IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

(BLOEMFONTEIN)

APPEAL COURT CASE NO:

COURT A QUO CASE NO: A2023/092235

EQUALITY COURT CASE NO: EQ4/2021

In the matter between:

THAPELO KENNETH KUNENE	Applicant
And	
JULIUS SELLO MALEMA	First Respondent
THE PATRIOTIC ALLIANCE	Second Respondent

FOUNDING AFFIDAVIT

I, **THAPELO KENNETH KUNENE**, hereby state on oath:

DEPONENT AND PARTIES

1. I am an adult male politician and the Deputy President of the Second Respondent (The Patriotic Alliance). I am the applicant in this matter.

2. I bear personal knowledge of the matter: I was the first respondent in the Equality Court case in which this application has its genesis, and then the first appellant in an appeal before the Full Bench of the Gauteng Division of the High Court, Johannesburg (the Full Court) to which this application relates. The facts contained in this affidavit are, unless the context indicates otherwise, within my personal knowledge and are, to the best of my belief, both true and correct.

3. The remaining interested parties are:

    3.1. the first respondent (Mr Malema), whom the Full Court**,** an adult male politician who is a sitting Member of Parliament and the President and Commander-in-Chief of the Economic Freedom Fighters (EFF), a political party duly registered in terms of the Electoral Commissions Act 51 of 1996, and who was the complainant in the Equality Court and the respondent in the appeal before the Full Court; and

3.2. the second respondent (the Patriotic Alliance)**,** a political party duly registered in accordance with Section 15 of the Electoral Commission Act 51 of 1996, cited by virtue of its interest in the matter as the second respondent in the Equality Court proceedings and the second appellant before the Full Court.

FORMALITIES AND STRUCTURE

4. I attach hereto:

4.1. the judgment of the Equality Court of 31 January 2023 under case number EQ4/2021as annexure **KTK1**;

4.2. the Equality Court order of the same date as annexure **KTK2;**

4.3. the Equality Court judgment of 24 April 2023 granting leave to appeal to the Full Court as annexure **KTK3**;

4.4. the resulting order as annexure **KTK4**;

4.5. the judgment of the Full Court of 5 August 2025 under case number A2023/092235 as annexure **KTK5**; and

4.6. the order of the Full Court dated 5 August 2025 as annexure **KTK6**.

5. The affidavit is structured as follows:

5.1. first, I provide a summary of the factual background and litigation history;

5.2. thereafter, I offer preliminary observations on why the requirements for special leave to appeal are satisfied;

5.3. I identify the key findings of the Full Court;

5.4. and discuss the grounds of appeal,

5.5. in light of those grounds, I offer a more fulsome discussion of the reasons why special leave to appeal ought to be granted; and

5.6. finally, I conclude.

FACTUAL BACKGROUND AND LITIGATION HISTORY

6. Mr Malema instituted proceedings against me and the Patriotic Alliance in the Equality Court, seeking an order declaring certain utterances I made in the course of a live televised interview on eNCA during the 2021 Local Government elections period (a period of intense political negotiation and public debate concerning the formation of coalition governments in various municipalities) to constitute hate speech in contravention of section 10(1) of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act), and for ancillary relief.

7. The relevant portion of the interview as transcribed is as follows:

"Once I am done, I am then going to deal with this little frog. Julius is just an irritating cockroach that now I must deal with publicly, and I will call you, I will call all the press, and I will begin to deal with this and show you that Julius, whatever he criticises he is. Julius is a criminal, and I am going to show South Africans the crimes that he is involved in, he has been involved in, and I am going to tell South Africans why I truly, the real truth why I left the EFF, because of this cockroach.

So I am going to deal with this cockroach because we have given him time, we have given him respect, he has got his issues. He hates himself, now he hates everybody else. He also went for the TG of the ANC, he gets personal on politics. We have stood back, but now it is over."

