

**IN THE EQUALITY COURT OF SOUTH AFRICA  
HELD AT THE GAUTENG HIGH COURT, JOHANNESBURG**

Case number:

In the matter between:

**THE SOUTH AFRICAN JEWISH  
BOARD OF DEPUTIES**

Applicant

and

**ANDILE MNGXITANA**

Respondent

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**SUPPORTING AFFIDAVIT**

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I, the undersigned

**WENDY KAHN**

do hereby make oath and say that:

**I. INTRODUCTION**

1. I am an adult Female and the National Director of the South African Jewish Board of Deputies (“the SAJBD” or “the Board”), which is the Applicant in this matter. I am duly authorised to depose to this founding affidavit on behalf of the SAJBD.

2. The contents of this affidavit are within my personal knowledge and are true.  
Where I make submissions on the law, I do so on the advice of my legal representatives, which advice I verily believe to be correct.
3. This affidavit is made in support of an application to the Equality Court concerning hate speech.
4. This application is brought to:
  - 4.1. declare that Mr Andile Mngxitama, the Respondent, is in violation of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”), inasmuch as he has uttered hate speech;
  - 4.2. declare that the Respondent has committed harassment on the basis of religion and/or ethnicity, in violation of section 11 of the Equality Act;
  - 4.3. declare that the Respondent has been guilty of unfair discrimination on the basis of religion and/or ethnicity, in violation of section 12 of the Equality Act.
  - 4.4. direct Mr Mngxitama to make an unconditional apology for, and acknowledgement of the harmfulness of, his conduct which amounts to hate speech and/or harassment, and post it forthwith on all Twitter accounts over which he exercises control;

- 4.5. direct the Respondent to take all necessary and reasonable steps to remove all hate speech from the Twitter accounts over which he exercises primary control;
- 4.6. direct the Respondent to participate in an education programme conducted by the Johannesburg Holocaust & Genocide Centre on the completion of which he be required to produce to this Court within 3 months a certificate from that institution confirming that he has completed such a course, failing which he shall pay R150 000.00 to the Nelson Mandela Children's Fund; and
- 4.7. in terms of section 10(2) of the Equality Act refer the matter to the Director of Public Prosecutions for the purposes set out therein.
5. Section 10(1) of the Equality Act prohibits the publication, propagation, advocating or communicating of what is defined as "hate speech".
6. Mr Mngxitama has engaged in conduct that amounts to hate speech against the South African Jewish community, and Jewish people in general, by posting via his Twitter account demeaning, hurtful and grossly offensive comments that qualify as hate speech.
7. Such comments create an environment within which racist and hateful attitudes are allowed to flourish, and a hostile and intimidating environment is created for persons at whom the racist commentary is directed.

8. As a result of Mr Mngxitama's posts, his Twitter forum – he has approximately 75 000 followers on his Twitter account – itself has also become a platform and a discussion area for further antisemitic hate speech and the advocacy of hatred on the basis of religion and/or ethnicity.

9. This is in violation of section 10(1) of the Equality Act, read, to the extent that it is relevant, in light of section 16(2)(c) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), as well as section 11 of the Equality Act.

10. In support of the above, this affidavit deals with:

10.1. The parties;

10.2. The law;

10.2.1. The Constitution;

10.2.2. The Equality Act;

10.2.3. Online responsibility;

10.3. The facts;

10.3.1. Mr Mngxitama;

10.3.2. The complaints against Mr Mngxitama;

10.3.3. The commentary;

10.4. Hate speech;

- 10.5. Harassment; and
- 10.6. Conclusion and relief sought.

## II. THE PARTIES

11. 11.1 The Applicant is the South African Jewish Board of Deputies (SAJBD), which since its founding in 1903 has acted as the elected representative spokesperson of the South African Jewish community. The primary mandate of the SAJBD is to safeguard the safety and civil rights of South African Jewry. This includes combating all forms of antisemitism, defined as any hostile and/or harmful behaviour towards members of the Jewish community, whether as individuals or as a collective, that can reasonably be assumed to have been motivated, as a whole or at least in part, by anti-Jewish prejudice. I annex a copy of the SAJBD's Constitution hereto marked "WK1".

