



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref. No.: WC/1415/0119

In the matter between:

WEISS, S C

FIRST COMPLAINANT

SOUTH AFRICAN

JEWISH BOARD OF DEPUTIES

SECOND COMPLAINANT

and

EHRENREICH, TONY

RESPONDENT

INVESTIGATIVE REPORT

1. INTRODUCTION

- 1.1 The South African Human Rights Commission (Commission) is an institution established in terms of Section 184 of the Constitution of the Republic of South Africa, 1996 (Constitution).
- 1.2 The Commission and other institutions created under Chapter 9 of the Constitution are described as "*state institutions supporting constitutional democracy*".
- 1.3 The Commission is specifically mandated to:

- 1.3.1 Promote respect for human rights and a culture of human rights;
 - 1.3.2 Promote the protection, development and attainment of human rights; and
 - 1.3.3 Monitor and assess the observance of human rights in the Republic.
- 1.4 Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.5 The South African Human Rights Commission Act, 40 of 2013 (SAHRC Act) provides the enabling framework for the powers of the Commission. The Complaints Handling Procedures records procedures to be followed in conducting an investigation regarding the alleged violation of or a threat to a fundamental right.

2. THE PARTIES

- 2.1 The First Complainant is an adult female resident of the Gauteng Province, Republic of South Africa.
- 2.2 The Second Complainant is an organisation that describes itself as “*the representative spokesperson and civil rights lobby of the South African Jewish community.*” It is headquartered in the Gauteng Province, with additional offices in Cape Town, Durban, Port Elizabeth, Pretoria and Bloemfontein.
- 2.3 The Respondent is an adult male resident of Cape Town, in the Western Cape Province, Republic of South Africa. He is the Provincial Secretary of the Congress of South African Trade Unions (COSATU), Western Cape Branch.¹

3. THE COMPLAINTS

- 3.1 On 4 August 2014, the Commission received a complaint from the First Complainant. In it, the First Complainant alleged that:
- 3.1.1 On or about 30 July 2014, COSATU and the Respondent posted a media release on Politicsweb, which describes itself as “a website focused on the news and politics of Southern Africa.”² The release read as follows:
“The Jewish Board of Deputies is allowed to spread their Zionist-supporting lies with impunity in South Africa. When our Government

¹ COSATU is not cited as a party in this matter.

² www.politicsweb.co.za/about.

condemns the actions of the murderous Israeli state, the Jewish Board of Deputies declares that it is a minority of people in South Africa who support the Palestinians. When COSATU and other civil society and religious organisations condemn the Israeli brutalities against woman and children, the Jewish Board of Deputies says it is a minority of South Africa who support the Palestinians. When all religions including Christians, Muslims and Jews condemn Israeli aggression, the Jewish Board of Deputies say it is a minority of believers.

The Jewish Board of Deputies is in denial, at best or at worst condoning the Israeli aggression. This is against the sentiments of the majority of South Africans and is certainly not representative of the sentiments of progressive Jews in South Africa. If the Jewish Board of Deputies wants to advance a Zionist agenda, they should leave South Africa and go advance their agenda elsewhere. To let these funders of a war against defenceless people act with impunity in South Africa, is against South Africa's commitment to the people of Palestine. The Jewish Board of Deputies must be advised in no uncertain terms that if they are not part of the solution then they are part of the problem.

The Jewish Board of Deputies are given until the 07 August 2014 to stop their Zionist propaganda in Cape Town, failing which we will boycott and call strikes at all of their member – and supporting companies and organisations. The Jewish Board of Deputies should know that just because Premier Zille supports them, it does not mean that they can act with impunity against the will of the majority of South Africans.”

- 3.1.2 According to the First Complainant, the above statement was a violation of the right of freedom of expression of persons who held opinions different from the Respondent and made specific reference to Sections 16(2)(a) and/or (b) of the Constitution of the Republic of South Africa, 1996 (Constitution).
- 3.1.3 The First Complainant requested that COSATU and the Respondent issue a written apology to the Second Complainant and members of the Jewish community who were offended by the media release as well as a written formal and unreserved retraction of the release. The First Complainant did not seek relief specific to herself.

3.2 On 14 August 2014, the Commission received a complaint from the Second Complainant, which contained the following allegations:

3.2.1 On or around 13 August 2014, the Respondent posted the following statement on his Facebook page:

Its [sic] time for an Eye for an Eye against Zionist aggression

We have all noted the terrible destruction and killings and maimings that have been taking place in Gaza. The Israeli [sic] army has been acting with impunity, in their attempts to steal the Palestinian lands. This [sic] dastardly deeds have been condemned internally by Governments and Millions [sic] of people on the streets.

