

IN THE EQUALITY COURT FOR THE DISTRICT OF JOHANNESBURG

HELD IN JOHANNESBURG

FILE NO: 02/2009

IN THE MATTER BETWEEN:

SONKE GENDER JUSTICE NETWORK

COMPLAINANT

AND

JULIUS MALEMA

RESPONDENT

ON 15th March 2010 Court 25

PRESIDING OFFICER: Ms. C. J. Obolis

FOR COMPLAINANT: Ms. S. Gore

FOR RESPONDENT: MR T. Mokuwena

Stenographer: MR. W. Muller

COURT TIME:

09h45 – 10h15 = 0:30 G!

Proceedings mechanically recorded.

Judgement, as per Exhibit B, annexed.


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02/2009 Exb. B

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15/3/2010

IN THE EQUALITY COURT FOR THE DISTRICT OF JOHANNESBURG

HELD AT JOHANNESBURG

FILE NO: 02/2009

In the matter between:

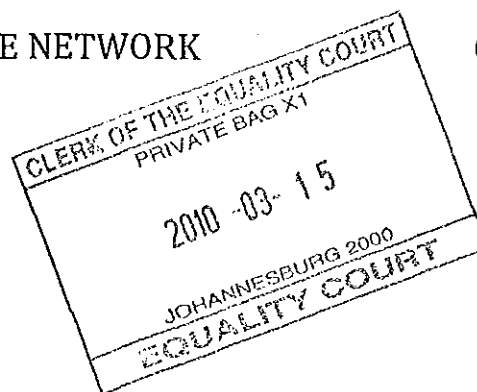
SONKE GENDER JUSTICE NETWORK

COMPLAINANT

And

MR. JULIUS MALEMA

RESPONDENT



JUDGMENT

In the words of the author Samuel Butler 1835-1902

***" WORDS ARE THE CLOTHES THAT THOUGHTS
WEAR---ONLY THE CLOTHES"***

[1] This matter was brought before the Equality on the 29th January 2009. The Respondent is called upon to answer for his conduct because of a speech that he made, while addressing members of the public on the 22nd January 2009, at the Cape Peninsula Technikon in Cape Town.

[2] *'When a woman didn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, requests*

(Cris)

breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don't ask for taxi money from somebody who raped you."

[3] These are the words complained of, upon which this Court was called upon to make a finding. This Court was to decide whether the said comments amount to *hate speech* and or *harassment* as per the definitions found within the framework of the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000, also referred to as the *Equality Act*. In making such a finding this Court further would have to decide what appropriate relief should be awarded to the complainant.

As formulated in the complaint, Sonke Gender Justice Network (or SONKE) seeks an appropriate declaratory relief, an unconditional apology for the statements and an order for compensation of the kind contemplated in section 21(2)(e) of the *Equality Act*. The complainant contends these statements constitutes *hate speech*, (as defined in the *Equality Act*), and also cumulatively, and in the alternative *harassment*.

[4] At the onset it should be mentioned the complainant carried the burden of proof and the duty to begin.

[5] It is common cause between the parties, these statements were made by the Respondent. In his response he contends it is submitted the utterances complained of are not offensive to gender equality nor hate speech but amount to fair comment in the circumstances of Mr.

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Jacob Zuma's rape trial. See in this regard *S v. Zuma 2006(2) SACR 191 WLD*. Thus, the respondent is placing reliance on one of the grounds of limitations as set out in section 12 of the *Equality Act*.

[6] The legal framework within which the case is to be decided upon to the Courts mind is sections 9, 10 and 16 of our Constitution, Act 108 of 1996 and sections 3, 10, 11, and 12 of the *Equality Act*.

Section 9 of the Constitution reads as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

Section 10 of our Constitution reads as follows:

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 16 of the Constitution entrenches freedom of expression. It reads :

- (1) Everyone has the right to freedom of expression, which includes –
 - (a) freedom of press and other media;
 - (b) freedom to receive or impart other ideas;
 - (c) freedom of artistic creativity ; and

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- (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
 - (a) propaganda of war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and constitute incitement to cause harm.

