IN THE EQUALITY COURT AT THE MAGISTRATE'S COURT
HELD AT LOUIS TRICHARDT

Case number: 01/2020

In the matter between:

MAVHIDULA, AZWIDINI VICTOR (ON BEHALF OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION)	Complainant
and	
MATUMBA, ANTHONY	Respondent
and	
MEDIA MONITORING AFRICA TRUST	Applicant for admission as an amicus curiae

---

HEADS OF ARGUMENT ON BEHALF OF MEDIA MONITORING AFRICA

TABLE OF CONTENTS

INTRODUCTION

1. The advent of the internet, and social media platforms in particular, has fundamentally changed the way in which we engage with the world, including how we communicate, socialise, learn, work and participate. While this has presented significant opportunities for the right to freedom of expression, it has also raised a number of pressing challenges regarding the dissemination of information online.

2. Social media platforms are unique in respect of the speed with which information can be conveyed; the amplification of the audience that can be reached; and the relative permanence with which information can remain online unless active steps are taken to remove it. In the light of the technological advances that have arisen from social media platforms, it is imperative that our courts remain responsive to the opportunities and challenges that these present, and fashion procedures and remedies that are appropriate and effective in the context of the digital era.

3. It is for these reasons that Media Monitoring Africa ("MMA") seeks to be admitted as an amicus curiae in this matter, in accordance with regulation 10(5)(c)(vi) of the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ("the Regulations"), in order to offer assistance to this Court in navigating the complex and nuanced issues that arise in respect of the allegations of harassment online.

4. MMA is a not-for-profit organisation that operates in the public interest to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. In the last 28 years, MMA's work has consistently related to key human rights issues, always with the objective of promoting democracy, human rights, and encouraging a just and fair society. MMA has and continues to play an active role in media monitoring and seeks to proactively engage with media, civil society organisations, state institutions and citizens, and in doing so advocates for freedom of expression and the responsible free flow of information to the public on matters of public interest. In this regard, MMA has a keen interest in navigating the appropriate balance to be struck between freedom of expression and other competing rights and interests.

5. In line with MMA's particular areas of interest and expertise, and fully cognisant of the duty of an amicus curiae not to repeat any of the submissions that have already been canvassed by the parties, MMA's substantive submissions are narrowly tailored to three key issues of law that are relevant to the present matter:

    5.1. ***First***, the ambit of the right to freedom of expression.

    5.2. ***Second***, the relevant context in which the impugned tweets should be construed.

    5.3. ***Third***, the appropriate remedy in such proceedings.

6. In making these submissions of law, MMA neither seeks to adduce new evidence nor examine or cross-examine any witnesses. MMA limits itself to the evidence of the complainant and the respondent. MMA also does not make any submissions as to whether the respondent is the author and publisher of the impugned tweets; as such, these submissions of law only become relevant to the extent that Mr Matumba's role in the impugned tweets is established by the complainant.

7. Accordingly, these heads of argument are structured in two parts. In ***Part I***, we deal with the application for admission as an amicus curiae. Thereafter, in ***Part II***, we deal with the substantive submissions advanced on behalf of MMA. These are dealt with in turn below.

PART I: APPLICATION FOR ADMISSION AS AN AMICUS CURIAE

Role and importance of an amicus curiae

8. In ***Hoffman v South African Airways***,[1] the role of an *amicus curiae* was described as follows:[2]

> "An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position."

9. Furthermore, in ***In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others***,[3] it was explained that the role of the amicus curiae—

> "is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court."[4]

---

[1] [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211.

[2] Id at para 63.

[3] [2002] ZACC 13.

[4] Id at para 5.

10. In the present matter, MMA is duly cognisant of the "special duty" that it owes to this Court to provide cogent and helpful submissions, as well as to be of assistance in the determination of this matter. MMA does not seek to adduce new evidence, but rather raises substantive matters of law that are relevant to the constitutional and contextual underpinnings of this matter. In what follows, we address the requirements to be assessed in considering MMA's application for admission as an amicus curiae.

