

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No.: 44685/2023

In the application of:

MEDIA MONITORING AFRICA TRUST

Applicant for admission
as an *amicus curiae*

In the matter between:

KOPANANG AFRICA AGAINST XENOPHOBIA

First Applicant

SOUTH AFRICAN INFORMAL TRADERS FORUM

Second Applicant

INNER CITY FEDERATION

Third Applicant

AB AHLALI BASEMJONDOLO MOVEMENT SA

Fourth Applicant

and

OPERATION DUDULA

First Respondent

**GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA**

Second Respondent

MINISTER OF POLICE

Third Respondent

**NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Fourth Respondent

MINISTER OF HOME AFFAIRS

Fifth Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Sixth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL:
GAUTENG DEPARTMENT OF HEALTH**

Seventh Respondent

MINISTER OF HEALTH

Eighth Respondent

MINISTER OF BASIC EDUCATION

Ninth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL:
GAUTENG DEPARTMENT OF EDUCATION**

Tenth Respondent

ZANDILE DABULA

Eleventh Respondent

DAN RADEBE

Twelfth Respondent

**THE SOUTH AFRICAN
HUMAN RIGHTS COMMISSION**

Thirteenth Respondent

and

SECTION27

First *Amicus Curiae*

THE INTERNATIONAL COMMISSION OF JURISTS

Second *Amicus curiae*

MEDIA MONITORING AFRICA TRUST'S HEADS OF ARGUMENT

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INTRODUCTION

1. The pervasive influence of social media on contemporary society is undeniable. It has not only reshaped public discourse but has also become a formidable force in shaping perceptions, influencing behaviour, and impacting fundamental rights. The South African Human Rights Commission, in the inaugural edition of its Social Media Charter, aptly observed that:

“Despite gains made since 1994 following the advent of democracy in South Africa, prejudice still abounds. There are instances of prejudice and harmful conduct that are increasingly being conveyed via social media platforms and such negative conduct is a threat to democracy in South Africa.”¹

2. In this matter, the applicants seek, *inter alia*,² an interdict against the first respondent (“**Operation Dudula**”), the eleventh respondent (“**Ms Dabula**”), and the twelfth respondent (“**Mr Radebe**”), restraining them from making public statements that constitute hate speech on the grounds of nationality, social origin, or ethnicity—whether at public gatherings, on social media platforms, or in any other way.³ Media Monitoring Africa Trust (“**MMA**”) seeks

¹ South African Human Rights Commission’s Social Media Charter (SAHRC Social Media Charter) at p1. Available here:

<https://www.sahrc.org.za/home/21/files/SAHRC%20Social%20Media%20Charter%20FINAL.pdf>

² The applicants seek 5 categories of relief against the various respondents. Applicants’ HOA at para 5, p2 – 3. CL 09-7 – 09-8.

³ Applicants’ Amended NOM at para 5.2, CL02-31.

to intervene as an *amicus curiae* to address the social media dimension of the relief sought.

3. Operation Dudula utilises social media as part of its campaign steeped in hate speech against foreign nationals in South Africa.⁴ What started online quickly spilt into the real world, as detailed in the applicants' founding papers, escalating into the forced removal of foreign nationals from their trading stalls, evictions from their homes, and interference with children's access to education.
4. This chilling evolution underscores the crux of MMA's submissions: that online harms do not remain confined to digital spaces but take root in lived realities. In this context, the right to freedom of expression must be carefully weighed against the fundamental rights to dignity and equality.
5. MMA's substantive submissions are supportive of the relief sought by the applicants and are narrowly tailored to three key issues of law that are relevant to the present matter:

5.1. **First**, the recognising and balancing of rights online;

⁴ Applicants' FA at annexure KX62, para 4.1 CL03-287.

5.2. **Second**, the proper approach to balance the tensions between the right to freedom of expression and the rights to dignity and equality online; and

5.3. **Third**, the key factors in assessing the context and impact of online content.