We have seen in our own country that the Jewish Board of deputies [sic] have arranged gatherings to pledge their allegiance to the killing of Palestinians . We [sic] are aware that the Jewish Board of Deputies has been facilitating [sic] and supporting the funding of the Isreali [sic] Army as well as getting SA youth to join the killings in Gaza . This makes the Jewish Board of Deputies complicit in the murder of the people in Gaza . The time has come to say very clearly that if a woman or child is killed in Gaza, then the Jewish board of deputies, [sic] who are complicit, will feel the wrath of the People of SA with the age old biblical teaching of an eye for an eye. The time has come for the conflict to be waged everywhere the Zionist supporters fund and condone the war killing machine of Israel. [sic] People in other countries waged war inside their countries for the freedom of South Africans from Apartheid , we are duty bound to do the same for other countries where apartheid is practiced .

3.2.2 A screen shot of the above post taken within 5 hours of the text being posted showed that 20 people had “liked” the Facebook post.

3.2.3 The Respondent had issued a statement on 30 July 2014, with the “relevant” section being the last two paragraphs quoted in paragraph 3.1.1.

3.2.4 The Second Complainant perceived the 13 August 2014 post to constitute hate speech and harassment in violation of the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (PEPUDA).

3.2.5 The complaint also refers to the 30 July 2014 Politicsweb statement, characterising its contents as a threat to “instigate punitive economic

actions against another organisation on the grounds that the viewpoints it is expressing are considered to be objectionable.”

4. HUMAN RIGHTS UNDER INVESTIGATION

4.1 The following rights were examined in the course of the investigation:

- 4.1.1 The right to equality in terms of Section 9 of the Constitution, as given effect to by PEPUDA, in light of the allegations of hate speech;
- 4.1.2 The right to human dignity in terms of Section 10 of the Constitution, in light of the allegations of ill treatment of the members of the Second Complainant;
- 4.1.3 Freedom and security of the person in terms of Section 12 of the Constitution, in light of the allegations that the comments in the 13 August 2014 Facebook post were of a violent nature;
- 4.1.4 Freedom of expression in terms of Section 16 of the Constitution, in light of the allegations by the First and Second Complainants that the Respondent's actions were motivated by a desire to infringe on their right to freedom of expression;
- 4.1.5 Assembly, demonstration, picket and petition in terms of Section 17 of the Constitution, in light of the language in the statement of 30 July 2014 pertaining to boycotts and strikes of businesses of members and supporters of the Second Complainant.

5. INVESTIGATION UNDERTAKEN BY THE COMMISSION

5.1 *Steps taken during the investigation*

- 5.1.1 On 30 March 2015, the Commission sent a letter setting out the allegations to the Respondent, requesting a response by 29 April 2015.
- 5.1.2 The Commission received no response from the Respondent within the requested timeframes and sent a further allegations letter on 14 May 2015 with a response date of 25 May 2015.
- 5.1.3 On 2 June 2015, the Commission received correspondence from the Respondent, wherein he stated that the complaints in this matter were similar to a case brought by the Second Complainant which was under police investigation.

5.1.4 The Respondent stated that the matters referred to in the complaints were sub judice and therefore that he was unable to respond to the allegations. However, with the 2 June 2015 correspondence, the Respondent provided a copy of a press statement bearing the COSATU letterhead dated 14 August 2014, one day after the date of the Facebook post described in paragraph 3.2.1.

“Tony Ehrenreich in his personal capacity

Tony to file counter claims against the Jewish Board of Deputies who have charged him for hate speech.

Tony Ehrenreich stands by his Facebook comment on the SAJBD.

At the outset let me state it clearly that I am not Anti Semitic and am not calling for violence against the Jews. My focus is against the Jewish Board of Deputies specifically, for condoning the violence against the Palestinians. The Jewish Board of Deputies is now trying to hide behind the Jewish Community, many of whom do not support what the Board is promoting in Palestine.

The Statement on my Facebook page is in my private capacity and I stand by it. The killings in Gaza by the Israeli army have never been condemned by the Jewish Board of Deputies. They have in the face of overwhelming rejection of South Africans of the genocide in Palestine, arranged events to support the right to kill Palestinians. The Jewish Board of Deputies fund and condone the actions of the Israeli state. They support the sending of young South Africans to go and kill unarmed Palestinians in Gaza. The Jewish Board of Deputies acts with impunity in South Africa as they try to spread their propaganda.

