



EQUALITY COURT IN JOHANNESBURG
SITTING IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No. **EQ 1/2019**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

26 August 2018

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In the matter between:

Mr P

First Complainant

Mrs P

Second Complainant

And

THE DUTCH REFORMED CHURCH OF SOUTH AFRICA

First Respondent

THE CHRISTIAN SOCIAL COUNCIL ORGANISATION

First Respondent

JUDGMENT

SPILG, J

INTRODUCTION

1. Mr and Mrs P brought proceedings before the Equality Court of this division contending that the Dutch Reformed Church of South Africa (generally known as *the NGK* which is its Afrikaans acronym) and The Christian Social Council Organisation (whose Afrikaans acronym is *CMR*) are vicariously liable for the statements of , in particular, a certain social which they contend constituted unfair discrimination based on;
 - a. their religious beliefs as Pentecostals;
 - b. their gender;
 - c. their sexual orientation; and
 - d. their economic and social status.

The complainants contend that as a consequence of the discriminatory remarks they have suffered damages in an amount of R15 million. No corrective or other remedy is sought against the respondents but a claim for damages appears to be countenanced by s 21(2) (d) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (*the Act*) if the complaint arises from a breach of the Act and no other court enjoys exclusive jurisdiction to determine the same matter.¹

BACKGROUND

¹ Compare *S v Neotel(Pty) Ltd* 2019 (1) SA 622 (GJ)

2. The case has its origins in the steps taken by the complainants to care for their two grandchildren who were born to their daughter and then partner/husband. In December 2008 they obtained an interim order of guardianship from van der Merwe DJP in the Pretoria High Court.
3. They alleged that the biological father had been assaulting the children and the order directed that the biological parents could only visit the children under the supervision of the complainants. Moreover their daughter was prevented from removing the children to her house in Boksburg where the boyfriend was living.
4. The interim order was made pending investigations by the Family advocate. Prior to the outcome of the report the complainants and their daughter obtained protection orders against the biological father.
5. In October 2011 the first complainant sought the intervention of the Children's Court on the ground that the biological father had traumatised the children. Adv Lindeque was appointed to represent the children and the first respondent approached the second respondent's offices advising that the Children's Court requested that it assess the complaint against the biological father.
6. In April 2012 the matter was referred to the High Court because it appeared that the matter was more a custody dispute which was still pending before the high court.
7. The second respondent appeared to have appointed Mrs JvR as the social worker.

8. Although there is some confusion as to the sequence it appears that due to the seriousness of the allegations against the complainants the Children's Court ordered that the children remain in a place of safety pending the finalisation of the matter by the high court. However in late September 2012 the Children's Court was approached by JvR because during the course of her investigations she had received a statement from the complainants' own daughter stating that her own father, i.e. the second complainant, had sexually abused her as a child.

This prompted JvR to approach the Assistant Director and Presiding Officer of the Children's Court pursuant to which she completed a Form 36 (under the Children's Act 38 of 2005) because she was of the opinion that, as a consequence of the biological mother's statement, the children were in need of care and protection and recommended that the children go back to their biological parents.

9. Adv Lindeque disagreed as she did not believe that the children would be safe in the care of their biological father.
10. The matter came before the Children's Court in late September 2012 and it determined that the children should be placed temporarily at Carino which is a place of safety.
11. The decision was based on the social worker report prepared by JvR and certain psychologist reports attached to it. JvR's report is one of the documents which forms the subject of the complaint of discrimination. In para 20 of the report JvR concluded that *the negative and conflicting relationships that the parties involved have with each other is not in the best interests of the children concerned. It was*

observed during the investigation that they are constantly busy trying to influence the children concerned about their future”.

The parties referred to by JvR were the complainants and the biological parents of the children.

12. In her report JvR recommended that;

- a. the children should not be placed back in the care of either the complainants or the biological parents *“because of the unstable and conflict relations between the (present complainants) and the biological parents. This is not in the best interests of the children that caregivers that must care for them cannot act in the best interest of the children concerned”*;
- b. the children be placed in alternative care, such as a Children’s Home or Youth Centre and that family re-unification services be provided to both biological parent’s with the objective of placing the children, within six months, back in their care.
- c. The parents and the complainants commit themselves to parental guidance at a social organisation in their area;
- d. Irrespective of where the children may be placed that *“there must be care and contact with the biological parents and the maternal and paternal grandparents”* (emphasis added)

- e. All the parties must obtain police clearance *“to make sure that all parties involved have no charge against them that involves children”*.

