

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

C2391/2023

In the matter between

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Applicant

and

DAWOOD LAGARDIEN

Respondent

RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. This matter concerns whether the respondent violated PEPUDA in placing a sign at his place of business and creating a whatsapp group – both of which expressed his religious belief that same sex relationships were impermissible and prohibited.
2. The Respondent, Mr Dawood Lagardien (**Lagardien**) is a practicing Muslim who observes the Islamic faith.¹ As part of his beliefs regarding Islam, he believes that same sex relationships are un-Islamic and amoral. He also holds the belief that, under his faith, he is obliged to take steps to prevent children from being exposed to, what his faith and spiritual beliefs dictate is, amoral behaviours.
3. In expression of his religious beliefs, Lagardien displayed a sign outside his business, called La Gardi, which read "LGBTQ not welcome at LaGardi – Save

¹ Answering affidavit at para 6.

our children” and administers a whatsapp group called “Our rights – antiLGBTQ+”. These two facts are common cause and represent the extent of the conduct that the Applicant (the SAHRC) seeks to have declared to be in contravention of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

4. Specifically, the SAHRC seeks to have the creation of the whatsapp group and the posting of the sign declared as constituting hate speech, unfair discrimination and harassment in terms of various sections of PEPUDA. The SAHRC also seeks further ancillary relief predicated on this finding, including a public apology and damages in the amount R500 000.
5. This case turns on two issues:
 - 5.1. whether a statement that members of the LGBTQ community are not welcome at a particular business establishment as a result of religious beliefs constitutes prohibited speech or unfair discrimination on the basis of sexual orientation; and
 - 5.2. whether the creation of a whatsapp group constitutes dissemination and publication of information that unfairly discriminates, when the communications on the group were not made by the person who created the group.
6. In the event that this court finds that there was discrimination, the secondary issue before the court is whether the Respondent’s actions amount to unfair discrimination on the listed ground of sexual orientation in terms of the PEPUDA in light of the religious beliefs implicated in these expressions and conduct.
7. In addition to opposing the SAHRC application, Lagardien has brought a counter-application alleging that the SAHRC’s investigation was defective and that, accordingly, the SAHRC has failed to discharge its duties under section 2 and 4 of the South African Human Rights Commissions Act 40 of 2013. If the main application fails there is no need to deal with the counter application.
8. In what follows I deal with:
 - 8.1. the facts;

- 8.2. the legal framework of PEPUDA;
- 8.3. the allegations made by the SAHRC
- 8.4. that the SAHRC failed to prove that there was a refusal of services;
- 8.5. that the SAHRC failed to prove there was a contravention of section 12 of PEPUDA
- 8.6. that there was no prohibited speech; and
- 8.7. freedom of religion.

FACTS OF THE CASE

9. Lagardien is a Muslim male who operates a private retail business, La Gardi at 70 Bell Street Gqeberha.² As part of his faith, Lagardien considers acts of homosexuality as prohibited conducted.³ In addition, Lagardien believes that he is communicating and disseminating that this conduct is prohibited under Islam is part of practising his faith and protecting other Muslims.⁴
10. During June 2023, two homosexual men attended at his shop and while in his store, engaged in certain kinds of behaviour which Lagardien viewed as sexually inappropriate behaviour. This included kissing each other and touching each other's genitals.⁵ There were a number of Muslim customers present at the store, including young children, who witnessed this conduct and it resulted in their feeling uncomfortable.
11. In response, Lagardien requested that the men leave the store. The men did leave the store but first responded that 'It was pride month and they could do as they please'. In the days that followed, Lagardien and his family experienced acts of intimation and threats of violence.⁶

² Answering affidavit at para 1.

³ Ibid at para 10.

⁴ Ibid at para 10.

⁵ Ibid at para 12.

⁶ Ibid at para 14.

