



THE SAHRC'S LATEST FINDING ON JULIUS MALEMA

It is with the greatest concern that the FW de Klerk Foundation notes the 8 March 2019 finding of the South African Human Rights Commission (SAHRC) in which it dismisses the Foundation's complaint of November 2016 against Julius Malema. The Foundation lodged a complaint against Malema regarding a statement that he had made outside the Newcastle Magistrate Court, in which he had said, *inter alia*, that *"...White people found peaceful Africans here. They killed them. They slaughtered them like animals. We are not calling for the slaughtering of white people, at least for now. What we are calling for is the peaceful occupation of land and we don't owe anyone an apology for that."*

The SAHRC found that this did not constitute hate speech. In its view, *"a determination of hate speech in this case hinges on whether the addition of 'at least for now' to the statement that Mr Malema is 'not calling for the slaughter of white people' can be reasonably construed to demonstrate a clear intention to incite harm at some indeterminate time in the future. Such incitement is not 'imminent' as per the language of section 16(2)(c) of the Constitution or foreseen at the time when the utterances are made. Moreover, viewed in its context, the statement deals with the subject matter of land dispossession and redistribution, and is not aimed at inciting harm to white people."*

The SAHRC brushed aside the truly chilling implication that Malema might call for the slaughter of white people at some later stage. Also, his highly prejudicial version of history that "white people" slaughtered peaceful Africans "like animals" was clearly intended to sweep up racial hatred. His words, by his own admission, also constituted incitement to cause harm. Does the SAHRC really think that the illegal occupation of the land of white farmers could be achieved without causing them 'harm'?

The very notion that the leader of a major political party in a multi-racial country can say that he is not calling for the slaughter of another ethnic group - "at least for now" - constitutes not only hate speech, but verges on advocacy of genocide at some future date.

The definition of genocide in the United Nations (UN) *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), to which South Africa is a party, includes *"...acts committed with intent to destroy, in whole or in part, a national ethnic racial or religious group."*

South Africa is also a party to the UN's *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), which calls on signatory states, among other things, to:

"(a) declare an offence punishable by law of all dissemination of ideas based on racial superiority or hatred; incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another



colour or ethnic origin and also the provision of any assistance to racial activities including the financing thereof;”

Ironically, the SAHRC is the UN Committee on the Elimination of Racial Discrimination (CERD) agent in South Africa, and is charged with ensuring that the provisions of the Convention are observed in the Republic. In carrying out this responsibility, CERD has instructed the SAHRC to take into consideration the following criteria in its consideration of racism:

- the context and form of speech;
- the economic, social and political climate;
- the position and status of the speaker;
- the reach of the speech.

One can hardly think of more volatile circumstances than those surrounding Malema’s 2016 statement. It was made in the context of heightened racial tensions arising from the complex and vexatious question of land reform and farm murders; it was made to demonstrating EFF followers outside the court and was soon given national and international coverage. The speaker was the leader of the third largest political party in the country.

This was, of course, not the first time that complaints had been made against Malema for racist statements and actions. In September 2011, Judge Colin Lamont found that the singing of the “shoot the boer” song by Malema constituted hate speech. He interdicted Malema and the ANC from singing the song at any public or private meeting held by, or conducted by them.

This did not prevent President Jacob Zuma from the singing the “Kill the Farmer” song at an ANC rally only a few months later on 8 January 2012. The President removed any doubt as to whether this was a struggle song - or one intended for the New South Africa - because in his version “the Cabinet was going to shoot the Boer”. His singing of the song was also the substance of a complaint lodged with the SAHRC - but was, far as we are aware, simply swept under the carpet.

A material point in the SAHRC’s finding was that “white people, albeit a political minority, have significant economic power”. One might, of course, have said the same about prosperous but politically-disempowered minorities in several other societies who became the victims of racial persecution.

In his Malema judgment, Lamont J made an important point in this regard. He said that:

“It must not however be forgotten that minority groups are particularly vulnerable. It is precisely the individuals who are members of such minorities who are vulnerable to discriminatory treatment and who in a very special sense must look to the Bill of



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Rights for protection. The Court has a clear duty to come to the assistance of such affected people.”

“...Minorities have no legislative or executive powers and are compelled to approach the Court to protect their rights. They are particularly at risk due to the expense involved in such approaches...A Court which hears a matter must, while balancing the rights in question, take into account in the construction of what hate speech is the fact that it is directed at a minority.”

Minorities may well ask - in response to the SAHRC’s latest finding - what recourse they have to defend their rights under the Constitution. They can, of course, seek to have the SAHRC’s finding set aside by the courts - but as Lamont J points out, approaches to the courts are expensive.

There is, however, a real question as to whether the SAHRC should be allowed to continue to act as the CERD’s agent in South Africa.

What is also disturbing is that the SAHRC did not even criticise Malema’s statement or call on him to moderate his language. Findings like these by the SAHRC will surely embolden him in his racist attitude and his flouting of constitutional principles. He has no doubt come to realise that there are no consequences for his unacceptable utterances. The public pressure is building up, however, especially in the run-up to the election and his comments about Karima Brown. The question is, how long will public bodies such as the SAHRC let him off the hook, time and again, and how long will he get away with his behaviour?

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