



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2010/0060

In the matter between:

) **Izak Van Niekerk**

Complainant

And

Living Hope Ministries

Respondent

REPORT

(In terms of Article 21 of the Complaints Handling Procedures of SAHRC)

1. Introduction

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- 1.1. The South African Human Rights Commission (hereafter referred to as the "Commission") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, Act 108 of 1996 (herein referred to as the "Constitution").
 - 1.2. The mandate of the Commission in terms of s 184 of the Constitution is *"to make steps to secure appropriate redress where human Rights have been violated"*.
 - 1.3. This mandate in terms of s 184 obliges the Commission to:

- 13.1 Promote respect for human rights;
 - 13.2 Promote the protection, development and attainment of human rights;
 - 13.3 Monitor and assess the observance of human rights in the Republic.
- 1.4. Further, the Commission has the powers, as enabled by national legislation to perform its functions, including the power to -
- 14.1 To investigate and report on the observance of human rights;
 - 14.2 To take steps and secure appropriate redress where human rights have been violated;
 - 14.3 To carry out research; and
 - 14.4 To educate.

2. The Parties

- 2.1. The Complainant is Mr Izak Van Niekerk, an adult male based in Kroonstad in the Free State Province.

- 2.2. The Respondent is Living Hope Ministries, a Christian organisation, operating as a church, in the Free State Province.
- 2.3. The Respondent is vicariously liable for the acts of its founder, and senior Pastor, acting in the course of his position as such.

3. Background to the Complaint

- 3.1. At all times material hereto, the Respondent was publisher of a Christian publication entitled "**Die Raadsplan**," authored by the Lead Pastor of the Respondent organisation, Mr W. H Smith.
- 3.2. On or about the 18th of May 2010, the SAHRC (FS) received a written letter of complaint from the Complainant.
- 3.3. The Complainant alleges that the Respondent authored and published a racially offensive book entitled the "**Die Raadsplan**".
- 3.4. The Complainant further alleges that the book was distributed by the Respondent in various Christian book stores within the Republic of South Africa.

- 3.5. The Complaint alleges, yet further, that in the publication the Respondent depicts the white races of the world as the divinely ordained to be a superior race, which must rule over all other races; and that if any person other than a white male is at the pinnacle of society will lead to chaos and destruction.
- 3.6. The Respondent requests the Commission to investigate the matter urgently, and stop the further publication and distribution of this book.

4. Key Quotes from "Die Raadsplan"

- 4.1 To illustrate the nature of the work, the following key extracts are quoted from "Die Raadsplan": "Om naak te loop en gedurig op die uitkyk te wees vir wat hulk an roof, is kenmerkend van die swarte van Afrika."¹ (Translated: "To walk around naked and constantly being on the lookout for "hulk and roof" is characteristic of the African Black".)
- 4.2 "Enige verwysing na die swarte in die Bybel moet onder die word *dier*, of *diere van die land of diere van die aarde gesoek* word. Die swarte

¹ Smith: 112

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en *Mongoliede* word nooit onder die term mens ingesluit nie. Die swarte of Negroïde is 'n totalla aparte skepping van die Adamitese mens. Daar is nie 'n enkele aanduiding in die Bybel dat veelrassige huwelike toelaatbaar is nie!² (Translated: "Any reference to these Blacks in the Bible must be searched for under the word "animal" or animals of the land or animals of the earth. The Blacks and the *Mongoliese* are never included under the term "man/human being". The Black or Negroid are a totally separate creation of the *Adamic* man. There is not a single indication in the Bible that interracial marriage is permissible"). (Smith's emphasis).

4.3 "Die swarte is 'n ras wat vernietig en het al baie beskawings verwoes."³ (Translated "The Blacks are a race that destroyed and have destroyed many civilisations".)

4.4 "Hy sal nooit wat hy van die witman ontvang het in stand kan hou nie. Daarvan getuig die agteruitgang van ons totale infrastruktuur. Goeie, vrugbare en voortstrewende plase wat aan hulle gegee is, is vandag niks anders as plakkerskampe vol erosie nie. Wanneer sal ons volk se oë oopgaan vir die waarheid en hulle ophou om perels aan die varke

² Smith: 113

³ Smith: 115

en honed te gee?"⁴ (Translated: "He will never be able to maintain what he has received from the white man. The deterioration of our entire infrastructure is a testimony to this. Good fertile and prosperous farms given to them, are nothing more than shantytowns/squatter camps full of erosion. When will our nation's eyes be opened to the truth and they will stop giving pearls to swines and dogs.")