Requirements for admission as an amicus curiae

11. Regulation 10(5)(c)(vi) of the Regulations afford this Court — sitting in its capacity as an Equality Court — a broad discretion in respect of the application for admission as an amicus curiae. Specifically, it provides that a presiding officer may make any order in respect of amicus curiae interventions. This should also be read in accordance with the guiding principles contained in section 4 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA"), which emphasise that proceedings in term of PEPUDA are intended to be "expeditious and informal", and further conducted in a manner that facilitates "participation" and "access to justice to all persons".[5]

12. MMA submits, therefore, that this Court, sitting as an Equality Court, is granted more leeway than it would ordinarily have by virtue of the provisions of PEPUDA and the Regulations, including in respect of MMA's application for admission as an amicus curiae.

13. While PEPUDA and the Regulations are silent on the specific requirements that must be met in order for a prospective amicus curiae to be admitted, there are three requirements that can be distilled from the caselaw: (i) the submissions sought to be advanced must be relevant to the issues before the Court; (ii) the submissions must be useful to the Court; and (iii) the submissions must be different from those of the other parties before the Court.[6] MMA submits that it meets all three requirements:

[5] Section 4(1)(a) – (c) of PEPUDA.

[6] ***Institute for Security Studies; In Re: S v Basson*** [2005] ZACC 4; 2006 (6) SA 195 (CC) at para 6.

13.1. ***Relevance:*** The substantive submissions to be advanced are directly relevant to the constitutional and contextual underpinnings of this matter. In formulating these submissions, MMA has had regard to the papers to ensure that the submissions are narrowly tailored to the pertinent issues before the Court. In doing so, MMA submits that these submissions are relevant to the adjudication and determination of this dispute.

13.2. ***Usefulness:*** In this regard, MMA submits that its submissions will assist this Court in three key respects. First, it will place the impugned tweets and the prohibition of harassment in the proper constitutional framework that will need to be assessed when determining the outcome of this matter. Second, it will assist this Court in grappling with the unique features of expression on a social media platform, and the varying considerations that arise from this. And third, it will be of use in fashioning an appropriate and effective remedy.

13.3. ***Novelty:*** As mentioned above, MMA has been cognisant throughout not to repeat the submissions of the other parties. To MMA's knowledge, the ambit of section 16 of the Constitution, the unique context of social media platforms and the particular submissions that MMA seeks to advance regarding the remedy have not been canvassed by either the complainant or the respondent.

14. Accordingly, taking into account the relevance, usefulness and novelty of its submissions, MMA submits that its application for admission as an amicus curiae should properly be granted. Given the complex and nuanced issues that arise from the present matter, MMA is of the view that it is important for these submissions to be appropriately considered by this Court, as they have a direct bearing on the potential outcome of this matter. MMA is also aware that our court have taken the view that submissions of this nature should be raised before a court *a quo*, so that any appellate court that may be later charged with hearing an appeal on the merits will have the benefit of understanding the initial court's views on the submissions of the amicus curiae.[7]

[7] ***AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others*** [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 121.

PART II: SUBSTANTIVE SUBMISSIONS ON BEHALF OF MMA

Scope of submissions

15. As mentioned above, MMA advances three submissions in this matter:

    15.1. ***First***, the ambit of the right to freedom of expression. In this regard, MMA considers the content of the right to freedom of expression when balanced against the competing rights and interests that arise from the prohibition on harassment, including the right to dignity and the interest in promoting national unity.

    15.2. ***Second***, the relevant context in which the impugned tweets should be construed. In doing so, regard will be had to the unique context presented by a social media platform, including who constitutes the hypothetical reasonable reader on Twitter.

    15.3. ***Third***, the appropriate remedy in such proceedings. The focus here will be on the importance of a swift and effective remedy in circumstances where harassment has been perpetrated online, and the importance of an apology in the present matter.