8. Shortly before the interview in which I made the impugned statement, Mr Malema had publicly referred to the Patriotic Alliance, as a party of "*amabhantiti*" (a colloquial term for prisoners or convicts). The impugned statements were made in response to the interviewer confronting me with these comments, and asking for my response.

9. Before the Equality Court, my legal team argued that my statements did not constitute prohibited speech because they did not target a group and merely discredited, humiliated, or offended Mr Malema himself. They contended that, regardless of what I said, it certainly did not meet the threshold of extreme detestation and vilification that could incite discriminatory actions against a

group, which constitutes hate speech. They argued that, reasonably interpreted, the use of the term "*cockroach"* in context lacked any of the hallmarks of hate speech.

10. The Equality Court disagreed. On 31 January 2023, Justice Makume declared that my use of the words "*cockroach*", "*little frog*", and "*criminal*" to refer to Mr. Malema constituted hate speech. The Court ordered me to apologise to Mr Malema for the impugned utterances, interdicted me from making similar statements in the future, and referred the matter to the Director of Public Prosecutions for further investigation. In his reasoning in support of the order, he accepted that "*when Kunene uttered the impugned statement he was referring to Malema in his personal capacity and not as a member of any racial group"* (para 29); he concluded that Mr Kunene's utterances were "*not aimed at [Mr Malema's] ethnicity but at his political affiliation and belief*" (para 62). The learned judge considered that I could not claim the free speech protection under section 16 of the Constitution. In his view, section 10 of the Equality Act was "*enacted to regulate statements that may be perceived to be inappropriate"* (para 42). Finding that I knew "*that usage of that [the term "cockroach"] does not mean good things about an individual"* (para 45), he considered that a comment by a Twitter user "*clearly and unambiguously demonstrated that objectively readers understand the word to be offensive nothing less than that"* (para 49). The learned judge found that Mr Malema had "*clearly placed himself within the meaning of Section 1(b) of the prohibited grounds"*, because he alleged that the term "*cockroach"* had been used to undermine his dignity and adversely affect the equal enjoyment of his rights and freedoms (para 52).

11. With the leave of the Equality Court, the Full Court heard my appeal on 23 July 2025. On 5 August 2025, the Full Court partly dismissed the appeal. It confined the hate speech finding solely to my use of the word "*cockroach"* and limited the ancillary relief initially granted to an interdict preventing me from describing Mr Malema as a "*cockroach"* in future, along with an order for a written and oral public apology. The Full Court's order held both myself and the Patriotic Alliance responsible for costs in the Equality Court and in the (partially successful) appeal.

12. In reaching this conclusion, the Full Court considered that, while political debate allows for strong opinions, it does not permit hate speech that incites harm and promotes hatred against political opponents. The court determined that a reasonable observer would understand the use of "*cockroach"* in context as intending to cause harm and promote hatred, relying on the fact that calling someone a "*cockroach"* is a form of dehumanisation, especially in light of international recognition that it evokes the Rwandan genocide. The Full Court rejected the argument that the section 10(1) prohibition against hate speech does not extend to political speech because it considers that political affiliation can be closely tied to conscience and belief. The Full Court emphasised that hate speech degrades social interaction and undermines the values of equality and dignity.

LEAVE TO APPEAL

13. This is an application for leave to appeal against the relevant parts of the judgment and order of the Full Court dated 5 August 2025 under case number A2023/092235.

14. I contend that the appeal not only has reasonable prospects of success but also, importantly, raises special circumstances of a profound constitutional and public nature that demand the urgent and definitive consideration of this Honourable Court. The key issue involves the proper interpretation and application of South Africa's hate speech laws in relation to political discourse, a matter of fundamental significance for safeguarding freedom of expression and maintaining the health and functioning of our constitutional democracy.

15. In submission, the requirements of section 16(1)(b), read with section 17(3) of the Superior Courts Act 10 of 2013 (Superior Courts Act) are met.