- 4.5 Witmens wat vir swartes werk, hulle kleintjies aanneem en grootmaak en met hulle trou, sal gou uitvind dat daar 'n vloek op hulle us. Dit is net so onvanpas soos 'n leeu en 'n hyena wat besluit om 'n gesin te begin. Witmense wat deel uitmaak van YAWEH se volk en voor die swart barbare kruip in die stof, met hulle meng en hulle aanry kerk toe en se dat dat YAHSHUA swart was, moet hulle reghou vir YAHWEH se komende oordeel.⁵ (Translated: "White people working for blacks, adopting and raising their young and marrying them, will soon find that there is a curse resting on them. This is just as inappropriate as a lion and a hyena who decide to start a family. White people who belong to the YAWEH people and who crawl in the dust before these black savages, who mix with them and then cart them off to the church and say YESHEWA was black, they should prepare themselves for the coming judgement of YAHWEH.")

⁴ Smith: 116

⁵ Smith: 592

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4.6 "Predikante (Baalpriesters) se by begrafnisse waar wit mense deur swart barbare vermoor is, dat hulle die swartes moet vergewe, want hulle is ons naaste – g'n wonder die Afrikaner het ruggraatloos geword het en die heiden toelaat om te maak net wat hy wil nie."⁶

(Translated: "At funerals where white people have been murdered by black savages, Priests say that they should forgive Blacks, for they are our neighbours (fellow-men) – no wonder the Afrikaner has become spineless and the heathen are allowed to do just what he wants.")

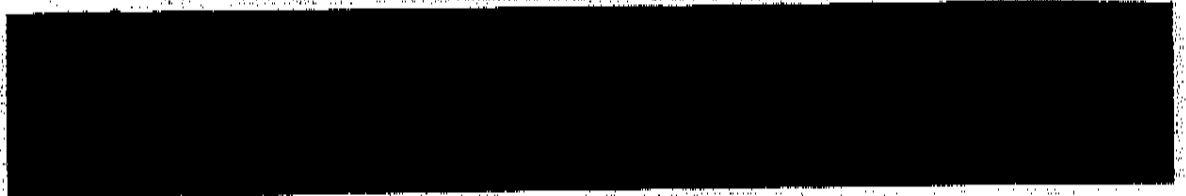
4.7 "Apartheid is skriftuurlik. Elohim wil he dat sy volk nie vermeng met ander volke nie en dat volke hulself binne die grense wat hy gestel het, hou (Handleinge 17:26). Oortreding daarvan is strafbaar deur Elohim. Die huidige gelykheids – en vermengingsbeleid van die regering in Suid-Afrika en die res van die wereld, is die gees van die duiwel."⁷ **(Translated: "Apartheid is scriptural. God does not want His people to be mixed with other people. He wants his people to remain within the boundaries He has set for them (Acts 17:26). To breach or offend this is punishable by God. The current equity and mixing policy of the Government of South Africa and the rest of the world is the spirit of the devil.")**

⁶ Smith: 567

⁷ Smith: 222

FROM

(TUE)DEC 4 2012 18:27/ST. 15:12/No. 7518182808 P 1



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Israelites beïnvloed of met hulle in aanraking kom, Elohim is die Skepper van alle lewensvorme, insluitende elke afsonderlike ras. Gevolglik is dit sy oorspronklike ontwerp of plan vir elke ras om geskeet en afsonderlik te bly. Elohim het spesifieke dade van die aarde aan elke ras toegewys. Dit is die mens, nie Elohim of die Skrif nie, wat vermenigvuldiging voorsien, doen, verdel en dit selfs aanmoedig.



Illustrations showing the position of the head on the body. In the more primitive types the head protrudes away from the body. In the more advanced and modern forms the head straightens up.

- 1. Chimpanzee
- 2. Neanderthal
- 3. Hottentot
- 4. European



Representation of facial angles of different species of man showing the more acute angles in the more primitive species

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Die swarte in die Skrif



Fig 1. The superior beauty of the white race over colored races is universally recognized and is a factor in the "color problem".

