

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 744/2024

In the matter between:

WILLEM HENDRIK ACKERMAN **APPELLANT**

and

EMMANUEL AMANING **FIRST RESPONDENT**

GARTH WELLMAN **SECOND RESPONDENT**

Neutral citation: *Ackerman v Amaning and Another* (744/2024) [2026] ZASCA 138 (7 October 2026)

Coram: DAMBUZA, MBATHA, HUGHES, MATOJANE and KGOELE JJA

Heard: 19 September 2025

Delivered: 7 October 2026

Summary: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2004 — whether the appellant's communications are hate speech under s 10(1) of the Act — whether the communications are protected under the right to privacy in s 14 of the Constitution — s 9 right to equality — whether the communications are discriminatory — s 16(1) right to freedom of expression — whether communications between two individuals of the same race against members of another race constitute hate speech — gratuitous use of the k-word.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Wright J) sitting as the Equality Court:

The appeal is dismissed with costs including the costs of two counsel where so employed.

JUDGMENT

Dambuza JA (Mbatha, Hughes, Matojane and Kgoele JJA concurring):

Introduction

[1] The issues in this appeal are whether the appellant, Mr Willem Hendrik Ackerman (Mr Ackerman), made statements using the word 'k*ffir' during conversations with the second respondent, Mr Garth Wellman (Mr Wellman). If so, this Court must decide whether such statements constitute hate speech and determine the remedy determined by the Gauteng Division of the High Court, Johannesburg, sitting as the Equality Court, is appropriate.

[2] The Equality Court found that Mr Ackerman committed acts of hate speech as provided in s 10 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act). [1] It found that between January 2018 and

[1] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

October 2021 Mr Ackerman used the word 'k*ffir' (the k-word unless directly quoted) on three occasions in conversation with Mr Wellman. It held that Mr Ackerman's utterances constituted unlawful hate speech which discriminates against black people, including the first respondent, Mr Emmanuel Amaning (Mr Amaning).

[3] The Equality Court ordered Mr Ackerman to: (i) pay R500 000 to the Ahmed Kathrada Foundation; (ii) make a public apology to Mr Amaning and Mr Wellman within five days of the date of the judgment; (iii) undergo 50 hours of racial sensitisation training conducted by the South African Human Rights Commission or an institution nominated by it; and (iv) pay, on an attorney and client scale, the legal costs incurred by Mr Amaning and Mr Wellman, including the costs of three counsel. This appeal is with the leave of the Equality Court.

Background

[4] For reasons that will become apparent, it is necessary to refer to the races and ethnicities of the parties involved. Mr Ackerman, a white South African, is a former client of Caleo Capital (Pty) Ltd (Caleo), a business owned by Mr Amaning, a black African,[2] together with Mr Wellman, a white South African (the respondents). The business conducted investment management services for Mr Ackerman from 2008 to 2022.

[5] In 2023, Mr Wellman, Mr Amaning and Mr Nicholas Liebmann (a white South African of Jewish descent who was also a partner in Caleo) laid hate speech and harassment claims against Mr Ackerman in the Equality Court. Mr Liebmann

[2] Mr Amaning grew up in Ghana but now lives in South Africa.

withdrew his complaint before the matter was heard. The Equality Court found that Mr Amaning and Mr Wellman had proved the following facts. In January 2018, Mr Ackerman and Mr Wellman met at Mr Ackerman's place of business to review Mr Ackerman's investment portfolio. The review included considering local and offshore investments. During the meeting, Mr Ackerman made a statement that 'the k*ffirs running this country will just keep f*cking it up as they have done in the rest of Africa' (2018 communication). Furthermore, on 3 October 2018, in a conversation with Mr Wellman about Mr Liebmann, Mr Ackerman described Mr Liebmann as 'that f*cking Jew who only wants to enrich himself in every deal'.

[6] On 23 August 2019, Mr Ackerman sent a WhatsApp text message to Mr Wellman with the following statement: 'Garth, after today I might be seen as a racist, but I will man alone kill every k*ffir that cross my path. So God help me' (2019 communication). The statement was made following a robbery that occurred earlier that day at Mr Ackerman's home in the presence of his wife, daughter and domestic worker. Mr Wellman contacted Mr Ackerman through WhatsApp to offer his support. A day after this statement was made, on 24 August 2019, Mr Wellman and Mr Ackerman exchanged further messages and phone calls, in which Mr Wellman advised Mr Ackerman to avoid posting messages on social media in relation to the robbery. Later on the same day, Mr Ackerman sent a message to Mr Wellman, that 'Deleted it Was in an extremely emotional state.' Mr Wellman and Mr Liebmann also exchanged messages via WhatsApp, discussing their concerns about Mr Ackerman's racist views, and the impact of his relationship with Caleo and on the company's culture. They further discussed their concerns in emails exchanged in the ensuing days but took no action at the time. They did not inform Mr Amaning of Mr Wellman's interactions with Mr Ackerman.

[7] During October 2021, Mr Wellman called Mr Ackerman to discuss the potential impact of the National Union of Metalworkers of South Africa (NUMSA) strike on Mr Ackerman's business. In that conversation, Mr Ackerman stated, 'my k*ffirs know their place' (2021 communication). The 2018, 2019 and 2021 communications (the impugned communications) are at the centre of this appeal.

[8] On 30 September 2022, Mr Ackerman terminated his business relationship with Caleo. On 14 October 2022, Mr Wellman informed Mr Amaning of the racially-charged communications made by Mr Ackerman. On 14 February 2023, Mr Amaning, Mr Liebmann and Mr Wellman filed the complaint of hate speech and harassment against Mr Ackerman in the Equality Court based on the impugned communications. As stated, Mr Liebmann later withdrew his complaint.

