IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT – GRAHAMSTOWN)

CASE NO. 231/2009

In the matter between:

JOHAN RUTGERT HERSELMAN **APPELLANT**

and

KHAYALETHU ERIC GELEBA **RESPONDENT**

APPEAL JUDGMENT

DAWOOD J,

1. This is an Appeal against the decisions of the Magistrate presiding in the Equality Court.

2. **Facts of the case**

(i) the facts of the case are briefly as follows:-

a) The Respondent herein instituted proceedings against the Appellant on the 18th of January 2007 in terms of Section 20 of the **Promotion of Equality and Prevention of Unfair Discrimination Act (Act number 4 of 2000) [Regulation 6 (1)],** (hereinafter referred to as the Act) wherein he alleged that on the 16th of January 2007 the Appellant said *"look what this baboon is doing, it is scratching the door and he repeated that 3 times. He was shouting when he was uttering that and Ms Swaartbooi is my witness".*

b) The Appellant in his response denied:-

1) That he called the Respondent a baboon;

2) That he repeated it 3 times;

3) That he screamed at the Respondent.

c) According to the Appellant he told the Respondent that he must not be like a baboon, *"nie soos 'n Bobbejaan moet wees nie".*

d) The Appellant further pleaded that:-

1) The Respondent's claim did not satisfy the requirements of the Act and in particular did not fall under the prohibited grounds provisions as defined by **section 1 of the Act;** and
2) Does not comply with **section 9 and 10 of the Act.**

e) The matter was accordingly argued in the court *a quo* firstly on Jurisdiction as the point in *limine,* that is, whether or not the conduct complained of fell within the ambit of the Act.

f) The Magistrate in dealing with the issue of jurisdiction held that the word baboon on the face of it can be hurtful or harmful or incite harm or promote or propagate hatred.

g) The Magistrate went on to say that whether it does so in this case is a matter for evidence.

h) The Magistrate accordingly ruled that the words in question so uttered are on one or more of the prohibited grounds and the court accordingly had jurisdiction to hear the matter, and proceeded with the trial.

i) The record illustrates on the merits, that the Respondent gave three different versions regarding what precisely was said. In the Police

statement he indicated that the Appellant had said to him twice *"can you see what this baboon is doing, and where did you get this baboon"*.

(ii) In his complaint form the Respondent had indicated that the Appellant had said 3 times *"look what this baboon is doing, it is scratching the door and he repeated it three times... ..."*

(iii) In his testimony in court the Respondent said that the Appellant had referred to him as a baboon 3 times saying:-

aa) *"Kyk hoe maak die Bobbejaan, hy krap die deur";*

bb) *"Waar kry jy die bobbejaan"; en*

cc) *"Here, die bobbejaan".*

j) According to the Appellant he told the Respondent *"moenie soos a bobbejaan wees nie, jy is besig om die gebou te beskadig"*, and he maintained this version throughout.

k) The Appellant testified that:-

aa) He only said this once and it took him 30-40 seconds because he was walking.

bb) According to him the phrase *'moenie soos a bobbejaan wees nie'* meant that someone is doing something stupid and he wanted him to stop.

cc) His only intention was to stop the Respondent and not to hurt his feelings or to insult him.

dd) That he could have raised his voice or spoken a bit louder than normal because he was upset.

ee) That he went for Equality training.

ff) He stated that this was the first time that he heard that African people do not like to be referred to as a baboon.

gg) The Magistrate held:-

1) That it was the views of the recipient community and not the utterer's community that had to prevail.

2) That the ordinary meaning of words does not assist when considering social context meaning.

hh) The Magistrate accordingly rejected the argument presented on behalf of the Appellant since it was based on the views of the Afrikaner community and not the community that was being addressed as required by law.

ii) The Magistrate accepted the Respondent's version despite being alive to the discrepancies of the Respondent's version.

jj) The Magistrate found it unthinkable that the Appellant could not know the racial import of the word

"baboon", "Kaffir", "Bantu", when it is directed at a black or African in particular.

kk) The Magistrate found that Appellant's utterances amounted to hate speech as defined in section 10 of the promotion of equality and prevention of unfair discrimination act 4 of 2000.

ll) The Appellant now appeals against the judgment of the Magistrate in its entirety both with regard to the findings in respect of jurisdiction as well as the merits.

