



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

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 5 August 2025

Case no: A2023-092235

In the matter between:

KENNY KUNENE

First Appellant

THE PATRIOTIC ALLIANCE

Second Appellant

and

JULIUS SELLO MALEMA

Respondent

CORAM: WILSON J, MFENYANA J and WENTZEL AJ

Summary

Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – the nature of hate speech – whether hate speech can be committed by addressing hateful words to a political opponent – the purpose of section 10 explained and discussed – the genocidal connotations of the word “cockroach” – the hateful nature of its use in political debate.

JUDGMENT

WILSON J (with whom MFENYANA J and WENTZEL AJ agree):

- 1 The central question in this appeal is whether one political leader who calls another political leader a “cockroach” in the course of a televised discussion

of the outcome of a local election commits an act of hate speech within the meaning of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”). We conclude that he does. This is because that conduct falls squarely within the textual definition of “hate speech” outlined in section 10 of the Equality Act, and because that text, read purposively in its statutory setting, was in our view designed, at least in part, to prevent political speech in South Africa from degenerating into an act of mutual dehumanisation. The consequences of such dehumanisation are writ large across the pages of history. They reveal themselves in the pogroms and genocides that the use of the word “cockroach” evokes. While South Africa is presently some way from deteriorating into widespread factional violence, the Constitution, 1996, and the Equality Act require us to enforce the modest limits on political discourse that are necessary to prevent it from doing so.

The speech

- 2 The first appellant, Mr. Kunene, is the Deputy President of the second appellant, the Patriotic Alliance. The Patriotic Alliance is a political party represented in the National Assembly. It is one of several parties which form the parliamentary coalition that presently controls the national executive. On 17 November 2021, Mr. Kunene appeared on television as part of a news programme to discuss the outcome of the 2021 local government elections, which had taken place on 1 November of that year. Much of the interview was concerned with a deal the Patriotic Alliance had struck with the African National Congress, which involved each party supporting the other’s

candidates for senior offices in municipal councils in which neither party could command a governing majority.

3 Towards the end of Mr. Kunene's appearance, his interviewer, a Mr. Simelane, asked Mr. Kunene to comment on remarks the respondent, Mr. Malema, had made on social media the day before. Mr. Malema is the leader of the Economic Freedom Fighters, which is presently an opposition party in the National Assembly. Though occasionally prepared to enter into alliances with the African National Congress, the Economic Freedom Fighters was in 2021 and remains today one of the African National Congress' sharpest critics. The Economic Freedom Fighters competes for votes with both the African National Congress and the Patriotic Alliance.

4 Mr. Malema's remarks concerned the deal that had been struck between the Patriotic Alliance and the African National Congress. He had criticised the African National Congress for entering into an arrangement with a "pati yama bantiti" ("a party of criminals"). The word "bantiti" was meant to refer to the well-known fact that both Mr. Kunene and Gayton McKenzie, who is the President of the Patriotic Alliance, have in the past been convicted of criminal offences. The remark was quite clearly not just a political critique of the African National Congress, but also an attempt to needle Mr. Kunene and Mr. McKenzie.

5 Mr. Malema achieved his purpose. When his remark was put to Mr. Kunene in the television interview of 17 November 2021, Mr. Kunene became angry. He accused Mr. Malema of "bitterness and jealousy". Mr. Kunene said that Mr. Malema had been "calling us these names for a very long time", but that the

Patriotic Alliance had “tried to be mature and not respond” to Mr. Malema. Mr. Kunene said that it was important to him to focus on “putting together our governments with [the] African National Congress”, which, he said, “is a very big agenda for the country”.

6 Mr. Kunene went on to say that once he is “done” with the coalition negotiations to which he had referred, he would “deal with this little frog”. Mr. Kunene said that “Julius is just an irritating cockroach that now I must deal with publicly, and I will call you. I will call all the press, and I will begin to deal with this and show you that Julius, whatever he criticises he is. Julius is a criminal, and I am going to show South Africans the crimes that he is involved in, he has been involved in, and I am going to tell South Africans why I truly, the real truth why I left the EFF, because of this cockroach”. Mr. Kunene went on: “so I am going to deal with this cockroach . . . we have stood back, but now it is over”. He said that he would “set up our governments”, and then “deal with this cockroach”.

7 The repeated use of the word “cockroach” to describe Mr. Malema was not lost on Mr. Simelane, who rounded the interview off by saying “I do imagine that there will be a fair degree of controversy around your choice of words, particularly the word cockroach. I do imagine that given its potent and loaded history, you know it has previously raised a lot of conversation. But nevertheless thank you for coming through and having the conversation with me here on ENCA”.