The reference to ‘an eye for an eye’ is to ensure that we take actions that are commensurate with the atrocities. The polite statements that have been made in South Africa thus far, has not seen an end to the murders in Gaza. This however is not a call for violence, but is a call for more decisive actions in South Africa, that would force the Jewish Board of Deputies to promote justice. The following are some options;

- *Charging the Jewish Board of Deputies with being complicit in war crimes, by the SA Government;*

- *Arresting those who have gone to fight in the Israeli attacks against Palestine;*
- *Investigating the funding sources from South Africa to the Israeli war machine;*
- *Instituting immediate wide spread boycotts, supported by ex-President Thabo Mbeki;*
- *When the Israeli deny Palestinian rights to protest marches to deny the Jewish Board of Deputies right to protest in South Africa;*

These steps and the language are designed to get more decisive action from the South African community and to get the Israeli army and their supporters in South Africa to stop the killing of women and children. This outrage that I feel is because the children there are no different from our children and we must do more to bring an end to the murders and maiming. If my statements make some people uncomfortable, then so be it, it is infinitely less discomfoting than having your family wiped out.

The Jewish Board of Deputies have now elected to lay charges against me for hate speech, which is their right in South Africa, rights they do not afford Palestinians in Gaza. I am in turn laying charges against them for supporting crimes against humanity in Gaza, and for being complicit through their actions or inactions, in the killing of woman and children in Gaza. Further charges relate to them sending money and young men to feed the Israeli war machine that is responsible for the massacre of the Palestinians.

Let this be a public trial on the value system of South Africa on what we should be doing in relation to advancing our principles. But let it be painfully clear that we will not be intimidated into silence so that the killing can continue in Gaza. The Jewish Board of Deputies must be held accountable for their complicity in this genocide in Gaza.”

5.1.5 The Commission transmitted the Respondent’s response to the First and Second Complainants for comment.

5.1.6 On 19 June 2015, the Commission received comments on the response of the Respondent from the Second Complainant.

- 5.1.7 In its response, the Second Complainant denied having any knowledge of the First Complainant and denied that the First Complainant acted on behalf of the Second Complainant.
- 5.1.8 The Second Complainant also advised that the Directorate of Public Prosecutions had declined to prosecute the Respondent on charges laid by the Second Complainant.
- 5.1.9 To date the Commission has not received any comment from the First Complainant on the response from the Respondent.
- 5.1.10 On 3 August 2015, the Commission and the Respondent met at the offices of the Commission in Cape Town to discuss the complaints of both the First and the Second Complainants and seek a resolution of the matter.
- 5.1.11 On 26 August 2015, the Respondent advised the Commission that he would revert to the Commission regarding the meeting on 3 August 2015 by 2 September 2015.
- 5.1.12 The Commission has no record of any further communication from the Respondent with respect to these complaints.
- 5.1.13 The Commission has therefore proceeded to make a finding based on the correspondence between the Commission, the Respondent and the Second Complainant.
- 5.1.14 On 8 May 2018, a provisional report was provided to the Complainants and Respondent in accordance with the Commission's Complaints Handling Procedures, with responses requested by 29 May 2018.
- 5.1.15 On 22 May 2018 the Commission received the response of the Second Complainant to the provisional report.
- 5.1.16 On 30 May 2018 the First Complainant contacted the Commission to advise that she was travelling overseas and therefore requested an extension of the time to respond to 22 June 2018, to which the Commission agreed.
- 5.1.17 On 25 June 2018 the Commission received the response of the First Complainant to the provisional report
- 5.1.18 The Commission has not received a response from the Respondent regarding the provisional report.
- 5.1.19 The responses that the Commission received to the provisional report have been assessed and considered for purposes of this finalised report.

5.2 *Historical context of the statements*

- 5.2.1 The longstanding conflict between Israel and Palestine (the Parties) is well known globally. The complex political conflict between the Parties while beyond the purview of this investigation, relate to certain events occurring in that region at the time of the statements at issue, and are to that extent relevant and necessary to an examination of the allegations in the complaints.
- 5.2.2 Peace talks between the Parties that had been ongoing for nine months came to a halt on 24 April 2014, with no agreement being reached between them.³
- 5.2.3 In May, June and early July 2014, young Israelis and Palestinians were attacked and abducted, resulting in rocket attacks and violent reactions from both sides.⁴
- 5.2.4 On 8 July 2018 Israel launched a military campaign in Gaza that was ongoing at the time that the statements at issue in this complaint were made.⁵
- 5.2.5 Though exact numbers of casualties are disputed, fighting was fierce and protracted and led to injury and death of both Palestinians and Israelis.⁶

6. ISSUES TO BE DETERMINED BY THE COMMISSION

- 6.1 The questions for determination in this matter are whether the 30 July 2014 Politicsweb post and the 13 August 2014 Facebook post (as purportedly “clarified” or qualified by the 14 August 2014 press release) violated the rights to free expression, equality and dignity and freedom and security of the members of the Second Complainant.

