

**Notes on the Political Significance of Songs
in Promoting Equality and Maintaining
Historical Legacy: Legal Challenges to Hate
Speech in:**

Afriforum v Economic Freedom Fighters
[2022] ZAGPJHC 599; 2022 (6) SA 357 (GJ)

1 Introduction

Song and music can be a powerful medium through which life is expressed (Adebayo “Vote Does Not Fight’: Examining Music’s Role in Fostering Non-Violent Elections in Nigeria” 2017 17 *African Journal on Conflict Resolution* 55 56). Music has influenced the struggle for independence in most African countries (Adebayo 2017 *African Journal on Conflict Resolution* 55 61). This sentiment is evident from the judgment in *Afriforum v Economic Freedom Fighters* ([2022] ZAGPJHC 599) (*Afriforum*). This case note studies the importance of singing songs in a democracy and its limitations. History contains numerous examples of how music was used as a tool for political transformation and social revolution (Adebayo 2017 *African Journal on Conflict Resolution* 55 64). The disadvantage lies in the reality that the singing of songs can, in some instances, feed hatred and lead to dire consequences such as the commission of hate crimes (Adebayo 2017 *African Journal on Conflict Resolution* 55 64). The *Afriforum* judgment endorses a contextual approach to the interpretation of racist speech and its capacity to be classified as hate speech.

In the *Afriforum* matter, the Equality Court had to establish whether the singing of the songs “Kill/Kiss the Boer/Kill/Kiss the Farmer and “*Biza a ma’* Fire Brigade; Call the Fire Brigade” constituted hate speech. It was found that singing the songs did not constitute hate speech. At first glance, it seems that the judgment in *Afriforum* is a direct contradiction of the judgment in *Nelson Mandela Foundation Trust v Afriforum NPC* ([2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ)) (*Nelson Mandela Foundation*), wherein it was found that the gratuitous display of the old South African flag constituted hate speech. This contribution indicates that these judgments pose distinct issues and differ in many aspects. A critical analysis of the decision under discussion reveals the importance of songs in African societies and democracy for activism. This note also points out the importance of distinguishing between offensive speech and hate speech.

It should be noted that when the discussion of the *Afriforum* case was at an advanced stage, the Supreme Court of Appeal ([2024] ZASCA 82) delivered a judgment that essentially vindicated the position of the Equality

Court. While the Supreme Court judgment is interesting on its own terms, it does not form the subject of the enquiry in this note. Still, the Supreme Court judgment serves to further motivate the argument of this note since it confirms the Equality Court's judgment, which is discussed in this note. According to the judgments, a reasonably well-informed person would appreciate that when Mr Malema sang "*Dubula Ibhunu*", he was not calling for farmers or white South Africans to be killed. Both the Equality Court and Supreme Court judgments illustrate the importance of context in a hate-speech enquiry. The judgments reinforce the pertinent argument that singing songs should be protected owing to their political use, ability to bring social unity and cohesion, and advocacy for social and political change.

2 The factual background

In essence, the issue leading to the case of *Afriforum* was the singing of the song "Kill the Boer/ Kill the Farmer and *Biza a ma fire brigade*", translated as "Call the Fire Brigade". The complainant in this case was Afriforum, which alleged that the songs were in contravention of sections 10(1) and 7(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) (PEPUDA) (*Afriforum supra* par 1). Afriforum sought an order declaring that the singing of the two songs constituted hate speech (*Afriforum supra* par 27). This complaint came about after members of the Economic Freedom Fighters (EFF) sang the song "Kill the Farmer" outside a magistrates' court in Senekal, where a matter was heard concerning the murder of a farm manager (*Afriforum supra* par 54).