16. MMA does not seek to adduce new evidence, examine or cross-examine any witnesses, or weigh in on whether the respondent is the author and publisher of the impugned tweets. MMA's submissions are of relevance to this Court in assessing the harm and appropriate remedy only to the extent that the complainant is able to establish that it was indeed Mr Matumba who perpetrated the alleged harassment.

Overarching considerations

17. MMA submits that there are three overarching considerations that should be borne in mind when assessing the import of the submissions below:

17.1. ***Constitutional values:*** Section 39(1)(a) of the Constitution of the Republic of South Africa, 1996 ("Constitution") enjoins a court called upon to interpret the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Moreover, in terms of section 39(2) of the Constitution, every court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation, which in this instance would include PEPUDA.

17.2. ***International and foreign law:*** Sub-sections 39(1)(b) and (c) of the Constitution provide that courts must consider international law, and may consider foreign law, when interpreting the Bill of Rights. Similarly, sub-sections 3(2)(b) and (c) of PEPUDA provide that any person interpreting PEPUDA may be mindful of international law and comparable foreign law. In making submissions based on international and foreign law, MMA is cognisant of the expectation on courts to have regard to these tenets of our law when interpreting the Bill of Rights and PEPUDA.

17.3. ***Relevance of context:*** Section 3(3) of PEPUDA provides that any person applying or interpreting PEPUDA must take into account the context of the dispute. In the present matter, the impugned tweets were published and disseminated via an online platform. This context is directly relevant in assessing the harm that arises, and the appropriate remedy that should follow, in determining the outcome of this case.

18. MMA submits that it is through the lens of these three overarching considerations that the submissions below should be considered.

(i) Ambit of the right to freedom of expression

19. The prohibition against harassment contained in section 11 of PEPUDA is a limitation of the right to freedom of expression. The respondent does not seek to challenge the constitutionality of section 11 of PEPUDA, and it is therefore presumed for present

purposes that section 11 is constitutionally permissible. However, in constituting a limitation of a fundamental right in the Bill of Rights, regard will need to be had to striking the appropriate balance between Mr Matumba's right to freedom of expression, on the one hand, and other competing rights and interests, on the other.

Content of the right to freedom of expression

20. Section 16(1) of the Constitution guarantees that everyone has the right to freedom of expression, which in terms of sub-section (b) includes the freedom to receive or impart information or ideas. Moreover, the right to freedom of expression is further guaranteed through international treaties, including article 9 of the African Charter on Human and Peoples' Rights and article 19 of the International Covenant on Civil and Political Rights.

21. Freedom of expression has been described by the Constitutional Court as "a *sine qua non* for every person's right to realise his or her full potential as a human being".[8] In ***South African National Defence Union v Minister of Defence and Another***,[9] the Constitutional Court held that:[10]

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

22. The Constitutional Court has further accepted that the right to receive or impact information or ideas is applicable "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that

---

[8] ***Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Others*** [1996] ZACC 7; 1996 (3) SA 617 (CC) at para 26.

[9] [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC).

[10] Id at para 7.

offend, shock or disturb".[11] According to the Constitutional Court, freedom of expression extends "even where those views are controversial". The corollary of freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views".[12] This is central to fostering an "open market-place of ideas".[13]

23. According to Milo and Singh, the broad formulation contained in section 16(1) of the Constitution applies regardless of the medium through which the expression is conveyed; this includes the typical forms of communication, such as publishing and broadcasting, as well as newer forms, such as blogging and tweeting.[14] Both the United Nations ("UN") and the African Commission on Human and Peoples' Rights ("ACHPR") have similarly confirmed that the right to freedom of expression applies equally both on- and offline.[15] This has been echoed in the recently revised Declaration of Principles on Freedom of Expression and Access to Information in Africa, published by the ACHPR, which provides that:

> "The exercise of the rights to freedom of expression and access to information shall be protected from interference both online and offline, and States shall interpret and implement the protection of these rights in this Declaration and other relevant international standards accordingly."[16]

24. Given the importance of the right to freedom of expression, any limitation of the right must not be taken lightly.

---

[11] ***De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*** [2003] ZACC 19; 2004 (1) SA 406 (CC) at para 49, citing ***Handyside v United Kingdom*** (1976) 1 EHRR 737 at 754.