11.2 The Respondent has heavily criticised the SAJBD for not bringing cases against other forms of hate speech. In response to this, it should be stressed in the first instance that the Jewish community's right to dignity and equality is not conditional on its representative organisations first condemning human rights violations against other groups. It is an absolute right guaranteed to all citizens under the Constitution.

11.3 Notwithstanding 11.2 above, the SAJBD is in reality on record as having frequently condemned all forms of racism, xenophobia and related

bigotry. However, it is not in a position to launch cases in respect of each complaint.

12. Section 20(1) of the Equality Act provides:

**“Proceedings under this Act may be instituted by-**

- (a) any person acting in their own interest;**
- (b) any person acting on behalf of another person who cannot act in their own name;**
- (c) any person acting as a member of, or in the interests of, a group or class of persons;**
- (d) any person acting in the public interest;**
- (e) any association acting in the interests of its members;**
- (f) the South African Human Rights Commission, or the Commission for Gender Equality.”**

(Emphasis added.)

13. The SAJBD accordingly has *locus standi* to bring this application in its own right in terms of subsection 38(a) and in terms of subsection 38(c) of the Constitution.

14. It also brings this application in the public interest in terms of section 38(d) of the Constitution. See *Lawyers for Human Rights v Minister of Home Affairs and* [2004] (4) SA 125 (CC) at paras [15] – [16]. Public interest standing is warranted because this matter relates to the question of defining what can be said to constitute unlawful “hate speech” on any of the prohibited grounds listed in the Equality Act, and which is thus of concern to the South African population as a whole and not just to a particular grouping.

15. 15.1 The Respondent is Mr Andile Mngxitama, an adult male who currently heads the movement known as Black First Land First (BLF). He is cited in his personal capacity. He is the person in control of the Twitter account referred to below, on which he posted the offending comments.

15.2 It bears emphasis that this is not the first time he has been the subject of litigation concerning his utterances. Indeed, he had a suspended sentence imposed on him by the High Court for breaching a High Court interdict relating to his speech.

16. Before dealing with the nature of Mr Mngxitama's public persona and activities, it is appropriate to set out the law pertaining to this application.

### **III. THE LAW**

17. This application could be regarded as implicating the right to freedom of his expression contained in section 16 of the Constitution. It must therefore be considered in light of constitutional principles.

18. As the SAJBD contends the Constitution does not protect hate speech. Therefore, the Respondent's utterances are not protected.

19. The Constitution is the supreme law of South Africa. Law or conduct inconsistent with it is invalid.

20. Chapter 2 of the Constitution sets out the rights in the Bills of Rights.

21. Section 10 of the Constitution states:

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

22. Section 16 of the Constitution states:

- “(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 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.**

(Emphasis added.)

23. Expression that falls under section 16(2)(c) of the Constitution or section 10(1) of the Equality Act shall be referred to as “hate speech”.

24. All rights in the Bill of Rights may be limited in terms of section 36 of the Constitution by a law of general application.



25. The right to freedom of expression does not include the right to propagate hate speech. It is not protected at all in the Bill of Rights or the Constitution as a whole.

26. Concerning the importance of the right to freedom of expression generally, the Constitutional Court held in *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at paragraphs 7-8 that:

**“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”**

27. The Constitutional Court however, held in *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) (“IUC”) that:

**“[27] The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. Thus, open and democratic societies permit reasonable proscription of activities and expressions that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.**

[28] 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, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests.

....

[30] ...Section 16(2) 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”.

(Emphasis added.)

28. Section 16(2) is an internal limit or qualifier on the scope of the right in section 16(1).

29. The Equality Act is legislation which creates the prohibition on hate speech and/or harassment on which this application is based.

### **The Equality Act**

30. The Equality Act is the legislation envisaged by section 9(4) of the Constitution.

Section 2 of the Equality Act states:

**“The objects of this Act are-**

- (a) to enact legislation required by section 9 of the Constitution;**
- (b) to give effect to the letter and spirit of the Constitution, in particular-**

- (i) the equal enjoyment of all rights and freedoms by every person
  - (ii) the promotion of equality;
  - (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
  - (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
  - (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16 (2) (c) of the Constitution and section 12 of this Act;
- (c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability”.

(Emphasis added.)

31. Section 1 of the Equality Act defines “the prohibited grounds” as:

- “(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)”.