[9] In the Equality Court, Mr Ackerman challenged the reliability of the electronic communications proffered by Mr Amaning and Mr Wellman in respect of the 2019 communication, as well as their credibility as witnesses. He argued that the complaint was made to pressure him into abandoning other legal disputes between himself and Caleo. He denied having made the statements and asserted that he did not remember sending the August 2019 communication. He maintained that the message could have been fabricated or occurred as a result of a technical error during updates on Mr Wellman's phone. He invoked s 15 of the Electronic Communications and Transactions Act[3] (ECTA) and criticised Mr Wellman for having failed to proffer expert evidence of an IT professional to verify the origin and authenticity of that communication.

[3] Electronic Communications and Transactions Act 25 of 2002.

[10] Mr Ackerman testified that he was highly emotional as a result of the robbery, and 'as a deeply religious man' he used the k-word spelt with two f's in reference to a disbeliever in God rather than as a derogatory reference to race. He maintained that he used the word to refer to the persons who had committed the heinous crime at his home. He further maintained that if he made the impugned communications, they would constitute private communications protected by s 14 *(d)* and s 16 (1) of the Constitution. For this proposition he relied on the judgment of the Constitutional Court in *Qwelane.*[4] which found that hate speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination. Mr Ackerman's case was that most private conversations will not have this effect.[5]

[11] The Equality Court rejected Mr Ackerman's defences. It found him to be an evasive and unreliable witness, whose assertions of a conspiracy on the part of Mr Amaning and Mr Wellman to defame and pressure him were baseless and lacked credibility. It further found that there was no requirement under s 15 of ECTA for Mr Wellman to provide expert evidence from an IT professional regarding the veracity of the WhatsApp messages, as Mr Wellman was available to be examined. For context, s 15 of the ECTA regulates the admissibility and the evidentiary weight of data messages.[6]

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[4] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC).
[5] Id at para 118 (emphasis omitted).
[6] In full, s 15 of the ECTA provides:
Admissibility and weight of data messages.-
(1) In any legal proceedings, the rule of evidence must not be applied so as to deny the admissibility of a data message, in evidence-
(a) On the mere grounds that it is constituted by a data message; or
(b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
(2) Information in the form of a data message must be given due weight.
(3) In assessing the evidential weight of a data message regard must be had to-

[12] In relation to Mr Ackerman's assertions of privacy, the Equality Court found that the impugned communications fell outside 'intimate personal sphere' and were thus within the ambit of s 10(1) of the Equality Act.[7] The Court found that, on a balance of probabilities, Mr Ackerman had made all three communications that formed the basis of the complaint and that they amounted to hate speech against all black people, including Mr Amaning, due to their content. It also found that the statements caused harassment to Mr Wellman. This is because by virtue of the statements, Mr Wellman was invited to participate, agree with and enjoy the content of the impugned communications. The Equality Court accordingly granted the relief sought by Mr Amaning and Mr Wellman, including ordering Mr Ackerman to donate R500 000 to the Ahmed Kathrada Foundation and complete 50 hours of racial sensitisation training.

[13] In this appeal Mr Ackerman raises six issues to be determined, whether: (1) Mr Amaning and Mr Wellman proved, on a balance of probabilities, that the impugned communications were made; (2) the impugned communications constitute hate speech; (3) they constitute hate speech even when they were made privately by one white person to another; (4) the repetition rule applies to hate speech; and (5)

(a) the reliability of the manner in which the message was generated, stored and communicated;
(b) the reliability of the manner in which the integrity of the message was maintained;
(c) the manner in which the initiator was identified; and
(d) any other relevant factor.
(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person is, on its mere production in civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self- regulatory organisation or any other law or common law, admissible evidence against any evidence and rebuttable proof of the facts contained in such record, copy, printout or extract.
In section 1 "data" is defined as 'electronic representations of information in any form', and "data message" means data generated, sent, received or stored by electronic means and includes-
(a) voice, where the voice is used in an automated transaction, and
(b) a stored record'.

[7] *Amaning and Others v Ackerman* [2024] ZAEQC 2 (Equality Court judgment) para 125.

the order imposed by the Equality Court in relation to the donation, sensitisation training and apology is appropriate, and (6) whether the costs order awarded by the Equality Court is appropriate.

Did the complainants prove that the impugned communications were made?

[14] Mr Ackerman advances multitudinous grounds for his contention that the complainants never proved on the applicable test that he made the impugned communications. The following is an overview of these grounds. First, Mr Wellman could not prove the January 2018 meeting. He asserts that, if it had happened, there is no reason why Mr Wellman did not raise his objection to him when the statement was made. He suggests that the failure by Mr Wellman and Mr Liebmann to confront him means that they acquiesced to its content. In addition, the fact that Mr Wellman only communicated with Mr Liebmann long after the statement was made suggests that the complaint is *mala fide*.

[15] Regarding the August 2019 communication, Mr Ackerman disputes the authenticity and, by extension, the admissibility of the WhatsApp message in which he is alleged to have used the k-word. He argues that the Equality Court erred in finding that the WhatsApp message could not have been fabricated, that the evidence produced by Mr Wellman was the best evidence available, and that s 15 of ECTA was duly complied with.

[16] With regard to the October 2021 communication, Mr Ackerman contends that the Equality Court erred in rejecting his evidence that his staff had gone on strike during that period, rendering the alleged communication meaningless.

[17] On the whole, Mr Ackerman challenges the Equality Court's credibility findings in respect of his testimony and those of Mr Amaning and Mr Wellman. He argues that the Equality Court should have found him to be a credible witness and rejected Mr Amaning and Mr Wellman's evidence as unreliable.