[12] ***South African National Defence Union***, above n 9 at para 8.

[13] ***S v Mamabolo (E-TV, Business Day and Freedom of Expression Institute Intervening)*** 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 37.

[14] Milo and Singh, "Freedom of expression" in ***Public Interest Litigation in South Africa*** (2018).

[15] UN Human Rights Council, "Resolution on the promotion, protection and enjoyment of human rights on the internet", A/HRC/32/L.20 (2016); ACHPR, "Resolution on the right to freedom of information and expression on the internet in Africa", ACHPR/Res.362(LIX) (2016).

[16] ACHPR, "Declaration of Principles on Freedom of Expression and Access to Information in Africa" (2019) at principle 5.

Striking an appropriate balance with competing rights and interests

25. While the right to freedom of expression is self-evidently an important right — both in itself and as an enabler of other rights — it is not absolute. As explained by the Constitutional Court:

> "The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms.' Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself."[17]

26. In ***Islamic Unity Convention***, the Constitutional Court explained that there is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity contained in section 10 of the Constitution, as well as other state interests, such as the pursuit of national unity and reconciliation.[18] The Constitutional Court noted further that determining the parameters of the right to freedom of expression is therefore important, particularly where its exercise might intersect with other interests.[19] Notably, that there is no hierarchical relationship between the rights to freedom of expression and dignity, with the Constitutional Court having held that:[20]

> "With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. <u>What is clear though and must be stated, is that</u>

[17] ***Islamic Unity Convention v Independent Broadcasting Authority and Others*** [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 29.

[18] Id at para 28.

[19] Id.

[20] ***Mamabolo***, above n 13 at para 41.

> freedom of expression does not enjoy superior status in our law." (Own emphasis.)

27. Within the context of the present matter, it is submitted that Mr Matumba's right to freedom of expression may justifiably be limited by the prohibition of harassment contained in section 11 of PEPUDA, having due regard to the competing rights and interests of dignity, national unity and reconciliation. We make the following submissions in this regard:

    27.1. ***Definitional elements of harassment:*** The impugned tweets meet the definitional elements of harassment as contained in section 1 of PEPUDA. In the absence of a constitutional challenge to the definition of harassment, or the prohibition against harassment, it is presumed for present purposes that these provisions of PEPUDA are constitutionally compliant. As noted in the initial complaint, the tweets contained serious, demeaning and humiliating comments against women, and black women in particular.[21]

    27.2. ***Narrowly circumscribed interpretation:*** Any limitation of a fundamental right, including the right to freedom of expression, should be narrowly circumscribed in its interpretation, and should not put in jeopardy the right itself.[22] Limitations must be directly related to the specific need on which they are predicated.[23] In interpreting section 11 of PEPUDA, read with the definition contained in section 1, this Court should narrowly circumscribe its interpretation of harassment so as not to have a chilling effect on the right to freedom of expression. However, even in taking a narrow interpretation of the relevant provisions, it is submitted that the impugned tweets fall within the scope of harassment in terms of PEPUDA.

---

[21] Complaint at p 4.

[22] UN Human Rights Committee, "General Comment No. 34 on article 19 of the ICCPR: Freedom of opinion and expression" (2011) at para 21.

[23] Id at para 22.

27.3. ***Reasonable and justifiable in an open and democratic society:*** Any limitation of a right must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. MMA submits that the present limitation on Mr Matumba's right to freedom of expression meets this threshold, and that the limitation is indeed reasonable and justifiable. It is also relevant in this regard that the extent of the limitation is not unduly onerous or burdensome when all relevant factors are considered.

