



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 1105/2022

In the matter between:

AFRIFORUM

APPELLANT

and

ECONOMIC FREEDOM FIGHTERS
RESPONDENT

FIRST

JULIUS SELLO MALEMA

SECOND RESPONDENT

MBUYISENI NDLOZI

THIRD RESPONDENT

RULE OF LAW PROJECT
(FREE MARKET FOUNDATION)

AMICUS CURIAE

Neutral citation: *AfriForum v Economic Freedom Fighters & Others*
(1105/2022) [2023] ZASCA 82 (28 May 2024).

Coram: SALDULKER, MATOJANE and MOLEFE JJA and
NHLANGULELA and KEIGHTLEY AJJA

Heard: 4 September 2023, 15 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be delivered on 28 May 2024.

Summary: Equality – Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – s 10(1) – prohibition of hate speech – *res judicata* – issue estoppel – recusal – on grounds of bias or apprehension of bias – test for recusal – application of test requiring both that apprehension of bias be that of reasonable person and that it be based on reasonable grounds – test to be applied to the true facts on which application is based – test not satisfied – issue estoppel – not in the interests of justice and equity to apply – hate speech – importance of context in determining whether hate speech established – in full context singing of the song by respondents not prohibited hate speech.

ORDER

On appeal from: Gauteng Division of the Equality Court, Johannesburg (Molahlehi J, sitting as court of first instance):

1. The application for the recusal of Keightley AJA from the adjudication of or further participation in the determination of this appeal is dismissed with costs, such costs to include those of two counsel where so employed.
2. The appeal is dismissed with costs, such costs to include those of two counsel where so employed.

JUDGMENT

THE COURT: Saldulker, Matojane and Molefe JJA and Nhlangulela and Keightley AJJA:

Introduction

‘We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika, Morena boloka setjhaba sa heso.

God sêen Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.'

[1] These are the words of the Preamble to the Constitution. Despite the decades that have elapsed since its adoption, it is sometimes necessary to remind ourselves of the commitments we made in this nation's founding document. In many respects this appeal lays bare the obstacles that may impede the attainment of these constitutional objectives. The two main litigants occupy positions on opposite ends of South Africa's spectrum of diversity.

[2] The appellant is AfriForum. It is a civil rights organisation operating within South Africa with an emphasis on the protection of minority rights. AfriForum claims a membership of 265 000 individual members. It conducts several campaigns. One of these is a campaign against farm murders, another is a campaign against hate speech.

[3] These two campaign objectives were drawn together in December 2020 when AfriForum lodged a complaint in the Gauteng Division of the Equality Court, Johannesburg (the equality court) in terms of s 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). AfriForum averred that the respondents, being the Economic Freedom Fighters (the EFF), the EFF's President, Mr Julius Sello Malema (Mr Malema),

and Dr Mbuyiseni Ndlozi (Dr Ndlozi), who is an EFF Member of Parliament, had committed hate speech in terms of section 10(1) of the Equality Act.

[4] The hate speech complaint centred, in the main, on the song which is commonly known as ‘Dubula ibhunu’. AfriForum’s complaint was directed at the words ‘awudubula ibhunu, dubula amabhunu baya raypah’, the literal English translation, relied on by AfriForum, is ‘Kill the Boer – the farmer’.

[5] AfriForum pointed to six occasions on which Mr Malema had chanted the song, albeit that on some occasions Mr Malema had substituted the word ‘kiss’ for ‘kill’. In addition, it pointed to a single occasion when Dr Ndlozi chanted a similar song including the words: ‘Shisa lamabhunu, EFF ingen’endaweni’ (Shisa lamabhunu). The literal English translation of that chant is: ‘Burn these Boers, EFF enters in the space, or place’. The alleged utterances occurred between 2016 and 2020.

[6] Mr Malema describes his political party, the EFF, as a leftist organisation that subscribes to the struggle for economic emancipation. One of its cardinal pillars, which Mr Malema states is non-negotiable, is the expropriation of land without compensation. The foundation for this objective, according to Mr Malema, is that the colonial settlers took land from indigenous African people by force. For the EFF, the land issue is central to the economic struggle it pursues.

[7] The equality court heard the evidence of several witnesses over a period of ten court days. It dismissed AfriForum’s complaint¹ but granted leave to appeal to this Court. The Rule of Law Project (Free Market Foundation) (the *amicus curiae*) was admitted as *amicus curiae* with leave of this Court.

¹ The judgment of the equality court is reported as *AfriForum v Economic Freedom Fighters and Others* [2022] ZAGPJHC 599; 2022 (6) SA 357 (GJ) (*AfriForum v EFF* (2022)).

[8] Before dealing with the merits of the appeal, we need to address an application instituted by AfriForum for the recusal of Acting Justice of the Supreme Court of Appeal Keightley, which arose under the following circumstances. The appeal against the equality court's judgment and order was heard on 4 September 2023. The bench consisted of Justices Saldulker, Matojane and Molefe JJA, and Acting Justices of Appeal Nhlangulela and Keightley AJJA. Judgment in the appeal was reserved on 4 September 2023.

[9] Four days later, on 8 September 2023, Hurter Spies, attorneys for AfriForum, addressed a letter to the Registrar of this Court. They stated that subsequent to the hearing of the appeal on 4 September 2023 their attention had been drawn to a transcription of remarks made by Acting Justice of Appeal Keightley (Justice Keightley) concerning AfriForum in a previous hearing in the high court in which it was a party. The transcription was attached to the letter. According to Hurter Spies, the comments by Justice Keightley demonstrated bias against their client AfriForum. Alternatively, they showed that Justice Keightley had expressed herself in terms directed at AfriForum such as to establish a reasonable apprehension of bias against it. Their instruction from AfriForum was to request that Justice Keightley recuse herself from any further involvement in the adjudication of the appeal.

[10] On 20 September 2023, AfriForum launched a formal application in this Court for the recusal of Justice Keightley from the adjudication of or further participation in the determination of the appeal, together with ancillary relief. The latter included a request that the President of this Court direct the hearing of oral argument in relation to the recusal application, the filing of further affidavits, and the composition of the Court regarding any consequential rehearing of the appeal.

The EFF opposed the recusal application. The President issued directives on the filing of further affidavits and heads of argument, and the recusal application was set down for hearing on 15 February 2024. After the hearing, this Court reserved judgment.

[11] This judgment deals with both the recusal application and the appeal against the decision of the equality court. We turn first to deal with the recusal application.

The application for the recusal of Justice Keightley

[12] In its application for the recusal of Justice Keightley, AfriForum claimed that it had learned two days after the judgment was reserved in the hearing of the appeal that Justice Keightley had made certain prior comments on 15 June 2018 about AfriForum (the impugned remarks). They were made to counsel for AfriForum during the hearing of the leave to appeal her ruling in the high court in the matter of *AfriForum v Chairman of the Council of the University of South Africa and Others*² (the Unisa matter). The Unisa matter concerned the use of Afrikaans as a language of instruction in higher education.

