DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE 16/5/2011 SIGNATURE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

Case number: 11174/10

In the application of:

THE AFRICAN NATIONAL CONGRESS	FIRST INTERVENING PARTY/ APPLICANT
AFRIFORUM	SECOND INTERVENING PARTY
VERENGING VAN REGSLUI VIR AFRIKAANS	THIRD INTERVENING PARTY

AND

HARMSE; W	FIRST RESPONDENT
VAWDA; M	SECOND RESPONDENT

In re the main application:

HARMSE; W	APPLICANT

AND

VAWDA; M	RESPONDENT

JUDGMENT

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ap

HALGRYN AJ:

Introduction

1. This is an application for leave to appeal, in which the African National Congress, ("the ANC")[1] seeks leave to appeal against an Order which I made – by consent – on the 26th of March 2010; in a matter to which it was not a party.

The parties

2. The *"First Intervening Party"*[2] is the ANC, the applicant in the application for leave to appeal. The ANC needs no introduction herein. It is the ruling political party of our land, placed in power by popular and majority vote in terms of free and fair elections.

3. Mr W Harmse, ("Harmse"), was the applicant in an urgent application, which he brought against Mr M Vawda, ("Vawda"), who was the respondent in that application, ("the main application"), in which I made the Order by consent; which the ANC seeks leave to appeal against.

4. The Second Intervening Party is Afriforum, a section 21 company, registered and incorporated as such, in

[1] I dislike doing so, but for ease of reference, I refer to the parties as they are cited, in order to avoid confusion.

[2] I record this in italics - deliberately - as the ANC made no application for leave to intervene and my referral to it as the *"First Intervening Party"* must not detract from that fact.

terms of the Laws of our land, "*...acting for and on behalf of its members, and in particular on behalf of a group of persons also known as "the Afrikaners of South Africa"*.[3]

5. The Third Intervening Party is the Vereniging van Regslui vir Afrikaans, "*...a voluntary association with legal personality...*",[4] ("The VRA").

The main application and the consent order

6. On the 26th of March 2010, Harmse, brought an urgent application against Vawda, who, (along with others), had allegedly made his/their intentions clear to display a banner during a peaceful march, arranged by the "*Protection of our Constitution Society*", scheduled for the 9th of April 2010, containing the words "*Dubula Ibhunu*" and also to bring other people along to shout/utter the said chant.

7. Harms contended that the chant meant "*Shoot the white man*" or "*Shoot the boer*" and alleged that the chants would cause him injury if allowed to be made at the protest march.

8. Harms was of the intention to ensure that this does not happen - hence his urgent application - and sought the following relief:

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[3] According to an affidavit filed in support of the intervening application, deposed to by one Alex Ernst Roets, ("Roets").
[4] Also according to the affidavit by Roets.

1. *"Declaring the publication and chanting of the words "Dubula Ibhunu" to be unconstitutional and unlawful.*

2. *Declaring that the publication and chanting of the words "Dubula Ibhunu" prima facie satisfies the crime of incitement."*

9. Vawda was initially unrepresented but later in the day, was represented by counsel, the name of whom has escaped me.

10. The main application stood down, after it was initially called, and I was informed that the parties are attempting to settle the matter. The matter was mentioned again later in the day. I was informed that the parties had settled the matter and I was handed a draft order which the parties requested me to make an Order of Court. The draft order reads as follows:

> *"1. That the utterance and/or publication of the words "Dubula Ibhunu" is unconstitutional and unlawful. "Dubula Ibhunu" translated means "Shoot the Boer/White man".*
>
> *2. That the publication and chanting of the words "Dubula Ibhunu", prima facie satisfies the crime of incitement."*[5]

11. I considered the content of the draft order and without further ado, made it an Order of Court. That was that, as far as I was concerned; until I was confronted with such a furore in the press, that it left me quite

[5] I point out that the actual Order which was signed by the Registrar, stamped and which I found in the Court file on the date of the application for leave to appeal, is not the Order that I made.

perplexed, intently reflecting – often – on what had happened in my Court that morning and why something – which seemed so simple and obvious to me – could be perceived, so differently; by so many.

12. It is not my place to attempt to justify my Order in this application for leave to appeal. I need only deal with the grounds of appeal - that is - if I find that there is indeed an application for leave to appeal before me; (in that the ANC saw fit to approach this Court without as much as a hint of an application to intervene or join in the suit) and to decide whether it is reasonably possible that another Court may come to a finding, i.e. that I should not have made the draft order an Order of Court.

13. I do however, and before I set out to deal with the application for leave to appeal, briefly deal with the legal framework – as I understood it to be on the 26th of March 2010 - and as I still understand it to be, whilst writing this. I do this, to show that I did not merely rubberstamp, what Harmse and Vawda had agreed to; but that I - independent of their agreement – applied my own mind, as to whether the draft order should be made an Order of Court.[6]

[6] The main application was issued on the 24th of March 2010 and I had the file with me a day or two before the matter was called, during which I had the moment to read what I could on the subject, including the material I refer to hereunder, expecting strong opposition.

The sequence of events since the 26th of March 2010[7]

14. Before I deal with the legal framework, I record the sequence of events which took place since the 26th of March 2010.

15. On the 12th of April 2010, I received a letter from the ANC's attorneys, via my registrar, together with a notice of application for leave to appeal. This event and what followed are documented in my response to the letter:-

"

COURT'S RESPONSE TO REQUEST FOR REASONS

1. *On the 12th of April 2010, my registrar forwarded to me, a letter by the Applicant's attorneys, dated the 7th of April 2010, together with the Applicant's application for leave to appeal.*

2. *In the letter, I was simply advised as follows:*

[7] What is to follow, makes for admittedly laborious reading; but it is necessary.

1. We refer to the above matter and to the order granted by you in the above matter on 26 March 2010.

2. We act for the African National Congress. Our client intends to apply for leave to appeal against the above order and will do so in the public interest in accordance with the judgment of the Constitutional Court in Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd 2006 (6) SA 103 (CC). In particular, our client intends to appeal against the court's order that the utterance and / or publication of the words "*Dubula Ibhunu*" is unconstitutional and unlawful and the order that the publication of the said words *prima facie* satisfies the crime of incitement.

