IN THE PRESS COUNCIL APPEALS COMMITTEE

HELD IN JOHANNESBURG

MATTER NO: 3239/04/17

In the matter between:

PILLAY VERASHINI Appellant

and

AFRIFORUM Respondent

and

MEDIA MONITORING AFRICA 1st Amicus Curiae

SOUTH AFRICAN EDITORS FORUM 2nd Amicus Curiae

HEADS OF ARGUMENT FOR MEDIA MONITORING AFRICA AND THE SOUTH AFRICAN NATIONAL EDITORS' FORUM

INTRODUCTION

1 On 13 April 2017 the Huffington Post website published a piece[1] titled "*Could it be time to deny white men the franchise?*" The piece was published under the pseudonym "Shelley Garland" who, it has since been established, is Mr Marius Roodt. In summary, the piece suggests that white men should be disenfranchised for 20 to 30 years in order to strengthen a "*progressive cause*" and redistribute global assets to their rightful owners.

2 As a result of the publication, various individuals as well as Afriforum lodged a complaint with the Press Ombud. On 24 April 2017, the Press Ombud found, among other things, that the piece amounted to discrimination and hate speech in terms of section 5 of the Code of Ethics and Conduct.

3 Ms Verashni Pillay, the editor-in-chief of the Huffington Post at the time of the publication of Mr Roodt's piece, was granted leave to appeal the Ombud's finding on 6 June 2017.

4 These heads of argument are filed on behalf of two amici curiae: Media Monitoring Africa (**MMA**) and the South African Editors' Forum (**SANEF**).

4.1 MMA is a non-profit organisation that promotes democracy and a culture where media and the powerful respect human rights and

[1] The ruling of the Press Ombud refers to the piece as a "blog". But given that there does not appear to have been any explanation that the piece was a "blog", we use the more neutral term "piece".

encourage a just and fair society. MMA acts in a watchdog role to promote ethical and fair journalism that supports human rights.

4.2 SANEF is a non-profit organisation whose members are editors, senior journalists and journalism trainers from all areas of the South African media. SANEF is committed to championing South Africa's hard-won freedom of expression and promoting quality, ethics and diversity in the South African media.

5 MMA and SANEF only challenge the Press Ombud's finding that the piece amounted to hate speech and do not deal with any further issues.

THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION

6 Section 16 of the Constitution reads as follows:

> *"1. Everyone has the right to freedom of expression, which includes:*
>
> *a) Freedom of the press and other media;*
>
> *b) Freedom to receive and impart information or ideas;*
>
> *c) Freedom of artistic creativity; and*
>
> *d) Academic freedom and freedom of scientific research.*
>
> *2. The right in subsection (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."*

7 Section 16(1) of the Constitution protects freedom of expression. The importance of the free flow of information, particularly information in the public

interest, has been widely acknowledged by our courts. In this regard the Constitutional Court has held that the rights to freedom of expression and freedom of information under section 16 of the Constitution lie at the very heart of a democracy as individuals in society need to be able to hear, form and express views freely on a wide range of matters.[2]

8 In *Khumalo and Others v Holomisa*,[3] the Constitutional Court put it thus:

> *"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. …*
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> *…*
>
> *In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society*. …"(emphasis added)

9 One of the features of the right to freedom of expression important in this case, is that it is not confined to the protection of inoffensive information and ideas. It also protects offensive speech. In *Islamic Unity*,[4] and again in *De Reuck*,[5]

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2 *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at para 7.
3 2002 (5) SA 401 (CC) at paras 22 – 24. See also: *S v Mamabolo* 2001 (3) SA 409 (CC); *Islamic Unity*; *Laugh it Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

4 *Islamic Unity* para 28.
5 *De Reuck v DPP, Witwatersrand Local Division* 2004 (1) SA 406 (CC) para 49.

the Constitutional Court endorsed the point made by the European Court of Human Rights in *Handyside*[6] that Freedom of Expression also protects statements that "*offend, shock or disturb"*.

HATE SPEECH UNDER THE CONSTITUTION

The effect of section 16(2)(c)

10 Section 16(2) of the Constitution qualifies the scope of the section 16(1) right to freedom of expression by providing that the right does not extend to the three listed categories of expression.