13. The complainants were dissatisfied with the decision and the contents of the reports upon which the court relied. Of relevance is the complaint they lodged against JvR with the South African Council for Social Service Professions (SACSSP). JvR's written response is the other document on which the complainants' rely in the present matter.

14. Subsequently the complainants brought an application before the Children's Court to rescind and vary its order of September 2012 on a number of grounds including that the court did not have jurisdiction because the matter had already been transferred to the high court and because they were not afforded an opportunity to address the court at that hearing. The matter was opposed by the biological father.

15. Magistrate Verster dismissed the application. In the course of the judgement the court;

- a. found that it had assumed jurisdiction because the circumstances differed materially from those when the high court made its interim order close to four years prior to the September 2012 variation and that additional allegations of *“emotional, physical and sexual abuse”* were made which the court could not simply ignore;
- b. confirmed that the Children's Court had in fact transferred the matter back to the high court in Pretoria but, having regard to the children's best

interest, was compelled in the meantime to make the interim order placing the children at a place of safety;

- c. held that it had the jurisdiction and authority to vary and monitor its orders;
- d. was satisfied with the reports that had been provided by JvR with the supporting reports from psychologists.

16. For sake of completeness the complainants brought another application before the Tshwane Children's Court. The court requested the second respondent to again investigate the home circumstances of the children's biological mother after a complaint had been made by the first complainant. The report included the comments by a specialist counsellor who believed that the complainants' daughter was not fabricating her relationship with her father, the second complainant, *"and the events that happened between them"*.

The eldest child, a boy, was with the father but it was recommended that the other child remain in the care of her biological mother and that both *"continue with evaluations to determine whether or not molestation allegations for both of them are true or not"*.

17. The eldest child is now a major and the children have been now living for a considerable period with one or other biological parent.

PROCEEDINGS BEFORE THE EQUALITY COURT, GAUTENG DIVISION

18. The respondents initially attacked the proceedings before me on the grounds that the matter was still pending before the Pretoria High Court sitting as an Equality Court. It was however evident that the registrar had made an error in appointing a judge who had not been appointed an equality court judge and the case appeared to have got lost within the system. This prompted the complainants to withdraw the case before that court. The respondents contended that without a tender for costs the matter could not be withdrawn and was still before that court.

19. I disagreed. The Equality Act was enacted to give effect to s 9 read with item 23 (1) of Schedule 6 to the Constitution in order “*to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech*”.²

20. It is now beyond cavil that costs in matters involving the assertion of a constitutional right will not borne by a complainant save in exceptional circumstances where the litigant’s conduct is “*vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the court*”.³

The regulations governing the Act are to similar effect. See Reg 12(2) which provides that: “*Each party bears his or her own costs unless the presiding officer directs otherwise*”

21. During argument at the hearing of 27 May 2019 the respondents did not contend that this is such a case and I was able to make an order by consent that there had been a proper withdrawal of the proceedings instituted by the complainants

² Preamble to the Equality Act

³ Per Sachs J in *Trustees For The Time Being Of The Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) at paras 16-18

against the respondents in the Gauteng Provincial Division and that there are no costs implications.

FAILURE TO FILE AN AFFIDAVIT

22. The respondents had failed to file any affidavit or response to the complaint other than a note contending that the proceedings before the Equality Court in the Pretoria High Court had not been finalised. The complainants then brought an application for default judgment.

23. The procedures in the Equality Court differ fundamentally from those which apply in the ordinary civil courts. This is also foreshadowed by s 19 the Act which adopts the Superior Courts Act and the Uniform Rules (suitably modified) only “*in so far as these provisions relate to-*

(a) the appointment and functions of officers;

(b) the issue and service of process;

(c) the execution of judgments or orders;

(d) the imposition of penalties for non-compliance with orders of court, for obstruction of execution of judgments or orders, and for contempt of court;

(e) jurisdiction

24. The Regulations governing the conduct of proceedings in the Equality Court have their own scheme and the application of any of the courts ordinary civil procedures are generally resorted to where it is necessary to supplement.⁴

The guiding principles are that proceedings before an Equality Court are expeditious, more informal, intended to be conducted in a conducive environment and guided by the Regulations dealing with the conduct of the direction hearing.⁵

24. The proceedings before an Equality Court commence with a complainant by completing a notice which substantially corresponds to Form 2. The clerk must then notify the respondent by forwarding a notice which substantially corresponds to Form 3 and in terms of Reg 6 (2)(b) *“invite the respondent, if he or she so wishes, to submit the information contemplated in paragraph C of Form 3 of the Annexure in writing within 10 days of the receipt of such notice.”*

The operative word is *“invite”*. There is no penalty if a respondent does not wish to do so.