3. Issues to be determined

3.1 The Appellant inter alia raised the following points on appeal:-

i. Whether or not the conduct complained of fell within the ambit of The Act.

ii. Whether the words in section 10 (1) (a), (b) and (c) are to be read disjunctively or conjunctively, that is, whether they should be read disjunctively as having an "*or*" between them, or conjunctively as having an *"and"* between them.

iii. Whether the subjective test or objective test is applicable when considering Section 10.

iv. Whether an adverse finding can be made by the Respondent's failure to call Mrs Swaartbooi to testify to verify his version.

v. Whether or not adverse credibility findings ought to have been made against the Respondent based on the fact that his testimony with regard to what was uttered differed from what he had stated to the police and what was stated in the referral form;

vi. Whether or not the court of Appeal could make credibility findings particularly in the absence of such findings being explicitly made by the Magistrate.

vii. Whether or not the Freedom of Expression clause of the constitution was applicable;

3.2 **Jurisdiction**

i) In determining the issue of Jurisdiction an examination of the relevant authorities and the provisions of the Act is necessary;

ii) The issue of whether or not the provisions of Section 10 (1) (a), (b), and (c) are to be read disjunctively or conjunctively is also an important consideration in the assessment of Jurisdiction.

iii) Examination of the relevant authorities.

a) In Minister of Environmental Affairs and Tourism v George and others 2007 (3) S.A 62 (SCA) at page 66 – 68 Cameron JA held as follows:-

"[3] The equality court is established by s 16 of the Equality Act, which was enacted in fulfilment of the Constitution's central equality clause.[1] *The statute's objects are to give effect to the letter and spirit of the Constitution's equality promise and to provide practical measures to facilitate the eradication of unfair discrimination,* ***hate speech*** *and gender and other forms of harassment (s 2). The Act proscribes unfair discrimination on 'prohibited grounds', which are broadly defined (ss 6 – 12, read with s 1), and vests equality courts with extensive procedural and remedial powers in complaints of unfair discrimination (s 21)...*

[4] The purpose of these innovations is to create enhanced institutional mechanisms through which victims of unfair discrimination and inequality can obtain redress for the wrongs against them.

[5] The statute obliges an equality court before which proceedings are instituted to hold an inquiry in the manner prescribed in the regulations[2] *and to 'determine whether unfair discrimination ... has taken place, as alleged' (s 21 (1)). But when a complainant lodges an equality complaint, the statue first obliges the equality court to determine where the matter should best be heard. It requires the court to*

> *'decide whether the matter is to be heard in the equality court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum (hereafter referred to as an alternative forum) which, in the presiding*

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[1] '9 Equality
(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.
(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of ss (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in ss (3) is unfair unless it is established that the discrimination is fair.'

[2] GN R764 Government Gazette 25065 of 13 June 2003. Regulation 10 deals with the powers and functions of an equality court. Regulations 10 (1) provides that the inquiry 'must be conducted in an expeditious and informal manner which facilitates and promotes participation by the parties'. Regulation 10 (3) provides the proceedings 'should, where possible and appropriate, be conducted in an environment conducive to participation by the parties'.

officer's opinion, can deal more appropriately with the matter in terms of that alternative forum's powers and functions' (s 20(3) (a)....[3]

Before making a decision to refer a matter to another forum, the statute obliges the presiding officer to 'take all relevant circumstances into account', including the following:

a) ' The personal circumstances of the parties and particularly the complainant;

b) the physical accessibility of any contemplated alternative forum;

c) the needs and wishes of the parties and particularly the complainant;

d) the nature of the intended proceeding and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law;

e) The views of the appropriate functionary at any contemplated alternative forum.'...

[7] By providing that the court may refer a matter to 'another appropriate institution', the statute acknowledges not only the potential intricacy of unfair discrimination claims, but the range of other institutions that could afford appropriate assistance in resolving them. But the avenue so created, far from being intended to deprive the equality court of its jurisdiction, is premised on its continuing jurisdiction, with the result that, in cases of non-referral, no express order need be given...

[9] I would, in any event, add that the equality court's decision whether to redirect a matter entails a discretion with which this Court will interfere only when the equality court fails to exercise it judicially.[4] "

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[3] Regulation 6(4) of the regulations promulgated in terms of s 30 of the Equality Act (GN R764 Government Gazette 25065 of 13 June 2003) requires the presiding officer in the equality court, within seven days after receiving the documentation relating to the matter, to decide 'whether the matter is to be heard in the Court or whether it should be referred to an alternative forum'.

