</sup> 2003 (11) BCLR 1283 at 1289.



7.1.5. In *Ramesh Dharamshee Jethalal v Mbongeni Ngema and Universal Music*<sup>11</sup>, the court held that although there is little doubt that the song in question is racist in that it contrasts one race (Blacks) with another race (Indians) in a very generalised and unspecific way, section 16(2) of the Constitution is not aimed at the prohibition of advocacy of hatred based on race as such, but at the prohibition of advocacy of hatred based on race which also constitutes incitement to cause harm. Both elements, advocacy of hatred based on race and incitement to cause harm have to be present before an expression will amount to hate speech.

7.1.6. The first requirement in section 16(2) (c) — “advocacy of hatred” — suggests that the speaker must actively promote hatred. Currie and De Wall state that “[t]o advocate hatred is to propose or call for it, to make a case for it”.<sup>12</sup> In other words, the speaker must promote hatred or attempt to instil hatred in others.<sup>13</sup>

7.1.7. In *R v Andrews*<sup>14</sup> the court considered the meaning of the word “hatred”. The court noted that —

“[h]atred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies.”

7.1.8. It should also be pointed out that hate speech does not extend to speech which advocates hatred of a specific person. Such an expression would fall under the law of defamation. The expression must relate to advocating hatred based on group characteristics.

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<sup>11</sup> (Case No: 3524/2002, 28 June 2002)

<sup>12</sup> Currie and De Wall *Bill of Rights Handbook*, 6 ed (Juta, Cape Town 2014) at 35-8.

<sup>13</sup> Woolman and Bishop *Constitutional Law of South Africa*, 2ed (Juta, Cape Town 2014) at 42.8.

<sup>14</sup> 43 CCC (3rd) 193 at 211.

7.1.9. It must further be pointed out that section 16(2) only covers hate speech that is based on the specified grounds of race, ethnicity, gender or religion. The Appeal Committee made it clear in the *Freedom Front* case that “[c]alling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred, unless the context clearly indicates otherwise”.<sup>15</sup>

7.1.10. The second requirement of section 16(2) (c) — “incitement to cause harm” — is perhaps a more difficult requirement to pin down. In *Freedom Front*, the Appeal Committee held that “harm” not only included physical harm, but also psychological harm. The Appeal Committee further pointed out that “harm” should be interpreted broadly and that the reference to race, gender, ethnicity and religion is meant to prevent unwarranted intrusion into the right of freedom of expression.<sup>16</sup>

7.1.11. There is explicit recognition in *Islamic Unity Convention*<sup>17</sup> that harm may be caused by expression that adversely impacts upon dignity. In this regard the court stated that —

“[t]here is no doubt that the State has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality.”

7.1.12. The Appeal Committee further pointed out in *Freedom Front* that the harm must be “serious and significant” and it is not enough that the speech is merely offensive. In addition, it must

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<sup>15</sup> *Freedom Front* at 1290.

<sup>16</sup> *Freedom Front* at 1291-1293.

<sup>17</sup> *Islamic Unity Convention* at para 32-33.

be shown that the expression itself causes the harm or is likely to cause the harm. The context and content of the expression will have to be assessed on a case by case basis to determine whether it causes or is likely to cause harm as opposed to offence. Importantly, the Appeal Committee also highlighted that “[a] relevant factor in this determination is whether the speech advocating hatred is directed at minorities or vulnerable groups in society. The more vulnerable the group, the more likely it is that it will be harmed by the advocacy of hatred.”<sup>18</sup>

7.1.13. It has been argued that one must not only look at the “harm” but also at the ordinary meaning of “incitement”. The ordinary meaning of “incitement” is to encourage, stimulate or call for others to cause harm. It is further argued that if “incitement” bears its ordinary meaning:

“[T]he harms contemplated in section 16(2) (C) must be concrete. This does not mean, on the one hand, that 'harm' is confined to physical harm or, on the other hand, that 'harm' extends to expression which merely stirs up feelings of hatred in the audience. The harm contemplated in section 16(2) (c) includes various forms of serious harm that are capable of incitement in an audience, including incitement of violence (whether against persons or property), discrimination, harassment and verbal abuse. This position is similar to ICCPR art 20(2). ICCPR art 20(2) proscribes the advocacy of hatred that incites discrimination, hostility or violence. If this interpretation is correct, the harm ultimately caused to the target group extends to serious psychological or

