

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case No.: **CCT 13/20**

In the matter between:

**JONATHAN DUBULA QWELANE**

Applicant

and

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL  
SERVICES**

Second Respondent

**SA HOLOCAUST AND GENOCIDE FOUNDATION**

First Amicus Curiae

**PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA**

Second Amicus Curiae

**THE TRUSTEES FOR THE TIME BEING  
OF THE WOMEN'S LEGAL CENTRE TRUST**

Third Amicus Curiae

**SOUTHERN AFRICA LITIGATION CENTRE**

Fourth Amicus Curiae

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**THE WLC TRUST'S WRITTEN SUBMISSIONS**

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## INTRODUCTION

1. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (*PEPUDA*) is the legislation mandated by section 9(4) of the Constitution to achieve a society in which women fully enjoy all rights and freedoms, experience *de facto* equality and also equality in terms of outcomes.<sup>1</sup> To achieve this purpose, section 10 regulates hateful speech directed at women and other vulnerable groups.
2. The third amicus curiae, the WLC Trust, argues that section 10(1) of PEPUDA strikes an appropriate and proportionate balance between the right to freedom of expression, and the rights to equality, dignity and safety and security.<sup>2</sup> Any limitation of the right to freedom of speech imposed by section 10(1) of PEPUDA is reasonable and justifiable under section 36 of the Constitution.
3. The WLC Trust limits its submissions to three topics:<sup>3</sup>
  - 3.1. Firstly, the WLC Trust urges the Court to take particular account the nature and effect of hateful speech directed at women. In this respect, the WLC Trust submits that:
    - 3.1.1. Misogynistic hate speech undermines substantive equality, dignity and infringes women's rights to safety and security. It constitutes a

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<sup>1</sup> PEPUDA's preamble and objectives highlight: The Act seeks to eradicate the systemic social and economic inequalities generated by a history of patriarchy in this country. It must root out the systemic inequalities and unfair discrimination that remain "deeply embedded in social structures, practices and attitudes." It seeks to give effect to the value of non-sexism, to prevent unfair discrimination and protect human dignity.

<sup>2</sup> The WLC Trust proceeds from the premise that section 10 extends the scope of regulation beyond expression limited by section 16(2) of the Constitution. For this reason, and in accordance with the dicta of *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 34, the primary focus will be whether the infringement can survive the section 36 limitation analysis.

<sup>3</sup> The points raised by the WLC Trust are particularly relevant to sub-section (b), (d) and (e) of section 36 of the Constitution, being: the importance of the purpose of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.

form of violence against women, and creates and entrenches the patriarchal structures, institutions, attitudes and practices that enables violence against women;

3.1.2. As a result, any legislative measure that seeks to limit or prohibit misogynistic hate speech will serve to protect and promote these rights. Section 10 can and must achieve the constitutional directive contained in section 9(4).

3.2. Second, the WLC Trust argues that the terms “*communicate*” and “*publish*” used in section 10(1) are not overbroad in the context of the purpose of section 10 and are necessary to encapsulate the wide range of hate speech directed at women.

3.3. Thirdly, we point out the manner in which the balance has been struck in other legislation regulating hateful speech directed at women, and argue that the right to freedom of expression is appropriately balanced with the right to equality, dignity and safety and security of women.

4. The State has a constitutional duty to address systemic inequality against women and protect women from violence in all its forms.<sup>4</sup> This duty must include regulating gendered or misogynistic speech that is hurtful, harmful, hateful or violent.

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<sup>4</sup> The state's duty under section 7 of the Constitution includes both the negative obligation to protect these rights, but also the positive obligation to take steps to respect, promote and fulfil the rights. See *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), para 11 where the Court held that Court held that the state has a duty “directly to protect the right of everyone to be free from private or domestic violence”; *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC), para 47; *Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC), paras 44 to 45; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), para 20.