[18] Before us, it was submitted on Mr Ackerman's behalf that this case is nothing other than *mala fide* 'weaponisation' of the Equality Act by the respondents. The submission was that the delay of 61 months from the date of the first statement to instituting the proceedings in the Equality Court illustrates this. The argument on behalf of Mr Ackerman was that he did not make any of the statements complained of. Instead, the respondents are retaliating for his termination of the business relationship.

[19] The issue is whether the communications complained of did occur. The conclusions reached by the Equality Court in its judgment are closely reasoned and find support in the record of proceedings in that Court. The Equality Court rejected Mr Ackerman's accusations that Mr Wellman (together with Mr Liebmann) had fabricated the correspondence containing the impugned communication. On the first statement, the Equality Court accepted as 'genuine', the evidence of the correspondence which followed the making some of the communication. The Court found that such evidence showed that Mr Ackerman did meet Mr Wellman, either alone or with one of the other respondents as Mr Wellman alleged. It rejected Mr Ackerman's evidence that he spelt the k-word with two f's to signify a 'disbeliever' in God. Regarding the 2019 communication, the Equality Court considered the fact that on 24 August 2019, the day following the robbery and the WhatsApp communication, Mr Ackerman sent a further text message to Mr

Ackerman advising him that he had deleted the earlier message, also saying that he had sent it 'in an emotional state'.

[20] The Equality Court took into account that in the contentious WhatsApp text Mr Ackerman had prefaced the communication with the statement that 'I might be seen as a racist'. This, the Equality Court found, showed that Mr Ackerman used the k-word in the 'infamous South African sense'. The Court also considered the text message sent by Mr Wellman to Mr Liebmann on 24 August 2019 saying, among other things: 'I feel for him but this is not an out of character break out. This is who he is. I am finding it hard to have this caliber of human as my shareholder. He is governed purely by his emotions' and 'We need to write a letter to each other, discussing his exit as a result of this.'

[21] On 25 August 2019 Mr Liebmann sent an email about Mr Ackerman to Mr Wellman which he also copied to Mr Amaning in which he said: 'He has shown disloyalty; untrustworthiness and above all discrimination and in fact contempt for humanity in the form of outright racism.' Further correspondence was in the form of an email about Mr Ackerman written by Liebmann to Mr Wellman on 28 August 2019 in which he said; '. . . it does not excuse the language nor the attack on whatsapp . . . We have experienced several irresponsible events in his behaviour before. I would like to proceed with his exit from the business.'

[22] With regard to Mr Ackerman's defence of inadmissibility of the data messages under s 15 of the ECTA, the Equality Court found that it would be unreasonable to require that Mr Wellman call an expert to prove 'a chain of data' because he testified about something he knew and remembered. In addition, he had, in the meantime, bought a new cellphone onto which the communication was

transferred. The Court found that '[t]he chances of texts appearing randomly during a cellphone update are zero.' It found that the text evidence carried significant weight because Mr Ackerman and Mr Wellman knew each other well and had previously communicated by text.

[23] The Court also found against Mr Ackerman on the October 2021 communication, relating to the NUMSA strike. It found that it was common cause that Mr Ackerman's workers did go on strike during the relevant period. The Court found Mr Amaning to be an honest person who had remained dignified throughout his testimony and endured severe cross-examination.

[24] The trite principle that an appellate court will be reluctant to alter a trial court's factual findings, particularly those that rest on witness credibility, remains our law. Unlike a trial court, an appellate court does not have the benefit of observing witness testimony or interacting with witnesses. A trial court will usually be better placed to draw conclusions from witness examination. This principle is not inflexible, and an appeal court will set aside a trial court's findings on witness credibility and findings of fact if the trial court committed a misdirection or if its conclusions are plainly wrong.[8] No misdirection was shown in this case.

[25] The fact that Mr Wellman and Mr Liebmann did not confront Mr Ackerman about the communications does not detract from the evidence of two credible witnesses. Furthermore, as the Equality Court found, emails and messages exchanged by Mr Wellman and Mr Liebmann following the 2019 communication

[8] This principle, established in *R v Dhlumayo and Another* 1948 (2) SA 677 (A) and has been confirmed in other judgments of our highest courts, including *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5 and *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) para 106.

demonstrate that they held long-standing concerns regarding Mr Ackerman's views, and were unsure of how best to address them in the context of their business relationship with him. I find no valid reason to displace its findings in this regard.

[26] In the Equality Court it was not in dispute that the WhatsApp message constitutes a data message. In terms of s 12 of the ECTA, a requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message and is accessible for subsequent reference. This means that a data message generated by a human being, such as a WhatsApp message, constitutes a document and may be tendered as documentary evidence.[9] It is therefore subject to the admissibility requirements applicable to documents. This means that the document relied upon must be original, and its authenticity must be proved.[10] The originality of the message is assessed as provided in s 14 (1) of the ECTA, which requires that the integrity of the information is tested against s 14 (2). That section provides that the integrity of a data message must be assessed —

'(a) by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display;

(b) in the light of the purpose for which the information was generated; and

(c) having regard to all other relevant circumstances.'

[27] In addition, under s 15(1) of the ECTA, a rule of evidence must not be applied so as to exclude a data message from evidence on the mere ground that it is constituted by a data message, or on the basis that it is not in its original form, if it is the best evidence that the person adducing it could reasonably be expected to

[9] *S v Mohapi* 2026 JDR 2323 (GJ) para 55-7.
[10] *S v Brown* 2016 (1) SACR 206 (WCC) para 20.

obtain.[11] In this case, it is evident from the record that the WhatsApp message was transmitted during an informal conversation between business associates, Mr Ackerman and Mr Wellman, about the robbery.

