

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

REVIEW NO: 217044

DATE: 12 SEPTEMBER 2016

In the matter between:

BULELANI THEMBANI

APPLICANT

And

WAYNE SWANEPOEL

RESPONDENT

REVIEW JUDGMENT

BROOKS J:

- [1] This matter has been referred to us on review in terms of the provisions of s23(5)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) by the additional magistrate,

Mthatha, who heard the matter in terms of PEPUDA in the Equality Court for the district of Mthatha.

- [2] The complainant instituted proceedings in terms of PEPUDA and claimed an unconditional apology from the respondent and an award of R100 000, 00 as damages for having been referred to as a “kaffir”. The respondent admitted that on 27 January 2015 he had been involved in an argument with the complainant which culminated in a physical scuffle between the two, but denied uttering the word “kaffir”, or indeed any abusive term, towards the complainant.
- [3] Accordingly, the issue before the magistrate was to decide whether or not the respondent used the word “kaffir” towards the complainant and, if he did, whether its use could reasonably be construed to demonstrate a clear intention to be hurtful or harmful or to promote hatred towards the complainant as envisaged in s10 of PEPUDA.
- [4] The magistrate heard evidence from both parties. In its evaluation he was obliged to consider the question of *onus*. The provisions of s13 of PEPUDA are devoted to the nature of the burden of proof applicable to certain cases involving discrimination. The magistrate observed correctly that the provisions of s13 do not deal with so-called “hate speech” cases, of which undoubtedly the matter under consideration was an example. Accordingly, the magistrate had regard to the provisions of s 21 of PEPUDA, which provide for civil law remedies, and the provisions of regulation 10 (7) of the regulations promulgated under PEPUDA which provide that the law of evidence as applicable in civil proceedings is of

application to an enquiry in terms of PEPUDA, provided that in its application fairness, the right to equality and the interests of justice should prevail over mere technicalities.

- [5] In my view, the magistrate approached the question of the nature of the applicable *onus* in the correct manner. Moreover his conclusion that the burden of proof is on the complainant to be discharged on a balance of probabilities, leaving the respondent only an evidential burden to rebut the complainant's evidence (in accordance with the law of evidence applicable in civil proceedings) is not offensive to the principles of fairness, the right to equality and the interests of justice.
- [6] Both the complainant and the respondent gave evidence and were supported by the testimony of witnesses. To the extent that some contradictions emerged from the evidence of the complainant and his witnesses as to the exact nature of the words uttered by the respondent in conjunction with the word "kaffir", the magistrate sought guidance from the judgments emanating from the Supreme Court of Appeal. Contradictions *per se* do not lead to the rejection of a witness's version. The court has to look at their nature, number and bearing on the rest of the evidence. (**S v Mkohle 1990 (1) SACR 95 (A) at 98f; S v Mafaladiso en ander 2003 (1) SACR 583 (SCA)**). Furthermore, the courts regard it as irrational to expect witnesses to remember and recall their evidence *verbatim*. (**S v Prinsloo 2014 JDR 1444 (SCA) par [15]**). Experience has shown that two or more witnesses rarely give the same account. (**S v Bruinders en ander 1998 (2) SACR 432 (SE)**).

- [7] Applying these legal principles to the minor contradictions occurring in the complainant's evidence and that of his witnesses, it is clear that the contradictions refer to the nature of the words recalled by the witnesses to have been used in the association with the word "kaffir". The evidence of the complainant and his witnesses is in agreement as to the use of the term itself. This sort of inconsistency falls short of being seen as a material contradiction when evaluated in accordance with the rational and practical approach approved by the Supreme Court of Appeal. In my view, the magistrate's approach to these apparent contradictions was correct.
- [8] In his consideration of the evidence given by the respondent and his witnesses in rebuttal the magistrate correctly identified that in his answering affidavit, whilst denying that he ever uttered the word "kaffir", the respondent did not say what words he had used. It is clear from the admissions made therein that during the argument between the complainant and the respondent a heated exchange of words had occurred, leading to a physical scuffle, but the respondent did not specify what the words were in his affidavit. This lack of detail also characterised the respondent's oral evidence. It was in sharp contrast to the detailed and specific evidence given by the complainant and his witnesses. The magistrate correctly observed in his judgment that "the respondent's version is scanty and characterized more of arguments than facts."*(sic)*
- [9] In my view the magistrate was correct in the approach he adopted towards the evidence as a whole. He had regard to the demeanor of the witnesses