[4] Ex parte Neetling and Others 1951 (4) SA 331 (A) at 335 D – F, per Greenberg JA, 'Can it be said, in the present case, that the Court a quo exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons?'; L T C Harms Civil Procedure in the Supreme Courts (1990, with updates) in Para C1.39.

b) In Manang v Department of Roads (No 1) 2009 (6) SA 574 SCA at page 586 Kroon AJA held at paragraph 34 –

"[34] Equality courts are vested with extensive procedures and remedial powers in complaints of unfair discrimination and the jurisdiction and powers that the Equality Act confers on Equality Courts are wide...

The specific powers conferred on an Equality court by s21 (2) of the Act (which are to be read with the ancillary powers provided for in s21 (5)) are wide enough to embrace adjudication of the relief in question.

[36] The above conclusions accord with the purposes and objectives of the Equality Act which is aimed at giving Equality Courts wide powers to redress inequality and discrimination."

c) In Manong v Department of Roads (No 2) 2009 (6) SA 589 SCA at page 603 Navsa JA held at paragraph 53 –

"It is abundantly clear that the Equality Court was established in order to provide easy access to justice and to enable even the most disadvantaged individuals or communities to walk off the street, as it were, into the portals of the Equality Court to seek speedy redress against unfair discrimination, through less formal procedures."

iv) These cases do no pertinently deal with the issue at hand but nonetheless provide useful and instructive insight with regard to the applicable principles in adjudication of matters in the Equality Court.

v) The learned Magistrate has applied the principles set out in these cases when determining the issue of jurisdiction in this case, and whether or not to transfer the matter to another court.

vi) The complaint here is not that the Magistrate ought to have considered transferring the matter to another court but rather that the complaint itself does not fall within the definition of the Act, in particular prohibited grounds as defined in section 1 and Hate speech as defined on section 10 of the Act.

[A] 'Prohibited grounds' is defined in **Section One of the Act as follows:-**

"

'Prohibited grounds' are –

(a) ***race****, gender, sex, pregnancy, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or*

(b) any other grounds where discrimination based on that other ground –

i. causes or perpetrates systematic disadvantage;

ii. ***undermines human dignity****; or*

iii. *adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."* (my highlighting)

[B] Section 10 is defined as follows in the Act:-

"[10] Prohibition of hate speech

Section 10 – Prohibition of hate speech

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; and

c. Promote or propagate hatred.

2) ... ..."

vii) In examining whether or not the conduct complained of falls within the ambit of the Act the following facts are relevant.

a) The conduct complained of was made by a white person against an African person.

b) The issue of race was accordingly present in this case.

c) The word 'Baboon' was used whether as alleged by the Appellant or by the Respondent.

d) The referral to a human being as a baboon could reasonably be construed to undermine his human dignity.

viii) In **Strydom v Chiloane 2008 (2) SA 247 at 251 Hartzenberg J** held, "I accept, that when the words were uttered, by the Appellant, a white man, of and concerning the respondent, a black man, they had a **racial** connotation and a discriminatory import.

ix) The conduct complained of accordingly falls within the ambit of the definition of prohibited ground, either under race or

human dignity or both, and on this basis is justiciable in the Equality Court.

x) The Equality Court accordingly had jurisdiction on the basis that the words complained off fall within the definition of prohibited grounds.

3.3 The next issue is whether or not the words complained off constitute hate speech as defined in section 10 (1) of the Act.

a) The issue here is whether or not the words are to be read conjunctively or disjunctively, with the Appellant's counsel arguing that it should be read conjunctively and the Respondent's counsel arguing that it should be read disjunctively.

b) In the event of the provisions being read conjunctively then the Respondent would fail since he would not be able to establish the presence of a, b, and c of section 10 (1) having regard to the facts of this case.

c) The authorities have interpreted the words of the statutes conjunctively as well as disjunctively, pending on the subject matter of the statutes and having regard to the wording thereof.