[13] The CEO of AfriForum, Mr Carl Martin Kriel (Mr Kriel) set out the factual circumstances relating to the launching of the recusal application in his affidavit. He explained that it was instituted as soon as AfriForum became aware of the circumstances and that AfriForum had raised it at the earliest stage that this could be done, which was on or around 7 September 2023.

[14] A fellow director of Hurter Spies, Mrs Marjorie Van Schalkwyk (Mrs Van Schalkwyk), had been in court on 15 June 2018 when the impugned remarks were

² *AfriForum v Chairman of the Council of the University of South Africa and Others* (54450/2016) [2018] ZAGPPHC 295 (26 April 2018).

made. Despite her request, the transcribers were unable to provide her with a transcript. It was only when she was watching the live feed of the present appeal that she had heard lead counsel for AfriForum say ‘excuse me, Justice Keightley’. Suddenly and, according to her, for the first time, Mrs Van Schalkwyk realised that Justice Keightley was the same judge as in the Unisa matter. She informed Mr Spies. On 7 September 2023 they were able to obtain a full transcription of the proceedings of 15 June 2018.

[15] Correspondence was exchanged with the Registrar of this Court and with the respondents' attorneys. Thereafter, the recusal application was filed on 20 September 2023. This was more than two weeks after the appeal was heard and judgment reserved.

[16] The impugned remarks identified by AfriForum are the following:

‘I think your client is barking up a tree that it should you know perhaps there are other ways to use its resources.’

‘You know when you are dealing with such a small... such a small segment’.

‘[M]aybe I just do not get it. But I think one has to move beyond anachronistic positions which your client seems to be unwilling to do.’

‘[I]t does not matter I am granting you leave.’

‘And next time you in front of me with them you might to wish to apply for my recusal.’

‘[A] tiny minority on the back of we cannot lose this’.

‘I could have said it to you over a dinner table’.

‘I now have no longer any involvement in this matter which is why I can say these things and can I just stress because it is all on record. They are extremely general points that I made simply as a responsible South African and I am not at all commenting on you know on this particular case at all. I as a white South African feel very strongly’.

‘[W]hat you [are] wanting to do is to preserve for the sake of principle’.

[17] The gist of AfriForum’s case in its founding affidavit was that the impugned remarks show that Justice Keightley holds very strong personal views based on her perception of AfriForum as ideologically driven and litigating ‘anachronistically’, for the sake of it. She sees AfriForum as ‘going backward’ and litigating only in the interests of a tiny minority of white South Africans. AfriForum contends Justice Keightley’s gratuitous remarks inevitably demonstrate actual bias, or that ‘when it comes to cases involving AfriForum she is unable to bring an impartial mind to bear on their adjudication’.

[18] In opposing the substance of the recusal application, the EFF pointed out that the impugned remarks must be read in their fuller context. When this is done, the personal beliefs and dispositions of Justice Keightley, reflected in the remarks relied on by AfriForum, do not meet the test for bias developed in our jurisprudence. The EFF pointed out that the applicant in an application for recusal must clear a high threshold to succeed, and AfriForum has failed to do so.

[19] We should record that the EFF also objected to the recusal application on the basis that the delay in instituting the application evidenced that it was instituted *mala fides*. In short, the EFF argued that AfriForum had known for five years about the impugned remarks. Yet they had taken no steps, either in the Unisa appeal matter or when the current appeal was enrolled in this Court, to seek Justice Keightley’s recusal. The respondents submitted that this demonstrated

that the recusal application was being instituted for an ulterior purpose, namely, to collapse the panel that had heard the appeal and secure a new hearing *de novo*. Considering the decision that we reach on the substance of the recusal application, it is not necessary to adjudicate the *mala fides* point as a stand-alone ground of opposition.

[20] The principles relevant to determining applications for recusal are well settled, finding endorsement by the Constitutional Court in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another*,³ (*Masuku*) and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)*.⁴ The impartiality and independence of judicial officers are essential to the requirements of a constitutional democracy, being core components of the constitutional rights of access to courts and a fair trial.⁵ For this reason, a judicial officer should not hesitate to recuse herself if there are reasonable grounds for apprehending that she was not or will not be impartial.⁶

[21] On the other hand, it must be assumed that ‘judges are individuals of careful conscience and intellectual discipline, capable of applying their minds to the multiplicity of cases which will seize them . . . without importing their own views or attempting to achieve ends justified in feebleness by their own personal opinions’.⁷ It is assumed that judges can disabuse their minds of any irrelevant personal beliefs or predispositions.⁸

³ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC).

⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC).

⁵ *Masuku* fn 3 para 56; *SARFU* fn 4 para 48.

⁶ *SARFU* fn 4 para 48.

⁷ *Masuku* fn 3 para 58.

⁸ *SARFU* fn 4 para 48.

[22] The effects of this presumption of impartiality are that: a judge will not lightly be presumed to be biased; this presumption is not easily dislodged;⁹ cogent evidence demonstrating bias or a reasonable apprehension of it is required;¹⁰ and a judge has a duty to sit in any case in which they are not obliged to recuse themselves.¹¹ The presumption of impartiality must always be taken into account when conducting the inquiry into bias or a reasonable apprehension of bias.¹²

[23] The test for recusal is objective, with the applicant bearing the onus of establishing bias or a reasonable apprehension of bias. The question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge has not, or will not bring, an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.¹³ A double reasonableness requirement is involved in the application of the test: the apprehension of bias must be that of a reasonable person in the position of the litigant, and it must be based on reasonable grounds.¹⁴ The test requires a reasonable apprehension that the judicial officer might be biased, not that they would be biased.¹⁵

[24] According to AfriForum, the impugned remarks indicate that Justice Keightley has a pejorative view of AfriForum, perceiving it as promoting the archaic ideology of a small minority of primarily Afrikaans-speaking whites. Her view, demonstrated through her remarks, is that AfriForum is motivated to preserve and advance the privileged status of that segment of the population as a

⁹ *Masuku* fn 3 para 59.

¹⁰ *Ibid* para 60.

¹¹ *SARFU* fn 4 para 48.

¹² *Masuku* fn 3 para 62.

¹³ *SARFU* fn 4 para 48.

¹⁴ *Masuku* fn 3 para 64.

¹⁵ *S v Roberts* 1999 (4) SA 915 (SCA) paras 32-34.

matter of ideological purpose and principle. Further, she perceives this to be adverse to what she believes is the South African constitutional project of multicultural inclusivity and equality for all groups and individuals.

[25] These, AfriForum contends, are, in her own words, strongly held personal views. Moreover, she did not suggest that they have been prompted by anything AfriForum had done in the case before her. They were far more widely stated and related to what she saw as AfriForum's activities and aims generally. Additionally, in making the remarks, she contemplated her future recusal in any matter concerning AfriForum.

[26] Of course, as the principles recorded earlier make clear, AfriForum's subjective understanding of the impugned remarks is not the test. The test is objective. AfriForum must first satisfy this Court that the reasonable, objective, and informed person, with knowledge of the correct facts, would understand the impugned statements to reflect the views AfriForum ascribes to Justice Keightley. If this is established, AfriForum must then meet the double reasonableness requirements inherent in the test, considering the strong presumption of impartiality, and the recognition that a judge's personal views are not in and of themselves evidence of bias.

