

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: EC 02/2013
Heard on: 12/10/2016
Delivered on: 13/12/2016

In the matter between:

SYLVIA LUCAS

Applicant

And

WILLIAM PETERSON

Respondent

Coram: Kgomo JP et Mamosebo J

JUDGMENT

MAMOSEBO J

- [1] This is an appeal against the judgment and order of the Equality Court Magistrate, Mr JA Van Zyl, delivered on 30 June 2015 in Upington, district of Gordonia. The appellant is Ms Sylvia Lucas, the current Premier in the Northern Cape Province, who was then MEC of Environmental

Affairs and Nature Conservation. The respondent, Mr William Peterson, is described as a member of the Khoisan Ethnic Community and also a member of the National Khoisan Council. The appeal is brought out of time and is accompanied by an application for the condonation for the late prosecution thereof.

[2] In its translated form the Magistrate's order¹ was to the following effect:

"For her utterances in her speech delivered on 18 September 2010 during which she termed people to be 'hotnots' [hottentots] and further that 'we hotnots think of food and clothes', the respondent [Ms Sylvia Lucas] is ordered to apologise unconditionally:

- (a) *Over Radio Riverside, Upington; Radio Kabusna, Calvinia; and Namakwa FM;*
- (b) *As well as in the Volksblad; the Diamond Field Advertiser (DFA); and the Gemsbok [regional newspapers].*
- (c) *As far as the costs are concerned it is ordered that costs be awarded in favour of the applicant [Mr William Peterson], which costs are to be taxed."*

¹ The Magistrate's judgment and order are in Afrikaans and have been translated into English throughout.

The condonation application

- [3] Section 23(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA), stipulates:

*"Any person aggrieved by an order made by an Equality Court in terms of or under this Act may, **within such period and in such manner as may be prescribed**, appeal against such order to the High Court having jurisdiction or the Supreme Court of Appeal, as the case may be."* (Own emphasis).

- [4] The Magistrate delivered the *ex tempore* judgment in court on 30 June 2015. The transcribed judgment was made available to the parties on 20 July 2015. Rule 50 (1) of the Uniform Rules of Court stipulates:

"An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed."

Ms Lucas had 14 days to file her Notice of Appeal and 60 days to prosecute the appeal itself. Although the Notice was filed timeously, this is by 31 July 2015, the same cannot be said for the inordinate delay in prosecuting the appeal. Adv Moroka SC, for the Premier, maintained in her submission that nine months' delay was not unreasonable or wanton. Adv Calitz, for the respondent, contended that the delay was about 11 months and not 9 months as

argued by Ms Moroka. The two months that separates the parties in their computation is of no moment in the larger scheme or purport of this dispute.

[5] Ms Lucas attributes the delay to several causes:

- 5.1 First, the presumed but mistaken unavailability of the presiding officer's Regulation 19(5) statement. As shown in para 4 (above) the judgment was already available on 20 July 2015;
- 5.2 Secondly, the termination of the mandate of her erstwhile attorneys of record, Lange Carr & Wessels Inc on 20 November 2015. See para 6 (below);
- 5.3 Thirdly, that the *dies non* between 15 December 2015 and 15 January 2016 cannot be reckoned in as part of the delay;
- 5.4 Fourthly, that the article by Professor De Vos dated 24 July 2015 titled: "*Why the hate speech provisions may be unconstitutional*" lulled her into a false sense of security. The appellant gave the date of the article as 24 July 2015 whereas the correct date is 31 March 2010. The professor's article therefore predates Ms Lucas' speech by six months. Prof. De Vos exhorted Mr Julius Malema in it to challenge the constitutionality of s 10 of PEPUDA because, he opined, it infringes on his right of freedom of expression. This exhortation has however been overtaken by events regard being had to the

recent Constitutional Court judgment in which the section alluded to by Prof De Vos was not challenged. See ***South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others [2016] ZACC 38*** dealt with below at para 33.

5.5 Finally, changing counsel and the fact that it was the second counsel's legal opinion that the Equality Court Magistrate misdirected himself which triggered a rethink on the prospects of success, hence this appeal.

It should be borne in mind that one of the principles guiding the implementation of PEPUDA is the expeditious and informal processing of cases.

[6] Mr Calitz submitted that the delay was caused by mere tardiness. Ms Lucas conceded in her reply that she has always been represented by the State Attorney and that the reference to changing attorneys meant the substitution of counsel and not attorneys.