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<sup>18</sup> *Freedom Front* at 1296.

emotional harm, but it must be harm that is incited by speech.”<sup>19</sup>

7.1.14. The Appeal Committee in *Freedom Front* cautioned that section 16(2)(c) should not be given too broad a meaning as it could create a danger “that speech that is vitally important to the advancement of our constitutional democracy may be classified as hate speech, because our society is still, in respect of significant social issues, divided on racial lines.”

## **7.2. Section 10 and section 12 of PEPUDA**

7.2.1. The prohibition on hate speech in section 10 of PEPUDA is wider than that contained in section 16(2) of the Constitution. For example, the provision uses the words “publish, propagate, advocate or communicate” instead of simple “advocate” and “reasonably be construed to demonstrate a clear intention to” instead of “incite”. The prohibited grounds of advocacy of hatred are also not confined to those listed in section 16(2) (c), but includes all the grounds of non-discrimination listed in section 9(3) of the Constitution.

7.2.2. In addition to the listed grounds in section 9(3) of the Constitution, PEPUDA adds to the definition of “prohibited grounds” any other ground where discrimination based on that ground “causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner.”

7.2.3. This considerably widens the grounds of hate speech than those enumerated in section 16(2) (c) of the Constitution. The consequence of this is that PEPUDA potentially also applies to

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<sup>19</sup> Woolman and Bishop *Constitutional Law of South Africa*, 2ed (Juta, Cape Town 2014) at 42.8.

speech which is *prima facie* protected expression in terms of section 16(1) of the Constitution.

7.2.4. The prohibition in section 10(1) must be read subject to the proviso in section 12, which states that this provision does not preclude:

“The *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 section 16 of the Constitution.”

7.2.5. In ***Afriforum and Another v Malema***<sup>20</sup> a complaint was brought against the respondent that, while addressing various public meetings, he had cited, sang or chanted a song which included words, which when translated into English, meant “they are scared, the cowards. You should shoot the Boer the farmer! They are rapist/robbers”. The complainant contended that these words, read in context, referred to Afrikaner farmers in particular and to white people generally, who, on the basis of the song, were to be shot and/or killed. Lamont J summarised how hate speech matters should be approached and enunciated the following principles insofar as the determination of the meaning of words alleged to amount to hate speech is concerned:

7.2.5.1. *The intention of the person who utters the words is irrelevant.*

7.2.5.2. *The first question to be decided is what the words mean.*

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<sup>20</sup> *Afri-Forum and Another v Malema and Others* 2011 (6) SA 240.

- 7.2.5.3. *What the words mean is to be determined by applying the test of what the words would mean to a reasonable listener having the common knowledge and skill attributed to an ordinary member of society.*
- 7.2.5.4. *The meaning of the words is also to be determined by asking what a reasonable person of ordinary intelligence would understand the words to mean in their natural and ordinary meaning. In this regard, courts must not only take what the words expressly say into account, but must also have regard to what the words reasonably imply and the context in which the words were said.*
- 7.2.5.5. *The fact that portions of society do not know the meaning of words either because they are unable to decode the words to find the meaning (they do not understand what is being said) or are not exposed to them is irrelevant. If the words have a meaning to a portion of society that is sufficient.*
- 7.2.5.6. *Words can simultaneously have different meanings and mean different things to different people.*
- 7.2.5.7. *If the words have different meanings, then each meaning must be considered and be accepted as a meaning. The search is not to discover an exclusive meaning, but to find the meaning the target group would reasonably attribute to the words.*
- 7.2.5.8. *If the words mean different things to different portions of society then each meaning, for the reasonable listener in each portion of society, must be considered as being the appropriate meaning.*

7.2.5.9. *Once the meaning is ascertained a decision must be made as to whether or not the meaning is reasonably capable of demonstrating an intention to commit hate speech.*

7.2.5.10. *If words constitute hate speech they cannot be justified on the basis of a claim of right to sing them. Justification is not a defence as it does not change the character of the words to hate speech.*

### **7.3. The test for hate speech and the right to human dignity and equality**

7.3.1. The approach of our courts in dealing with issues relating to freedom of expression is to balance freedom of expression against other rights or interests, such as the rights to reputation, privacy, equality or the values of the administration of justice or national security. In *Mamabolo* the court remarked:

“With us the right to freedom of expression cannot be said to automatically trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.”<sup>21</sup>

7.3.2. The balancing of rights would follow the basic structure of the Bill of Rights, which sets out a wide array of fundamental rights.