11 The third category is relevant to this case. Section 16(2)(c) provides:

> "*The right in subsection (1) does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm*."

12 Section 16(2)(c) of the Constitution thus excludes hate speech from the protection of s 16(1). It tightly defines the hate speech it excludes. It is limited to:

12.1 the advocacy of hatred,

12.2 based on race, ethnicity, gender or religion

12.3 that constitutes incitement;

12.4 to cause harm.

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[6] *Handyside v The United Kingdom* (1976) 1 EHRR 737 at 754.

13 All of these aspects must be satisfied for speech to be regarded as "*hate speech*" in terms of the Constitution. The justification for the exclusion is that the pluralism and broad-mindedness central to an open and democratic society can be undermined by speech which "*seriously threatens democratic pluralism itself*".[7]

14 Once classified as hate speech in terms of section 16(2), the speech enjoys no constitutional protection. *In Islamic Unity*, the Constitutional Court held:

> "*Section 16(2) therefore defines the boundaries 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*."[8]

The test for hate speech

15 The jurisprudence of the Constitutional Court on hate speech demands that section 16(2) be interpreted as narrowly and strictly as possible. In *Islamic Unity*, the Constitutional Court considered the constitutionality of clause 2(a) of the Code of Conduct for Broadcasting Services, which prohibited the broadcasting of material that is '*likely to prejudice relations between sections of the population*".

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[7] *Islamic Unity* para 29.
[8] *Islamic Unity* para 32.

16 The Court held that the clause "*self-evidently limits the right in s 16 of the Constitution. The phrase 'section of the population' in this part of clause 2(a) is less specific than 'race, ethnicity, gender or religion' as spelt out in s 16(2)(c). The prohibition clearly goes beyond the categories of expression enumerated in s 16(2)*."[9] (emphasis added).

17 The underlined phrases show that section 16(2) must be afforded its narrowest meaning. This is because "*the categories of speech referred to in s 16(2)(c), are carefully circumscribed*"[10] so as not to intrude more than necessary on the protection of speech in section 16(1).

18 In order for speech to be hit by section 16(2), it must (1) advocate hatred on the listed grounds and (2) constitute incitement to cause harm. Two cumulative elements must therefore be present before an expression can be considered hate speech. One without the other does not suffice.

Advocacy of hatred

19 Currie and de Waal[11] define "*advocacy of hatred*", as follows:

> "*To advocate hatred to is to propose or call for it, to make a case for it. Hatred is an extreme emotion and advocacy of hatred should be confined to statements manifesting "detestation, enmity, ill-will and malevolence*."[12]

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9 *Islamic Unity* para 35.
10 *Islamic Unity* para 36.
11 *I Currie et al. The Bill of Rights Handbook Juta (2013) at page 359.*
12 Quoting *R v Andrews* (1988) 65 OR (2d) 161, cited in *R v Keegstra* [1990] 3 SCR 697 at 777.

20 Similarly, in *Afrifourm v Malema*[13], Bertelsmann J said that the speech is question ("*kill the boer*") met the requirement of "*advocacy of hatred*" because, among other things, it was *"extremely aggressive language*".

21 This accords with the jurisprudence of other constitutional democracies. The Canadian Supreme Court, for example, defines hatred as *"active dislike, detestation, enmity, ill-will, malevolence"*; hatred is limited to only the most severe and deeply felt opprobrium and is usually a strong and deep-felt emotion of detestation, calumny and vilification.[14]

Incitement to cause harm

22 The second element, "*incitement to cause harm*", in turn has two aspects, namely, "*incitement*" and "*harm*".

22.1 "*Incitement*" connotes urging, provoking or agitating certain behaviour or action.

22.2 "*Harm*" includes not only physical, but also emotional and psychological harm.[15]

23 In determining whether speech incites harm, the speech must be assessed objectively. As the Constitutional Court explained in *S v Mamabolo,* albeit in a different context:

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13 *Afriforum and Another v Malema* 2010 (5) SA 235 (GNP) p.239.
14 *R v Keegstra* [1990] 3. S.C.R. 697 para 14
15 See *Afrifourm v Malema* [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC) (12 September 2011) paras 29 and 30; *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (**SAHRC**).