28. As set out by the complainant in the complaint, the tweets contained serious, demeaning and humiliating comments against women, and black women in particular. Furthermore, it is alleged that this was done under the guise of being a white woman to further encourage racial discord and promote disunity. Accordingly, to the extent that it is established that Mr Matumba is the author and publisher of the impugned tweets, it is submitted that the right to freedom of expression may justifiably be limited in the circumstances when balanced against the competing rights and interests of dignity, national unity and reconciliation.

(ii) Relevant context in which the impugned tweets should be construed

Unique context presented by social media platforms

29. The unique context presented by social media platforms is of relevance to the present matter. While the court in ***H v W*** took the view that "social media is all about building friendships around the world, rather than offending fellow human beings",[24] it has otherwise been noted that—

> "[t]here is something about internet websites and social media platforms that seem to bring out the worst in people. Reasonably decent people who might carefully

[24] ***H v W*** [2013] ZAGPJHC 1; 2013 (2) SA 530 GSJ; 2013 (5) BCLR 554 (GSJ) at para 43.

weigh their words can become raving hatemongers and irresponsible tattletales on these platforms."[25]

30. There are three inter-related features of social media platforms that render it unique from other forms of publication:

30.1. **The first is the speed with which information is conveyed**. Notably, the nature of social media platforms is that the publication is instantaneous, and within moments content that may be contrary to the law can be published to a wide audience across the world.

30.2. **The second is the amplification of the audience**, by which social media platforms enable users to engage with wider audiences than they may otherwise have access to, which might be local, national, regional and international.[26] For example, the impugned tweets received hundreds of reactions, with the tweet of 27 July having received 1 300 likes, 566 retweets and 363 comments.[27]

30.3. **The third feature is the relative permanence of the content**, unless active steps are taken to remove it. According to Singh, with reference to the Twitter Help Centre, the deletion of a tweet also removes all retweets from Twitter.com, Twitter for iOS and Twitter for Android.[28] However, the deletion of the original tweet does not remove the following: any tweets in which other persons have copied and pasted part or all of the text into their own tweet; retweets in which persons have added a comment of their own; and tweets which may be cached or cross-posted on third-party websites, applications or search engines.[29]

---

[25] De Vos, "Defamation and social media: We have moved on from Jane Austen" in ***Constitutionally Speaking*** (2013).

[26] ***Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Sooknunan t/a Glory Divine World Ministries*** [2012] ZAGPJHC 97; 2012 (6) SA 201 (GSJ); [2012] 3 All SA 322 (GSJ) at para 71.

[27] Complaint at p 13.

[28] Singh, "Social media and defamation online: Guidance from Manuel v EFF" in ALT Advisory Insights (2019).

[29] Id.

31. These considerations are particularly relevant when assessing the extent of the harm of the impugned tweets, and further in determining an appropriate and effective remedy.

The hypothetical reader of the tweets

32. A further consideration that arises is by whom the impugned tweets were likely to have been read, how they were construed and what impact that this had on aspects such as dignity, national unity and reconciliation. In a matter of this nature, MMA submits that regard should be had to the hypothetical ordinary, reasonable reader of the tweets. Notably, in ***Stocker v Stocker***, the United Kingdom Supreme Court explained that:[30]

> "The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read."

33. In this regard, the United Kingdom Supreme Court relied on ***Monroe v Hopkins***,[31] which provided guidance on engaging with Twitter posts:

> "The most significant lessons to be drawn from the authorities as applied to a case of this kind seem to be the rather obvious ones, that this is a conversational medium; so it would be wrong to engage in elaborate analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter."

34. The United Kingdom Supreme Court in ***Stocker*** endorsed this and held that it would be wrong to engage in an elaborate analysis of a tweet or to parse a Facebook posting for its

[30] [2019] UKSC 17 at para 41.

[31] [2017] EWHC 433 (QB) at para 35.

theoretically or logically deducible meaning.[32] Rather, the Supreme Court explained that:[33]

> "The imperative is to ascertain how a typical (i.e. an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on."

