

IN THE EQUALITY COURT

HELD AT UBOMBO MAGISTRATES COURT

CASE NO: 01 /2017

IN THE MATTER BETWEEN

ISIMANGALISO WETLAND PARK AUTHORITY

FIRST APPLICANT

DEPARTMENT OF TOURISM

SECOND APPLICANT

AND

SODWANA BAY GUEST HOUSE

FIRST RESPONDENT

ENKI ANDRE M. SLADE

SECOND RESPONDENT

APPLICANTS' CLOSING ARGUMENTS

Introduction:

The central issues to be decided upon in this matter are as follows:

- a) Whether the Respondents comments and /or conduct amount to unfair discrimination on the ground of race;
- b) Whether the Respondents comments and/or conduct amounts to hate speech
- c) Whether there is an impairment of human dignity of the Applicants and African people.

1. The Right to Equality:

1.1 The preamble of our Constitution envisages a country that is united in its diversity in which all citizens are recognised as being worthy of equal respect.

1.2 The Constitution has been adopted to, *"heal the divisions of the past, and establish a society based on democratic values, social justice and fundamental human rights..."*

1.3 Section 9 (4) of the Constitution states that, “no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)”. This includes race and colour;

1.4 Any person in this context includes both individual people as well as private businesses;

1.5 The preamble to the Equality Act provides that, *“Although significant progress has been made in restructuring and transforming our society and its institution, system inequalities and unfair discrimination remain deeply embedded in social structures, practice and attitudes, undermining the aspirations of our constitutional democracy;*

The basis for progressively redressing these conditions lies in the Constitution, which amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish...”;

1.6 Section 6 and 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 (“Equality Act”) prohibits both the state and any person from unfairly discriminating against any person. There are however some distinctions between people that are justified;

1.7 The Applicants’ submit that the Respondents’ practices, beliefs, comments and conduct are all inconsistent with the vision that our Constitution seeks to achieve because they are based on racial segregation and is demeaning and oppressive towards African people;

1.8 The test for determining whether discrimination is fair or unfair was laid down in *Harkens vs Lane NO and others 1997 ZACC 12*. The test is as follows:

a) Does the provision differentiate between people or categories of people? And if so does the differentiation bear a rational connection to a legitimate government purpose. If no, then it is unfair discrimination;

b) Does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established.

1.8.1 If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then the unfairness will be presumed;

1.8.2 In this instance the onus rests on the Respondents' to prove that the discrimination;

1.8.3 If discrimination is found on an unspecified ground then the onus of establishing or proving unfairness rests on the Applicants;

1.8.4 In this matter the discrimination by the Respondents is found on the listed ground of race. the onus therefore rests on the Respondents to prove that the discrimination is fair.

1.9 This was also confirmed in the case of MEC for Education: KwaZulu-Natal and Others vs Navaneethum Pillay and Others 2007 ZACC 21.

2. Some of the primary factors that must be considered in determining whether discrimination is unfair is contained in section 14 of the Equality Act. These include:

2.1 *“Whether the discrimination impairs or is likely to impair human dignity;*

2.2 *The impact or likely impact of the discrimination on the Complainants / Applicants’;*

2.3 *The position of the Complainants / Applicants’ in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers such patterns of disadvantage;*

2.4 *The nature and extent of the discrimination;*

2.5 *Whether the discrimination is systemic in nature;*

2.6 *Whether the discrimination has a legitimate purpose;*

2.7 *Whether and to what extent the discrimination achieves its purpose...*

3. A private individual may show that discrimination is fair if he/she can show that there is a legitimate purpose for the discrimination or that the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

4. The Respondents' comments and /or conduct discriminates between African people based on their race. The Respondents' discrimination of African people does not bear a rational connection to any legitimate government purpose. Instead the Respondents' discrimination of African people is based on their beliefs of their "Gods Law", which allegedly entitles them to practice some sort of segregation between the creation that their "God" left here;

5. The Respondents have averred that their "Gods Law" and their alleged extensive research into humanity further entitle them to refer to African people as follows:

5.1 African people have extremely low intelligence;

5.2 African people are not people but animals;

5.3 African people are not human beings but rather are considered as being sub-human;

5.4 African people are beasts and creatures;

5.5 African people are inferior to white people;

5.6 The black kind;

5.7 African people are domestic in that they have the privilege of speech however they are still wild animals;

5.8. African people are uncivilised...African people are partially civilised;

5.9 African people are servants of their white masters;

5.10 African people can never be better than their teachers/masters;

5.11 African people are servants, who have to be guided due to their lower intelligence.

6. The Respondents abovementioned references to African people are clearly discriminatory, offensive and deeply demeaning to the Applicants' and to African people in general;

7. The Applicants have expressed to the Honourable Court that they consider the Respondents' abovementioned comments and /or conduct to be extremely hurtful, harmful, derogatory and discriminatory towards African people;

8. The Respondents' witness, Slindile Ntombenhle Mthiyane ("Ms Mthiyane") is employed by the Respondents and has confirmed that she is financially dependent on the Respondents'. Ms Mthiyane's demeanour during her evidence appeared to reflect the "servant-master" mentality of the Respondents' in respect of African people;

8.1 Ms Mthiyane further confirmed to the Honourable Court that she did not possess full knowledge of the Respondents' comments and or conduct against African people. Ms Mthiyane only became aware of the Respondents' specific comments and /conduct during cross examination. Ms Mthiyane confirmed to the Honourable Court that she had no knowledge of the Respondents' comments and /or conduct as referred to in paragraph 5 above.

8.2 On being made aware of the Respondents' comments by the Applicants' attorneys, Ms Mthiyane confirmed that the said comments "*did not sit well with her*". She further confirmed that the Respondents' comments were discriminating based on race;

8.4 During cross examination, Ms Mthiyane stated that she did not consider white people to be superior to African people;

8.5 Also during cross examination, Ms Mthiyane initially advised the Honourable Court that as the community representative, she did not have any written petition/authority to represent the community.

Ms Mthiyane thereafter told the Honourable Court that there was a written petition / authority from the community. This reflects that she was clearly being untruthful to this Honourable Court;

8.4 Ms Mthiyane further confirmed that she hadn't been aware of the content of the petition/ written authority to represent the community as same had been authored by

the Second Respondent. She further confirmed that the said petition/authority was not a reflection of her or the community's views as they were not aware of the Respondents' comments and/or conduct;

9. In *Minister of Home Affairs and Another vs Marie A Fourie and Others* 2005 ZACC 19, the court held that, *"all persons have the same inherent worth and dignity as human beings whatever their other differences may be..."*

10. The Respondents defence is based on their right to hold their beliefs and their right to practise their culture as members of the white race group who in their opinion are superior to all other races especially in respect of African people. The Respondents have told this Honourable court that the Constitution is racist and invalid on the basis that it does not confirm to their "Gods Law". Section 5 of the Equality Act holds that the provisions of the Equality Act bind the state and all persons. It further provides that in the event of there being any conflict relating to a matter dealt with by the Equality Act and the provisions of any other Act or legislation, that the provisions of the Equality Act will override / supersede the other legislation.

Therefore in terms of the abovementioned provision, the right to equality which is specifically protected in terms of Sections 6 and 7 of the Equality Act will override and/or supersede the Respondents' rights to their beliefs and culture in light of their beliefs and culture being discriminatory against African people based on their race;

12. In *Christian Education South Africa vs Minister of Education* 2000 ZACC 11, ad paragraph 25 (page 24), the court acknowledged the supremacy of the Constitution;

13. The Rights to freedom of religion, belief and opinion

13.1 Section 15 (1) states that, "Everyone has the right to freedom of conscience, religion, thought, belief and opinion..."

13.2 In the Fourie case, the court stated that, “the denial of equal dignity and worth degenerates to a denial of humanity.” The court further held this undermines ones confidence and sense of self-worth;

13.3 Ad paragraph 113 (page 71), the court held that, *“however strongly and sincerely held the religious beliefs, these beliefs cannot through the medium of state law be imposed upon the whole of society in a way that denies the fundamental rights of those negatively affectively.”*

13.4 In this case the court ultimately held that one cannot use the New Testament to interpret the Bill of Rights. Whilst one is entitled to his/her beliefs, he /she cannot use his beliefs to violate the rights of any other person.