[7] This Court will later in the judgement refer back to the provisions of the Constitution as quoted above.

[8] The object of the *Equality Act*, is to enact the legislation required by section 9, just partially alluded to, and to give effect to the letter and spirit of our Constitution in various respects.

[9] The object of the *Equality Act*, is to be found in section 3. Same reads as follows:

(1) Any person applying this *Act* must interpret its provisions to give effect to

(a) *the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination.*

(2) Any person interpreting this *Act*, may be mindful of

(a) *any relevant law or code of practice in terms of the law*

(b) *international law particularly the international agreements referred to in section 2 and customary international law*

(c) *comparable foreign law*

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(3) Any person applying or interpreting this Act must take into account the context of the dispute and the purpose of this Act.

To turn then to the relevant provisions contained in the *Equality Act*.

[10] Section 10 of the Equality Act defines hate speech as follows:

(1) 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.

Section 11 of the Act prohibits harassment, which is defined in section 1 as :

"Harassment means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or intended adverse consequences and which is related to -

- (a) sex, gender or sexual orientation, or
- (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group."

The Court then turns in dealing with the definition of hate speech as per the provisions of the Equality Act.

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[11] HATE SPEECH

In terms of the definition words communicated amount to hate speech if:

11.1 They are based on one or more of the *prohibited grounds*, and

11.2 May objectively be considered to be *hurtful, harmful, incite harm or propagate hatred*.

As per the definition of *prohibited grounds* (such definition to be found in section 1), two categories are made provision for, either listed grounds or unlisted grounds. The unlisted grounds being grounds other than the listed grounds which perpetuates systemic disadvantage or loss of dignity or which affect a person in the same way as listed grounds.

[12] Thus, any words communicated may amount to hate speech, if they meet the above criteria as set out in section 10. It should also be noted that section 10 expressly refers to "words" and not to a picture or non-verbal forms of communication. To the matter at hand it is admitted by the Respondent that he had uttered the words complaint of.

[13] From the above definition quoted, it is clear that the *Equality Act's* definition of hate speech is broad. It extends beyond communicated words that promote hatred by specifically including within its scope the communication of words that are hurtful or harmful.

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Hurt or harm in this context is not limited to direct physical harm, and extends to an attack on dignity. See in this regard the decision of *Islamic Unity Convention v Independent Broadcasting Authority* 2002(4) SA 294 (CC) at pg 32.

[14] A court in assessing whether the words complaint of falls within the definition of hate speech the following questions would have to be asked:

14.1 Are the words communicated based on one or more prohibited grounds?

14.2 May any reasonable person consider the words to be intended to hurt, harm or incite hatred?

14.3 Is the use of the said words falling within the prescribed exclusion as set out in section 12?

If the answer to either of the first two questions is in the negative, the words complaint of do not amount to hate speech. If indeed the answer to either of the first two questions is in the positive, the words amount to hate speech. Important is that intention on the part of the Respondent is not required.

[15] The test is whether a reasonable person would construe the speech as demonstrating a "clear intention" to be hurtful. If the complainant succeeds in proving the words complaint of amounts to hate speech, it however would not be the end of the inquiry.

[16] An assessment would still need to be made whether or not the words are not protected under section 12. In the event of such a

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finding being made, the words would still constitute hate speech, but the Respondent cannot be held liable. Thus, the provisions of section 12 can be raised as a defence.

[17] In applying the above criteria to the evidence placed before this Court, the following assessment is hereby made.

(a) Prohibited grounds

It is clear the words complained of are based on not only one but two of the listed prohibited grounds, i.e gender and sex. The Respondent when giving evidence conceded when the utterances complaint of was made by him, he was firstly referring to the act of sexual intercourse, and secondly to the behaviour of the complainant in the S v. Zuma rape trial. The Respondent having made the utterances in respect of the opposite gender to himself.