[7] It is trite that condonation is not to be had merely for the asking. Since the applicant is seeking an indulgence, which is within the discretion of the Court to grant or refuse, our view is that the merits of the case will determine whether condonation should be extended to the petitioner. A slight delay and a good explanation may help

compensate for prospects of success which are not strong. Of importance is whether the explanation by Ms Lucas covers the entire period of the delay and is reasonable to purge the default. See ***Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*** 2008 (2) SA 472 (CC); (2008(4) BCLR 442) para 20; ***S v Mercer*** 2004 (2) SA 598 (CC); ***Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*** 2000 (2) SA 837 (CC); ***Melane v Santam Insurance Co Ltd*** 1962 (4) SA 531 (A) at 532B-F. Hence the examination of the merits.

The issue before the Magistrate

- [8] The issue before the Equality Court Magistrate was to determine whether or not the impugned words used by Ms Lucas justified the Magistrate's determination. She is quoted as having said:

"Are we going to talk the entire day on environmental matters. Nevertheless, what is pleasing is that the Chairperson [of the African National Congress (ANC)], this refers to the MEC [Member of the Executive] for Finance [Mr John Block] has supported me because he thinks differently from us Hotnots [Hottentots]. You know, we only think of food and clothing. His vision goes a bit further. He, at the time, made them understand why it was important to discuss issues like the environment and environmental governance."

Could this statement reasonably be construed to demonstrate a clear intention to be hurtful or harmful or to promote hatred towards the complainant and or the Khoisan Community as contemplated in s 10 of PEPUDA?

- [9] By agreement between the parties the Magistrate decided the matter essentially in the mode of a stated case, based on the papers, the templated Form 2, the appellant's speech and her answering affidavit to make his determination. The proceedings were launched in terms of s 20 of PEPUDA. The nature of the complaint was outlined in the said Form 2 dated August 2013. The starting point by the Magistrate was to look at the nature of the complaint and the relief sought and noted:

9.1 *"The applicant [Mr Peterson] intimated that he is affected [by the remarks] by virtue of being of the khoi bloodline, as well as being leader and a member of the National Khoisan Council. He states in his statement that he feels worthless and his human rights have been infringed. Now the compensation or vindication that the applicant requires is an unconditional apology, **as agreed to in all regional newspapers** circulating in the Northern Cape and, all community radio stations."* (own emphasis)

9.2 The exact terms of the said agreement alluded to in para 9.1 have not been set out nor is there any document that contains such agreement. What was negotiated

emerges from various statements contained in the papers of the parties. However, the upshot of what was proposed, maybe not in exact terms, seems to me to have been achievable because they seem to relate to the retraction of the impugned statements and the publication of an apology in the media.

The background

[10] On 18 September 2010 and at Eiland Holiday Resort in Uppington Ms Sylvia Lucas, in her capacity as MEC for Environmental Affairs and Nature Conservation, delivered a speech on tourism and biodiversity. Among the guests was the MEC for Finance, Mr John Block. Mr Peterson, the complainant, was not in attendance but heard what appeared to be edited snippets of the speech over the radio.

[11] Mr Peterson lodged a complaint with the Human Rights Commission (HRC) around 09 November 2010. Mediation and conciliation efforts were attempted by the HRC about a year later, on 08 November 2011. While on the one hand Ms Lucas states that she tendered an apology to Mr Peterson which he accepted, he on the other maintains that the relief he sought was a written apology in "Die Gemsbok" and "Die Volksblad" newspapers as well as an unconditional apology on all the five local community radio stations through which the live broadcasts of Ms

Lucas' speech were made. The dispute remained unresolved. Mr Peterson wrote a letter to the HRC and informed them that he was seeking relief from the Equality Court because, he claims, Ms Lucas defaulted on her undertaking to retract her offending words and statements and in particular to tender her apology at an appropriate forum and the media.

[12] Ms Lucas did not see her way clear to acceding to the demand for a public apology. Her explanation for resisting is couched like this:

"I do not believe that it is in the public interest that I publish and broadcast an apology, as it would not be in the interests of justice and those of the public as publication may have unintended consequences.[T]he public never had any problem with my speech."

What the "public interest" which is protected is and what the "unintended consequences" foreseen are, are not elaborated upon by Ms Lucas. The Magistrate found that Ms Lucas had contravened s 10 of PEPUDA and made the order set out in para 2 above.

[13] Ms Moroka further argued that the Court a quo was unmindful or did not even acknowledge that Ms Lucas is a member of the Khoisan bloodline or their descendant. This submission is evidently mistaken because the Magistrate stated:

"And it is common cause that the respondent [Ms Lucas] is a woman of colour. See para 10 of her affidavit. The said paragraph 10 reads:

I found the remark by Mr Block as an accolade to be shared by the Hottentots (of which I am a descendant) in order to encourage them to rise up and take their rightful place in society, in that, if I can do it so can they."