8 Mr. Kunene’s choice of words did excite controversy. Mr. Malema objected to them, and complained to the Equality Court that they amounted to hate

speech. The Equality Court agreed. On 31 January 2023, Makume J declared that Mr. Kunene's use of the words "cockroach", "little frog" and "criminal" to refer to Mr. Malema amounted to hate speech within the meaning of section 10 of the Equality Act. He directed Mr. Kunene to apologise for using these words to describe Mr. Malema, interdicted Mr. Kunene from doing so in future, and referred Mr. Kunene's utterances to the Director of Public Prosecutions for further investigation.

The appeal

- 9 Mr. Kunene and the Patriotic Alliance now appeal, with Makume J's leave, against Makume J's decision. Their arguments before us are more or less what they were before the Equality Court: that Mr. Kunene's utterances do not fall within the ambit of section 10 of the Equality Act because they were personal attacks on Mr. Malema, rather than on any group of which Mr. Malema is a member; that to the extent that Mr. Kunene's attacks on Mr. Malema might reasonably be construed to be based on his membership of an opposing political party, political attacks of that nature cannot amount to hate speech, since political affiliation is not a ground on which the Equality Act recognises that hate speech can be addressed; and that a particularly wide margin of appreciation must be afforded to political actors who attack each other in pungent or unpleasant terms. It was also suggested that, since Mr. Kunene did not actually threaten Mr. Malema with violence, or explicitly incite violence against him, his words could not reasonably be construed as harmful.
- 10 To this was added the proposition that Makume J had set far too low a standard in evaluating whether Mr. Kunene's utterances amounted to hate

speech. Makume J's judgment repeatedly describes Mr. Kunene's utterances as "inappropriate", and it was the serial use of this word that Ms. Engelbrecht, who appeared together with Mr. Mathopo for Mr. Kunene, emphasised in her critique of Makume J's decision.

11 However, I do not think that it would be fair, on reading Makume J's judgment as a whole, to impute to him the view that Mr. Kunene's speech had to be enjoined merely because it was "inappropriate". Makume J was clearly alive to the need to evaluate Mr. Kunene's utterances in context against section 10 of the Equality Act. The question is really whether he was right to conclude that Mr. Kunene's use of the words "little frog", "cockroach" and "criminal" during the 17 November 2021 interview amounted to hate speech under section 10, properly interpreted in light of the Constitution.

12 It is to an evaluation of that nature that I now turn.

The nature of hate speech

13 The Constitution entrenches the right to free expression, but recognises two sorts of limits on it. The first is that the right to free expression does not extend to propaganda for war, incitement of imminent violence, or "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" (section 16 (2) (c) of the Constitution). In other words, 16 (2) expression is constitutionally unprotected: expression of the kind defined there can be extinguished at will, without raising any constitutional issues at all.

- 14 The second is the sort of limitation that section 36 of the Constitution permits on all constitutional rights: a limitation authorised by “a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” (section 36 (1) of the Constitution). Section 10 of the Equality Act is such a limitation. While it certainly outlaws much if not all of the expression defined in section 16 (2) of the Constitution, section 10 casts its net much wider. It applies to “words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred”.
- 15 The “prohibited grounds” are “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status” (section 1 of the Equality Act), or any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground section 1 specifically enumerates.
- 16 The hate speech prohibition strikes at words which a reasonable person would understand as clearly intended to harm or incite harm against, and to encourage hatred of, a person or any group of persons merely because they bear a characteristic covered by a prohibited ground (see *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC) (“*Qwelane*”), paragraphs 121 and 122). In prohibiting hate speech of this type, the Equality

Act sets modest outer limits for social and political interaction. It recognises that words, left unregulated, can skew the terms of social and political participation against vulnerable groups, or against individuals, whether vulnerable or not, who are nonetheless targeted for opprobrium merely because of personal characteristics that they are perfectly entitled to have and which are constitutive of their dignity.

- 17 Words can do this not just by inciting physical harm against individuals or members of a specific group, but also by promoting the hatred of those individuals and groups in a manner that causes “deep emotional and psychological harm that severely undermines the dignity” of the targeted groups or individuals, or which harms “social cohesion in South African society” thereby “undermining our nation-building project” (see *Qwelane*, paragraph 154),
- 18 Outlawing words which harm “our nation-building project” may seem at first blush to have an Orwellian ring. But it bears emphasis that critique of that project will never itself constitute unlawful expression. When the Constitutional Court speaks in *Qwelane* of harm to a nation-building project, it does not address itself to vigorously expressed opposition to the constitutional dispensation we presently enjoy, even if that opposition is accompanied with hostile or even violent imagery. It seems to me that what *Qwelane* strikes at is harm to the fundamental terms of social interaction: harm which denies others the right to speak or be heard simply because of their social status or characteristics, or which encourages others to regard individuals with specific

social characteristics as less than human; as unworthy of having their voices heard.