According to Afriforum's complaint, the singing of the songs promoted the dehumanising and targeting of certain racial groups with acts of violence (*Afriforum supra* par 32). Afriforum's complaint linked the singing of the songs to farm attacks and farm murders. The applicant led its evidence and called three expert witnesses and two witnesses who testified based on personal experiences (*Afriforum supra* par 27). The first expert witness was Mr Roets, who testified on farm attacks and led evidence that singing the impugned songs undermined the seriousness of farm attacks (*Afriforum supra* par 32). The applicant employed Mr Roets, who gave evidence based on his book *Kill the Boer* (*Afriforum supra* par 32). The respondent challenged the role of Mr Roets as an expert witness, based on his relationship with the applicant (*Afriforum supra* par 48). The next expert witness to testify on behalf of the applicant was Mr Human, who is a pastor of the Dutch Reformed Church and works for the applicant's trauma unit dealing with farm attacks and farm murders (*Afriforum supra* par 50). Mr Human's evidence was rejected based on unsubstantiated evidence (*Afriforum supra* par 52). The third expert witness to testify on behalf of the applicant was Mr Crouse, an employee of the Institute of Race Relations (*Afriforum supra* par 53). His testimony concerned the singing of the song *Bizani ifire brigade* by Dr Ndlozi at the magistrates' court in Senekal (*Afriforum supra* par 54). It was argued that Mr Crouse also did not qualify as an expert witness and that his testimony did not assist in proving the applicant's case (*Afriforum supra* par 59). Mr Muller, another witness, presented evidence as a victim of a farm robbery, and Mr Prinsloo also testified. However, all the witnesses' testimonies were held to be of no

probative value in that they had not succeeded in establishing a link between the singing of the songs and the farm attacks or farm murders (*Afriforum supra* par 62–67). Furthermore, the Afriforum’s expert witnesses were held to be of no assistance to their case since the witnesses were professionally linked to the complainant (Afriforum), as indicated in their testimonies, and they had a vested interest in the outcome of the case.

The defendant (EFF) first led evidence through Mr Malema’s testimony. He argued that the song should not be understood according to its literal meaning but as expressing views against an oppressive state system (*Afriforum supra* par 70). Malema’s evidence focused on political ideologies and concepts such as communism, revolutionaries, and the struggle for land ownership (*Afriforum supra* par 72). Malema argued that the song should be seen in the context of the battles fought by African culture and the expression of political views and ideas through songs (*Afriforum supra* par 75).

An expert witness, Professor Gunner, testified on behalf of the EFF, providing evidence that the songs carried significant weight owing to their historical context and mentioned that a political idea could be enacted through a song (*Afriforum supra* par 77). According to the expert witness testimony, the song aimed to expose government failure (*Afriforum supra* par 111). Professor Gunner’s evidence reflects the political significance of songs in a political arena, particularly in an African state. The expert witness referred to other songs often sung by politicians, such as “*Tshela Thupa*”, translated as “Holding the Stick”, and “*Leth’u Mshine Wam*”, translated as “Bring My Machine Gun” (*Afriforum supra* par 107–108). According to Professor Gunner, these songs should not be interpreted according to their literal meanings but according to the political ideas or political messages carried by the songs (*Afriforum supra* par 107). For instance, the EFF promotes ideologies of economic empowerment and land distribution, and these ideologies are usually communicated through songs (*Afriforum supra* par 104). This led the court to decide that declaring the impugned songs as hate speech would significantly alter or curtail the right to freedom of expression (*Afriforum supra* par 111).

Afriforum was held to have failed to make a case that the singing of the impugned songs infringed section 10(1) of PEPUDA. Furthermore, witnesses who testified on behalf of Afriforum were held to be of no assistance to the court, as they could not demonstrate the link between farm attacks and song singing.

3 The test for establishing hate speech

This matter was brought in terms of sections 7(a) and 10(1) of PEPUDA. Section 7(a) prohibits hate speech on the grounds of race. In contrast, section 10(1) prohibits speech that is hurtful or harmful, or that incites harm and propagates or promotes hatred based on a specified group characteristic. However, in terms of the judgment in *Qwelane v South African Human Rights Commission* ([2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC)) (*Qwelane*), section 10(1) of PEPUDA excludes the word “hurtful” from its criteria and calls for the application of a

reasonableness test. The inclusion of the word “hurtful” was declared unconstitutional owing to its broad nature, which could result in the prevention of various forms of speech, including offensive or racist speech. This test, applied in *Qwelane* was the objective test that assesses whether a reasonable reader or reasonable listener would regard the statement or utterance as harmful (*Qwelane supra* par 72). Similarly, in the case of *Qwelane*, the assessment of hate speech questioned whether the utterance could be reasonably construed to demonstrate a clear intention to incite harm (*Qwelane supra* par 93). The reasonable reader or listener used in *Qwelane* is described as a reader or listener of ordinary intelligence who can determine, while taking into account the applicable context, whether the utterance could be said to constitute hate speech (*Qwelane supra* par 95).

