



**IN THE EQUALITY COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: EC06/2023

In the matter between:

THE CITY OF CAPE TOWN

Complainant

and

FADIEL ADAMS

Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 01 MARCH 2024

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an application in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“*PEPUDA*”) regarding utterances made by the respondent against the Municipal Manager of the City of Cape Town, Mr Lungelo Mbandazayo. The complainant is the City of Cape Town Municipality (“*the City*”), acting on behalf of Mr Mbandazayo, and it seeks orders declaring that the respondent’s utterances constitute unfair discrimination, hate speech and harassment, and also seeks certain ancillary relief.

[2] The respondent is the President of the Cape Coloured Congress¹, which is a registered political party. He is also a Proportional Representative Councillor (“*PR Councillor*”) in the City. He made the utterances in question on social media platforms, and specifically Facebook, where he hosts ‘live broadcasts’ and addresses his followers, numbered at 5000, on a range of issues which include service delivery in the City. The live broadcasts are usually recorded and subsequently posted to the respondent’s Facebook page where they may be viewed by the public until he removes them.

B. THE FACTS

[3] The brief background is that in or about 2018 Mr Mbandazayo, in his capacity as the City’s Municipal Manager, cancelled a contract for the repair of staircases of residential flats in the Cape Flats. Subsequently, the City conducted a forensic investigation into the cancellation, but failed to make it publicly available. The respondent states that he requested copies of the report from, amongst others, Mr Mbandazayo, and also made an application in terms of the Promotion of Access to Information Act 2 of 2000, to no avail. He believed that he was entitled to receive the report because he was a PR Councillor. He also held the view that the cancellation was as a result of fraud and corruption amongst certain staff members of the City and the service provider awarded the tender by the City for the repairs.

[4] As a result of his persistence in requesting a copy of the forensic report from Mr Mbandazayo, the latter blocked him on whatsapp and refused to answer any of his phone calls. He also states that he was prevented from raising the issue by the Speaker of the Municipal Council at one meeting of the Council. His main frustration is that, despite the City’s awareness of the poor state of the staircases - which constitutes a health hazard to the residents - it did not act with requisite haste in renewing or awarding the contract to another service provider.

¹ The answering affidavit ‘notes’ the complainant’s averment that the respondent is the President of the Cape Coloured Congress, but later states that he is the President of the ‘*National Coloured Congress formerly known as the Cape Coloured Congress*’. His heads of argument, however, state that he is the President of the Cape Coloured Congress.

[5] The specific utterances that are the subject of this application were made on 6 February 2023 and 10 March 2023. After the first of these was made on 6 February 2023, the City's legal representatives addressed a letter to the respondent stating that the utterances were false, defamatory and racially discriminatory, and requested him to remove the posts from his Facebook account and to cease and desist from making further defamatory and racially discriminatory utterances.

[6] After receiving the letter from the City's legal representatives, he hosted another live broadcast on 10 March 2023, which is also the subject of these proceedings. He was resolute in his beliefs and repeated some of his previous statements. By the time these proceedings were launched, the respondent had not complied with the demands made in the letters from the City's legal representatives.

C. THE UTTERANCES

[7] The utterances made by the respondent are common cause. It is their meaning that is in dispute. They are as follows:

6 February 2023

- *"The City Manager, in case you didn't know, is Lungelo Mbandazayo. We presume the man is from the Eastern Cape. We understand that he may not care about Coloured people or the Cape Flats. It's generally what you get when you hire from without".*
- *"What has happened here guys is that the Cape Flats has been robbed again... And a man from the Eastern Cape has made a decision to cancel it. Coloured lives don't matter".*

10 March 2023

- *"Young man... from the Eastern Cape who doesn't give a crap about the living conditions of the Coloured people... I am waiting for your summons".*
- *"These people don't give a crap about you, me, our children, our grandmothers, or anyone that is poor and Coloured".*
- *"Mbandazayo, I swear to you, I will get that forensic report whether your hand is cold when I take it from you. I will get that report. My people will have justice....Coloured lives don't matter. They don't matter to you people. They never did".*