- 19 The problem with this sort of expression is that it degrades the social arena in which it takes place. It makes us all less human, less tolerant of each other, and more tolerant of hate. It encourages us to accept dehumanisation as a normal part of political or social life, and it is a necessary precondition for the infliction of widespread violence against the groups it targets. In *Qwelane*, the Constitutional Court made clear that the Equality Act aims not merely to remedy the harm in hate speech after it occurs, but also “to ensure that it does not occur” (*Qwelane*, paragraph 110). The outlawing of the kinds of “societal harm” of which the court in *Qwelane* spoke (see paragraphs 109 and 121), is a critical part of the Equality Act’s preventative purpose.
- 20 Understood in this way, the limits section 10 places on free expression are quite modest. Section 10 strikes only at words that are reasonably apprehended as clearly intended to cause harm to and encourage hatred against the individuals or groups defined by reference to the prohibited grounds in section 1. The words used must be objectively capable of causing appreciable harm to those individuals or groups. Mere subjective hurt is not enough (*Qwelane*, paragraph 144). The harm, though, may be direct, in the sense that it causes or is capable of causing physical or psychological injury to the targeted groups or individuals, or indirect, in the sense that it adjusts or is capable of adjusting the terms of social interaction against those groups or individuals.

The words Mr. Kunene used against Mr. Malema

- 21 Mr. Kunene referred to Mr. Malema as a “cockroach” four times in a televised interview about the outcome of an election. Mr. Kunene and Mr. Malema were, and still are, leaders of competing political parties. The trigger for Mr. Kunene’s attack on Mr. Malema was Mr. Malema’s critique of the African National Congress’ decision to form municipal council coalitions with Mr. Kunene’s party.
- 22 Although Mr. Malema originally suggested that Mr. Kunene’s attack on him was motivated by his ethnicity, I do not think that proposition can be sustained. There is nothing in the context of Mr. Kunene’s remarks that could reasonably be taken as an attack on Mr. Malema’s ethnicity. Ms. Engelbrecht in fact argued that the attack could only reasonably be understood as entirely personal. She emphasised that Mr. Kunene said that Mr. Malema was the reason he left the Economic Freedom Fighters, underscoring, she submitted, the personal animosity between the two men.
- 23 I do not think that proposition can be sustained either. It is clear that Mr. Malema and Mr. Kunene do not like each other. But that would not have been the dominant impression left on the reasonable observer of the 17 November 2021 interview. Mr. Kunene referred to Mr. Malema as a “cockroach” in the context of party-political debate. The reasonable observer would accordingly have understood the epithet to have been directed at Mr. Malema because he was a political competitor.
- 24 Ms. Engelbrecht could not really gainsay this, but pointed to the decision of Equality Court in *Gordhan v Malema* 2020 (1) SA 587 (GJ), at paragraph 18,

in which it was observed that: “[a] notable omission from the prohibited grounds is, not unsurprisingly, political ideology: neither capitalists nor socialists can complain about their vilification as a class by invoking this statute”. The submission, as I understood it, was that, because political ideology is not a ground listed in section 1 of the Equality Act, hate speech cannot be committed in the context of debate between different political factions, so long as the words that flow between political competitors are directed at the antagonists’ ideologies, rather than the immutable characteristics such as race, ethnicity or gender.

25 I accept that political ideology is not a listed ground, but I do not think it follows that hate speech cannot extend to conflicts between people of contrasting political ideologies. In the first place both “conscience” and “belief” are grounds listed in section 1 of the Equality Act. Politics being what they are, not all political affiliations will be matters of conscience or of belief, but some clearly are. One need look no further than the anti-communist pogroms of the mid-twentieth century United States for an example of the persecution of individuals because their consciences and beliefs coincided with their political affiliation to the Communist Party USA. Moreover, political affiliation, at least for some people, clearly qualifies as a ground on which discrimination against them would undermine their human dignity, or adversely affect the equal enjoyment of that person's rights and freedoms in a serious manner that is comparable to discrimination on a listed ground.

26 Accordingly, I reject the proposition that political ideology or affiliation may not provide a basis for hate speech. Indeed, it seems to me that dangerous

currents of violence and dehumanisation will often flow along the lines of political ideology or affiliation. The question is whether a reasonable observer would have understood Mr. Kunene's remarks to be clearly intended to cause or incite harm and propagate hatred against Mr. Malema because of Mr. Malema's conscience, belief or political ideology or affiliation.