12. The next day the Respondent's daughter was confronted by intimidation and threats by two men inside the store from persons appearing to be a part of the of the LGBTQ community. These threats were a response to Lagardien's request for the men to leave his store. There were many other threats of violence and harassment.⁷
13. In a reaction to the intimidation and threats, Lagardien displayed a handwritten sign outside his store which read "LGBTQ NOT WELCOME AT LA GARDI SAVE OUR CHILDREN" on 10 July 2023. A few days later, the sign was destroyed by three men.⁸
14. He also created a whatsapp group to alert members of his community to the threats and intimidation from the LGBTQ community within their locality. The whatsapp group was intended to communicate regarding Islamic teachings were regarding homosexuality and all members of the group were people of Muslim faith.⁹ There were no communications to incite violence or harm against the LGBT community in the group.¹⁰ In respect of the whatsapp group, it should be noted that none of the messages included in the screenshots contained in the SAHRC's founding affidavit, were sent by Lagardien's cell number or whatsapp account.¹¹
15. While the SAHRC alleges that Lagardien has refused to remove the sign, the sign was in fact destroyed by unknown men and thus is no longer displayed at the shop. Moreover, the whatsapp group is no longer active.
16. Thus this case does not concern ongoing conduct but only past conduct.

LEGAL FRAMEWORK OF PEPUDA

17. Section 6 of PEPUDA contains a general prohibition against unfair discrimination against any person.

⁷ See Annexure RA1 to the Answering Affidavit.

⁸ Ibid at para 15.

⁹ Ibid at para 17.

¹⁰ Ibid at para 17.

¹¹ Note in the Founding Affidavit at para 41, the SAHRC asserts that Lagardien's cell phone number is 0824932204 which is not the number that sent any of the messages in the screenshots.

18. Section 10(1) contains a prohibition of hate speech, stating

“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.”

19. Section 12 prohibits the dissemination and publication of information that unduly discriminates unless that communication constitutes “bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice.”

20. Section 1 of PEPUDA defines harassment as

“unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or 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”

21. For conduct regarding prohibited discrimination or harassment, the SAHRC is required to make out a prima facie case. If such a case is made, there are a few potential defenses to Lagardien such as proving that:

21.1. the discrimination did not take place;

21.2. the conduct was not based on a prohibited ground;

21.3. that discrimination which took place was fair.¹²

22. Section 14 guides the determination of whether discrimination is fair. This includes inquiring into the fairness of the discrimination given: the context, whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned as well as section 14(3) factors which are:

*“(a) Whether the discrimination impairs or is likely to impair human dignity;
(b) the impact or likely impact of the discrimination on the complainant;*

¹² Section 13 of PEPUDA.

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity.”

23. However, section 14 does not apply to hate speech or harassment.

ALLEGATIONS OF PROHIBITED CONDUCT

24. The SAHRC alleges that Lagardien engaged in conduct that violated the rights of the LGBT community but also constituted hate speech and harassment in that, Lagardien:

24.1. denied services to a community based on a prohibited ground;

24.2. displayed a harmful sign outside his premises; and

24.3. created and administer a social media group that incites violence and hatred against the LGBT community.

25. I will deal with each in turn.

26. It should be noted that none of the conduct alleged above falls within the definition of harassment nor could it be construed harassment. In addition, the SAHRC's papers do not contain any factual allegations that Lagardien had engaged in harassment of particular persons or groups.

27. It is submitted that the SAHRC has failed to make out a case for its assertions that Lagardien has engaged in harassment, both factually and legally and that this Honourable Court should dismiss their case.