3. In order to enable our client to pursue the application for leave to appeal, our client requests the court to furnish it with reasons for the order.

4. In the interim and based upon the information at our disposal we have drafted an application for leave to appeal which will be supplemented when the reasons for the order are furnished. We enclose a copy of the application.

5. We await your response in this regard.

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3. *The almost casual way, in which I am requested to furnish reasons to someone who was not a party to a matter, in which I granted an Order by agreement, is rather ungallant, to put it mildly.*

4. *There is no attempt, let alone under oath, (as it ought properly to have been done), to show that the Applicant has standing for approaching me in this manner, save for the bald statement that an application for leave to appeal will be made "...in the public interest..."*

5. *Moreover, the fact that I granted an Order by agreement, (which is undoubtedly by now known to the Applicant(s)), in itself, is sufficiently compelling not to be obliged to furnish reasons.*

6. *All of the aforesaid notwithstanding, I am prepared to say this:*

   6.1. *I granted the Order by consent between the parties after I was satisfied that:*

      6.1.1. *the consent draft Order, which was handed up to*

me, was the manner in which the parties wished to bring the dispute between them to an end;

6.1.2. the consent draft Order would indeed bring an end to their dispute;

6.1.3. the consent draft Order contained nothing which offended public policy, the boni mores of our society or in any manner conflicted with any of the principles of our Law."

(1.) If not to the press, some highly critical, but unenlightened, academics and writers who continue to incorrectly refer to my "Judgment".

16. My recordal that the ANC needed to show its standing herein under oath, is significant. It was ultimately ignored.

17. In the notice of application for leave to appeal, the ANC initially raised only three grounds, i.e. to wit:

1. *"The court erred in imposing an absolute prohibition on the utterance, publication and chanting of the words in question irrespective of the time, place, manner and context in which the words are uttered, published or chanted.*

2. *The Court erred in failing to give any or sufficient consideration to the guarantee of freedom of expression in section 16 of the Constitution.*

3. *The court erred in relying directly on the Constitution in circumstances in which the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted to give effect to section 16(2) and section 9 of the Constitution and application ought to have been directed to the Equality Court exercising powers in terms of Act 4 of 2000."*

18. I heard nothing more - from anyone - until Mr Marcus, appearing on behalf of the ANC, telephonically contacted me somewhere in October of 2010 and arranged a date for this application, i.e. the 29th of November 2010.

19. Unbeknown to me, the ANC had filed an amended notice of application for leave to appeal on the 12th of May 2010.[8] The amended notice of application for leave to appeal was accompanied by an affidavit by one Thandi Modise, ("Modise"), who alleges to be the Deputy Secretary of the ANC. The ANC's amended grounds of appeal are set out in an annexure to this amended application for leave to appeal, which I deal with hereunder.

20. Under cover of a notice dated the 17th of November 2010, Afriforum and the VRA filed an application for leave to intervene, supported by a founding affidavit by Roets,

[8] I saw this document for the first time during the argument in this application for leave to appeal.

seeking to oppose, not only the ANC's standing in this matter, but also the application for leave to appeal.

21. The ANC filed an answering affidavit, dated the 26th of November 2010, in opposition to the aforesaid application for leave to intervene, deposed to by its attorney, one Viwe Lunga Soga, ("Soga").

22. The ANC's application for leave to appeal was argued - the Court file being in a complete mess nonetheless - and heard on the 29th of November 2010. At the argument, the ANC, Afriforum and the VRA handed up written submissions.[9]

23. I reserved my Judgment.

24. During the middle of December, two weeks after the hearing of this application, I received a telephone message at my chambers from Mr Du Plessis, acting on behalf of Afriforum and the VRA, requesting me to not commence with the writing of my Judgment, as he intended to file additional written submissions.

25. Upon my return from leave, during the third week of January 2011, I found that the ANC had filed supplementary written submissions and Mr Omar,

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[9] Clearly no-one thought that I could somehow benefit by having a well prepared, indexed and paginated Court file, including the written submissions, well in advance of the hearing. There is no doubt that I would have been able to contribute more meaningfully to the debate during argument, had I been "*afforded*" the luxury to familiarize myself with the many and often far-reaching submissions beforehand. This should not happen again.

(attorney) on behalf of Harms, had also decided to file written submissions. I had not received any additional written submissions from Mr Du Plessis. I thought nothing of it and waited for him to do so.

26. A few weeks later, towards the end of February 2011, it dawned upon me that there could be every possibility of a misunderstanding and I took the liberty of speaking to Mr Du Plessis's secretary, who confirmed that this was the case. They had in fact sent me their additional written submissions somewhere in January; I cannot quite recall. She undertook to, and did in fact (again) send me the additional written submissions, which I received on or about the last day of February 2011. This caused me to send an e-mail to all the parties' representatives, advising them of this fact and I undertook to finalize this Judgment as soon as I possibly could.

27. This notwithstanding, Mr Omar commenced sending me letters, in which he abrasively requested to be advised as to when my Judgment herein would be forthcoming. All of this came to a head when he saw fit to actually phone me on my mobile and repeated his earlier written requests verbally.

28. I indicated to Mr Omar that I thought his telephone call was improper and that I was unprepared to discuss the matter with him. Mr Omar followed this conversation up

with a letter, the contents of which, *inter alia*, read as follows:

> *"To date the judgment has not been handed down. Afgri has approached the International Criminal Court for assistance. According to the Rome Statute, the International Court will only intervene when all domestic remedies in a country have proved futile.*
>
> *To delay judgment in this matter could result in the perception that South African courts are failing to address the concerns of it's people and they are forced to approach international courts for relief. This would, without doubt, be embarrassing for our country."*

29. Mr Omar's conduct is improper. These allegations are designed to influence and put pressure on me, the impropriety of which is such that I will request the Registrar to furnish a copy of this Judgment to the Law Society for investigation and further measures.

30. This Judgment was written during the middle of April 2011 and finalized at the end of it; some eight weeks after I had finally received all the papers/written submissions herein. There was thus no undue delay.