6. I now turn to deal with the application for admission as an *amicus curiae*. Thereafter, I deal with MMA's substantive submissions as outlined above.

MMA'S ADMISSION AS AN *AMICUS CURIAE*

Role and importance of an *amicus curiae*

7. In *Hoffmann v South Africa Airways*, the Constitutional Court explained that⁵—

“[a]n amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its

⁵ *Hoffmann v South African Airways* 2001 (1) SA 1 para 63.

expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.”

8. *In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign*, it was explained that the role of the *amicus curiae*—

*“is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court.”*⁶

9. Our courts value the role of an *amicus curiae*, and have noted the role of an *amicus curiae* as “very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights”, with the purpose of Rule 16A “to facilitate the role of *amici* in promoting and protecting the public interest.”⁷

10. In the present matter, MMA is cognisant of the “special duty” that it owes to this Court to provide cogent and helpful submissions, to be of assistance to

⁶ [2002] ZACC 13 at para 5.

⁷ *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) at para 26.

this Court in the determination of this matter, and to promote constitutional rights and values. MMA does not seek to adduce new evidence but rather raises substantive matters of law that are relevant to the constitutional and contextual underpinnings of this matter.

11. MMA, a not-for-profit organisation, submits that the Court's decision in this case will have significant implications for online safety, combatting disinformation, and protecting fundamental rights in the digital space. Given its longstanding advocacy for freedom of expression and access to information, while ensuring appropriate safeguards against online harms, MMA is uniquely positioned to assist the Court in navigating the complex interplay between the applicable competing rights.

Requirements for admission as an *amicus curiae*

12. On 6 December 2024, MMA requested consent from the parties to intervene as an *amicus curiae*, subsequently, MMA made an application to the above Honourable Court to be admitted in this matter on 13 December 2024.
13. At this stage of the proceedings, MMA has secured the consent of the applicants and the thirteenth respondent. In *Treatment Action Campaign*, the Court affirmed that a party may be admitted as an *amicus curiae* "on the basis of the written consent of all the parties in the proceedings or on the basis of

an application addressed to the Chief Justice”.⁸ However, the Court retains discretion in such matters, provided that the participation of an *amicus* offers assistance it would not otherwise receive. As MMA has not obtained written consent from all parties, it submits that the Court can exercise its discretion and admit its participation, ensuring that the Court benefits from novel and valuable submissions that will aid its decision.

14. It is well established that for a party to be admitted as an *amicus curiae*, the following criteria must be met:

- 14.1. The party must have a legitimate interest in the proceedings;

- 14.2. Its submissions must be relevant to the case; and

- 14.3. It must introduce new arguments that could assist the Court.

15. MMA meets all three of these requirements:

- 15.1. **Interest:** MMA’s interest in this matter has been outlined both above and in its Founding Affidavit submitted in support of its application for admission as an *amicus curiae*. MMA is a not-for-profit organisation

⁸ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 3.

dedicated to promoting media freedom, freedom of expression, and access to information in South Africa and across the continent. Over the past 31 years, MMA has consistently worked on key human rights issues, advocating for democracy, justice, and equality. MMA has extensive experience in balancing freedom of expression with other competing rights and interests both on- and offline and has a rich history of engaging in notable cases addressing the balance of freedom of expression and dignity.

15.2. **Relevance:** The submissions MMA intends to present are directly relevant to the constitutional and contextual considerations in this case. Specifically, MMA will highlight the applicability of rights online and the appropriate balance to be struck when assessing speech and content online. Additionally, MMA will advance submissions on the unique context of speech online, and the impact of hate speech, incitement, and disinformation online on the rights to dignity and equality. MMA has carefully tailored its submissions to align with the core questions before the Court, ensuring their direct relevance to the adjudication of this matter.