5. This Court has recently acknowledged its duty to “*develop and implement sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security.*”<sup>5</sup> What is required in the present case, is the acknowledgement of the peculiar way in which misogynistic hate speech affects the rights of women.
6. The WLC Trust broadly supports the arguments of the first and second respondents, the Psychological Association of South Africa and South African Holocaust and Genocide Foundation as to the proper interpretation and constitutionality of section 10(1) of PEPUDA.<sup>6</sup>

### **MISOGYNISTIC HATE SPEECH UNDERMINES EQUALITY FOR WOMEN**

7. PEPUDA recognises that women are one of the many groups whose structural disadvantage and vulnerability to violence is embedded in and sustained by the use of harmful, hurtful or hateful speech. Women in South Africa are subjected to misogynistic, sexist or gendered speech daily at different intervals and different forms from school, to the home, the community, the workplace, public places as well as online. Equality is particularly important in light of the fact that the majority of women in this country sit at the intersection of different vulnerable groups.
8. Misogynistic hate speech it is in itself a form of violence against women, and creates and reinforces patriarchal structures and systems that legitimise violence

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<sup>5</sup> Concurring judgment of Acting Judge Victor in *Tshabalala v S; Ntuli v S* [2019] ZACC 48; 2020 (3) BCLR 307 (CC) at para 63.

<sup>6</sup> The WLC Trust does not make submissions on the merits of the complaint made by the SAHRC against Mr Qwelane.

against women. In this way, misogynistic hate speech undermines equality for women even where it does not expressly incite violence or advocate harm.

9. It follows, that the meaningful pursuit of equality mandated by section 9(4) of the Constitution requires the state to take steps to protect women from all forms of violence, including violence through words and to actively dismantle institutionalised patriarchy that gives rise to violence.
10. Section 10 works to achieve both these constitutional imperatives. To the extent that the achievement of this purpose infringes the right to freedom of expression, such infringement is justifiable in light of the importance of the purpose in South Africa's current and historical context.

***Misogynistic speech constitutes a form of violence against women***

11. Misogynistic speech seeks to reinforce patriarchal control over women by instilling fear and insecurity, and by threatening, humiliating and degrading women. The words themselves are harmful to the individual, silencing, creating fear, reinforcing control over the individual, and halting the participation of the individual in civic and personal spaces.
12. Domestic legislation and case law, as well as regional and international instruments, recognise that misogynistic language and gendered speech form part of the continuum of violence against women.

12.1. This Court has recognised that the threat of sexual violence is as pernicious as sexual violence itself.<sup>7</sup> In *F v Minister of Safety & Security*

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<sup>7</sup> *F v Minister of Safety & Security & another (Institute for Security Studies & others as amici curiae)* [2012] JOL 28228 (CC), para 56.

*& another (Institute for Security Studies & others as amici curiae) [2012] JOL 28228 (CC) at para 56, the Court found that these threats “go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women.”* The Courts have similarly recognised how abusive speech is an instrument in the patterns of physical violence and psychological denigration that exemplifies domestic violence.<sup>8</sup>

12.2. Parliament acknowledges this in the Domestic Violence Act 116 of 1998 which includes emotional, verbal and psychological abuse within the definition of domestic violence.<sup>9</sup> The legislation provides recourse to women in circumstances where this kind of speech “*harms, or may cause imminent harm to, [their] safety, health or wellbeing ...*”.<sup>10</sup>

12.3. Article 3 of the Maputo Protocol guarantees that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. It requires states to ensure

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<sup>8</sup> *S v Engelbrecht 2005 (2) SACR 41 (W)*, para 52.

<sup>9</sup> Section 1, Definitions: subsection (c).

