IN THE SUPREME COURT OF APPEAL

SCA CASE NO: 1105/2022

GJ CASE NO: EQ 04/2020

In the matter between:

AFRIFORUM	Appellant
and	
ECONOMIC FREEDOM FIGHTERS	First Respondent
JULIUS SELLO MALEMA	Second Respondent
MBUYISENI NDLOZI	Third Respondent
RULE OF LAW PROJECT	Amicus Curiae
(FREE MARKET FOUNDATION)	

AMICUS CURIAE'S HEADS OF ARGUMENT

ISSUES RAISED BY THE AMICUS

1. The Amicus raises four issues of relevance to these proceedings.

2. First, the court *a quo* creates a category of specially protected speech uttered by political role players. This elevates politicians over ordinary

citizens and flies in the face of the fundamental requirement of the rule of law that no one is above the law. Furthermore, it turns on its head the requirement set out by the Constitutional Court in *Qwelane* that the status of the speaker in relation to the audience is a factor to be considered when curtailing speech.[1]

3. Second, that equality before the law require that the rules of evidence are applied equally to parties in similar circumstances. The court *a quo* both included and excluded expert and lay witness testimony for inappropriate reasons.

4. Third, the court *a quo* held that the Appellant had failed to show that the Song "Kill the Boer" targeted people on any of the listed grounds like race or ethnicity that are mentioned in PEPUDA.[2] The effect of this is to treat Afrikaners as second class citizens unworthy of protection. In the *Masuku* case the Constitutional Court recognized that the term Zionists actually referred to Jews as a religious and ethnic group, the term Boers should similarly be understood to refer to Afrikaners.

5. Fourth, the court *a quo's* Judgment undermines the founding value of non-racialism by implicitly creating different rules based on the race of the perpetrator and the victims.

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[1] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22, para 89
[2] Para 101 of Judgement of the court a quo, at 1946 of Appeal Bundle.

SPEECH BY POLITICIANS

6. The Court *a quo* provided special protection for the speech uttered by Mr Malema on the grounds of him being a politician.[3] This approach runs counter to the norms that public officials and those with an elevated status ought to be subject to stricter scrutiny.

7. In **August 2016**, The United Nation Committee on the Elimination of Racial Discrimination produced a report about hate speech in South Africa[4]. The report stated that:

> The Committee is further concerned at the rise of hate crimes and hate speech in the State party including physical attacks against certain ethnic groups and non-citizens, discriminatory statements by State officials and politicians, and the increase in the use of media and the internet to propagate racist hate speech…The Committee further recommends that the State party ensure all incidents of hate crimes and hate speech are investigated and prosecuted and that the perpetrators are punished, regardless of their official status.

[3] Paras 111-2 of Judgement of the court a quo, at 1949-50 of Appeal Bundle.
[4] "Concluding observations on the combined fourth to eighth periodic reports of South Africa" UN Doc CERD/C/ZAF/CO/4-8,
available at http://www.politicsweb.co.za/documents/un-cerds-observations-on-sa.

8. In *Economic Freedom Fighters and Another v Minister of Justice* the Constitutional Court was tasked with determining whether the Riotous Assemblies Act met constitutional muster. Mr Malema had been charged with breaching the Act for calling on people to take land.[5]

9. Mogoeng CJ held for the majority of the Court that:

> No constitutional right is absolute or ranks higher than all others in this country. In our enjoyment of these rights, a greater sense of responsibility is demanded particularly of those who are thought-leaders whose utterances could be acted upon without much reflection, by reason of the esteem in which they are held and the influence they command. After all, leaders from all walks of life ought to bear heavier responsibilities than all others, to help preserve our ubuntu, justice and equality-based heritage and actualise our shared aspirations.[6]

10. In *Qwelane*, the Constitutional Court held:

> Various factors have been identified in international law that justify the curtailment of freedom of expression. These include: (i) the prevailing social and political context; (ii) the status of the speaker in relation to the audience; (iii) the existence of a clear

[5] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC), paras 6-9
[6] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC), para 3

intent to incite; (iv) the content and form of the speech; (v) the extent and reach of the speech; and (vi) the real likelihood and imminence of harm.[7]

11. During the trial in the Court *a quo*, Mr Malema testified as follows:

12. He believes that he will eventually be President of South Africa.[8]

13. He describes the EFF as a very radical, very militant party.[9] It is a Marxist-Leninist Fanonist Organisation.[10] He said, "I never said I am somewhat moderate. I am very radical and very militant. And I make no apology about that."[11]

14. When asked whether he would embrace violence as a process to decolonise South Africa, he responded: "Colonisation is violent. It is like racism. And the only [way] to deal with violence you must be violent. Therefore, there is nothing wrong in engaging in a revolution and one to be suggesting that you cannot be engaged in violence. Revolution itself is violence."[12]