27 I think this is exactly how the reasonable observer would have understood Mr. Kunene's utterances. Mr. Malema had criticised the African National Congress for entering into coalitions with the Patriotic Alliance. He had done so by seizing on Mr. Kunene's and Mr. McKenzie's past to label the Patriotic Alliance as a "party of criminals". There is no suggestion that Mr. Malema did not honestly believe what he said. Nor is it suggested that the critique was not advanced in good faith against a political competitor taking a step Mr. Malema genuinely believed was inappropriate or damaging to the public interest. It is likely that the critique was, for Mr. Malema, a matter of conscience, or at least of genuine belief, and it was advanced in the context of airing a political opinion that Mr. Malema was entitled to have.

28 Mr. Kunene's response was to call Mr. Malema a cockroach. There can be no doubt what the use of that word would have evoked for the reasonable observer. Whatever Mr. Kunene intended, the use of the word cockroach is internationally recognised as hateful of those to whom it is directed. It is also, if not itself an incitement to do them harm, clearly indicative of an attempt to place them beyond the protection of ordinary human decency. The political use of the term cockroach is always and everywhere a call to treat those to whom the term is directed as objects of hate. This is because, as Makume J

found, the Rwandan genocide is the dominant context in which the reasonable observer would have understood Mr. Kunene's use of the term. That genocide was characterised by the use of the word "cockroach" to dehumanise and mark-out for slaughter the hundreds of thousands of men, women and children who were hacked to death in its commission.

29 Ms. Engelbrecht was alive to this, and urged us to find that the word "cockroach" lacks the connotations in South Africa that it would have in Rwanda. I do not think this is realistic. Part of what makes hateful words hateful is that they break free of their context and become vehicles for hate well beyond the circumstances in which they were developed. "Cockroach" is such a word.

30 In any event, the question is not the precise etymology of a particular word or phrase, but how a reasonable observer would have understood its deployment. It seems to me that the use of the word "cockroach" would reasonably have been understood as evincing a clear intent to harm and promoted hatred of Mr. Malema because he was one of Mr. Kunene's political foes, and because his belief and political conscience were not those of Mr. Kunene. The use of the word conveys that Mr. Malema is not human, but deserves to be treated like a cockroach – to be eliminated from public life, perhaps together with his followers. It does not matter whether this is what Mr. Kunene intended. It is plainly the meaning a reasonable observer would have attributed to Mr. Kunene's utterances. Mr. Simelane himself alluded to this in drawing Mr. Kunene's interview to a swift conclusion.

- 31 Ms. Engelbrecht further argued that the context of Mr. Kunene’s utterances – fierce political debate to which a margin of appreciation must be afforded – saved them from being considered hate speech. In my view, that context simply compounded the harm Mr. Kunene’s words were likely to cause to Mr. Malema, and to society at large. It seems to me that one fundamental purpose of section 10 is to place limits on the terms of social and political debate, with the aim of ensuring that it cannot degenerate into mutual dehumanisation and violence. In other words, South African law does not tolerate political attacks reasonably understood to incite harm and promote hatred against one’s political opponents. The tendency of such attacks is to poison the atmosphere of political contestation, and move us closer to the resolution of political disputes by violence rather than deliberation and election.
- 32 I accept, of course, that courts should be slow to police speech merely because it is “angry in tone or conveys hostility” (*Hotz v University of Cape Town* 2017 (2) SA 485 (SCA), paragraph 68). For this reason, I do not think that describing Mr. Malema as a “criminal” or as a “little frog” (a quaint term, the provenance of which was not argued before us) could count as hate speech. This is because a reasonable observer would have understood them as no more than heated rhetoric. It is the specifically genocidal connotations of the word “cockroach” which take it into a different category.
- 33 For all these reasons, we must, in my view, confirm the core finding of the Equality Court: that the repeated use of the word “cockroach” to describe Mr. Malema amounted to hate speech, within the meaning of section 10 of the Equality Act. This is because a reasonable observer would have understood

the use of that term in the context it was deployed as being clearly intended to promote hatred of and incite harm against Mr. Malema for no reason other than that his political conscience and beliefs were not those of Mr. Kunene.

Relief

34 These conclusions mean that the appeal must be dismissed. However, the order of the Equality Court cannot stand in its current form. In the first place, the order must be purged of the declaration that the use of the words “criminal” and “little frog” were hateful. Nor can the referral of Mr. Kunene’s utterances to the National Prosecuting Authority be sustained. Criminal sanction of unlawful expression is a measure of last resort, which should be applied only in the most serious of cases (see *Qwelane*, paragraph 90). In the context of hate speech, the primary aim should be to repair the social breach the hate speaker caused.