THE SAHRC HAS NOT PROVED THAT LAGARDIEN DENIED SERVICES TO MEMBERS OF THE LGBT COMMUNITY

28. The denial of services on the basis of sexual orientation is not explicitly listed as a form of prohibited discrimination under PEPUDA. Consequently, the SAHRC is requested to demonstrate that Lagardien fell foul of section 6 of PEPUDA.
29. In their founding affidavit, the SAHRC describe their investigation into Lagardien's alleged actions. In these allegations, there is no averment nor any evidence that Lagardien denied services to any specific or particular member of the LGBT community.
30. The SAHRC's case, coupled with Lagardien's own evidence, is that a sign was placed outside the store which indicated that LGBT persons were not welcome at the store. This sign was up for a few days after which it was taken down and destroyed. There is no evidence that, at any point, Lagardien denied service or admission to any member of the LGBT community. In fact, the opposite is true, namely that after the sign was put up, various members of the LGBT community entered Lagardien's store, not to seek services but to harass, threaten and intimidate the Lagardien family.
31. There is also no indication that prior to the incident with the two men, that Lagardien had denied services to members of the LGBT community. Indeed, Lagardien had no difficulty with the two men entering his store or purchasing from his store until he witnessed conduct that was prohibited under his religious beliefs.
32. It is submitted that the SAHRC has failed to demonstrate that the discrimination it alleges took place. In addition, Lagardien's version demonstrates that there was no actual denial of services to any specific member of the LGBT community following the sign being put up.
33. In the event that this Court finds that the SAHRC has made out a prima facie case that Lagardien discriminated on the basis of sexual orientation, it is submitted that the discrimination is not unfair. There is a clear reason why Lagardien placed the sign outside his shop – namely that he did not want to risk his Muslim customers and their children being exposed to conduct that is against their Islamic beliefs. The alleged discrimination is not systemic in nature, services

a legitimate purposes and is aimed to prevent the impairment of the dignity and religious beliefs of the Muslim community served by the store.

34. The context for the sign is also relevant, demonstrating that the alleged discrimination emanates not from the general presence and existence of homosexual persons in South African society but from their engagement in what are believed to be prohibited acts in public. In this regard, Lagardien's actions were, at most, aimed at creating an environment that is welcoming and acceptable for his Muslim clientele.
35. In light of the above, it is submitted that, in the event that there was discrimination, this discrimination was fair and thus permissible under PEPUDA.

THE SAHRC HAS FAILED TO PROVE THAT LAGARDIEN VIOLATED SECTION 12 OF PEPUDA

36. The SAHRC relies on **Isperta v Richter**¹³ to assert that Lagardien is liable for the content of what is said in a whatsapp group based on him being the creator and administrator of that group. What the SAHRC fails to acknowledge is the concept of "chain of publication" and the liability extended under *Isperta* related to delictual liability for defamatory content.
37. Defamatory speech is substantially different to prohibited speech, most significantly because liability for defamatory speech has historically been extended to the publisher of the speech, creating liability not only for the originator of the speech but for those who republish it.
38. Prohibited speech under PEPUDA is of an entirely different character to defamatory speech and carries significantly broader implications. Most specifically, defamatory speech is not prohibited, it is merely sanctioned through a monetary penalty.
39. More importantly, section 12 of PEPUDA delineates the specific type of publication and dissemination that are prohibited. Specifically, it requires that

¹³ 2013 (6) SA 529

the person “disseminate or broadcast”, “publish or display any advertisement or notice”.

40. The only conduct the SAHRC has alleged in respect of the whatsapp group and Lagardien is that he created and administered the group. There is no evidence or even allegations put forward that Lagardien used the whatsapp group to post any information that would unfairly discriminate against persons based on their sexual orientation.
41. The creation and administration of a whatsapp group does not reasonably fall within the meaning of these terms and thus Lagardien cannot be found to have contravened section 12 through his conduct.
42. In addition, even if Lagardien is liable for the content of the whatsapp group, the SAHRC has failed to prove that any of the information posted in the whatsapp group amounts to information that “could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person.”.
43. It is submitted that the SAHRC has failed to make out a prima facie case of discriminatory conduct what falls within the prohibition under section 12 of PEPUDA.

THERE WAS NO PROHIBITED SPEECH

44. It appears that the SAHRC alleges that the sign which stated “LGBTI not welcome at La Gardi” (**the Sign**) constitutes a form of prohibited speech.
45. As outlined above, the Sign was an expression of Lagardien’s beliefs that homosexuality is impermissible and that his faith required him to prevent, in particular, young children from being exposed to such conduct.
46. It is well recognized that our Courts take a robust approach to freedom of speech, recognizing that it is a corner stone of our democracy and that section 16 offers protection to views that may even be considered unacceptable or offensive. The Constitutional Court confirmed this in **Democratic Alliance v African National Congress**, where the Court stated:

*"This Court has already spoken lavishly about this right. The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. **If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values. What is more, being able to speak freely recognises and protects 'the moral agency of individuals in our society'.** We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human."¹⁴ (emphasis added).*

47. It is recognized that not all members of society share Lagardien's beliefs, nor should they but this tolerance of different beliefs is similarly required by section 16 of the Constitution. As the Constitutional Court noted in **Qwelane v South African Human Rights Commission** with reference to **Islamic Unity**:

"In addition, this Court has highlighted that "[t]he corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views." In Islamic Unity, Langa DCJ elucidated:

"Freedom of expression is applicable, not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.