- *We will take what is ours. We are not asking we are taking. Dis bruin tyd ouens. We will make the Western Cape brown again.*
- *You people are going to jail...I will walk you down the aisle... I will call my cousins in Pollsmoor... I will tell them don't be gentle... don't be gentle want die varke het gesteel van onse kinders af"*
- *"I don't speak war guys; I make war. I am not one of those people that come here and says I come in peace... if it's gonna come to a shooting match, the people who know me will tell you I've never fired a warning shot in my life. Never...Koels is duur, en ouens laat sloote in jou kop as jy mis"*

[8] The complainant states that the respondent uses the word "*Eastern Cape*" as a racial trope to dehumanise, marginalise and exclude Black African persons employed by the City. Further, that he seeks to divide Coloured and Black African persons on the basis of race by contending that a person from the Eastern Cape is inherently incapable of serving the needs of Coloured communities. And his statements perpetuate and reinforce the idea that persons of a certain race belong in only certain parts of the country. Accordingly, the complainant states that the statements constitute hate speech, unfair discrimination and harassment. In addition, the complainant states that the statements amount to incitement to commit violence against City officials, as well as intimidation and threats.

[9] There were other similar statements made by the respondent - some of which are alleged to be xenophobic - which are not disputed. However, that part of the case was not mentioned during argument in Court or in the parties' heads of argument, and as a result, this judgment does not focus on them.

[10] The respondent states that the reference to "*Eastern Cape*" is accurate because Mr Mbandazayo is actually from the Eastern Cape, and he (Mr Mbandazayo) had confirmed this in a previous newspaper article. The respondent explains that his utterances regarding Mr Mbandazayo being from the Eastern Cape were not made on basis of his race. It was an expression of his disappointment at Mr Mbandazayo for implementing the policies of the Democratic Alliance ("*DA*") whose effect was the

marginalisation of poor communities living in the Cape Flats. He was also expressing his disappointment regarding the cancellation of the contract by the Municipal Manager, which he considered to be unlawful; as well as his refusal to release the forensic report.

[11] The respondent denies that the reference to the 'Eastern Cape' reaffirms the idea of apartheid in terms of which certain people belonged only to certain parts of the country. He disputes the complainant's interpretation that the references to the Municipal Manager being from the Eastern Cape were a reference to him being black, referring to the fact that he never mentioned the word 'black man' or 'black persons' in his broadcasts.

[12] And when he stated that the Municipal Manager may not care about Coloured people or the Cape Flats, it was because of what he believed was unlawful cancellation of the contract and the consequences thereof. In this regard, he refers to complaints he received that some residents, who happen to be Coloured, suffered injuries as a direct result of the dilapidated state of the staircases and no medical, financial or other kind of assistance had been offered by the City to them. He therefore formed the opinion that by cancelling the contract, the Municipal Manager showed that Coloured lives do not matter, and that he was incompetent and unable to fulfill responsibilities as a Municipal Manager of the City.

[13] The respondent further explains that when he said "[t]hese people don't give a crap about you", this statement was not directed at the Black African population group in the Western Cape, but to the DA whose leadership is predominately white. In any event, he states that since the DA's membership is constituted of mixed races, he cannot be accused of discrimination on the prohibited ground of race.

[14] When he stated that "*we will make the Western Cape brown again*", he was expressing a hope that his party will take control of the Western Cape after the next government elections, and there were no racial undertones invoked.

[15] The respondent denies that his statements were threatening in any way. When he stated that he would get the forensic report whether or not the Municipal Manager's hand was cold, he was referring to the winter season and was at the time sitting in front of a fireplace. He was not referring to death or making a death threat. And when he spoke of war and a shooting match and not being one to fire a warning shot, he was referring to a 'metaphorical war', which he is politically fighting in government as a PR Councillor. He denies that he was inciting violence against City officials.

