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FOUNDATION

STATEMENT BY THE FW DE KLERK FOUNDATION REGARDING THE SAHRC'S LATEST HATE SPEECH RULINGS

The FW de Klerk Foundation is once again deeply concerned about the hate speech findings made by the South African Human Rights Commission (SAHRC) regarding certain statements made by Mr Malema and other members of the Economic Freedom Fighters (EFF). These include the Foundation's initial complaint against Mr Malema in November 2016, in which he stated that "...*We are not calling for the slaughtering of white people, at least for now*". This was, inexplicably, found by the SAHRC not to be hate speech in terms of section 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (the Equality Act). The SAHRC found that none of the other complaints were hate speech in terms of the Equality Act.

The Foundation disagrees. In its view Malema's statement constitutes a clear breach of section 16(2)(c) of the Constitution, which prohibits "*advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm*". It also breaches section 10 of the Equality Act that prohibits language that could reasonably be construed to be "*hurtful; harmful; incite harm; promote hatred; or propagate hatred*".

In addition, the Foundation is deeply concerned that the SAHRC judgement did not give proper consideration to the hate speech criteria that have been laid down by the Committee on the Elimination of Racial Discrimination (CERD) which oversees the implementation of the *International Convention on the Elimination of all Forms of Racial Discrimination*. These include:

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

The Foundation is concerned that little consideration appears to have been given to these criteria:

- The context and form of speech could hardly have been more incendiary. The statement that "...*White people found peaceful Africans here. They killed them. They slaughtered them like animals...*" could, by any reasonable standard, be expected to stir up hatred - or very negative sentiments - against white people now. The SAHRC's perfunctory dismissal of Malema's statement that "*We are not calling for the slaughter of white people, at least for now*" goes beyond disingenuousness. This is a clear and unambiguous threat that at some time in the future Malema *might* call for the slaughter of white people. This goes beyond hate speech and constitutes a veiled threat of genocide.
- The economic, social and political climate were extremely volatile. Malema's statements must be considered within the context of heightened political tension and growing racial polarisation and against the background of deep concerns over farm



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murders, statements by political leaders that “*whites are not the rightful owners of their land*”, and threats that property will be expropriated without compensation. By his own admission, Malema clearly incited harm by calling for the illegal occupation of white farms - with all the potential for racial conflict that any such action might precipitate.

- The speaker was the leader of the third largest political party in the country with a long record of racially divisive rhetoric - who, in 2011, had been already been found guilty of hate speech.
- Malema’s statement was clearly intended for widespread dissemination. The media and many of his supporters were present when he made the statement, which was almost immediately broadcast throughout the country.

The SAHRC, as the steward of human rights (among these equality) in South Africa, is setting a dangerous and worrying example that could escalate in the run-up to the general election May 2019. We detect a disturbing trend in the SAHRC’s findings, in the emergence of a relativity in determining what is hate speech for whom. It seems that a person’s supposed racial association with past privilege or oppression is a determinant of present rights, including the right to make statements that could be considered hate speech for some, but not for others. This is done by stretching the so called “context” far beyond its internationally acceptable scope. The SAHRC also calls itself the steward of social cohesion in the country. By making such findings, it is actually destroying social cohesion and is undermining confidence in its willingness to protect the human rights of all South Africans equally. Finally, the Foundation believes that the SAHRC should resign as the South African agent of the Committee on the Elimination of Racial Discrimination, as it is clearly not applying CERD’s hate speech criteria.

In a young democracy such as South Africa, freedom of expression should be strenuously defended, but hate speech as understood in terms of the Constitution - and by CERD - has the devastating potential to shred all attempts at reconciliation and social cohesion. Hate speech should be counteracted swiftly, firmly and impartially - whether it emanates from black or white South Africans - by the SAHRC, the institution that the Constitution has established to protect the human rights of *all* South Africans.

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