15.3. **Novelty and Usefulness:** MMA's submissions will assist the Court by providing international and regional law, norms and standards that display the importance of the protection and promotion of rights in the digital era. They will also provide insight into the tensions between

balancing the right to freedom of expression and the right to dignity and equality online and emphasise the need to balance these competing interests. While the applicants have sought an interdict against the Dudula Respondents from “making public statements that constitute hate speech on the grounds of nationality, social origin or ethnicity at public gatherings, on social media platforms or in any other way”,⁹ and provided evidence that these harms have occurred,¹⁰ they do not elaborate on the necessity of balancing the right to freedom of expression and dignity on digital platforms. MMA’s submissions go further by offering a novel perspective.

16. In addition to the substantive criteria, Rule 16A sets out procedural requirements. As detailed in its founding affidavit, MMA requests condonation for non-compliance with the Uniform Rules. It submits that no parties have suffered, or will suffer, any prejudice due to the late filing of this application and that the delay is reasonable in the circumstances.
17. MMA submits that its non-compliance with the Uniform Rules be condoned, submitting that MMA became aware of the matter at an advanced stage and MMA took reasonable steps to ensure that its submissions would be novel and relevant. Accordingly, and in order to avoid further delay, MMA has filed its

⁹ Applicants’ FA at para 6.5.2 CL 03-6.

¹⁰ Applicants’ HOA at para 40.1 CL09-24.

written submissions on the date directed by the court despite its late intervention in the matter.¹¹ MMA further submits, that in the interest of convenience and expedience, its application, which is unopposed, should be heard together with the Main Application. This would not prejudice any parties, and MMA's submissions—while distinct from those of the other parties—are relevant and will assist the Court in reaching a well-informed decision.

RECOGNISING AND BALANCING RIGHTS ONLINE

The same rights that apply offline apply online

18. The advent of the internet, and social media platforms in particular, has fundamentally changed the way in which we engage with the world, including how we communicate, socialise, learn, work and participate. While this has presented significant opportunities for the exercise of the right to freedom of expression and access to information, it has also raised a number of pressing challenges regarding the dissemination of information online. This is of particular concern where there is the publication of content that damages the rights of others, including the rights to dignity and equality.

¹¹ See MMA's Application to Intervene as an *Amicus Curiae* paras 34 – 45.

19. The United Nations Human Rights Council (“**UNHRC**”) has reaffirmed on multiple occasions that “the same rights that apply offline apply online”.¹² At a regional level, the African Commission on Human and Peoples’ Rights (“**ACHPR**”) has similarly affirmed that “the same rights that people have offline should be protected online.”¹³
20. MMA submits that this has particular relevance to this matter. MMA submits, in line with the prevailing position regarding the applicability of rights both on- and offline, the online conduct of the Dudula Respondents, should be considered as a rights issue, and that the rights at play in this matter – freedom of expression, dignity, and equality, among others – should be understood and applied in the context of the digital era.

BALANCING COMPETING RIGHTS

21. Competing rights and interests are a common characteristic of diverse societies, such as ours.¹⁴ When these tensions arise, an appropriate balance

¹² United Nations Human Rights Council (“**UNHRC**”), ‘Resolution adopted by the Human Rights Council on 13 July 2021 47/16: The promotion, protection and enjoyment of human rights on the Internet’ (2021) *A/HRC/RES/47/16* at 2. See further UNHRC, The promotion, protection and enjoyment of human rights on the Internet (2012) *A/HCR/RES/20/8*; UNHRC, ‘The promotion, protection and enjoyment of human rights on the Internet’ (2016) *A/HRC/32/L.20*.

¹³ African Commission on Human and Peoples’ Rights, “Declaration of Principles on Freedom of Expression and Access to Information in Africa” (2019).

¹⁴ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) (“**Arena Holdings**”) at para 129.

is required.¹⁵ Such a balance should be struck in a way that encourages the tolerance and respect for diversity that our Constitution demands from all in our society.¹⁶ Central to the issues before this Court is the need to balance the rights to dignity and equality,¹⁷ and freedom of expression.¹⁸ As this case demonstrates, these tensions manifest online, necessitating an approach of balancing those rights and interests.