[27] We accept that the exchange between Justice Keightley and counsel for AfriForum could objectively be construed as a perception on her part that she and AfriForum do not share the same ideology. She expresses that she has more progressive views than those she perceives as endorsed by AfriForum. However, this is not enough to establish bias warranting her recusal.

[28] As the Constitutional Court explained in *Masuku*:

‘This test does not mean that any judge who holds certain social, political or religious views will necessarily be biased in respect of certain matters, *nor does it naturally follow that, where a judge is known to hold certain views, they will not be capable of applying their minds to a particular matter. The question is whether they can bring their mind to bear on a case with impartiality*’.¹⁶ (Emphasis added.)

[29] The Court went on to emphasise that judges do not exist in a vacuum. They bring their personal and professional experiences to bear in their adjudicative function. Not only is this appropriate, but in our multilingual and multiracial society, it cannot reasonably be expected that judges should share all the views or prejudices of the parties before them.¹⁷ Consequently, proving that a judicial officer holds a particular view does not, without more, establish a reasonable apprehension of bias,¹⁸ and:

‘It is safe and pragmatic to assume that judges are able to set aside their personal views and be guided by the relevant legal principles when deciding any matter. *We must, after all, be reminded of the weight of the presumption of impartiality*’.¹⁹ (Emphasis added.)

[30] We have considered the full transcript of the exchange in which the impugned comments were made. It is clear from it that Justice Keightley was engaging in a robust debate with AfriForum’s counsel on matters pertaining to nation-building. Her expressed view was that white South Africans, in particular, have a responsibility to work towards inclusionary efforts to dismantle their historical privileges, rather than seeking to preserve them. AfriForum does not suggest, nor could it, that her views in this regard are perverse. They are consistent with the Constitution.

¹⁶ *Masuku* fn 3 para 66.

¹⁷ *Ibid* para 67, citing *SARFU* para 42.

¹⁸ *Ibid* para 68.

¹⁹ *Ibid* para 83.

[31] The remarks were made in open court and in good faith as part of a robust exchange with counsel for AfriForum after Justice Keightley had already very clearly indicated to both parties that she would grant leave to appeal. Justice Keightley acknowledged that the remarks were ‘all on record’. She stated more than once that they were her personal views, that they were of a broad and general nature, and that they were not directed specifically at AfriForum.

[32] Moreover, the transcript shows that Justice Keightley understood that the responsibility of white South Africans to question their previous privilege and its continued effect were ‘difficult questions . . . (and that) the law and the courts . . . are there to guide us’. She acknowledged that she might be wrong. She expressed that she was happy for the matter to go on appeal because ‘we will get further guidance from the courts about . . . that difficult situation’, leading to a better understanding of ‘what we can hold on to for purposes of nation building and what we cannot’.

[33] Viewed objectively, this is not the type of conduct a reasonable person would expect of a judicial officer so fixed in her personal views that she may be unable to act impartially in a matter involving AfriForum. It shows a mind open to persuasion and a willingness to embrace a higher court’s guidance on the ideological issues she had raised.

[34] AfriForum relied on the fact that Justice Keightley had said to counsel for AfriForum in the Unisa matter that ‘the next time you (are) in front of me with (AfriForum) you might wish to apply for my recusal’. It submitted that this demonstrated that Justice Keightley was aware, as a judicial officer who understood the test for bias, that she had overstepped the bounds in her earlier impugned remarks. In our view, this takes AfriForum’s case no further. The full

transcript shows that this remark was made in response to a statement by counsel for AfriForum that she had an ‘unfortunate perception’ about his client. In fact, he responded to her reference to a possible future recusal application by saying ‘No, no’. Justice Keightley responded, ‘that was not where (she was) going’. Seen in its context, her suggestion to counsel cannot reasonably be understood to have been based on a seriously weighed judicial view that her remarks merited recusal then, or in the future.

[35] In view of all of the foregoing, it cannot be said that the test for recusal as laid down in the Constitutional Court has been met or that there is any reason to apprehend bias from Justice Keightley. Thus, AfriForum's application for recusal must fail. Justice Keightley is not only permitted to adjudicate the appeal but, as *SARFU* makes clear, she has a duty to do so. Justice Keightley is to remain part of the coram in the appeal before this Court. This is where we now direct our attention.

The appeal

Point in limine: issue estoppel

[36] The EFF raises a point *in limine* against AfriForum’s hate speech complaint based on *res judicata*, or more accurately, issue estoppel. They point out that AfriForum previously instituted a hate speech complaint in the equality court against Mr Malema (the first complaint). As in the complaint before us on appeal, the first complaint was also directed at Mr Malema’s singing of *Dubula ibhunu*. At that time, Mr Malema was a member of the African National Congress (ANC), and he sang the song in public at meetings convened by the ANC Youth League. The ANC was joined as a respondent in the first complaint.

[37] The equality court upheld the first complaint. It declared that the singing of the song constituted hate speech and granted an interdict against the ANC and Mr Malema singing the song at any public or private meeting conducted by them.²⁰ The matter came on appeal to this Court and was enrolled for hearing on 1 November 2012. At the suggestion of the President of this Court the parties engaged in a mediation process. This resulted in a mediation agreement entered into and signed by, AfriForum and Mr Malema. An order was made by this Court on 1 November 2012, under case number A815/2011 (the settlement order).

[38] The terms of the settlement order recorded that:

- a. It was in full and final settlement of the dispute between the parties.
- b. The parties agreed that it was crucial to mutually recognise and respect the right of all communities to celebrate and protect their cultural heritage and freedom. To this end, they committed to deepening dialogue among leaders and supporters of their respective organisations to contribute to developing a future common South African heritage.
- c. They recognised that certain words in certain struggle songs may be experienced as hurtful by members of minority communities.
- d. The ANC and Mr Malema recognised that ‘the lyrics of certain songs are often inspired by circumstances of a particular historical period of struggle which in certain instances may no longer be applicable’. In the interests of promoting reconciliation and avoiding inter-community friction, they committed to counselling and ‘encouraging their respective leadership and supporters to act with restraint to avoid the experience of such hurt’.

²⁰ *AfriForum and Another v Malema and Others* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 011 (12) BCLR 1289 (EqC) (*AfriForum v Malema 1*).

e. AfriForum agreed to abandon its equality court order, and the ANC and Mr Malema agreed to abandon their appeal to this Court.

[39] The EFF contends that the issue in this appeal was finally disposed of by the first settlement order and that it was impermissible for AfriForum to seek to relitigate the same issue in the equality court, and subsequently on appeal to this Court. They accept that there is not a complete overlap in the identities of the parties in the two hate speech complaints. The ANC is not a party to the complaint on appeal to this Court, and neither the EFF nor Dr Ndlozi were parties to the first complaint. The first requirement of the classic *res judicata* defence, which requires that the dispute must involve the same parties, is thus not satisfied. However, the EFF submits that the development of the offshoot, issue estoppel defence, in terms of which the requirements of the classic *res judicata* defence may be relaxed, finds application in this case. They submit that the appeal ought properly to be dismissed on this basis alone.