[28] The context surrounding the WhatsApp message supports the version that Mr Ackerman sent it. As stated, the Equality Court's judgment astutely points out that, if Mr Ackerman thought his text was innocuous, he would not have deleted it or explained why he had sent it in the first place.[12] The Court found that Mr Wellman testified from recollection of what he personally knew, did not rely on the texts to jog his memory, and told the truth. The Court also considered that in his evidence Mr Ackerman explained that on the day of the robbery he used the k-word on two occasions – first as he was talking to his wife, and later that evening to Mr Wellman. In his discovery affidavit and when giving oral evidence, Mr Ackerman said he used the k-word with one f, 'which he pronounced with the stress on the 'i' rather than on the a, as in the infamous South African pronunciation', referring to the robbers as non-believers. He testified that it was the first time in about forty years that he had uttered the k-word. The Equality Court however found that, even when giving evidence in chief, Mr Ackerman was an evasive witness and that his evidence was not credible.

[29] The Equality Court also found that the authenticity and the authorship of the WhatsApp message had been established,[13] the relevant evidence having been provided by the person in whose custody the message was.[14] As the recipient of the

[11] Fn 6 above.
[12] Equality Court judgment op cit fn 5 para 92.
[13] *Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa* 1971 (3) SA 937 (T) at 940E-G.
[14] Ibid fn 13.

WhatsApp message, Mr Wellman had been in custody of the data message from the moment it was generated, the Court found. He was therefore a competent witness to testify on its authorship. Expert evidence was not required as Mr Ackerman has failed to meaningfully challenge Mr Wellman's evidence. During the hearing in the Equality Court, Mr Wellman assured the court, on being questioned, that the WhatsApp messages which had been copied onto the discovered document to which he referred in court, were still on his Cellphone which he had with him in Court and could be verified.

[30] Section 15(1)*(a)* of ECTA does not permit rejection of a data message based solely on the fact that it is a data message. And even if it were assumed that the WhatsApp message was not tendered in its original form, as the Equality Court found it was clearly the best evidence that Mr Wellman could have reasonably been expected to obtain. This satisfies the requirements in s 15(1)*(b)* of the ECTA.

[31] Regarding the October 2021 communication, the Equality Court noted that Mr Ackerman's employees were on strike at the time, but found that his false and conflicting testimony with regard to the 2019 communication (that he did not recall sending the message but was confident that he had used the k-word in a religious sense) rendered his version of events around the 2021 communication non-credible. There is no valid basis to disturb the Equality Court's findings on Mr Ackerman's credibility in relation to either the 2019 communication or the 2021 communication.

[32] The further ground of appeal raised by Mr Ackerman regarding the evidence admitted by the Equality Court, that it failed to apply the cautionary rule, applies only in criminal proceedings. The submission therefore does not assist Mr Ackerman.

[33] For these reasons, I agree with respondents' submission that there is no basis for interfering with the Equality Court's factual findings together with the legal conclusions deriving from such findings. As the Equality Court found, Mr Amaning and Mr Wellman did prove, on a balance of probabilities, that Mr Ackerman made the impugned communications to Mr Wellman.

Do the impugned communications constitute hate speech?

[34] Although a relatively recent judgment, *Qwelane*[15] has become the *locus classicus* for hate speech as a statutory delict under s 10 of the Equality Act. [16] In that case, the Constitutional Court interpreted s 10(1) of the Equality Act as comprising three components —

(a) publication, propagation, advocating or communicating words;
(b) based on one or more of the prohibited grounds, against any person;
(c) that could be reasonably construed—
(i) to demonstrate a clear intention to be harmful or to incite harm; and
(ii) to promote or propagate hatred.

[35] *Qwelane* sets out hate speech as a delict implicating both the constitutional rights to equality (s 9) and freedom of expression (s 16) in that it perpetrates unfair discrimination through expression.[17] While there is no universally accepted definition of hate speech, in *Qwelane*, it is characterised as an expression that 'travels beyond mere offensive expression' by 'subverting the dignity and self-worth of human beings.'[18]

[15] *Qwelane v South African Human Rights Commission* 2022(2) BCLR 129 (CC).
[16] Ibid fn 15 para 95.
[17] *Qwelane* para 78.
[18] *Qwelane* para 81.

[36] Hate speech falls outside the protection offered by s 16 (1) of the Constitution, which entitles everyone to the right to freedom of expression. This is because hate speech constitutes the 'advocacy of hatred that is based on race, ethnicity, gender or religion, and it constitutes incitement to cause harm' as provided in s 16 (2).[19]

[37] The intention to be harmful or to incite harm is determined objectively. The test is whether a reasonable person would interpret the words as demonstrating the requisite intent (to be harmful or to incite harm and to promote or propagate hatred) based on one of the prohibited grounds,[20] having regard to the factual and social context.[21]

[38] In *South African Revenue Service*,[22] the Constitutional Court said the following about the use of the k-word:

'Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite'.[23]

[39] The Court referred to Dr Gabeba Baderon's description of the word as—

'the most notorious word in South African history, known most pointedly for its licence of violence towards Blacks during apartheid, but first used and elaborated during the colonial period . . . [a

[19] Section 16(2) of the Constitution.
[20] Section 1(1) of the Equality Act.
[21] *Qwelane* paras 95 to 101.
[22] *South African Revenue Service v CCMA and Others (Kruger)* ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC). Although this case predates *Kruger*, the conclusion reached on the meaning of the k-word still prevails.
[23] Ibid para 2.

word which is] offensive in all senses and combinations to the extent of being unspeakable today, its use now constitutes a hate crime in our country and is unpardonably painful and violent.'[24]

[40] In sum, our Courts have described the k-word as bearing inescapably racist, with derogatory connotations that a reasonable person cannot interpret differently, and as, on its own, harmful or inciting harm, promoting hatred, and dehumanising, independently of the speaker's intention.[25] This meaning is settled in our law, and no case-by-case evidence analysis or determination of a reasonable person's interpretation is necessary when its communication is established, unless the context clearly indicates differently. The narrow category in which the k-word can be used acceptably may be assessed in relation to the proviso to s 12 of the Equality Act. It includes academic and scientific inquiry, fair and accurate reporting in the public interest or publication of information, advertisement or notice in accordance with s 16 of the Constitution.