A) In the judgment of **Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg [1999] 2 ALL SA 491 (A) or 1999 (2) SA 1057 (SCA)**, the court was asked to decide whether the conjunctive or disjunctive approach/interpretation should be applied when interpreting

section 1 of Act 3 of 1996. At paragraph 11 the Court held that the words "and" and "or" are sometimes used inaccurately by the legislature and there are many cases in which one of them has been held to be equivalent of the other. The court further stated that although much depends on the subject matter there must be compelling reasons why the words used by the legislature should be replaced. In this decision the court favoured the conjunctive approach over the disjunctive approach because it believed that the disjunctive approach would lead to absurdity.

B) In the decision of **Boman's Trustee v Land and Agricultural Bank of South Africa and Registrar of Deeds Vryburg 1916 CPD** at 53, the court held that the division of section 21 into subsections is just punctuation it does not form the essential part of the statute.

C) In the decision of **Commissioner For Inland Revenue v Dundee Coal Co. Ltd 1923 AD** at 355 the court made a reference to the decision of ***King v Inhabitants of Network-Urban- Trent (3B&C59)*** where it was held that the division of the Act of Parliament into sections is a mere arbitrary thing forming no part of the Act. The court further held that the only proper way to interpret a statute is to look at the language itself and the connection it has with the other enactments.

D) In the decision of **Minister of Finance and Another v Van Heerden 2004 (11) BCLR 1125 CC**, at paragraph 30 the Court held that the provisions of section 9 (1) and (2) of the Constitution are complementary. The Court further held that the disjunctive reading of the two subsections would frustrate the fundamental equality objective of the Constitution.

E) In the decision of **S v Stagie and Another 2003 (1) BCLR 43 (C)**, the court held that it is clear where the legislature uses semicolon between (a) and (b) it is **not to be read as "and". (My emphasis)**

F) In the decision of **Domingo v S 2003 (2) BCLR 213 (C)**, the court was called to interpret the provision of section 158(3) of the Criminal Procedure Act 51 of 1977. The court at 217 stated that *"Reading the five paragraphs (a) to (e) of subsection (3)* ***disjunctively would be in accordance with what might be regarded as the plain meaning of the text.*** *More often than not conjunctive reading of a statutory provision constructed in the same way as subsection (3), with a semicolon between various sub-paragraphs except between the last two which are separated by "or", would be meaningless and absurd".* (My emphasis)

d) The question is which approach should be adopted in interpreting section 10 of this Act.

e) The Act itself is instructive in this regard.

i) Section 2 – Objects of the Act states:-

"The objects of this Act are inter alia -

a) to enact legislation required by section 9 of the Constitution;

b) to give effect to the letter and spirit of the Constitution, in particular-

(i) the equal enjoyment of all rights and freedoms by every person;

(ii) the promotion of equality;

(iii) *the values of non-racialism and non-sexism contained in section 1 of the Constitution;*

(iv) *the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;*

(v) *the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16 (2) (c) of the constitution and section 12 of this Act;*

c) *to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;*

d) *to provide for procedures for the determination of circumstances under which discrimination is unfair;*

e) *to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;*

f) *to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality had been infringed;*

ii) **Section Three – Interpretation of the Act** reads inter alia 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;

(b) the Preamble, the objects and guiding principles of this Act, thereby fulfilling the spirit, purport and objects of this Act...

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

iii) Guiding principles

"(1) In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:

a) the expeditious and informal processing of cases which facilitate participation by the parties to the proceedings;

b) access to justice to all persons in relevant judicial and other dispute resolution forums;

c) the use of rules of procedures in terms of section 19 and criteria to facilitate participation;

d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature;

e) the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof.

(2) In the application of this Act the following should be recognised and taken into account:

a) the existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and

b) the need to take measures at all levels to eliminate such discrimination and inequalities."

f) If one has regard to the purpose of the Act, the object of the Act and the Interpretation clause it militates against the acceptance of the conjunctive approach. If one were to adopt a conjunctive approach then racially discriminatory words which are clearly hurtful and even harmful, which are directed at an individual may not fall within the ambit of the Act simply because they may not *per se* promote or propagate hatred because they were not uttered in a group context.

g) This is untenable and could not have been the intention of the legislature, having regard to the purpose and objectives of the Act and the interpretation clause. Such an approach would undermine the purpose of the Act.

h) In this case the disjunctive approach appears to be the correct approach in interpreting the provisions of section 10 (1) or else the very purpose of the Act may well be defeated.

