IN THE EQUALITY COURT FOR THE DISTRICT OF DURBAN

HELD AT DURBAN

CASE NUMBER 09/2004
DATE:01/06/2004

In the matter between
E. N. M. COMPLAINANT
And
K. R. RESPONDENT

JUDGEMENT

TO; Mr E N M.
11979
St Wendolins

AND TO Mr K R.
c/o Attorney E van der Merwe

EMBARGO

Publication of this Judgment is permitted subject to the absolute restriction that neither of the litigants are to identified by name, neither are their present or erstwhile employers to be identified by name,

THE COMPLAINT
The complaint was the result of certain words which were uttered by the respondent to a group of fellow workers, of which the complainant was one.

The words allegedly uttered were to the following effect;
"Look at your government now. That government is a real monkey government and does not provide anything for you. Thabo Mbeki is the biggest baboon that is controlling the other monkeys like Jacob Zuma who is stealing his money"

The complaint was lodged under section 10 of The Promotion of Equality and Prohibition of Unfair Discrimination Act, Act 4 of 2000, as amended (The Act)

Section 10 is captioned "Prohibition of Hate Speech"

THE DIRECTIONS HEARING

The parties attended the directions hearing on 29 April 2004. Mr M. did not require an interpreter.

In addition to the parties, the respondent's employer, L. M. (Pty) Ltd was represented by Glenn Hutchinson, an employee,

L. M. (Pty) Ltd was cited as a co-respondent and the court dealt with the necessity for its presence as a matter in limine, and Mr Hutchinson was excused from further attendance.

Both Mr M. and Mr R. chose not to subpoena witnesses and did not require legal aid assistance: were satisfied that they were ready to proceed with the hearing and it was agreed that the inquiry would proceed at 8h00 on 14 May 2004.

THE INQUIRY

The inquiry proceeded as agreed, Mr R. on this occasion was represented by Mr E van der Merwe (Attorney). Mr M. confirmed his statement under oath and supplemented it to the extent that he sketched what he perceived to be a hostile approach that Mr R. adopted to himself and his fellow workers over a period of time that culminated in the complaint.

He explained that after the statement was made he cautioned Mr R. who was dismissive and persisted that what he stated was true.

He expressed his own feelings of hurt and denigration at these remarks, as he was one of a number of co-workers being addressed by Mr R., in his defence Mr R. denied that he directed the remark at Mr M. and stated that it was said in jest and he did not intend it to be taken seriously. He denied that he made the remark as set out. Instead he only made the statement up to and including, "does not provide anything for you"
In any event, Mr R. admits at least to part of the statement, and that segment on its own, convicts him of the complaint against him.

Furthermore, Mr Van der Merwe's analysis of what is meant by the clause: "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," does not find the court's favour.

The respondent's subjective intention is unimportant. What is pivotal is the subjective impact and effect of the words on the complainant, and whether these elicit the responses set out in sub-paragraphs a, b and c.

I cannot agree that a b and c (above) are to be read conjunctively but rather that these provisions should be read disjunctively.

The intention referred to is to be objectively assessed by the court.

I am further of the mind that in making this assessment this court should not only concern

itself with the ipse dixit of the respondent, but also the intended innuendo.

Clearly, the complainant is of the same group of persons against whom the remark was directed, and a racial slur was intended against that group. This much was said by Mr M., in addition to the hurtful effect these words had.

When this is read in the context of the preamble to the Constitution, the seriousness thereof becomes obvious. This court should not countenance the mischief that the Constitution aims to outlaw.

The court was not addressed as to Mr R.'s conflicting evidence of his state of mind when he made the statement. He equivocated as to whether he was angry or joking at the time.

When one juxtaposes the purported apology against this backdrop, it is dismally inadequate.

In Ward Jackson v Cape Times Ltd 1910 WLD 257, Curlewis J remarked at 263:
"An apology should not only contain an unreserved withdrawal of all imputations made, but should also contain an expression of regret that they were ever made. A mere retraction cannot be called a full and free apology"

JUDGMENT
Trie respondent is found to have failed to discharge the onus of disproving the offence set out in section 10.
The respondent is ordered to furnish an unconditional written apology as envisaged in section 21 (i)(i) of the Act addressed to the complainant. It is to be handed to the clerk of this court within seven days of receipt of this order.

The clerk of the court is to transmit the original thereof further to complainant.

The content of the apology is to conform substantially with the requirements as set out in the dictum of Curlewis J, above.
Each party is to bear its own costs.

DATED AT DURBAN ON 1 JUNE 2004,

G L ABARAHAMS: PRESIDING OFFICER