> *"Whether one is looking at an allegedly scandalising statement, or an allegedly defamatory or fraudulent one, this particular part of the enquiry has to ask what the effect of the statement was likely to have been. It is an objective test, applied with the standard measure of reasonableness, in order to establish whether the harmful effect at which the law strikes, came about or not. Therefore one does not ask — indeed it is not permissible for a party to try to prove — what the actual effect of the disputed statement was on one or more publishees. The law regards it as more reliable to infer from an interpretation of the statement what its consequence was."*[16]

24 A similar approach was taken by Bertlesmann J in *Afriforum v Malema*, where he held that *"[t]he true yardstick of hate speech is neither the historical significance thereof nor the context in which the words are uttered, but the effect of the words, objectively considered, upon those directly affected and targeted thereby*".[17]

25 In considering the likely effect of the words, the Constitutional Court has adopted the test of the "*reasonable reader*". In the case of *Le Roux v Dey*[18] the Constitutional Court said:

> *"In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons by whom it was published, whether or not they believed it to be true or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied."* [19]

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16 *S v Mamabolo* 2001 (3) SA 409 (CC) at para 43.
17 *Afriforum and Another v Malema* 2010 (5) SA 235 (GNP) p.239.
18 2011 (3) SA 274 (CC).
19 At para 89.

26 In other words, the subjective intent of the author of a piece is not the focus in determining whether it violates the Code. Rather, the focus is on how, objectively, the reasonable reader would have received and understood the piece.

HATE SPEECH UNDER THE PRESS CODE

27 We have thus far considered the meaning of hate speech under the Constitution. We now turn to deal with hate speech under the Press Code.[20]

28 The Press Council is the self-regulatory body for the South African media. As a member of the Press Council, Huffington Post is subject to its code of ethics and conduct. The Press Code therefore governs the manner in which the media exercises their right to freedom of expression and also provides for certain limitations of this right.

29 The Preamble of the Code reproduces section 16 of the Constitution. It emphasises:

29.1 the essential role of the media in "*realising the promise of democracy*";

29.2 that "*the media's work is guided at all times by the public interest, understood to describe information of legitimate interest of importance to citizens*";

29.3 that the media must strive for truth, avoid unnecessary harm and reflect a multiplicity of voices.

[20] "Code of Ethics and conduct for South African print and online media" (Effective from January 1, 2016)

30 The Code is divided into two main chapters. Chapter 1 is applicable to media-generated content and activities; Chapter 2 is applicable to user-generated content. Both chapters deal with hate speech:

30.1 Section 5 of Chapter 1 (applicable to media-generated content) provides:

"***5. Discrimination and Hate Speech***

5.1. Except where it is strictly relevant to the matter reported and it is in the public interest to do so, the media shall avoid discriminatory or denigratory references to people's race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or other status, nor shall it refer to people's status in a prejudicial or pejorative context.

5.2. The media has the right and indeed the duty to report and comment on all matters of legitimate public interest. This right and duty must, however, be balanced against the obligation not to publish material that amounts to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

30.2 Section 14 of Chapter 2 (applicable to user-generated content) provides:

"***14. Prohibited Content***

14.1. Material constitutes prohibited content if it is expressly prohibited in a member's UGC Policy.

14.2. In addition to, and notwithstanding anything to the contrary contained in a member's UGC Policy, content which contains the following:

14.2.1. Propaganda for war;

14.2.2. Incitement to imminent violence;

14.2.3. Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm constitutes prohibited content for the purpose of this Code."

31 Though the position is not entirely clear, it seems likely to us that the piece presently at issue falls under Chapter 1 of the Code (media-generated content) and therefore that the relevant clause is 5.2 of the Code. However, ultimately nothing turns on this issue as the piece would not amount to hate speech under either clause 5.2 or clause 14.2

32 Both clauses 5.2 and 14.2 track the wording of section 16(2) of the Constitution.

33 There is one major difference.

33.1 Clause 5.2 does not contain an outright prohibition on hate speech as defined in the Constitution.

33.2 Rather, it refers to the fact that the right and duty to report on comment on all matters of *"legitimate public interest"* must be *"balanced"* against the obligation not to publish material that amounts to hate speech.

