

IN THE EQUALITY COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

CASE NO: 29/05

In the matter between

H I DONALDO

COMPLAINANT

And

R HARIPERSAD

RESPONDENT

J U D G M E N T O N *Q U A N T U M*

TO: MRS H I DONALDO
C/O ATTORNEY S P KUNENE
(FOR COLLECTION)

AND TO: MR R HARIPERSAD
C/O ATTORNEY S BALGOBIND
DURBAN JUSTICE CENTRE
(FOR COLLECTION)

INTRODUCTION

On 20 October 2006 the court found that the Complainant had established (as set out in the provisions of section 13 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act)) the complaint of Hate Speech and Harassment on a *prima facie* basis. The court heard the

respective submissions on *quantum* on 29 November 2006 and the ruling on this aspect was reserved.

I now deal with this aspect.

AN ANALYSIS OF THE REQUIREMENTS OF SECTION 21(2) (d)

This section provides as follows.

- (2) "After holding an inquiry, the court may make an appropriate order in the circumstances, including;
- (d) An order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the unfair discrimination, hate speech or harassment in question"

The concept of damages has its foundation in the civil court practice, and although this court has a "*quasi-constitutional*" character it applies the civil standard of adjudication. (See S Jagwanth, *The constitutional roles and responsibilities of Lower Courts* (2002) 13 SAJHR 201 at 212)

The authors Visser and Potgieter define Damages or Damage as "the diminution as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved" (*Law of Damages* Juta & company Ltd 1993 at 22). This is the civil court usage, read together with section 21(2) (d) that this court will apply.

In his address Mr Kunene referred to both the personality as well as the patrimonial interests of the complainant in the sense that it was complainant's testimony that she had incurred both proven financial/quantifiable patrimonial loss as well as infringements of her rights to dignity and emotional and psychological suffering. Rather, this is the

construction that the court put on his submissions that were subsumed under the traditional captions of Special Damages and General Damages, which are, strictly speaking, concepts that only relate to actions founded in delict. They are really not suited to meet the definitional criteria of section 21(2) (d). Apart from this Mr Kunene dealt adequately with the evidential aspects.

I divert slightly at this point to suggest that practitioners consciously re-orientate themselves to an understanding of the court's "*quasi-constitutional*" character. This is seminal to the aims and objects of the Act, that itself was legislated to give substance to the Right to Equality that is found in section 9 of the Constitution.

There is therefore a *continuum* that begins with the Constitution and runs into the courtroom adjudication process. An appreciation of this truism distinguishes the Equality Court's *ethos* from the Rules and Act-bound practice in the civil courts.

THE EVIDENCE FOR COMPLAINANT

I deal firstly with what I shall refer to her testimony on her patrimonial damages/proved financial loss. I will refer to this as "the first inquiry".

Thenjiwe Immaculata Donaldo testified that at the time that the complaint arose in 2005 she was in the throes of preparing to undertake an extended study visit to the United Kingdom. These preparations, together with the accompanying expenses involved were amply documented in papers that Ms Balgobind agreed were admissible. In essence these indicated that the sums of 2 500pounds sterling and \$930.00 were expended in anticipation of embarking on the study visit.

Complainant also testifies that she expected that the complaint would have been dealt with timeously in order to allow her to undertake the visit. When she became aware of the delays that (then) could have potentially impeded

her plans she discussed the withdrawal of the criminal charges against the Respondent that were then pending, with the investigation officer. She was advised that if were to do so or were she to absent herself that she would face criminal charges. This dissuaded her from this course of action. In the circumstances she was clearly poorly advised, however she followed this advice and in the process forfeited the visit and the monies she had paid. She also testified that her legal expenses amounted to approximately R15 500 00.

In addition she had to pay for a number of sick-leave certificates from various medical practitioners in order to attend court hearings. She could not quantify these payments fully.

She then testified to her non-patrimonial damages/impairment of her dignity, emotional and psychological suffering. This segment will be referred to as "the second inquiry".

She stated that she was thirty eight years old, whilst the respondent was twenty years old. She was then a married educator who taught scholars who were in the same age grouping as Respondent and the fact that he had sworn and shouted at her in a shop filled with customers degraded her as a person and as a woman. At the time she felt shocked and violated and also thereafter when Respondent remarked that he did not care about the law or the constitution and that he swore at about ten people a day.

An aftermath of this is that she was constantly being reminded of this incident by those who witnessed the incident or who had heard about it. This amounted to a constant reminder of the trauma related to the incident.

All of these matters impelled her to lay the complaint and when there was no meaningful progress with the complaint after four months she decided to engage the services of Mr Kunene.

Ms Balgobind's cross-examination focussed on the Complainant's testimony in relation to the first inquiry that ultimately did not impugn her earlier testimony. Crucially, she was not cross examined on what I refer to as the "second inquiry"

THE EVIDENCE OF RESPONDENT

Ms Balgobind referred to an affidavit wherein Respondent set out his personal circumstances. The court required him rather to testify to these. He stated that he was presently unemployed and was casually engaged to repair electrical appliances and it was for this reason that he applied for legal aid assistance.

He was living with his mother and stepfather and was required to contribute to the upkeep of the household where many accounts for services were in arrears. He was planning to seek employment in Johannesburg after the hearing. He was about to have been employed in Johannesburg in October 2006 but was not appointed as he had to attend an earlier hearing in this court on 20 October 2006.

THE COURT'S FINDING ON *QUANTUM*

The court does not take the expenditure relating to Complainant's aborted trip into account. This loss was not occasioned by any action of the Respondent and this aspect of the claim is dismissed.

The Respondent chose to engage an attorney's services and Respondent cannot be held to account for this.

The unsubstantiated medical costs too are disallowed.

The court sustains the Complainant's claim for impairment of her dignity and emotional and psychological suffering. The court must also be cognisant of the impact of an order for costs on the Respondent.

The Respondent's sole defence was that he was not present and the substance of the complaint was therefore not put into dispute and the

Respondent abandoned the contents of an affidavit dated 29 June 2005 wherein he stated that he was not person who committed the offence.

The court is under these circumstances duty bound to make an award for damages- which is always an intricate and demanding assessment.

In the present case the court is obliged to take particular note of the impact of the Hate Speech and Harassment on the Complainant and the court must of necessity view the impact from a subjective perspective.

It is found that in order to meaningfully address the complaint and adequately compensate the Complainant as best as the court can, the following order is made:

- 1 Respondent is ordered to make a written apology to the Complainant wherein he admits the use of the words "Kaffir Bitch" that he retracts the words whilst admitting that these were harmful, hurtful and apologises unconditionally for their usage. This signed, written apology is to be forwarded to the Clerk of court within 21 (twenty one) days of this Order. Failure to do so will amount to the Clerk lodging a complaint of Contempt of the Court's Order with the Director of Public Prosecutions.
- 2 Respondent is ordered to pay damages in the sum of R10 000.00 (Ten Thousand Rands) to the Complainant. This is to be paid in ten instalments of R1 000.00 each in cash or by bank guaranteed cheques to the Clerk of the Equality Court, Durban who will issue a receipt to the payer. The first payment is due on or before 7 March 2007 and each further payment will fall due on or before the 7th day of each succeeding month. Failure to comply with any payment as stipulated will result in a civil judgment being noted against the name of the Respondent without any notice to him.

- 3 Respondent is further ordered to address a letter of apology to the Presiding Officer of the Equality Court, Durban wherein he apologises unconditionally for the use of the words (directed at witness Timothy Tshabalala) namely, that he did not care about the law. This apology is to assert that everyone is equal before the law and is also entitled to the equal protection of the law and that he respects these provisions of the Constitution. This too must be forwarded to the Clerk of the court within 21 days and is subject to the same penalty provision as in clause 1 (above)

DATED AT DURBAN ON 05 JANUARY 2007

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)*