³ Associated Press. Israeli-Palestinian violence in 2014 – timeline. <https://www.theguardian.com/world/2014/nov/18/israel-palestinian-violence-timeline>. Accessed 27 March 2018.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

7. LEGAL FRAMEWORK

7.1 *Promotion of Equality and Prohibition of Unfair Discrimination Act, 4 of 2000*

7.1.1 The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA), was enacted in terms of Section 9(4) of the Constitution to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith. PEPUDA endeavours to facilitate South Africa's transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom for all.

7.1.2 Section 1 of PEPUDA defines the following key terms:

'discrimination' means any act or omission...which directly or indirectly-

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

(b) withholds benefits, opportunities or advantages from,

any person on one or more of the prohibited grounds;

'harassment' means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to-

...

(b) A person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

'prohibited grounds' are-

(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 systemic disadvantage;

(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);

7.1.3 Section 2 sets out the objectives of PEPUDA as:

(a) to enact legislation required by section 9 of the Constitution;

(b) to give effect to the letter and spirit of the Constitution

...

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed.

7.1.4 Section 10 of PEPUDA defines and prohibits hate speech:

(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 –

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.

7.1.5 Section 11 of PEPUDA states:

No person may subject any person to harassment.

7.1.6 Section 12 of PEPUDA states:

No person may-

(a) Disseminate or broadcast any information;

(b) Publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person; provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution is not precluded by this section.

7.2 **Constitution of the Republic of South Africa, 1996**

7.2.1 Section 9 – Equality

- (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

7.2.2 Section 10 – Human dignity

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

7.2.3 Section 12 – Freedom and security of the person

- (1) *Everyone has the right to freedom and security of the person, which includes the right—*

...

- (c) *to be free from all forms of violence from either public or private sources;*

...

7.2.4 Section 16 – Freedom of expression

- (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 and ideas;*

...

(2) *The right in subsection 1 does not extend to-*

(a) *propaganda for war;*

(b) *incitement for imminent violence; or*

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

7.2.5 Section 17 - Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

7.3 Case law

7.3.1 Hate speech

7.3.1.1 *African Diaspora and Chief Goodwill Zwelithini*⁷

In examining a complaint of hate speech against migrants, the Commission determined that, for purposes of the prohibition against certain forms of hate speech contained in PEPUDA:

“Hurtful refers to serious psychological or emotional harm experienced by individuals and the target group;

Harmful includes physical harm, discrimination and other forms of harm experienced by individuals and the target group beyond psychological or emotional harm that is hurtful; and

Promoting and propagating hatred refers to the effect of words not on the target person or group, but on a group of persons in whom hatred for the target group is promoted or propagated, including communities and society as a whole.”⁸

7.3.1.2 *South African Human Rights Commission v Qwelane*⁹

In *Qwelane* the court concluded that the provisions of PEPUDA pertaining to hate speech are neither vague nor overbroad.¹⁰

The court emphasised that both the content and the context of alleged hate speech must be objectively assessed and evaluated

⁷ *African Diaspora and Chief Goodwill Zwelithini*, SAHRC Final Report, 29 September 2016.

⁸ *Ibid.* para 13.16.

⁹ *South African Human Rights Commission v Qwelane* [2017] 4 All SA 234 (GJ).

¹⁰ *Qwelane* at paras 54-65

and that the actual intention of the speaker is not essential to the assessment.¹¹

The court noted that the term “hurtful” as used in section 10(1)(a) of PEPUDA connotes severe psychological and deeply traumatising impact on members of the community targeted by the speech. The court also recognised the significance of the identity of the speaker, particularly when the speaker holds a position of authority, and the exacerbation of hurt from refusal to offer an apology when the opportunity is presented.¹²

7.3.1.3 *South African Human Rights Commission v Masuku*¹³

In *Masuku* the court recognised the importance of the context in which statements alleged to be hate speech are made.¹⁴

7.3.1.4 *Afri-Forum, Tau SA vs Julius Malema*¹⁵

In *Afri-Forum*, the court noted that the meaning of words alleged to be hate speech must be assessed according to what they would mean to a reasonable listener having the knowledge and skill of an ordinary member of society, keeping in mind that words can have different meanings.

7.3.1.5 *Freedom Front v South African Human Rights Commission*¹⁶

In *Freedom Front*, an appeal committee of the Human Rights Commission concluded that:

Calling for the killing of people because they belong to a particular community...must amount to the advocacy of hatred, unless the context clearly indicates otherwise.

7.3.2 *Human dignity*

In *S v Makwanyane and Another*¹⁷ O'Regan J explained the right to dignity:

¹¹ *Qwelane* at para 50.

¹² *Qwelane* at paras 49, 52.

¹³ *South African Human Rights Commission obo Jewish Board of Deputies v Masuku* [2017] 3 All SA 1029 (EqC, J).