as an integral part of his evaluation of the quality of their evidence and the general probabilities inherent therein. He concluded that the probabilities on balance lay in the version of the complainant and his witnesses, which was accordingly probably true and must be accepted, whereas the poverty of the respondent's version demonstrated improbabilities, leading to the conclusion that it was false and fell to be rejected. This approach is reflected in the applicable principles of the law of evidence in civil proceedings pertaining to the discharge of the burden of proof. (See for example **National Employers' General Insurance v Jagers 1984 (4) SA 437 (E) 440D**; **Stellenbosch Farmers' Winery Group Ltd v Martell & another 2003 (1) SA (11) SCA par [5]** and **Dreyer v AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA) 558 E-G.**)

[10] It follows that in my view the magistrate was correct in his conclusion that the complainant had discharged the *onus* placed upon him and had demonstrated on the balance of probabilities that in the heated verbal exchange between them the respondent had used the term "kaffir" towards him.

[11] What remains is the evaluation of the magistrate's approach to the issue of whether the use of the term "kaffir" could reasonable be construed to be hurtful or harmful or to promote hatred towards the complainant. The magistrate first identified that the determination of a clear intention required the adoption of an objective approach. This was the conclusion of the court upon consideration of the use of the phrase "could reasonably be construed" in s10 of PEPUDA in **Herselman v Geleba case no**

231/2009 (ECG). In my view, in adopting an objective approach the magistrate was correct.

[12] Thereafter the magistrate stated the following:

“In this case the kaffir word was used by the respondent, a white man in the course of chasing the complainant, a black man, out of his store. It is inconceivable that a reasonable African person would not consider the use of this word under the circumstances as derogatory and constituting hate speech. I therefore find that the word kaffir was used within the ambit of section 10 of this Act.”

In adopting his objective approach towards the consideration of the issue the magistrate armed himself with the following *dicta* from **S v Puluza 1983 (2) PH H150 (E)** quoted with approval in **Ryan v Petrus 2010 (1) SA 169 (ECG)**:

“When a black man is called a kaffir by somebody of another race, as a rule the term is one which is disparaging, derogatory and contemptuous and causes humiliation.”

[13] The appropriateness of this observation has not been adversely affected by the passage of more than thirty years since it was first expressed in **S v PULUZA** (*supra*). If anything, the truth which finds expression therein is

even more accessible today than it was before the dawn of a constitutional democracy in South Africa and the concomitant dramatic increase in the awareness of her citizens of the need to recognize, respect and exercise the demands now made by society for the demonstration of respect for human dignity and equality. The term “kaffir”, historically bandied about with impunity, is a term which today cannot be heard without flinching at the obvious derogatory and abusive connotations associated with the term. It is rightly to be classified as an inescapably racial slur which is disparaging, derogatory and contemptuous of the person of whom it is used or to whom it is directed. Considered objectively, its use can only be as an expression of racism with a clear intention to be hurtful and to promote hatred towards the person of whom it is used or to whom it is directed. This brings its use clearly within the ambit of s10 of PEPUDA.

[14] In my view, the approach adopted by the magistrate in this matter is beyond reproach. This view extends to his evaluation of the appropriateness of the relief sought by the complainant as compensation for the violation of his basic right to human dignity perpetrated by the respondent and the order made at the end of his judgment.

[15] In the circumstances, the judgment and the order made by the magistrate on 19 October 2015 are hereby confirmed.

RWN BROOKS

JUDGE OF THE HIGH COURT.

MAJIKI J:

I agree.

B MAJIKI

JUDGE OF THE HIGH COURT