*“emotional, verbal and psychological abuse” means a pattern of degrading or humiliating conduct towards a complainant, including—*

(a) *repeated insults, ridicule or name calling;*

(b) *repeated threats to cause emotional pain; or*

(c) *the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security”.*

<sup>10</sup> The Act includes emotional, verbal and psychological abuse within its ambit and describes such abuse as: “*a pattern of degrading or humiliating conduct towards a complainant including repeated insults, ridicule, or name calling; repeated threats to cause emotional pain; or the repeated exhibition of possessiveness or jealousy which is such to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security*”.

protection against “*all forms of violence, particularly sexual and verbal violence.*”<sup>11</sup>

- 12.4. Article 1 of the United Nations Declaration on the Elimination of Violence Against Women includes “threats of such acts, and coercion” in the definition of “violence against women”.<sup>12</sup>

### ***Misogynistic speech perpetuates the conditions for violence against women***

13. Misogynistic hate speech fosters and entrenches the attitudes, cultures, institutions and systems that sustain inequality and legitimise violence against women. Patriarchy manifests in speech. Words that may appear neutral will very often create and reinforce male domination and patriarchal institutions, practices and attitudes.<sup>13</sup>
14. When left unchallenged, these patriarchal institutions, practices and attitudes are the source of violence against women. Our courts have accepted that patriarchy is the structural driver behind violence against women and is central to the culture and framework in which violence thrives.

- 14.1. In her concurring judgment in *Tshabalala v S; Ntuli v S [2019] ZACC 48; 2020 (3) BCLR 307 (CC)*, Victor J pointed out at para 91 that the “*Deconstruction of patriarchy should not only be a victim-centred societal*

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<sup>11</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. South Africa ratified the Protocol on 17 December 2004.

<sup>12</sup> Article 1 provides: “*For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*”

<sup>13</sup> Patriarchy has been defined as ‘*the manifestation and institutionalisation of male dominance over women and children in the family and the extension of male dominance over women in society in general; patriarchy implies that men hold power in all important institutions of society and that women are deprived of access to such power*’. Lerner, G. 1989. *The Creation of Patriarchy*. Oxford University Press: New York, p 239.

*project but it should also break down structures that enhance patriarchal practices that in turn give rise to gender-based violence.”*

14.2. This Court has accepted that male domination is the underlying cause of the majority of sexual and ‘gender-based’ violence.<sup>14</sup>

14.3. In *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (5) SA 30 (CC)* Nkabinde J reiterated the widely accepted notion that: “*sexual violence and rape ... reflects the unequal power relations between men and women in our society.*”<sup>15</sup>

14.4. The link between culture and attitudes and physical violence against women was noted in *Bridgman NO v Witzenberg Municipality and Others 2017 (3) SA 435 (WCC)*:

*“Human dignity, the achievement of equality, the advancement of human rights and freedoms, and non-sexism are values that found the Republic of South Africa as a democratic state. Nevertheless, sexual and gender based violence, particularly rape, is endemic within South Africa. This undermines each of the founding values above. It enfeebles “defensible civilisation”, as well as our democratic enterprise. It has its origins in and remains a legacy of the domination and patriarchy that characterised slavery, colonialism and apartheid. It has not been attenuated by the legal transition to democracy. Rape culture, incorporating culture of masculinity, male*

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<sup>14</sup> Concurrence by Langa CJ in *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (5) SA 30 (CC); 2007 (8) BCLR 827* at para 84.

<sup>15</sup> *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (5) SA 30 (CC)* at para 29.



*entitlement and immunity from the consequences of gender based violence, permeates South African society.”<sup>16</sup>*

15. This Court has also stressed the need to be hyper vigilant about the ways in which sexism and patriarchy are incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. This Court acknowledged the “*cloaked but ubiquitous nature of patriarchy in the past*”.<sup>17</sup> In *Volks v Robinson* [2005] (5) BCLR 446 (CC) this Court held:

*“This Court has on numerous occasions stressed the importance of recognising patterns of systematic disadvantage in our society when endeavouring to achieve substantive and not just formal equality. The need to take account of this context is as important in the area of gender as it is in connection with race, and it is frequently more difficult to do so because of its hidden nature. For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. The constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry.”<sup>18</sup>*

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<sup>16</sup> *Bridgman NO v Witzenberg Municipality and Others* [2017] 1 All SA 466 (WCC); 2017 (3) SA 435 (WCC), para 1. The matter went on appeal in respect of the quantum: *Witzenberg Municipality v Bridgman N.O and others* [2019] JOL 46368 (SCA).