35. The following observations are of relevance:

35.1. ***Representative of users of the social media platform:*** The hypothetical reader must be taken to be a reasonable representative of users of the particular social media platform who follow the person responsible for publishing the post or tweet.[34] However, the mechanics of a medium like Twitter is that the readership of the tweet may go beyond followers of the person responsible for the tweet, and include followers of other Twitter users.[35]

35.2. ***Fast-moving:*** Social media is a fast-moving medium, and people scroll through messages relatively quickly.[36] The essential message being conveyed by a tweet is likely to be absorbed quickly by the reader.[37]

35.3. ***Impressionistic and fleeting:*** People on social media do not ponder on what meaning a statement might possibly bear, with their reactions being more impressionistic and fleeting.[38] The meaning that an ordinary reasonable reader will receive from a tweet is likely to be more impressionistic than from

---

[32] ***Stocker***, above n 30 at para 43.

[33] Id.

[34] ***Monroe***, above n 31 at para 36.

[35] Id.

[36] ***Monir v Wood*** [2018] EWHC (QB) 3525 at para 90.

[37] Id.

[38] ***Stocker***, above n 30 at para 44.

a newspaper article, for instance, which in terms of the amount of time it takes to read allows for an element of reflection and consideration.[39]

35.4. ***No close analysis:*** Social media users do not necessarily subject content to close analysis, and do not ordinarily have someone by their side pointing out the possible meanings that might, theoretically, be given to a post or tweet.[40]

35.5. ***External material:*** A matter can be treated as known to the ordinary reader of a tweet if it is clearly part of the statement made by the offending tweet itself.[41]

36. MMA submits that these elements should be appropriately considered in determining the hypothetical reader in the context of the impugned tweets in this matter. Having due regard to the factors set out above, MMA submits that there is a reasonable likelihood that the hypothetical reader of the tweets would accept the content thereof at face value, without interrogating them further or immediately recognising them to be contrary to the law. This submission is bolstered by the level of engagement with the tweets, particularly seen through likes and retweets, which in turn expanded the audience and reach of the content.

Disinformation as an exacerbating factor

37. The impugned tweets do not just constitute harassment; it is submitted that they also amount to disinformation, which exacerbates the harmful nature of the tweets. According to the European Commission High-Level Expert Group on Fake News and Online Disinformation, disinformation is defined as "all forms of false, inaccurate or misleading information designed, presented and promoted to intentionally cause public harm or

[39] ***Monir***, above n 36 at para 90.

[40] ***Stocker***, above n 30 at para 47.

[41] ***Monroe***, above n 31 at para 37.

profit".[42] While disinformation is not in itself a new concept, it has been amplified through social media and other online platforms.[43]

38. Disinformation may have far-reaching consequences, cause public harm, be a threat to democratic political and policy-making processes, and may even put the protection of the public's health, security and environment at risk. Disinformation erodes trust in institutions, as well as in the media, and harms democracy by hampering the ability of the public to take informed decisions. It can polarise debates, create or deepen tensions in society, undermine electoral processes, and impair freedom of opinion and expression. The preamble to the Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda further emphasises that disinformation "may harm individual reputations and privacy, or incite to violence, discrimination or hostility against identifiable groups in society".[44]

39. MMA submits that the impugned tweets constitute disinformation in two key ways. First, a false identity was created to give the impression of the author and publisher of the tweets being a white woman. Second, the content of the tweets contained various falsities. It appears that this was done intentionally, with the aim of causing public harm by encouraging racial discord and promoting disunity. In assessing this complaint, MMA submits that the element of disinformation exacerbates the harmful nature of the impugned tweets, which should be factored into the outcome and the fashioning of an appropriate remedy.

---

[42] European Commission, "A multi-dimensional approach to disinformation: Report of the independent high-level group on fake news and online disinformation" (2018) at p 3.

[43] European Commission, "Tackling disinformation online: A European approach" in ***Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*** (2018) at pp 5-6.