16. The finding that my reference to Mr Malema as a "*cockroach"*, which, in context, was a personal insult to a political adversary that I threatened to expose in the media as a criminal is irreconcilable with the views of this court in *AfriForum v Economic Freedom Fighters and Others* 2024 (6) SA 1 (SCA) (the *Kill the Boer* judgment), which the Constitutional Court has endorsed by declining leave to appeal. In *Kill the Boer* this Court highlighted the importance of context in a hate speech enquiry, including how a reasonable person would evaluate the utterances of a populist politician who is known not to mince his words (at para 96), and recognising where utterances constitute "*political speech"* (at paras 103 – 104).

17. We remove hate speech from the constitutional protection given to free speech on the basis that hate speech substantially increases the likelihood of very real harm against the person or group of persons against whom it is directed. It is difficult to imagine that any reasonable person, hearing my reference to Mr Malema as a cockroach, in the context of robust (if irresponsible) political debate, would believe that Mr Malema, and those who share his political views are, as a result of what I said in the interview, to be hated or harmed in the manner contemplated in section 10(1) of the Equality Act.

18. The Full Court judgment introduces a limitation upon freedom of speech that both this court and the Constitutional Court have carefully guarded against whilst holding that courts are obligated to delineate the bounds of the constitutional guarantee of free expression generously (*Masuku and Another v SA Human Rights Commission obo South African Jewish Board of Deputies* 2019 (2) SA 194 (SCA) (*Masuku SCA*) at para 16; see also *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) (*SANDU*) at para 7; *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) (*Democratic Alliance*) at para 122; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) (*Economic Freedom Fighters*) at paras 1 & 155; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) (*Laugh it Off*) at para 47).

19. The Full Court judgment is inconsistent with the views expressed by both this court and the Constitutional Court that the expression of unpopular or even

offensive beliefs does not constitute hate speech, and that a "*court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of hate or ethnicity"* (*South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) (*Masuku*) at para 79; *Hotz and Others v University of Cape Town* 2017 (2) SA 485 (SCA) (*Hotz*) at para 68; *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) (*Qwelane*) para 18 and footnote 96).

20. It is, in submission, necessary for this court to consider and opine upon the apparent inconsistency between the *Kill the Boer* judgment (as well as the judgment *Gordhan v Malema* 2020 (1) SA 587 (GJ) (*Gordhan*)) and the Full Court judgment insofar as these relate to expression in the political context.

21. Importantly, the Constitutional Court in *Qwelane* appropriately located the hate speech prohibition in section 10(1) of the Equality Act in the discrimination context (at para 49) and underscored the importance of the free speech right (para 67). The Constitutional Court declined to prohibit speech that "*ridicules, belittles or otherwise affronts the dignity of"* protected groups, and which may even be "*offensive to most people"*, unless the expression exposes a "*target group"* to "*extreme detestation and vilification which risks provoking discriminatory activities against that group",* something that goes beyond "*mere disdain or dislike"* (at paras 80 – 81). This court's intervention is required to correct the regressive interpretation of the free speech right, and the extension of the hate speech provision in section 10(1) of the Equality Act,

to give clarity and certainty that has been lost in light of the Full Court's reasoning that led to the impugned order.

22. For these reasons, I submit that there is a substantial and realistic basis to believe that this Court would interfere with the judgment and order of the Full Bench. The Full Court's errors of law are of such a nature that the admittedly high threshold for the grant of special leave is met.

23. Not only that: the Full Court's judgment raises a substantial point of law of immense public importance: the legal boundary between robust, even offensive, political speech, which is protected by section 16 of the Constitution, and hate speech, which is proscribed by the Equality Act.

24. Simply put, the judgment of the Full Court has the effect of unjustly expanding the scope of hate speech legislation into the political sphere, setting a precedent that could be used to suppress legitimate political opposition and debate. This poses a serious risk of a "*chilling effect*" on political expression, which is a fundamental aspect of our democracy. The question of defining the proper scope of the "*prohibited grounds*" in the Equality Act is therefore not just a theoretical matter, but one that will shape the rules of engagement in South African politics for the foreseeable future. To uphold a judgment that fundamentally misinterprets the legislative framework of the Equality Act and infringes upon a core constitutional right would amount to a manifest injustice. This application thus provides this Honourable Court with a crucial opportunity to clarify these foundational principles.