i) In **Strydom v Chiloane 2008 (2) SA 247 at 251 Hartzenberg J** held at paragraph 13, *"In Mangope v Asmal and Another 1997 (4) SA 277 (7) at page 286 J – 287 A, the view was expressed that if a person is called a baboon, when severely criticized, the purpose is to indicate that he is base and of extremely low intelligence. It was also stated that it can be inferred from the use of the word, in the circumstances, that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It follows that the person described as a baboon in those* ***circumstances may rightfully perceive them to be hurtful."*** (My highlighting)

At Paragraph 14, *"The Magistrate was accordingly not wrong to find that the words complained off fall within the definition of 'hate speech' as defined in Section 10 of PEPUDA..."*

At Paragraph 15 at page 252, *"on the other hand it is so that the words complained of also fall within the definition of "hate speech" if the mater were to proceed in the equality court, and it was found that the Appellant indeed uttered those words, an order in terms of s 21 of PEPUDA could be made against him."*

j) The Respondent accordingly only needed to satisfy either (a) or (b) or (c) of section 10 and not (a) and (b) and (c) to

establish that the conduct of the Appellant fell within the ambit of the definition of hate speech.

k) In interpreting section 10 disjunctively, the conduct complained of does fall within the ambit of the definition of hate speech and accordingly the conduct complained of does fall within the Jurisdiction of the Equality court, on that basis as well.

l) The court a quo accordingly correctly found that it had jurisdiction to hear the matter.

3.4 The next issue is whether or not the objective or subjective test is applicable in applying the provisions of Section 10.

i) The wording of section 10 appears to suggest an objective approach *"could reasonably be construed to demonstrate a clear intention"*.

ii) **In Mangope v Asmal and Another 1997 (4) SA 277 at 286 H – 287 E** it was held that:-

"..... I have already pointed out that the word 'baboon' was clearly used in a derogatory sense. The definition of baboon in Chambers Twentieth Centaury dictionary is given as:

'a large monkey of various species, with long face dog-like tusks, large lips, a tail, and buttock – callosities, a clumsy, brutish person of low intelligence.'

Applying that definition, it is, in my view, clear that when the epithet ***"baboon"*** *is attributed to a person when he* ***is severely criticised****, as in this case, the* ***purpose is to indicate that he is base and of extremely low intelligence. But I also think that it can be inferred from the use of the word in such circumstances that the person mentioned is of subhuman intelligence and not worthy of being described as a human being."***

It will depend on the circumstances and on the views of those to whom the words are addressed. *It follows, I think, that the words are capable of a defamatory meaning.*

In the light of that conclusion, I am not allowed at this stage to decide whether the words are per se defamatory or not or to decide whether ***the words are capable of conveying to a reasonable person of ordinary intelligence any or all*** *of the meanings pleaded in paragraph 9 and 10.*

The next question is whether the words do not constitute meaningless abuse. Again it will depend on the circumstances in which they were uttered whether the words constitute meaningless abuse or not.
In this regard what was said by **Price J in Wood No and Another v Branson 1952 (3) SA 369 (T) at 371** D is instructive:-

*"The **context in which a word is used,** the **circumstances in which it is used,** the **tone in which it is uttered,** are **all facts which may render meaningless abuse defamatory".***

iii) In **Lebowa Platinum minds Ltd v Hill (1998) 7 BLLR 666 (LAC) at 669 Kroon AJA** held inter alia

"12) The finding was in respect of conduct that was manifestly serious. The Dictionary of South African English on Historical Principles (Oxford University Press, 1996) defines the secondary, derogatory, meaning of **"bobbejaan"** as "(a) **nickname for one held to be a fool** . . . in certain **contexts used with racist overtones"**. Not only **was the respondent's use of the word insulting and abusive, but, in the circumstances that obtained, the word was also undoubtedly racist in its connotation.** The following passage in Wallis Labour and Employment Law at paragraph 25, is apposite:

... **Such an extension involves the recognition of the interdependence of all people engaged in the enterprise and is consistent with any reasonable concept of the importance of human dignity and society**. The position was well expressed by the arbitrator in Siemens Ltd v NUMSA (a case of racial abuse) in saying: '. . . **racial insults go beyond those to whom they are individually directed**. They impact upon the workforce as a whole . . . This is particularly applicable where the bulk of the workforce is **black and the language in issue has the effect of humiliating and degrading blacks generally'.**