¹⁴ *Masuku* para 54.

¹⁵ *Afri-Forum, Tau SA vs Julius Malema* 2011 (6) SA 20 (EqC).

¹⁶ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC).

¹⁷ 1995 (3) SA 391 (CC).

*Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.*¹⁸

The Court noted further that:

*Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion.*¹⁹

7.3.3 Freedom and security of the person

In *Law Society of South Africa & Ors v Minister of Transport & Another*²⁰ the Court stated that:

*Section 12(1) of the Constitution is directed at protecting the physical integrity of a person. In its terms, everyone has the right to “security of the person”. It is clear from section 12(1)(c) that the protection includes the right “to be free from all forms of violence from either public or private sources”. It seems correct, as some commentators suggest, that the right is engaged whenever there is an “immediate threat to life or physical security” deriving from any source.*²¹

7.3.4 Freedom of expression

In *S v Mamabolo*²² the Constitutional Court held:

*That freedom to speak one’s mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights. It is the right — idealists would say the duty — of every member of civil society to be interested in and concerned about public affairs.*²³

¹⁸ Ibid. at para 328.

¹⁹ Ibid. at para 222.

²⁰ *Law Society v Minister of Transport* (hereinafter *Law Society*) 2011 (1) SA 400 (CC).

²¹ Ibid at para 58.

²² *S v Mamabolo* 2001 (3) SA 409 (CC).

²³ Ibid.

The Constitutional Court considered parameters of the right to freedom of expression and scope of Section 16(2) in *Islamic Unity Convention v Independent Broadcasting Authority and Others*²⁴:

*How is section 16(2) to be interpreted? The words “the right in subsection (1) does not extend to...” imply that the categories of expression enumerated in section 16(2) are not to be regarded as constitutionally protected speech. Section 16(2) therefore defines the boundary beyond which the right to freedom of expression does not extend. In that sense the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom and these objectives should be given effect to.*²⁵

*There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity... The right [to freedom of expression] is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution.*²⁶

*It is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas. It is also in the public interest that reasonable limitations be applied, provided that they are consistent with the Constitution.*²⁷

In *Hotz v UCT*²⁸, the Supreme Court of Appeals noted that:

Freedom of speech must be robust and the ability to express hurt, pain and anger is vital, if the voices of those who see themselves as oppressed or disempowered are to be heard.

²⁴ *Freedom Front v South African Human Rights Commission* 2002 (5) BCLR 433 (CC).

²⁵ *Islamic Unity Convention* at para 30.

²⁶ *Ibid.*

²⁷ *Ibid* at para 35.

²⁸ *Hotz and Others v University of Cape Town* (SCA) 2017 (2) SA 485 para 67.

8. LEGAL ANALYSIS

8.1 *The 30 July 2014 Politicsweb post*

8.1.1 To determine whether the 30 July 2014 statement constituted hate speech that is not protected, a consideration of the content of the statement is necessary.

8.1.2 To constitute hate speech prohibited by PEPUDA, words must first be based on a prohibited ground.

8.1.2.1 The Second Complainant asserts that the Respondent's words calling for particular treatment is based on their religion.

8.1.2.2 Although religion is certainly a prohibited ground, the Respondent clearly distinguishes between members of the Jewish faith at large and the Second Respondent in the 30 July 2014 statement.

8.1.2.3 The Respondent speaks of "all religions including...Jews" as doing one thing, while describing the Second Complainant as doing something else, and explicitly differentiates between "progressive Jews" and the Second Complainant.

8.1.2.4 Given the clear delineation between Jewish South Africans in general and the Second Complainant in the 30 July statement, an objective assessment of the content of the 30 July 2014 statement does not lead to a conclusion that the Respondent's words were directed at all Jewish people or the Jewish religion in general or at the members of the Second Complainant because of their religion or religious beliefs.

8.1.2.5 However, an objective assessment of the 30 July 2014 statement does show that the Respondent singled out the members of the Second Complainant for specific treatment based on membership within the Jewish Board of Deputies.

8.1.2.6 Based on that membership, the Respondent calls for the members of the Second Complainant to "leave South Africa and go advance their agenda elsewhere."

8.1.2.6.1 The language is not framed to infer a call for voluntary departure by the Second Complainant. It is framed as

a call for departure in disregard of their right to remain in and to reside anywhere in the Republic guaranteed by Section 21(3) of the Constitution. Such a call has obvious adverse effects on both the Section 21(3) right and other constitutional rights and freedoms protected within the Republic. The impact of the adverse effect would be tantamount to discrimination levelled against groups identified in Section 1(a) of PEPUDA.

8.1.2.6.2 The statement that the members of the Second Complainant should leave South Africa also undermines their dignity by implying that their citizenship and consequent rights are not as worthy of respect and protection equivalent to other persons within the Republic.