The test of the reasonable reader or listener is challenging in a country such as South Africa, which is characterised by past discrimination and different lived experiences based on gender and race, among others. The legacy and impact of apartheid and racial segregation cannot be ignored when applying a reasonable-reader or -listener test, as this would result in substantive equality not being attained or achieved. According to Jeewa and Bhina, a reasonable reader or listener cannot always be characterised as a neutral concept, which would permit judges to hide behind racism and other stereotypes (see Jeewa and Bhima “Discriminatory Language: A Remnant of Colonial Oppression” 2021 11 *Constitutional Court Review* 1 14). In this current judgment, the court appeared to have considered history and did not apply a reasonable neutral race-free reader test, which is commended in terms of this note’s argument. This is demonstrated by the significant weight given to Professor Gunner’s testimony by the court in arriving at its finding: had such evidence not been carefully considered, and had it been based on a neutral, reasonable person or a raceless person, the singing of the impugned songs would have been held to constitute hate speech.

4 Assessment

The different outcomes in the cases of *Nelson Mandela Foundation* and *Afriforum* point to potential contradictions and bias. However, crucial distinguishing factors can be found in the *Afriforum* judgment that warrant debate and which prove to be worthy factors in establishing the existence of hate speech in complex political matters. Three crucial factors emanating from the *Afriforum* judgment are discussed in this section to highlight why it is vital to differentiate the two decisions. The *Nelson Mandela* judgment is discussed first, followed by the three crucial factors: (i) distinguishing offensive speech and hate speech; (ii) the importance of song in a democracy; (iii) an application of the reasonable-reader or -listener test that is democratically inclusive.

4.1 *The facts in Nelson Mandela Foundation v Afriforum*

In *Nelson Mandela Foundation*, the applicant lodged a complaint against Afriforum for displaying the old South African flag (pre-democracy flag) during a protest, called Black Monday, over farm murders in South Africa

(*Nelson Mandela Foundation supra* par 23). The applicant (the Nelson Mandela Foundation) sought an order declaring that the gratuitous display of the old flag constituted, in terms of section 10(1) of PEPUDA, hate speech against Black South African people. It was held that the display of the old flag constituted hate speech in terms of section 10(1) of PEPUDA based on the argument that the old flag represented apartheid, which was characterised by racial segregation and an inhumane government system featuring gross human-rights violations (*Nelson Mandela Foundation supra* par 64).

It was further argued that apartheid is a crime against humanity and, as such, the gratuitous display of its flag does not strive for unity and the promotion of diversity but strives for continued division. Such display cannot be protected in terms of section 16 of the Constitution of the Republic of South Africa, 1996 (Constitution), which provides for the right to freedom of expression. It is submitted that this argument successfully distinguishes the outcome in *Afriforum*, wherein the impugned songs were aimed at expressing political ideologies linked to economic freedom, thus sparking public debate and awareness; the singing of the impugned songs was not primarily aimed at promoting racial hatred and division, leading ultimately to the incitement of violence based on race.

The outcome in *Nelson Mandela Foundation* would have been different had the old flag been displayed in a historical museum; however, a display at a protest against farm attacks and farm murders could spark violence and racial division, so the court's outcome can be justified.

The cultural and historical heritage of all racial groups is protected according to the Constitution, and this is demonstrated later.

The contrast between the two judgments lies in the fact that, in *Afriforum*, the singing of the impugned songs was to spark public awareness and debate on the EFF's political ideologies, and the impugned songs have always been sung during political rallies and reflect South African politicking culture. The impugned songs, as sung previously during political rallies, targeted government policies that derailed economic growth and land redistribution but did not target any racial group. On the other hand, the gratuitous display of the old flag in *Nelson Mandela Foundation* invoked memories of a government system based on racial segregation. This cannot be said to be in the public interest and contradicts PEPUDA, which strives to prevent unfair discrimination.

In the case under discussion, Professor Gunner's testimony on the value and purpose of songs in politics, assisted the court in arriving at its decision, especially concerning the application of the reasonable-reader or -listener test to assess the motive of the respondent in singing the impugned songs. Accordingly, the singing of the impugned songs was held not to have intended to cause harm, although it was offensive; the motive was not to target specific racial groups but to send a message on land redistribution and economic emancipation.