D. THE RELEVANT LAW

[16] In *Rustenberg Platinum Mine v SAEWA (obo Bester) and Others*² the Constitutional Court held that the test to determine whether the use of words is racist is objective, and is whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory.

[17] However, the context in which the words or phrase is used is determinative.³ Phrases that appear neutral or innocuous may carry an entirely different meaning when viewed in context.⁴ And as both parties in this matter admit, the context in our country is that the impact of the legacy of apartheid and racial segregation has left us with a racially charged present.⁵

[18] As the Constitutional Court observed, "*it cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral — our societal and historical context dictates the contrary. Racism and racial prejudice have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others.*"⁶ Such an approach takes

² *Rustenberg Platinum Mine v SAEWA (obo Bester) and Others* 2018 (5) SA 78 (CC) at [28].

³ *Rustenberg Platinum Mine v SAEWA (obo Bester) and Others* 2018 (5) SA 78 (CC) at [28].

⁴ *Rustenberg Platinum Mine v SAEWA (obo Bester) and Others; SARS v CCMA* 2017 (1) SA 549 (CC) at [86]; *Qwelane v SAHRC* 2021 (6) SA 579 (CC) at [86].

⁵ *Rustenberg Platinum Mine v SAEWA (obo Bester) and Others* para 48. See also *SARS v CCMA* 2017 (1) SA 549 (CC) at [86].

⁶ *Rustenberg Platinum Mine* at para [49] and [52].

cognisance of the substantive-equality demands that flow from the Constitution, and takes into account of how words perpetuate and contribute towards systematic disadvantage and inequalities.⁷

[19] This includes the use of coded language and racial tropes, which the Constitutional Court in *Masuku* recognised are inherently imbued with deep historical roots and contemporary manifestations.⁸

[20] The Constitutional Court has also stated that the purpose of hate speech regulation is linked to our constitutional object of healing the injustices of the past and establishing a more egalitarian society, by curtailing speech which is part and parcel of the system of subordination of vulnerable and marginalised groups in South Africa.⁹

E. DISCUSSION

[21] The starting point must logically be the respondent's express statements. What you get when you hire from without, according to him, is a person who "*may not care about Coloured people or the Cape Flats*" and "*who doesn't give a crap about the living conditions of the Coloured people*". There is no doubt from these words that what the respondent sought to emphasise is that Mr Mbandazayo is an outsider who has different interests from people of the Western Cape, specifically Coloured people; and who has no care for Coloured people. The reason given in these statements for the Municipal Manager's supposed lack of care for Coloured people is that he is from the Eastern Cape. It is not that he cancelled a contract or that he was failing to fulfil his obligations as a Municipal Manager.

[22] In that same vein, the respondent repeatedly emphasises with incredulity that decisions concerning Coloured people's lives are being made by a man from the Eastern Cape. He constantly notes that a man from the Eastern Cape made the decision to cancel the contract. The rhetorical question is: "*Of what relevance is the fact that the Municipal*

⁷ *Qwelane v SAHRC* 2021 (6) SA 579 (CC) at [86].

⁸ *SAHRC v Masuku* 2022 (4) SA 1 (CC) at [144].

⁹ *Qwelane v SAHRC* 2021 (6) SA 579 (CC) at [86].

Manager is from the Eastern Cape to the cancellation of the contract?" The respondent's papers do not address this issue, which is at the core of this application. The answer can only be that the fact that the Municipal Manager is from the Eastern Cape, according to the statements, disqualifies him from making decisions affecting Coloured people, including the cancellation of the contract.

[23] In one such reference, the respondent refers to the Municipal Manager as a "*young man from the Eastern Cape*". This can be viewed in no other way than a means, not only to marginalise Mr Mbandazayo, but also to belittle him – to express that he is viewed by the speaker as a person of low ranking. It is another way of expressing that he is not qualified to make decisions concerning the Coloured community. There was no evidence produced to show that, in relation to the respondent, Mr Mbandazayo may be considered a 'young man'. Instead, an article attached by the respondent indicates that the Municipal Manager will be 62 years old this year, whilst the respondent's answering affidavit shows that he will be turning 48 years this year. There was accordingly no basis for the respondent to refer to the Municipal Manager as a young man other than to demean him. Simply put, the message conveyed is that Mr Mbandazayo's professional capabilities are inferior by reason of his origin from the Eastern Cape.

