

IN THE EQUALITY COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN CASE NO.04/2006

In the matter between:

SIPHO DUBE Applicant

And

STUART WESTON Respondent

JUDGMENT

To : **Savera Maharaj & Dunn**
Applicants Attorneys
Suite 2000
2nd Floor
200 Mansion House
12 Field Street
Durban
(Ref: LSD/1/DD305)

And to: **Garlicke & Bousfield Inc.**
7 Torsvale Crescent
La Lucia Ridge Office Estate
Umhlanga
Tel: 031 570 5300
(Ref: S Ndlovu/N56)

INTRODUCTION

The complaint centres around complainant's allegation that on 15 December 2005 the respondent was referred to as a "Kaffir monkey". He attributes his words to the respondent who was in the company of three uniformed policemen in the course of a police raid on the room he occupied.

He bases his complaint on the prohibition of hate speech as set out in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (Hereafter referred to as the Equality Act)

He seeks an order for damages in the amount of R10 000, 00 as compensation from the respondent.

ISSUES OF COMMON CAUSE

1. The Respondent was in the company of police inspectors Buchanan, Pillay and Naidoo who were at the time stationed at the Durban North Police Station.
2. The raid took place at approximately 20h00 on the evening of 15 December 2005 in the room that complainant occupied on the Natal Sharks Board premises.
3. The respondent was present in his capacity as the head of security for the Natal Parks Board.
4. The purpose of the raid was to search complainants' room for dagga.

THE ISSUES IN DISPUTE

The court was informed that the following would be the issues in dispute

1. The events that preceded the raid and subsequent to the complainant's arrest
2. The conduct and words attributed to the respondent and whether these contravened the provisions of Section 10 of the Act.
3. The conduct that the court also had to decide related to whether the respondent entered the complainant's room, whether he communicated with the complainant in any manner and whether he assaulted the complainant *en route* to the police station.

These were issues that were raised in the opening addresses on behalf of the litigants.

COMPLAINANT'S EVIDENCE

Sipho Christopher Dube testified that on the day he had returned from his duties with the Sharks Board and whilst he was in the ablution block he was distracted by a knock. He went out and met a white policeman who asked him his name. He identified himself and he was told to go to his room. His room was situated on the floor above the ablution block.

They encountered more policemen at his room one of whom was holding his wallet who enquired from him whether it belonged to him to which he admitted. He also saw his personal belongings scattered around the room.

He described his room as being as large as the courtroom and it had four beds and four cupboards. These were occupied by his workmates, one of

whom was Vusi Shandu who was present in the room at the time of the incident.

Respondent then asked him to identify himself again which he did and it was then that he was referred to as a "Kaffir monkey". He noticed at this particular time that the respondent had a packet of dagga in his hand.

The respondent then phoned a Mr. Krog, who he knew to be a manager at the Sharks Board. In the course of respondent's discussion with Krog, he overheard him to say that he (the complainant) had been found and that they had still been looking for Emmanuel Makhathini.

An amount of R390 was in his wallet. He was handcuffed and taken down to Makhathini's room on the floor below. Makhathini was not there.

He was then led to the police van where he was told to admit that the dagga belonged to Makhathini and that he sold it on his behalf. He testified that at this point, the respondent assaulted him.

He was then placed in the police vehicle that he described as a "Condor" and *en route* to the Durban North Police Station, the Condor stopped in La Lucia Ridge where he was further forced to admit that he sold the dagga on Makhathini's behalf. He stated that he was once again referred to as a monkey and Makhathini was referred to as the "tall monkey".

He was duly charged at the police station where he spent four days in the police cells. He was dismissed from his employment as a result of this incident.

He was asked under cross examination as to why he did not open a charge of *crimen injuria* and assault against the police and he stated that he mentioned this to his attorney. He was further asked as to how he was certain that the respondent was indeed the person who insulted him and his response was that it was the respondent who asked all the questions and who spoke to him at his room and in the police vehicle.

EVIDENCE OF ZWELABANTU SHANDU

Complainant's first witness was Shandu who he also referred to as Vusi.

On the 15th of December 2005 three policemen and a white male in civilian dress entered the room he occupied with complainant and began a search of the complainant's cupboard. He could not recall the time as he did not have a watch.

A white policeman entered with Sipho (the complainant) and respondent informed Sipho that dagga had been found amongst his possessions and it was then that he referred to complainant as a "Kaffir monkey" it was in the process of doing so that the respondent also approached complainant and

grabbed him by the two ends of his shirt collar with both hands. He witnessed this whilst he was seated on his bed.

He testified under cross examination that when the policeman entered the room it was in darkness when he was asked where Sipho was. He replied that he did not know and it was whilst they were conducting the search that he asked them to switch on the light from the passage. He then could clearly see what the policemen were doing and it was only after the light was switched on that he noticed one of the policemen holding a dark blue plastic bag that appeared to contain packets of cigarettes.

He testified further that the respondent alone confronted the complainant when he was escorted into the room by the white policeman and respondent was the only person who conversed with the complainant and in the course of the respondent grabbing the complainant the other policemen did not restrain him.

EVIDENCE OF RUFUS NKOSINATHI MABIKA

Witness Mabika testified on complainant's behalf that he occupied the room adjoining that of the complainant.

At approximately 23h00 on the evening of 15 December 2005 he was awoken by policemen who entered the room and who enquired about Sipho's whereabouts. The policemen were accompanied by respondent who he referred to as Mr. Stuart. He replied he did not know. The police and respondent left and he went back to sleep.

He was unable to testify as to respondent's alleged conduct or to any words addressed to complainant by respondent.

This concluded the evidence on behalf of complainant.

RESPONDENT'S EVIDENCE

Stuart Anthony Weston testified that he was the security portfolio manager for the Natal Sharks Board.

He was at the time engaged in an investigation into drug dealing at the Board's premises. The investigation culminated in a raid in conjunction with the police services on the 15th of December 2005.

He accompanied the police in the course of the evening as he had carried out the initial investigations. He did not know the exact location of the suspect's quarters and it was inspector Buchanan who located the suspect and he identified him as being the complainant.

He denied that he entered the room of complainant's witness Mabika.

He testified that the only role he played in the presence of the policeman was to point out and identify the complainant. He denied the suggestion that he was at the time wearing a balaclava and he could not advance any reason as to why the complainant would have made the allegations of hate speech against him.

He specifically denied that he assaulted or insulted the complainant as set out in his complaint. What he did confirm was that a quantity of dagga had been found amongst his possessions.

The raid would have lasted for approximately ten minutes from 22h20 to about 22h30 as he recalled that he returned to the Durban North Police Station in the company of the policemen at 22h30.

He further testified that he was called as a witness at a disciplinary hearing where the complainant was charged with misconduct that related to this incident. At no stage in the course of that hearing was it put to him that he assaulted complainant or referred to him as complained.

THE EVIDENCE OF DOROTHY THUSI

Ms Thusi testified that she was the Head of the Human Resources Department at the Natal Sharks Board. She was familiar with the facts relating to this incident as she was the interpreter at the disciplinary hearing and she subsequently represented her employer at the CCMA hearing that resulted from this incident.

She testified that the complainant made no mention of either an assault or hate speech at either of these hearings.

THE REQUIREMENTS FOR HATE SPEECH

Section 10 of the Act sets out that 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

In addition, in terms of **Section 13** of the Act the complainant must make out a *prime facie* case of hate speech and if he/she does so, the respondent must prove that the incident did not take place.

In coming to its assessment the court must use the civil standard of proof, namely proof on a balance of probability.

THE COURT'S REASONING

The relevant witnesses who testified for complainant were the complainant himself and his witness Shandu.

Shandu's evidence corroborated complainant's evidence only in respect of the words attributed by them to respondent. Shandu made no mention of the money that was supposed to have been found in complainant's wallet and the quantity of dagga that was in the dark blue plastic bag. The court's view is that he chose only to testify to the aspects that were favourable to complainant. He did not impress the court as being a reliable witness.

Witness Mabika's evidence was of no assistance to the complainant's case as he could not testify to the alleged conduct and insults attributed to respondent.

The court then also had to compare the version of respondent and his witness Thusi. Thusi, although she was not an eyewitness to the incident, was familiar with the circumstances surrounding the complainant's arrest and the subsequent disciplinary enquiry.

She was adamant that the complainant's allegations of assault and hate speech were not made at either of these tribunals. This casts doubt as to whether these allegations did in fact occur as averred.

The court therefore finds that the complaint brought under section 10 of the Act has not been established on a *prima facie* level. The respondent therefore has no case to answer. There was therefore no *onus* that the respondent was obliged to discharge.

The court makes this finding despite the fact that the respondent did not lead the evidence of any of the witnesses that it attempted to secure.

The complaint is dismissed and each party is ordered to pay its own costs.

DATED AT DURBAN ON 20 NOVEMBER 2006.

G L ABRAHAMS: PRESIDING OFFICER