The clerk then refers the matter to the presiding officer who, if he or she does not refer the matter to another forum will require the clerk to assign a date for a directions hearing. A directions hearing in terms of Reg 10 is intended to resolve administrative or procedural matters relating to the inquiry and the presiding officer will give directions in respect of the conduct of the proceedings.

⁴ In terms of Reg 10(2):

The regulations regulating the proceedings of the inquiry must, as far as possible, be interpreted in a manner that gives effect to the guiding principles contemplated in section 4 of the Act.

This is echoed in Reg 10(5)(d) as one of the guiding principles but which also accepts that;

“the presiding officer must, as far as possible, follow the legislation governing the procedures in the court in which the proceedings were instituted, with appropriate changes for the purpose of supplementing this regulation where necessary, but may, in the interests of justice and if no one is prejudiced, deviate from these procedures after hearing the views of the parties to the proceedings.”

⁵ Reg 10(3). See also Reg 10(1) which provides under the heading *“Powers and functions of court”*:

(1) The inquiry must be conducted in an expeditious and informal manner which facilitates and promotes participation by the parties

25. There is no provision for an application for default judgment if a party fails to appear. The nature of the relief which the legislature envisages will be granted by an Equality Court does not lend itself to such a process: The relief sought will ordinarily include remedial or corrective measures or the issuing of directives which in turn may involve other authorities.⁶

It is for this reason that irrespective of whether there is an appearance by a respondent s 21 of the Act obliges the court to hold an inquiry. An inquiry is peremptory.

26. It is only in Reg 12 where one finds the consequences of non-appearance by either a complainant or the respondent. In the case of a respondent under Reg 12 (4):

“(a) If a respondent, without reasonable excuse, does not attend a directions hearing or the inquiry and the presiding officer is satisfied that proper notice of the directions hearing or the inquiry has been given to the respondent, the presiding officer may-

(i) order that the proceedings continue in the absence of the respondent; and

⁶ See s 21(2) of the Act. By way of illustration; realistically it is not possible to grant much of the relief under subsection (g) to (m) without holding an inquiry. Ss 21(2) (g) to (m) provide:

(g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;

(h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;

(i) an order directing the reasonable accommodation of a group or class of persons by the respondent;

(j) an order that an unconditional apology be made;

(k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;

(l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;

(m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;

(ii) *order the respondent to pay the costs of the complainant.*

(b) *The clerk must in the event of an order contemplated in paragraph (a) (i) or (ii) inform the respondent in writing accordingly.*

27. Accordingly the procedure adopted by the complainant to apply for default judgment was not competent. On 2 May and again on 27 May I held directions hearings under Reg 10(5) which regulated the procedural aspects of the matter in order to hold the inquiry.

FAIR HEARING ISSUES

28. It was also necessary to deal with a number of issues arising from the fact that the complainants were still not represented by lawyers. The first was to deal with their right in terms of s 10(5)(e) to obtain legal assistance and establish whether they had exhausted all reasonable avenues to obtain *pro bono* counsel bearing in mind the criteria they apply. It appeared that they had but were unable to obtain the services of any and confirmed that they would proceed without legal assistance.

29. In terms of s10 (5) (c) it is only after hearing the views of the parties to the proceedings, that a court can make certain orders. In the present case since one of the parties;

a. believed that I should hear the case by affidavit only; and that

b. the giving of evidence at the hearing, including whether evidence of witnesses in chief should be given by affidavit

it was necessary to hear the views of the other party. This is by reason of subsection (ix) and (xiii).

30. I then advised the parties that it was necessary to explain the content and implications of any direction or order that may be made if this court was to separate the issues and deal with the question of whether a *prima facie* case had been made by reference to the affidavits alone and without leading any evidence. I proceeded to do so.⁷

31. The parties considered that it was appropriate to determine the issue separately and that no evidence other than the affidavits already before me would be considered. I considered it necessary to deal with the question of separation and the nature of the evidence before me by reason of the provisions of s 10(5)(d) which requires that:

“the presiding officer must, as far as possible, follow the legislation governing the procedures in the court in which the proceedings were instituted, with appropriate changes for the purpose of supplementing this regulation where necessary, but may, in the interests of justice and if no one is prejudiced, deviate from these procedures after hearing the views of the parties to the proceedings.”

It was also necessary to have regard to ss 10(6) and 10(7).

32. Section 13 of the Act envisages a two stage enquiry, the first part of which under s13(1) is for the complainant to demonstrate, on the thin threshold test of *prima facie* proof, that there was a discriminatory act or omission in terms of s 13(1)⁸.