35 In this case, it seems to me that Mr. Kunene should be given the opportunity to bring himself back within the limits of lawful expression, and unequivocally to accept that there are some things that he is simply not permitted to utter because they undermine the political system in which he is himself an important participant. The interdictory relief and the order that Mr. Kunene apologise the Equality Court granted are both sufficient and well-tailored to that end.

36 The parties were agreed that, unless Mr. Kunene’s appeal is substantially successful, costs should follow the result. The importance and complexity of this matter justify the taxation of counsel’s costs on the “C” scale. Since the Patriotic Alliance made common cause with Mr. Kunene in defending the

Equality Court complaint, and in pursuing this appeal, it will be jointly and severally liable with Mr. Kunene for those costs.

The rule 49 (6) (a) and condonation applications

- 37 Mr. Premhid, who appeared together with Ms. Zikalala for Mr. Malema, took the preliminary point that the appeal had lapsed. He asked us to make a declaratory order to that effect. The submission was that the appellants had not complied with rule 49 (6) (a), and that the appeal had lapsed as a result.
- 38 Rule 49 (6) (a) requires an appellant to apply “to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal” within sixty days of issuing their notice of appeal. If the appellant fails to do so, and the respondent does not themselves set the appeal down, rule 49 (6) (a) states that the appeal and any cross-appeal “shall be deemed to have lapsed”.
- 39 There is no dispute that the appellants in this case did apply for a date within the sixty-day period prescribed in rule 49 (6) (a). However, the practice directives of this court required such an application to be accompanied by the appellants’ heads of argument. The appellants’ heads of argument were not submitted with the date application. They were filed at the direction of this court just under a month before the hearing.
- 40 Mr. Premhid submitted that, because the application for a hearing date was not accompanied by the appellants’ heads, it was not an “application” within the meaning of the rule 49 (6) (a). For that reason, Mr. Premhid submitted, the appeal lapsed.

41 The point is a specious one, which should never have been taken. In the first place, rule 49 itself envisages a different regime for the filing of heads than the practice directives of this court. Rule 49 (15) permits the filing of an appellant's heads of argument "[n]ot later than fifteen days before the appeal is heard". Rule 49 cannot therefore sensibly be read to provide for the lapsing of an appeal merely because an appellant's heads do not accompany a date application. In addition, as the relevant practice directive makes clear, the failure to file heads with a date application means no more than that the appeal will not be allocated a date until the heads are filed.

42 In this case, the appellants obtained a date without filing their heads. This did not mean that their appeal lapsed. It meant merely that the registrar had made a mistake. The oversight was cured by this court's direction that heads be filed. The rule 49 (6) (a) application must fail. Costs will follow the result. Though the application was easily dealt with, there is no wisdom in awarding counsel's costs on a lower scale than in the main application. The rule 49 (6) (a) application simply added a layer of complexity to an already complex and important matter.

Order

43 Accordingly –

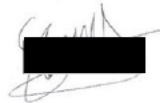
43.1 The application to declare that the appeal has lapsed is dismissed with costs, including the costs of two counsel. Counsels' costs may be taxed on the "C" scale.

43.2 Save to the extent that the Equality Court's order is varied below, the appeal is dismissed with costs, including the costs of two counsel, to be paid by the first and second appellants jointly and severally, the one paying the other to be absolved. Counsel's costs may be taxed on the "C" scale.

43.3 The Equality Court's order is varied and replaced with the following order –

- "1. It is declared that the first respondent's use of the word "cockroach" to describe the complainant in the ENCA television interview of 17 November 2021 amounted to hate speech in contravention of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
2. The first respondent is interdicted and restrained from describing the complainant as a "cockroach" in future.
3. The first respondent is ordered to issue an unconditional written and oral public apology for referring to the complainant as a "cockroach". The apology must unequivocally retract the use of the word "cockroach" to describe the complainant.
4. The first respondent's written and oral apology must be published within one month of the date of this order.

5. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of the complaint, including the costs of two counsel.”



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 5 August 2025.

HEARD ON: 23 July 2025

DECIDED ON: 5 August 2025

For the Appellants: MJ Engelbrecht SC
T Mathopo
(Heads of argument drawn by MJ Engelbrecht SC)
Instructed by E Botha and Y Erasmus Inc

For the Respondent: K Premhid
M Zikalala
Instructed by Ian Levitt Attorneys