These dictates of pluralism, tolerance and open-mindedness require that our democracy fosters an environment that allows a free and open exchange of ideas, free from censorship no matter how offensive, shocking or disturbing these ideas may be. However, as stated by this Court in Mamabolo, this does not mean that freedom of expression enjoys superior status in our law.[88] Similarly, a unanimous Court in Khumalo v Holomisa stated that, although freedom of expression is fundamental to our democratic society, it is not a paramount value. That being said, as this Court observed in Laugh it Off, "we are obliged to delineate the bounds of the constitutional guarantee of free expression generously."¹⁵

¹⁴ Democratic Alliance v African National Congress [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at paras 122-3

¹⁵ Qwelane v South African Human Rights Commission and Another 2021 (6) SA 579 (CC) at para 73-4.

48. PEPUA expands, to some extent, the limits on freedom of expression contemplated in section 16 of the Constitution. Specifically, following the Constitutional Court's decision in **Qwelane**, the section presently operates as reading:

"Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred."

49. In **Qwelane**, the Court was called upon to interpret this section and emphasized that the section could not go substantially further than the limitations contained in section 16 and, as a result, read the provisions of section 12 conjunctively. In other words, the works complained of must not only promote or propagate hatred, they must be harmful (or incite harm) and be hurtful. Merely offensive speech will not qualify as prohibited speech, as recognized in **Qwelane**:

"Thus, 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" Expression will constitute hate speech when it seeks to violate the rights of another person or group of persons based on group identity. Hate speech does not serve to stifle ideology, belief or views. In a democratic, open and broad-minded society like ours, disturbing or even shocking views are tolerated as long as they do not infringe the rights of persons or groups of persons. As was recently noted, "[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced"¹⁶

50. In determining whether the Sign could be objectively determined to be hate speech, this Court must consider: who the speaker is, the context in which the speech occurred and its impact, as well as the likelihood of inflicting harm and propagating hatred.
51. In the **South African National Editors' Forum and Others v Economic Freedom Fighters and Another** the court stated that even if the prohibited utterances in question could qualify as hate speech on its terms but fail to incite,

¹⁶ *Qwelane* at para 81.

or reasonably construed as inciting harm, no liability could arise in respect of section 10 of the Equality Act¹⁷.

52. In **Hotz v University of Cape Town 2017 (2) SA 485 (SCA)** the court held that a statement with an aggressive tone of hostility and overtones of race or ethnicity does not necessarily fall within the prohibition of section 10 of the Equality Act though statements of such a nature may be tempting for the court to treat the same as hate speech.¹⁸
53. In **SANEF v EFF** the court cautioned against readily declaring unpopular, offensive or even controversial statements as hate speech.¹⁹
54. The context the preceded the Sign has been discussed in some detail – it was not designed to incite hatred or direct harm towards persons based on their sexual orientation. The Sign effectively communicated that members of the LGBT communication were not welcome within a space that was designed to cater for Muslims. The Sign, in and of itself, did not actually effect a prohibition on LGBT persons from entering the store – and when considered in the broader context, effectively communicated that sexually expression of homosexuality was not welcome at Lagardien’s store. Indeed, notwithstanding the sign, members of the LGBT community were able to enter the store freely.
55. It is clear that the sign while it may be offensive does not constitute hate speech. Certain groups of people are restricted access to certain areas of society for wide ranging reasons. In this case the Respondent aimed at keeping the members of a group outside his private space due to their deliberate threats, intimidation and provocation.
56. I now turn to deal with the broader, religious context for Lagardien’s statements and the need to recognize the protections afforded by section 15 in determining what is prohibited speech.