THE FINDINGS OF THE FULL COURT SOUGHT TO BE APPEALED

25. The key findings of fact and law made of the Full Court are summarised below with reference to the relevant paragraphs of the judgment.

26. The Full Court rejected the argument that my utterance was solely a personal attack. While recognising the personal animosity between myself and Mr Malema, it concluded that a reasonable observer would have understood the epithet "*cockroach*" to be aimed at Mr Malema in his role as a political rival, considering the context of a party-political debate about election outcomes (para 23).

27. The Full Court determined that hate speech under the Equality Act can encompass conflicts between individuals with differing political ideologies. It reasoned that although "*political ideology*" is not explicitly listed as a ground, the grounds of "*conscience*" and "*belief*" are broad enough to include specific political affiliations. Additionally, it found that political affiliation could serve as an analogous ground where discrimination based on it would diminish human dignity in a way similar to the listed grounds (paras 25 - 26).

28. The Full Court found that the use of the word "*cockroach*" is "*internationally recognised as hateful of those to whom it is directed*" and that its political use "*is always and everywhere a call to treat those to whom the term is directed as objects of hate*" (para 28). It held that the word carries "*specifically genocidal connotations*" primarily because of its association with the Rwandan

genocide, and that these hateful connotations transcend their original context (paras 28, 29, 32).

29. Purporting to apply the objective test, the Full Court concluded that a reasonable observer would have understood my use of the word "*cockroach*" as indicating a clear intent to harm and promote hatred towards Mr Malema because he was my political foe and his beliefs differed from mine (para 30). The court held that the word conveys that Mr Malema is not human and deserves to be removed from public life, and that the immediate reaction of the interviewer, Mr Simelane, supported this interpretation (para 30).

30. The Full Court dismissed the argument that the context of intense political debate should grant the utterances greater protection. Instead, it concluded that this context compounded the harm. It stated that a "*fundamental purpose of section 10 is to place limits on the terms of social and political debate, with the aim of ensuring that it cannot degenerate into mutual dehumanisation and violence*" (para 31).

31. The Full Court distinguished between the term "*cockroach*" and the other words I used, namely "*criminal*" and "*little frog*". It held that the latter terms would be understood by a reasonable person as "*heated rhetoric*" or insults born of anger or hostility, which do not qualify as hate speech. However, in its view, the "*specifically genocidal connotations of the word 'cockroach' place it in a different category*" (para 32).

32. Based on the above, the Full Court confirmed the Equality Court's core finding that my repeated use of the word "*cockroach*" constituted hate speech under section 10 of the Equality Act (para 33).

GROUNDS OF APPEAL: SUBMISSIONS ON THE ERRORS OF LAW AND FACT

33. I submit that the Full Court erred in law and fact on several fundamental grounds, each of which is elaborated upon below. Each ground, it is submitted, establishes a reasonable prospect that this Honourable Court would come to a different conclusion.

Ground 1:

34. The Full Court erred in law by extending the ambit of the prohibited grounds in the Equality Act to include political ideology and affiliation. This finding impermissibly created a new, unlisted prohibited ground of "*political affiliation*" without undertaking the constitutionally mandated analysis for doing so. This amounts to a significant and unwarranted judicial expansion of a statutory provision that curtails a constitutional right.

35. The authoritative test for recognising an unlisted ground as analogous to the listed grounds in the Equality Act was set out by the Constitutional Court in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC). It requires a court to determine whether the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human

beings, or to affect them adversely in a comparably serious manner to the listed grounds like race, gender, or religion.

36. The listed grounds overwhelmingly relate to characteristics that are immutable, difficult to change, or fundamental to a person's identity and have been historically used to marginalise and oppress. The Full Court wholly failed to engage in this analysis. It did not assess whether political affiliation, a volitional choice that can and often does change, is a characteristic that impairs dignity in a manner comparable to race or ethnicity.

