

Media Release: SAHRC errs in hate speech ruling against COSATU's Masuku

The Congress of South African Trade Unions (COSATU) and the Palestine solidarity movement in South Africa are shocked and appalled by the decision of the South African Human Rights Commission (SAHRC), which found that COSATU's International Relations Secretary, Bongani Masuku, is guilty of hate speech and called on him to apologise to the South African Jewish Board of Deputies (SAJBD).

In a submission to the SAHRC, the SAJBD had accused Bongani of hate speech for comments he made during a lecture at the University of the Witwatersrand, hosted by the Palestine Solidarity Committee and the Young Communist League, as well as comments he had made on a Zionist blog and in a personal email to a Zionist detractor. As Bongani's response to the SAJBD complaint illustrates, none of his comments can be regarded as hate speech in terms of the South African Constitution. Furthermore, his comments, in the main, referred to South Africans who supported the illegal Israeli military occupation – irrespective of their religious or ethnic backgrounds. These comments were certainly a trenchant critique of Israel and its apologists and supporters in South Africa, but were not directed at the Jewish community or any other ethnic group.

Section 16 of the South African Constitution, the section on Freedom of Expression, states:

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

None of Bongani's statements can be regarded as being 'advocacy of hatred' based on 'race, ethnicity, gender or religion'. He did not refer to Jews, as is being alleged. The gleeful and smug comment by the SAJBD, following the SAHRC decision, is simply untrue. Their claim that Bongani's comments 'advocate and imply that the Jewish and Israeli community are to be despised, scorned, ridiculed and thus subjecting them to ill-treatment on the basis of their religious affiliation' is a pack of lies.

It is through such lies and intimidation that the SAJBD, the South African Zionist Federation, and other apologists of Israel have sought to chill free expression in South Africa and to prevent any critique of Israeli war crimes. Their repeated accusations of 'hate speech' against criticisms of Israel have become wasteful of public resources, and trivialise the very serious charge of 'hate speech'. Furthermore, their constant, frivolous, and false accusations of 'anti-Semitism' against critics of the state of Israel and the calumny of 'self-hating Jews' against those Jews who support the just struggle of the Palestinian people against racism and oppression is an attempt to silence and intimidate those who, using their own experience of racism and oppression in Apartheid South Africa, feel they can contribute to a just resolution of the problems in the Middle East.

Indeed, we believe that SAJBD's statement during the Gaza massacre of December 2008-January 2009, wherein it defended all Israeli actions in that massacre – including the use of white phosphorous against civilians, the bombing of United Nations buildings, the murder of civilians, the bombing of civilian infrastructure such as schools, hospitals and places of worship – violates

Section 16 of the Constitution in attempting to incite South Africans (especially South African Jews) to violence against Palestinians, and in being clear and obvious propaganda for war.

We are shocked that the SAHRC, after receiving a written complaint and a written response to that complaint, saw fit to make such a finding – with the potential weighty precedent that it can set – without even entertaining a hearing on this matter. We do not believe this constitutes due process and believe it to be unprocedural in terms of the manner in which the Commission should operate and in terms of its mandate to ensure the realisation of Constitutional rights – including the right to free expression. We are also surprised that the Commission made such a decision which blatantly contradicts previous rulings it has made on similar issues.

Bongani, with the support of Cosatu and various solidarity organisations in South Africa, will appeal this SAHRC decision and is willing to defend his right to free expression – as guaranteed by our Constitution – in the Equality Court and in any other court in South Africa.

4 June 2009

Ms. U Nyar
Legal Officer
Gauteng Provincial Office
South African Human Rights Commission

