iAfrica Transcriptions (Pty) Ltd/rm

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT,)

PRETORIA CASE NO: 18172/2010

DATE: 2010-04-01

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE 19/5/10 SIGNATURE

In the matter between

AFRIFORUM 1st Applicant

TRANSVAAL AGRICULTURAL UNION OF SOUTH AFRICA 2nd Applicant

and

JULIUS SELLO MALEMA Respondent

JUDGMENT

BERTELSMANN, J: I would have preferred to have more time to prepare my judgment, but as this matter was heard in the urgent court and had to be disposed of, the judgment is of necessity somewhat shorter and sparser than it might otherwise have been.

The court is indebted to counsel on both sides for their thorough and comprehensive arguments and the stimulating debate that ensued between

counsel and the court, and the professional manner in which both parties guided the court toward a solution in this matter.

The parties are the following: The first applicant is Afriforum, a section 21 company fully compliant as required by the Companies Act 61 of 1973, with its registered address at 1, Eendracht Street, Kloofsig, Centurion, Gauteng, acting on behalf of its members and specifically also on behalf of a certain class of persons, commonly known as the Afrikaners of South Africa. As such the first applicant is an active non-governmental organisation involved with the protection and development of civil rights within the context of the South African Constitution 1996. At present the first applicant has 10 829 members. I hasten to add that this description is the one that the first applicant has used to describe itself.

The second applicant is the Transvaal Agricultural Union of South Africa, a voluntary non-governmental organisation with its registered address at 194 James Avenue, Silverton, established, as it describes itself, to guard over and protect the rights and interests of its members who are mainly commercial farmers, many of whom have been victims of violent farm attacks over the past number of years.

The respondent is Mr Julius Sello Malema, a major male person with identity number 8103035973084 and working address on the 7th Floor Luthuli House, 54 Sauer Street, Johannesburg whose further and fuller particulars are not mentioned. The respondent, it is common cause between the parties, is the President of the African National Congress Youth League. The respondent will henceforth be referred to as the "first respondent".

When the matter commenced this morning, counsel for the first

respondent indicated to the court that he was also briefed on behalf of the ANC and the ANC Youth League. After a short debate it was common cause that these parties had an interest in the matter and could properly be joined by order of the court as the second and third respondent respectively.

The relief that the applicant claims, in as much as it is relevant for this judgment, is the following

> "2 Pending the final adjudication of a complaint laid by the first applicant at the Equality Court in Johannesburg on 12 March 2010, the respondent is interdicted and restrained from publicly uttering words or singing any songs or communicate lyrics using words which can reasonably be understood or construed as being capable of instigating violence, distrust and/or hatred between black and white citizens in the Republic of South Africa ...
>
> This paragraph shall issue as a temporary interdict with immediate effect, pending the return day of the order, when the respondent is to show cause why the orders in paragraph 2 above shall not be confirmed with costs."

Obviously this now refers to the first respondent.

The reference to the Equality Court is significant. First applicant has filed a complaint with the Equality Court in which the first respondent is accused of having used hate speech and having been guilty of discrimination, because of the song "Avudubele Ibulu", translated as "shoot the boer or farmer". The second respondent is joined in those proceedings, in which an order is sought against it to prevent the aforesaid song from being sung at its meetings.

The first respondent has filed opposition to the complaint in which he pleads as follows:

"1. The complaint relates to a matter of national importance.

2. The substance of the complaint has already been the subject matter of debate and determination, be it in a different context, in the South Gauteng High Court.

3. The subject matter of the complaint concerns issues affecting political, historical and cultural interests.

4. The competing interests surrounding the subject matter of the dispute is likely to attract other interested parties in the form of *amicus curae*.

5. Without being exhaustive, the first respondent denies that he participated in hate speech or sought to unfairly impinge on the dignity of any other person.

6. The alleged offending portion of the song must be seen in the following context.

i) The song which contains the alleged offending portion is part of the struggle history of the second respondent and embedded as part of the liberating history of this country.

ii) The reference to 'boer' is well entrenched and universally accepted in our country as a reference not to the Afrikaner people, but reference as a word denoting an oppressor.

7. The first respondent will amplify his defence by reference to expert witnesses to be filed and served within a reasonable period of time."

The applicants have proceeded by way of urgency in this court in spite of the proceedings pending in the Equality Court. It is not clear why this court had to be approached as the remedy of an urgent interdict is available in the Equality Court. The parties are agreed that the matter will have to be transferred to the Equality Court, but are not in agreement whether the court should grant interim relief in the meantime. Mr Soni appearing for the respondents has urged the court not to grant any interim interdict because :

a) the respondents have been given very short notice of the proceedings;

b) no papers have been prepared on their behalf;

c) to grant an order at this stage would fly in the face of the respondents' fundamental right to be heard as guaranteed by the Constitution;

d) this step would be a transgression of fundamental constitutional principles;

e) a temporary interdict, however qualified, would be extremely prejudicial to the first respondent;

f) there would be no significant prejudice to the applicants if the proceedings were to be postponed to allow the respondents to file their affidavits;

g) to grant an order would infringe first respondent's constitutional rights to freedom of expression;

h) to present the respondents' justification of the case of the song would require evidence of historians and experts;

i) granting an order at this stage would be fundamentally unfair to the respondents;

j) it could therefore undermine the respect for the courts; and

k) an interdict would only be granted against one person and would not serve to prevent others from singing the song or using similar words.