The legal framework against which the Order was made

31. The right to freedom of expression, fundamental to any true democracy, is one of the entrenched fundamental rights, in the Bill of Rights.[10]

32. Section 16, of the Constitution, provides that:-

> *"(1) Everyone has the right to freedom of expression, which includes –*
>
> *(a) freedom of the press and other media;*
>
> *(b)freedom to receive or impart information or ideas;*
>
> *(c) freedom of artistic creativity; and*
>
> *(d) academic freedom and freedom of scientific research."*

33. There are, however, limitations to the right to freedom of expression, which like other rights, including fundamental rights, is not absolute.[11]

34. Van Wyk points out that the right to freedom of expression is limited by:-

> 34.1. the Common Law, such as the Law of defamation;[12]

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[10] The Constitution of the Republic of South Africa, No 106 of 1997.
[11] CHRISTA VAN WYK; HATE SPEECH IN SOUTH AFRICA; The XVIth congress of the International Academy of Comparative Law, Brisbane, 14th – 20th July 2002. (The updated electronic version.) Her lucid essay on the topic is insightful, comprehensive and I quote from it extensively herein.
[12] To the extent that these are consistent with the Bill of Rights.

34.2. State interests, such as the national security, the public order, the constitutional order, the pursuit of national unity and reconciliation, public safety, public health, public morals and democratic values;

34.3. The rights of others (and therefore conflicting rights have to be balanced);

34.4. The fact that it does not enjoy superior status and does not automatically trump the right to human dignity or the right to equality;

34.5. The fact that it may be limited by complying with the provisions of the general limitations clause, section 36, of the Constitution; and

34.6. The fact that section 16(2) provides for a curtailment thereof, with the introduction of an internal limitation.

35. Section 16(2) reads as follows:

"(2) The right in sub-section (1) does not extend to-

(a) propaganda for war;

(b) incitement of imminent violence; or

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

36. Before I deal with the internal limitations to the right to freedom of speech, I think it appropriate to quote a concise summary by Van Wyk[13] on the nature of the right to freedom of expression and to consider if the chant in question can somehow – quite irrespective of any limitations – be said to fall in any of these broad categories. She says:

> *"Freedom of expression is generally deemed necessary to promote scientific, artistic and cultural progress. Even the expression of false ideas (false speech) provokes further debate and the search for truth. Expression is seen as means of fulfilment of the human personality, and is closely related to other fundamental rights and freedoms, such as the freedom of religion, belief and opinion;[14] the right to dignity;[15] the right to freedom of association;[16] the right to vote and to stand for public office;[17] and the right to assembly.[18] It is seen as a prerequisite for free political activity, and recognises the importance, both for a democratic society and individuals, of the ability to express opinions, even when those views are controversial.[19] Even unpopular views are tolerated in the marketplace of ideas, and society needs to be able to hear, form and express opinions and views on a wide range of matters. One of the goals of freedom of expression is therefore to assist in the democratic decision-making and to aid in the process of stability and*

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[13] Supra. I quote the learned author's footnotes verbatim.
[14] *Section 15 of the Constitution.*
[15] *Section 10 of the Constitution.*
[16] *Section 18 of the Constitution.*
[17] *Section 19 of the Constitution.*
[18] *Section 14 of the Constitution.*
[19] *South African National Defence Force Union v Minister of Defence 1999 (4) SA 469 (CC) para 8.*

> *change in society.*[20] *This is all the more important in a country such as South Africa where the democracy is not yet firmly established and where there is a commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for all South Africans of all ages, classes and colours."*[21]

37. The beleaguered chant in question is not an opinion or a viewpoint; and even if it was, it is not one "*which our society needs to be able to hear*".

38. It does not "*assist in the democratic decision making*", nor does it "*aid the process of stability and change in society*". If anything, it serves to destroy all of this.

39. It is not a "*prerequisite for free political activity*".

40. It is not necessary "*to promote scientific, artistic or cultural progress*". If I am wrong about the last-mentioned, i.e. "*cultural progress*", I was not told this. It is not a ground of appeal and no evidence was submitted to show this.

41. It cannot be "*a means to fulfilment of the human personality*". Again, if I am wrong about this, this was not raised as a ground of appeal, nor was any evidence placed before me to show this.

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[20] *Burns, Suprema Lex: Essays of the Constitution Presented to Marinus Wiechers 35 46.*
[21] *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening) 2001 (3) SA 409 (CC) para 37; Shabalala and Others v Attorney-General, Transvaal and Another 1996 (1) SA 725 (CC) para 26.*

42. Moreover, even if it can be said, that the chant is necessary to promote cultural progress and for the fulfilment of the human personality, the right to its utterance has to be balanced against the rights of others, affected by it and only, once and if it passes muster under section 16(2) of the Constitution.

43. Van Wyk correctly states that section 16(2) operates independently of section 36 and introduces a curtailment of the right to freedom of expression. I am mindful of the fact that - as an exception to the right to freedom of expression - section 16(2) has to be interpreted restrictively.

44. Van Wyk,[22] - significantly - states that:

> *"Section 16(2) places certain forms of "hate speech" – outside the right of freedom of expression and removes them from the ambit of constitutional protection. The right to freedom of expression does not extend to the listed categories of speech, which in advance have been singled out by the framers of the South African Constitution as not deserving constitutional protection, since they have, amongst other things, the potential to impinge adversely on the dignity[23] (one of the core values of the Constitution) of others and cause them harm.[24]"*

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[22] Supra. Again, I also quote the learned author's footnotes.
[23] The others being equality and freedom.
[24] The Islamic Unity Convention v the Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) para 32.

45. This analysis by Van Wyk is undoubtedly correct. Moreover, Van Wyk refers to Burns,[25] who remarked that unlike people in many other countries, South Africans do not have to examine, analyse and agonize over the question whether or not to prohibit hate speech – as I did not – and that there is no need to debate issues such as whether hate speech should be heard and how the consequences should be dealt with.

46. Van Wyk states further:

> *"The debate which has been raging elsewhere, namely whether hate speech should be protected as expressions of thought, or whether it should be repressed as infringements on the right to equality – in short whether equality should be considered as the most important constitutional value – has to a large extent been made unnecessary in South Africa. By excluding advocacy of hatred from constitutional protection, South Africa has also implemented various international documents which demand that hate speech should be proscribed."*

47. Van Wyk[26] refers further to Burns and states:-

> *"She argues that hate speech is by nature insulting, degrading and of low value and does not advance any of the goals of freedom of expression mentioned above. She points to the fact that many people in diverse societies encounter the very real problem of hate speech, often in the form of racist speech, in their daily*

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[25] Referred to in footnote 27 of the learned author's essay. Burns; Suprema Lex: Essays on the Constitution Presented to Marinus Wichers.
[26] Supra.