Daar word nie veel oor die swarte in die Skrif gesê nie, meer met die genade en hulp van Elohim kan ons tog sy spoor in die Skrif kry. Ons moet egter onthou dat die Bybel die geskiedenis bevat van die wit Adamitiese ras, in besonder die aadlyk van Abraham, Isak en Jakob Israel, want dit is met hulle wat Yahweh in verbond het. Gevolglik konsentreer die Bybel op die geskiedenis van die twaalf stamme van Israel en bevat daarom nie die geskiedenis van die ander rasse nie. Hulle word net genoem wanneer die Heilige Gees dit vir een of ander rede belangrik eg. Terwyl hulle in die Skrif genoem word, is hulle nooit die *primêre onderwerp of fokus* nie. Die volgende Skrifverwysings sal ons help om beter te verstaan hoe die swarte inpas by die Skrif in sy geheel.

Die Swarte as 'n *Khal Nephesh-Wese*

Die woorde *Khal nephesh* die Hebraïese woorde vir "lewende wese" in Génees 1:24-25. Die swarte word ingesluit onder die klassifikasie van "Lewende wese se gesluisde soorte". Die Afrikaanse woord "lewende" is afkomstig van die Hebraïese woord *khal* wat "om te leef" beteken. Die woord *wesens* of "wese" is afkomstig van die Hebraïese woord *nephesh* en dit beteken "in wese wat asemhaal". Die term *lewende wese* is 'n breë klassifikasie en sluit allerhande soorte wesens in, insluitende die tweevuotige wese wat tans swartes genoem word. Die swarte is geskep volgens die Wet van Soort volgens sy Soort.

Die swarte is op die reeds dag geskep, net voor die skepping van die Adamitiese mens. ~~Waarheen~~ Die swarte is aan hom toegewys, in besonder daardie gedeeltes wat naby die oeweroan is. Hier sou die swarte floreer tussen sy soort en in 'n omgewing wat die beste geskik is vir sy fisiese en verstandelike ontwikkeling. Hy sou tuis wese tussen die verskillende lewensvorme in die oerwoud en die bos. Die morele en geestelike waardes van die swarte sou beperk wese, maar

106

5. Preliminary Assessment

5.1 The Provincial Office of the Free State made a preliminary assessment of the complaint. The preliminary assessment of the Office was:

5.1.1 That the Respondent's publication constituted a *prima facie* violation of **Sections 9 (equality) and 10 (human dignity) of the Constitution**; and further,

5.1.2 That the Respondent's statements in its publication *prima facie* amounts to hate speech within the meaning of *Section 10 of the Promotion of the Equality and Prevention of Unfair Discrimination Act 4 of 2000*.

5.1.3 That the Respondent's publication *prima facie* amounts to an infringement of *Section 12 of the Promotion of the Equality and Prevention of Unfair Discrimination Act 4 of 2000*.

5.1.4 That the assessed violations *falls within the mandate and jurisdiction* of the South African Human Rights Commission;

5.1.5 That the possible defences that are open to the Respondent in support of its publication of the "**Die Raadsplan**" were Sections 15 of the Constitution (*freedom of religion, belief and opinion*) and Sections 16 (*freedom of expression*).

5.1.6 That the Commission is the organisation that is best positioned to effectively and expeditiously deal with the complaint.

6. Motivation for undertaking investigation

- 6.1. Racism has the potential to demean persons in their inherent humanity and dignity. For this reason, both the spirit and text of the South African Constitution abhor the unequal treatment of persons on the basis of criteria such as biological attributes and other social characteristics.
- 6.2. The founding provisions of the Constitution provide that the Republic of South Africa shall be a "*sovereign, democratic state founded on the values of human dignity, non-racialism*", amongst others.
- 6.3. Beyond the founding provisions, the Bill of Rights in the Constitution provides that everyone should be equal before the law, and directs that the state should not unfairly discriminate ***directly or indirectly*** against anyone on the grounds of race, culture, ethnic or social origin, colour and belief, amongst others.