8.1.2.7 Therefore, in this instance the Commission concludes that the claimed discrimination was made based on a ground that falls within the scope of part (b) of the definition of 'prohibited ground' in PEPUDA.

8.1.3 However, the statement cannot be construed to incite harm or propagate hatred as prohibited by Section 10 of PEPUDA. The only action discernible from the 30 July 2014 statement involves economic action in the form of boycotts and strikes.

8.1.4 Both the First and Second Complainants perceived the call for boycotts and strikes in the 30 July 2014 Politicsweb post as an impermissible encroachment on the right to express their views with respect to the conflict within Israel and Palestine, which differ from those of the Respondent.

8.1.4.1 Activity giving form to expression through boycotts and strikes such as peaceful protest activity clearly falls within the scope of Section 17 of the Constitution. It is both recognised and protected in our law, including for the purposes of effectuating changes of view or behaviour.

- 8.1.4.2 A call to engage in constitutionally protected activity, albeit robustly worded,²⁹ is not a promotion of hatred but instead furthers the formation of a mature society where persuasion is used rather than force to resolve disagreement or differing viewpoints as described in *Makwanyane*.³⁰
- 8.1.4.3 In terms of section 10(a) of PEPUDA, the 30 July 2014 statement may have been hurtful to the members of the Second Complainant, but it was not harmful, did not incite harm, and did not promote or propagate hatred against the members of the Second Complainant in terms of sections 10(b) or (c).
- 8.1.4.4 The prohibition of hate speech set out in section 10 of PEPUDA is 'subject to the proviso in section 12'. The proviso in section 12 excludes any 'publication of any information, advertisement or notice in accordance with section 16 of the Constitution' from the ambit of the prohibition of hate speech and unfair discrimination in sections 10 and 12, respectively. The 30 July 2014 statement does not constitute hate speech excluded from constitutional protection by Section 16(2) of the Constitution. The statement satisfies the conditions for constitutionally protected speech under section 16(1) of the Constitution on a matter of significant public interest at the time. Therefore, the call for economic actions falls within the scope of the section 12 proviso.

8.2 ***The 13 August 2014 Facebook post***

- 8.2.1 The content of the Facebook post stands in stark contrast to the language used in the 30 July 2014 statement.
- 8.2.2 In this post, the Respondent refers to the Second Complainant by name but uses no language that would draw a distinction between the Second Complainant and Jewish South Africans in general, in contrast to the 30 July 2014 statement.
- 8.2.3 Given the lack of explanation that the Respondent was limiting his statements to the Second Complainant, a person unfamiliar with the

²⁹ *Hotz* at para 67; *Islamic Unity* at para 37.

³⁰ *Makwanyane* at para 222.

Second Complainant could assume that the South African Jewish Board of Deputies is representative of all Jewish South Africans in general, particularly given the prominence of the word “Jewish” in the Second Complainant’s name.

- 8.2.4 Based on the above, it is within the realm of reason that, the statement could objectively be interpreted to be based on the ground of religion, which is specifically prohibited in PEPUDA. However, even for persons who understood the distinction between the South African Jewish Board of Deputies and Jewish South Africans in general, as discussed above, the Respondent’s characterisation and treatment of the Second Complainant satisfies part (b) of the definition of a prohibited ground.
- 8.2.5 A literal reading of the language used by the Respondent when he states that the Second Complainant has “pledge[d] their allegiance to the killing of Palestinians....This makes the Jewish Board of Deputies complicit in the murder of the people in Gaza...if a woman or child is killed in Gaza, then the Jewish board of deputies [sic], who are complicit, will feel the wrath of the People of SA with the age old biblical teaching of an eye for an eye,” requires very little further elaboration and may be reasonably construed to demonstrate a clear intention to incite harm.
- 8.2.6 The term “an eye for an eye” connotes retaliation, revenge, or retribution in kind; to talk about murder and killing and then invoke the phrase “an eye for an eye” toward the person perceived to be responsible for the killing is a call for that person to be killed, unless clearly stated to the contrary.
- 8.2.7 The Respondent proceeds to state that South Africans are “duty bound” to wage war inside South Africa in support of freedom in countries where ‘apartheid’ is practised, which in the context of the post is clearly a reference to Palestine. A reasonable implication is that the opponents in the ‘war’, at least in part, would be the members of the Second Complainant.
- 8.2.8 The reference to the struggle against apartheid within South Africa would be expected to have a strong impact on readers, as would the fact that the reference is made by a person regarded as a public figure, occupying a senior office within COSATU, an organisation of immense public value and

standing in South Africa, that has been recognised as contributing to the demise of apartheid in South Africa.