[40] AfriForum disputes that the defence of issue estoppel is available to the EFF. It points to the fact that the EFF was not even in existence at the time the first complaint was litigated and the settlement order made. AfriForum submits that a considerable period has elapsed since the settlement order. Moreover, according to AfriForum, the complaints that form the subject matter of this appeal constitute new acts of hate speech, in blatant disregard of Mr Malema's undertakings in the settlement order.

[41] In its classic formulation, *res judicata* applies when a dispute arises between the same parties, based on the same issue, and the same relief is sought as in a previously decided matter.²¹ This Court's judgment in *Prinsloo NO and*

²¹ *South African Human Rights Commission v Khumalo* [2018] ZAGPJHC 528; 2019 (1) SA 289 (GJ); [2019] 1 All SA 254 (GJ) para 54 (*Khumalo*).

*Others v Goldex 15 (Pty) Ltd*²² (*Prinsloo NO*) is authority for the limited development of the classic *res judicata* defence in appropriate cases. The Court found that ‘issue estoppel allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties’.

[42] *Prinsloo NO* only considered the relaxation of the second and third requirements of *res judicata*, not the requirement that the disputes must involve the same parties. In *Royal Sechaba Holdings (Pty) Ltd v Coote and Another*²³ (*Royal Sechaba*) this Court accepted a further development in respect of the first requirement, finding that:

‘It is, however, the view of this court that the ‘same parties’ requirement is not immutable and may in appropriate cases and in line with this court’s duty to develop the common law, be relaxed or adapted in order to address new factual situations that a court may face.’²⁴

[43] However, the Court issued the following caution:

‘In order to develop the common law, by either relaxing or extending the ‘same person’ requirement, *persuasive reasons must be placed before the court for doing so*. If fairness and equity dictate a development of the law, and to do otherwise would defeat the very purpose of the defence, consideration should be given to allowing issue estoppel as a defence even where there is not, strictly speaking, identity of parties.’²⁵ (Emphasis added.).

The question is whether there are persuasive reasons in this case for allowing the issue estoppel defence, despite there being an absence of complete identity of parties, issue and relief.

²² *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) paras 23-24.

²³ *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* [2014] ZASCA 85; [2014] 3 All SA 431 (SCA); 2014 (5) SA 562 (SCA).

²⁴ *Ibid* para 19.

²⁵ *Ibid* para 21.

[44] We leave aside for the moment the complaint against Dr Ndlozi, which requires separate consideration. Insofar as the singing of Dubula ibhunu is concerned, the EFF is correct that if one looks at the substance of AfriForum's first complaint and its present one, Mr Malema was, and remains, the central protagonist. He was joined individually as a respondent in both complaints. This is because it was his conduct in singing Dubula ibhunu at political events that formed the basis of that complaint. AfriForum's complaint before the equality court was about precisely the same kind of conduct by Mr Malema, albeit that his audience in the present complaint was the EFF rather than the ANC Youth League.

[45] Mr Roets, who deposed to the affidavit supporting AfriForum's complaint to the equality court, expressly confirmed that Mr Malema was the central focus of the complaint. He described Mr Malema as 'the main and single most significant and the single most influential person' who continues to sing Dubula ibhunu. In other words, in both the first complaint, and that before us on appeal, what AfriForum sought primarily to have declared hate speech, and to interdict, is Mr Malema's singing, or instigating the singing of, Dubula ibhunu. By extension, the complaint in both matters also sought to interdict the political party in respect of which he was a member at the relevant time. Consequently, despite the substitution of the EFF in the present complaint for the ANC in the first complaint, there is an overlap in the identity of the central respondent in both complaints.

[46] It follows from this that there is also commonality, in certain respects, with the cause of action and relief sought. The basis for AfriForum's complaint remains the same as that for its first complaint. Its contention was, and is, that the singing of Dubula ibhunu by Mr Malema is an incitement to hatred or harm on

the grounds of race or ethnicity against white, Afrikaans South Africans, and particularly farmers.

[47] It is for all these reasons that the EFF submitted that it would be appropriate to apply the issue estoppel defence and to hold AfriForum bound to the settlement order. To do otherwise, the EFF contended, would be to permit AfriForum, under the guise of fresh litigation, to resurrect a complaint it had effectively abandoned under an agreement endorsed by order of this Court. Implicit in the EFF's argument is the proposition that it would be in the interests of justice to hold AfriForum to the bargain it struck previously, and which was endorsed by this Court. Mr Malema should not be expected to face a repeat of what was essentially the same complaint, nor should this Court be required to interrogate an issue which has been settled between, in essence, the same parties.

[48] Are these reasons sufficiently persuasive to justify an application of the issue estoppel defence in this case? Other relevant factors suggest not. It is so that where parties have entered into a bargain, justice and the rule of law bind them to it. However, this applies to both parties. In the settlement order AfriForum agreed to abandon the previous equality court order in its favour, in exchange Mr Malema gave certain personal undertakings. Importantly, and with reference to the continued singing of struggle songs, he undertook to encourage his followers to act with restraint.

[49] AfriForum contends that he did not stick to his side of the bargain, as is manifested by his repeated singing of Dubula ibhunu on the occasions identified in AfriForum's complaint. Mr Malema disputes this. It is not necessary for this Court to make a finding on whether he breached the terms of the settlement order or not. However, it would not be fair or equitable to deprive AfriForum of the

opportunity to proceed with their appeal in circumstances where they contend, not without reason, that Mr Malema has failed to comply with the terms of the very order which he now seeks to hold up as a shield.

[50] There are additional reasons for reaching this conclusion. The issues in this appeal involve important constitutional rights. The rights to dignity and equality, on the one hand, and those of freedom of expression and the right to engage in political activity on the other. The Equality Act is an important constitutional law. Courts are bound by the Constitution to adjudicate in a manner that advances constitutional rights. The issue estoppel defence would prevent this Court from making a determination on the competing rights of the parties, and of interpreting and applying the relevant provisions of the Equality Act. This would be contrary to this Court's constitutional obligations. It is also in the public interest that the appeal should be heard, particularly in circumstances where the equality court has delivered two diametrically opposed judgments on the issue.

[51] For all these reasons, we conclude that the interests of justice and equity do not support the application of the issue estoppel defence in this case. We turn to consider the merits of the appeal.

Merits

Legal principles

[52] We commence by setting out the legal principles regulating the prohibition of hate speech. As the Constitutional Court observed in *Qwelane v South African Human Rights Commission and Another*²⁶ (*Qwelane*), this involves a delicate balance between the fundamental rights to freedom of expression, dignity and

²⁶ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) para 2.

equality. Freedom of expression is protected under s 16(1) of the Constitution. However, s 16(2) qualifies this right by excluding from its protection the:

‘(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.’