De Klerk

- 6.4. In order to strengthen this constitutional prescription, the text of the Bill of also creates various *state institutions to support this new constitutional democracy* Rights with a mandate to create a culture of democracy and human rights in South Africa, and to progressively reverse the racial inequalities of the past.
- 6.5. The South African Human Rights Commission is one of such institutions; vest with powers to investigate and report on the observance of human rights, and to take steps to secure appropriate redress where human rights have been violated.
- 6.6. The facts of the present case invite the Commission to evaluate the allegations of the Complainant and the possible defences of the Respondents, and make a determination regarding the appropriateness of the content of the Respondent's publication in an open and democratic South Africa built on foundational values of equality and human dignity.

7. Steps taken by the Commission

- 7.1 Pursuant to the assessment of this complaint, the Commission sent a letter of allegation to the Respondent in May, 2012.

7.1.1 presenting the preliminary analysis of the Commission;

7.1.2 inviting the Respondent to respond to the allegations;

7.1.3 calling for a response within twenty-one (21) days.

7.1.4 recommending the removal of the book from all bookstores;

7.1.5 advising the cessation of further distribution;

7.1.6 advising to refrain from publishing oral or written statements of a similar nature.

7.2 On the 26 May 2012, the Commission received a written response from the Respondent.

7.3 In his written response, the Respondent neglected and/or refused to respond to the substance of the allegation; instead, the Respondent offered to:

7.3.1. cover two pages⁸ in the book that contained demeaning pictorial depictions of African people in the current stock of publications; and to

⁸ Smith:105, 106.

7.3.2. replace them with re-written and updated amended pages in future re-prints.

8. **Applicable Law**

8.1 **International Legal Instruments**

8.1.1 **Universal Declaration of Human Rights, 1949**

Article 1

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

8.1.2 **International Convention on the Elimination of all Forms of Racial Discrimination**



The International Convention on the Elimination of All Forms of Racial Discrimination defines "*racial discrimination*" as unfair differentiation based on "*race, colour, descent, or national or ethnic origin*".

Further,

"CERD provides that *states who are parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin or which attempts 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 with due regard to the principles embodied in the universal declaration of human rights and the rights expressly set forth in article 5 provide inter alia that participating states:*

- (a) *declare an offence punishable by law of 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 racial activities including the financing thereof;*
- (b) *declare illegal and prohibit organisations and also organised and all other propaganda activities which promote and incite racial discrimination and further that such states recognise participation in such organisations or activities as an offence punishable by law."*

8.1.3 International Covenant on Civil and Political Rights

Article 2

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in

the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

8.2 Regional Legal Instruments

8.2.1 The African Charter on Human and Peoples' Rights.

Article 2

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter 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."

8.3 National Constitution

The following provisions of the National Constitution are applicable:

8.3.1 Section 9, Constitution of South Africa (1996) (Right to Equality).

"9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law;

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may taken;

(3) The state may not unfairly discriminate directly or indirectly against anyone on or more grounds including race;

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection;

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

8.3.2 Section 10, Constitution Act of South Africa (1996) – (Right to Human Dignity):

"Everyone has the inherent dignity and the right to have their dignity respected and protected".

8.3.3 Section 16 (2)(c), Constitution Act of South Africa (1996) – (Freedom of expression must not be used to incite hatred).

[The right to freedom of expression] "... does not extend to- (c) advocacy of hatred that is based on race and that constitutes incitement to cause harm".

8.4 Domestic Legislation

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act')

8.4.1 The Framework of the Equality Act

The Equality Act was assented to in order to give effect to the constitutional imperative, but also to 'prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech.

In its preamble, the statute recognizes that, despite 'significant progress made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy'.

Accordingly, the Equality Act 'endeavours to facilitate the transition to a democratic society, united in diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom'.

8.4.2 Section 10, of the Equality Act provides that:

"No person may unfairly discriminate against any person on the ground of race"

And "... no person may use language that incites hatred...violence".

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8.4.3 Section 12 of the Equality Act provides that:

"12. 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: Provided that 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, is not precluded by this section".

8.4.4 Section 24 of the Equality Act provides that:

Section 24(1) *"Any person who knowingly distributes a publication that does within the context, amount to-*

(a) Advocate hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm shall be guilty of an offence."

8.5 Relevant Case Law

8.5.1 Islamic Unity Convention v Independent Broadcasting Authority and Others 2002(4) SA 294 (CC) (2002(5) BCLR 433(CC).