8.2.9 The words the Respondent chose are therefore likely to carry weight and exert pressure on readers of the post.

8.2.10 The phrases “It’s time” and “the time has come” are repeated through the post in conjunction with calls for killing and waging conflict suggesting imminence as envisaged in the Constitution.

8.2.11 This language associates with imminent action and is proximate to the language of war included in the statement. Section 16(2)(b) of the Constitution is clear - incitement of imminent violence is not protected expression.

8.2.12 For members of the targeted group, the language of the Facebook post in essence calling for a war against them, openly stating they should be murdered by their fellow South Africans in retaliation for acts taking place in another country, would be deeply psychologically and emotionally hurtful in terms of Section 10(a) of PEPUDA.

8.2.13 The Respondent’s words specifically call for members of the Second Respondent to be physically harmed, and thus constitutes incitement to cause harm in terms of Section 10(b) of PEPUDA.

8.2.14 Finally, with regard to the last requirement for words to constitute hate speech, statements must meet a high threshold to constitute an expression of hatred for purposes of section 10(1)(c) of PEPUDA.

8.2.15 Absent a context clearly to the contrary, calling for the killing of people because they belong to a particular community meets this threshold.³¹

8.2.16 Added to the core message of the 13 August 2014 Facebook post are the invocation of a religious basis for action (“the age old biblical teaching of an eye for an eye”) and the clear reference to the moral imperative of opposing systems of apartheid, which both evince a clear indication to provide bases for acting in a way that would otherwise be considered unacceptable, that readers would be unlikely to challenge.

³¹ *Hotz* at para 68; *Freedom Front*.

8.2.17 It appears that the Respondent viewed the expanded explanation of what he intended to convey with his Facebook post, set out in the press release issued the following day, as sufficient to introduce a different meaning for the Facebook post than the one discussed above.

8.2.18 Aside from the fact that the subjective intention of a speaker is not the relevant inquiry for hate speech and the implausibility of the meaning that Respondent stated was his actual intention, namely that it did not have the meaning that would be commonly attributed to the phrase “an eye for an eye” but was instead a call for less polite and more decisive action by the South African community with respect to what was happening in Israel and Palestine, there is no evidence that the contents of the press release issued the following day were posted on the Respondent’s Facebook page or published by the media, such that it would be unlikely to reach the same audience as the original post.

8.2.18.1 The ongoing situation in Palestine and in Israel elicit grave concerns for the protection of basic human rights. Injury, and loss of life invokes strong emotion, resulting in expression and action from many people not simply in South Africa, but globally. Such reactions however, cannot provide a justification for the harm of another group outside of the domestic and international legal frameworks. The Respondent made the comments on his personal Facebook page, a platform to which he could control access and that would likely be accessed by a large number of persons who would be likely to agree with him as well or be influenced by his position in deciding whether to act in accordance with the sentiments he expressed.

8.2.18.2 The quick response and potential reach of the post is demonstrated by the fact that it received 20 “likes” in 5 hours.

8.2.18.3 Thus, the context of the post does not counteract its content but rather reinforces a conclusion that it constituted prohibited hate speech.

8.3 **14 August 2014 press release**

- 8.3.1 Other than providing a copy of the 14 August 2014 press release, the Respondent did not offer a formal response to the allegations informing him of the complaint.
- 8.3.2 It would therefore appear that the Respondent desired that the 13 August Facebook post should be read in conjunction with the contents of the subsequent press release.
- 8.3.3 The Commission appreciates the subsequent explanation tendered by the Respondent and is mindful of a number of factors including that the Respondent took it upon himself to clarify the meaning of his comment and that he did so within a short space of time.
- 8.3.4 The Commission in particular welcomes the Respondent's explicit statement that he is not calling for violence against Jewish people or against the Second Complainant.
- 8.3.5 It is noted that the subsequent press release may also be interpreted as an admission³² of the fact that the Facebook post was unacceptable, and/or that it may constitute hate speech in terms of the Constitution and PEPUDA.
- 8.3.6 However, while his statement brings clarity on the position in respect of Jewish people generally, the statement with respect to the Second Complainant includes a call for actions that would constitute a measure to "force" the Second Complainant to act in a particular fashion.
- 8.3.7 The Respondent also states twice in this explanatory statement that he "stands by" the statements in his post and suggests that it would be acceptable for the members of the Second Complainant to be deprived of their rights to assemble and demonstrate under Section 17 of the Constitution in retaliation for actions taken by the Israeli government against Palestinians.
- 8.3.8 As noted by the Gauteng High Court in *Qwelane*, this refusal to recognise the hurt, harm and hatred caused by the Facebook post and to make a sincere attempt to address the same does not dispel, but rather exacerbates, the effect of the initial communication.

³² Hotz at para 68.