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<sup>21</sup> *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 41. Professor Govender, on behalf of the Appeal Committee in *Freedom Front* at 1288 (SAHRC) describes this as “a much more nuanced and balanced approach” to freedom of expression than that of the US courts.

However, all these rights are subject to the self-standing limitations clause in section 36 of the Constitution. One would first determine whether the expression is excluded from protection in terms of section 16(2), i.e. whether it amounts to propaganda for war, incitement of imminent violence and hate speech.

## 8. Analysis

8.1. In turning to the Respondent's response to the allegations levelled against him, he stated that the post served to provoke debates and that he believes that his authoritative position at the Municipality allows him to engage in robust discussions with the intention of correcting narrow mind-sets that are not benefitting our democracy.

8.2. Freedom of expression speaks to one's right to be able to hold opinions and impart and/or receive these as well as ideas and information to others in any form. The European Court of Human Rights has held that:

"[Freedom of expression is] applicable not only to 'information' and 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ... Such are the demands of that pluralism, tolerance and broad mindedness without which there is no 'democratic society'".<sup>22</sup>

8.3. The right to receive and impart ideas and information is indeed vital to establish a society based on democratic values, social justice and fundamental human rights in that it facilitates critical discourse and serves to strengthen our democracy. However, in the South African context discussions around race relations and the sharing of ideas in relation thereto should be approached with the necessary thoughtfulness. Discussions around race must always be done with a full understanding of the South African history where racism was legally sanctioned and division

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<sup>22</sup> Handyside v UK (5493/72) [1976] ECHR 5 (7 December 1976).



and repression of the majority of the population was the order of the day. Discussions of this nature will not be constructive if there is not at least a measure of appreciation of the hurt that the system caused and the wounds that still exist today.

- 8.4. The preamble of the Constitution recognises that we are a country still in the process of healing from the wounds of our past by stating that “[w]e ... “through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”. We must therefore be aware that in such a fragile society and fledgling democracy, any inflammatory statement carries the real risk of instilling or perpetuating racist and other bigoted views. Open debate will see our democracy flourish, but we must not be irresponsible and unnecessarily confrontational in our approach.
- 8.5. The Respondent’s aim of evoking constructive discussion around race could be seen as admirable and, indeed, we all should be guardians of the democracy that was so hardily-won. However, the manner in which the Respondent went about achieving his aim leaves much to be desired.
- 8.6. In order to provide context to the Respondent’s post, Lawrence Beitler took this iconic picture depicting the lynching of Thomas Shipp and Abraham Smith on 7 August 1930. These young black men were wrongly accused of raping a teenaged white woman and subsequently attacked and lynched by a mob of white people. The picture showing the tortured black bodies and jubilant white crowd was transformed and sold as postcards symbolising white supremacy.<sup>23</sup>
- 8.7. The picture he posted does elicit a measure of shock, as with any other image depicting human suffering and torture. Although the picture captures events that took place in Indiana in the United States in 1930, the context of racial strife that it depicts is very real to South Africans.

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<sup>23</sup> <https://iconicphotos.wordpress.com/tag/lawrence-beitler/>.

8.8. The accompanying caption - "Unless we want this under a white man's rule, AGAIN" - is also not phrased in a manner that one would think was aimed at eliciting the views of others as it is stated in the form of a conclusion. A reasonable person would interpret the Respondent's caption as saying that we need to be "cautious" of trusting white people and putting them in power again because white people have committed atrocities against black bodies in the past. We need to be aware of white supremacy, even post 1994. The message conveyed is that racist regimes, whether they be in the American South or Apartheid South Africa and the atrocities committed under such rules should not be forgotten. However, the post goes further than merely cautioning against "white rule". It speaks to resisting a certain form of rule and to the inevitable consequence of any future "white rule". "Inevitable" implies unavoidable consequence. The conclusion can thus be drawn that the Respondent meant that physical abuse and torture of black people will be a natural consequence or unavoidable part of white leadership. The Complainant's allegation that the photograph with the caption purports to portray the attitude of white people in South Africa is therefore not unreasonable.