<sup>17</sup> In *Rahube v Rahube and Others* 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC), the Court stated at para 23:

*“African women under apartheid were systemically disenfranchised in a number of ways. It is important to recognise that the pervasive effects of patriarchy meant that women were often excluded even from seemingly gender-neutral spaces. The perception of women as the lesser gender was, and may still be, a widely-held societal view that meant that even where legislation did not demand the subjugation of women, the practices of officials and family members were still tainted by a bias towards men. The prioritisation of men is particularly prevalent in spheres of life that are seen as stereotypically masculine, such as labour, property, and legal affairs.”*

<sup>18</sup> *Volks v Robinson* [2005] (5) BCLR 446 (CC) para 163.

16. Prevention is recognised by the courts and government as an essential element of addressing violence against women, and part of prevention is actively addressing attitudes and stereotypical beliefs about women.
17. Both the National Strategic Plan on Gender Based Violence and Femicide (2020 – 2030) (NSP)<sup>19</sup> and the Emergency Response Action Plan (ERAP October 2019) recognise patriarchy as being one of the structural drivers of violence against women. The ERAP specifically recognises the need to challenge the use and acceptability of violence against women, patriarchy and related forms of discrimination and inequalities. One of the four key areas of interventions is to ‘change norms and behavior through high-level prevention efforts’<sup>20</sup>.
18. A striking example of the way in which speech can entrench ideas that perpetuate violence against women can be found in the Equality Court case of *Sonke Gender Justice Network v Malema* (02/2009; 15 March 2010).
  - 18.1. In January 2009, Mr Malema pronounced at a political rally that “*When a woman didn’t enjoy it [i.e. sex] she leaves the next morning. Those who had a nice time will wait until the sun comes out, request breakfast and taxi money. In the morning, that lady requested breakfast and taxi money. You don’t ask for taxi money from somebody who raped you.*” Sonke Gender Justice Network demanded an apology from the African National Congress, and when no response was forthcoming, filed a complaint with the Equality Court. The Court found that the words could reasonably be construed as hurtful, harmful and demeaning to women,

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<sup>19</sup> The NSP was approved by Cabinet in December 2019.

<sup>20</sup> Emergency Response Action Plan on Gender Based Violence and Femicide October 2019 p3.

and ordered Mr Malema to make an apology and pay R50 000 compensation to People Opposing Women Abuse.

- 18.2. The Equality Court heard undisputed evidence that the words relied on generalisations about women, rape and consent which reinforce rape myths. The myths and stereotypes reinforce men's dominance and perspectives at the expense of women's equality.<sup>21</sup> In particular, expert evidence suggested that Mr Malema's words sought to imply that *"consent is to be inferred from a victim's conduct, rather than explicitly asked and further that inferences of consent can be made after the fact of sex – not beforehand."*
- 18.3. Mr Malema's remarks trivialised the experience of rape, and centred on the myth of 'real rape'.<sup>22</sup> Rape myths reflect and shape societal responses by creating and encouraging a discourse of what counts as 'real rape' and which victims are 'genuine' victims. Rape myths, and the language used in perpetuating them, silence women who are victims of sexual and domestic violence and make women doubt their own experiences of that violence. It serves to maintain the status quo of power relations and control of men over women.
- 18.4. Our criminal justice statistics reflect these strongly held beliefs which result in systemic under-reporting of sexual violence and 91% of reported sexual offences cases resulting in withdrawals or not guilty findings.

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<sup>21</sup> *Sonke Gender Justice Network v Malema* at p12.

<sup>22</sup> Roehrs, Stefani "Waiting and watching: Malema's delayed apology and compensation payment and their broader implications" *Agenda: empowering Women for Gender Equity* Vol 25, No 4(90), Gender sexuality and commodity culture (2011) p112 – 117.