8.4 ***Harassment***

- 8.4.1 In each of the three statements made in this matter, the Respondent has called for the members of the Second Complainant to be deprived of rights and freedoms guaranteed to them by the Constitution, to be treated as less deserving of equal enjoyment and full protection of the same because of his perception of their views and actions.
- 8.4.2 This conduct, based on its persistence and viewed in light of the reflection and effort to clarify the earlier offensive statements, is clearly one conducted with intent. The finding that the comments with regard to the Second Complainant was made with intent is borne out in the words used by the Respondent to, force the Second Complainant to adopt a course of action which he advocated, by making threats of adverse consequences, and as was done on the basis of a prohibited ground. Accordingly, the comments attract the prohibition against harassment envisaged by Section 11 of PEPUDA.

8.5 ***Human dignity***

- 8.5.1 The words used by the Respondent in the 13 August 2014 Facebook post and the 14 August 2014 press release evidence a lack of respect and concern for the rights of the members of the Second Complainant as fellow South Africans and for them as human beings.
- 8.5.2 The language used by the Respondent to the audience in his comments are ironically very much of a kind which he himself takes a stance against as constituting unacceptable violations to the rights of people in Palestine.
- 8.5.3 The Respondent's actions did not support or advance human dignity but rather in this sense undermine it.

9. **FINDINGS**

In light of the above the Commission makes the following findings:

9.1 ***First Complainant***

- 9.1.1 The Commission finds that the First Complainant's rights were not violated by the Respondent's actions.

9.2 ***Second Complainant***

- 9.2.1 *30 July 2014 statement on Politicsweb - hate speech*

- 9.2.1.1 The Commission finds that the 30 July 2014 statement made by the Respondent was based on a prohibited ground as defined in part (b) of the definition of that term set forth in PEPUDA Section 1.
- 9.2.1.2 The 30 July 2014 statement was not hurtful or harmful within the meaning attributed to those terms by PEPUDA, and it did not promote or propagate hatred toward members of the Second Complainant. Therefore, the Commission finds that the 30 July 2014 statement does not amount to hate speech in terms of Section 10 of PEPUDA.
- 9.2.2 *30 July 2014 Politicsweb statement – freedom of expression of the Second Complainant*
- 9.2.2.1 The 30 July 2014 statement involved robust expression about a matter of significant public interest. The comment called solely for boycotts and pickets, which are actions protected by Section 17 of the Constitution. This call for action is therefore separate, and one which is protected and regulated in domestic law. The call for boycotts therefore does not violate the right of the members of Second Complainant to express their views on the conflict between Israel and Palestine.
- 9.2.3 *The 13 August 2014 Facebook post – hate speech*
- 9.2.3.1 The statements the Respondent made in his 13 August 2014 Facebook post with respect to the Second Complainant advocated unfair discrimination against the Second Complainant.
- 9.2.3.2 The statements of the Respondent advocated that the ability of the members of the Second Complainant to equal enjoy constitutional rights and freedoms, specifically the rights to equality, human dignity, and freedom and security of the person, should be adversely limited. The statements of the Respondent were therefore based on a prohibited ground as defined in part (b) of the definition of that term in PEPUDA.
- 9.2.3.3 In light of the above, the Commission is of the view that the contents of the 13 August 2014 Facebook post can be reasonably construed to demonstrate a clear intention to promote hatred of

the members of the Second Complainant, as is prohibited by section 10 of PEPUDA. Though the Respondent was clearly upset and angered by the situation taking place in Israel and Palestine, the manner in which as a public figure, he expressed his feelings went beyond the robust dialogue protected by the Constitution into the realm of unprotected and unacceptable hate speech.

9.2.4 *Harassment*

9.2.4.1 The conduct called for by the Respondent in his 13 August 2014 Facebook post was calculated to induce submission on the pain of threatened adverse consequences. It was directly related to membership in the Second Complainant and constitutes harassment under Section 11 of PEPUDA.

9.2.5 *Human dignity*

9.2.5.1 The statements the Respondent made in his 13 August 2014 Facebook post with respect to the Second Complainant undermined the human dignity of the members of the Second Complainant.

10. RECOMMENDATIONS

The Commission directs that:

- 10.1 As a public figure, the Respondent make concerted efforts to conduct himself in a manner consistent with constitutional values.
- 10.2 The Respondent refrains from hate speech on Facebook or any other public platform.³³
- 10.3 The Respondent furnish the Second Complainant with a written statement apologising for the statements made in the 13 August 2014 Facebook post and affirming his commitment to constitutional values, within one month of the date that this finding is communicated to the parties.

SIGNED AT CAPE TOWN ON THE

2018

³³ PEPUDA, Section 21(2) (p).

Shanon CT
29/08/2018