

**IN THE EQUALITY COURT FOR THE DISTRICT OF
VICTORIA WEST**

HELD AT VICTORIA WEST

CASE NUMBER: 1/2005

In the matter between:

CACADU, ANDILE

COMPLAINANT

and

VAN ZYL, PAUL H S

RESPONDENT

PRESIDING OFFICER: Additional Magistrate, BOTHA M F T

JUDGMENT

Delivered: 21 OCTOBER 2005

BOTHA Add. Magistrate.

1. This matter serves before the equality court because the complainant feels aggrieved by words allegedly uttered by the respondent and addressed to him that he must '*(f)ok uit my plek uit kaffer!*'
These words were allegedly uttered at the respondents' place of business on Monday 13 December 2004, in the presence of employees of the respondent as well as a client of the respondent who was in the office of the respondent at the time of the incident.
2. A directions hearing was held and the parties agreed that the court must decide the matter and not send it to an alternative forum. I agreed thereto and the matter went on trial. The complainant was not legally or otherwise represented during the proceedings and conducted his own case after he could not secure the attendance of his legal representative. He decided not to make use of legal aid or any other representation despite been informed by the court of his rights in this regard. During the trial the respondent was represented by Mr. Viljoen, an attorney at M D Visser Attorneys.
3. The complainant testified in his own case and did not call any witnesses to strengthen his case. The respondent also testified and called a number of witnesses to corroborate his version of the events.
4. What follows now, is common cause between the parties;
The complainant paid a visit to the respondent on Monday 13 December 2004 after making an appointment to see the latter at his office in order to discuss the alleged unfair dismissal of an employee of the respondent.

The complainant was late for his appointment. The respondent was with a client of his in his office when the complainant entered the

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but he did not hear it for the reason stated.

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Martin Bosh testified that he did not hear the words *been uttered as* the respondent could not have said it, because if it was said he would have heard it.

The reason John Bauman advanced for not hearing the words, is the same as that of Martin Bosh. He testified that he was quite close and would have heard the words if it were uttered.

14. In order to keep this judgment a reasonable length, I shall not set out the detailed evidence of these witnesses. Suffice it to say that their evidence is also not free from criticism for the reasons that follow.

John Mamane was most certainly a reluctant witness as Mr. Viljoen correctly pointed out. He at first denied knowing much of the incident, and justified this by saying that he was not listening to the conversation as his attention was somewhere else. Later, when questioned in detail, he, not realising the effect of his answers, came up with information that he could not have known had his denial been true or had he not gained the information so given, from someone else. When questioned he testified that he *inter alia* heard the respondent saying that the complainant was late for his appointment and that he must make another appointment. He also heard the complainant saying that he was not late because he was there earlier. In addition he heard the respondent saying that he should have been there 09H00. Clearly this witness was not prepared to, and in fact did not, play open cards with the court.

15. The criticism against the evidence of Martin Bosh is that at first he testified that he heard the whole conversation that took place between the complainant and respondent. He furthermore testified, quite adamant, that the complainant said nothing before the respondent spoke. Later on, after been questioned, he went back on this and said that he in fact did not hear the whole conversation but only heard the complainant from the time the complainant walked closer to the office.

He said he did not hear the complainant when complainant walked into the workshop and therefore complainant could, for example, have introduced himself at first, but he can't recall it.

16. John Baumann was clearly a better witness than the two I just mentioned. His evidence, if looked at in isolation, is not open to real criticism because he did not contradict himself. He did change his evidence in one or two ways, but I never got the impression that it was a material deviation from what he first said. His evidence does however contradict some aspects of the evidence of the other witnesses.
17. This brings me to a discussion of the contradictions in the evidence of the witnesses that testified on behalf of the respondent. There were several contradictions as Mr. Viljoen correctly conceded in argument. In his heads of argument, he puts it as follows in paragraph 9.2;

'It is admitted that there were various instances that the witnesses for the respondent differed in their accounts of what transpired on 13 December 2004, e.g. where Complainant was standing, whether Respondent stayed in his office or walked out, whether Complainant said something or waved to attract the attention of the respondent, etc. These differences in account are however to be expected.'