22. In this matter, the applicants' case against the Dudula Respondents, highlights the tensions that can arise in the context of freedom of expression of the Dudula Respondents and their engagement online on the one hand, and the right to dignity and equality of foreign nationals in South Africa on the other.
23. Freedom of expression, which lies at the "heart of a democracy", is not absolute.¹⁹ Where content – such as Tweets or posts – subverts the dignity and self-worth of others, marginalises and delegitimises individuals based on their nationality, and violates the rights of another person or group of persons based on group identity, it is not protected under the right to freedom of expression.²⁰ Although freedom of expression is central to democracy, it does not extend to speech that degrades others, incites harm, or promotes

¹⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 at para 114.

¹⁶ *Prince v President of the Law Society of the Cape of Good Hope* (2) SA 794 ("**Prince**") para 147.

¹⁷ Section 9 and 10 of the Constitution.

¹⁸ Section 16 of the Constitution.

¹⁹ *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) ("**Qwelane**").

²⁰ *Qwelane id* at paras 1 and 81

discrimination and hatred based on group identity. There is a clear distinction between speech that is merely offensive or provocative and speech that actively incites discrimination or violence against a particular group.²¹

24. In ***Islamic Unity***, the Constitutional Court confirmed that there are “boundaries beyond which the right to freedom of expression does not extend” and “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”.²²
25. Content posted online or on a social media platform that incites xenophobic violence and discrimination against foreign nationals, is content that falls outside the realm of protected speech. Content that undermines a person’s or a group’s dignity or marginalises or delegitimises individuals based on their group identity, or causes harm, particularly when rooted in nationality, social origin, or ethnicity, falls outside the scope of protected expression.
26. As set out below, in order to meaningfully conduct an appropriate balancing exercise, it is necessary to consider the broader context in which Operation Dudula operates. The Constitutional Court has endorsed the need for a

²¹ *Id* paras 73-76.

²² *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) (***Islamic Unity***) at para 32.

contextual approach in *Qwelane*,²³ where it stated that to determine whether a statement amounts to hate speech relevant factors must be considered such as “who the speaker is, the context in which the speech occurred and its impact”.²⁴ Further, in *Masuku*²⁵ the Constitutional Court stated that “context, to the objective person, is important and instructive of meaning”.²⁶ Therefore, in this matter, context is instructive for how Operation Dudula’s actions should be interpreted and analysed, which in turn informs the appropriate balance to be struck in the circumstances.

ASSESSING THE CONTEXT AND IMPACT OF ONLINE CONTENT

Context

27. As a movement that has been widely criticised for its xenophobic rhetoric and targeted actions against foreign nationals, both in physical spaces and online, Operation Dudula’s activities must be scrutinised under the legal framework governing hate speech, harassment, and the incitement of violence. Understanding the real-world impact of its operations particularly its amplification of xenophobic narratives through digital platforms provides

²³ *Qwelane* 2021 (6) SA 579 (CC).

²⁴ *Id* at para 176.

²⁵ South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another 2022 (4) SA 1 (CC) (“*Masuku*”).

²⁶ *Id* at para 144.

critical insight into the necessity of legal interventions that balance freedom of expression with the rights to dignity, equality, and protection from harm.

28. The assessment of speech and content must consider both the broader socio-political climate and the digital landscape in which it occurs. Operation Dudula operates in a highly volatile South African context, where xenophobia, institutionalised discrimination, and political endorsement of anti-foreigner sentiment have been well-documented by domestic and international bodies.
29. This hostility extends online, where social media platforms accelerate the spread of information, amplify harmful narratives, and reinforce echo chambers. The evolving role of social media users—as both creators and disseminators of content—further shapes the impact of online speech, making contextual analysis essential.