13) The Respondent's attempt to explain his use of the word "Bobbejaan" and to play **down the effect thereof does not hold water.** He claimed that both Phogole's name and his nickname slipped his memory and, on the spur of the moment and without intending to insult Phogole, he, by mistake, used the word "Bobbejaan". He noticed immediately that Phogole was upset – the latter, in fact, obviously in accusatory vein, made the observation that the respondent had called

him a "Bobbejaan" – and when the other employees left his office, he requested Phogole to stay behind and he apologised to him. **Under cross-examination he was not prepared to concede that the word was insulting and abusive and in this regard he relied on his claim** that, as was evidenced by his apology, **it had not been his intention to insult Phogole**. He in fact contended that his use of the word when **addressing a black man was acceptable**. He conceded, however, that he had not **used the word** in jest and, subsequently, that it "could be" that in the circumstances obtaining the word was **understood by Phogole as having a racial connotation**. He **was not prepared to concede that other black people could view his use of the word as insulting to them as a group. Suffice it to say that the stance of the respondent was untenable.** It is, of course, in his favour that he apologised to Phogole shortly after the incident, but by then the damage had been done." (My highlighting)

iv) **In Afriforum and Another v Malema 2010 (5) SA 235 (GNP)**

Bertelsmann J held that the true yardstick of hate speech is neither the historical significance thereof, nor the context in which the words are uttered, but the effect of the words, ***objectively considered, upon those directly affected and targeted thereby.***

The words 'shoot the farmer/Boer' as they appear in a popular 'struggle' song are experienced as a threat by a large number of South Africans, and, seen in the light of the definition of 'hate speech' in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, constitutes such speech (AH 237E, 239 H-I, 240 B-D and 240 F]

v) In **Freedom Front v South African Human Rights commission and Another 2003 (11) BCLR 1283 (SAHRC)** the chairperson, K Govender, said the following at page 1299:

"... ... words convey meaning and do cause hurt and injury. There is a real likelihood that this slogan causes harm."

vi) The use of the phrase "could reasonably be construed' in **section 10** is indicative of the adoption of an objective approach in the determination of the "clear intention".

vii) Furthermore the authorities appear to adopt the objective test and go even further to base it on the views of the recipient community.

viii) This approach, with respect, appears to be the correct one if one has regard to the purpose and object of the Act otherwise particularly the utterer, as in this case, could with impunity place a definition on a word which to his community would not be objectionable, or could have an innocent interpretation.

ix) The purpose of the Act would be defeated if the views of the utterer's community was considered.

x) It would also be impossible to determine the reasonable man in South African context having regard to the number of languages and different race groups in South Africa as correctly pointed out in **Mangope's** case.

xi) The cases demonstrate that the word "baboon" is construed as derogatory and in **Lebowa supra**, Kroon AJA, stated that it

would be disingenuous for the Appellant to submit that he was not aware that Black people in general would consider it to be so.

xii) Kroon AJA appears to have accepted that black people in general will consider the use of the word 'baboon' to be derogatory

xiii) It is for the court to determine what the views of a reasonable African person would be if they were referred to as baboons.

xiv) The word "baboon" has racial undertones and a derogatory meaning and would be construed as such by a reasonable African person.

xv) In **Mangope v Asmal and Another 1997 (4) SA 277 at 285** "the test to ascertain if a matter is defamatory or not is that of the fictitious normal, balanced, orthodox and reasonable person who is neither hypercritical nor oversensitive. (Suid Afrikaanse uitsaaikorparasitive v O' Malley 1977 (3) SA 394 (A) at 408 D – E and Coulson v Rapport Uitgewers (EDMS) Bpk 1979 (3) SA 286 (A) at 294 H – 295 (A)

xvi) The authorities have demonstrated that the word "baboon" is racially charged and has been construed to be derogatory and constitute hate speech and a reasonable Black or specifically African person will consider it to constitute hate speech.

xvii) The recipient community would accordingly view the use of the word "baboon" as hate speech and the authorities referred to have stated that the use of the word "baboon" does constitute hate speech.

xviii) The utterer subjectively may only have intended to be insulting but his conduct in the circumstances objectively viewed does fulfill the requirement of hate speech.

xix) In determining whether or not the Respondent had established that a clear intention was objectively demonstrated the Magistrate looked at the fact that:-

a) the words were only directed at the Respondent despite the fact that he was assisted by a coloured lady;

b) That the Appellant could have assisted the Respondent in moving the table instead of insulting him;

c) That the words were spoken harshly when the Respondent was being severely criticized and accordingly the purpose was to demonstrate that the Respondent was base and of extremely low intelligence.

xx) The Magistrate accordingly found that the necessary intent was present.

xxi) The reasoning of the Magistrate and his findings on this point cannot be faulted having regard to the facts of the case. He accordingly correctly found that the use of the word baboon did constitute hate speech as defined in the Act.

xxii) It is accordingly found that the Appellant's utterances amounted to hate speech as defined in **Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)** and that the test to be applied is an objective one.