33.3 This approach is to be welcomed. It is a recognition that sometimes it will be necessary and in the public interest for the media to report on hate speech uttered by someone, particularly a public figure – because it is important that the public be made aware of the hateful sentiments being expressed. For example, if a senior member of a political party were to call for women or Pedi people or Muslim people to be killed, it may well be necessary that the public was made aware of that.

34 Thus, when considering whether a piece violates clause 5.2 to a piece, the Press Ombudsman is required to ask three different questions before concluding that the piece violates the clause:

34.1 Does the piece amount to advocacy of hatred that is based on race, ethnicity, gender or religion? If not, the complaint must be rejected.

34.2 If so, does the piece constitutes incitement to cause harm? If not, the complaint must be rejected.

34.3 If so, is there some overarching public interest that justified the publication of the piece? If so, the complaint must be rejected.

35 As we demonstrate in what follows, the Press Ombud regrettably failed to follow this approach.

THE FINDINGS BY THE PRESS OMBUD

36 The Press Ombud found that the piece amounted to hate speech and this violated the Code. The relevant section of the ruling reads as follows:

> *"There are many definitions of hate speech, and it is a lively debate which reaches even Parliament and our courts.*
>
> *As far as this office is concerned, Section 5.2 should determine this office's considerations – but it should be read in conjunction with Section 5.1 as well.*
>
> *This means that hate speech can be described:*
> *first and foremost, as material that amounts to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race and gender (etc.), and that constitutes incitement to cause harm (Section 5.2); and*
> *as discriminatory or denigratory references to people's race, gender, etc. (Section 5.1).*

I find the contribution of Mercy Muendo of the Mount Kenya University (theconversation.com) in this regard quite helpful (in which she combines the contents of Sections 5.1 and 5.2 of our Code).
I have amended her criteria for identifying hate speech slightly to boil them down to the following questions:
Is the speech likely to be inflammatory, discriminatory, hostile, and is it targeting a particular group?
How influential is the speaker?
Is the audience likely to react violently?
Have similar statements led to violence?
As the blog was indeed inflammatory, discriminatory, and targeting a specific group of people, I believe it can be described as hate speech on that basis (Section 5.1) alone.
I accept that the text itself did not directly propagate violence – but if the actions it advocates were ever put into practice, they might well lead to just that.
I therefore have little hesitation in labelling [sic] the content of the blog as hate speech, and therefore in breach of the Code."

37 To the extent that the Ombud formulates a test for hate speech, it is with respect wrong:

37.1 It is impermissible to conflate sections 5.1 and 5.2 of the Code. Speech that is discriminatory is not necessarily hate speech.

37.2 The proper test is not, even in part, "*if the actions it advocates were ever put into practice, it may lead to violence*". The speech is not the act.

38 Rather, the three questions to be asked were those we set out at paragraph 34 above. In what follows we apply these questions to the piece.

ANALYSIS

39 In short, the piece argues that South Africa's (and the world's) troubles have been caused by white men. What's more, the privilege of white men seem

unassailable and immutable. Therefore radical steps needs to be taken to undo centuries of abuse, including disenfranchising white males for a few decades and seizing the assets they accumulated unfairly over time.

Does the piece amount to advocacy of hatred that is based on race, ethnicity, gender or religion?

40 The tone of the piece is not aggressive or inflammatory. If anything, it is *faux* academic: it is measured and seeks (even if it fails) to persuade through a form of inductive reasoning.

41 What would the piece mean to the reasonable reader of ordinary intelligence of the Huffington Post? The reasonable reader, in our view, would regard the piece as one of three options: plain stupid, a spoof, or a *faux* academic thought experiment trying to solve the intractable problem of white male privilege.

42 The piece does not advocate or call for hatred. It does not contain statements manifesting *"detestation, enmity, ill-will and malevolence"*.[21] It does not describe white men as bearing any intrinsic characteristics that deserve to be despised. Rather, it depicts them as disproportionately powerful, economically and politically.

43 Accordingly, the piece falls below the threshold advocating hatred. On this basis alone, the hate speech complaint cannot succeed.

[21] See footnote 12 above

Does the piece constitutes incitement to cause harm?