⁷ I should add that the damages claim for R15 million which included special; damages would itself have involved considerable time and expense and it was to the advantage of both parties that the court should first establish whether the claim itself had merit.

⁸ Section 13(1) provides that:

13 Burden of proof

(1) *If the complainant makes out a prima facie case of discrimination-*

(a) *the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or*

Once I was satisfied that the parties understood and agreed to it I directed that I would first determine if there was *prima facie* discrimination on the basis of:

- a. Religious belief
- b. Gender
- c. Sexual orientation; or
- d. Economic and social status.⁹

THE INQUIRY

33. The inquiry then proceeded. As stated earlier the complainants rely on the contents of the two reports provided by JvR at the request of the Children's Court to demonstrate that the respondents through their employee, agent or representative was guilty of unfair discrimination against them. The complainants also relied on certain reports and publications of the first respondent and the KMDR.

I will deal with the facts relied on in respect of each ground of discrimination separately.

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- (b) *the respondent must prove that the conduct is not based on one or more of the prohibited grounds.*

"Discrimination" in s1 is defined as;

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

- (a) *imposes burdens, obligations or disadvantage on; or*
- (b) *withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;*

⁹ These are all "*prohibited grounds*" in terms of the s 1 definition section

Religious Belief

34. The complainants contend that JvR by reason of the beliefs adopted by the NGK, including in the training given to social workers such as her that she provided the two reports which deliberately contained false allegations in order to destroy and discredit them. Its purpose was to remove the complainants' grandchildren from them,

"because they were members from another church and the complainants were in her view disqualified to care for children, because the complainants practiced a different religious doctrine which is in conflict with the doctrine of the Dutch Reformed Church.

35. In JvR's report (Exhibit K to the complainants' papers) under the heading *Religious and Cultural Aspects* she wrote

"The P... family belong to the AGS Looft Church. They attend services on Sundays. The children concerned were part of the Power Kids at the church. The P... family said that religion is an important part of their life"

Then under the *"Evaluation"* heading which sets out a summary of each of the preceding headings, which covered employment history, current circumstances, financial background religious aspects and many others JvR wrote *"The P... family belong to the AGS denomination,"*

It is relevant to point out that the *P family*” is identified in the report as comprising not only the complainants but also their three children including the biological mother of the minor children whose circumstances JvR had been requested to investigate.

36. Finally the complainants rely under this head on a passage contained in JvR’s reply to the complaint laid against her before her professional body by the complainants. In it she refers to an interview she had on 3 October 2011 with the minor child who related that the first complainant had said that “*die bloed van Jesus oor hulle is en dat ouma ook se dat “cheers” sonde is*”. In answer to a question the child told JvR that the first complainant had said that it was evil because that is what stands in the Bible.

JvR did not take this up further with the child but approached the first complainant who accused her of criticising her belief. JvR stated that this was definitely not the case and that she told the first complainant that she must not use the Bible if it does not appear in it and said that she never criticised the “*P... family’s*” belief.

37. The difficulty facing the complainants is that JvR identified the complainants’ entire family, including their daughter and mother of the child as of the Apostolic faith yet had no difficulty in recommending that a program be implemented that will result in the children being returned to either the biological mother or father, that family re-unification services and parental guidance programs be implemented in respect not only of the children’s parents but also between them and the complainants .

The explanation for recommending that the children not be placed back with the complainants has been cited earlier. It had nothing to do with belief but everything to do with the divisiveness JvR claimed the complainants had caused which was not conducive to the restoration of the parent/child relationship between the biological parents and their children.

38. If regard is had to the reports as a whole and the recommendations I am satisfied that the identification of the complainants' as of the Apostolic faith was neutral. The confrontation between JvR and the first respondent was not an issue of discrimination but a different perspective in relation to interacting with an impressionable child.

Again if regard is had to JvR's report as a whole it is not one sided. There are many positive findings in relation to the complainants. By way of illustration JvR refers to the complainants wishing to provide for their family in the best possible way. The report also openly states that that it was difficult to finalise the report *"because of resistance of Mrs P .. at times"*.

It is therefore evident that the issues were not about a conflict of beliefs but rather personality clashes between the first respondent and JvR.

39. The decisions regarding the placing of the children clearly was because of concerns about the children's wellbeing where allegations of abuse and sexual molestation were levelled against both the biological father and the second respondent with the psychologist advising that the children's mother's claim that the second applicant had sexually molested her as a child could not be discounted at that stage.

