



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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AfriForum v Economic Freedom Fighters and Others (1105/2022) [2023] ZASCA 82 (28 May 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing an appeal, with costs, against the decision of the Gauteng Division of the Equality Court, Johannesburg.

The appellant, AfriForum, is a civil rights organisation with an emphasis on the protection of minority rights. In December 2020, AfriForum lodged a complaint in the Gauteng Division of the Equality Court, Johannesburg (the equality court) in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). AfriForum averred that the respondents, being the Economic Freedom Fighters (the EFF), the EFF's President, Mr Julius Sello Malema (Mr Malema), and Dr Mbuyiseni Ndlozi (Dr Ndlozi), an EFF Member of Parliament, had committed hate speech in terms of s 10(1) of the Equality Act.

The hate speech complaint centred, in the main, on the song which was commonly known as 'Dubula ibhunu'. The literal English translation being 'Kill the Boer- kill the farmer'. AfriForum pointed to six occasions on which Mr Malema had chanted the song, albeit that on some occasions Mr Malema had substituted the word 'kiss' for 'kill'. In addition, it pointed to a single occasion when Dr Ndlozi chanted a similar song including the words: 'Shisa lamabhunu, EFF ingen'endaweni' (Shisa lamabhunu). The literal English translation of that chant was: 'Burn these Boers, EFF enters in the space, or place'. The equality court dismissed AfriForum's complaint but granted leave to appeal to this Court.

The appeal was heard by the Court in September 2023 and judgment was reserved. Subsequently, on 20 September 2023 AfriForum instituted an application for the recusal of Acting Justice of the Supreme Court of Appeal Keightley (Justice Keightley), from the adjudication of, or further participation in, the determination of the appeal. They referred to remarks Justice Keightley had made in 2018 during an application for leave to appeal in a matter in which AfriForum was a party. According to AfriForum, the comments demonstrated bias against it or, at least, they showed that Justice Keightley had expressed herself in terms directed at AfriForum such as to find a reasonable apprehension of bias. The EFF opposed the recusal application. The SCA dismissed the application for Justice Keightley's recusal, finding that the test for recusal as laid down in several Constitutional Court judgments had not been met.

On the merits of the appeal, the Court dealt first with a preliminary point raised by EFF based on *res judicata*, or issue estoppel. It contended that the issue of whether Mr Malema's singing of Dubula ibhunu constituted hate speech had been finally disposed of in a settlement agreement Mr Malema and AfriForum had entered into in a previous hate speech complaint. That settlement agreement had been made an order of this Court on 1 November 2012. The SCA held that the interests of justice and equity did not support the application of the issue estoppel defence in this case and thus dismissed the EFF's preliminary point.

On the main issue on appeal, the SCA held that the reasonably well-informed person would appreciate that when Mr Malema sang Dubula ibhunu, he was not actually calling for farmers, or white South

Africans of Afrikaans descent to be shot. Nor was he romanticising the violence exacted against them in farm attacks, as contended by AfriForum. The reasonably well informed person would understand that Mr Malema was using an historic struggle song, with the performance gestures that go with it, as a provocative means of advancing his party's political agenda. Understood in its full context, it was a form of political speech. Even if Mr Malema's performance of *Dubula ibhunu* may be regarded by some people to be shocking or even disturbing, the Constitution required a measure of tolerance. The Court held that what Mr Malema was doing was no more than exercising his right to freedom of expression, which was protected under s 16 of the Constitution. He was doing so in the course of participating in the activities of, and campaigning for, the political party of which he was leader, which rights are protected under s 19(1)(a) of the Constitution. The same reasoning applied in respect of Dr Ndlozi regarding *Shisa lamabunu*. In the result, the SCA appeal was dismissed.

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