13.5 Ad paragraph 94 (page 59), the court held further that, *“In an open and democratic society contemplated by the Constitution, there must be mutually respectful co-existence between the secular and the sacred...there must be no prejudice to basic rights”*

13.6 The Respondent is therefore entitled to his beliefs in terms of section 15 (1) of the Constitution, however he may not use his beliefs to discriminate against any persons including African people;

13.7 South Africa’s rich constitutional jurisprudence holds that the Constitution must be interpreted based on South Africa’s history of racial discrimination and oppression. One of the Constitutions primary goals is to eradicate discrimination and the hurt and harm that is associated with racism;

13.8 Given the value and importance that the Constitution places on the right to equality, the rights to religion and freedom of association cannot override the right to equality of any person;

13.9 The Respondents have attempted to justify their discrimination against African people based on their “Gods Law” and the many physical characteristics and attributes that exist between White and African people. In the Pillay case, ad paragraph 60, the court referred to the Fourie judgement quoting the following:

“The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological

characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different and celebrates the diversity of the nation."

The Applicants' submit that the Respondents' basis for discriminating against African people based on their "supposed biological characteristics" is not protected by either our Constitution or our Equality Act. The Applicants' further submit that the Respondents' basis in discriminating against African people in this regard is a repetition and /or revival of the past inequalities suffered by African people in our country.

14. Right to Association (s18):

14.1 Section 14 states that, "*Everyone has the right to freedom of association*"

14.2 The right to freedom of association in terms of s 18 of the constitution does not extend to criminal associations or to associations that directly threaten constitutional order.

14.3 While associations may discriminate by choosing the persons with whom they will and will not associate

14.4 The Constitutional court has determined the best test for exclusionary associational practices. In terms of this test any association which has discriminatory policies has a burden of showing:

- a) A rational connection between its discriminatory policy and the associations ends;
- b) Where such a rational connection exists that the ends of the association are worth maintaining despite its discriminatory membership policies.

14.5 The Respondents claim to religious association however does not enjoy any constitutional protection on the basis that it is in contravention of section 9 of the Constitution and Sections 6 and 7 of the Equality Act.

14.6 In terms of the Equality Act "Equality" is the superseding goal. The Respondents comments and conduct which is premised on his beliefs that:

"blacks are not people"; "That blacks are inferior to whites"; "Blacks are the servants of their white masters" cannot be considered to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

14.7 In *Hoffman v SAA 2001 (1) SA 1 (CC)*, the court cautioned that, *"prejudice can never justify unfair discrimination"* given that South Africa has emerged from institutionalised prejudice. Our constitutional democracy is categorised by respect for human dignity for all human beings and in our democracy prejudice and stereotyping have no place.

This implies that prejudice which is informed by sincerely held religious beliefs and ideology cannot justify any form of discrimination. Therefore enforcing or protecting prejudice could never be a legitimate purpose for unfairly discriminating against anyone based on their race.

15. Freedom of Expression and Hate Speech

15.1 Section 16 (2), states that, *"the right in subsection (1) does not extend to-*

a) propaganda for war;

b) incitement of imminent violence; or

c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

15.2 Section 10 (1) of the Equality Act states that, “ *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.”*

15.3 Section 12 of the Equality Act states that, “*no person may-*

- a) disseminate or broadcast any information;*
- b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person...”*

15.4 For comment and/or conduct to amount to hate speech it does not have to meet all of the criteria referred to above. The disjunctive approach applies and therefore the Respondents’ conduct and /or comments only needs to meet any one of the above criteria to amount to hate speech;

15.5 In addition, the harm referred to does not have to be physical harm, it can be emotional and/or psychological harm. This was confirmed in the Canadian case of *R vs Keegstra* 1990 (3) SCR 697;

15.6 In *Freedom Front vs South African Human Rights Commission* 2003 (11) BCLR 1298 A-C, the court confirmed that the test to determine whether comments/conduct

in question constitutes hate speech is to determine whether the comments /conduct causes harm before it can be deemed to amount to hate speech;

15.7 It is therefore sufficient for the Applicants' to prove that the Respondents' comments and /or conduct were either harmful or hurtful;

15.8 In *Mangope vs Asmal and Another* 1997 (4) SA 277 (T), at 286 J – 287 A, the court held that, *"the view was expressed that if a person is called a baboon, when severely criticised, 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 sub-human 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."*

15.9 In the case of *Morne Strydom vs Bethuel Chiloane* 2007 ZAGPHC 234, Mr Chiloane was referred to as a "Baboon" by his employer. The court found, *"that what was complained of in this matter was hate speech..."*

15.10 In *South African Human Rights Commission obo South African Jewish Board of Deputies vs Masuku and Another* (2017) 3 All SA 1029 (EqC, J), the court emphasised that speech that amounts to advocacy of hatred which is based on the listed ground of race under section 16 (2) of the Constitution amounts to hate speech. The court further confirmed that the state is obligated to regulate speech of this nature because of the harm that it may cause to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and equality.