[53] Of relevance too is s 19(1) of the Constitution, which protects the right of every citizen to make free political choices, to form a political party, to participate in the activities of a political party and to campaign for a political party or cause. The combination of s 16 and s 19 are critical to our democracy. It is through support for the free expression of political ideas by political parties that our system of government and its election ultimately operate.

[54] Speech that is merely unpopular, offensive or shocking remains protected under s 16(1). As the Constitutional Court explained:

‘Thus, it would appear that hate speech travels beyond mere offensive expressions and can be understood as “extreme detestation and vilification which risks provoking discriminatory activities against that group.” Expression will constitute hate speech when it seeks to violate the rights of another person or group of persons based on group identity. Hate speech does not serve to stifle ideology, belief or views. In a democratic, open and broad-minded society like ours, disturbing or even shocking views are tolerated, as long as they do not infringe the rights of persons or groups of persons. As was recently noted, “[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced.”’²⁷

[55] The Equality Act is the vehicle through which the right to equality and protection from unfair discrimination, safeguarded under s 9 of the Constitution, are given effect.²⁸ The objects of the Equality Act, which are identified in s 2, include:

²⁷ Ibid para 81, citing, among others, *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25; 2021 (2) BCLR 118 (CC); 2021(2) SA 1 (CC); 2021 (1) SACR 387 (CC) para 155.

²⁸ *AfriForum NPC v Nelson Mandela Foundation Trust and Others* [2023] ZASCA 58; 2023 (4) SA 1 (SCA); [2023] 3 All SA 1 (SCA) para 31. (*AfriForum v NMFT*).

- ‘(a) . . .
- (b) to give effect to the letter and spirit of the Constitution, in particular-
- (i) the equal enjoyment of all rights and freedoms by every person;
 - (ii) the promotion of equality;
 - (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
 - (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
 - (v) the prohibition of advocacy of hatred, based on race, ethnicity gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;
- (c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability; . . .’

[56] Hate speech is expressly prohibited under s 10. Following the declaration of constitutional invalidity of this section in *Qwelane*,²⁹ and until the section is amended by the legislature, section 10 is to be read as follows:

‘(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words *based on one or more of the prohibited grounds*, against any person, that *could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.*’ (Emphasis added.)

[57] In its original form, s 10(1) also included as hate speech words that could reasonably be construed to demonstrate a clear intention to be ‘hurtful’. The judgment in *Qwelane* effectively excised this ground from the section on the basis that it constituted an unjustifiable limitation on the freedom of expression guaranteed in s 16.³⁰

²⁹ Ibid fn 26 para 2 of the Order of the Constitutional Court.

³⁰ *Qwelane* fn 26 para 144.

[58] The phrases highlighted in s 10(1), above, describe a two-stage hate speech inquiry. The first leg is directed at establishing that the impugned words are ‘based on’ one of the identified prohibited grounds. If this is established by the complainant, the second leg of the inquiry is to determine whether the words ‘could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred’.

[59] Section 1 of the Equality Act identifies the grounds for the prohibited purposes of the first stage of the inquiry. Of relevance to this case, they include race, ethnic or social origin³¹ or any other ground where discrimination based on that other ground undermines human dignity.³²

[60] As to the second stage of the inquiry, *Qwelane* has clarified that the phrase ‘could reasonably be construed to demonstrate a clear intention’ involves an objective, reasonable person test. On this test, an intention to incite harm and promote hatred will be deemed if the reasonable reader could construe the words or speech as reflecting that intention. Critically, it is the effect of the text that is assessed, rather than the subjective intention of the author or speaker,³³ or the subjective perception of the targeted group.³⁴

[61] It is accepted that the reasonable reader is one of reasonable intelligence, that she would understand the statement in its context, and would have regard not only to what is expressly stated but also to what is implied.³⁵ Important considerations in applying the test include who is the speaker, the context in

³¹ Definition of ‘prohibited grounds’ in s 1(a).

³² Definition of ‘prohibited grounds’ in s 1(b)(ii).

³³ *Qwelane* fn 26 para 97.

³⁴ *Ibid* paras 96 and 99.

³⁵ *Ibid* para 97.

which the speech occurs, the impact of the speech, and the likelihood of inflicting harm or propagating hatred.³⁶

[62] No causal link between the impugned speech and actual actions taken against a target group need be established. Nor is the incitement of harm restricted to physical violence. It also includes the incitement to discrimination and hatred.³⁷ Moreover, s 10(1) targets the meaning behind the words, not simply the words.³⁸

Proceedings before the equality court

[63] In the affidavit supporting its complaint, Mr Roets identified the following acts of alleged hate speech:

- a. Mr Malema singing and chanting Dubula ibhunu at a EFF rally at the end of 2016.
- b. Mr Malema leading the singing of Dubula ibhunu on 30 July 2017 at the EFF's fourth birthday celebrations in Durban.
- c. Mr Malema leading the singing of Dubula ibhunu at the EFF's Africa Day celebration event in May 2018.
- d. Mr Malema singing Dubula ibhunu and gesturing with a shooting motion at the Vaal University of Technology on 29 October 2018.
- e. Mr Malema leading and encouraging the singing of Dubula ibhunu at the EFF Manifesto Launch in February 2019 in Soshanguve.

³⁶ Ibid para 176.

³⁷ Ibid para 107

³⁸ *AfriForum v NMFT* fn 28 132, cited in *Qwelane* fn 26 para 115.

f. Mr Malema leading and encouraging the singing of Dubula ibhunu at the kwaTsheka sports ground at eNseleni in April 2019.

g. Mr Malema leading members of the EFF singing Dubula ibhunu in Senekal on 16 October 2020 during protests surrounding the death of the farm manager, Brendin Horner, coupled with Dr Ndlozi chanting Shisa lamabhunu on the same occasion.

[64] AfriForum sought, among others, the following relief:

‘54.3 A declaratory order that the words uttered by the Respondents and their members and support[er]s constitute hate speech as defined in section 10(1) of the Equality Act.

...

54.6 An order interdicting and restraining the Respondents from advocating hate speech as defined in section 10(1) of the Equality Act.’

[65] It averred in its written complaint that the identified utterances of Dubula ibhunu constitute hate speech in that they advocate hatred on the grounds of race and ethnicity and constitute an incitement to cause harm. AfriForum did not elaborate in any detail on these averments, relying on the oral evidence led at the trial to spell out the nature of its case.

[66] As to Shisa lamabhunu, AfriForum alleged in its written complaint that the singing of this song was an incitement to cause arson and damage to property. AfriForum averred that after Dr Ndlozi had sung the song during protest action in Senekal in October 2020, several farms in the Free State were set alight. This latter averment was subsequently demonstrated to be incorrect. Facts brought to light in Mr Malema’s answering affidavit, and confirmed in the evidence led at the trial, revealed that while there were fires on agricultural land, the land in

question was not in or near the Senekal district. There was no link between these fires and what had occurred at the Senekal protests.

[67] Mr Roets was the main witness for AfriForum. It described him as an expert witness, although the equality court rejected his status as an expert. AfriForum took issue with this finding in its grounds of appeal, but nothing turns on the point.