[44] UN Special Rapporteur on Freedom of Opinion and Expression, ACHPR Special Rapporteur on Freedom of Expression and Access to Information in Africa, Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe and Special Rapporteur on Freedom of Expression of the Organization of American States, "Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda" (2017).

(iii) Need for an effective remedy

Elements of an effective remedy

40. The right to an effective remedy is guaranteed under international law. In particular, article 2(3)(a) of the ICCPR requires each state party to ensure that any person whose rights or freedoms are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". As explained by the UN Human Rights Committee in General Comment 31, "[c]essation of an ongoing violation is an essential element of the right to an effective remedy."[45]

41. The UN Human Rights Committee has explained further that without reparation to individuals whose rights have been violated, the obligation to provide an effective remedy is not discharged.[46] Reparation in this regard might entail compensation, restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of rights violations.[47]

42. In understanding what constitutes an effective remedy, guidance may be drawn from the European Court of Human Rights ("European Court"), which has interpreted the right to an effective remedy in accordance with article 13 of the European Convention on Human Rights. The following principles are of relevance to the present matter:

    42.1. ***Available and sufficient:*** A remedy is only effective if it is available and sufficient.[48]

    42.2. ***Theory and practice:*** The remedy must be available in theory and in practice, meaning that the remedy must be accessible, capable of providing redress

[45] UN Human Rights Committee, "General Comment No. 31: Legal obligation on states parties to the Covenant" (2004) at para 15.

[46] Id at para 16.

[47] Id.

[48] Council of Europe, "Guide to good practice in respect of domestic remedies" (2013) at p 12.

and offers reasonable prospects of success.[49] Regard may also be had to issues such as procedural complexity, resultant delays and the incurrence of costs.[50]

42.3. ***Practice and law:*** The remedy must be effective in practice, as well as in law.[51] The effectiveness of a remedy does not depend on a favourable outcome for the applicant.[52]

42.4. ***Context and personal circumstances:*** In assessing the effectiveness of a remedy, account must be taken not only of formal remedies available, but also the general and political context in which they operate, as well as the personal circumstances of the applicant.[53]

43. In crafting an effective remedy in the present matter, MMA submits that the above elements should be taken into account, with due regard to the particular context that arises from content published on social media. Regard must also be had to the use of corrective or restorative measures, in conjunction with measures of a deterrent nature.[54]

Importance of an apology as a remedy

44. MMA submits that an apology in the present matter is a particularly important remedy, as contemplated in section 21(2)(j) of PEPUDA. Our courts have consistently placed considerable weight on such a remedy. For instance, in ***Dikoko v Mokhatla***, the Constitutional Court drew a link between the import of an apology and the idea of *ubuntu* or *botho*, stating that:[55]

---

[49] ***McFarlane v Ireland***, App. No. 31333/06, European Court of Human Rights (10 September 2010) at para 114.

[50] Id.

[51] ***Kudla v Poland***, App. No. 30210/96, European Court of Human Rights (26 October 2000) at para 157.

[52] Id.

[53] ***Dordević v Croatia***, App. No. 41526/10, European Court of Human Rights (24 July 2012) at para 101.

[54] Section 4(1)(d) of PEPUDA.

[55] [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 68-69.

> "In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin. The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant. A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws.
>
> The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant."

45. In the present matter, MMA submits that an apology can serve multiple purposes. It can assist in restoring the dignity and repairing the harm caused by the impugned tweets, including correcting the falsehoods that the tweets perpetuated. However, importantly, an apology of a public nature can serve a broader purpose. It can act as a deterrent to others on social media who may consider behaving in a similar fashion.

46. While an apology is typically directed at the individual to whom the harmful content was initially targeted, a public apology in this matter can serve to recognise the broader public

harm that the impugned tweets caused by sowing racial discord and disunity amongst the community of Twitter user who engaged with the tweets. This is particularly valuable in remedying the harm caused by the impugned tweets, and preventing similar conduct from being perpetrated in the future.