[41] Mr Ackerman's use of the k-word in all three instances of communication does not fall within this category. The communications therefore require no further analysis except to note his aversion, disrespect and ill will for those about whom he was communicating.

Based on one or more of the prohibited grounds against any person

[42] Ordinarily, two considerations are relevant in relation to this requirement. First, a court must determine whether or not the impugned words are based on one or more of the prohibited grounds. Second, it must determine whether the communication has been directed against any person. Again, as demonstrated in the

[24] Ibid para 3.
[25] *Prinsloo v S* [2014] ZASCA 96 para 20 and *Thembani v Swanepoel* [2016] ZAECMHC 37; 2017 (30) SA 70 (ECM) para 13.

discussion on whether the communications constituted hate speech, this enquiry is unnecessary in this case as the k-word used inherently refers to race – a ground prohibited under s 9(3) of the Constitution. Historically and presently the k-word is directed at black and African people as the targeted group.

The race of the audience in k-word hate speech in this instance

[43] It is common cause that the impugned communications were made between Mr Ackerman and Mr Wellman, both of whom are white, and were only passed on to Mr Amaning by Mr Wellman. Mr Ackerman maintains that the impugned communications cannot constitute hate speech, as they were never made directly to a member of a targeted group.

[44] The identity of the persons or party to whom the k-word or other communication is made has no bearing on whether the k-word (or other communication) constitute hate speech. The test remains whether the communication is based on a listed ground and whether the intention to incite harm, or to propagate hatred against the target group is established. Generally, the k-word immediately constitutes hate speech. Save in instances where such intention is disproved by the context, the word is inherently harmful to the dignity of black South Africans generally, not only to the individual to whom it is communicated. The hateful, racially discriminatory and derogatory character attaches to the k-word and the target group regardless of who is present in the room. In addition, as the emails between Mr Wellman and Mr Liebmann show, the distressing effect of the word may not be limited to the target group.

[45] In *South African Human Rights Commission v Khumalo* (*Khumalo*),[26] the Equality Court, affirmed that harm may manifest from hate speech through 'the reaction of persons who read the utterances and who are inclined to share those views and be encouraged by them to also shun, denigrate and abuse the target group.'[27] Clearly, Mr Ackerman expected his audience, Mr Wellman, who had a black business partner, Mr Amaning, to either share the same sentiments about black people or be persuaded by Mr Ackerman's utterances that his denigrating views about black people were justified.

[46] In *South African Revenue Service*,[28] the Constitutional Court had the following to say about the use of the k-word in the workplace:

'It is constitutionally and relationally intolerable to have any racist daring enough to refer to fellow employees as k*ffirs, within the employ of SARS. His African co-employees know that he called one of them a k*ffir and that he regards them as lazy, incapable of leading him and intellectually inferior to him solely because of their race. They would be entitled to feel extremely offended and regard it highly insensitive of SARS, to keep in their midst someone like Mr Kruger.'[29]

As I will demonstrate in the discussion on the privacy defence, these remarks are equally applicable when the k-word is used amongst business associates.

[47] Internationally, the courts have expressed similarly strong views about the effects of hate speech. In *Keegstra*,[30] the Supreme Court of Canada illustrated the pervasive nature of the harm caused by hate speech thus:

'The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. *This impact may cause*

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[26] *South African Human Rights Commission v Khumalo* [2018] ZAGPJHC 528; 2019 (1) SA 289 (GJ); [2019] 1 All SA 254 (GJ).
[27] Ibid fn 26 para 95.
[28] See fn 22 above.
[29] Ibid para 47.
[30] *R v Keegstra* [1990] 3 SCR 698.

target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society. . .. [H]atred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and the values of our society.'[31] (emphasis added)

[48] For completeness, I briefly discuss Mr Ackerman's contentions that the communication of August 2019 was driven by the robbery at his residence; that it was directed only towards the individuals who robbed his house; and that as a deeply religious man, his use of the k-word – spelt with two f's – was in reference to an Arabic religious term for a non-believer rather than a racial invective. It is necessary to point out that Mr Ackerman's oral evidence was that he had written the word using one 'f'.

[49] All of this is self-evidently untrue as the Equality Court found. The plain language of the August 2019 communication expresses homicidal contempt for 'every k*ffir that crosses [his] path'. It is not limited to the perpetrators of the robbery, and is framed in a manner that unequivocally indicates that the scope of the invective extends far beyond them. This is further evinced by Mr Ackerman's choice to preface the communication with the words 'after today I might be seen as a racist'. The argument about the spelling is only a deflection of blame. In light of the above the Equality Court was correct in finding that the defence relating to the race of his audience does not provide a safe escape for Mr Ackerman.

[31] Ibid fn 30 para 746 & 777.