15.11 In the case of *South African Human Rights Commission vs Qwelane and Others* (2017) ZAGPGHC 218; 2017 4 All SA 234 (GJ) the court confirmed that, *"...the rights to dignity and to have such dignity respected and protected are critical..."* The Court

further suggested that, "since the advent of the Equality Act, there was/is a clear mandate to our courts to be actively involved in the creation and advancement of the guiding jurisprudence on equality..."

15.12 The Respondents comments and/or conduct in referring to African people as wild animals, creatures, beasts, sub-human, not people and/or human beings clearly constitutes hate speech against the African people. The Applicants' as well as the Respondents' witness, Ms Mthiyane have undoubtedly described to this Honourable court their hurt, humiliation and harm that they felt following the Respondents' comments. The evidence revealed a deep sense of hurt, harm and a lack of respect based on racial discrimination. The evidence also revealed a blatant disregard and denial of African people to be considered as people and equal human beings to the Respondents;

16. The impact of the Respondents' comments on the Applicants' and on African people in general is severe and extremely harmful because it has the effect of affecting their human dignity, personhood and/or identity at many levels.

17. The Applicants' submit that the Respondents' comments and /or conduct burdens African people to remain oppressed despite our current democratic dispensation and it further revives the past hurt that African people have suffered historically. It also fuels the false and highly offensive notion that African people are sub-human and of extremely low intelligence, despite some of the great minds of our times belonging to persons of African origin.

18. The Respondents have challenged the validity and supremacy of the Constitution as they have averred that their "Gods Law" is superior to the Constitution. This matter is therefore of significant social importance in correcting this misconception.

19. The Applicants' and African people seek the right to be acknowledged as equals and to be embraced with dignity as provided for by the law.

20. In light of the above, allowing the Respondents' comments and conduct to continue would be inconsistent with the equality provisions of the Bill of Rights as it clearly discriminates against African people. It further undermines and demeans African people and constitutes hate speech against African people because it is deeply disrespectful, hurtful and harmful to the Applicants and to African people in general.

21. In the Fourie case above, the court held ad paragraph 60 that, "to penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality..."

The court held further that, "*Equality does not imply a levelling of homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least it affirms that difference should not be the basis for exclusion, marginalisation and stigma...*"

22. Despite the supremacy of our Constitution and Equality legislation, the Country has had a huge spate, of social media complaints involving discrimination based on race and hate speech against African people as well as against members belonging to other racial groups. A number of these complaints have occurred in KwaZulu-Natal and has caused a great deal of hurt, and harm to the affected racial groups, heightening the existing tensions particularly between White and African people. The Applicants therefore submit, that there is an urgent need for the Honourable Court to make a clear determination in this matter in order to prohibit and curb these matters.

23. The Applicants submit that the Respondents have failed to discharge the onus of proving that the discrimination against African people based on race is fair. The Applicants accordingly pray for the order as set out in terms of page 11 of the founding affidavit to be confirmed.

24. In addition to the order referred to above the Applicants' humbly request that the Honourable Court direct the Respondents to close their website/s and /or blogs given the discriminatory, offensive and hurtful nature of the comments that they contain as these comments are open to the public domain and therefore have the potential of propagating further discrimination, harm and hurt to members of the African

we further request the Honourable Court to stop the distribution and publication of the Respondents books as ~~their~~ ^{its} content contravenes the provisions of entitled "where to from here: cognition" Section 12 of the Equality Act

community. Copies of some of the comments referred to on the Respondents ~~book~~ website/s and/or blogs are attached hereto, marked as Annexure "A" and "B" respectively

PREPARED BY APPLICANTS' ATTORNEYS