18. The several contradictions that he points out in the paragraph are but some of the less serious ones that can be found. There were other more serious contradictions. The most important of all was that the respondent for example in effect denied that he chased the complainant out of his workshop or that he even waived him out. According to him he only told the complainant that he was late for his appointment and that he should make another appointment. This was contradicted by John Bauman who testified that the respondent indeed told the complainant to get out of his place and he also testified and

demonstrated in court how the respondent waived at the complainant to chase him out of the place. The respondent also testified that Bauman was outside the workshop working on a truck when the conversation took place whereas Bauman himself testified that he was inside the workshop around the pit.

The other less material contradiction relates to the making of the appointment by the complainant. This testimony of the complainant as to the appointment was in essence corroborated by John Mamane who in addition testified that the Respondent in fact told him the previous day that the complainant had an appointment with him.

John Mamane also contradicted a statement that Mr. Viljoen made in cross-examination to the effect that the complainant said to John Mamane *'why are you testifying for a white man.'* John Mamane testified that the complainant did not say that, but only told him that he should not testify about a case that he knows nothing of.

19. There are also a few other contradictions in the statements that was made by the attorney to the complainant and the evidence of the different witnesses on whose behalf those statements were made. The most important of these are the fact that Mr. Viljoen made a statement that Mamane and Bauman will testify that they both heard the whole conversation whereas both of these witnesses testified just the opposite of that.

I do not intend to deal with all the contradictions that were apparent in the evidence of these witnesses for the respondent. I am pointing it out because it necessarily affects the weight to be attached to the evidence as a whole. I know very well that not every contradiction or unsatisfactory aspect in the evidence of a witness or several witnesses on the same side necessarily justifies a negative response and I keep that principle in mind when judging this matter.

20. It is indeed so that the complainant is the only witness who testified that the alleged words were uttered. He is therefore a single witness in this regard. I keep in mind what section 16 of the Civil Proceedings Evidence Act 25 of 1965 provides with regard to a single witness, but also what has been said in ***Daniels v General Accident Insurance CO LTD 1992 (1) SA 757 (CPD)***. King J said;

'(A)lthough there is apparently no 'cautionary rule' in civil cases as in criminal matters where proof beyond reasonable doubt is required, the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the Court that on a balance of probabilities it is the truth.' -760 A-B

21. The numerical superiority of witnesses on one side to witnesses on the other should not of itself be a ground for accepting the evidence of the former. The proper way to decide between the two opposing versions should still be by reference to probabilities and demeanour and credibility. Keeping in mind the fact that the complainant is a single witness, one should therefore not be swayed by the number of witnesses who testified on either side. See ***Els v Herbert 1952(2) PH L16 (N)*** in this regard.
22. The criticism against the evidence of the complainant relates, in my opinion, to matters that are not very material. He satisfactorily cleared up the difference between his evidence and his statement to the police. The other criticism is also not fair as the complainant never testified that he visited the respondents' place the previous day. He testified that he made an appointment by phone the previous day. Bauman and Mamane testified that he visited the place the previous day. But even if they are all wrong as to the day the appointment was made, it is clear that they are all making an honest mistake in this regard. Such a mistake should not affect their credibility on this point.

Be that as it may, I am in any event of the opinion that this is immaterial to the question whether the complainant was treated the way he says he was treated on the Monday.