¹⁷ South African National Editors' Forum and Others v Economic Freedom Fighters and Another [2019] ZAEQC 6 (24 October 2019) at para 36.

¹⁸ *Hotz v University of Cape Town 2017 (2) SA 485 (SCA)*.

¹⁹ South African National Editors' Forum and Others v Economic Freedom Fighters and Another [2019] ZAEQC 6.

FREEDOM OF RELGION

57. While there are a number of cases where freedom of expression was in tension with freedom of religion, what is unusual about the present case is that the speech complained of in this matter was, in fact, an expression of religious beliefs held by Lagardien.
58. Section 15 of The Bill of Rights expressly contemplates that 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.' In other words, Lagardien's beliefs that members of his community should not be exposed to homosexual behaviour is a belief and opinion he is permitted to hold under section 15. That is not to say that this is an unlimited right but it must be recognized and protected.
59. The SAHRC appear to entirely disregard the right to freedom of religion enshrined in section 15, contending that freedom of religion must always be subservient to the right to dignity and equality. However, it is trite that there is no hierarchy of rights within the Bill of Rights. No right can be placed above another and in a given instance, competing rights must be balanced against one another.
60. Importantly, it has been recognized by the Constitutional Court that freedom of religion does not only include a right to individually, privately and personally believe but also a right to express and manifest such belief within a community.
61. Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) states: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, *either individually or in community with others* and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."
62. In **Christian Education South Africa v Minister of Education**²⁰ the Constitutional Court stated that

'if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism. ...It is achieved indirectly through the double

²⁰ 2000 (4) SA 757.

mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practise their own religion.”

63. The Court went further to state that:

‘The right to believe or not to believe, and to act or not to act according to his or her beliefs or nonbeliefs, is one of the key ingredients of any person’s dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. ... It affects the believer’s view of society and founds the distinction between right and wrong.’

64. In **Prince v President, Cape Law Society** the court held that

‘The constitutional right to practise one’s religion is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society.’²¹

65. The above case law emphasizes that the Respondents’ religious beliefs are sufficiently protected within the Bill of Rights jurisprudence and that, in line with international human rights norms, it protects the Respondent’s right to manifest his religion in worship, observance, practice and teaching. The Respondents words ‘SAVE OUR CHILDREN’ is clear indicator of his focus to stand as a bulwark in relation to the Muslim children in the community.

66. The Respondents views and beliefs on the LGBTQIA+ ideology are inextricably linked to his right to dignity. Disallowing him the right to freely maintain his belief is to unjustifiably limit his right to dignity.

67. In addition to this, Muslims uphold a strict code of modesty and decency which extends to all facets of their lives. The dissemination of such religious beliefs to Muslim children and the larger Muslim community is incumbent on Muslims as they are instructed in the Quran to ‘Enjoin that which is good and Forbid that which is evil.’²²

68. In **MEC for Education, KZN v. Pillay** 2008 (1) SA 474 (CC) the court held t that the exercise of religious practices is protected because of its importance to

²¹ 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC) at para 24.

²² Chapter 9 Verse 37 of the Noble Quran.

- human identity, and that voluntary practices are no less part of identity than are mandatory practices.
69. The education and cultivation of Muslim children is a duty on the Muslim community and it is duty that is not taken lightly. Muslims are extremely discerning about what their children are exposed to. Cinemas impose age restrictions on movies based on a rationale of not exposing children to certain content. Similarly, the desire to limit exposure of children to certain behaviour operates on the same rationale.
70. Muslim adults have the right to protect the children in their communities from being bombarded with attacks on the fundamentals in their religion. An expression of such should not illicit an automatic label of unfair discrimination.
71. It is submitted that given the protections afforded by the right to freedom of religion, Lagardien's statements should not constitute a form of prohibited speech under PEPUDA.

CONCLUSION

72. It is submitted that, in light of the foregoing, the SAHRC has failed to demonstrate that Lagardien acted in contravention of PEPUDA and their application must therefore be dismissed.

F BODA SC

Respondent's Counsel

Chambers, Sandon

March 2024