[68] Mr Roets' evidence was based on his book 'Kill the Boer'. He described it as a current affairs book about the phenomenon of farm attacks. Relying on excerpts from the book, Mr Roets opined that there is a political climate in South Africa in which violence towards white people in general and white Afrikaans farmers in particular has been romanticised and encouraged by politicians for several decades. He gave lengthy evidence on the prevalence of farm attacks and their often violent nature. In his view, Dubula ibhunu, with its words and Mr Malema's accompanying gestures, mimicking the shooting of a firearm, contribute to the phenomenon in which violence of this type is normalised.

[69] Mr Human, a pastor who counsels victims of farm attacks, gave evidence about the traumatic effects for victims. Two victims of separate farm attacks, Ms Muller and Mr Prinsloo, also gave evidence of what had happened to them and what they personally had experienced in the aftermath of the attacks. Finally, Mr Crouse, a reporter and employee of the Institute of Race Relations testified. He was present in Senekal when Dr Ndlozi sang Shisa lamabhunu. He testified as to what he had witnessed when members of, among other groups, AfriForum and the EFF were involved in a stand-off during protest action stemming from the murder of a young farm manager, Brendan Horner, in the Senekal district.

[70] Mr Malema testified on his own behalf and on behalf of the EFF. According to Mr Malema, he had been taught Dubula ibhunu as a young activist during apartheid. He was taught that struggle songs like this one should not be understood literally. Instead they were directed at the system of oppression and anything that represented it at the time. He emphasised that the EFF is committed to overcoming economic apartheid represented by what he referred to as 'white monopoly capital'.

[71] According to Mr Malema, democracy has not had the effect of getting rid of economic apartheid. Nor has it succeeded in the restoration of land to black South Africans. Thus, the EFF had adopted these as two of its key objectives. Mr Malema explained that when he leads the singing of Dubula ibhunu, it is directed at this system of economic and land apartheid. Similarly, the shooting gesture sometimes accompanying the chant signifies shooting at the system. Under cross-examination Mr Malema confirmed his view that white farmers were part of and had benefited from the prevailing system of inequality in respect of land and the economy. He said that in the song the Dubula ibhunu, the ibhunu, or farmer, is symbolic of the system against which the EFF campaigns.

[72] It bears repetition that Mr Malema's evidence of his subjective intention in singing the song is not the basis on which to assess whether his conduct amounted to hate speech. However, his evidence about the EFF's political objectives is relevant contextual material. In any event, the EFF's policies and objectives are public information.

[73] The respondents also relied on the expert evidence of Prof Gunner, who is an authority on the role of political song in the public life of the state, particularly African states. She has also written an article on Mr Malema's use of Dubula

ibhunu. Prof Gunner explained the history of the song, which she said goes back many years, and its use in political discourse. In her view, the song should be seen in the context of the contestation for power through the expression of the ideas and policies of the user. Suffice to say that Prof Gunner's opinion, which is not binding on the court, was that properly understood as a political song with a known history, *Dubula ibhunu* should not be regarded as hate speech. However, her evidence about the history of the song, and the genre of liberation songs more generally, is useful contextual evidence.

[74] The equality court dismissed AfriForum's complaint. On the first leg of the s 10(1) inquiry, without providing reasons, it was found that AfriForum had failed to show that the lyrics of the impugned songs are based on any of the prohibited grounds.³⁹

[75] As to the second stage of the inquiry, the equality court concluded: 'As [I] understand the impugned song in its political and cultural context it has traversed time in the history of South African politics and projects the political vision of [the] EFF in a new dimension of a strategy of achieving radical economic transformation of the society. It is in the current political situation a song directed at articulating the failure of the current government in addressing the issues of economic power, land reform and distribution. If anything, this calls for a generous delineation of the bounds of the constitutional guarantee of freedom of expression. Thus, in my view, declaring the impugned song to be hate speech would significantly alter or curtail freedom of expression. However, it may well be that under a different inquiry, it may be found that the song is offensive, and undermining of the political establishment. It may be heard as a song that fails to celebrate the achievements made by democracy and the need for unity in the country. In that respect, it would be expressing a view different to those who belief (sic) that the image of democracy need not be tainted by what they regard as an offensive song.'

³⁹ *AfriForum v EFF* (2022) fn 1 para 101.

As matters stand, in my view, the singing of the impugned song and its lyrics should be left to the political contestations and engagement on its message by the political role players. Accordingly, a reasonable listener, would conclude that the song does not constitute hate speech but rather that it deserves to be protected under the rubric of freedom of speech.’⁴⁰

In this Court

[76] Before this Court, AfriForum took the view that the overwhelming bulk of the evidence led in the equality court was irrelevant to the appeal. The only parts of its own evidence that AfriForum maintained were relevant were Mr Roets’ testimony, and that of Mr Prinsloo and Ms Human, and only to the extent that this evidence affirmed the social milieu in which the words were used and their impact.

[77] Attached to AfriForum’s heads of argument was a new draft order in the event of its appeal being upheld. In the substituted draft order, AfriForum sought the following relief, in relevant part:

‘1. The words and translations of words, phrases and songs set out below constitute hate speech:

awudubula ibhunu

dubula ibhunu baya rayapha

shoot to kill, Kill/Kiss the Boer – the farmer

Shisa lamabhunu

EFF Ingen’endaweni

2. The respondents are interdicted and restrained from any public use, singing or chanting of the words, phrases or songs set out in paragraph 1.’

[78] The relief in the new draft order was wider than the one sought in paragraph 54.3 of AfriForum’s original claim. It did not restrict the declaration of hate speech to ‘words *uttered by the Respondents*’ as was the case in the original

⁴⁰ Ibid paras 111-112.

claim. The new draft order expanded AfriForum's case on appeal. It effectively called for a declaration of the relevant parts of *Dubula ibhunu* and *Shisa lamabunu* as hate speech in *toto*, regardless of who uses them or in what circumstances. This was not the case made out by AfriForum in the equality court. There, the hate speech averment was restricted to the singing of the songs by Mr Malema and Dr Ndlozi on particular occasions.

[79] At the hearing of the appeal, counsel for AfriForum accepted that the amended relief was too wide, and that if the appeal was to succeed, any declaration that the songs constituted hate speech would have to be expressly limited. He suggested that the relief sought be amended by the insertion of the phrase 'on the occasions set out in the complaint' in prayer 1. He also accepted, correctly, in our view, that the same songs could be sung by a range of persons in different circumstances without this constituting hate speech.

[80] In light of the concession, it is important to appreciate that this appeal is not about an outright ban on *Dubula ibhunu* as hate speech *per se*. The question is narrower than this. It is whether, when Mr Malema sang or led the singing of the song on the occasions identified by AfriForum in its complaint, this constituted a form of hate speech as framed by AfriForum in its complaint. Similarly, Dr Ndlozi's singing of *Shisa lamabunu* in *Senekal* is the focus of the inquiry.