The decision had to do with the best interests of the children having regard to these accusations that were as yet untested. It had nothing to do with religious intolerance or discrimination. This is also evident from the findings of the magistrate who relied on the psychologist reports attached to JvR's report.

40. Finally the complainants relied on the reports and publications posted by the first respondent and the instructions by the KMDR to the second respondent of 1 April 2010 through to 30 March 2011. They suggest that the contents demonstrates a dogma of intolerance to any other Christian faiths. I do not agree with this interpretation. In my view it demonstrates the opening of doors and acceptance of other Christian based beliefs.

41. I am satisfied that the complainants have failed to make out a *prima facie* case of religious discrimination.

Gender and Sexual orientation;

42. The complainants contend that JvR also unfairly discriminated against them by referring, in a block she had created identifying other the members of the "*P... family*" and their relationships;

- a. To the first respondent, who JvR identifies in the first columns as "Mrs" but in the last column of the same row under the heading relationship, as the maternal grandfather;
- b. To the second complainant, who JvR identifies in the first columns as "Mr" but in the last column of the same row under the heading relationship, as the maternal grandmother;

- c. To the then male partner of a person who bears the surname of the complainants and the biological father and identified as “Mr” with the same initials as the second complainant

43. It is evident from the other rows that JvR had incorrectly cut and pasted names between blocks in the grid. Anyone reading the blocks as a whole would know this and that in the last incident JvR had intended to refer to the biological mother by reference to both her maiden name and married surname.

44. Far from suggesting that the complainants had entered into same-sex relationships or were involved with the partner of their daughter every other reference to the complainants' relationships was as the children's grandfather and grandmother.

45. These were genuine errors and no incident of discrimination against gender or sexual orientation can be found, not even on a *prima facie basis*

Economic and social status

46. The complainants contend that JvR belittled their economic and social status by using it to demonstrate that they were not worthy to care for their grandchildren.

47. They contend that this is demonstrated by the mention of the number of changes to their respective employment status, by the use of the word “*only*” when describing the first respondent's academic qualifications and by JvR questioning her employers to determine whether the first respondent had provided accurate details of her employment history.

48. In regard to the claim that the word “only” was used disparagingly it is necessary to repeat the sentence as a whole. It reads;

“Mrs P... obtained grade 11 at ... High School and left school in 1974. After school she obtained only her grade 12 typing qualification, a certificate in a secretarial course, obtained a Real Estate Agent qualification and a diploma in 2007 as a Business Broker at Mrs P ... obtained her code 10 drivers licence in 1997 when she worked for ... Municipality as a garden technician.”

Read in its context the word “*only*” signifies that there was one grade 12 subject she attained in addition to completing grade 11. Without the inclusion of the word there may have been lack of clarity and ambiguity. One must bear in mind that the purpose of the report was to present to the Children’s Court at its request a report and recommendation on the suitability of residence and care of the children.

49. The complainants have misunderstood the thrust of the report and the need for the compiler to set out the employment and academic history of those who she is investigating in relation to their suitability to become guardians of children and the need to do a check. I am satisfied that she did so professionally and dispassionately. It is equally clear that the magistrate understood it as such since the reasons for not placing the children in the continued care of the complainants was for other reasons relative to the potential risk posed by allegations of sexual and other abuse levelled against both the second complainant and the biological father.

50. Once again there is nothing in the first respondent’s publications suggesting the class or social bias contended for by the complainants which they allege JvR implemented. Quite the contrary. It speaks of outreach and upliftment programs involving the less fortunate.

51. I am satisfied that no *prima facie* case made out on the complainants' papers of social or economic discrimination.

GENERAL

52. The complainants approached the courts for guardianship and were effectively rebuffed. From taking proactive steps when the biological parents appeared to be incapable of caring for the children they became the target of accusations. But those accusations were made by their own daughter.

The courts and social workers did their job in minimising the risk inherent in the allegations that were being made and which, at that stage, remained disputed. They could not make findings and consequently only sought to deal with how to protect the best interests of the children in a very difficult situation where there were insufficient facilities to get to the bottom of the allegations.

53. While there were personality clashes I am satisfied that relying only on the complainants papers they have not made out a *prima facie* case of discrimination.

ORDER

54. For the reasons I have given the complaint is dismissed. There is no order as to costs.

SPILG, J

DATES OF HEARINGS: 27 May, 28 June and 7 August 2019

DATE OF JUDGMENT: 26 August 2019

FOR COMPLAINANTS: In person

FOR RESPONDENTS: Adv D Ungerer
Couzyn Hertzog & Horak