[24] Also disturbing is the manner in which the social origin of Mr Mbandazayo is introduced into the live broadcast: "*We presume the man is from the Eastern Cape*". This supposed presumption has not been explained by the respondent. At the same time, the answering affidavit relies significantly on a newspaper article dated 11 May 2018, in which the Municipal Manager confirmed that he was from the Eastern Cape. The respondent states that it was against the background of this article that he referred to Mr Mbandazayo as being from the Eastern Cape.

[25] The question then is why was it necessary to *presume* that Mr Mbandazayo is from the Eastern Cape if the respondent was aware of the newspaper article at the time at which the statements were made? And who is 'we' to whom this presumption is

attributed? The respondent's papers do not provide answers to these questions. When viewed in light of the respondent's own version that he was already aware, from the article dated May 2018, that the Municipal Manager was from the Eastern Cape, the only reasonable inference is that the phrase '*we presume*' was used as a further means of '*othering*' the Municipal Manager and to cast him in suspicious, diminished light.

[26] It is not a big leap to conclude from the respondent's statements that, according to him, the reason that the Municipal Manager who is from the Eastern Cape does not care about Coloured lives is because he is not Coloured. If he were Coloured he would be so qualified and would care about the issues affecting them. That interpretation is supported by the respondent's repeated explanations in the answering affidavit that he drew the inference that the Municipal Manager did not care about Coloured people from, amongst other things, the consequences of the cancellation of the contract which were dire to the "*people of the Cape Flats who happen to be Coloured*". This is nothing but '*othering*'. It links the fact that Mr Mbandazayo is of a different race from Coloured people to his failure to renew the contract. It similarly links the fact that Mr Mbandazayo is of a different race from Coloured people to his lack of care for Coloured people.

[27] Not being Coloured, in the case of Mr Mbandazayo means being Black African. It is what constitutes an additional, disqualifying strike against Mr Mbandazayo from making decisions concerning Coloured people according to these statements, including the cancellation of the said contract. It conveys, according to the respondent, that "*Coloured lives don't matter*". It is what makes the cancellation particularly bitter.

[28] The corollary is that, if a person from the Eastern Cape has no business making decisions affecting people of the Western Cape, he or she is only qualified to make decisions over Black African people in the Eastern Cape. The implication is that he or she must go back to the Eastern Cape. This conclusion is confirmed by the respondent's explanation that he is frustrated by the "*large scale lack of jobs within the Western Cape [which] is highlighted by the fact that a local government chooses to employ an individual from another province [thereby] overlooking so many more competent and*

qualified individuals who live in the Western Cape"¹⁰. This belief is repeated in the respondent's heads of argument, where it is stated that the respondent believes that there were suitable candidates who could have been appointed from within the Western Cape.¹¹ This belief simply reaffirms the apartheid concept of separate development, a well-documented phenomenon from whose consequences our nation continues to reel.¹² It is an affront to the constitutional guarantee that South Africa belongs to all who live in it.¹³

[29] As for the respondent's averments that he was actually referring to the DA, none of the specific utterances discussed above were directed at anyone other than the Municipal Manager. The DA is not a 'man' from the 'Eastern Cape'. And as the complainant points out, in terms of the Constitution, a Municipal Manager is required to operate with high standards of professional ethics, and must provide service impartially, fairly, equitably and without bias;¹⁴ and with a duty to only execute lawful policies of the government of the day¹⁵. In other words, properly construed in the light of these constitutional provisions, Mr Mbandazayo is a professional who must be seen to be operate above, or separate from, party politics, and not as an extension of the DA. In passing, I note that this point is made even clearer when one has regard to the provisions of the Municipal Structures Act 117 of 1998¹⁶, Municipal Systems Act 32 of 2000¹⁷ and the Municipal Finance Management Systems Act 56 of 2003¹⁸, which were not referred to, but in terms of which a clear statutory distinction is created between municipal managers and politicians.