[81] AfriForum submits that the equality court erred in finding that it had failed to establish that the impugned words were based on a prohibited ground. It accepts that the Equality Act does not protect farmers as a group. However, according to AfriForum, the question of what is understood by the term 'boer' should be approached grammatically, as had been accepted by the equality court in

AfriForum v Malema I. AfriForum contends that it is a truism, reflected in history books and dictionaries, that the term ‘boer’ is a reference to an ethnic group, being South Africans who are Afrikaans-speaking or of Afrikaner descent. They say that the words of the songs are therefore based in material part on a prohibited ground, and fall within the ambit of s 10.

[82] As to the question of whether the songs also demonstrate an intent to incite harm or propagate hatred, AfriForum submits that the equality court erred in the application of the objective test to be applied. The court had impermissibly accepted Mr Malema’s evidence of his subjective intention and his understanding of the song. It had also accepted Professor Gunner’s subjective view of what the words mean.

[83] AfriForum places reliance again on *AfriForum v Malema I*, in which it was found sufficient that ‘a variety of members of society who act for large constituencies and . . . say that their constituencies are affected in that they perceive the song to be harmful and/or hurtful towards them’.⁴¹ It relies also on the decision of this Court in *Hotz v University of Cape Town*⁴² (*Hotz*). That case involved a person wearing a t-shirt with the words ‘sKILL ALL WHITES’ painted on it. The letter ‘s’ before the first letter ‘K’ was much smaller than the remainder of the message. This Court rejected the submission that the message was ‘skill all whites’ rather than ‘kill all whites’, finding that it would be understood by people who saw the message, with its imperceptible ‘s’ as an incitement to violence against white people.⁴³

⁴¹ *AfriForum v Malema I* fn 20 para 93.

⁴² *Hotz v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA); [2016] 4 All SA 723 (SCA).

⁴³ *Hotz* para 68.

[84] Afriforum's submission is that, as in *Hotz*, people who hear Mr Malema singing the words of *Dubula ibhunu* stand to react to it as an incitement to violence against 'boers'. In other words, it could be understood as a call to kill ethnic white South Africans of Afrikaans descent. According to AfriForum, this is exacerbated by Mr Malema's hand gestures when he was singing. On a broader level, there is also the potential harm that the song causes to wider society in risking inter-racial hostility.

[85] AfriForum accepts that *Dubula ibhunu* has an historical pedigree with an attendant meaning, and that one reasonable person may not understand the song in the same way as another reasonable person. However, AfriForum's submission is that provided it is capable of being understood by some as intending to demonstrate an intent to incite harm or propagate hate that is sufficient to meet the test.

[86] The respondents submit that the equality court was correct in finding that AfriForum had failed to establish that the songs were based on prohibited grounds. When Mr Malema sang *Dubula ibhunu* he was engaging in a form of political speech in which the song addressed his party's dissatisfaction with land and economic injustice. In the particular context in which the songs had been sung, the reasonable person would understand the words as being metaphorical and not a literal exhortation to incite harm or violence against farmers or white South Africans of Afrikaner descent, as AfriForum had sought to argue. Consequently, the songs were not hate speech, but were a form of political speech protected under s 16 of the Constitution.

[87] The respondents dispute that it is open to AfriForum in the appeal to simply eschew reliance on the record of its evidence before the equality court.

That evidence is relevant in that it formed the basis of AfriForum's complaint to the equality court. The complaint was squarely based on farm attacks and the alleged link between that phenomenon and the message AfriForum contended that Mr Malema sent when he sang the song. The respondents submit that it was this case that AfriForum had failed to establish before the equality court, which had correctly rejected its complaint.

[88] The *amicus curiae* supports AfriForum's appeal. It aligns itself with AfriForum's contention that the term 'boer' has a discernable meaning, being a reference to white Afrikaners. Consequently, according to the *amicus curiae*, there is a racial element in the songs.

[89] The *amicus curiae* refers to Mr Malema's leadership position as a politician. It submits that the equality court ought to have directed a high level of scrutiny at his speech, rather than exempting Mr Malema because of his political status. In this regard, the amicus cites *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*⁴⁴ in which the Constitutional Court stated that in securing the enjoyment of 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'. The *amicus curiae* agrees with AfriForum that the equality court erred in dismissing the hate speech complaint.

Discussion

[90] As regards the first stage of the s 10 inquiry, both AfriForum and the *amicus curiae* advance the view that Mr Malema's singing of Dubula ibhunu is

⁴⁴ *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25; 2021 (2) BCLR 118 (CC); 2021 (2) SA 1 (CC); 2021 (1) SACR 387 (CC) para 3.

based on a prohibited ground because of the term ‘bhunu’. This word, according to their arguments, has an established meaning. They say that dictionaries and other reference books confirm that it means white South Africans of Afrikaner descent.

[91] In our view, this is not the correct approach. The question of whether Dubula ibhunu, and for that matter Shisa lamabunu, is based on a prohibited ground within the meaning of s 10 of the Equality Act is more complicated than AfriForum and the *amicus curiae* suggest. It is not a question that a simple reference to a dictionary can answer. This is because the word ‘bhunu’ is part of a verse in a song. Its meaning must be determined with reference to that verse as a whole. The meaning of the verse, in turn, must be assessed in its broader context, including, but not limited to, the circumstances in which the verses were sung on the particular occasions identified.

[92] Put simply, ‘bhunu’ may have different meanings in different contexts. As the Constitutional Court confirmed in *Masuku*, ‘words cannot always be taken for their plain meaning’.⁴⁵ This is not to say that colloquial understandings or dictionary definitions may not be of some assistance, but they are not determinative of whether the impugned songs, sung by Mr Malema and Dr Ndlozi, are based on a prohibited ground. Nor can this be determined from the single word, ‘ibhunu’, extracted from the remainder of the context. There is thus a necessary overlap in this case between the assessment at the first stage of the s 10 test and that in the second stage.

[93] What characterises the inquiry in this case is that the Dubula ibhunu complaints are directed at the singing of a known, pre-existing song, with its own

⁴⁵ *Masuku* fn 3 para 154.

history. It is unlike, for example, *Qwelane*, *Masuku*, *Hotz* and *Khumalo*, which were all cases in which the respondents were the authors of the impugned words. It is notable that in *Hotz*, this Court found, on the facts of that case, that:

*‘There was no context to ameliorate that message. It was advocacy of hatred based on race alone and it constituted incitement to harm whites. It was not speech protected by s 16(1) of the Constitution.’*⁴⁶ (Emphasis added.)

[94] *Hotz* illustrates the importance of context in the hate speech inquiry. In that case, the words ‘kill all whites’ could be interpreted literally because there was no context to provide a different, or more nuanced meaning. Anyone seeing the t-shirt would understand the plain and very direct message painted on it. In contrast, in a case like the present, context is everything. This requires a consideration of who the singer is, the context in which the songs were sung and their likely impact.⁴⁷

[95] All but one of the impugned occasions when Mr Malema sang *Dubula ibhunu*, with accompanying hand gestures, were at EFF events. They were public, celebratory occasions most of which were organised by, and for, the EFF. It was at these events that Mr Malema led the singing. There is no suggestions that the events were closed to all but EFF members, and in all likelihood there would have been some reporting on what occurred. In this context, the reasonably well-informed person could and would understand that *Dubula ibhunu* was sung on these occasions as an expression of the EFF’s political identity.