(Emphasis added.)

32. Section 10 of the Equality Act states:

- “(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.
- (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”

(Emphasis added.)

33. Section 11 of the Equality Act states:

**“No person may subject any person to harassment.”**

34. Section 1 of the Equality Act defines “harassment” as:

**“[U]nwanted 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-**

- (a) **sex, gender or sexual orientation, or**
- (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”.**

35. Section 12 of the Equality Act provides:

**“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.”

(Emphasis added.)

36. In *Afriforum and Another v Malema and Another* 2011 (6) SA 240 (EqC) (“*Afriforum*”) at paragraph [37], this Court, per Lamont J, held that the prohibition on hate speech in section 10(1) of the Equality Act contains the following elements:

“Section 10 of the Equality Act defines what may not be published.

1. A person may not publish,
2. against any person, including a juristic person, a non-juristic entity, a group or category of persons,
3. words concerning race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,
4. or words concerning any other ground where the discrimination based on that ground:
  - (a) causes or perpetuates systemic disadvantage;
  - (b) undermines human dignity; or
  - (c) adversely effects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground referred to supra in para 3.(See 'prohibited grounds'.)
5. If the words in para 4 could reasonably be construed to demonstrate a clear intention to:
  - (a) be hurtful;
  - (b) be harmful;
  - (c) incite harm;

- (d) promote hatred; or
- (e) propagate hatred.”

37. At paragraph 42 of *Afriforum*, this Court further stated:

“The publication of words includes the propagation, advocating or communication thereof. This definition in my view encompasses secondary publication.”

38. In *South African Human Rights Commission v Bongani Masuku and Another* [2017] ZAEQC1 (29 June 2017) (“*Masuku*”) at paragraph 21(b)(i-iv), this identified the purpose of the Equality Act as including:

- (b) to give effect to the letter and spirit of the Constitution, in particular –
  - (i) the equal enjoyment of rights and freedoms by every person;
  - (ii) the promotion of equality, the values of non-racialism and non-sexism contained in section 1 of the Constitution;
  - (iii) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
  - (iv) the prohibition of advocacy of hatred, based on race, ethnicity, gender, or religion, that causes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act.

[Emphasis added]

39. At para [26], the *Masuku* Court indicated that hate speech in cases where “**the targeted group is visibly identifiable**” was a significant factor in determining whether or not such discourse could be considered to fall within the parameters of the right to freedom of expression.

40. The SAJBD contends that the hateful material that was published, and placed in the public domain by Mr Mngxitama on his Twitter profile, meets the above criteria and accordingly amounts to hate speech

41. The SAJBD also contends that the comments on Mr Mngxitama's Twitter profile amounts to harassment under section 11 of the Equality Act.

42. It is submitted that Mr Mngxitama is liable for this unlawful commentary. He has demonstrated support for this commentary by not correcting or removing the first unlawful comment that he made but responded to criticism of what he wrote by posting in the same forum a second comment equally offensive.

43. Indeed, he committed further transgressions in a radio interview concerning his conduct.

44. I now turn to the facts, wherein it shall be demonstrated precisely what Mr Mngxitama has done and why his actions constitute a clear infringement of the Equality Act.

45. It should be stressed that his Twitter profile is more than just a personal series of exchanges with friends and family; it is a public arena in which hundreds and even thousands of people engage in discussions.

46. Equally relevant is the fact that Mr Mngxitama himself enjoys something of a public profile as a result of his leading position in the Black First Land First

movement, whose activities have been widely reported on in the mainstream media. As stated above, he has recently been held by the High Court to be guilty of contempt of Court and given a suspended sentence of jail resulting from his unlawful activities and conduct.

#### **IV. THE FACTS**

##### **Mr Mngxitama**

47. It is public knowledge that Mr Andile Mngxitama is the leader of Black First Land First (“BLF”), a socio-political activist grouping whose ideology, public statements and actions are the subject of much controversy.

##### **The complaints against Mr Mngxitama**

48. On 24 August 2017, the SAJBD received numerous complaints from members of the Jewish community regarding a highly offensive and hateful comment written by Mr Mngxitama and posted on his Twitter profile.

49. The post elicited a strong, largely negative reaction from the broader public, and was that same day widely reported on by the online media, both locally and internationally. These reports were largely based on a press statement condemning the comment issued by the SAJBD earlier that day.