(b) Words intended to hurt, harm or incite hatred

Here the context within which the words were uttered needs to be assessed. It is common cause between the parties the words were uttered at a political rally, during an electioneering campaign, by a prominent political leader. It was also common cause the Respondent holds significant social and political influence and particularly over young people. On the said day he was addressing an audience predominantly tertiary students consisting of both males and females. He testified on that day as he was on the campaign trail; his objective was to persuade the audience to agree with what he says, and to mobilize the youth on the African National Congress victory. Upon a question raised by a student in the audience as to why they

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should support Mr. Zuma as president, he in trying to interpret what was said in the Zuma judgement had made the utterances complaint of. The respondent had further contextualise the utterances by testifying he on the day had mentioned women who lie and report rape under false pretext will not advance the struggle against rape, but yet the newspapers had failed to report on this. Furthermore, his political party promotes the advancement of women and specifically black women and will never promote any hatred of women as he was mentored by several women, and raised by his grandmother. He considered the report in the newspaper thus as selective reporting by the media, and conceded upon his utterances having been made, the audience had cheered with loud applause.

(b)(i) The respondent was also questioned at length as to the generality of his utterances, with particular reference to the first two sentences i.e.

"When a woman did not enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, requests breakfast and taxi money....."

This he had denied.

He was adamant the utterances made refers specifically to the complainant in the S v. Zuma -matter and that he was referring to the behaviour of the complainant in that matter.

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(b)(ii) In support that the words complaint of could be construed as hurtful, harmful or to incite hatred, the complainant called two witnesses.

(b)(iii) Mr. Mbuyiselo Botha's evidence on point was that SONKE considered the utterances as gender insensitive more so in the light that South Africa has a high statistic of rape. He considered the utterances made to encourage women to be seen as sexual objects and felt aggrieved by the statements as it portrayed women as fair game and stereotyped them. He was of the opinion the utterances made by the Respondent seem to imply how women should or should not react after an alleged rape. Furthermore, that the utterances made by the Respondent may lead to women who refuses advances made by men, to be subjected to extreme forms of violence and even rape. This he attributed to the applause received by the audience on the day the utterances was made. He considered the utterances as gender insensitive, and was of the opinion it trivialise rape. He further testified even if the utterances were made by a female SONKE would still have lodged a complaint.

(b)(iv) The next witness called by the complainant was Ms. Lisa Vetten.

At the onset this Court wishes to express its opinion on the expertise of Ms. Vetten. She was called as an expert in the filed of gender violence. Her experience and qualifications having been set out in the report submitted to this Court. In order for a witness to be called to give evidence as an expert the matter upon which the witness will

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testify to, must call for specialised skill and knowledge. A person so called must be a person with experience or skill to render him, or her an expert in a particular subject. The guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the court. The expertise of the witness should not be elevated to such heights that the court's own capabilities and responsibilities are abrogated. The opinion offered to the court must be based on admissible evidence. Furthermore, the opinion of the witness must not usurp the function of the court.

See in this regard *S v. Engelbrecht 2005 (2) SACR 41*.

The Respondent during cross examination took issue with the expertise of Ms. Vetten, more specifically her lack of formal qualifications in the field of psychology in order to formulate an opinion on the behaviour of rape victims. In response thereto, it was her evidence she was a trained counsellor and have gained a range of experience over some 18 years, which past experience includes activities as a counsellor, trainer and researcher. As researcher statistics she had assisted in compiling have been relied upon by government agencies in the past. Furthermore, as a counsellor she has worked with over 200 women who have experience some form of violence.

(b)(v) Save for the respondent attacking Ms. Vetten's lack of formal qualifications i.e that she is not a person holding a degree, no suggestion was made that the research and literature relied upon by her in her report is unreliable or may be called into question. No

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evidence was lead by the respondent to contradict the evidence of Ms. Vetten.

(b)(vi) As a consequence this court is satisfied her evidence is relevant and of value to some of the issues to be determined by this Court, and that specialized knowledge on gender based violence is required in this matter.

