

**IN THE EQUALITY COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

Case Number: EQ 2391/2023

In the matter between:

**SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

Complainant

And

DAWOOD LAGARDIEN

Respondent

COMPLAINANT'S HEADS OF ARGUMENT

INTRODUCTION

- 1 This is an application in which the South African Human Rights Commission (“Commission”) seeks various relief against the respondent in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act¹ (“PEPUDA”). The Commission complains of various conduct against the respondent, according to the Commission such conduct amounts to hate speech, unfair discrimination and/or harassment.²

- 2 The respondent has filed a counter application³ denying that the conduct complained of amounts to hate speech, unfair discrimination or harassment. In the counterapplication the respondent seeks various relief against the Commission on the basis that it failed in its constitutional duty as set out in section 184 of the Constitution. The respondent asserts that the Commission failed to investigate and provide appropriate redress for his and his customers’ rights’ violations. This assertion is made without the respondent having filed a complaint with the Commission or bringing the alleged violations to the Commission’s knowledge so that it may investigate on its own accord. We will address the demerits of the counterapplication below, suffice to say for now that it should be dismissed.

¹ 4 of 2000.

² Part A p 9 paras 19.2 -19.3.

³ Part C p 60.

3 In its answering affidavit, the respondent dedicates a significant amount of time setting out his religious belief and what Islam means to him and what it says about homosexuality.⁴ While the Commission appreciates the importance of Islam to the respondent and others who share the same belief, we must state from the onset that this matter is not about religion. It is not so for two reasons. The first is that the respondent obviously has a right to choose his religion as guaranteed by section 15(1) of the Constitution, therefore the Commission has no problem with the respondent having chosen Islam as his religion of choice. The respondent's religion and what it says about homosexuality are not disputed by the Commission, hence they should not derail this Court from getting to the merits of the matter, they are common cause.

4 The second is that Islam, or any other religion for that matter, is not a license for the respondent to infringe on other people's rights. In other words, the respondent should *not* be allowed to justify his offensive conduct using Islam because Islam – as important as it is to him – is not the supreme law of the Republic to which all laws and conduct must be subservient. The Constitutional Court has held that certain basic norms and standards are binding to all of us regardless of religion, resultantly, “*believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land.*”⁵

5 Instead, what this matter is about is the respondent trying to use the right to religion as a justification for his offending conduct. This, we submit, should not be allowed by this Court. The offending conduct must be separated from his

⁴ Part C p 61 from para 6.

⁵ *Christian Education South Africa v Minister of Education* [2000] JOL 7320 (CC) para 35.

religion. The question for determination is whether the conduct complained of by the Commission contravenes PEPUDA, if it does, Islam and the respondent's belief in it is neither here nor there. If the impugned conduct contravenes PEPUDA then the court must impose a sanction as prescribed by the Act. Such contravention is not justifiable because of what the Qurán dictates. The respondent is intentionally fusing the offending conduct with his religious rights so that this Court may not grant the relief sought on the basis that it would be an infringement of his right to religion. This should not be allowed.

6 In light of the above introduction, these submissions will address the following issues:

6.1 First, why the offending conduct contravenes PEPUDA in that it amounts to:

6.1.1 Hate Speech

6.1.2 Harassment

6.1.3 Disseminating information that unfairly discriminates

6.2 Second, remedy; and

6.3 Third, conclusion.

THE CONDUCT IN QUESTION CONTRAVENES PEPUDA

7 At the centre of this matter is an offensive sign that the respondent displayed outside his shop which read "LGBTQ not welcome at LaGardi Save our

children” (sic).⁶ The respondent argues that the sign has been removed so this application is moot, we shall address this mootness argument below, except to submit for now that this matter is more than just about the sign. The respondent’s offending conduct is also through the establishment of a WhatsApp group which propagates hate speech and unfairly discriminates against members of the LGBTIQ community. So, the placement of the sign is but one aspect of the Commission's attack.⁷

Hate Speech

8 The Commission submits that the impugned conduct – the establishment of a WhatsApp group and putting up of the sign outside the shop – constitutes hate speech. In this regard it must be recalled that the respondent has admitted to putting up the sign⁸ and establishing the WhatsApp group⁹, so it is common cause that impugned conduct is attributable to him.

9 Section 10 of PEPUDA prohibits hate speech in these words:

“(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.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy,

⁶ Founding Affidavit: Part A p 7 para 10.

⁷ Ibid para 13.

⁸ Supplementary Answering Affidavit: Part C p 64 para 15.