3.5 **Freedom of Expression**

i) Whether or not the Freedom of expression clause of the constitution is applicable.

ii) The Magistrate in his reasons submitted in this regard that the Appellant did not rely on **Section 16 of the Constitution of the Republic of South Africa, 1996** (Act 108 of 1996) which entrenches freedom of expression, as his defence in the court a quo.

a) The Appellants defence was that his intention was not to hurt or humiliate the complainant but to inform him not to act in a silly manner.

b) It is evident from a reading of the record that this point was not raised as a defence in the court a quo, nor was any evidence led to substantiate or advance this defence.

c) Any argument in this regard cannot be entertained in light of the failure to raise it in the court a quo.

d) The Appellant cannot at this stage rely on the Freedom of expression clause, when it was never the

basis of his defence, and was accordingly not properly ventilated or considered in the court a quo.

e) It is accordingly deemed unnecessary to deal with the merits or demerits of the arguments raised in this regard.

f) It suffices to say that this defence cannot be considered.

3.6 Failure to call Mrs Swaartbooi

i) The next point raised is **failure to call a witness, Mrs Swaartbooi**

ii) The authorities state as follows with regard to this point,

A) In **Nock v Road Accident Fund [2000] 2 ALL SA 436 (W)** the court was asked to establish whether adverse inference should be drawn against the party who failed to call the witness.

In that decision the court stated that there are certain factors to be considered to establish the above, the factors were:

(a) The availability of the witness to give evidence.

(b) Whether the witness was in a position to elucidate facts relevant to the case.

(c) The strength of the opponents case, and

(d) The strength of the party's own case.

In **Nock** ***(supra)*** at paragraph 25, the court referred to the decision of ***Galante v Dickinson 1950 (2) SA 460 AD at 465*** where it was stated that "*It is not advisable to seek to lay any general rule as to the effect that may properly be given to a failure of a party to give evidence on matters that are unquestionably within his knowledge...*

See also Leeuw v First National Bank [2009] JOL 24657 (SCA)

B) In the unreported decision of **Skhosana v Eskom [1999] JOL 4780 (W)**, the court held that the defendant's failure to call a witness who may have been able to shed light on the disputed facts did not give rise to an adverse inference against the defendant.

C) In the decision of **Brand v Minister of Justice and Another [1959] 4 ALL SA 420 (A)** at 423 the court stated that "where a witness, who is available and able to elucidate the facts, is not called by a party such failure "leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him".

iv) The principles in these cases must be seen in the context of the facts of this case.

v) The issue in this case is whether or not the use of the word "baboon" was established to constitute hate speech.

vi) The issue is not whether or not the word was used.

vii)The number of times it was used is also irrelevant since a repetition of the words is not the requirement or criteria for it to constitute hate speech.

viii) The use of the word "baboon" was not in dispute so whether or not Mrs Swaartbooi was called and verified the Respondent's version on the number of times it was used, is not a material fact.

ix) No adverse inference can be drawn from the Respondent's failure to call her in the context of this case.

x) Accordingly nothing turns on the Respondent's failure to call her as a witness in this case.

3.7 **Credibility Findings**

i) The Appellant's counsel submitted that this court could and should make adverse credibility findings against the Respondent having regard to the discrepancies in his statement to the police and his referral form, and the testimony he adduced in court.

ii) The older authorities inter alia have the following to say with regard to the issue of an Appeal court making credibility findings:-

a) In **Bitcon v Rosenberg 1936 AD 380**

In this case the trial court, though the evidence of the Plaintiff and his witnesses was not quite satisfactory, had disbelieved the story of the Defendant and accepted that of the Plaintiff.