(b)(vii) To turn then to her evidence presented. In essence she testified, the comments of the Respondent constitute an act of myth-making in that what he reported as the facts of the S v. Zuma trial are distortions of the actual findings of the case. The comments made by the Respondent rely upon generalizations about women, rape and consent which reinforce rape myths and that he is abrogating to himself the prerogative of deciding what does and does not constitute rape. Myths and stereotypes are typically created by groups dominant in society. Thus, when men proclaim what is and is not sexual violence, and justify their reasoning with rape myths, they reinforce men's dominance and perspectives at the expense of women equality.

Furthermore, the victim in the Zuma matter requested neither breakfast nor taxi money from the accused.

The decision read at page 218 as follows:

"The next morning she wandered around in the house for at least one and a half hours. She took food from the fridge...."

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The judgement refers to the accused having offered the complainant taxi money, which she had refused.

(b)(viii) The respondent's revision of the facts is calculated to suggest that some sort of normal morning after behaviour had taken place between the victim and the accused, which he suggests means that no rape could have taken place. In making the claims he did, he relied upon a number of rape myths one being that women who did not enjoy sexual encounters leaves soon thereafter. Secondly, that "real" rape survivors do not ask for things from their attackers. He further reinforced the myth that women lie about rape. The witness was of the opinion, the Respondent through his comments advances the notion of male sexual entitlement. His statement is to imply that consent is to be inferred from a victims conduct, rather than explicitly asked and further that inferences of consent can be made after the fact of sex---not beforehand. In making such statements the Respondent created the notion that there existed no obligation on men to obtain explicit consent from women before sex; rather they need only wait until after sex to confirm whether or not consent had been given.

She was of the opinion, not only were these not the facts in the Zuma-rape trial, but that no such generalisation could conceivably be inferred from the judgement in the matter.

(b)(ix) In contrast to the evidence presented by the complainant, the Respondent had testified the audience he was addressing on the day, did not perceive his utterances as harmful or hurtful. No witnesses

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were however called by the Respondent to rebut the evidence presented by the complainant. The Respondent is an influential a public figure on whose utterances are widely reported and on the day in question was not only addressing an audience, but the broader public. Therefore, even if the specific audience he was addressing did not perceive his utterances as hurtful or harmful he should have been mindful that such uttered words were not just meant for that audience.

(b)(x) Given the totality of the evidence this Court is satisfied the uttered words could reasonably be construed as hurtful, harmful and demeaning to women. To the Court's mind the first two utterances was made in general terms and that the Respondent in making them, had made it applicable to the complainant in the Zuma-trial. This Court therefore rejects the contention by the Respondent that his comments did not constitute generalisations about women, sex and rape.

(b)(xi) As a result this Court is satisfied the utterances made by the Respondent on the 22nd January 2009, amounted to hate speech.

[18] The Court has next to assess whether the words are not falling within the prescribe exclusions as set out in section 12.

In his response in terms of Regulation 6(2)(B), the Respondent sets out the utterances complaint of are not offensive to gender equality nor hate speech but amount to fair comment in the circumstances of Mr. Jacob Zuma's rape trial. The Respondent had testified in having

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made the utterances, he was trying to interpret what was said in the Zuma-judgement. Prior to having made the statements he was relying on his memory, as he was present in Court when the said judgment was delivered. He had never before taken the trouble to read the said judgment. He further asserted the statements were made in English being his fourth language and that his highest level of education had been Grade 12.

[19] In order for the Respondent to succeed in his defence he has to allege and prove:

- (a) the statement complained of was a comment(opinion) and not a statement of fact and that it was or would have been understood as a comment by a reasonable hearer;
- (b) the comment was fair. It need not necessarily have been impartial or well balanced, that it does not exceed certain limits;
- (c) the facts commented on were truly stated; and
- (d) the matter was of public interest.