In this case the Court confirmed that prohibition against the broadcasting of any material which is *"likely to prejudice relations between sections of the population"*.

The court further stated that *"the pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself"*.⁹

8.5.2 In Freedom Front v South African Human Rights Commission¹⁰

the court considered the meaning of "harm" and came to the conclusion that harm cannot and should not be restricted to physical or actual harm. It found that the term harm was broader than physical harm. The reference to race, gender, ethnicity and religion, was meant to prevent unwarranted intrusion into the right of freedom of expression. Harm must also be interpreted to refer to impacts upon dignity, and psychological, emotional and social harm that can be

⁹ Para 29

¹⁰ 2003 (11) BCLR 1283 (SAHRC)

caused by hate speech. It may therefore cause psychological harm and evoke a sense of hostility.¹¹

8.5.3 The court held that:

"Calling 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".¹²

8.5.4 In Human Rights Commission of South Africa v South African Broadcasting Corporation¹³ it was held that derogatory and inflammatory statements about the Indian population in a Zulu song ("Amandiya") were advocacy of hatred based on race. The song, according to the Commission,

"polarises Zulus with Indians which by demeaning Indians: they were the cause of the poverty of Zulus, and were worse than Whites, and have turned an important clan (Zulus) into clowns, have dispossessed them, have suppressed them and play the fool with them".¹⁴

¹¹ See p 1292A to 1295F; p 1298A to p 1298B; p 1299C to p 1299E

¹² See p 1290

¹³ Human Rights Commission of SA v SABC 2003 (1) BCLR 92 (BCCSA)

¹⁴ Broadcasting Complaints Commission of South Africa adjudicates complaints of violations of the Broadcasting Code, which prohibits broadcasting of hate speech.

8.5.5 *R v Keegstra*

The Canadian Supreme Court in this case said:

"a response to humiliation and degradation from the individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to a community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target-group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with outsiders or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

Further, the Court said per Dickson C J C that:¹⁵

*"In my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in **R. v Andrews**...:"Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition...." ... Hatred in this sense is a most extreme*

¹⁵ [1990] 3 SCR 697, 3 CRR (2d) 193.

W.A.A.

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."

8.5.6 In the Equality Court decision of the **Malema-case** Lamont J made the following statement:

"All hate speech has an effect, not only upon the target group but also upon the group partaking in the utterance. That group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers. In addition, to the extent the words are inflammatory, members of the group who hear them might become inflamed and act in accordance with that passion instilled in them by the words"¹⁶

9 Analysis of Complaint

9.1 The Constitution of South Africa entrenches the right to freedom of speech and expression.¹⁷

9.2 Generally speaking, any person is free to express himself in speech or otherwise in a democracy. A reading of this provision,

¹⁶ *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (Equality Court); [2011] 4 All SA 293 (Equality Court); 2011 (12) BCLR 1289 (EqC)

¹⁷ Section 15, Constitution of South Africa

read together with sections 10 and 12 of the Equality Act, suggests that *offensive religious speech is permitted, as long as such speech does not amount to the advocacy of hatred based on religion and which constitutes incitement to cause harm.*¹⁸

- 9.3 In the present case, the Respondent sought to exercise its right to express itself with respect to its religious thoughts, ideas, ideologies and theology. In doing so, the Respondent made a series of statements and assertions which in both substance and effect stated that the white race is superior to other non-white races. These statements are patently offensive.
- 9.4 The central theme of the publication is founded on the theology and logic asserts that the white man is the "*Son of God*", and that the white race is supreme to that of non-white races.
- 9.5 A review of the Constitution indicates that the only constraint to free speech relating to religion is found in section 16(2)(c) of the Constitution. This section expressly refers to religion as one of the four (4) grounds on which a complaint of hate speech may be based.
- 9.6 ***In casu*, the question therefore for determination for the Commission was whether in the exercise of its freedom of expression, and the exercise of the right to hold religious beliefs, the Respondent has exceeded the**

¹⁸ Van Rooyen 2011: 3.

threshold of sincerity and has trespassed into the realm of hate speech.