50. In response to this reaction, Mr Mngxitama expressed no regret about what he had posted, but on the contrary justified it by saying that it had had the intended



effect of drawing attention to certain controversial comments about colonialism made on an earlier occasion by Helen Zille, who he claimed is Jewish.

51. In addition to defending what he wrote, Mr Mngxitama posted a second highly offensive comment of a similar hateful nature.

### **Mr Mngxitama's conduct**

52. On 24 August 2017, at or around 05h00, Mr Mngxitama posted the following Tweet:

**For those claiming the legacy of the holocaust is ONLY negative think about the lampshades and Jewish soap.**

53. The references to “lampshades and Jewish soap” allude to the belief that during World War II, the skins and body fat of murdered Jews was used by the Nazi regime to manufacture, respectively, lampshades and soap.

54. While some historians have since discredited this theory in view of the necessary evidence being lacking, the belief still widely persists and is utilized too on a fairly regular basis by those wishing to taunt, humiliate or otherwise demean Jewish people. In addition to belittling the sense of collective trauma that Jewish people continue to experience over the Nazi genocide against Jewry, scoffing references to ‘soap’ and ‘lampshades’ effectively deny the essential humanity and dignity of Jewish people by mocking them. So what if Jewish skin was used to make lampshades? So what if the bodies of murdered Jews were used by the Nazis to

make soap? It is hateful taunting which leads to the demonization of Jewish people.

55. Later that same day, in clear response to the negative reaction to his 'lampshades' and 'soap' tweet, Mr Mngxitama posted the following tweet:

**I concur with @helenzille that the aroma of the burning flesh from the furnaces of the holocaust may wet [sic] the appetite of the S.A. cannibals.**

56. This comment refers to the mass cremation of Jewish corpses in the Nazi concentration camps.

57. Since the Holocaust, the theme of Jewish persons being burned (alive) in ovens and furnaces has been a commonplace in antisemitic abuse and propaganda, whether it is celebrated as something that Jews brought on themselves by their alleged criminal behaviour, made the subject of anti-Jewish 'jokes' or even invoked as something that should be repeated. Typically, Jews are mockingly likening to ashes, which like the 'soap' and 'lampshades' slurs, serves to dehumanise them altogether.

58. In addition to in and of themselves being deeply hurtful and offensive, Mngxitama's tweets elicited numerous further overtly antisemitic comments in the social media, with several of these being sent directly to Jewish community members. These included:

**So it's free speech to insult blacks? Hear this then: Hitler did well to make soap and lampshades out of your ancestors. That's my free speech.**

**Haha Mngxi is a champion, he brings discomfort to the enemy. I see us getting our land back soon.**

[Emphasis added]

**Don't forget that Hitler was the Jews greatest teacher. They learnt from the best and then improved on his work: <http://www.globalresearch.ca/israels-genocide-towards-palestinian-arabs/5591341> ...**

Screenshots of the above are attached hereto marked “**WK2**”.

59. We further note that in responding to criticism of his tweets, Mr Mngxitama has claimed to have paraphrased a previous tweet by Western Cape Premier Helen Zille in which she controversially stated that colonialism had yielded certain benefits as a way of expressing his feelings of outrage about it.

60. In our view, this defence should be rejected for, inter alia, the following reasons:

- a) There is no indication from the tweet itself, nor in any preliminary or follow-up tweet by the Respondent, that this was his aim. Seen in isolation, it came across as depicting the turning of Jewish corpses into soap and lampshades as a good thing, and indeed was interpreted as such by a large majority of those who responded.
- b) Instead of clarifying what his intention had been and apologising for the offense caused, the Respondent instead posted a second, equally repulsive Holocaust-related tweet, refers to the appetite of SA cannibals being whet

by the aroma of burning Jewish flesh. The nature of this second comment can in no way be seen to be a paraphrase of the Zille tweet.

- c) The analogy between Zille’s colonialism tweet and Nazi atrocities against Jews is in any case clearly incorrect. While the developments associated with colonialism, such as building of roads, hospitals, schools etc, cannot be said to justify colonialism, they are not intrinsically bad things in and of themselves. This is not true of desecrating the remains of murdered Jews by turning them in soap and/or lampshades, which are self-evidently evil acts.