The repetition of the word "Hottentot" in this passage, when it was already objected to, boggles the mind.

- [14] Was there any material misdirection by the Magistrate in the assessment of the evidence? Magistrate Van Zyl in the case before us dealt with three defences raised by Ms Lucas: First, that the application was out of time; Secondly, whether essentially the same issues between the same parties were already adjudicated upon, in other words whether the matter forms *res judicata*; and Thirdly, whether the provisions of the Constitution and PEPUDA were contravened by Ms Lucas. Having dismissed the first two grounds the Magistrate dealt with the third extensively and, relying on the provisions of s 9 (4) and 5 of the Constitution, stated the following:

"Unfair discrimination is when you are treated differently as compared to other categories of people and that your dignity as a human being is impaired by such treatment. It is important to note that the Act does not prohibit [fair] discrimination but unfair discrimination."

[15] PEPUDA was enacted to give effect to s 9 of the Constitution, which prohibits unfair discrimination and harassment, it promotes equality, it prohibits hate speech and provides for matters connected or related therewith.

[16] On appeal, Ms Moroka urged us to consider the interpretation of s 10 and how it should be read with s 16 of the Constitution of the Republic of South Africa which grants everyone freedom of expression. Counsel criticized the Magistrate for his alleged failure to evaluate the evidence correctly. Section 10(1) of PEPUDA stipulates:

"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

(a) Be hurtful;

(b) Be harmful or incite harm;

(c) Promote or propagate hatred."

[17] The Magistrate reviewed extensively the meaning of subsections 9(3) and (4) of the Constitution to enable him to understand what hate speech as contemplated in s 10 of PEPUDA really is. He found that the words 'kaffer' and 'hotnot' fell within the same class or category. He then remarked that "*'n persoon van kleur wat 'n ander*

'kaffer' of 'hotnot' noem, is nie in 'n klas van sy eie wat vrywaring betref in terme van die Wet nie." What the Magistrate sought to convey is that a person of colour who calls another "kaffer" or "hotnot" is not in a *sui generis* category which would clothe him/her with immunity. He went on to strike the similarity between the use of those words and the chant or slogan *"kill the boer, kill the farmer."* The Magistrate found both sets of words to be hurtful. Some words are derogatory and hurtful irrespective of whether they are uttered by a person of the same ethnic group or nationality.

[18] From the aforementioned evaluation, one need only refer to the report by the Human Rights Commission (HRC) analysing the effect of the use of the word "Hottentot" when it remarked:

"This word is currently a forbidden word and is only used herein to explain and expose the apparent cause, nature, and magnitude of this complaint. It is important to explore the exact meaning of the word "Hottentots" or "Hotnots" as the word could engender the level of anger and contempt and indeed an infringement of the dignity of the Communities as demonstrated by the complainant and his followers."

[19] The HRC referred to the definition of "Hottentots". In www.Urbandictionary.com.define.php it is defined as "A

person of colour from Cape area in South Africa. Not white and not black. Brown skin colour.”
www.scienceinafrica.co.za/2002/august/khoi.htm define
“the name ‘Hottentots’ or in Afrikaans shortening ‘Hotnot’ became a disparaging term for people of colour at the Cape. Today we refer to the aboriginal herders.” And
 (en.wikipedia.org/wiki/khoikhoi) had this to say: *“The European immigrants labelled them Hottentots, in imitation of the sound khoekhoe language but today considered derogatory.”*

[20] The following information was sourced from
https://en.wikipedia.org/wiki/Saartjie_Baartman:

*“Dutch colonizers also bestowed the term “Hottentot”, which is derived from “hot” and “tot”; Dutch approximations of common sounds in the Khoi language. The Dutch used this word when referencing Khoikhoi people because of the clicking sounds and staccato pronunciations that characterize the Khoikhoi language; these components of the Khoikhoi language were considered strange and ‘bestial’ to Dutch colonizers. **The term was used until the 20th century, at which point most people understood its effect as a derogatory term.**”* (own emphasis)

[21] Furthermore, the appellant is a member of the ruling party, the ANC, and not a youngster. She must be

assumed to have been aware of the State of the Nation Address delivered by the former President Nelson Mandela on 24 May 1994 when he said:

*"We must end racism in the workplace as part of our common offensive against racism in general. No more should words like kaffirs, **Hottentots**, Coolies, Boy, Girl and Baas be part of our vocabulary."* (own emphasis)