The South African Context

30. Three United Nations Experts²⁷ issued a joint press release in which they stated that “discrimination against foreign nationals in South Africa has been institutionalised both in government policy and broader South African

²⁷ The experts: Ms E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions; Mr. Felipe González Morales, Special Rapporteur on the human rights of migrants. annexure KX66 to the Applicants’ FA CL03-384..

society”.²⁸ According to the applicants’ Heads of Argument, “xenophobic violence has resulted in at least 612 deaths and the displacement of 122 298 persons”.²⁹ The effects of xenophobia have been felt both on- and offline for foreign nationals who have been scapegoated for a myriad of South Africa’s social and economic problems.

31. The Committee on the Elimination of Racial Discrimination (“**CERD**”), a treaty body tasked with monitoring and interpreting the Convention on the Elimination of All Forms of Racial Discrimination to which South Africa is a state party, noted that despite legislation prohibiting hate speech, harassment and racial discrimination, there was a “concerning prevalence of hate crime and racist hate speech, including in the media, on the Internet and in social media, particularly against non-citizens”.³⁰
32. MMA supports the cautions from the UN experts and submits that the Court should actively consider the on- and offline South African context within which Operation Dudula operates as both perpetuating the abuse of rights violations against foreign nationals.

²⁸ Achiume, Tidball-Binz and González Morales “South Africa: UN experts condemn xenophobic violence and racial discrimination against foreign nationals” *United Nations* (15 July 2022) (**UN Experts Statement**). Attached as annexure KX66 to the Applicants’ FA CL03-383 – 03-385.

²⁹ Applicants’ HOA at para 14, CL09-11 – CL09-12.

³⁰ Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined ninth to eleventh periodic reports of South Africa’ CERD/C/ZAF/CO/9-11 (2023).

Unique context presented by social media platforms

33. In light of Operation Dudula's use of social media and messaging platforms,³¹ the impact on social media, the unique context presented by social media platforms is of further relevance to the present matter. Those who share and receive content, as well as the platform on which the content is shared, form part of this unique contextual understanding.
34. The concept of the reasonable reader has been recognised by domestic and international courts in relation to the interpretation of defamatory statements made both on- and offline. In *Le Roux*, the Constitutional Court stated that the test to be applied when establishing the ordinary meaning of a statement is an objective one which considers "what meaning the reasonable reader of ordinary intelligence would attribute to the statement".³²
35. While a South African Court has yet to apply the reasonable reader to the online context, in *Stocker v Stocker*, the UK Supreme Court explained that:¹⁴

"The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings

³¹ For example, Operation Dudula's tweet at "KX6" of the Applicants Founding affidavit CL 04-68; Applicants Heads of Argument at para 28 CL: 09-20.

³² *Le Roux and Others v Dey* 2011 (3) SA 274 (CC).

and tweets are made and read.”

36. These elements should be appropriately considered in determining the reasonable reader in the context of social media in the present matter. The South African context and the average social media user’s exposure to anti-foreigner content and sentiment should also be included in this analysis for the Court to accurately determine the resultant harm and appropriate remedy.
37. Exposure can be driven by the nature of the content. According to the Special Rapporteur on the Promotion and Protection of the Right to freedom of Opinion and expression (“**UNSR on FreeEx**”), disinformation is “designed to promote sensational content that keep users engaged on platforms”.³³ It “thrives in an online environment that encourages amplification” and is often “amplified by algorithms”.³⁴ According to the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and related intolerance (“**UNSR on Intolerance**”) the fact that algorithms shape content has contributed to the creation of echo chambers, where “people are only shown material that reinforces and amplifies pre-existing views and beliefs, increasing engagement but also deepening harmful racial stereotypes and spreading hate speech”.³⁵

³³ United Nations General Assembly, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Disinformation and freedom of opinion and expression’ A/HRC/47/25 (2021) at para 16 (**UNSR on FreeEx**).

³⁴ *Id.*

³⁵ United Nations General Assembly, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’ A/78/538 (2023) (**UNSR on Intolerance Report**) at para 20.