Held that inasmuch as the trial Judge with a full appreciation of the difficulties of the case and realizing that the onus was heavy on the Plaintiff had found the contract to be proved and there was nothing so improbable in the Plaintiff's story that the Court on Appeal could say that the trial Judge had no right to accept it, the Court of Appeal court would not be justified in interfering with the decision.

Wessels C.J at 395 -396 held

"it is true that an appeal is a re-hearing of the case, but as was said by Lord Sankey in Powell and wife v Streatham Manor Nursing Home [1935, AC, page 249: "it is perfectly true that an appeal and by way of ***re-hearing but it must not be forgotten that the Court of Appeal does not re-hear the witnesses****. It only reads the evidence and re-hears the counsel.* ***Neither is it a re-seeing court*** *... ... On an appeal against a judgment of a Judge sitting alone the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the Judge was wrong and his decision ought to have been the other way.* ***Where there has been conflict of evidence the Court of Appeal will have special regard to the fact that the Judge saw the witnesses"***

Lord Sankey quotes with approval the remarks of Lord Shaw in Clark v Edinburg Tramways Co. (1919, SCHL 35, 36) where he says:-

"In my opinion the duty of an Appellate court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question: ***(am I – who sit there without those advantages sometimes broad and sometimes subtle – which are the privileges to come to a clear conclusion that the Judge who had them was plainly wrong?"***

If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."(My highlighting)

b) In Dex v Dhlumayo 1948 (2) SA 677 (A)

The principles which should guide an Appeal court in an Appeal purely upon facts are as follows:-

1) ... ...

2) ... ...

3) *The trial court has advantages – which the Appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial.* ***Not only has he had the opportunity of observing their demeanor, but also their appearance and whole personality. This should never be overlooked.***

4) *Consequently the Appellant court is very reluctant to upset the findings of the trial Judge*

5) ***The mere fact that the trial Judge has not commented on the demeanor of the witnesses can hardly place the appeal court in as good a position as he was.***

6) ***Even in drawing inferences the trial court may be in a better position ... in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.***

7) ***Sometimes, however, the Appellate court may be in as good a position as the trial court to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.***

8) ***Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct, the appellate court will only reverse it where it is convinced that it is wrong.***

9) ***They may be a misdirection of fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such misdirection, also where; though the reasons as far as they go are satisfactory; he is shown to have overlooked other facts or probabilities.***

10) ***The Appellate court is then at large to disregard his findings of fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion in the matter. (my highlighting)***

iii) The recent authorities confirm this proposition and the fact that the Appeal Court can in appropriate circumstances make their own credibility findings of fact.

iv) The Magistrate had an opportunity to evaluate the demeanor of the Appellant and the Respondent, when they testified and make findings. He in fact accepted the Respondent's testimony despite being alive to the discrepancies in his testimony and he explained his reasons for such acceptance despite him not explicitly making credibility findings.

v) In any event as was correctly pointed out by the Magistrate the use of the word "baboon" was not disputed.

vi) The Magistrate further looked at probabilities and made an assessment based on these as well.

vii) The facts of this case and the findings made do not warrant an interference with the findings of fact made by the Magistrate.

viii) There is accordingly no reason for this court to make adverse credibility findings against the Respondent.

ix) It is accepted, as was correctly argued by the Appellants counsel with regard to the authority cited, that where the circumstances warrant it and it is justified this court can make credibility findings.

x) However no compelling reasons exist to do so in this case.

4. The Appellant has failed to establish that the Magistrate was wrong on either his findings on the point in limine or on the merits on any and all the grounds advanced by him.

5. Order

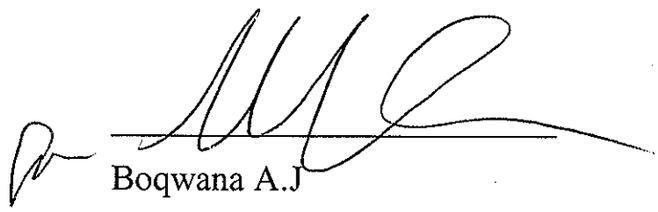
In the result:-

a) The Appeal is dismissed; and

b) There is no order as to costs.

Dawood J

I agree



Boqwana A.J

MATTER HEARD ON:	10 December 2010
JUDGMENT HANDED DOWN:	01 September 2011
FOR THE APPELLANT:	ADV BEYLEVELD
FOR THE RESPONDENT:	ADV T. NGCUKAITOBI