¹⁰ Answering affidavit para 56.1.

¹¹ Although, the heads of argument do not specify it, the context indicates that this is in reference to the appointment of Mr Mbandazayo.

¹² Woolman and Bishop *Constitutional History in CLOSA* (Juta Publishers, Cape Town 2012) at 2- 18, explains separate development as "*the fictional oasis of tribal government in which Africans could exercise their own unique political aspirations. The apartheid regime referred to this racist ghettoization of South Africa as the policy of 'separate development'*".

¹³ See Preamble to the Constitution.

¹⁴ Section 195(1)(a) and (d).

¹⁵ Section 197(1).

¹⁶ Section 83.

¹⁷ Sections 6, 53 and Item 11 of Schedule 1.

¹⁸ Chapter 8.

[30] What remains to be said in relation to the respondent's averment that the Municipal Manager is to be seen as the face of the DA is that the same article attached by the respondent dated 11 May 2018 which reported that Mr Mbandazayo was from the Eastern Cape, also set out the history of his involvement in the Pan Africanist Congress from his student days. In other words, the respondent could never have been under the belief that the Municipal Manager was the face of the DA as he now claims. As a result, the respondent's version in this regard is far-fetched.

[31] It is therefore clear from the above discussion that the use of the term "*Eastern Cape*" by the respondent was not a neutral reference to geography divorced from race. Any reasonable, objective and informed person, on hearing these words would perceive them to be racist and derogatory. It is coded language and a racial trope which is intended to convey Mr Mbandazayo as inferior. It matters not that the respondent did not specifically mention the words 'race', 'black' or 'black man'.

[32] I am furthermore in agreement with the complainant that the utterances discussed above undermine the intellectual and leadership ability and position of the Municipal Manager on the basis of his birth, ethnicity, social origin and race.¹⁹ They are used to isolate, hurt and marginalize the Municipal Manager on those bases.

[33] I now turn to consider the complainant's case based on unfair discrimination based on race and harassment.

Unfair Discrimination

[34] Section 7 of PEPUDA provides, in relevant part, as follows:

"Subject to section 6, no person may unfairly discriminate against any person on the ground of race including --

(a) The dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence.

¹⁹ SARS at [86].

(b) *The engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity based on race.*

(c) *The exclusion of persons of a particular race group under any rule practice that appears to be legitimate, but which is actually aimed at maintaining exclusive control by a particular group."*

[35] I have already indicated that the respondent's utterances convey that Black African people from the Eastern Cape generally do not care about the plight of Coloured people; that they are outsiders to the issues affecting Coloured people; and are accordingly not capable to lead or participate in governance issues affecting them. Further, they convey the idea that the Western Cape belongs to "*bruin*" (brown) people and that Black African persons are outsiders from the Eastern Cape who do not properly belong in the Western Cape.

[36] A reasonable person would understand these utterances to promote: (a) racial superiority; (b) racial exclusivity in the sense that the Western Cape belongs to a certain race group; and (c) exclusion on the basis of race because Black African persons are to be regarded as unwanted outsiders. Thus, I am of the view that the complainant has established a *prima facie* case of discrimination based on the prohibited ground of race. Accordingly, in terms of section 13, the burden shifts to the respondent as follows:

"Burden of proof

(1) If the complainant makes out a *prima facie* case of discrimination—

- (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
- (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place—

- (a) on a ground in paragraph (a) of the definition of "prohibited grounds", then it is unfair, unless the respondent proves that the discrimination is fair;
- (b) on a ground in paragraph (b) of the definition of "prohibited grounds", then it is unfair—
 - (i) if one or more of the conditions set out in paragraph (b) of the definition of "prohibited grounds" is established; and

(ii) unless the respondent proves that the discrimination is fair.”