44 If the piece does not advocate hatred, then there is no need to consider whether it constitutes "incitement". We do so out of an abundance of caution.

45 The piece clearly offended and outraged some people. It may have made white men feel uncomfortable. But that, as the Constitutional Court expressly said in *Islamic Unity*,[22] does not amount to hate speech.

46 Rather, the question is whether the piece could reasonably be said to be incite the causing of physical or significant psychological harm to anyone.

47 We submit that it cannot. It cannot seriously be contended that a piece of this sought would result in:

47.1 People forcibly removing white men from voting queues; or

47.2 South African lawmakers deciding to disenfranchise white men.

48 This is so whether one views the piece as a faux-academic piece or a spoof.

48.1 If the former, it plainly does not amount to the kind of "incitement" that is required for hate speech to be established.

[22] In *Islamic Unity* it was held at para 36:
"*Not every expression or speech that is likely to prejudice relations between sections of the population would be 'propaganda for war', or 'incitement of imminent violence' or 'advocacy of hatred' that is not only based on race, ethnicity, gender or religion, but that also 'constitutes incitement to cause harm*'."

48.2 If the latter, the same applies. Our law gives wide latitude to humour. In the *Laugh it Off* case Sachs J[23] asked, "Does the law have a sense of humour?" He went on to say:

> *"A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health.*" [24]

49 A cursory comparison of the piece to, for example, the "*kill the boer*" song and slogan, illustrates how far the piece is from hate speech. That speech is highly aggressive and (at least literally) calls for the murder of the farmer and the boer. A quasi-academic rumination of how nice it would be to disenfranchise white men in our constitutional democracy could not be more different.

Is there some overarching public interest that justified the publication of the piece?

50 As we have already explained, the piece met neither of the first two requirements for hate speech. Once that was so, there could be no violation of clause 5.2.

51 However, if the piece had met both of these requirements, the Ombud was required to balance Huffington Post's right and duty to publish an opinion of public interest on the one hand and its obligation not to publish hate speech on the other. He states in a throw-away line that the piece is of no public

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[23] in a separate concurring judgment

[24] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) SA 144 (CC)* para 109.

interest. This cannot be so. A piece considering the persistence of white male privilege is highly topical in South Africa today. Depending on the circumstances, there may be a significant public interest in hearing all genuine views on the subject, however extreme, wrong-headed and offensive.

52 However, notwithstanding this, we consider that if the piece had satisfied the two requirements for hate speech, its publication would probably not have been saved by the public interest issue. This is because there a series of other problems with the piece.

52.1 First, it is clear that the Huffington Post was entirely unaware of who "Shelley Garland" was and the fact that it was a pseudonym. On this basis alone, the publication of a piece which amounted to hate speech would likely not have been saved by the public interest defence.

52.2 Indeed, as a general proposition beyond the realms of hate speech, while it will be permissible for media organisations to publish pieces under a pseudonym, we are of the view that the editor at least must know the author's real name and that the published piece should make clear that it is being published under a pseudonym.

52.3 Second, it was not sufficiently clear to the reader that the piece was an individual's comment rather than the voice of the Huffington Post. Even in respect of user-generated comment, clause 13.7 of the Code provides that *"[t]he public should be informed that UGC is posted directly by users and does not necessarily reflect the view of the member*."

52.4 Third, the Huffington Post did not pick up or point out the numerous factual errors in the piece.

53 Thus, if the piece had amounted to hate speech, its publication would likely have violated the Code. But, as explained, given that the piece does not meet either of the first two requirements for hate speech, the public interest issue does not arise.

CONCLUSION

54 It is critical to our democracy that hate speech be defined as narrowly as possible. Once speech is labelled “hate speech”, it loses all constitutional protection, and its value cannot be weighed against other rights and values. That category must be reserved for only the most egregious forms of speech.

55 The piece might have been offensive and prejudicial and even have fermented social relations in South Africa. It created unease and discomfort but it did not advocate hatred, let alone incite harm. By defining hate speech too broadly, the Ombud has formulated a test that is likely to stifle the multiplicity of voices that characterises a constitutional democracy in which openness and debate are fostered.

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20 July 2017