> *lives. Hate speech, which is often regarded as synonymous with expressions of racial hatred and racism, has a destabilising and divisive effect on society. It encourages discrimination between groups which may lead to violence and breakdown in public order."*

48. I agree with the approaches of Burns and Van Wyk.

49. The Promotion of Equality and Prevention of Unfair Discrimination Act,[27] ("the PEPUD-act"), was enacted to give effect to section 9[28] of the Constitution, to prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination, to prohibit hate speech and to provide for matters connected therewith.[29]

50. Van Wyk puts the interaction between the hate speech provisions of the Constitution and the PEPUD-act into perspective. She says:

> *"The act implements and clarifies the constitutional hate speech provision. While the constitution puts these forms of expression outside constitutional protection, the act clearly prohibits hate speech and creates rights. It provides remedies, apart from existing Roman-Dutch common law offences and other remedies to counter the harmful effects of hate speech."*

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[27] No 4 of 2000.
[28] The clause dealing with equality.
[29] See the Preamble to the PEPUD-act.

51. One of the objects of the PEPUD-act[30] is to give effect to the letter and spirit of the Constitution, in particular –

> *"(b)(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..."*

52. Section 10 of the PEPUD-act prohibits hate speech and reads as follows:

> *"(1) Subject to section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –*
>
> *(a) be hurtful;*
>
> *(b) be harmful or to incite harm;*
>
> *(c) promote or propagate hatred."*

53. Prohibited grounds are defined as:

> *"(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or*
>
> *(b) any other ground where discrimination based on that other ground –*
>
> *(i) causes or perpetuates systematic disadvantage;*

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[30] Section 2.

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

54. Section 10 of the PEPUD-act contains an important proviso, i.e. the bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate publication of information, and advertisement or notice in terms of section 16 of the Constitution, is not precluded by this section.

55. It is clear that the PEPUD-act creates specific categories of expression, which it expressly forbids and that these categories far extend those forms of hate speech which section 16 of the Constitution places outside the ambit of constitutional protection.

56. Johannesen holds the view that given the strong constitutional emphasis on values such as human dignity, equality, non-racism and non-sexism, it would not be difficult to justify hate speech limitations.[31]

57. Having dealt briefly with the nature of the right to freedom of expression and the limitations thereto, what remains to be said, is how I understood, on the 29th of March 2010, (and how I still understand), the way in

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[31] 1997 South African Journal of Human Rights 135 140.

which speech - under attack - should be determined; hateful or not.

58. It appears to me that there are potentially two enquiries in this respect. The one is to analyse the words under attack from the perspective of section 16(2) of the Constitution, in order to establish if it falls outside the ambit of constitutional protection, and the other is to establish whether it falls under one or more of the prohibited categories created under section 10 of the PEPUD-act. To me, it has never been entirely clear which of the enquiries ought to be embarked upon initially (or if they should be embarked upon simultaneously) or even if the enquiry should actually include both approaches, or if one could suffice. Our jurisprudence will shed light on that in due course. For now, I need not deal with it, as in my view; by any analysis the chant falls foul on both approaches.

59. Either way, Van Wyk points out that the constitutional test whether speech is to be judged as hate speech is a stringent one. I agree and I remain mindful thereof.

60. In the enquiry into whether speech constitutes speech, for which there is no constitutional protection in terms of section 16(2)(c) of the Constitution, according to Van Wyk, there are two elements which should be present before an expression will amount to advocacy of hatred or hate speech, i.e. -

60.1. advocacy of hatred that is based on race, ethnicity, gender or religion; and

60.2. that constitutes incitement to cause harm.

61. In my view the analysis whether speech constitutes hate speech, requires a passionless and objective investigation into the actual words of the utterance under consideration;[32] a comparison thereof with the internal limitations created in terms of section 16(2)(c) of the Constitution and if the utterance falls foul of the internal limitations; there ends the enquiry.

62. Only, and if the utterance successfully traverses the internal limitations contained in section 16(2)(c) of the Constitution; then a balancing enquiry may be called for in terms of section 36 of the Constitution - which I need not and do not deal with - as a result of the approach I took and still take herein.

63. In the investigation whether the utterance falls foul of the internal limitations of the Constitution or whether it manages to navigate safe passage beyond it, the intention of the person making the utterance is wholly irrelevant.

64. It is not for the maker / articulator of the expression / declaration under consideration, (nor is it for our Courts), to dictate how the beholder thereof, should perceive it.

[32] Given their ordinary grammatical meaning.

65. Van Wyk states that *"advocacy"* implies more than a mere statement and includes an element of *"exhortation, pleading for, supporting or coercion."* She states further that *"hatred"* may be interpreted to mean an intense, passionate or active dislike, ill-will, malevolence, or feeling of antipathy or enmity, connected with a disposition to injure. The chant under consideration falls in all of these categories.

66. On the topic of race, there is no doubt that *"Boer"* connotes the white man.[33] This is common knowledge, but Modise goes a long way towards confirming this by stating in her affidavit in support of the ANC's application for leave to appeal:-

> *"The song in question forms part of the history of the ANC's struggle for liberation."*

67. Accepting that this is so - for current purposes - it is also no secret that the ANC's *"struggle for liberation"* was always directed at the white oppressive regime; which it succesfully ousted. The chant was therefore directed at white people, or at least an element amongst this race group; and it still is. The chant was designed to install fear in the heart of the white oppressor and it undoubtedly did. It is therefore reasonable to say that its use today still incites fear in the heart of many white beholders, (for more than one and a half decades no

[33] Or at least a part of this race group.

longer the oppressor), and I am not at liberty to dictate to them, (or to Harmse), that they should perceive it otherwise.