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[7] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22, para 89
[8] Evidence of Mr Malema, Transcript - 17 February 2022, 1678 of Appeal Bundle
[9] Evidence of Mr Malema, Transcript - 17 February 2022, 1676-7 of Appeal Bundle
[10] Evidence of Mr Malema, Transcript - 17 February 2022, 1675 of Appeal Bundle
[11] Evidence of Mr Malema, Transcript - 16 February 2022, 1586 of Appeal Bundle
[12] Evidence of Mr Malema, Transcript - 17 February 2022, 1676-7 of Appeal Bundle

15. When asked whether he would be happy to endorse the use of violence for his revolutionary aims, he responded "M'Lord when the time comes and the conditions on the ground necessitate that arms must be taken, we will do so without hesitation."[13]

16. "I am not scared of killing. A revolutionary is a walking-killing machine, not scared of death. If that need arises I will kill. And I will do so with no hesitation, especially in defence of my people."[14] "We are very angry. We are ready to kill."[15]

17. Given the prominence of Mr Malema and the EFF, the Court *a quo* ought to have applied a high level of scrutiny to his speech instead of exempting it because of his political status.

EXPERT EVIDENCE

18. The evidence of Afriforum's expert Mr Roets was excluded on the basis that he was employed by the Appellant and that he is an activist on issues related to socio-political affairs of the Afrikaner communities.[16] However, in the Equality Court trial of Jon Qwelane, the Court admitted the evidence of Mr Gregorio, the SAHRC's own employee,[17] in addition to the

[13] Evidence of Mr Malema, Transcript - 17 February 2022, 1676 of Appeal Bundle
[14] Evidence of Mr Malema, Transcript - 17 February 2022, 1685 of Appeal Bundle
[15] Evidence of Mr Malema, Transcript - 17 February 2022, 1680 of Appeal Bundle
[16] Para 46 of Judgement of the court a quo, at 1926 of Appeal Bundle.
[17] *South African Human Rights Commission v Qwelane* 2018 (2) SA 149 (GJ), para 23

expert evidence of Prof Nel who testified about the deleterious effects of homophobic speech. "He testified extensively about his own ill-treatment and discrimination meted out on him by virtue of his gay and sexual orientation status."[18]

19. The court *a quo* disregarded the Appellant's expert Mr Human on the basis that his testimony about the physical and psychological effects that farm attacks have on their victims constituted hearsay evidence.[19] However, in the Qwelane trial, the Court admitted evidence from Ms Moekoena of POWA about a series of lesbian women that had been correctively raped.[20] The court did not dismiss the evidence as hearsay despite the victims not being called to corroborate her testimony.

20. The court a quo disregarded the Appellant's expert Mr Crouse's evidence about Mr Ndlozi singing the song "Bizan'ifire brigade" on the basis that he did not prove that there was a causal link between the singing of the song and farms being set alight in the region.[21] However, the Constitutional Court in Qwelane held that "Considering next the phrase "to incite harm", it is imperative to point out at the outset that there is no requirement of an established causal link between the expression and actual harm committed."[22]

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[18] *South African Human Rights Commission v Qwelane* 2018 (2) SA 149 (GJ), para 39
[19] Para 52 of Judgement of the court a quo, at 1928-9 of Appeal Bundle.
[20] *South African Human Rights Commission v Qwelane* 2018 (2) SA 149 (GJ), para 28
[21] Paras 58-9 of Judgement of the court a quo, at 1931 of Appeal Bundle.
[22] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22, para 98

21. The court *a quo* disregarded the Appellant's lay witness who testified about the personal attacks they had suffered on the basis that they could not prove that they were attacked because of the singing of the song Kill the Boer.[23] However, the Equality Court in Qwelane admitted the evidenced of a witness described as MN who testified about the personal abuse that she suffered because of her sexual orientation. "Like Mokoena, MN conceded readily that the incidents perpetrated on her can not be directly linked to the applicant's offending statements. However, she added that the offending statements were exacerbating the current situation where people like her are being harassed."[24]

22. The court *a quo* relied on the Respondents' expert witness to determine the meaning of the song Kill the Boer.[25] However in *Masuku* the Constitutional Court held that "because it has long been held that an expert may not usurp the adjudicative functions of our courts, the experts in this matter could not be used to determine the meaning of the statements"[26]

23. The court *a quo* relied on the evidence of Mr Malema to determine the meaning of the song.[27] However, the Constitutional Court in Qwelane

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[23] Paras 62 and 66 of Judgement of the court a quo, at 1932-3 of Appeal Bundle.
[24] *South African Human Rights Commission v Qwelane* 2018 (2) SA 149 (GJ), para 34
[25] Paras 105-110 of Judgement of the court a quo, at 1946-7 of Appeal Bundle.
[26] [2022] ZACC 5, at paras 145
[27] Paras 104 of Judgement of the court a quo, at 1947-8 of Appeal Bundle.

held that "because the objective test of the reasonable reader is to be applied, it is the effect of the text, not the intention of the author, that is assessed."[28]

24. These discrepancies create the impression that that different rules were being applied by the court a quo in a manner that is inconsistent with the rule of law. Litigants ought to be able to rely on the decisions of other courts when deciding how to conduct their own proceedings.