⁹ Ibid para 17.

propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”

- 10 We have underlined the portions on which the Commission’s case hinges. The respondent’s conduct, we submit, constitutes hate speech because it propagated and advocated or communicated words based on prohibited grounds (sexual orientation) which demonstrate a clear intention of being harmful, inciting harm and promoting or propagating hatred.
- 11 First, the sign itself makes it clear that people are not welcome at the shop because they belong to the LGBTQI community. There is no other reason why they are not allowed into the shop, the words used by the sign and the message communicated by the sign propagate hatred against the LGBTQI community.
- 12 Second, the messages exchanged in the WhatsApp group put it beyond doubt that the respondent and other members of the group are promoting harm and inciting harm against LGBTQI members. These quotations taken from the group make it abundantly clear:

“LGBTQ is a blatant attack on Islam. Force is the only option... If only I had a powerful group to crush these sodomists (sic). . . become that RUKN SHADEED and crush these evil vermin from within.”¹⁰

- 13 The above message is expressly calling for the use of force as an only option to crush the evil vermin, the evil vermin that must be crushed is clearly LGBTQI

¹⁰ Founding Affidavit: Part A p 13.

members who are deemed to be an attack on Islam. Surely, we submit, this is the kind of conduct prohibited by section 10 of PEPUDA. The above words do more than just express Islam's stance against homosexuality (which is not a problem) but they go as far as calling for the use of force to crush members of a society which are protected by the Constitution. It is for this reason that we submit that the right to religion is secondary herein, because the respondent has gone further than expressing a religious dogma. He and his accomplices have called for the annihilation of others using religion as an excuse.

14 This is why the Constitutional Court stated in *Qwelane*¹¹ *"it would appear that hate speech travels beyond mere offensive expression and can be understood as "extreme detestation and vilification which risks provoking discriminatory activities against that group."*¹² The words uttered in the WhatsApp group travel way beyond a mere offensive expression and constitute an extreme detestation which provokes violence against a certain group.

15 Importantly, the Court went on to state that *"[e]xpression will constitute hate speech when it seeks to violate the rights of another person or group of persons based on group identity."*¹³ We submit that the calling of "force" to "crush" LGBTQI members violates their rights on account of their sexuality. The above text taken from the group was not an isolated incident because another one stated:

¹¹ *Qwelane v South African Human Rights Commission and another* (South African Holocaust and Genocide Foundation and others as Amici Curiae) [2021] JOL 51843 (CC).

¹² *Ibid* para 81

¹³ *Ibid*.

“If this group is just for debates then I shall leave. I am under the impression that this group is for fighting the vermin and seeking ways and means to stop them.”

- 16 Again, this text too is calling for the fighting of the vermin. What this text also makes plain is the fact that the group is not just meant for a debate, because if it was, then some participants would exit it. There was an impression that was created on the members – created by the respondent we submit – that the group is or was meant for “fighting the vermin and seeking ways to stop them”. The reference to “them” obviously refers to LGBTQI members. Therefore, the submission by the respondent that the group was created for awareness and that the respondent did not “incite violence or harm amongst the participants of the group”¹⁴ is plainly false.
- 17 Lastly, the WhatsApp group has a motto which is “[e]vil will advance no further” and its mission is or was clearly to “STOP THE FAGS”, these are phrases shared in the group created by the respondent. The “evil” that will advance no further is clearly LGBTQI members. We submit that these phrases are clearly aimed at inciting harm or, at the very least, promote hatred against LGBTQI members hence they are referred to as evil.
- 18 The test to be applied in determining whether the above words amount to hate speech is an objective one, in other words, would a reasonable person reasonably construe the above words to demonstrate a clear intention to incite harm or propagate hatred?¹⁵ We submit yes. The reference to homosexuality

¹⁴ Supplementary Answering Affidavit: Part C p 64 para 17.

¹⁵ *Qwelane* note 10 above para 96.

as “evil” “vermin” and that “force” must be used to “crush” and “stop” it is the clearest example of inciting harm. Sometimes speech that does not directly recommend individuals to commit hateful acts may qualify as hate speech too,¹⁶ but herein we are dealing with clearer speech and conduct that directly urges individuals to commit hateful acts. If speech that does not directly incite hateful acts sometimes constitutes hate speech, surely the speech in question qualifies as hate speech.

19 We submit that the respondent’s assertion that the group did not consist of any person who subscribes to the LGBTQI community is neither here nor there. First, there is no legal requirement that hate speech must be communicated to the affected group for it to qualify as such. To the contrary, true hate speech presupposes a public dissemination of some sort¹⁷, the group had in excess of 633 members which means everything shared therein was shared publicly. Second, if the WhatsApp group was private, there was definitely nothing private about the sign outside the shop because it also amounted to harassment and unfair discrimination.

20 Lastly, the fact that the group was intended for awareness by the respondent is immaterial, even if this was the true intention of establishing the group. It is immaterial because with hate speech, focus is on whether the expression itself causes or is likely to cause harm, it is not on the subjective intention of the

¹⁶ Ibid para 108.

¹⁷ Ibid para 119.

person articulating it.¹⁸ The available authorities on section 10 are unanimous in holding that the subjective intention is irrelevant, and the test is whether the speech objectively demonstrates a harmful or hateful meaning.¹⁹

Harassment

21 The Commission further submits that the sign outside the respondent's shop constituted harassment of the LGBTQI community. Section 11 of PEPUDA states that no person may subject another person to harassment. The Act defines harassment as:

. . . unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile and intimidating environment or is calculated to induce submission by actual or threatened 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; . . ."