[37] “*Prohibited grounds*” are defined as -

“(a) 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; or

(b) any other ground where discrimination based on that other ground—

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)”

[38] As the discussion above shows, the utterances of the respondent easily fit within paragraph (a) of the definition of ‘*prohibited grounds*’, and specifically birth, race and ethnic or social origin. Accordingly, in terms of section 13(2)(a), the respondent’s *prima facie* discrimination is presumed to be unfair unless the respondent proves that the discrimination is fair.

[39] When determining whether discrimination is fair, section 14 provides as follows:

“(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account—

(a) The context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following—

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.”

[40] In applying these provisions, I am persuaded that the respondent’s utterances amount to unfair discrimination. The utterances undoubtedly impair the dignity of Mr Mbandazayo;²⁰ and undermine his leadership and self-worth on the basis of his race, ethnicity, social origin and birth.²¹ Given our nation’s painful past, it cannot be gainsaid that Mr Mbandazayo is a member of a group that has suffered past patterns of discrimination, specifically by virtue of his race, ethnicity and social origin. And the respondent’s discriminatory utterances reinforce those past patterns - the notion of separate development where racial and ethnic groups are confined to territories in the country.²² The discriminatory utterances are persistent and pervasive, and there is every indication in the papers that the respondent lacks remorse and in fact intends to continue making them.²³ Even after the respondent was served with a letter from the complainant’s legal representatives, he persisted with his conduct.

²⁰ Section 14(3)(a).

²¹ Section 14(3)(b).

²² Section 14(3)(c).

²³ Sections 14 (3)(d) and (e).

[41] For similar reasons, the respondent's conduct meets the requirements of 'harassment' which is defined in section 1 as follows:

"...unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to—

(a) sex, gender or sexual orientation; or

(b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group..." (my emphasis)

[42] The requirements for harassment, which are highlighted above are clearly met. I now turn to consider the case of hate speech.

Hate Speech

[43] Section 10 of PEPUDA reads as follows:

"Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred."

[44] It is not in dispute that the respondent communicated his utterances to an unknown number of people who joined his live, public broadcasts on Facebook. Even after the live broadcasts, their recordings remain available on his Facebook page for as long as he allows the posts to remain there. In other words, that he communicated, or advocated, or propagated ideas. Thus, the requirement of a speech made within the contemplation of section 10 is met.²⁴ And as I have already found, the respondent's reference to "*Eastern Cape*" in relation to Mr Mbandazayo is a racial trope for "*Black African*". The speech is accordingly based on the ground of race which is listed as a prohibited ground in section 1 of the PEPUDA.

²⁴ See *Qwelane* at para [113].

[45] As for whether a reasonable person would conclude that the speech was clearly intended to be harmful or to incite harm and promote or propagate hatred, the test is objective.²⁵ It matters not whether the respondent intended his speech to be harmful, or that the complainant subjectively understood the speech to be so. The determination in this regard falls within the exclusive function of a court, and no evidence - expert or otherwise - is admissible²⁶. Important considerations in making that determination include who the speaker is, the context in which the speech occurred and its impact, as well as the likelihood of inflicting harm and propagating hatred.²⁷

[46] The Constitutional Court has stated that the first part of the objective enquiry in this regard is whether a reasonable person would regard the speech as demonstrating hatred towards an individual or group on a prohibited ground; or alternatively, whether a reasonable person would regard the speech as inciting harm on a prohibited ground; and third, does the speech, reasonably construed promote or propagate hatred. The first two are alternatives – only one of them needs to be satisfied.²⁸

[47] The incitement of harm requirement includes physiological harm or an affront to an individual's dignity, and there is no requirement to establish a causal link between the expression and the actual harm committed.²⁹

[48] I have already stated that what is sought to be conveyed by the respondent's utterances is that Black African people from the Eastern Cape generally do not care about the plight of Coloured people, and that they are outsiders to the issues affecting Coloured people. I have also already rejected the respondent's explanation that the actual target of his statements was the DA. The clear implication of the utterances is that the leadership of a Black African person is incapable of addressing the concerns of

²⁵ *Qwelane* at para [176].