## THE LIMITATION IS NECESSARY AND PROPORTIONATE

19. This Court's jurisprudence cannot be clearer on the pernicious impact of violence against women, and the manner in which it infringes equality, dignity and the right to safety and security.

19.1. In *Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)* at para 62, this Court said that sexual violence and the threat of sexual violence "*is the single greatest threat to the self-determination of South African women*" and goes to the "*very core of the subordination of women in society*".

19.2. In *F v Minister of Safety & Security & another (Institute for Security Studies & others as amici curiae) [2012] JOL 28228 (CC)* the Court stressed that violence "*entrenches patriarchy as it imperils the freedom and self-determination of women.*"<sup>23</sup>

19.3. Similarly, in *Omar v Government of the Republic of South Africa and Others 2006 (2) SA 289 (CC)* this Court stressed that "[d]omestic violence brutally offends the values and rights enshrined in the Constitution."<sup>24</sup>

20. The protection of women against violence in all its forms, and the pursuit of substantive equality for women in South Africa is a constitutional imperative. It is, literally, a matter of life and death.

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<sup>23</sup> *F v Minister of Safety & Security & another (Institute for Security Studies & others as amici curiae) [2012] JOL 28228 (CC)* para 56.

<sup>24</sup> *Omar v Government of the Republic of South Africa and Others 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC)* para 17.

21. Misogynistic hate speech threatens the constitutional project and democratic pluralism. The late Chief Justice Langa acknowledged this danger when he acknowledged that: “*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.*”<sup>25</sup>
22. When considering the constitutionality of the provisions of the Domestic Violence Act, this Court found that these provisions represent “*an extension of the law into an area where lawlessness has long been sustained by interlaced notions of patriarchy and domestic privacy.*”<sup>26</sup> So too, must PEPUDA venture into previously uncharted territory where underlying patriarchy has allowed words that undermine key values of our democracy to prevail.. As this Court noted in *S v Baloyi*, the Legislature should be afforded “*must enjoy a reasonable degree of latitude or margin of appreciation in choosing appropriate solutions to a grave social ill.*”<sup>27</sup>

## **THE BALANCE IN OTHER LEGISLATIVE MEASURES DESIGNED TO PREVENT VIOLENCE AGAINST WOMEN**

23. The state is obliged to “*directly to protect the right of everyone to be free from private or domestic violence*”.<sup>28</sup> Speech amounting to violence or that infringes or threatens to infringe the right to dignity, safety and security and equality is regulated by a number of statutes. Parliament and government have decided that

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<sup>25</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294, para 27.

<sup>26</sup> *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), para 18.

<sup>27</sup> *S v Baloyi*, para 30.

<sup>28</sup> *S v Baloyi*, para 11.

freedom of expression must give way to other rights in the criminal context. The state recognises that violence and harm is not limited to physical and/sexual violence but extends to that of harm caused by words.

24. Section 10 of PEPUDA is another appropriate intervention by the state to protect, promote and fulfil women's rights to equality, dignity and safety and security.

25. Misogynistic, gendered hate speech is appropriately regulated in a number of pieces of legislation:

25.1. ICASA's Code of Conduct for Broadcasters expressly regulates and limits the broadcast of material that depicts or promotes violence against women.<sup>29</sup> The Code excludes material that amounts to bona fide discussion, argument and opinion, or scientific, dramatic or artistic material.<sup>30</sup>

25.2. The Domestic Violence Act includes in its definition of domestic violence emotional, verbal and psychological abuse.<sup>31</sup> This type of abuse is

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<sup>29</sup> GN 446 of 14 February 2003: Notice of the publication of the revised Code of Conduct for Broadcasters (Government Gazette No. 24394). Clause 15 provides:

*"Broadcasters shall:—*

- (i) not broadcast material which, judged within context, sanctions, promotes or glamorizes any aspect of violence against women;*
- (ii) ensure that women are not depicted as victims of violence unless the violence is integral to the story being told;*
- (iii) be particularly sensitive not to perpetuate the link between women in a sexual context and women as victims of violence"*

<sup>30</sup> Paragraph 17 provides:

*"The abovementioned prohibitions shall not apply to.—*

- (i) a bona fide scientific, documentary, dramatic, artistic, or religious broadcast, which judged within context, is of such nature;*
- (ii) broadcasts which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or*
- (iii) broadcasts which amounts to a bona fide discussion, argument or opinion on a matter of public interest."*

<sup>31</sup> Section 1, Definitions: subsection (c).

defined as ‘repeated insults, ridicule, or name calling; repeated threats to threats to cause emotional pain’.<sup>32</sup> The relief available to victims of this type of domestic violence is a protection order. A protection order constitutes a serious limitation on various rights of the respondent but is currently considered a justifiable limitation on those rights. The Act recognises that the use of this type of language must be prevented and provides for measures to prevent the perpetrator from continuing with the use of that language. The Act recognises the harm caused and that victims are worthy of protection. Those who are victims of that violence and the harm it causes are entitled to the protections contained in the Act and they can rely on the state to enforce and implement that protection. The remedies available in the Act can be onerous on the respondent (note here, often more onerous than those contained in the Equality Act).

25.3. The Protection from Harassment Act includes in its definition of harassment as conduct that ‘*causes harm or inspires the reasonable belief that harm may be caused....by unreasonably....engaging in verbal, electronic or other communication aimed at the complainant*’, or ‘*sending, delivering or causing the delivery of letters, telegrams, packages....to the complainant*’<sup>33</sup>. It too recognises the need to protect

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“emotional, verbal and psychological abuse” means a pattern of degrading or humiliating conduct towards a complainant, including—

- (a) repeated insults, ridicule or name calling;
- (b) repeated threats to cause emotional pain; or
- (c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security”.

<sup>32</sup> Act 116 of 1998 section 1.

<sup>33</sup> Act 17 of 2011 section 1.

victims against certain types of language and speech, and accepts any limitation on the right to freedom of expression is justifiable.

26. The right to freedom of expression is limited in all these cases but the limitation is justified in light of the important objectives. The same rationale applies in the present case.
27. We urge the Court to consider the impact of its judgment not only on the protections afforded to women in section 10 of PEPUDA, but also to consider the impact of its reasoning on these other critical legislative protections.

#### **THE FORMS OF SPEECH COVERED BY SECTION 10(1)**

28. Section 16(2) sets a high threshold for hate speech; it only applies where the expression amounts to advocacy of hatred and constitutes incitement to cause harm.
29. The wording of section 10(1) deliberately imposes a different standard and methodology for assessing whether the expression falls within its ambit and should be sanctioned.
30. We submit that on a proper interpretation, the section 10 standard and methodology is appropriate, constitutionally permissible, and indeed necessary to meet the objectives of PEPUDA.
31. We make submissions on one aspect of the provision.
32. Section 16(2) excludes from the scope of the right expression that constitutes *“incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”*



- 32.1. The authors Milo, Penfold and Stein take the view that “*the use of the word ‘incitement’ [in section 16(2)] indicates that the speech must instigate or actively persuade others to cause harm.*”<sup>34</sup> In the context of criminal and labour law, the word “incite” has been interpreted to mean to “*reach and seeks to influence the mind of another*”.<sup>35</sup>
- 32.2. The word ‘advocate’ is generally understood to mean to publicly recommend or support. As Iain Currie and Johan de Waal state: “[*t]o advocate hatred is to propose or call for it, to make a case for it.*”<sup>36</sup> The words “*advocates, advises, defends or encourages*” in the context of section 11(b) of the Suppression of Communism Act also contemplate communication to an audience.<sup>37</sup>
33. All too often the strict standard created by section 16(2) permits harmful misogynist speech to go unsanctioned contrary to the core values of our Constitution.<sup>38</sup>
34. Section 10 is worded differently. It provides that “*no person may publish, propagate, advocate or communicate words...*”. To “**publish**” means to “to make publicly or generally known”;<sup>39</sup> To “**communicate**” means “*to impart (information, knowledge, or the like); to impart or convey the knowledge of, inform*

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<sup>34</sup> Constitutional Law of South Africa, 2<sup>nd</sup> ed, 42-72.

