

IN THE EQUALITY COURT FOR THE DISTRICT OF DURBAN

HELD AT DURBAN

CASE NO: 07/05

In the matter between

MR G S KHOZA

COMPLAINANT

And

MR M SAEED

FIRST

RESPONDENT

MS R ESSAY

SECOND

RESPONDENT

J U D G M E N T

TO: MR G S KHOZA

AND TO: ATTORNEY Y OMAR

INTRODUCTION

Complainant lodged a complaint on 28 January 2005 wherein he alleged that on 3 November 2003 he was the victim of Hate Speech uttered by the Second respondent (Ms Essay) in that she variously referred to him as a pig, dog and kaffir.

He also alleged that on 1 September 2005 at approximately 15h52 he received a telephone call from First Respondent (Mahomed) wherein he was

asked (by Mahomed) whether he still denied that he was a kaffir, or words to that effect. This was not specifically set out Form 2 but emerged in the course of evidence.

Both complaints against respondents were denied.

THE EVIDENCE FOR COMPLAINANT

Apart from his own evidence complainant advised the court that he wished to call other witnesses to testify but feared that as they were still in the employ or associated with the respondents, that they would be unwilling to testify.

One such witness was Mr Mbongiseni Shamase who the respondents and the complainant both initially intended to call and who was subsequently called as a witness by the court.

The material aspects of the complainant's evidence was that he approached Ms Essay on 3 November 2003 to request to speak to Mahomed about an advance on his wages to use as bus fare. She then replied that Mahomed did not have any money to give to a dog and she banged the window through which he had spoken to her.

She then called the security guard to "get this kaffir out" and in the process referred to him as a pig and a dog.

He waited for Mahomed and reported the incident to him, to which Mahomed replied that there was nothing that he could do as Ms Essay was his aunt. He decided to report the incident to the police the following day.

A charge was brought that was withdrawn by the state and he thereafter brought his complaint to the Equality Court.

He testified in closing that he and Mahomed enjoyed a father-son relationship before this incident that deteriorated thereafter to the point that he left their employ and had to seek further relief from the Labour Court.

He referred to his relationship with Ms Essay as always being strained because of her tendency to refer to him and his co-workers as pigs and dogs.

Complainant was then allowed to examine witness Shamase after he completed his testimony.

Witness Shamase's evidence did not corroborate complainant's evidence against Ms Essay. He denied witnessing the incident and instead testified that Complainant called him into the change room and briefed him as to what to state about the alleged incident and offered a money inducement in exchange. As a result he submitted the untrue sworn statement to the investigation officer, however when he realised that there was no prospect of receiving the inducement he decided to testify to the truth in court. He is found to be an unreliable witness and his evidence was of no value to the court.

MS ESSAY'S EVIDENCE

Ms Essay testified that on 3 November 2003 complainant asked her, as the cashier, to advance him money that she declined and suggested that he ought to wait for Mahomed and to ask him instead.

It was then that he became angry and called her a makhula and said that she ate pig (meat). She felt insulted and retaliated by calling him a pig and denied calling him a kaffir. Whilst he said this he also tried to enter her office and that was when Mahomed arrived and told him that he should not enter.

She denied that witness Shamase was on the scene at all and testified that the only reason why she referred to him as a pig was because of his provocation.

Importantly, whilst she under cross-examination she added that she told him that she could not advance him any more money as he had already overdrawn on his wages. This impacted negatively on the reliability of her evidence and her credibility.

Mr Saeed's evidence was that the commotion at the window drew his attention, as both Ms Essay and complainant exchanged insults with each other, although he could not remember their precise words, he did not hear the word kaffir being used.

He too testified that as a result of this incident his cordial relationship with complainant deteriorated.

THE COMPLAINT AGAINST MR SAEED

Mr Saeed was variously referred to as Mr Mahomed, Mahomed and even Mumsy on the record. He seemed comfortable with Mahomed so I will refer to him by this name.

Insofar as the complaint against him is concerned, as to what transpired telephonically on 1 September 2005, he denied complainant's version *in toto* and in turn substantiated his claim in court that, on the contrary, it was the complainant who had sent him electronic messages with a view of extorting money from him.

THE *ONUS* OF PROOF AS SET OUT IN SECTION 13 OF THE ACT

The court notes with concern that when Mr Omar was asked to address it as to whether the respondents had discharged the *onus* of disproving the complaint he asked whether section 13 was relevant.

The result is that he did not address the court in argument on this most crucial aspect of law and it is the court's view that this was a disservice to the respondents.

I summarise the legal standard prescribed by the provisions of section 13 as follows:

Firstly, the complainant must establish a complaint on one of the established causes as set in sections 6 to 12. Once this has been done a *prima facie* case has been made and the respondent must then prove that; either the occurrence did not take place or if it did, that it is not based on one of the prohibited grounds.

THE COURT'S FINDING

I apply this test firstly to the complaint against Mr Saeed.

On the balance of the evidence before the court, the complainant has not made out a *prima facie* case of Hate Speech against him. His evidence weighed against that of Mr Saeed does not establish his complaint on this basic level that the offensive telephone call was made; rather the contrary is true that complainant unduly communicated with Mr Saeed.

This complaint is dismissed.

As regards the complaint against Ms Essay I am satisfied that, by her own admission and indirectly by Mr Saeed that an angry exchange took place, that she referred to complainant as a pig and that in all probability the offensive word "kaffir" was used, whether Mr Shamase was present or not is not crucial.

Mr Saeed was not forthcoming as to what words were used and gave no reason as to why he could not recall these. The court's impression was that he attempted to protect Ms Essay.

Complainant's evidence is sufficient and satisfies the *prima facie* requirement of section 13.

This complaint is sustained.

THE COURT'S REMEDY

Since the complainant has severed all ties with Ms Essay the court does not have to investigate her conduct any further and it considers that an appropriate remedy is to be found in section 21(2) (d) of the Act, in accordance with which Ms Essay is ordered to pay complainant the amount of R3 000,00 in damages.

This amount is to be paid to the Clerk of the Equality Court on or before 12h00 on 3 March 2006 and may be uplifted by Mr Khoza at 12h00 on the day.

Mr Ntombela is to issue a receipt to the payer and Mr Khoza must in turn sign his receipt of this amount.

DATED AT DURBAN ON 24 FEBRUARY 2006

G L ABRAHAMS: PRESIDING OFFICER

PLEASE NOTE: *Any person who is dissatisfied by an order made by the Equality Court may appeal against such order in the required manner and time to either the High Court or the Supreme Court of Appeal, as the case may be. An appeal can also be made directly to the Constitutional Court. In terms of Regulation 19(1) any person wishing to appeal against any order made by the court as contemplated in section 23(1) of the Act, must within 14 days of such order being made, deliver a notice of appeal to the clerk and to the complainant or the respondent as the case may be. (See Regulation 19 relating to the Promotion of Equality and Prevention of Unfair Discrimination Act 2000)*