4.2 *Distinction between offensive statements and hate speech*

The singing of the impugned song “*Dubula ibhunu*” is offensive, especially since the song’s literal meaning is “Shoot the Boer”. Likewise, the song “*Biza a ma fire brigate*” (“Call the Fire Brigade”) seems to suggest that a fire would be started or an instance of arson. This interpretation was considered by the court (*Afriforum supra* par 111) when it was mentioned that the impugned song could be regarded as offensive and not hate speech. However, the court pointed out the crucial issue of ensuring that a distinction be made between offensive speech and hate speech. Sight must never be lost of the special protection accorded to offensive speech, thus warranting the clear distinction. In making this distinction, courts can in some instances assess whether the impugned speech or expression advances democracy, is part of a truth-finding process or is a means of self-fulfilment (see Geldenhuys and Kelly-Louw “Demystifying Hate Speech Under the PEPUDA” 2020 23 *PER/PELJ* 10).

The *Afriforum* judgment involved distinguishing statements that appear hostile, offensive or aggressive, from hate speech. The court further pointed out that an aggressive or offensive tone should not be treated in the same way as hate speech (par 96). Accordingly, it held that, although the impugned songs were offensive, they qualified as a form of political expression. Within that context, a reasonable listener or reader would conclude that the impugned songs do not constitute hate speech. The judgment referred to the cases of *Hotz v University of Cape Town* (2017 (2) SA 485 (SCA)) and *South African National Editors’ Forum v Economic Freedom Fighters (SANEF) v EFF* ([2019] ZAEQC 6) (*National Editors Forum*), which are discussed here, together with similar judgments that distinguish offensive speech and hate speech.

The court in *Afriforum* referred to the case of *Hotz v University of Cape Town* ((*supra*) par 32), where the court cautioned against courts finding that hostile speech made concerning race automatically constituted hate speech. Furthermore, the judgment referred to the *National Editors Forum* case, which involved debates on the Zondo Commission of Inquiry into State Capture. In this case, Malema commented:

“Let us attack fighters. Let us occupy every street, every house, and every space in society. Let us not leave the enemy to chance. Where we meet the enemy, we must crush the enemy. Be on Facebook, Twitter, and social media to guard the revolution. When the enemy raises its ugly head, cut the head. No time to entertain enemies of the revolution. We must protect the revolution at all costs.” (*National Editors Forum supra* par 7)

In this case, the applicants alleged that these comments singled out journalists and threatened them (*National Editors Forum supra* par 8). The EFF had criticised the applicants for defending President Ramaphosa (*National Editors Forum supra* par 8). Notably, the court cautioned against automatically viewing offensive and controversial views as hate speech (*National Editors Forum supra* par 46), which would undermine the value of freedom of expression and its advantages in a democracy. In this case, it was thus held that the respondents acted in the public interest and that the

applicants had failed to establish that the comments in question qualified as hate speech in terms of section 10(1) of PEPUDA.

The importance of permitting offensive and unpopular speech in a democracy was also reiterated in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* ([2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) par 109) (*Laugh It Off*). The matter involved a company known as Laugh It Off, which printed humorous remarks about Sabmark registered trademarks on T-shirts that were sold by Laugh It Off. The remarks, such as “Black Labour” and “No regard given worldwide”, reflected racial and economic issues and made fun of some of Sabmark’s trademarks – for example, the Black Label alcoholic beverage, among others (*Laugh It Off supra* par 7).

In some instances, impugned speech, although offensive, may promote debate within a democracy – such as in the case of *The Citizen 1978 (Pty) Ltd v McBride* ([2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC)). In this matter, McBride sought to be Chief of Police for Ekurhuleni; however, he was criticised in the Citizen newspaper in a commentary wherein he was described as a “murderer” and “criminal” and having committed cold-blooded murder (De Klerk “*The Citizen v McBride* 2011 (4) SA 191 (CC): Defamation – The Defence of “Fair” Comment and Media Defendants” 2011 27 *De Jure* 447 447). Although the commentary against McBride was distasteful, the Constitutional Court reiterated the importance of open and vigorous discussion in a democratic country (*The Citizen v McBride supra* par 100). *The Citizen v McBride* judgment is directly applicable in that it reiterates the importance of offensive comments to a democracy and the importance of distinguishing between what is hateful and what is offensive.