68. A finding is thus justified that the chant constitutes "*advocacy*" of "*hatred*" based on "*race*".

69. All that remains is a consideration of whether it constitutes "*incitement to cause harm*". Again, the enquiry is restricted to the actual words and no expanse of evidence can or must detract from that fact. The words of the chant - in clear language - constitute incitement to cause harm.

70. The chant under consideration therefore falls foul of the internal limitation in terms of section 16(2)(c) of the Constitution. It constitutes hate speech, which is moved beyond the scope of constitutional protection and from a general limitations analysis. Section 16(2)(c) places the chant outside of the right to freedom of expression and removes it from the ambit of constitutional protection.

71. I do not deal with the enquiry as to whether the speech falls into one or more of the prohibited categories of section 10 of the PEPUD-act in any detail herein. By any analysis, I fail to see how it does not, and as Bertelsmann

J, correctly in my view, subsequent to my Order found[34]:-

> *"If this yardstick* (section 10 of the PEPUD-act) *is applied to the offending words in the relevant song, they constitute prima facie hate speech. See further Strydom v Chiloane 2008 (2) SA 247 (T)."*[35]

72. Finally on this topic, our Constitutional Court has long since emphasized that it is in the interest of the State to regulate hate speech in our land, as hate speech may pose harm to the constitutionally mandated objective of a non-racist and non-sexist society.[36]

73. This concludes the brief synopsis of my understanding of the legal framework on the 26th of March 2010; and in my view it has not changed since then.

The Judgment by Bertelsmann J

74. Significantly, a mere three days, after I made the Order under consideration herein, and on the 1st of April 2010, Bertelsmann J heard an urgent application in the matter of Afriforum and Another v Malema, in the Northern Gauteng High Court.[37]

75. This matter concerned the same chant and Afriforum sought an urgent interdict against the respondent,

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[34] I deal with this Judgment hereunder.
[35] Infra, at p240.
[36] The Islamic Unity Convention v The Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at paragraph 33.
[37] This matter is reported at 2010 (5) SA 235 (GNP).

prohibiting and interdicting him from publically uttering the chant pending the outcome of the final adjudication of a complaint laid against him in the Equality Court.

76. Bertelsmann J, had little time to his disposal to write his Judgment, (he stated as much), but in the little time that he had – with respect to him – he undoubtedly came to the right conclusions.

77. Bertelsmann J found:

> *"Prima facie the words 'shoot the farmer' mean that farmers should be attacked or killed. If this is correct it would clearly constitute hate speech against that population group. The words 'shoot the farmer' can hardly be distinguished from the words 'kill the boer, kill the farmer,' which slogan was declared to be hate speech in the matter of the Freedom Front v South African Human Rights Commission and Another 2003 (11) BCLR 1283 (SAHRC). The chairperson, K Govender, who spoke on behalf of the unanimous committee, said the following on page 1299:*
>
> > *'The slogan, under consideration in this appeal, was chanted at high profile functions organised by the African National Congress, the ruling party in this country. These events and the chanting of the slogans were widely publicised. There can be no doubt that the slogan, given its content, its history and the context in which it was chanted, would harm the sense of wellbeing, contribute directly to a feeling of marginalization, and adversely affect the dignity of Afrikaners. The slogan says to them*

> *that they are still the enemy of the majority of the people of this country. It contributes to the alienation of the target community and conveys a particularly divisive message to the majority community that the target community is less deserving of respect and dignity. This generalised slogan is directed against an entire community of people. Words convey meaning and do cause hurt and injury. There is a real likelihood that this slogan causes harm.'*
>
> *The same conclusion would have to be reached in this instance, if the words 'shoot the farmer' in the song cannot be explained by their context. As in the matter of the South African Human Rights Commission, they were sung at high-profile occasions in public in a political setting. To explain, as the first respondent apparently intends to do, that the context of a historical struggle song of great significance to the majority of this country, justifies singing or speech that is experienced as a direct threat by a large number of South Africans, appears to be a very shaky basis upon which to justify what appears to be extremely aggressive language.* ***The true yardstick of hate speech is neither the historical significance thereof not the context in which the words are uttered, but the effect of the words, objectively considered, upon those directly affected and targeted thereby.***"[38] (I added the emphasis.)

78. Bertelsmann J went further to state:

> *"It cannot be contested that applicants' members and others are offended and alarmed, if not threatened, by this song. This is a fact of which respondents must clearly be aware, given the high level of controversy that has surrounded the*

[38] Supra, at p239.

> *singing thereof. Our democracy is still fragile. Participants in the political and socio-political discourse must remain sensitive to the feelings and perceptions of other South Africans when words are used that were common during the struggle days, but may be experienced as harmful by fellow inhabitants of South Africa today.* ***Seen in that light the offending words do constitute hate speech, for which there is neither justification nor protection in the Constitution.*** *The rights of those whose fundamental constitutional rights are threatened by hate speech must take precedence over procedural prejudice that may arise in the context of this particular matter."*[39] (I added the emphasis.)

79. I respectfully agree with the learned Judge's approval of the findings by Commissioner Govender, (referred to in the above quotation), and in finding that the chant does constitute hate speech, for which there is neither justification nor protection under the Constitution.

The ANC's standing in the application for leave to appeal/Failure to apply for leave to intervene/join in the suit

80. The ANC was not a party to the main application, between Harmse and Vawda. Yet it seeks - without further ado - an audience in respect of its application for leave to appeal.

81. I questioned Mr Marcus about the absence of any application for leave to intervene or to join the suit - often throughout his argument - and I got the impression

[39] Supra, at p240.

that Mr Marcus did not think it important; or maybe better put, thought of it as less important than the grounds of appeal.

82. Mr Du Plessis certainly made much of this fact and more so Mr Omar, who, in very uncomplimentary terms, persisted with a vehement objection to the ANC's standing in the matter and also denied that Modise had any authority to depose to her affidavit on behalf of the ANC, a challenge which the ANC ignored. It is so that there is nothing but her say-so, that she was indeed so authorised. Mr Omar argued strongly that there was no resolution attached, authorising Modise to depose to the affidavit on behalf of the ANC and there existed no proof that the majority of ANC members support the application for leave to appeal. He urged upon me to have regard to the fact that our President, himself, had expressed views which, on the face of it, casts doubt if the ANC was indeed uniform in its resolve to bring this application for leave to appeal.