38. The pervasive exposure to disinformation and other forms of harmful or hateful content on social media, when viewed alongside evolving jurisprudential conceptions of the “reasonable reader”³⁶ in the digital domain, are important factors to consider in this matter.

Impact

39. In addition to assessing context, it is necessary to consider the impact, as well as the likelihood of inflicting harm and propagating hatred of online speech. In considering these issues, MMA brings to the court’s attention:

- 39.1. The manifestation and real-life consequences of online hate speech, noting that certain manifestations of online hate speech may be serious enough to be considered incitement to discrimination, hatred or violence.³⁷ Even in cases where online speech does not amount to incitement to hate speech, discrimination, hostility or violence, it can still be a factor in offline violence or hate and can erode our social fabric and undermine equality and non-discrimination.

³⁶ See *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) at para 31 and the cases cited therein (*Monroe v Hopkins* [2017] EWHC 433 (QB) para 35; *Stocker v Stocker* [2019] UKSC 17; [2020] AC 5903; 2019 (3 All ER 647 (SC) para 41.).

³⁷ UNSR on FreeEx above n 33 at para 26.

39.2. Further, while disinformation and falsehoods are distinct from hate speech and incitement, online hate speech can be linked to the dissemination of disinformation. There is a nexus between disinformation and certain content that may be harmful to the dignity of one or more persons, which compounds harmful stereotypes and related disinformation, can potentially make violence against targeted groups more acceptable and arguably more likely.³⁸

Real-life consequences of online hate speech

40. The UNSR on Intolerance has called online racist hate speech “a global phenomenon”,³⁹ the consequences of which can be “life-threatening. . . and in the most extreme cases can amount to incitement to discrimination, hostility or violence”.⁴⁰ Often this type of hate speech “promotes stereotypes and spreads hatred towards members of groups that are the most vulnerable to racial discrimination”.⁴¹

41. Domestically, the South African Human Rights Commission (“**SAHRC**”) found in their report into the July 2021 Unrest in Gauteng and Kwa-Zulu Natal (2021

³⁸ *Id.*

³⁹ UNSR on Intolerance Report above n35.

⁴⁰ *Id* at para 28.

⁴¹ *Id* at para 14.

Report) that “social media platforms have proven to be vulnerable to being used to fuel unrest within societies”.⁴²

42. During this period of unrest—

*“access to vital services such as food, medicine, medical care, security, and basic education as well as important national and international supply chains were disrupted. It was reported that 40 000 businesses and 50 000 informal traders were affected, with 150 000 jobs put at risk. The financial damage of the Unrest was estimated at R50 billion, and approximately 353 lives were lost.”*⁴³

43. The 2021 Report found that “the failure to promptly address and counter digital orchestration and instigation through social media and other online platforms allowed the Unrest to grow. This suggests that online communication and coordination played a role in fuelling the violence”.⁴⁴ Further, the “ease of organizing and coordinating through social media enabled the swift mobilisation of groups with disruptive intentions, leading to the Unrest, and ultimately, human rights abuses.”⁴⁵

44. The 2021 Report found that much of the Unrest happened through the “secondary” acting. The “orchestrators, it appears, relied on the substantial

⁴² South African Human Rights Commission The National Investigative Hearing Report into the July 2021 Unrest in Gauteng and Kwa-Zulu Natal (January 2024) (**SAHRC 2021 Report**) at 74.

⁴³ *Id* at 10.

⁴⁴ *Id* at 12.

⁴⁵ *Id* at 74.

levels of inequality and the feelings and experiences of disenfranchisement, particularly by residents in Black townships for the creation of instability or chaos that was the Unrest”.⁴⁶ This shows that social media allows instigators to hide behind their screens and, often, those who perpetuate the violence or engage in human rights abuses, are influenced by the narratives that they encounter on social media platforms while content creators avoid any type of liability.