²⁶ *Masuku* at para [143].

²⁷ *Qwelane* at para [176].

²⁸ *Qwelane* at [122].

²⁹ *Qwelane* at [122].

Coloured communities. Any reasonable person would regard these utterances as assailing the dignity of the Municipal Manager. His leadership and contributions are diminished on the basis of his race, birth, social origin and ethnicity. In my view, the respondent's speech meets all of the requirements for hate speech as set out in *Qwelane* and *Masuku*.

[49] It was contended that the respondent's utterances are protected in terms of section 16 of the Constitution because they amount to political speech, and he is entitled to raise concerns about governance and leadership in the City. In this regard, section 12 of the PEPUA creates an exception to hate speech and discriminatory speech where it amounts to a –

“bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution”.

[50] Section 16 of the Constitution provides as follows:

- “(1) Everyone has the right to freedom of expression, which includes—
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to—
 - (a) propaganda for war
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

[51] The clear wording of section 16(2) is that the right to freedom of expression does not extend to advocacy of hatred that is based on race or ethnicity. Since I have already found that the respondent's utterances amount to hate speech and unfair discrimination

based on race, this provision cannot assist him. As the complainant points out, although the respondent is constitutionally entitled to raise his concerns about governance in the City, including passionately and forcefully, that is no licence for hate speech or unfair discrimination. The right to freedom of expression does not entitle him to discriminate against others, assault their dignity, and propagate hate speech.³⁰ Accordingly, the proviso in section 12 does not apply, and his utterances amount to hate speech.

F. RELIEF

[52] I have found that the respondent's utterances amount to hate speech, unfair discrimination based on race and harassment. I consider it appropriate to grant all the relief sought by the complainant. Since the utterances were made on a social media platform which is accessible to an unknown number of people, it is appropriate that the respondent should not only remove the posts but also apologise publicly to Mr Mbandazayo for his utterances. Given his recalcitrant attitude especially after receiving a 'cease and desist' letter from the complainant's legal representatives, as well as some of his beliefs which are highlighted in this judgment, it is also appropriate that he should be ordered to attend some racial sensitivity training.

[53] There is furthermore no reason why the respondent should not be ordered to pay the costs of this litigation. In the pre-litigation correspondence he was afforded an opportunity to desist from his conduct, and was warned that failure to do so would lead to enforcement of legal remedies. He failed to heed that warning. There is no reason why the complainant should be put of pocket as a result of his reckless disregard for the law. Nevertheless, although it is laudable to include junior counsel in a matter such as the present, I am of the view that one counsel would have sufficed on behalf of the complainant, and will accordingly only grant costs in respect of senior counsel.

³⁰ See *Masuku* at [141].

G. ORDER

[54] In the circumstances, the following order is granted:

- 1) It is hereby declared that the utterances made by the respondent against the Municipal Manager of the City of Cape Town, Mr Lungelo Mbandazayo (Mr Mbandazayo), constitute unfair discrimination, hate speech, and harassment.
- 2) The respondent is ordered to remove the social media posts dated 6 February 2023 and 10 March 2023 which contain the prohibited speech by end of 4 March 2024.
- 3) The respondent is ordered to issue an unconditional public apology to Mr Mbandazayo for the prohibited speech contained in his social media posts of 6 February 2023 and 10 March 2023, by end of 4 March 2024.
- 4) The respondent is ordered to enrol for and undertake a programme on racial sensitivity training, at his own expense, by end of 30 May 2024.
- 5) The respondent is ordered to file a report to this Court and serve it upon the complainant, evidencing his compliance with paragraphs 2, 3 and 4 of this Order, by end of 31 May 2024.
- 6) The respondent is ordered to pay the complainant's costs, including costs of senior counsel.



N. MANGCU-LOCKWOOD
Judge of the High Court