83. There is much to be said for these objections, but I need not make any definitive findings thereon, by reason of the view I take herein. It would seem to me, however, that in dealing with a matter where a representative body, especially a political party, seeks leave to intervene in a matter such as this, at the very least, it has to show, in a substantive application, that it had

resolved to take the action, that the resolution to take the action was in keeping with its constitution and or policies which are supported by its members and so on. None of this was shown.

84. Significantly, (on this topic), Afriforum and VRA formally applied for leave to intervene in a substantive application, which was opposed by the ANC, formally by way of affidavit.

85. During his reply, Mr Marcus, if I understood him correctly, applied for condonation in this regard. I confess that I was uncertain then - as I am at the time of writing this - if this was a conditional application for condonation, i.e. only if I were to find that a formal application for leave to intervene or to join was indeed necessary, then and in that event, the ANC applied for condonation for its failure to have done so.

86. I am prepared to give the benefit of the doubt to the ANC, i.e. that it was a conditional application for condonation only; and that there was no concession that a formal application was indeed necessary.

87. In my initial response to the ANC's request for reasons, (quoted hereinabove), I made it clear that I found the almost casual request contained in a letter, by a non-party to a suit, to furnish it with reasons, as unsavoury. I reiterate what I said in this respect:-

> "***There is no attempt, let alone under oath, (as it ought properly to have been done), to show that the Applicant has standing for approaching me in this manner,*** *save for the bald statement that an application for leave to appeal will be made "...in the public interest..."* (I added the emphasis.)

88. The ANC, in its initial written submissions, contended that the matter is unprecedented as no recognised procedure existed and accordingly that no disrespect was intended. It contended further that the High Court has the inherent jurisdiction to regulate its own procedures, especially in the light of section 173 of the Constitution and the procedure adopted by it, was entirely appropriate.

89. It is so that our High Courts have the inherent power to regulate its own procedures but it should have dawned upon the ANC, that, (if anything), I had already done so - by clearly indicating to it in my response to its request for reasons - that it should ultimately convince me that it had standing, under oath.

90. Moreover, I do not think that this is a matter, which is so unprecedented that a deviation from the normal rules is justified. Rule12 clearly provides the vehicle which the ANC could and should have utilised to apply for leave to intervene herein. It requires notice to all parties of the intention to make application for leave to intervene, which envisages a substantive application, supported by an affidavit.

91. It is correct, as Mr Marcus submitted that there is no longer an absolute bar against a non-party to a suit, obtaining the necessary standing, to join as a party or obtain leave to intervene.[40]

92. That is not the issue. What is in issue, is that it does not happen automatically and standing in a matter, to a non-party, should not and cannot be granted on the mere say-so of the potential litigant.

93. Section 38 of the Constitution provides as follows:

> *"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) anyone acting as a member of, or in the interest of , a group or class of persons;*
>
> *(d) anyone acting in the public interest; and*
>
> *(e) an association in the interest of its members."*

94. There was no application to join or to intervene in these proceedings and I find that in matters such as this, a

[40] See Campus Law Clinic, University of Kwa-Zulu Natal v Standard Bank of South Arica Limited and Others 2006 (6) SA 103 (CC), at [20] – [21]. See also section 38 of the Constitution.

substantive application has to be brought. This, in my view, is in itself, sufficient reason to dismiss the application for leave to appeal.

95. With regards to the application for an Order condoning the failure to bring a substantive application, I am unclear as to how I can condone something that was - not at all - done, without a substantive application for condonation, wherein all the requirements for condonation are properly set out and dealt with. The appropriate route would have been to seek condonation, by way of a substantive application, and then to seek leave to bring a substantive application for leave to intervene; even if all of this meant seeking a postponement.

96. Mr Marcus repeatedly urged upon me to be mindful of the fact that "*context is everything*". I indicated to Mr Marcus that, on this topic, I was very much in agreement with him and in turn urged upon Mr Marcus to contextualise the ANC's case for me, so I could appreciate its contention that it has standing to bring the application for leave to appeal. Mr Marcus did not feel that this was necessary and reiterated his stance in this regard in his additional written submissions, where he stated:-

> *"To suggest that the ANC would have been obliged to advance a position is contrary to most basic principles of civil procedure."*[41]

97. Admittedly this was said in the context of, what the ANC was obliged to do (or not to do), had it received notice of the main application, i.e. it need not have dealt with the merits of the main application and could have elected to merely raise the many deficiencies in the main application. Hence - so I understand the submission - the ANC need not have disclosed its stance in the application for leave to appeal before me.

98. In these additional written submissions, the ANC also submitted that the affidavit by Modise, *"...sets out the broader interest of the ANC in the matter."*[42]

99. Although Mr Marcus correctly conceded that the affidavit by Modise was not filed in support of any application for leave to intervene or to join in the suit, which is also evidenced from her affidavit where she stated that her affidavit *"... is made in support of an application for leave to appeal..."*[43] I am, however, prepared to investigate - if somehow – it can be contended that enough was said in her affidavit to justify an Order granting the ANC leave to intervene herein; the absence of a substantive application nonetheless.

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[41] In paragraph 3.11.
[42] In paragraph 3.10.
[43] Paragraph 3 of Modise's affidavit.

100. From the structure of the affidavit, it is clear that it was designed to only echo the grounds of appeal, set out in the annexure thereto, and no more. In point of fact, care was taken by Modise to deal with each ground of appeal, only.

101. If my reading of Modise's affidavit is correct, then there are only two (possible) allegations, which the ANC can possibly rely on and contend that I should take it into account as support for an application for leave to intervene or join in the suit. They are:-

101.1. Harms made repeated references to the ANC's constitution in his founding affidavit in the main application, which means that the ANC has a direct and substantial interest herein;

101.2. The song forms part of the ANC's history of its struggle for liberation and my Order affects the public at large.

102. None of these "*grounds*" suffice. As far as the first "*ground*" is concerned, the Order does not affect the ANC's constitution at all. If it did, I was not told in what respects it did so.

103. As far as the second "*ground*" is concerned, the historical context and significance of the chant, is

irrelevant - as it constitutes hate speech - for which there is no constitutional protection. I have dealt with this.