8.9. The Respondent further responded to the complaint by stating that the post was not intended to cause any harm to white individuals or to mean that white people should be feared, but it served as a reminder about South Africa's divided past. In the *Malema* case<sup>24</sup> the court stated that "intended meanings are not relevant to determine objectionability. What the words mean is what governs the position."

8.10. Another aspect that has to be considered is not only the meaning of the words used in the post, but the meaning of those words in conjunction with the picture. In order to determine the overall meaning of the Respondent's post, the meaning of the image must be ascertained. In *Le*

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<sup>24</sup> *Malema* at para 42.

***Roux and Others v Dey***<sup>25</sup> the Constitutional Court refers to the High Court judgment, where it was stated:

“To answer the first question a court has to determine the natural and ordinary meaning of the publication: how would a reasonable person of ordinary intelligence have understood it? The test is objective. In determining its meaning the court must take account not only what the publication expressly conveys, but also of what it implies, i.e. what a reasonable person may infer from it. The implied meaning is not the same as innuendo, which relates to a secondary or unusual defamatory meaning that flows from knowledge of special circumstances. Meaning is usually conveyed by words, but a picture may also convey a message, sometimes even stronger than words.”

8.11. Based on the foregoing conclusion that the Respondent’s caption to the picture was framed in a manner of a conclusion, and the fact that the picture depicts the lynching of black persons by members of the KKK, it can be reasonably concluded that the overall message that the Respondent’s post sends is that white people will torture black people again, should the country fall under “white rule” and such brutality is an intrinsic characteristic of all white people.

8.12. Having ascertained the meaning of the Respondent’s post, the question that arises is whether the post amounts to a violation of the rights of the Complainant and other White people as alleged.

### ***Hate Speech***

8.13. In light of all the considerations above and the test for hate speech as set out, it cannot be concluded that the Respondent’s post constitutes hate speech in terms of section 16(2) of the Constitution. This is because the

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<sup>25</sup> 2011 (3) SA 274 (CC) at para 39.

post does not amount to advocacy of hatred *and* incitement to cause harm. As indicated above, for a statement to constitute advocacy of hatred and incitement to cause harm, the speaker must actively promote hatred i.e. propose or call for it or to make a case for it. Indeed a statement must go a long way to constitute advocacy of hatred. In this instance, whilst the Respondent's post was clearly insensitive, offensive, and even harmful (as illustrated below), it cannot be concluded that it has reached the threshold for hate speech in terms of section 16(2) of the Constitution.

8.14. The same cannot be said for the threshold of hate speech in terms of section 10 of PEPUDA. As alluded to above, the threshold for hate speech in terms of PEPUDA is much lower than that of section 16(2) of the Constitution. In terms of section 10 of PEDUDA, it suffices to show that the Respondent's utterances could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm or promote or propagate hatred.<sup>26</sup> As indicated above, harm includes serious psychological and emotional harm, which may be caused by expression that adversely impacts upon dignity.

8.15. That the Respondent's post could be reasonably construed to demonstrate a clear intention to be harmful is self-evident. The post is manifestly insensitive and offensive and has the potential to cause serious psychological and emotional harm. Expressions such as the one the Respondent made contribute to the alienation of minority groups in the country and sends a potentially divisive message to the majority community that the target community is less deserving of respect and dignity.

8.16. The Commission therefore finds that the Respondent's Facebook post and its accompanying caption constitutes hate speech in terms of section 10(1) (b) of PEPUDA.

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<sup>26</sup> As indicated above, the Respondent's post cannot be said to constitute a promotion or propagation of hatred.

## ***Unfair Discrimination and Human Dignity***

8.17. The Commission also finds that the post is discriminatory and undermines the dignity of white South Africans as not all white people supported these racist regimes. The caption unfairly apportioned white supremacist attitudes and/or advocacy of violence on the basis of race to white persons generally, and implies that white persons in power would revert to a discriminatory and violent system of governance.