45. It is important to note that even in cases where online hate speech does not amount to incitement, discrimination, hostility or violence, it can be a factor in inciting offline violence influenced by online hate speech.⁴⁷

Nexus between online hate speech and disinformation leading to impairment of equality and dignity

46. UNSR on FreeEx has defined disinformation as “false information that is disseminated intentionally to cause serious social harm”.⁴⁸ The consequences of disinformation are often far-reaching, causing public harm by hampering the ability of the public to make informed decisions or putting members of the public at risk. Disinformation has been characterised as a threat to democracy and the rule of law as it tends to thrive during times of elections and is

⁴⁶ *Id* at 70.

⁴⁷ *Id.*

⁴⁸ UNSR on FreeEx above n 33 at para 15.

increasingly difficult to regulate.⁴⁹ Social media plays a key role with disinformation spreading “rapidly and widely” on these platforms.⁵⁰

47. The Report of the UNSR on FreeEx noted with regards to disinformation that:

“At the core is a human rights challenge, aggravated by an information disorder. There is growing evidence that disinformation tends to thrive where human rights are constrained, where the public information regime is not robust and where media quality, diversity and independence is weak. Conversely, where freedom of opinion and expression is protected, civil society, journalists and others are able to challenge falsehoods and present alternative viewpoints. That makes international human rights a powerful and appropriate framework for addressing disinformation.”

48. Operation Dudula have used disinformation to aggravate existing xenophobic attitudes both on- and offline as evidenced by the applicants’ Founding Affidavit. Operation Dudula’s social media posts include hate speech and false narratives regarding the number of foreign nationals present in South Africa and the unverified contribution of foreign nationals to crime and unemployment.⁵¹ While also engaging offline in issuing fake notices from the applicants’ to threaten a gathering that the applicants had organised.⁵²

⁴⁹ *Id* at para 2.

⁵⁰ *Id* at para 16.

⁵¹ Applicants’ FA at para 62 and 137, CL03-25 and CL03-50 – CL03-53.

⁵² Applicants’ FA at para 125.2, CL03-46 – CL03-47.

49. The applicants' papers also clearly indicate how Operation Dudula's spread of disinformation has led to violence against foreign nationals and the incitement of violence among its members.⁵³
50. MMA argues that the effect of publishing disinformation about foreign nationals has led to the impairment of their constitutional rights, including the right to dignity and equality as enshrined in the South African Constitution by subjecting them to inhumane treatment, violence and discrimination. The impairment of these rights is further highlighted by the harmful stereotypes and related disinformation which makes violence against targeted groups more acceptable and arguably more likely.
51. Disinformation can be used to foment "discrimination and hatred against minorities, migrants and other marginalised communities".⁵⁴
52. The UNSR on intolerance highlighted the effects of disinformation concerning how the COVID-19 pandemic was used by "populist regimes and extremists to exploit and fuel anxieties"⁵⁵ about the pandemic, fuelling ethnonationalism and racialised fear and hatred. It was acknowledged that social media played a significant role in the spread of such fear and hatred.

⁵³ Applicants' FA at para 137.8, CL03-52.

⁵⁴ UNSR on FreeEx above n 33 at para 26.

⁵⁵ The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance 'Contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (2022) A/77/512 at para 63.

53. The nexus between disinformation and its intended harmful consequences has therefore been made clear by reference to both international and domestic examples. The Court should take cognisance of the imminent risks that Operation Dudula create in their spread of disinformation and incitement to violence through social media.

CONCLUSION

54. This case presents a crucial opportunity for the Court to affirm the principle that online harms are not confined to the digital realm but have tangible, often devastating real-world consequences. The amplification of hate speech, incitement, and disinformation through social media disproportionately targets marginalised groups, particularly foreign nationals, eroding their rights to dignity and equality. As digital platforms increasingly shape public discourse, the legal framework governing online expression must align with constitutional protections against discrimination and violence.
55. For the reasons advanced above, MMA should be admitted as an amicus *curiae* and permitted to address this Court on its substantive submissions.

DEBORAH MUTEMWA

Counsel for Media Monitoring Africa Trust

CHAMBERS SANDTON

17 February 2025

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