104. In the premises, I am left with no option, but to find that:-

104.1. a non-party to a suit, where an Order of Court has been made, (by agreement or otherwise), and who seeks an audience in respect of an application for leave to appeal against such an Order in terms of section 38 of the Constitution, has to show its standing, by way of a substantial application, supported by a founding affidavit, in compliance with Rule 12;

104.2. the ANC made no attempt to bring such an application for leave to intervene or join the suit herein;

104.3. the allegations in Modise's affidavit were never intended to found a cause of action for an application for leave to intervene and in any event do not make out a case for an Order granting the ANC leave to intervene or to join the suit herein.

105. It follows that the ANC's application for leave to appeal has to be dismissed for want of any Order granting it standing herein.

The ANC's grounds of appeal

106. I proceed to - briefly - deal with the ANC's grounds of appeal, although I need not do so. I do this, by reason only of the exposure that this matter has received.

Non-joinder of the ANC in the main application[44]

107. It was contended that the ANC had to be joined in the main application and that its non-joinder renders the Order I made, appealable. This ground of appeal is based on the fact that Harmse made repeated references to the ANC's constitution in his founding affidavit and in fact even alleged that the chant violated the constitution of the ANC.

108. I do not deal with the trite authorities cited in respect of joinder or non-joinder. The simple fact is that the Order which I was ultimately prepared to grant, does not affect the ANC's constitution in any way - directly or indirectly – and Harmse's references to the ANC's constitution were superfluous. There is thus no merit in this ground of appeal.

Non-compliance with Rule 16A

109. The second ground of appeal is based on the fact that I should not have heard the application at all, for want of compliance with Rule 16A, which requires notice to the

[44] I do not deal with the grounds in the sequence they were raised.

Registrar, by anyone who intends to raise a constitutional issue, who will then in turn post a notice to this effect on the Court's notice board.

110. I confess that I do not recall if this issue was addressed on the day in question; but I assume in the ANC's favour that it was not and that I should have enquired about compliance with Rule 16A. It is so that I may have dispensed with its compliance, but I accept that I was not asked to do so and did not do so.

111. I was referred to three cases in which *"The importance of compliance with Rule 16A has been stressed"*. They were *"Shaik v Minister of Justice and Constitutional Development and Others"*,[45] *"Philips v National Direct* (sic) *of Public Prosecutions"*[46] and *"Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others (Mont Blanc Projects and Properties (Pty) Ltd and others as amici curiae"*.[47]

112. The portions of the first two cases, Mr Marcus relied upon, are not authority for his submission. They deal with the sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions under attack. The third matter is one where Gildenhuys J, postponed an application for a week, to enable the

[45] *"2004 (3) SA 599 (CC), at para 25"*.
[46] *"2006 (1) SA 585 (CC) at para 40"*.
[47] *"2008 (4) SA 572 (W) at para 2"*.

Municipality to give the required notice, after it initially failed to do so.

113. This leaves me with the question if the non-compliance is of such significance that it could found a ground of appeal herein. The Rule does appear to be peremptory and I do not intend to set a precedent for its non-compliance. The commentary in Erasmus[48] does provide some assistance. The learned author holds the view the purpose of the Rule is to enable parties in a constitutional issue, to seek to be admitted as *amicus curiae*, so that they can advance submissions in regard thereto. This, interested parties can do after the Judgment or Order has become known and if they were not aware of the notice on the notice board. I also doubt if it happens frequently - if at all - that someone just happens to notice such a notification on the notice board.

114. I make no finding in this respect and all of this matters not, as in my view, it was quite wrong of me to proceed without making an inquiry if there had been compliance with the said Rule. If the ANC had shown its standing herein, I may have been inclined to grant leave to appeal, restricted to this ground, although I express no firm view on this. Suffice it to say, that this

[48] Supra, at pB1-122A.

would have been in respect of the constitutional portion of the Order only.

Impermissible reliance on the Constitution/Court lacking jurisdiction

115. The third ground of appeal is that it was impermissible for Harmse to rely directly on the Constitution in as much as the Promotion of Equality and Prevention of Unfair Discrimination Act,[49] ("the PEPUD-Act"), had specifically been enacted to give effect to the provisions of section 9(3) and section 16(2)(c) of the Constitution.

116. In respect of Mr Marcus's reliance on the Preamble to the PEPUD-act, it does not state that this act was enacted to give effect to section 16(2)(c) of the Constitution. It does however state that it was enacted to prohibit hate speech.

117. In any event it is trite that litigants may not circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on a constitutional right and that to do so would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.[50]

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[49] No 4 of 2000.

[50] The authorities I was referred to in this respect were:- Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) at paragraph 73; MEC for Education, KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC) at paragraph 40; SA National Defence Union v Minister of Defence and Others 2007 (5) SA 400 (CC) at paragraph

118. It must be borne in mind however, that the Constitutional Court has adopted a practical approach where an applicant did not rely directly on the provisions of the Promotion of Administrative Justice Act.[51] Justice O'Regan found:-

> *"In these circumstances, it is clear that PAJA is of application to this case and the case cannot be decided without reference to it. To the extent, therefore, that neither the High Court nor the SCA considered the claims made by the Applicant in the context of PAJA, they erred. Although the applicant did not directly rely on the provisions of PAJA in its notice of motion or founding affidavit, it has in its further written argument identified the provisions of PAJA upon which it now relies."*[52]

119. The allegations by Harmse in his founding affidavit are sufficient to found a cause of action under the PEPUD-act, irrespective of whether he labelled it as such. I am furthermore not convinced that the authorities referred to hereinabove precludes an applicant from relying directly on section 16(2)(c) of the Constitution.

120. As I have pointed out hereinabove, section 10 of the PEPUD-act creates specific categories of hate speech which are prohibited, whilst section 16(2)(c) of the Constitution removes certain speech from constitutional protection. Section 10 did not supersede or replace

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52; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) at paragraphs 22 – 26.

[51] No 3 of 2000.

[52] Bato Star, Supra, at [26].

section 16(2)(c). It is therefore, in my view, open for a litigant to approach a Court with competent jurisdiction and to found his cause of action on hate speech for which there exists no constitutional protection, with or without specific reference to the PEPUD-act, as long as the necessary averments are made, to found a cause of action under the PEPUD-act.