Private communications

[50] It is common ground that the impugned communications were not published for wide or general public consumption. They were made to specific persons. Mr Ackerman contends that because the communications between him and Mr Wellman were private, they are not subject to s 10(1) of the Equality Act. He relies on the following passages from *Qwelane*:

'In contradistinction to the other verbs in the impugned provision — such as 'publish', 'propagate' or 'advocate'— that all inherently require some form of public dissemination, 'communicate' is capable of both being public and private. But 'communicate' in terms of section 10(1) plainly requires that the speaker transmits words to a third party — there must be communication, the transmission of information. And the conjunctive reading required here entails that 'communicate' must be read in light of what appears in section 10(a)–(c). The concepts 'promote' and 'propagate' in (c) connote the dissemination of information and do not fit the notion of communicating in private. And on a reading that accords with section 39(2), one would—in any event—have to read 'communicate' to mean communication that excludes private conversations.…

Our most private communications — and being able to freely communicate in one's private and personal sphere—form part and parcel of the 'inner sanctum of the person' and are in 'the truly personal realm'. This approach resonates with Canadian jurisprudence. I hasten to acknowledge that their jurisprudence must be understood in view of the fact that s 319 of the Canadian Criminal Code extends to private conversations. It is nonetheless useful to consider it with that caveat in mind.…

Hate speech prohibitions, even those that attach civil liability, should not extend to private communications, because that would be incongruent with the very purpose of regulating hate speech — that public hateful expression undermines the target group's dignity, social standing and assurance against exclusion, hostility, discrimination and violence. Furthermore, the purpose of hate speech prohibitions is 'to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader societal well-being. The speech must expose the target

group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination. It is improbable that most private conversations will have this effect.'[32] (Footnotes omitted).

[51] In this case, the Equality Court accepted that the impugned communications were not published, propagated or advocated in the sense of being disseminated as envisaged in s 10(*c*) of the Equality Act. However, a few points must be made. First, in *Qwelane*, the Constitutional Court refers to the meaning of 'communicate' as transmission of information to a third party. Furthermore, although in *Qwelane* the Constitutional Court emphasised the distinction between 'propagate', 'publish' and 'advocate' – under s 10(1) of the Equality Act, which it said requires some form of public dissemination – and private communication, the Court recognised that 'communicate' may refer to private or public communication. In settling on the interpretation that excludes private communication from s 10 hate speech, the Constitutional Court considered that such exclusion is necessary to protect 'our most private communications", those that 'form part and parcel of the "inner sanctum of the person' and take place in the 'truly personal realm'.

[52] In protecting private communication, *Qwelane* also follows Canadian jurisprudence but acknowledges that s 319 of the Canadian Criminal Code, which criminalises hate speech, extends to private communication. Furthermore, the protection of private communication in *Qwelane* is premised, in part, on the understanding that such communication exposure of target groups to hatred, negative stereotyping and unfair discrimination, is improbable with private communication.

[32] *Qwelane* paras 16-18.

[53] We are not here concerned with 'most private communications'. The Equality Court correctly reasons that privacy is not a binary concept. It exists on a spectrum in relation to the nature of and parties to the conduct in question. In *Bernstein* the Constitutional Court held: '[p]rivacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interactions, the scope of personal space shrinks accordingly'.[33] As such, while the communications impugned in this case happened behind closed doors, affording them the protections provided by s 14 of the Constitution would be counterproductive and would derogate from the purpose of s 10.[34]

[54] The impugned communications were made in the context of social interactions between two business associates rather than within the 'inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community'.[35] The Equality Court was therefore correct in finding that communications between business associates, even if conducted one-on-one, or at private business premises, or by personal text messages are located too far along the privacy continuum to enjoy the privacy envisaged in *Qwelane*.

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[33] *Bernstein v Bester N O* 1996 (2) SA 751 (CC) para 67.
[34] Section 14 of the Constitution provides:
'Everyone has a right to privacy, which includes the right not to have-
(a) their person or home searched;
(b) their property searched;
(c) their possession seized; and
(d) *the privacy of their communications infringed*.'
[35] Ibid fn 34.

[55] In *AfriForum NPC v Nelson Mandela Foundation Trust and Others* (*AfriForum)*,[36] the Supreme Court of Appeal made the following pertinent comments on privacy:

'AfriForum relies on *Qwelane* for its submission that the High Court erred in declaring private displays of the old flag as hate speech. The Constitutional Court stated that the concepts to 'promote', and 'propagate' hatred in section 10(1)(c) of [the Equality Act] 'do not fit the notion of communicating in private'; and the word 'communicate' in section 10(1) excludes private conversations. The court went on to say that our most private communications form part of the 'inner sanctum of the person', which is in the 'truly personal realm', and are thus protected by the right to privacy. The prohibition of hate speech should not extend to private communications.

. . .

This, however, is not to say that a private display of the old flag can never breach the provisions of [the Equality Act]. It is hard to see how a display of the old flag in the privacy of a home to which, for example, family members, children or young people are invited and indoctrinated in racism and white supremacy, would not entitle a person to institute proceedings in the Equality Court for an order that there has been a breach of [the Equality Act]. But that is a case for another day.'[37]

[56] Protection of privacy under s 14 of the Constitution is an extension of the s 10 commitment to dignity.[38] In this context, shielding communications that take place within the 'inner sanctum of the person' is indispensable. Such protection strengthens the platform for enjoyment of the right to freedom of expression. However, privacy can be abused.[39] This is so when privacy is invoked to shield conduct from sanction for reasons that are unrelated to the principles that undergird the protection of privacy - namely, to preserve the dignity and security of individuals

[36] *AfriForum NPC v Nelson Mandela Foundation Trust and Others* [2023] ZASCA 58; 2023 (4) SA 1 (SCA); [2023] 3 All SA 1 (SCA).
[37] *AfriForum NPC v Nelson Mandela Foundation Trust and Others* paras 27-33.
[38] *Amabhungane Centre for Investigative Journalism v Minister of Justice and Correctional Services* [2021] ZACC
[39] See *De Reuck v Director of Public Prosecutions* WLD 2003 (2) SACR 445 (CC) at para 90.

and to protect them from abusive intrusion by the State or other parties. The right to communicate freely in private comes with the responsibility of doing so in a manner that does not threaten 'broader social well-being', particularly through the normalisation of harmful and/or hateful ideas.[40]

[57] This much is acknowledged by the Court in *AfriForum*,[41] and *AfriForum* goes further to identify an instance where privacy could be misused to shield conduct that causes harm to social well-being. It identifies an instance in which a seemingly private communication 'exposes a group to hatred' by preserving or propagating hateful ideas, such as racism and white supremacy, against a target group.