## V. HATE SPEECH

61. On the same day, Mr Mngxitama was interviewed on the radio. A copy of the transcript is annexed marked “**WK3**”. When asked whether he would apologise for his hate speech, he responded by saying that he “deserved an apology from the Jewish community and all White people.”
62. The SAJBD contends that Mr Mngxitama’s comments:
- 62.1. qualify as “publication”, in that they are words made available to the public in a public forum;
  - 62.2. are antisemitic, in that that they refer specifically to people of the Jewish faith and/or of Jewish ethnicity;

- 62.3. are hurtful, in that they depict atrocities visited upon Jewish people as something to be mocked and joked about; in that they amount to taunting Jews about the enormous suffering and cruelty that was inflicted on their co-religionists, in many cases their direct forebears and other family members, and; thereby scorn the deep sense of trauma and collective grief that Jews experience about the events of the Nazi Holocaust;
- 62.4. are harmful, in that they dehumanize Jewish people and their lives and bodies;
- 62.5. they 'humorously' portray the (supposed) turning of their corpses into everyday objects like soap and lampshades as being a good thing and, equally crassly, the burning of their bodies in furnaces as being something that cannibals would appreciate;
- 62.6. incite harm, in that they encourage other Twitter users to add their comments denigrating Jews, *inter alia*, describing Jews as 'the enemy' [of the South African people], inferring that Jewish persecution during the Holocaust never actually happened and falsely accusing Jews in Israel of carrying out atrocities comparable (or even exceeding) those of the Nazis against Palestinians;
- 62.7. undermine the fundamental right to dignity to which all citizens of South Africa, including those of the Jewish faith, are entitled;

62.8. propagate feelings of contempt against Jews by inferring that Jewish lives, and the right to life of Jewish persons, are of no value, which in turn feeds in to such radically racist antisemitic theories portraying Jews as 'sub-human' and therefore unworthy of empathy or respect by the general society in which they live; and

62.9. encourage others to, for example, suggest that Hitler was justified in committing genocide against the Jews.

63. The SAJBD contends that Mr Mngxitama's comments:

63.1. constitute unwanted and unlawful conduct;

63.2. demean and humiliate, by their intrinsically insulting and derogatory nature;

63.3. are related to people of the Jewish religious faith and/or ethnicity; and

63.4. constitute an attack (advocacy of hatred) against Jews, which constitutes incitement to cause harm, both physically and mentally (psychologically).

64. For these reasons, his comments amount to hate speech against South Africans, and particularly the South African Jewish community and constitute

a contravention of section 10(1) of the Equality Act, together with a violation of the rights and values of the Constitution (particularly to dignity and equality).

65. On the facts, Mr Mngxitama is clearly in violation of sections 10(1), 11 and 12 of the Equality Act and a declaration to that effect must be made.
66. The SAJBD avers that anti-Semitic attacks on the Jewish people is not dissimilar in nature to the racist comments by for example Penny Sparrow, who was fined R 150 000.00 by the Equality Court.
67. Racist speech of any kind has no place in South African society.
68. All conduct targeting hatred at any and all group or persons, whether the target is for example foreigners, members of the LBGT community, the adherents of the Christian, Islamic and other faiths and religions, or racial groups, in society is condemned by the SAJBD in the strongest terms.
69. Mr Mngxitama's hate speech must be dealt with and an appropriate just and equitable remedy ordered.

## **VI. CONCLUSION AND RELIEF SOUGHT**

70. In the recent matter of *South African Human Rights Commission v Qwelane; Qwelane v Minister of Justice and Correctional Services* [2017] ZAGPJHC 218 (18 August 2017), the High Court declared the impugned conduct (the

offending statements made against the LGBT community), to be hate speech, ordered costs and referred the matter for investigation by the South African Police Service and ordered costs against Mr Qwelane.

71. There is no reason why at least similar orders should not be made against Mr Mngxitama.
72. In addition, the SAJBD submits that it is important that Mr Mngxitama ought to undergo an educational sensitivity training course at a suitable institution. The SAJBD suggests the Johannesburg Holocaust & Genocide Centre is appropriate for such purpose.

At such a course he would (hopefully) become aware of the horrors of where his racist hate-filled conduct could lead.