The court’s stance in *Afriforum*, referring to the distinction between offensive speech and hate speech, has precedent, as demonstrated in the above-mentioned judgments.

4 3 *The importance of song in a democracy*

The judgment in *Afriforum* refers to the political significance of songs, which often carry political ideas. This section discusses the value of songs in politics and democracy, especially in demonstrating and protesting for the promotion of human rights and in some instances highlighting societal ills and cultural ills. Furthermore, songs constitute historical legacy and cultural heritage and form an integral part of our democracy. They should be promoted as a form of the constitutional expression guaranteed in section 16(1) of the Constitution.

The singing of struggle songs emanates from the historical heritage of freedom songs, which are in the archive of the people of South Africa (see Tichmann and Galant “The ‘Singing Freedom’ Exhibition: Painful Histories, Collective Memories and Perceptions of Freedom” 2015 3 *Oral History Journal of South Africa* 21 22). Black people were condemned to a situation of relegation, and treated as non-humans, which resulted in their using songs as a means of healing and of instilling ideologies in their fighting the struggle (Ramantswana “Song(s) of Struggle: A Decolonial Reading of

Psalm 137 in Light of South Africa's Struggle Songs" 2019 32 *OTE* 464 466). These songs were intended to inspire people to fight against oppression and foster liberation (Ramantswana 2019 *OTE* 464 480). The singing of struggle songs is thus engraved in South Africa's heritage and history (Ramantswana 2019 *OTE* 464 484). Equally important is music's role in fostering unity and social transformation. For example, Phakathi mentions that music can also be used to fight against xenophobia (see Phakathi "The Role of Music in Combating Xenophobia in South Africa" 2019 16 *African Renaissance* 125 142).

Although times have changed, songs about freedom and struggle still play an essential role today (see Tichmann and Galant 2015 *Oral History Journal of South Africa* 21 29). For instance, struggle songs have been sung during service protests and, more prominently, during the Fees Must Fall Protests (Ndelu "A Rebellion of the Poor: Fallism at the Cape Peninsula University of Technology" in Langa, Ndelu, Edwin and Vilakazi (eds) *#Hashtag: An Analysis of the #feesmustfall Movement at South African Universities* (2017) 13–32). Furthermore, in protests involving gender-based violence, songs are sung owing to the critical role that music plays in the lives of Africans (Mlamla, Dlamini and Shumba "Madoda Sabelani!: Engaging Indigenous Music in the Fight Against Toxic Masculinities and Gender-Based Violence in South Africa: A Critical Discourse Analysis" 2021 *Acta Criminologica* 101 102). In indigenous traditional communities, people use music such as Maskandi (traditional Zulu music) to convey critical political messages and to communicate on matters affecting the community (Mlamla *et al* 2021 *Acta Criminologica* 101 102). The song "Madoda Sabelani", for instance, has been sung in protests against the scourge of gender-based violence (Mlamla *et al* 2021 *Acta Criminologica* 101 102). During the Fees Must Fall protests, activists sang songs like "Senzeni Na!", also focusing on rape and other forms of violence against women (see Dlakavu "Black Feminist Revolt and Digital Activism Working to End Rape Culture in South Africa" 2016 7 *Buwa* 103).

Activism through song also takes place in the LGBTQIA+ community (lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, and many other gender and sexual identities). Musicians such as Nakhane Touré have used songs and music to express issues on gender identities and sexuality to assert themselves against hegemonic heteronormativity and deal openly with gay sexuality (Ncube "To Be Black, Christian and Gay: Nakhane Touré's Brave Confusion" 2015 12 *Muziki* 37 42). Hilder also articulates the use and importance of song in reflecting sexuality through songs like "Sing if You're Gay / Sing if You Are Happy That Way" (Hilder "Stories of Songs, Choral Activism and LGBTQ+ Rights in Europe" 2023 2 *Music and Minorities* 1 8). Unfortunately, situations still result in inequalities and culminate in different forms of oppression (Tichmann and Galant 2015 *Oral History Journal of South Africa* 21 28). This points to the importance of history and music and its cultural relevance in addressing societal inequalities.