[58] Generally, the sole purpose of the k-word within the South African context, both historically and presently, is to spurn and demean black people. Its use with reference to black people is inherently hateful. The rationale for the restrictive approach taken by the Constitutional Court in *Qwelane* was that private conversations that are held within the inner sanctum of a person are unlikely to undermine a target group's dignity, social standing, and assurance against exclusion, hostility, discrimination and violence in the same manner and to the same extent as public statements do.[42] Apart from the fact that the communications under consideration in this case do not fall within the inner sanctum of the persons concerned, objectively they cause harm to the target group and constitute propagation of hatred.

[40] *Bernstein* above n 20 para 67.
[41] Ibid fn 40para 71.
[42] *Qwelane* para 118.

[59] In this case, the findings of the Equality Court resonate with *Qwelane*. The purpose underlying s 10 of the Equality Act is to prohibit speech that exposes the target group to hatred, negative stereotyping and unfair discrimination. Where private communication has the effect of defeating that purpose, it cannot escape censure. As the Equality Court put it:

'. . . it would be difficult to find that these laws and authorities were purposed for protecting any persons that used the k-word in private in the hope that the third party the speaker had communicated with would be like-minded'.[43]

Does the repetition rule apply?

[60] The repetition rule is a defamation law principle. It holds responsible not only the originator but also a person who republishes a defamatory statement made by someone else.[44] The purpose of the principle within the defamation law context is important. In *Tsedu v Lekota*,[45] this Court referred to *Kelsey Stuart's Newspaperman's Guide to the Law*[46] in which the principle is set out:

'a person who repeats or adopts and re-publishes a defamatory statement will be held to have published the statement. The writer of a letter published in a newspaper is *prima facie* liable for the publication of it, but so are the editor, printer, publisher and proprietor. So too a person who publishes a defamatory rumour cannot escape liability on the ground that he passed it only as a rumour, without endorsing it.'

[61] The aim in defamation is to avoid escaping liability on the basis that the re- publisher had no intention to defame, but was merely repeating or reporting on what the first person said. Mr Ackerman argues that, as Mr Wellman passed the impugned communications on to Mr Amaning, it is Mr Wellman who is responsible

[43] *Amaning and Others v Ackerman* (EQ3/2023) [2004] ZAEQC 2 para 119.
[44] *Tsedu v Lekota* 2009(4) (SA) 372 (SCA).
[45] Ibid fn 44.
[46] Bell, Dewar & Hall *Kelsey Stuart's* The Newspaperman's Guide to the Law 5 ed (1990) at 43.

for ‘publishing’ the message, resulting in it having the harmful hate speech effect. The invocation of the repetition rule in this instance is misplaced. The test as to whether a statement constitutes hate speech is objective – whether the statement could reasonably be construed to carry the requisite intention. The subjective intention of person who makes the statement is not the test. Section 10 is self-sufficient and there is no lacuna to be closed through the repetition principle. In any event, Mr Wellman’s report to Mr Amaning is not the conduct complained of in these proceedings.

The harassment claims

[62] The Equality Court did not discuss the harassment claim in detail. It also made no separate order to address this part of the claim. However, it did find in favour of Mr Amaning and Mr Wellman in relation to this claim. Mr Ackerman argues that the Equality Court erred in finding that his conduct constituted harassment of Mr Wellman. He argues that such allegations were never made by Mr Wellman and were never put to him before the Equality Court. He further argues that, for similar reasons as set out above in relation to the allegations of hate speech, he could not have harassed Mr Wellman as Mr Wellman is not a member of the racial group targeted by the impugned communications.

[63] The first point may be dismissed out of hand. Mr Wellman alleged harassment in relation to each of the impugned communications in his founding affidavit before the Equality Court, and Mr Ackerman denied each in his answering affidavit. The matter was thus properly before the Equality Court for determination. As the Equality Court did not provide an in-depth analysis of the harassment claim and instead upheld it as a logical extension of the finding of hate speech against Mr Ackerman, it is worth briefly addressing it here.

[64] Section 11 of the Equality Act simply states that '[n]o person may subject any person to harassment'. Harassment is defined in s 1 of that Act:

''harassment' means 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.'[47]

[65] The key elements for a finding of harassment can thus be summed up are as follows:

(a) unwanted conduct which is persistent *or* serious;

(b) that demeans, humiliates *or* creates a hostile *or* intimidating environment *or* is calculated to induce submission by adverse consequences; and

(c) which is related to sex, gender, or sexual orientation or a person's membership of a group identified by one or more prohibited grounds or a characteristic associated with such group.

[66] The first element is readily satisfied in this matter. Mr Ackerman's conduct was unwanted, as demonstrated by the internal communications between Mr Mr Wellman, Mr Liebmann and Mr Amaning. Further, although intermittent, this conduct was persistent and serious, with communications containing racial slurs spanning a period from January 2018 to October 2021. The second element is similarly satisfied. The communications did result in a hostile environment between the former business associates.