Mr Mngxitama would learn that the Rwandan genocide did not just happen. It was fermented, *inter alia*, by radio references to the targeted group as “*cockroaches*”. In the celebrated media case of the United Nations International Criminal Tribunal for Rwanda dealt extensively with freedom of expression and hate speech in the context of the gravest crimes known to human kind. He would learn that his kind of utterances, apart from causing a violation of members of the targeted group’s dignity and harm to them psychologically, it also has the serious potential to physically cause harm to the target group. The advocacy of hatred on the basis of the religious and ethnic identity of Jewish persons amounts to incite to cause harm.



73. After having participated in such an educational course, the SAJBD believes Mr Mngxitama will carefully consider the utterances he has made and will make in the future.
74. Mr Mngxitama will become aware of the inherent dignity of all human beings. Hopefully, his hatred and bitterness will be directed at making positive changes to society; rather than his regular taunting, mocking and heaping scorn on those he targets.

Is it rhetorical to ask whether Mr Mngxitama would express himself differently if knew that his utterances could lead to another genocide?

The SAJBD invites Mr Mngxitama to answer whether:

he supports a genocide against the Jewish people or any other group.

Indeed, he is invited to explain whether:

he supports violence against any person merely because who they are and what they believe rather than because what they personally may have done.

75. Depending on his response to this application and the responses he gives to these fundamental questions, the SAJBD will suggest and seek appropriate

just and equitable orders from this Court, including, but not limited to a referral to the DPP for prosecution against Mr Mngxitama.

76. For all of the above reasons, the SAJBD contends that this Court should grant orders:

76.1. declaring that Mr Mngxitama has committed hate speech in contravention of section 10(1), 11 and 12 of the Equality Act inasmuch as he has uttered hate speech;

76.2. directing Mr Mngxitama to make an unconditional apology for his conduct which amounts to hate speech and/or harassment, and post it forthwith on all Twitter profiles over which he exercises control;

76.3. directing Mr Mngxitama to take all necessary and reasonable steps to remove all hate speech and harassment from the Facebook pages over which he exercises control;

76.4. directing Mr Mngxitama to participate in an education programme conducted by the Johannesburg Holocaust & Genocide Centre on the completion of which he be required to produce to this Court within 3 months a certificate from that institution confirming that he has completed such a course.

- 76.5. Impose a fine on the Respondent to the amount of R150 000.00, to be paid, subject to the agreement of the proposed beneficiary, to the Nelson Mandela Children's Fund
- 76.6. in terms of section 21(2) of the Equality Act referring the matter to the Director of Public Prosecutions for the purposes set out therein.
77. The basis for the first two orders above (the declaratory orders) appears in the preceding chapters. The Court is also empowered to make the second two orders (the directory orders).
78. Section 21(2) of the Equality Act provides:

**“After holding an inquiry, the court may make an appropriate order in the circumstances, including-**

- (a) an interim order;**
- (b) a declaratory order;**
- (c) an order making a settlement between the parties to the proceedings an order of court;**
- (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;**
- (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;**
- (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;**

- (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
- (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
- (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
- (j) an order that an unconditional apology be made;
- (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
- (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
- (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;
- (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
- (o) an appropriate order of costs against any party to the proceedings;
- (p) an order to comply with any provision of the Act.”

(Emphasis added.)

79. The SAJBD contends that if the Court sees fit to make the declaratory orders, the directory orders are also appropriate to be made.

80. The directory orders will ensure that the decision of this Court is more than symbolic: they will, together, make it clear to the public that Mr Mngxitama's conduct is unlawful, and presumably ensure that no further anti-Jewish hate speech will be posted by him via his Twitter account.

81. The SAJBD submits that an order of costs against Mr Mngxitama is appropriate as a mark of the Court's displeasure.

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**WENDY KAHN**

I certify that:

The deponent signed this affidavit and swore and acknowledged that she:

- a) knew and understood the contents thereof;
- b) had no objection to taking the oath; and
- c) considered the oath to be binding on her conscience.

The Deponent then uttered the words *"I swear that the contents of this declaration are true, so help me God"*.

**DATED** at \_\_\_\_\_ on this the \_\_\_\_\_ day of \_\_\_\_\_ **2017.**

**COMMISSIONER OF OATHS**