[22] The Magistrate referred to Ms Lucas' explanation in paras 12 and 16 of her answering affidavit where she intimate that her remarks were not intended to devalue or demean the "Hotnots" but to change the mindset that a "Hotnot" is inferior to other races. Ms Lucas also said she had no intention to cause harm and/or spew hate speech. The applicant, she maintains, was the only member of the public who felt hurt by her utterances even though they were broadcast across the entire province that, she says, proves the point. To this the Magistrate remarked:

"There is no demonstrable evidence in favour of the respondent [Ms Lucas] to back up her claim. It is strange and improbable that only the applicant 'was the only member of the public who felt hurt by my utterances'. It may be that he was the only member of the public who laid the complaint. Even if he may have been the only member of the public who felt 'hurtful', he is also entitled to the protection of the law."

[23] The Magistrate further made the following finding:

"The respondent informs the Court that she is a person of colour. In that event it is totally improbable that the respondent would be unaware of the connotation which is attached to the term 'hotnot'. On the contrary the reference to a person as 'hotnot' has a degrading or demeaning effect or meaning. To attach a different meaning to the phrase which also specifically implicate the mindset, does not have an uplifting effect. The Court is of the view that the utterances, at least, struck the complainant as defined in s 10(1), in a 'hurtful' and 'harmful' manner. The Court is of the view that the utterances constitute hate speech, which the law forbids. In terms of s 10 the test is an objective one. The intention of the speaker is actually irrelevant. Section 12 does not come to the rescue of [Ms Lucas] in her search for a defence."

The Magistrate has indeed followed the correct approach and applied the correct test in the assessment of the evidence before him.

I find no misdirection in the Magistrate's analysis on this aspect.

[24] Inasmuch as Ms Lucas was addressing the community on biodiversity, her utterances, in my view, stretched beyond her scope of engagement on that front on a twofold basis: When she referred to the Khoisan as "Hotnots" and by

stating that they are only good for food and clothes whereas Mr Block is more visionary. The Magistrate cannot be faulted for making such a finding. Utterances of a respondent should not be hurtful, harmful or propagate hatred. As the Magistrate correctly remarks, it cannot be construed as uplifting the Khoi Community when they are painted with the same brush as being only good at food and clothes.

[25] Ms Lucas' further contention is that because she used the Afrikaans word "ons", meaning "we", in the impugned phrase to include herself, her intentions were to encourage the Khoisan people, of whom she is a member, to think beyond the perception of inferiority or being stereotyped as lesser people.

[26] The Magistrate considered the aforementioned submission and observed:

"Ms Lucas does not specify who she is referring to in her use of the generic word "ons" ["we"], except that she uses the all-embracing phrase "ons hotnots" ["we hotnots"]. She contrasts the thinking capacity of the then MEC for Finance with the people she refers to as 'hotnots' in a demeaning sense, in that they can only think of food and clothing and that the MEC thinks further. This in the Court's view falls within the ambit of secs 9(1) and 10 of Act 108 of 1996. The Court is of the view that the passage

constitutes discrimination and that Ms Lucas in her best endeavours has failed to discharge the onus that rested upon her. She states in para 5 that she spoke with pride of the people of the Northern Cape. But to refer to people as 'hotnots' which is regarded as degrading, and whatever goes with the term, does not engender pride at all. The claim is totally devoid of cogency."

[27] The following statement in Ms Lucas' answering affidavit seem to suggest that she is distinguishable from the Khoisan people and is therefore at a more elevated level. She says the following at para 7:

"I also mentioned that Mr Block was confident that I would perform my duties diligently, contrary to the perception that we as "Hotnots" think more in terms of material things ('klere en kos')."

[28] Mindful of the fact that no formal definition of hate speech exists in our country. The meaning has to be derived from the Constitution and s 10 of PEPUDA. Daniel E Hall 'e-Study Guide for: Constitutional values: Government Power and Individual Freedoms' (Facts 101 study guides) ISBN 9780131717695, Google e-Book whereat hate speech is described as "any speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected

individual or group, or because it disparages or intimidates a protected individual or group.”

[29] In ***Afriforum and Another v Malema*** 2010 (5) SA 235 (GNP) Bertelsmann J stated:

“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.”

I share the sentiment.

[30] The impugned words must also be construed from the perspective of freedom of expression as contemplated in s 16 of the Constitution which stipulates:

“16 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."