9.7 It would seem from an analysis of relevant constitutional provisions and case law that the exercise of the right to express oneself freely is not limited to inoffensive ideas, but also extends and includes the right express offensive ideas.¹⁹ In other words, one is permitted to express himself on ideas, even if such ideas are offensive.

9.8 This widely couched liberty to express oneself is also acknowledged in foreign jurisprudence. In the European Court of Human Rights, **Handyside v The United Kingdom** the Court pointed out that the right to freedom of expression is:

"applicable not only to 'information' or '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 broadmindedness without which there is no 'democratic society'."

9.9 The legal parameters and thresholds for the expression of offensive religious beliefs in democratic South Africa has exercised the mind of jurists in the Constitutional Court, and is set out in the Constitutional case of **Pillay**²⁰, cited above.

¹⁹ *De Reuck v Director of Public Prosecutions, WLD and Others* 2004(1) SA 406 (CC).

²⁰ *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)

- 9.10 In the Pillay-case it was held that claims based on religious grounds may be successfully supported by the Respondent if he is able to show that he was sincere in his or her religious belief. If not, the infringement is not justified.
- 9.11 This suggests that the right to religion is not impenetrable and absolute in South African law; the question, always, should be **whether the publications are capable of being construed as meeting the prerequisites of hate speech set out in the Equality Act.**
- 9.12 This principle was further emphasised in the case of **Islamic Unity Convention v Independent Broadcasting Authority & Others**²¹ in which the Court emphasized that offensive ideas and statements will only be excluded from protection if it constitutes propaganda for war, incitement of imminent violence and egregious hate speech in terms of Section 16(2) (c) of the Constitution.
- 9.13 This Constitutional provision is also reflected in the wording of **Section 10 of the Equality Act**²², discussed below.
- 9.14 Section 10 of the Equality Act²³ (as set out by **Lamont J in the Malema-case**) defines what may not be published [by any person in exercise of his freedom of expression and/or religion]:

²¹ 2002(4) SA 294(CC), 2002 BCLR 433 (CC) ('Islamic Unity')

²² The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

1. "A person may not publish,

against any person including a juristic person, a non-juristic entity, a group or category of persons,

- a) words concerning race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,
- b) *or words concerning any other ground where the discrimination based on that ground:*
- c) *causes or perpetuates systemic disadvantage;*
- d) *undermines human dignity; or*
- e) *adversely effects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground referred to supra in para*

9.15 South Africa is party to several treaties that advocate the eradication of hate speech including **International Covenant on Civil and Political Rights. It is, however, the 1965 Convention on the Elimination of All forms of Racial Discrimination (CERD)** that provides the best description:

"CERD provides that states who are parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin or which attempts to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures

²³ Act 4 of 2000.

designed to eradicate all incitement to or acts of such discrimination and to this end with due regard to the principles embodied in the universal declaration of human rights and the rights expressly set forth in article 5 provide inter alia that participating states:

- a) *declare an offence punishable by law of 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 racial activities including the financing thereof;*
- b) *declare illegal and prohibit organisations and also organised and all other propaganda activities which promote and incite racial discrimination and further that such states recognise participation in such organisations or activities as an offence punishable by law."*

9.16 If one concludes from the statements above that "**Die Raadsplan**" is hurtful, promotes hatred, incites harm, propagates hatred the definition of hatred is of great importance. The Canadian Supreme Court case of **R v Keegstra** Dickson C J C held:²⁴

"In my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in R. v Andrews...: "Hatred 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 within the definition..." ... 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

²⁴ [1990] 3 SCR 697, 3 CRR (2d) 193.

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are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.

9.17 Although this definition of hatred is sourced from a court outside our borders, it is equally applicable here.²⁵

9.18 There can be little argument from any reader of the Respondent's publication, that the *content* of the book as well as the *context* within which the offensive remarks are published, attracts an emotion that if exercised by white people against non-white people will imply that white people are being called upon to despise, scorn, deny respect and subject non-white people to ill-treatment.

9.19 In the *U.S. Holocaust Museum's Sudikoff Annual Interdisciplinary Seminar* on Genocide Prevention it was emphasized that the *context* where the alleged hate speech occurs is of paramount importance in determining its nature:

"The context in which speech occurs helps determine its impact, as does the position of the person or persons speaking. Additionally hate speech alone does not indicate impending violence. It is only by analyzing contextual clues that the potential threat of any given speech can be evaluated."²⁶

9.20 In this regard, the Commission is unable to ignore the fact that the offensive references to racial superiority of the white

²⁵ Section 39 of the Constitution entreats adjudicators of the Bill of Rights to consider foreign law.