Re: Complaint received from South African Jewish Board of Deputies

1. Thank you for allowing us an opportunity to respond to the complaint submitted to you by the South African Jewish Board of Deputies. We believe it is a frivolous complaint with no substance, which is, once again, forcing the SAHRC to expend its resources on a trivial matter.
2. Before responding directly to the specific complaints submitted to you by the South African Jewish Board of Deputies, I wish to give some background to the events of the 5th March 2009.
3. I was invited to deliver a lecture at Wits University on the plight of the Palestinian people. During the lecture, I was repeatedly heckled – mainly by a particular section of the audience, most of whom seemed to be members of the South African Union of Jewish students. Some of those from that section even shouted pro-Nazi slogans in a deliberate attempt to provoke me. That such provocation was pre-planned is evidenced by a letter published in the South African Jewish Report (13-20 March 2009, Page 12). A copy of the letter is attached.
4. The heckling and disruptions, at certain points, were so serious that I was temporarily prevented from speaking.
5. It is within the above context that I made a number of remarks about those South Africans who support Israel.
6. It is true that I stated, during that lecture: “... COSATU has got members here even on this campus; we can make sure that for that side it will be hell” or words to that effect, in reference to South Africans, especially students, who supported Israel.
7. I did not, however, refer to Jewish students. Indeed, the supporters of Israel in South Africa include people from a variety of religious and ethnic backgrounds, and, thus, my comment about such supporters cannot be construed to mean a reference “clearly [to] Jewish students”, as your letter to me claims. I did not refer to “Jewish students” either explicitly or implicitly.
8. Furthermore, irrespective of who this reference was to, my comment can in no way be construed to be a violation of the constitutional rights of any individual or any group.
9. The comment that “it will be hell” is a metaphorical one, implying difficulty. It is a comment, for example, that could be made by workers during wage negotiations, suggesting that their union representatives will make sure that “for the bosses it will be hell”, meaning that the employers will not be able easily to dominate in the negotiations. It, most certainly, is the kind of reference that we might make with regard to racists or sexists in our society. While they have the right, according to our constitution, to freedom of expression, we also

have the right to make sure that when they do express these views, for them “it will be hell”, as long as, of course, such “hell” does not violate the rights guaranteed in our Constitution.

10. It is true that, also at that meeting, I stated: “... the following things are going to apply: any South African family, I want to repeat it so that it is clear for anyone, any South African family who wants to send its son or daughter to be part of the Israeli Defence Force must not blame us when something happens to them with immediate effect.”
11. It is not true that “the reference to the South African families is clearly to the South African Jewish families,” as your letter claims. I made no reference, explicit or implicit, to Jewish families. We are convinced that there are South Africans who serve in the Israeli Occupation Forces. The religion or ethnicity of such persons is of no concern to us. What concerns us is that such persons, by their actions, are in violation of the Regulation of Foreign Military Assistance Act, and, as such, are committing crimes that are prosecutable in South Africa.
12. We remain determined that with regard to South Africans who serve in foreign armed forces, “something happens to them with immediate effect”, i.e. such people must be prosecuted in South Africa under the above-mentioned legislation. Our government should not allow such transgressions to occur without bringing down the full might of the law on such persons - “with immediate effect”.
13. I also stated, at the same meeting: “COSATU is with you, we will do everything to make sure that whether it’s at Wits, whether at Orange Grove, anyone who does not support equality and dignity, who does not support the rights of other people must face the consequences even if it means that we will do something that may necessarily cause what is regarded as harm.”
14. It is not correct that this was a reference to Jews. It was a general reference to all who do not support the constitutionally-guaranteed rights to equality and dignity.
15. The reference to “harm” is a reference, firstly, to vigorous intellectual and other forms of engagement (such as protests, newspaper articles, rallies, and so forth). Secondly, it is a reference to our conviction that the South African Constitution promotes and protects equality and dignity, and that those who violate the rights to equality and dignity must face the might of law and the wrath of our legal system.
16. It is true that I commented on the Supernaturals blog: “...as we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity.”
17. This reference, as is clear from the text, was not to Jews but to Zionists – irrespective of what religion or ethnicity they might belong to.
18. Zionism is widely regarded, across the world, as a form of racism. Indeed, the United Nations General Assembly had adopted a resolution in 1975, Resolution 3379, which concludes that “Zionism is a form of racism and racial discrimination”. The resolution also endorsed the August 1975 statement by the Conference of Ministers for Foreign Affairs of Non-Aligned Countries that “severely condemned Zionism as a threat to world peace and security and called upon all countries to oppose this racist and imperialist ideology”.

Resolution 3379 was, in 1991, rescinded as a result of negotiations between Israel (Israel made its rescission a condition of any agreement) and the Palestinian Liberation Organisation, and pressure from the USA on various countries. Nevertheless, the racist, colonialist, and imperialist nature this political ideology is beyond question.