These are very weighty considerations that must be given serious consideration, which has been anxiously done by the court. On the other hand the applicants argue that:

a) the words that are used in the song are not in dispute;

b) they clearly constitute hate speech;

c) the fact that the applicants' members and many other South Africans are concerned about the song and its effect upon them and upon persons that may be incited thereby is not really in dispute;

d) the song clearly advocates violence against farmers who are predominantly white and Afrikaans speaking;

e) their constitutional rights are threatened directly and immediately and the threat to life, limb and the right to emotional and psychological integrity outweighs any temporary procedural prejudice that the respondents might suffer and in particular the first respondent might suffer.

Section 16 of the Constitution reads as follows:

"Freedom of expression:

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."

Prima facie the words "shoot the farmer" mean that farmers should be attacked or killed. If this is correct it would clearly constitute hate speech against that population group. The words "shoot the farmer" can hardly be distinguished from the words "kill the boer, kill the farmer", which slogan was declared to be hate speech in the matter of Freedom Front v *The South African Human Rights Commission* 2003 11 BCLR 1283 (SAHRC). The chairperson, K. Govender, who spoke on behalf of the unanimous committee, said the following on page 1229:

"The slogan, under consideration in this appeal, was chanted at high profile functions organised by the African National Congress, the ruling party in this country. These events and the chanting of the slogans were widely publicised. There can be no doubt that the slogan, given its content, its history and the context in which it was chanted, would harm the sense of wellbeing, contribute directly to a feeling of marginalisation, and adversely affect the dignity of Afrikaners. The slogan says to them that they are still the enemy of the majority of the people of this country. It contributes to the alienation of the target community and conveys a particularly divisive message to the majority community that the target community is less deserving of respect and dignity. This generalised slogan is directed against an entire community of people. Words

convey meaning and do cause hurt and injury. There is a real likelihood that this slogan causes harm."

The same conclusion would have to be reached in this instance, if the words "shoot the farmer" in the song cannot be explained by their context. As in the matter of the *South African Human Rights Commission* they were uttered at high profile occasions in public in a political setting. To explain, as the first respondent apparently intends to do, that the context of a historical struggle song of great significance to the majority of this country, justifies singing or speech that is experienced as a direct threat by a large number of South Africans appears to be a very shaky basis upon which to justify what appears to be extremely aggressive language. The true yardstick of hate speech is neither the historical significance thereof, nor the context in which the words are uttered, but the effect of the words, objectively considered upon those directly affected and targeted thereby.

Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 defines hate speech as follows:

"... words based upon one or more of the prohibited grounds (Unfair discrimination generally or unfair discrimination on the ground of race, gender or disability) ... that could reasonable be construed to demonstrate a clear intention to –

(a) Be hurtful;

(b) Be harmful or to incite harm;

(c) Promote or propagate hatred."

If this yardstick is applied to the offending words in the relevant song, they constitute *prima facie* hate speech. See further *Strydom v Chiloane* 2008 (2)

SA 247 (T).

It cannot be contested that applicants' members and others are offended and alarmed, if not threatened by the song. This is a fact of which respondents must clearly be aware, given the high level of controversy that has surrounded the singing thereof. Our democracy is still fragile. Participants in the political and socio-political discourse must remain sensitive to the feelings and perceptions of other South Africans when words were used that were common during the struggle days, but may be experienced as harmful by fellow inhabitants of South Africa today.

Seen in that light the offending words do constitute hate speech, for which there is neither justification, nor protection in the Constitution. The rights of those whose fundamental constitutional rights are threatened by hate speech must take precedence over procedural prejudice that may arise in the context of this particular matter.

This court is very decidedly aware of the fact that the respondents have not had an opportunity to present evidence and were brought to court on very short notice. This court's finding is therefore merely provisional. Even though the court accepts that the granting of a provisional order in the present context may disadvantage the respondents, that consideration is outweighed by the very strong *prima facie* case established by the applicants that the offending words do constitute hate speech.

The court wishes to emphasise, however, that this finding is provisional only and is not binding on any other court that will deal with the matter once all the parties are ready, have presented evidence and have made their submissions. The court is furthermore of the view that this application should

have been brought in the Equality Court. although this court's jurisdiction has not been affected by the act creating that court. The court is also aware of the fact that, although the applicants have established a right to an interdict, the manner in which the national discourse should be conducted in our new dispensation can only be determined to a very limited extent by interdicts and other court orders. The parties are urged to avail themselves of the mediation processes in the Equality Court to eliminate obstacles that might continue to cause divisions in the national debate and to encourage a form of discourse that is sensitive and respectful of all South Africans' dignity and self respect.

The following order is consequently made:

ORDER

1. The matter is regarded as urgent.
2. The matter is referred to the Equality Court.
3. The first respondent is interdicted and restrained from publicly uttering the words of the song identified in the applicant's founding affidavit "Avudubele Ibulu", and from uttering and singing any songs or communicate lyrics using words of a similar nature, which can reasonably be understood or construed as being capable of instigating violence, distrust and/or hatred between black and white citizens in the Republic of South Africa.
4. This order is effective only until the first date upon which the matter may be heard in the Equality Court once all the parties have filed their submissions.

5. Costs are reserved for the decision by the Equality Court.