²⁶ United States Holocaust Museum 2009: 7.

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population, and the inferiority of the non-white population is being published and disseminated by the Respondent within the South-African socio-political context.

9.21 The history of South Africa and the legacy of white supremacy and subjugation and humiliation of non-white South Africans is widely publicized and needs no further detail. This history is a key factor in determining whether the Respondent's publication should be construed as an expression that constitutes hate speech and an unacceptable exercise of freedom of expression and religion or not.

9.22 In the view of the Commission, the history and social context of South Africa render the Respondent's publication racially discriminatory and amounting to hate speech.

9.23 In the Equality Court decision of the **Malema-case Lamont J** made the following statement:

"All hate speech has an effect, not only upon the target group but also upon the group partaking in the utterance. That group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers. In addition, to the extent the words are inflammatory; members of the group who

hear them might become inflamed and act in accordance with that passion instilled in them by the words²⁷"

9.24 Accordingly, the Commission in the present case does not only consider the effect of hate speech on the target group, but also takes into consideration the effect of hate speech on the speaker.

9.25 Drawing all these strands together, the Commission is unable to find that the statements of the Respondent were sincere and reasonable, within the context of South Africa's apartheid history.

9.26 Instead, it is the view of the Commission that the publication has the effect of undermining and regressing the gains that South Africa has made through constitutional values of equality and dignity. It has at its core the purpose of reverting the thoughts and ideas of congregants of the Respondent Church to pre-democratic South African values of white supremacy and black inferiority. It provides reinforcement for pre-democracy stereotypes that used white racial superiority as an argument to justify privileges and social hierarchy of whites people.

²⁷ *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC)

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9.27 To allow the Respondent to persist in its publication of these views, the Commission would be permitting the Respondent to counter current efforts by other institutions to debunk the theory of racial superiority and racial differences in this country.

9.28 In the result, the Commission concludes that such a publication as the "**Die Raadsplan**" is one that is unacceptable in a free and democratic dispensation that espouses equality as its central theme.

10. Finding

10.1 After a thorough and careful academic analysis the Commission finds that the Respondent's publication violates the following fundamental constitutional rights:

(a) The Right to Equality on the grounds of race (s 9);

(b) The Right to Human Dignity (s 10).

10.2 The Commission further finds that the quoted sections of the said publication, both in terms of its content and its effect can

reasonably be construed to demonstrate an intention to be hurtful and to promote hatred through the dehumanisation of African, Indian and Coloured people (all non-white people).

) 10.3 Accordingly, the Commission finds that the Respondent's publication has met the requirements of Section 16 (2) (c) of the Constitution and Section 10 of the Equality Act that prohibit hate speech.

10.4 The Commission rejects the possible defence available to the Respondent that the publication was made in exercise of the freedom of religion or freedom of expression.

) 10.5 In conclusion, the Commission finds that the "**Die Raadsplan**" is an example of systemic unfair discrimination that is embedded in ideologies, beliefs and attitudes that undermine the aspirations of our constitutional democracy, as referred to in the preamble of the Equality Act".

11. Recommendations

11.1 The Films and Publications Board is advised to take the necessary steps to remove the offensive publication from all public channels of distribution, and to mete out appropriate administrative and other sanctions in terms of the Films and Publications Act.

11.2 The Institute for Race Relations of the University of the Free State, in collaboration with the Governing Council of South African Council of Churches, engage the Respondent (including its leadership and associated institutions) in a series of *Race Relations Sensitisation Workshops*, and report in writing to the Commission on the progress achieved thereby no later than six (6) months from the date of this finding.

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 competent or alternative relief provided for in Section 21 of the Equality Act.

12. 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:

**The Chairperson
South African Human Rights Commission
Private Bag X2700
Houghton, 2041**

SIGNED IN Johannesburg THE 21st DAY OF
February 2013.



ADV M.L. MUSHWANA

SOUTH AFRICAN HUMAN RIGHTS COMMISSION