[31] From the aforementioned provisions, it is clear that Ms Lucas' freedom of expression had to be exercised responsibly because it was limited by s 16(2)(c). Her failure to act in accordance with this prescript or do so appropriately resulted in her utterances impacting negatively on the rights of Mr Peterson and other members of the Khoisan community.

[32] I am further of the view that Ms Lucas, being a public figure whose role on that day was to enlighten the community on biodiversity issues, cannot invoke protection under freedom of speech. The impugned words were hurtful and harmful. She misused the platform to undermine and belittle the Khoisan Community. It is disappointing that so many years into our democratic dispensation Ms Lucas still deemed it acceptable to use the term "Hotnot" to people she regards as her ethnic group. The term carries with it a painful past. She should have exercised more sensitivity and refrained from the use of the word. She exacerbated matters by labelling the Khoisan Community as lacking initiative or ambition. Her speech had the potential of fuelling anger and resentment towards other races or groups or the Premier herself.

[33] In ***South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others***

[2016] ZACC 38, Mogoeng CJ in a unanimous judgment of the Constitutional Court enunciated at para 12:

"[12] The Constitution is the conscience of the nation. And the courts are its guardians or custodians. On their shoulders rests the very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised. To this end, when there is litigation about racial supremacy-related issues, it behoves our courts to embrace that judgment call as dispassionately as the judicial affirmation or oath of office enjoins them to and unflinchingly bring an impartial mind to bear on those issues, as in all other cases.

[13] Judicial Officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle sympathetic or emotional alignments are so stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. To be caught up in that web, as a Judicial Officer, amounts to a dismal failure in the execution of one's constitutional duties and the worst betrayal of the obligation to do the right thing, in line with the affirmation or oath of office.

[14] Bekker CJ², Mohamed CJ³ and Zondo JP⁴observed in essence that racist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. To achieve that goal would depend on whether they view the use of words like kaffir [I would add baboon, coolie, Hotnot, etc] as an extremely hurtful expression of hatred and the lowest form of contempt for African people [and in this instance, the Khoisan community] or whether the outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack."

[34] It is my view that the term 'Hotnot' is not just a colloquial term as submitted by Ms Moroka. If it is used in the context of the impugned phrase coupled with the assertive insinuation of elevating the MEC for Finance, who is an African male, to a higher intellectual and better person than the Khoisan people, the Magistrate's finding has to be correct that it was not just discriminatory but could be construed as hate speech. In my view, the approach adopted by the Magistrate in this matter is beyond reproach. This view also extends to his evaluation of the

² S v Van Wyk 1992 (1) SACR 147 (NmS) at 172D of concurrence

³ S v Salzwedel [1999] ZASCA 93; 2000 (1) SA 786 (SCA) at para 18

⁴ Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp (2002) 23 ILJ 863 (LAC); (2002) 6 BLLR 493 (LAC) (Crown Chickens) at para 38

complaint and the relief sought by Mr Peterson for the violation of his basic right to human dignity and that of the Khoisan Community perpetrated by the appellant.

[35] In the circumstances, the judgment and the order made by the Magistrate on 30 June 2015 and the judgment made available on 20 July 2015 are hereby confirmed. Ms Lucas should have done the honourable thing and complied with the Magistrate's order which is fair and had as its purpose redeeming the dignity of Mr Peterson and the Khoisan Community and ameliorate their hurt.

[36] In the event the following order is made:

- 1. The application to condone the late prosecution of the appeal is dismissed.**
- 2. The appeal is dismissed with costs.**
- 3. The Magistrate's translated order which the appellant (Ms Sylvia Lucas) must comply with is the following:**

"For her utterances in her speech delivered on 18 September 2010 during which she termed people to be 'hotnots' [hottentots] and further that 'we hotnots think of food and clothes', [Ms Sylvia Lucas] is ordered to apologise unconditionally:

- (a) Over Radio Riverside, Upington; Radio Kabusna, Calvinia; and Namakwa FM;**

(b) As well as in the Volksblad; the Diamond Field Advertiser (DFA); and the Gemsbok [regional newspapers].

(c) As far as the costs are concerned it is ordered that costs be awarded in favour of the applicant [Mr William Peterson], which costs are to be taxed."

4. The above order must be fully complied with not later than 04 March 2017 failing which the respondent (Mr William Peterson) is granted leave to approach this Court for the appropriate relief on the same papers suitably supplemented.



MPHO C MAMOSEBO
JUDGE

NORTHERN CAPE DIVISION

I concur



F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the appellant:

Adv K Moroka SC

M Lekoane

Instructed by:

Office of the State Attorney

For the respondent:

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