37. This omission is particularly glaring when one considers the clear signals of legislative intent. The Legislature has demonstrated that it knows precisely how to include political belief as a protected ground when it wishes to do so. A direct comparison between Equality Act and the Employment Equity Act 55 of 1998 (EEA) a statute also aimed at promoting equality, is instructive.

    37.1. While both statutes prohibit discrimination on grounds such as race, gender, religion, conscience, and belief, the EEA explicitly includes "*political opinion*" as a prohibited ground of unfair discrimination in the workplace. Its deliberate and conspicuous omission from the list of prohibited grounds in section 1 of the Equality Act is therefore legally significant.

    37.2. This reflects a conscious legislative choice to differentiate between the regulation of conduct in the employment sphere and the regulation of speech in the public political sphere, where a greater degree of

robust, and even offensive, debate is tolerated and constitutionally protected. The Full Court's judgment effectively usurps the legislative function by writing "*political ideology*" into the Equality Act, thereby violating the principle of separation of powers.

38. The Full Court's attempt to justify its finding by linking political ideology to the listed grounds of "*conscience"* and "*belief*" is a strained and impermissible interpretation. As was submitted by *amici* in the *Qwelane* matter, these terms are themselves potentially vague and must be interpreted narrowly in the context of deeply held moral, ethical, or religious convictions, not in relation to changeable political affiliations.

39. To hold otherwise would be to stretch the meaning of these words beyond their breaking point, rendering the list of prohibited grounds almost limitless and creating profound legal uncertainty.

Ground 2:

40. The Full Court erred in its application of the objective reasonable observer test by failing to give sufficient weight to the political context of the utterance.

41. The correct test for hate speech, as reformulated by the Constitutional Court in *Qwelane*, is an objective one. The inquiry is not what I intended or what Mr Malema felt, but what a reasonable, objective, and informed observer, aware of the full context, would have construed my utterance to mean.

42. The Full Court failed to characterise this reasonable observer properly. The reasonable observer is not an abstract, hypersensitive individual divorced from the realities of South African society. They are a person aware of the country's vibrant, often vitriolic, political discourse. Such an observer would have understood several crucial contextual factors:

42.1. The statement was made in the cut-and-thrust of political contestation immediately following an election.

42.2. It was a direct and personal retaliation to a political insult from Mr Malema himself.

42.3. While the reasonable observer would undoubtedly be aware of the horrific history of the word "*cockroach*" in the Rwandan genocide, a history associated with the dehumanisation of the Tutsi ethnic group, they would also immediately discern that my utterance was not directed at any ethnic, racial, or religious group.

42.4. The target was a singular, political adversary. The observer would distinguish between the historical use of the term to incite ethnic cleansing against a vulnerable minority and its contemporary use as a crude political invective against a fellow politician.

43. The law requires a distinction between speech that is merely insulting or offensive and speech that advocates hatred against a group based on a protected characteristic. The Full Court's reasoning collapses this distinction. A

reasonable observer, steeped in the context of South African political rhetoric, where Mr Malema himself has used terms like "*dog*" and "*cockroach*" to describe political opponents, would have understood my words as a deeply offensive, political insult, designed to undermine a rival, not as an act of hate speech designed to incite hatred against a group.

Ground 3:

44. The Full Court erred in law by inverting the sequential analysis required for hate speech.

45. The legal inquiry mandated by section 10 of the Equality Act is sequential. A court must first establish that the speech is "*based on one or more of the prohibited grounds*". This is a jurisdictional threshold. Only once this gateway has been crossed can the court proceed to the second stage of the inquiry: whether the speech could reasonably be construed to demonstrate a clear intention to be harmful and to promote hatred.