LISTED GROUNDS

25. The Court a quo found that the impugned speech was not based on the grounds listed in PEPUDA like race and ethnicity. This was held despite Mr Malema's own testimony that "when I mention the word farmer, I see a white person."[29]

26. In the *Masuku* case the Constitutional Court examined the following impugned statement:

> "[A]s 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,

[28] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22, para 97
[29] Evidence of Mr Malema, Transcript - 16 February 2022, at 1564 of Appeal Bundle.

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."[30]

27. The Constitutional Court held that the speech targeted Jews despite not referring to them by name.[31]

28. In *President of The Republic of South Africa and Another v Hugo*[32] Goldstone J held that:

> The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.[33]

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[30] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC), para 3
[31] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC), para 156-7
[32] 1997 (4) SA 1 (CC).
[33] *President of the RSA v Hugo* 1997 (4) SA 1 (CC) para 41 at 22G - 23A.

29. The Court a quo's failure to find that the songs "Kill the Boer" and "Burn these Boers" referred to Afrikaners indicates the presence of a double standard that singles out Afrikaners as second class citizens unworthy of protection.

NON-RACIALISM

30. The judgement of the Court *a quo* creates the alarming impression that a different standard will be used to determine whether words amount to hate speech depending on the race of the speaker and the race of the targeted group. This runs counter to the constitutional value of non-racialism.

31. The preamble of the Constitution states:

> We, the people of South Africa, Recognise the injustices of our past; and Believe that South Africa belongs to all who live in it, united in our diversity.

32. Section 1(b) of the Constitution provides:

> The Republic of South Africa is one, sovereign, democratic state founded upon the following values: Non-racialism and non-sexism.

33. The principle of non-racialism was a potent rallying cry against the Apartheid regime. It permeates the text of the Freedom Charter, which includes the following proclamations:

> "South Africa belongs to all who live in it, black and white..."; "The rights of the people shall be the same, regardless of race..."; "ALL NATIONAL GROUPS SHALL HAVE EQUAL RIGHTS!"; "ALL SHALL BE EQUAL BEFORE THE LAW!"; and "All laws which discriminate on grounds of race...shall be repealed".[34] [as from original text]

34. In 1991 the ANC produced a document entitled "Constitutional Principles for a Democratic South Africa", which proclaimed that:

> A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all.

[34] Adopted at the Congress of the People at Kliptown, 1955.

35. In *Minister of Finance and Other v Van Heerden* Justice Moseneke held that:

> [T]he long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity.[35]

36. In *Pretoria City Council v Walker*[36] Justice Sachs held that:

> No members of a racial group should be made to feel that they do not deserve equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others belonging to other race groups.

37. The Court in *Khumalo* explicitly endorsed non-racialism in hate speech litigation.

> In South Africa, however, our policy choice is that utterances that have the effect of inciting people to cause harm is intolerable because of the social damage it wreaks and the effect it has on impeding a drive towards non-racialism. The idea that in a given society, members of a 'subaltern' group who disparage members of the 'ascendant' group should be treated differently from the circumstances were it the other way around has no place in the application of the Equality Act and

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[35] 2004 (6) SA 121 (CC), at para 44
[36] 1998 (2) SA 363 (CC), at para 81

would indeed subvert its very purpose. Our nation building project recognises a multitude of justifiable grievances derived from past oppression and racial domination. The value choice in the Constitution is that we must overcome the fissures among us. That cannot happen if, in debate, however robust, among ourselves, one section of the population is licensed to be condemnatory because its members were the victims of oppression, and the other section, understood to be, collectively, the former oppressors are disciplined to remain silent."

38. Non-racialism, if it is to mean anything, must imply that government, including the judiciary, will not treat individuals of different races differently for that reason alone. The importance of this principle given South Africa's racially discriminatory history cannot be overemphasised. Discriminatory treatment at the hands of the Apartheid state led to the systematic denial of rights. The constitutional prohibition of hate speech should protect all those in South Africa in equal measure. To achieve this objective, our courts should not countenance the distribution of license or silence on grounds of race, especially where prohibited hate speech is concerned.

CONCLUSION

39. The Court *a quo* appears to have deviated from the procedural and substantive rules that were used in similar cases. This sort of discrimination ought not be countenanced.

Counsel for the Amicus Curiae

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12 May 2023