[96] The reasonably informed person would also know that the EFF is a registered political party that competes for seats at all levels of government. The EFF is a very active political party, and its manifesto and pillars of the EFF’s

⁴⁶ *Hotz* fn 42 para 68.

⁴⁷ *Qwelane* fn 26 para 176.

political ideology are no secret to the general public. The reasonably well-informed person would know that the EFF is a leftist-aligned party, with a particular concern for the struggle to overcome economic and land injustice in South Africa. He or she would know that the party, and its leader, Mr Malema, are very outspoken on these issues. They would know that Mr Malema is often labelled as a populist politician and that he is known not to mince his words.

[97] *Masuku*⁴⁸ confirms that although the determination of whether the impugned words are likely to be harmful falls within the exclusive aegis of a court, evidence, including expert evidence, may be instrumental in assisting the court in this exercise. As noted earlier, Professor Gunner testified as an expert on song, oratory, and the history of African political forms, such as the political use of songs. She explained that the song fits within the long historical tradition of using public songs to voice opinions and comment on political issues. In this tradition, songs can be used as a call to change. In South Africa, songs have been used in this way for the last century, and even before. *Dubula ibhunu* itself has a very long history in the canon of South African liberation songs.

[98] There is no reason to reject Professor Gunner's evidence on this score: as South Africans we daily observe members of organisations and ordinary citizens singing and performing in public as a form of protest and a quest for change. Similarly, we can accept Professor Gunner's further evidence that the performance is part and parcel of the political song within the genre. The mimicking of shooting by a singer is part of the call for change. Neither the words nor the gestures forming part of the performance are meant literally.

⁴⁸ Ibid fn 3 paras 135 and 144.

[99] We accept that the reasonably well-informed person would have some understanding of Dubula ibhuna's history in South Africa as a protest song linked to the liberation struggle. They would certainly understand that when protest songs are sung, even by politicians, the words are not meant to be understood literally, nor is the gesture of shooting to be understood as a call to arms or violence. It is plain from this that the singing of Dubula ibhunu cannot, in our view, be equated with wearing a t-shirt bearing a painted message to 'kill all whites'.

[100] The complaint by Afriforum as advanced in the case it presented at the trial before the equality court was that Mr Malema's singing of Dubula ibhunu could be understood by the reasonable person as intending to send the message that the perpetration of violence against white South Africans of Afrikaner descent was acceptable. Moreover, that this was particularly so when the people in question were farmers, because these people historically had stolen the land from black South Africans.

[101] We cannot accept this submission. It relies on an interpretation of 'ibhunu' excised from its immediate context, and on an interpretation of the remainder of the impugned part of the song abstracted from its broader historical, and current political, context. AfriForum's complaint relies substantially on a literal interpretation of the words, namely that they are intended to be understood as a direct invocation to exact violence against white South Africans of Afrikaner descent, or at least to regard such violence as normalised.

[102] In its full context, this is not what the reasonably well-informed person would understand to be Mr Malema's intent in singing the song. They would understand it to be serving the purpose of garnering support for the party and for

its political objectives. They would know Mr Malema to be a populist leader who expresses controversial views. They would appreciate that this is part of his political persona.

[103] The reasonably well-informed person would appreciate that when Mr Malema sang *Dubula ibhunu* on the first six impugned occasions, he was not actually calling for farmers, or white South Africans of Afrikaans descent to be shot, nor was he romanticising the violence exacted against them in farm attacks. They would understand that he was using an historic struggle song, with the performance gestures that go with it, as a provocative means of advancing his party's political agenda.

[104] His performances of the song follows in the established tradition of *Dubula ibhunu* as a call to act for change. In the case of the EFF, their public call is for an end to land and economic injustice in South Africa. Whether one agrees with the EFF's agenda and Mr Malema's chosen method of conveyance or not, the intent behind the song on the occasions when he sang it is objectively linked to the party's stated political objectives. It is a form of political speech. Even if Mr Malema's performance of *Dubula ibhunu* at the events identified in the complaint may be regarded by some as shocking or even disturbing, *Qwelane* underlines the importance in our democracy of tolerance for all views. This is particularly so in the context of speech or, in this case, song, by a registered political party, at public events hosted or supported by it. To find that Mr Malema's singing of *Dubula ibhunu* on the first six occasions identified in the complaint is hate speech would impermissibly limit the rights protected under s 19 of the Constitution.

[105] AfriForum laid much emphasis on the test under s 10(1) being whether the impugned words 'could' not 'would' be understood as being intended to incite

harm or propagate hatred. In our view, this submission takes the matter no further. There may be people who might understand Mr Malema's singing of Dubula ibhunu as an exhortation to call for, or to support the normalisation of violence and hatred against white Afrikaans-speaking South Africans. Clearly, Mr Roets understands it this way. But we know that the subjective view of the target group is not the test. Seen in its full and proper context, Mr Malema's singing of the song could not reasonably be understood in the manner advanced by AfriForum.

[106] For these reasons, in respect of the first six occasions when Mr Malema sang Dubula ibhunu we find that high court correctly found that AfriForum had failed to establish that this constituted hate speech under s 10(1). Mr Malema was doing no more than exercising his right to freedom of expression, which is protected under s 16 of the Constitution, in the course of participating in the activities of, and campaigning for the political party of which he is leader, which rights are protected under s 19(1)(a) of the Constitution.

[107] The last complaint concerns Mr Malema leading the singing of Dubula ibhunu in Senekal and Dr Ndlozi singing Shisa lamabuna on the same occasion. As noted earlier, the original complaint about the latter song was that it was a call to arson. The evidence established that this averment was wrong. Not much further attention was paid to Shisa lamabunu at the trial. In our view, it falls to be treated as another form of protest song sung by Dr Ndlozi along the same lines as Dubula ibhunu. There is no reason why it, too, would not be understood by the reasonable person in this light.

[108] Both songs were sung in Senekal during the course of what appears to have been a highly charged gathering of different political groupings following the

violent murder of a farm manager. These included, but were not limited to, the EFF and AfriForum. There was even a suggestion that *agent provocateurs* were involved. In our view, there is no reason to assess the singing of Dubula ibhunu on this occasion any differently to his singing of it on the previous occasions. It would be understood as a means of asserting his party's identity and agenda within the context of the competing ideological groupings present at the protest. For these reasons, the complaint regarding the Senekal incidents should also be dismissed.

[109] In the result, the following order is made:

1. The application for the recusal of Keightley AJA from the adjudication of or further participation in the determination of this appeal is dismissed with costs, such costs to include those of two counsel where so employed.
2. The appeal is dismissed with costs, such costs to include those of two counsel where so employed.

H K SALDULKER
JUDGE OF APPEAL

K E MATOJANE
JUDGE OF APPEAL

D S MOLEFE
JUDGE OF APPEAL

Z NHLANGULELA
ACTING JUDGE OF APPEAL

R M KEIGHTLEY
ACTING JUDGE OF APPEAL

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