22 We have highlighted the parts on which the Commission's case relies. The Commission submits that the putting up of the sign amounted to serious and demeaning conduct which created a hostile and intimidating environment based on sexual orientation. Being at the shop at that time amounted to being in a hostile and intimidating environment.

¹⁸ LAWSA Constitutional Law: Bill of Rights Culture and Cultural Rights 2^{ed} (5) Part 4 para 117. Also see *Afriforum NPC v Nelson Mandela Foundation Trust and others (Johannesburg Pride NPC and another as amici curiae)* [2023] 3 All SA 1 (SCA) para 43.

¹⁹ *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* (EQ02/2018) [2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ) para 168.

23 The harassment by the displayed sign must be understood in its rightful context which is that the respondent admits to having chased away a same sex couple from his shop prior to posting the sign.²⁰ We submit that these two acts sufficed to render the shop a hostile environment for same sex couples for no other reason other than being a same sex couple. The message contained in the signage demeans members of the LGBTQI community and qualifies as harassment.²¹

Prohibition of Dissemination and Publication of Information that Unfairly Discriminates

24 The Commission submits that the installing of the sign by the respondent also amounted to displaying a notice that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person. This conduct is prohibited by section 12 of PEPUDA.

25 In this regard, the respondent avers that if his conduct amounts to hate speech, then he should get away with such offensive conduct based on section 12 because section 10 is subject to section 12. The argument continues that the publication of the sign was in his community's best interest.²²

²⁰ Supplementary Answering Affidavit: Part C p 63 para 12.

²¹ *Sonke Gender Justice Network v Malema* [2010] JOL 25181 (EqC). Also see *Nelson Mandela Foundation* note 18 above para 192.

²² Note 19 above paras 37-38.

- 26 We submit that the respondent's averment in relation to section 12 is misplaced because the exceptions listed in section 12 do not cover the present scenario. The section allows the display of a notice that unfairly discriminates if it is a *bona fide* engagement, among others, in fair and accurate reporting in the public interest. The common cause facts are clear that the sign was meant to keep away same sex couples from entering the respondent's shop on the sole basis that they are homosexuals, this is no *bona fide* engagement on fair and accurate reporting. The sign served a self-serving interest which was exclusive and intended to keep out some people based on their sexual orientation.
- 27 On the other hand, the Act defines discrimination as an act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds. The Commission submits that the sign imposed a condition or created a situation that disadvantaged same sex couples based on them being a same sex couple, this amounts to unfair discrimination as prohibited by section 12. Had the sign been put up for artistic, academic or journalistic purposes then it would be protected by section 12.²³
- 28 Lastly, the sign did not amount to "reporting" of anything, it was just an expression of the respondent's views possibly informed by his religion. We state this because section 12 states that it must be "fair and accurate reporting" done in the public interest which is protected. This is protection afforded to

²³ See *Afriforum* note 17 above at para 57.

media to make sure that their reporting and fulfilment of their duties is not regarded as unfair discrimination if done in a fair, accurate manner and in the public interest. This is why the section uses “public interest” which the respondent confuses with what is in the interest of his Muslim community. Public interest and what is in the interests of a particular community are not the same concepts, the respondent is amiss in treating them as the same thing.

REMEDY

- 29 The respondent further argues that this application is moot because the sign outside his shop has been removed and the WhatsApp group is “no longer operative”, the mootness point is mounted against the interim relief that was initially sought by the Commission. With respect, the Commission no longer seeks interim relief, that relief has been overtaken by events.
- 30 The matter is not moot in so far as the final relief is concerned. The final relief sought is aimed at preventing the respondent from acting in an unlawful manner in future. In the circumstances, a declarator that the respondent’s conduct – by placing the signage outside his shop and establishing a WhatsApp group – constituted hate speech and unfair discrimination is still necessary. It is especially necessary because the respondent does not admit to any wrongdoing, he persists that none of his conduct was unlawful. Moreover, the respondent should be interdicted from acting in such a manner again, made to apologise and pay damages to an NGO that will be identified by the Commission. Granting this relief is within this Court’s powers in terms of section 21 of PEPUDA.

31 Section 21(5) states that this Court has the power to grant interdicts. The requirements for a final interdict are well established.²⁴ Same sex couples have a clear right to equality before the law and for their dignity not to be infringed. There is a reasonable apprehension of harm on the part of same sex couples based on the express WhatsApp messages calling for the use of force to crush them. There is no similar protection available for their protection, the respondent must be interdicted from continuing with his vitriol.

CONCLUSION

32 In the result, the application should be granted as prayed for.

SD MBEKI

Counsel for the applicant

PABASA Chambers, Sandton
3 April 2024

²⁴ *Setlogelo v Setlogelo* 1914 AD 221 at 227.