19. It is true that in a PRIVATE email to a Mr Anthony Posner I wrote: "... all who have not accepted or woken up to the reality that we now live in a democratic South Africa where racism or promotion of it is a crime, are free to leave the country. I repeat whether Jew or whomsoever does so, must not just be encouraged but forced to leave, for such a crime is so heinous it can't be tolerated."
20. The email clearly states: "... whether Jew or whomsoever does so", and is, thus, not a reference only to Jews.
21. My mail does not refer to people, as you say in your letter, "who do not agree with" me. Agreement with me or my views is not at issue here. At issue is those who "have not accepted or woken up to the reality that we now live in a democratic South Africa where racism or promotion of it is a crime".
22. I did write in an email that "... all those who deny that occupation is wrong must be encouraged to leave South Africa before they infect our society with much more racism."
23. This statement in no way propagates "the forced removal of Jews from South Africa". Jews are not mentioned in this statement.
24. From the above, it is clear that not once, in the various statements quoted in your letter, did I express any opinions about Jews as a group. In the one reference to Jews, I say "Jews or whomsoever". In this instance, my reference to Jews was in the context of the conversation with Mr Posner, who insisted that I was attacking Jews.
25. None of the statements that you quoted in your letter – either individually or collectively – can be regarded as being hate speech as defined by Section 16(2) of the Constitution of the RSA Act 108 of 1996.
26. Section 16, the section on Freedom of Expression, states:
 - (1) Everyone has the right to freedom of expression, which includes-
 - e. freedom of the press and other media;
 - f. freedom to receive or impart information or ideas;
 - g. freedom of artistic creativity; and
 - h. academic freedom and freedom of scientific research.
 - (2) The right in subsection (1) does not extend to-
 - d. propaganda for war;
 - e. incitement of imminent violence; or
 - f. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

None of my statements that you quoted can be regarded as being "advocacy of hatred" based on "race, ethnicity, gender or religion". I did not, as I have already stated, refer to Jews, as is being alleged. My only reference to a specific group was a reference to Zionists. Zionists cannot be regarded as either a racial, ethnic, gender or religious group. Zionism is a political ideology and Zionists are, thus, adherents of a political ideology. Zionists include Jews, atheists, and Christians, among others.

27. Referring to the rights guaranteed under Section, the SAHRC, in your findings in *Freedom Front v South African Human Rights Commission*, stated: “Freedom of expression constitutes one of the essential foundations of any democratic society. It has been universally recognised in all democracies as pivotal to the growth and enhancement of the constitutional state and vital to the progress and development of humankind. “The necessity to protect the freedom of expression and the rights of the media cannot be overstated in a democracy such as ours which is still in its infancy and which has recently emerged from decades of repression, censorship and prescribed conformity. The robust debate of ideas, the lifeblood of any constitutional democracy, must be safeguarded. Thus any reflection on the right to freedom of expression must have regard to its importance to the constitutional state.”
- This finding is critical and pivotal in our nation’s understanding of the right to free expression. It is the right under which I am able to make the statements which you have quoted in your letter.
28. In the same finding, the Commission also stated: “In terms of section 16(2)(c), expression will amount to hate speech if it is advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.” Commenting on this finding, Karthy Govender wrote: “The harm must be caused by the advocacy of hatred on the stipulated grounds. These requirements are interrelated and must be considered cumulatively when interpreting section 16(2)(c) of the Constitution. Thus expression will only amount to hate speech if it involves the advocacy of hatred.” On the basis of this, my statements cannot be construed as hate speech.
29. Relevant to this complaint, also, is the Commission’s opinion, requested by then minister Ronnie Kasrils as to whether certain articles he had written constituted hate speech – as alleged by Mrs Helen Suzman and the South African Jewish Report, among others. The Commission’s opinion was that Mr Kasrils’ articles and statements did not constitute hate speech but were “trenchant” critiques that were protected by Section 16 of our Constitution.
30. I submit that, as in the Kasrils case, my statements too do not constitute hate speech.
31. Furthermore, we believe that the “harm” referred to in Section 16(2)(c) refers to physical harm that would result from the speech in question. None of my statements can be construed as having caused any physical harm to any person or group of persons, or to have incited people to cause physical harm to any person or groups of persons. No such allegations have been made in your letter, precisely because they cannot be made with any degree of truth.
32. In the case of *R v Andrews*, Cory JA defined “hatred” in the following terms: “Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition.” My statements, I believe, do not go a long enough way to qualify as hate speech.
33. For the same reasons as above, none of my statements that you quoted in your letter – either individually or collectively – can be regarded as being hate speech as prohibited by Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.
34. I deny that any of my statements violate, in any way whatsoever, Section 9 of the Constitution of the RSA, Act 108 of 1996.

35. We note that the constant cry of “hate speech” from the South African Jewish Board of Deputies against criticisms of Israel has become extremely tiresome, wasteful of resources, and is trivialising the serious charge of “hate speech”. We should note, furthermore, that their constant, frivolous, and false accusations of “anti-Semitism” against critics of the state of Israel and the calumny of “self-hating Jews” against those Jews who support the just struggle of the Palestinian people against racism and oppression is an attempt to silence and intimidate those who, using their own experience of racism and oppression in Apartheid South Africa, feel they can contribute to a just resolution of the problems in the Middle East.