46. The Full Court's judgment reveals a fatal flaw in its methodology, it inverted this sequence. The court was evidently and understandably moved by the odious and historically freighted nature of the word "*cockroac*h". It concluded that the word was harmful and hateful, and from that conclusion, it reasoned backwards to find that the speech must therefore have been based on a prohibited ground, which it then defined as political ideology by way of "*conscience*" and "*belief*".

47. This inverted logic renders the first, and most critical, step of the analysis superfluous. It creates a situation where any sufficiently offensive or shocking insult can be retrofitted into the definition of hate speech, regardless of whether it has any connection to a legally protected group characteristic. This approach is contrary to the clear structure of the Equality Act and the principled analysis required by the Constitutional Court. It effectively allows the perceived severity of the insult to create the prohibited ground, which is a manifest error of law.

Ground 4:

48. A foundational value of our Constitution is the rule of law, which requires that laws be clear, accessible, and predictable, enabling citizens to regulate their conduct accordingly. The Full Court's judgment offends this principle.

49. At the time I made the statement in November 2021, the prevailing legal understanding, as articulated in the Equality Court judgment of *Gordhan*, was that political ideology was pointedly not a prohibited ground under the Equality Act. A reasonable person would have conducted their affairs on that basis.

50. The Full Court's decision to declare political ideology a prohibited ground, and then to apply that new rule to my past conduct, amounts to a retrospective application of a new legal prohibition. The objective "*reasonable observer*" test must be applied based on the law as it was reasonably understood at the time of the utterance.

51. A reasonable observer in 2021 could not have construed my speech as hate speech under the Equality Act because the necessary prerequisite, a recognised prohibited ground, was absent from the law as it was then understood.

52. This retrospective creation of a prohibited ground violates the principle of legal certainty. If courts can create new categories of prohibited speech after the fact, speakers can never be sure of the lawfulness of their expression. This uncertainty will inevitably lead to self-censorship and a chilling of robust political debate, which is inimical to a democratic society.

Ground 5:

53. The Full Court erred in failing to properly distinguish between a personal, political insult directed at an individual and group-based hate speech.

54. The primary purpose of hate speech legislation, both in South Africa and internationally, is to shield vulnerable groups from the systemic harm caused by advocating hatred against them based on their shared, protected characteristics. It is not meant to protect powerful individuals from personal insults, for which remedies like the law of defamation are available.

55. The evidence demonstrates unequivocally that my utterance was an *ad hominem* attack directed at Mr Malema as an individual. I repeatedly used singular pronouns and identifiers: "*deal with this little frog*," "*deal with this*

cockroach", and expose "*his crimes*". The entire focus was personal and singular.

56. There was no incitement to harm or propagation of hatred against the members of the EFF as a group, or against any other group to which the Mr Malema belongs. A reasonable observer would not have understood my statement as a call to action against EFF members or supporters. They would have understood it as a statement made within the context of a personal and political feud between two prominent political figures.

57. The judgment in *Masuku CC* is instructive. In that case, the Court carefully distinguished between statements targeting "*Zionists*" (a political ideology) and those directed at Jewish people (a protected ethnic and religious group). The Constitutional Court affirmed that even inflammatory and aggressive political speech is protected (freedom of speech) unless it crosses the line into advocating hatred based on a protected group identity.

58. The Full Court's judgment fails to apply this crucial distinction. By conflating an attack on a political leader with an attack on the group he leads, the court creates a dangerous precedent that would insulate political figures from criticism by allowing them to claim victimhood on behalf of their followers, thereby stifling political accountability.

SPECIAL CIRCUMSTANCES AND COMPELLING REASONS WARRANTING THE ATTENTION OF THIS HONOURABLE COURT

59. Over and above the reasonable prospects of success on each of the grounds detailed above, it is submitted that there are compelling reasons, as contemplated in section 17(1)(a)(ii) of the Superior Courts Act, for this Honourable Court to hear this appeal. These reasons involve a substantial public interest, an important and novel question of law, and a clear instance of differing judicial interpretations that requires authoritative resolution.

An Important Question of Law of Substantial Public Interest:

60. This case presents a question of profound constitutional importance: where is the line to be drawn between constitutionally protected political speech and prohibited hate speech?