See in this regard **Delta Motor Corp(Pty) Ltd v. Van Der Merwe 2004(4) ALLSA 365 (SCA), 2004 (6) SA 185 (SCA).**

[20] As already alluded too, the Respondent contended he had made the utterances in reference to the complainant in the Zuma-trial, in expressing his opinion. Yet upon reading the first two statements it clearly is couched as facts and not an opinion being expressed on the behaviour of women when they do or don't enjoy sex. It has already through the evidence of Ms. Vetten been shown, that the facts

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commented on by the Respondent, were indeed not said in the Zuma-judgement. Was the matter commented on of public interest? The question taken from the audience related to the candidacy of Mr. Zuma as president. To the Court's mind it seems to have been superfluous to comment on the complainant in the Zuma-matter. The matter having been finalised a few years prior. Was the comment fair? To the Court's mind it exceeded certain limits as the statements violated the express prohibitions asserted by the *Equality Act*.

[21] As a consequence this Court is not convinced the defence of fair comment having been proven by the Respondent and as a consequence he should be held liable.

[22] HARRASSMENT

The definition of harassment was cited earlier in paragraph 9.

Conduct which constitutes harassment must either be persistent or serious. It must further demean, humiliate, or create a hostile or intimidating environmentand it must relate to sex, gender or sexual orientation.

The Respondent having denied his utterances amount to harassment.

To the matter at hand the utterances made refers to sex and gender. With reference to the expert testimony of Ms. Vetten it clearly demeans and humiliates women, and more specifically alleged rape survivors. To the courts mind the uttered words is viewed as serious, and not of particular nature necessarily persistent. Therefore, this

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Court is of the opinion the complainant has also proven the uttered words constitute harassment as contemplated by the Equality Act.

[23] To return then to the provisions as contained in our Constitution. Albeit that everyone in our democratic state have the right to freedom of expression, such right in terms of our Constitution can be limited if such expression advocates a hatred based on gender and constitutes an incitement to cause harm. The Court is of the opinion, the Respondent through his utterances, has infringed on the rights of women to have their dignity respected and protected.

RELIEF

[24] Paragraph 3 above sets out the appropriate relief as sought by SONKE. It should be noted the remedial powers of this Court are given in section 21 of the Equality Act. Specifically the complainant seeks an unconditional public apology as contemplated in section 21(2)(j). Furthermore, the complainant seeks an order requiring the Respondent to pay an amount of R 50 000 to an organisation that provides shelter for abused women, such as POWA (People Opposed to Women Abuse), as provided for in section 21(2)(e).

In respect of an apology to be tendered, the Respondent had testified in the event of this court ordering same, he would not be hesitant to make such public apology. He further testified upon a Court ordering him to pay the amount of R 50 000.00 as damages he would do so, once so ordered by the Court.

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[25] For the reasons as set out above, this Court finds :

25.1 The utterances complained of as formulated in Form 2 Annexure B to amount to hate speech and harassment.

25.2 The Respondent is ordered to issue a public apology within two weeks from date of this judgment in the form of a press release.

25.3 The Respondent is further ordered to pay People Opposed to Women Abuse (POWA) an amount of R 50 000 within one month of date of this judgement.

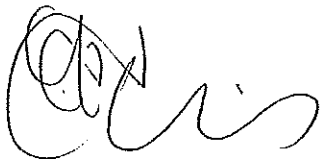
[26] As the complainant in this matter has been assisted on a pro bono basis and has been acting in the public interest, and having had regard to the decision of **Trustees for the Time Being of Biowatch Trust v Registrar Generic Resources and Others 2009 JDR 0559 (CC)**, this Court is of the opinion no order as to costs would be an appropriate costs order under the circumstances.

[27] In conclusion I wish to leave the parties and more specifically the Respondent with the following words of wisdom by Dr. Oliver Wendell Holmes 1809-1894. Mr. Malema being a man of vast political influence, be wary of turning into:

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"The man that often speaks but never talks".

Dated at JOHANNESBURG on this 15th day of MARCH 2010.



Presiding Officer

Ms. C.J. COLLIS