121. The fourth ground of appeal is that I did not have jurisdiction to adjudicate the main application, in that the jurisdictional domain to adjudicate alleged violations of section 9 and 16(2)(c) of the Constitution is now exclusively that of the Equality Court.

122. Mr Marcus relied, *inter alia*, on section 21 of the PEPUD-act, for his submission that I had no jurisdiction to adjudicate a matter involving alleged hate speech.

123. I do not agree with his submission. Section 21 of the PEPUD-act deals with the powers of the Equality Court. The powers of a Court are something distinctly different from its jurisdiction. It can only exercise its powers, if it has jurisdiction.

124. I find nothing in the PEPUD-act which ousts the jurisdiction of the High Court and the presumption against the ousting of the High Court's jurisdiction, militates against the submission that it has indeed been ousted.

125. I was referred to three matters where the jurisdiction of the High Court and the Equality Court has been dealt with. They are Minister of Environmental Affairs and Tourism v George and others,[53] Manong & Associates (Pty) Ltd v Department of Road and Transport, Eastern Cape and Another[54] and Manong & Associates (Pty) Ltd v Department of Road and Transport, Eastern Cape and Another.[55]

126. The first matter of George, in my view, does not advance Mr Marcus's case and in fact, is authority for the contrary submission that the High Courts and Equality Courts have parallel jurisdictions. Cameron JA stated:-

> *"...there is no reason why those who have interrelated remedies under the equality statute and other legislation should not be entitled to pursue their remedies in parallel proceedings before the High Court..."*[56]

127. In my view, *"other remedies under interrelated legislation"* would include related remedies under the Common Law.

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[53] 2007 (3) SA 62 (SCA).
[54] 2009 (6) SA 574 (SCA).
[55] 2009 (6) SA 589 (SCA).
[56] Supra, at [17].

128. Both of the Manong decisions are not in point[57] and do not support the submission advanced.

129. In conclusion on this topic, Bertelsmann J also found – correctly in my view – that the High Court's jurisdiction has not been affected by the PEPUD-act, creating the Equality Court.[58]

130. It follows that the third and fourth grounds of appeal are without merit.

The Order is overbroad

131. The fifth ground of appeal is that another fundamental flaw in my Order lies in its over breadth. I should, if anything, have restricted the Order to the parties to the main application, given the particular facts relating to it.

132. I do not quote the many interesting foreign and local decisions I was referred to, but I do agree with Mr Marcus that it has long since been an established principle of our Law - in keeping with foreign jurisdictions - that our Courts should be wary and indeed loathe to make (declaratory) Orders which bind third parties, who did not have the opportunity to be heard in the matter and then have to face contempt of Court charges, in the event of their breaches of the Order.

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[57] One of the principal questions being whether the Equality Court had jurisdiction to adjudicate claims under PAJA; which it did not. It was found that the Equality Court had jurisdiction for reasons other than review powers.

[58] Supra, at 240.

133. All of these cases, and the principle of Law, cannot and should not apply to cases involving hate speech. The prohibition of hate speech in our Constitution and the PEPUD-act is so profound, that it simply cannot be said, in my view, that every case involving hate speech should have application only to that specific case. It would defeat the object completely.

134. Our Courts are entrusted, not only with developing the Common Law, as a constitutional imperative but also to ensure that our constitutional jurisprudence uniformly gives effect to the requirements, imperatives and prohibitions of our Constitution and the legislation enacted under it. It is therefore fundamental that Orders and Judgments relating to hate speech be of broad application, in order to create legal certainty.

135. It has always been regarded as highly undesirable that different Courts may come to different findings, in respect of the same subject matter – hence – in my view, decisions on hate speech should be of broad application. There is no merit in this ground of appeal.

No such crime as "*Incitement*"

136. Very little has to be said in this respect. I agree, upon reflection, that there is merit in the submission that there exists no such generalised crime as "*Incitement*". This was an oversight; but that it forms a basis for a ground

of appeal, I do not agree. I intend to amend the Order, by inserting the following portion, typed in bold and underlined, to correct the oversight:-

> *"(2) That the publication and chanting of the words "Dubula Ibhunu", prima facie satisfies the crime of incitement,* ***to commit murder.***"

Failing to give any or sufficient consideration to the guarantee of freedom of expression

137. I have dealt with this herein above. There is no merit in this ground of appeal. It was – understandably – hardly touched upon during argument. The chant constitutes hate speech for which there exists no constitutional protection.

Conclusion

138. Afriforum and the VRA agreed, during argument, that if I find against the ANC, either on the basis of it failing to prove its standing herein or that the application for leave to appeal has to be dismissed, I do not have to make any finding in respect of their application for leave to intervene.

139. The ANC failed to prove its standing in this matter. In the premises its application for leave to appeal stands to be dismissed with costs, which costs are limited to that of Harmse, who opposed the application.

In the premises I make the following Order:

1. The ANC's application for an Order, granting it condonation for its failure to bring a substantive application for an Order granting it leave to intervene in or to join this suit, is dismissed with costs.

2. The ANC's application for leave to appeal against the Order I made herein on the 26th of March 2010, is dismissed with costs.

3. No Order is made in respect of Afriforum and VRAs' application for leave to intervene in this matter.

4. Paragraph 2 of the Order, which I made herein on the 26th of March 2010, is hereby amended to read as follows:-

   "That the publication and chanting of the words "Dubula Ibhunu", prima facie satisfies the crime of incitement to commit murder."

5. The Registrar is requested to furnish a copy of this Judgment to the Law Society, who in turn is requested to investigate Mr Omar's conduct herein.

LP HALGRYN

Acting Judge of the High Court

DATE OF THE ARGUMENT:- 29 NOVEMBER 2010

DATE OF THE JUDGMENT:- 16 MAY 2011

ON BEHALF OF THE ANC:- ADV G MARCUS SC

ADV M SIKHAKHANE

INSTRUCTED BY EDWARD NATHAN SONNENBERGS

ON BEHALF OF AFRIFORUM AND VRA:- ADV R DU PLESSIS SC

INSTRUCTED BY HURTER SPIES INC

ON BEHALF OF HARMSE:- ZEHIR OMAR ATTORNEYS