61. The Full Court's judgment extends the definition of hate speech to cover vitriolic exchanges between political opponents based on their differing ideologies. This is a discrete issue of statutory interpretation with far-reaching implications for all future political discourse in South Africa. It is a matter of substantial public interest that the highest court provides clarity on the rules of political engagement, to ensure that the essential right to freedom of expression is not unduly chilled by an overly broad application of hate speech laws.

Differing Judicial Interpretations

62. The judgment of the Full Bench in this matter creates significant legal uncertainty by establishing a precedent that is in direct conflict with prior judicial interpretations concerning political speech.

63. Firstly, it stands in stark contrast to the reasoning of the Equality Court in *Gordhan,* where Sutherland J (as he then was) expressly found that "*political ideology*" was a "*notable omission*" from the list of prohibited grounds in the Equality Act and that "*neither capitalists nor socialists can complain about their vilification as a class by invoking this statute*". The Full Court in the present matter took the opposite view, holding that speech based on differing political ideologies can qualify as hate speech by linking it to the grounds of "*conscience*" and "*belief"* (paras 25 - 26).

64. More significantly, the Full Court's reasoning is irreconcilable with the principles articulated by the Constitutional Court in *Masuku CC*, as I have already explained. The Full Court's judgment creates a direct conflict not only between High Court divisions but also with the authoritative jurisprudence of the Constitutional Court on the protected nature of political speech. Such a conflict is a quintessential compelling reason for this Honourable Court to intervene to settle the law and ensure legal certainty for all political actors and the public at large.

65. In summary, the appeal raises novel questions about the scope of the Equality Act's prohibited grounds in the context of political speech. The conflicting High

Court judgments on this very point create legal uncertainty that is detrimental to the functioning of our democracy. It is therefore respectfully submitted that there are compelling reasons and special circumstances that justify the granting of special leave to appeal.

CONCLUSION

66. It is respectfully submitted that the judgment of the Full Court, while aiming to uphold the vital constitutional value of dignity, has done so by making a series of serious legal errors that collectively unsettle the fragile balance between freedom of expression and the prohibition of hate speech. These are not minor misdirections but fundamental errors that strike at the core of our constitutional order.

67. The Full Court engaged in an unwarranted judicial expansion of the Equality Act by effectively creating a new prohibited ground of "political ideology" without the necessary constitutional analysis, contrary to clear legislative intent. It mischaracterised the reasonable observer and stripped my utterance of its essential political and personal context, thereby failing to distinguish a crude insult from group-based hatred.

68. In so doing, it inverted the required legal analysis, allowing the odious nature of a single word to define the prohibited ground, rather than the other way around. This approach not only offends the principle of legality but also creates a chilling effect on the robust political debate that is the lifeblood of our democracy.

69. These errors, when viewed collectively, establish more than a mere possibility that another court might disagree; they establish a strong and substantial prospect that this Honourable Court would find that the Full Court erred in its judgment. The issues at stake, the proper scope of Equality Act, the protection of political speech, and the need for legal certainty, are of immense public importance and are amplified by the conflicting jurisprudence now existing.

70. For these reasons, it is manifestly in the interests of justice that this Honourable Court grant special leave to appeal, to provide definitive guidance on these critical questions of law and to ensure that the boundaries of permissible speech are drawn in a manner that is consistent with the foundational values of our Constitution.

WHEREFORE I pray that this Honourable Court grant the relief as set out in the Notice of Motion.

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THAPELO KENNETH KUNENE

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO BEFORE ME AT JOHANNESBURG ON THE ____ DAY OF_____ 2025 THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO. R1258 OF JULY 1972, AS AMENDED, AND GOVERNMENT NOTICE NO. R1648 OF AUGUST 1977, AS AMENDED, HAVING BEEN COMPLIED WITH.

_____

COMMISSIONER OF OATHS

FULL NAMES:

ADDRESS:

DESIGNATION: