

IN THE EQUALITY COURT FOR THE DISTRICT OF DURBAN

HELD AT DURBAN

CASE NO: 60/2007

In the matter between:

A. J. SMITH

COMPLAINANT

and

MR T MGOQI
MRS N MGOQI

FIRST RESPONDENT
SECOND RESPONDENT

JUDGMENT

Introduction:

The complainant, Mrs A J Smith, instituted proceedings against the respondents in this matter, Mr & Mrs Mgoqi.

Background:

The complaint was first considered as a complaint to the Clerk of the Court dealing with applications to bind members of the public to keep the peace, under section 384 of the Criminal Procedure Act 56 of 1955.

The Presiding Magistrate recommended that no further action be taken at that stage and advised that the complaint should be lodged with the Clerk of the Equality Court.

The nature of the complaint was that on Monday 16 July 2007, AND AGAIN ON THE 17 July 2007, the two respondents and a woman named Mary, harassed the complainant and directed hate speech at her, *inter alia*: This is a black man's country and no white man is going to rule here. They (complainant) must build on the Bluff and not in Wentworth and should their building come up, they (respondents) would destroy it. They also referred to them as rubbishes, dirty and jealous, bad people. The complainant was also called a "Satan" at some stage.

The formal hearing commenced on 10 October 2007.

Complainant's Evidence:

Ms Smith testified and gave the court a brief rundown of what occurred the day before the incident. She resides at 29 Amoor Road, Wentworth, with her fiancé (who is white). They were planning to build a double storey with a double garage and were required to obtain consent from 5 neighbours. Four of their neighbours signed the forms consenting to the proposed building, but the respondents, who are their immediate neighbours refused to sign. On the Sunday, the builder accompanied them to the respondents and enquired why they would not sign. Mr Mgoqi then said the proposed building would block their view and he wants to consult his lawyer, after which the builder said they would proceed with the building anyway.

The complainant said she was alone at home, in her bedroom the next morning (16 July 2007). She was napping and not really sleeping at the time. Mr & Mrs Mgoqi and the woman called Mary were standing at their gate when the offending words were directed at the complainant. Under cross examination she conceded that she could not hear what Mr Mgoqi was saying. She said her bedroom window was closed and she opened it when she heard the commotion outside and wanted to make the Respondents aware of her presence. When they saw her they were even louder. Her bedroom window is about 10 – 12 metres from where they were standing. She said Mrs Mgoqi and Mary were the ones who uttered the words and they were pointing at her house. She said she does not know where Mary lives and that is why she did not institute proceedings against her as well.

Ms Smith mentioned that there was a witness to the incident who stood listening to everything that was being said and was shaking his head.

Ms Smith said she was not well on the day and it upset her to hear this. After merely asking for signatures they got hate speech and threats in return. She said the relationship between them and the Mgoqi's were fine until the building issue started.

She said she went to the SAPS to lay a complaint (on the same day), the police said they could not do anything and referred her to the courts. She also approached their local councillor who tried to arrange a meeting between the parties which Mrs Mgoqi apparently refused to attend. That same afternoon, Mrs Mgoqi referred to the complainant as a "Satan".

The following day, Tuesday, Mary visited the Mgoqi's again at about 10h00. She heard them say again that they would not leave them (complainant) alone and they would not allow them to erect the building. Although Mr Mgoqi was also present, Ms Smith could not hear if he said anything.

The complainant said she believed the cordial relationship between them could again prevail, but she was seeking an apology from the Respondents.

That concluded the evidence for the complainant.

At this stage, the Respondent's attorney requested an adjournment which was not opposed by the complainant.

The court requested the Clerk of the Equality court to subpoena the witness referred to by the complainant in her evidence, for the next court date.

The hearing continued on 26th October 2007.

Respondent's Evidence:

Mrs N Mgoqi testified first. Her evidence basically corroborated the evidence of the complainant in as far as what occurred on the day preceding the 16 July 2007.

She said Mary arrived on the Monday morning and as the Mgoqi's were going to leave for the hospital soon, she asked Mary to come back later. She accompanied Mary to the gate, to prevent the dogs from attacking her, and then went back into the house. They were just talking business at the gate. Mr Mgoqi was not with them, he remained inside the house. Thereafter they left for the hospital and returned later in the afternoon.

She said the ward councillor arrived and said that Ms Smith had laid a complaint because Mary had apparently insulted her. She said under cross examination that the insult apparently took place at their premises. She said they also received a letter from the police which said that she had insulted the complainant. The councillor wanted them to meet so that they could apologize to the complainant. She maintained that she had not said anything to the complainant. She had no idea why the complainant would fabricate these stories about them.

Mrs Mgoqi denied that she ever directed hate speech or any derogatory remarks at the complainant. She was of the opinion that the complainant was peeved because they had not consented to the building operations.

Under cross examination she said she did not even see the complainant that particular morning, but she conceded that the complainant would have been able to see them from her bedroom if they were at the gate.

She said when the complainant came to their house she was not at home, but she was told that the builder had said that they would proceed with or without their consent. She said that did not make her unhappy or angry. However, when the court questioned her regarding her feelings, she conceded that she was not happy about the fact that the complainant planned to proceed without their consent.

Mrs Mgoqi agreed that prior to this incident, there were never any problems between them and they enjoyed a cordial relationship.

Mr T Mgoqi then testified. He confirmed Mrs Mgoqi's version regarding Mary's visit and stated that he was not outside with them.

He did not hear anyone directing any derogatory remarks at the complainant.

Mr Mgoqi further confirmed that the builder said the building would proceed without their consent. He said he felt hurt and angry about that.

That concluded the evidence for the respondent.

The court's witness, Mr Welsch Birch then testified.

He said he knows the complainant as well as the respondents in this matter. On the date he was on the road after a 12km run, he was tired and was taking a break, walking up Amoor Road. He said he saw two people arguing, or at least he assumed they were arguing, due to their raised voices and hand signals. Under cross examination he said he thought it was uncivil for people to argue like that, but he did not react either positively or negatively.

Mr Birch said he has no idea what they said as he was not really paying attention. He could not say who these people were or whether they were male or female. He did not see the complainant on the date.

He said he did not discuss this matter with the complainant. He only saw her at court today.

Under cross examination he said he could not remember if the incident occurred in the morning or afternoon.

Both parties addressed the court on the merits.

Evaluation of the evidence:

In evaluating the evidence the court has given due consideration to the evidence adduced by all the witnesses, as well as the submissions made to the court during argument by Mr Zondi and Mr Govender.

The only issue the court has to decide on is whether the complainant was harassed and whether the offending words were in fact directed at the complainant by Mrs Mgoqi. What became clear during the evidence is of course that Ms Smith could not tell whether Mr Mgoqi uttered any offensive words. The respondents both deny that anything was said to or about the complainant.

The court could find no fault with the evidence of the complainant *per se*. She came across as a reliable and credible witness. It is so that there were some inconsistencies in her evidence. But the court is of the opinion that these are not material to the case.

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Question to be asked here is: If nothing untoward happened or was said, why the complainant would bother to go to the Police Station to lay a complaint. Why would she

✱ Court could also find no fault with evidence of respondents - acceptable.

try and get the assistance of the councillor to try and intervene to get the matter resolved and then finally why would she approach the courts for a peace order?

Although Mr Birch was unable to assist the court as to what was said, his evidence corroborates the evidence of the complainant to a certain extent. He said he saw people arguing and he thought they were not acting in a civil manner. If Mrs Mgoqi and Mary were just having a conversation, in all probability he would not have come to the conclusion that there was an argument.

The prohibition against hate speech in the Promotion of Equality and Prevention of Discrimination Act 4 of 2000 (sec. 10) reads as follows:

No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably construed to demonstrate a clear intention to:

- Be hurtful;
- Be harmful or to incite harm;
- Promote or propagate hatred.

Intention is not required. The test is whether a reasonable person would construe the speech as demonstrating 'a clear intention'. This can be subjective and/or objective. It was clear from the evidence of the complainant that she was upset and hurt by the offensive words directed at her.

The broad purpose of the Equality Act is to promote a culture of diversity based on equality, justice and freedom. This echoes the vision of a democratic society set out in the preamble to the Constitution of this country, particularly the idea that **"South Africa belongs to all who live in it, united in our diversity"**.

The parties involved here are neighbours who had a perfectly good relationship for all the years they have lived in close proximity to each other. This is no longer the case; the relationship is now somewhat strained, to say the least. However, it does appear to be possible that this previous cordial relationship can be rekindled.

We live in a beautiful, diverse country but sadly it is not without its problems. That is why, as neighbours, we should be there for each other; we need each other. We should promote the spirit of "ubuntu", show a mutual respect for each other and foster good relations, instead of living at loggerheads with each other. We should be an example to our children.

Judgment:

After carefully considering all the evidence in its totality, the court accepts that on a balance of probabilities, the offending words were directed at the complainant. Her complaint accordingly succeeds in as far as Mrs Mgoqi is concerned. The complaint against Mr Mgoqi is dismissed.

Sentence:

The respondent, Mrs Mgoqi, is to make a written apology to the complainant, to the satisfaction of the court within seven days of this order.

The apology must be an unconditional apology for the hurtful and harmful words that were used. The words must be withdrawn and the respondent must undertake not to use these again.

This apology must be shown to the Clerk of the Equality court who must be satisfied with it. Respondent is to sign this document before the Clerk of the Equality Court.

I sincerely hope that after today, the parties are able to live peacefully as neighbours again. I trust that this apology will be forthcoming from the heart and not merely because it is the order of this court.

Dated at Durban on the 23rd day of November 2007.



C.P. PEER.
ADDITIONAL MAGISTRATE: DURBAN



EXPLANATION OF THE RIGHT TO APPEAL OR REVIEW THE DECISION OF
THE COURT

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)*