CONCLUSION

47. The present matter presents an important and much-needed opportunity for this Court to grapple with the exigencies of online harassment and the application of PEPUDA in the digital era. Content such as the impugned tweets, which are coupled with disinformation, are geared towards ensuring content is distributed, reproduced and redistributed endlessly, by many different actors, all with different motivations. Owing to the ferocity with which content is disseminated, particularly in the context of online harassment campaigns, responses to such need to be effective and meaningful.

MICHAEL POWER
AVANI SINGH
Attorneys with Right of Appearance
Johannesburg, 27 July 2021

LIST OF AUTHORITIES

Domestic legislation and regulations

- Constitution of the Republic of South Africa, 1996
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
- Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000

Domestic case law

- ***AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others*** [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC)
- ***Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Others*** [1996] ZACC 7; 1996 (3) SA 617 (CC)
- ***Dikoko v Mokhatla*** [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC)
- ***Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Sooknunan t/a Glory Divine World Ministries*** [2012] ZAGPJHC 97; 2012 (6) SA 201 (GSJ); [2012] 3 All SA 322 (GSJ)
- ***H v W*** [2013] ZAGPJHC 1; 2013 (2) SA 530 GSJ; 2013 (5) BCLR 554 (GSJ)
- ***Hoffman v South African Airways*** [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211
- ***In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others*** [2002] ZACC 13
- ***Institute for Security Studies; In Re: S v Basson*** [2005] ZACC 4; 2006 (6) SA 195 (CC)
- ***Islamic Unity Convention v Independent Broadcasting Authority and Others*** [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC)
- ***S v Mamabolo (E-TV, Business Day and Freedom of Expression Institute Intervening)*** 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC)
- ***South African National Defence Union v Minister of Defence and Another*** [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC)

International law instruments

- African Charter on Human and Peoples' Rights (1981)
- African Commission on Human and Peoples' Rights, "Declaration of Principles on Freedom of Expression and Access to Information in Africa" (2019)
- African Commission on Human and Peoples' Rights, "Resolution on the right to freedom of information and expression on the internet in Africa", ACHPR/Res.362(LIX) (2016)
- European Convention on Human Rights (1950)
- International Covenant on Civil and Political Rights (1966)
- United Nations Human Rights Committee, "General Comment No. 31: Legal obligation on states parties to the Covenant" (2004)
- United Nations Human Rights Committee, "General Comment No. 34 on article 19 of the ICCPR: Freedom of opinion and expression" (2011)
- United Nations Human Rights Council, "Resolution on the promotion, protection and enjoyment of human rights on the internet", A/HRC/32/L.20 (2016)
- United Nations Special Rapporteur on Freedom of Opinion and Expression, African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information in Africa, Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe and Special Rapporteur on Freedom of Expression of the Organization of American States, "Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda" (2017)

Foreign case law

- ***Dordević v Croatia***, App. No. 41526/10, European Court of Human Rights (24 July 2012)
- ***Handyside v United Kingdom*** (1976) 1 EHRR 737
- ***Kudla v Poland***, App. No. 30210/96, European Court of Human Rights (26 October 2000)
- ***McFarlane v Ireland***, App. No. 31333/06, European Court of Human Rights (10 September 2010)
- ***Monir v Wood*** [2018] EWHC (QB) 3525
- ***Monroe v Hopkins*** [2017] EWHC 433 (QB)
- ***Stocker v Stocker*** [2019] UKSC 17

Academic authorities

- Council of Europe, "Guide to good practice in respect of domestic remedies" (2013)
- De Vos, "Defamation and social media: We have moved on from Jane Austen" in ***Constitutionally Speaking*** (2013)
- European Commission, "A multi-dimensional approach to disinformation: Report of the independent high-level group on fake news and online disinformation" (2018)
- European Commission, "Tackling disinformation online: A European approach" in ***Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*** (2018)
- Milo and Singh "Freedom of expression" in ***Public Interest Litigation in South Africa*** (2018)
- Singh, "Social media and defamation online: Guidance from Manuel v EFF" in ***ALT Advisory Insights*** (2019)