Afrikaans heritage is also celebrated in songs such as "De La Rey", which refers to the Anglo-Boer War. The song is about a general of the Anglo-Boer War and has been sung enthusiastically by White Afrikaans speakers at

rugby matches. It was also played in trucks at Eugene TerreBlanche's funeral. The heroic figure of De La Rey was seen as a saviour who could lead the Afrikaans community, which was threatened during the Anglo-Boer War. The singing of the song has, however, been criticised and led to fears of re-domination by the Afrikaans-speaking people in South Africa (see Van der Waal and Robins "'De La Rey' and the Revival of 'Boer Heritage': Nostalgia in the Post-Apartheid Afrikaner Culture Industry" 2011 37 *Journal of Southern African Studies* 763 763).

The case of *Duncanmec (Pty) Limited v Gaylard* NO ([2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC)) (*Duncanmec*) involved racism in the workplace and the singing of political struggle songs. Workers were charged with racism and dismissed from their place of employment for participating in an unprotected strike and singing a Zulu song that, translated into English, means "Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer" (*Duncanmec supra* par 10). A disciplinary hearing was later conducted, and the employees were found guilty of racism, which warranted a dismissal (*Duncanmec supra* par 13). Dissatisfied with this ruling, the trade union (NUMSA) challenged the dismissal, arguing that the singing of the song did not constitute hate speech. However, the Labour Court endorsed the previous decision that the workers were guilty of racism (*Duncanmec supra* par 28). The decision was later overturned by the Constitutional Court, which found that the protest was peaceful, and the uttering of the words was viewed in the context of a strike or protest action. It should not be seen as racism (*Duncanmec supra* par 52).

Another matter that dealt with a similar issue is the case of *Robertson Winery (Pty) Ltd v CSAAWU* ([2016] ZALCCT 45; (2017) 38 ILJ 1171 (LC) par 32), wherein workers and members of a trade union, during a protest, sang a song containing the words "*Dubula Reinnette*", referring to the company's human resources manager. The song containing the word "*Dubula Reinnette*" is a variation of the well-known struggle song containing the phrase "*Dubula iBhunu*" (shoot the Boers), which was also in contention in the *Afriforum* matter.

5 Conclusion

According to the judgment in *Afriforum*, the singing of struggle songs, though controversial, forms part of our South African heritage and is crucial to our democracy, especially as we still grapple with severe issues of socio-economic inequality and racism that should continue to be debated to redress and acknowledge past racial transgressions. South Africa protects and promotes the right to freedom of expression, which entails public debate concerning redressing past injustices. The judgment in *Afriforum* reiterates that emphasising only the literal application of words would result in the prohibition of vast categories of speech (Kok and Botha "How to Make Sense of the Civil Prohibition of Hate Speech in Terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" 2019 34 *Southern African Public Law* 1 28).

When assessing whether the singing of a song constitutes hate speech, it becomes apparent that context is critical. A reasonably informed person knows that the singing of songs during EFF rallies and occasions is not calling for farmers or white South Africans to be killed. According to the *Afriforum* judgment, singing songs about struggles with a group of politically conscious people is not likely to incite violence. This is the importance of context. The courts should contextualise the singing of historical songs in line with their constitutional rights to freedom of expression. This argument reinforces the crucial view that citizens must tolerate offensive speech and that such speech may include racist, homophobic, and other forms of offensive speech. It is essential to defend the right to sing political songs; however, a careful interrogation of the songs' context is required. This view is also supported by the *Qwelane* judgment, wherein the word "hurtful", as listed in section 10(1) of PEPUDA, was excluded from the requirements for hate speech. In *Duncanmec*, the Constitutional Court also pointed out the importance of context (Botha "Swartman": Racial Descriptor or Racial Slur? *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC)" 2020 10 *Constitutional Court Review* 353 375). Botha mentions that while the mere singing of a song can undoubtedly constitute hate speech, the effect of the singing must be assessed in relation to its historical significance and purpose during the event (Botha 2020 *Constitutional Court Review* 353 375).

It may thus be accepted that offensive speech and aggressive utterances do not automatically constitute hate speech, as demonstrated in the judgment of *Afriforum*. However, this does mean there are no limits to accepted speech in a democratic country; in that regard, free speech must be distinguished from hate speech. The singing of a song will accordingly only constitute hate speech according to the determination of a reasonably informed person, taking into account the context of the singing of the songs.

Martha Keneilwe Radebe

LLB LLM LLD

Senior Lecturer, Department of Public Law

University of Pretoria, Pretoria, South Africa

<https://orcid.org/0000-0002-7030-374X>