[47] Section 11 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[67] In relation to the final element, Mr Ackerman contends that the identity of the parties to the communication is determinative of whether harassment occurred. As with my analysis of s 10(1) above. I disagree. A sensible interpretation of the third element is that the purpose is to prohibit harassment that is based on sex, gender, sexual orientation of the target of the harassment or based on their membership of a group identified as other prohibited grounds. The person subjected to the offensive conduct must belong or be associated with a prohibited ground. Race is a prohibited ground. The communications were made to Mr Wellman based on his membership of the white race, on the assumption that as a member of that group he would be *au fait* with casual racism against his fellow black citizens.

Was the remedy ordered by the Equality Court appropriate?

[68] Mr Ackerman argues that, even if the findings that he committed acts of hate speech are upheld, the relief granted by the Equality Court is inappropriate. This is because the Equality Court heard no evidence regarding an appropriate sanction. He maintains that the relief granted is therefore arbitrary.

[69] With regard to the order for payment of R500 000 to the Ahmed Kathrada Foundation, Mr Ackerman asserts that the Equality Court ignored the evidence tendered in respect of his charitable donations. Regarding the order of a public apology, he avers that there is no basis for such an order. He emphasises that the impugned communications were never made to Mr Amaning or another black person, and Mr Wellman is white. Mr Ackerman asserts similarly that there is no basis for the order that he undergo 50 hours of racial sensitisation training because no evidence was led in this regard. On the adverse costs order, Mr Ackerman repeats

the argument that the complaint in the Equality Court was made in bad faith. As such, he is the victim and should not have been subjected to a punitive costs order.

[70] The Equality Court reasoned:

'. . . the sum of R500 00 is fair, to the limited extent that money may right wrongs of this case. Mr Ackerman is a relatively wealthy man who is unrepentant. This case is about equality and dignity, not money. Mr Ackerman may benefit from racial sensitisation training and might embrace the society envisaged by our Constitution as a result of such training. Mr Amaning and Mr Wellman were put through the ordeal of an unpleasant hearing when all they sought originally was an apology and recognition by Mr Ackerman of wrongdoing. A long, convoluted and dishonest defence was put up. Punitive costs follow.'

[71] The remedies available to a court adjudicating claims under the Equality Act are found in s 21(2) of that statute. In the relevant part, the section reads:

'After holding an inquiry, the court may make an appropriate order in the circumstances, including—

. . .

(e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;

. . .

(h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;

. . .

(l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;

. . .

(j) an order that an unconditional apology be made;

. . .

(o) an appropriate order of costs against any party to the proceedings.'

[72] The section affords the Equality Court discretion in the true sense when selecting a remedy under s 21(2). In *Florence v Government of the Republic of South Africa*,[48] the Constitutional Court held:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.'[49]

[73] The Equality Court's decision does not merit such interference. The remedy granted is within the remit of the discretionary remedies available to that Court under the Equality Act. Section 21(2)*(e)* makes an award to a body conditional on 'hearing the views of the parties'.

[74] Regarding the payment of R500 000 to the Ahmed Kathrada Foundation, this is the order that the respondents sought in the Equality Court. They did not seek payment to made to them or to benefit them. The Court is permitted to order payment in the form of an award to an appropriate body or organisation under s 21(2)*(e)*, and to make an appropriate order of a deterrent nature under s 21(2)(*l*). In this case, having noted Mr Liebmann's withdrawal from the proceedings,[50] the Court explained the purpose of the remedy it had chosen. It remarked on Mr Ackerman's behaviour before it and the offensive conduct it sought to address.[51] The fact that Mr

[48] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC).
[49] *Florence v Government of the Republic of South Africa* para 113.
[50] Ibid fn 49.
[51] Equality Court judgment, see fn 5 above para 128.

Ackerman ordinarily made donations to charitable organisations was not lost to the Equality Court. And the fact that this Court would have ordered payment of a lesser amount is not, on its own, a proper basis to interfere with the award of the Equality Court.

[75] There is no basis to find that the Equality Court did not exercise its discretion judiciously, or that it was influenced by wrong principles or it ignored relevant facts, including Mr Ackerman's donations to charitable organisations.[52] The Equality Court was permitted to order an unconditional apology under s 21(2)*(j)* in light of its findings that Mr Ackerman had committed acts of hate speech against black people.

[76] The 50 hours of racial sensitisation training is a special measure to address the unfair discriminatory conduct and hate speech under s 21(2)*(h)*.[53] It clearly falls within the ambit of the special measures contemplated in the section in light of the duration and of Mr Ackerman's persistent racist comments, and in light of the context in which they were made. The impugned communications indicate a clear lack of appreciation of the nature and extent of harm racial prejudice causes in South Africa. I am unable to find that no reasonable court would grant the relief granted by the Equality Court. For these reasons, I find no basis for interference with the remedy imposed by the Equality Court.

[77] On the costs order, the Equality Court noted that Mr Ackerman put up a 'long, convoluted and dishonest defence'.[54] Indeed the record reveals that the hearing in

[52] Equality Court judgment para 128.
[53] This section empowers the Equality Court, after holding an inquiry, to make an appropriate order, including an order 'for implementation of special measures to address the unfair discrimination, hate speech, or harassment in question.
[54] Ibid fn 52 para 129.

the Equality Court was protracted and involved extensive detail. I find no basis to interfere with the costs order made by the Equality Court. The issues were much simplified in this Court. For that reason, costs of two counsel will be allowed.

[78] Execution of the order of the Equality Court remains suspended as a result of this appeal. The order granted below dismisses the appeal. Once the order of this Court is handed down, the order of the Equality Court, including the order directing Mr Ackerman to make an apology, will immediately come into force in the terms ordered by the Equality Court.

Order

[79] In the result the following order is made:

The appeal is dismissed with costs including the costs of two counsel where so employed.

_____

N DAMBUZA

JUDGE OF APPEAL

Appearances:

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