<sup>35</sup> Constitutional Law of South Africa, 2<sup>nd</sup> ed, 42-6. In the criminal law context see *S v Nkosiyana* 1966 4 SA 655 (A). In labour law, see *Matlhong v JS Corporate Security (Pty) Ltd* (2014) 35 ILJ 790 (CCMA).

<sup>36</sup> Currie & de Vaal “The Bill of Rights Handbook” (5th Edition, 2005) 375.

<sup>37</sup> Claassen’s Dictionary of Legal Words and Phrases (2019) RD Claassen Judge of the High Court of South Africa. See also *R v Adams* 1959 1 SA 675 (Special Court, Pretoria).

<sup>38</sup> Two examples can be found in the decisions of the Broadcasting Complaints Commission which have allowed misogynistic speech to go unsanctioned on two occasions because it did not explicitly advocate hatred and incite violence against women *Smith v SABC (5FM)* [2015] JOL 32755 (BCCSA) and *Lottering v Radio Sonder Grense* [2013] JOL 31062 (BCCSA).

<sup>39</sup> *S v Laurence* [1975] 4 All SA 678 (A) at p 681 in reference to the Oxford English Dictionary definition.

*a person of, tell' 'to make known; inform a person of; convey knowledge or information of'.*<sup>40</sup>

35. Section 10 removes the requirement that the expression must “advocate” hatred and “incite” harm.<sup>41</sup> In doing so, it removes the requirement that the speech:

35.1. Is directed at another person in addition to the victim;

35.2. Expressly seeks to persuade or influence an audience.

36. The WLC Trust submits that this is an important departure as it enables section 10 to capture the forms of speech most frequently directed at women because:

36.1. It includes “commonly used” or normalised daily speech that does not expressly advocate hatred, but which forms part of the fabric of patriarchal, sexist society that does violence to women.

36.2. It also covers speech made in private. The focus of hate speech is all too often expression that occurs in the public space, but in many cases the hate speech directed at women is made in private and without an audience. This speech should not escape sanction, and is rightly covered by section 10 of PEPUDA.

## **REMEDY**

37. The WLC Trust submits that the order of the Supreme Court of Appeal should be overturned.

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<sup>40</sup> *S v Du Plessis* [1981] 2 ALL SA 207 (A), p 217.

<sup>41</sup> Milo et al concludes that the different wording means that section 10 “does not envisage that the hate speech must incite or persuade others” Constitutional Law of South Africa, 2<sup>nd</sup> ed, 42-87.

38. To the extent that the Court finds that the inclusion of “hurtful” speech within the prohibition renders section 10 overly broad, the WLC Trust agrees with the second respondent and first amicus curiae that the conjunctive reading of the sub-sections in section 10 would render the provision constitutional, and that this Court must prefer that interpretation.
39. If this Court rejects that interpretation, and finds that the provision is not justifiable under the limitations clause, and that section 10(1) must be declared unconstitutional and struck down, the WLC Trust will urge this Court to reject the narrow reading-in included in the order of the Supreme Court of Appeal. The SCA order, in effect, prevents the regulation of speech that undermines equality outside the specific categories in section 16(2) of the Constitution. This approach ignores the objectives of PEPUDA, but also has the potential to erode protections for women under other legislation that regulates speech.
40. Any order should retain the broader scope of speech – communicate and publish - contained in section 10, and make clear that, in principle, it is both legitimate and appropriate for the state to regulate speech that undermines equality and threatens the rights of women.

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Chambers, Sandton

9 April 2020