8.18. Moreover, the post amounts to a violation of equality and dignity in that:

8.18.1. Statements of this nature hold the potential to severely impede social cohesion and promotion of a nation State based on the principle of non-racism; and

8.18.2. Government officials, such as the Respondent, bear a greater responsibility to avoid making statements which may have such an impact.

8.19. Upon further investigation, at the time of drafting this report, it has been established that the post no longer appears on the Ngwathe Online Facebook page. This does not, however, detract from the fact that for the duration of the post on the Ngwathe Online Facebook page, the rights of the Complainant and other fellow White South Africans were being violated.

8.20. Section 1 of the Constitution lists the “achievement of equality” and “non-racialism and non-sexism” among the foundational values of our constitutional democracy. The attainment of equality as an ideal requires, amongst other things, the eradication of racism which manifests itself in various forms in our society. The Commission takes cognisance of the fact that such stereotyping of people on the basis of immutable characteristics is harmful to the achievement of a united society as they reinforce and

perpetuate patterns of discrimination and inequality, and have the potential to further divide South Africa.<sup>27</sup>

### ***General Observation***

8.21. A final issue that must be addressed in relation to the response received from both parties, is the element of persisting racial and discriminatory attitudes displayed by both parties to this complaint. In his response to the allegations, the Respondent stated that he posted the photograph after a racially offensive post was made by someone on the same Facebook page "Ngwathe Online". The Complainant in turn responded by alleging that white people in South Africa are *directly* attacked on a daily basis, as if white South Africans are the only racial group being directly attacked on a daily basis in this country. Both parties' behaviour in this regard has been reactionary and shows that they both hold unreceptive views about other races.

8.22. Section 184(1) (a) requires the Commission to "promote respect for human rights and a culture of human rights". It is hoped that through further engagement with the Commission and further interaction with other races, the parties will become more responsive and sensitive to this country's past and will be able to further contribute to our constitutional democracy.

## **9. Findings**

9.1. On the basis of the analysis in the preceding section, the Commission makes the following findings:

9.1.1. The Respondent's Facebook post violates both the right to equality on the ground of race and the right to human dignity.

9.1.2. The Respondent's Facebook post and its accompanying caption are discriminatory and undermine the dignity of the Complainant and white South Africans.

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<sup>27</sup> *Islamic Unity Convention* at para 45.

9.1.3. The Respondent's Facebook page constitutes hate speech in terms of section 10(1) (b) of PEPUDA.

9.1.4. The Respondent's Facebook post does not, however, constitute hate speech in terms of section 16(2) of the Constitution.

## 10. Recommendations

10.1. In view of the findings set out in Section 9 above, the Commission recommends the following:

10.1.1. That the Respondent post an unequivocal and unconditional apology to the Complainant and all white South Africans on the Ngwathe Online Facebook page immediately.

10.1.2. That the Respondent and the Complainant attend a human rights sensitisation programme regarding race relations in South Africa within a period of 1 month from the date of this finding. The Commission is available to assist in providing information on training programmes, should the parties request such assistance.

10.2. The Commission makes this finding **without prejudice** to the entitlement of the Complainant or any other party, including the Commission, to institute legal proceedings against the Respondent in the Equality Court for any additional or alternative relief provided for in Section 21 of the PEPUDA.

## 11. Appeal

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

**Physical Address:** Appeals Section

33 Hoofd Street

4<sup>th</sup> Floor, Forum 3

Braampark

Braamfontein

2017

**Postal Address:** Appeals Section

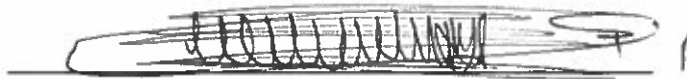
Private Bag X2700

Houghton

2041

Fax number: 011 403 0567 (Attention – Appeals Section) Telephone number:  
011 877 3654 / 3653

SIGNED IN Braamfontein THE 4<sup>th</sup> DAY OF July 2016.



Adv. ML Mushwana

Chairperson

**South African Human Rights Commission**

*MLM*