23. The same cannot be said for the shortcomings in the evidence of the respondent and his witnesses that testified on his behalf. The shortcomings in the whole of their case are very material. It relates to the actions of the respondent when he refused to see the complainant and also to the whereabouts and observations of the witnesses when they supposedly did not hear the words complained of been uttered. As I went through the evidence with a fine comb, I could not help but come to the conclusion that the respondent would have been better off without his witnesses. They actually sank his ship. I got the impression that they never thought they will be questioned in such detail; which explains the contradictions.
24. When Bauman was finished, the complainant suddenly found corroboration for his averments that the respondent chased him out and even went so far as to wave him out of the premises. This corroboration comes from the evidence of Bauman, who was a witness for the respondent. This is very important as the respondent vehemently denied this allegation. In considering this aspect of the case, I keep in mind the following principle enunciated in the judgment of the Appellate Division in ***Goodrich v Goodrich* 1946 AD 390**.

'The question as to its weight is not a question of law; in each case one has to ask oneself whether the fact that a party has sought to strengthen his case by perjured evidence proves or tends to prove his belief that his case is ill-founded, and one should be careful to guard against the intrusion of any idea that a party should lose his case as a penalty for his perjury. As a general rule, I think it can be said that a careful prepared false statement, and *a fortiori*, a conspiracy with others that they should give false evidence, is more likely to be an

indication of a consciousness of the badness of the case than a lie told on the spur of the moment. But the circumstances of each case must be investigated.'

So too, do I keep in mind ***Smit v Arthur* 1976(3) SA 378 AD** where it was said that a court should try to understand why innocent parties sometimes prefer to conceal facts from which they think an inference against them might be drawn.

25. In judging this matter, I also keep in mind what the Supreme Court of Appeal said as to how evidence should be evaluated. It said that;

'The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that is done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.' - ***S v Hadebe and Others* 1998(1) SACR 422(SCA) at 426.**

26. Applying these principles, if I look at the merits and demerits of the case for both parties, as well as the evidence as a whole as presented before the court, I have no doubt that the probabilities favour the version of the complainant. The respondent had no choice but to deny the uttering of the words complained of, because there would have been no way to justify such utterance.

It is to be expected that his employees would side with him. John Mamane's evidence is a clear indication that he was put in an unenviable position where he, as Mr. Viljoen has so eloquently put it in his heads of arguments, had to *'choose between his employer and his community and decided, perhaps wisely, to stay neutral.'* I am also not so sure that Martin Bosh was such an independent witness, as Mr. Viljoen tried to convince me.

27. All in all, I am satisfied that the version of the complainant is most probably the truth. The probabilities can never favour the respondent in this case. No, way, not in this case, on these facts.

28. Coming to the law, Mr. Viljoen, in his heads of arguments, argued the matter on the basis of unfair discrimination. I do not think he is correct in doing so. He missed the target by far. This case has nothing to do with unfair discrimination. It is a matter of racial vilification or hate speech as it is commonly known.

29. The prohibition against hate speech is contained in section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (hereinafter referred to as the Act). It reads as follows:

'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 to incite harm;
- (c) promote or propagate hatred.'

30. The respondent can only justify his words by raising a defence in terms of section 12 of the Act. This proviso reads as follows:

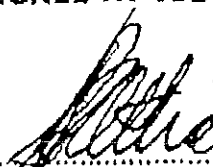
'(B)ona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.'

Section 16 of the Constitution is the right to freedom of speech. Section 16(2) provides that *'the right in subsection (1) does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'*

Clearly section 12 is not of any help to the respondent in this matter. Section 13 that deals with the burden of proof in unfair discrimination matters and section 14 that deals with the determination of unfairness in unfair discrimination matters also are not applicable to hate speech.

31. In the light of section 16(2) of the Constitution, the limitation clause in The Constitution is also not of any help to the respondent.
31. Accordingly there is no justification to be found for the uttering of the words used by the respondent and therefore I come to the conclusion that the respondent violated section 10(1) of the Act when he uttered the words complained of.
31. The issue as to costs and the remedies for the complainant will be dealt with separately from this judgment.

SIGNED AT VICTORIA WEST ON 21 OCTOBER 2005.



M F T BOTHA

ADDITIONAL MAGISTRATE

LANDROOS
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VICTORIA WEST
MAGISTRATE