

REPUBLIC OF SOUTH AFRICA



IN THE EQUALITY COURT
HELD AT THE GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: EQ 01/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED.
	29/6/2017
	DATE
	SIGNATURE

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Applicant

on behalf of:

SOUTH AFRICAN JEWISH BOARD OF DEPUTIES

and

BONGANI MASUKU

First Respondent

CONGRESS OF SOUTH AFRICAN TRADE UNIONS

Second Respondent

MEDIA SUMMARY

MOSHIDI, J:

The complaint is launched in this Equality Court by the South African Human Rights Commission against the respondents, and on behalf of the South

African Jewish Board of Deputies, in terms of the provisions of s 10(1) of the Promotion of Equality and Prevention of Unfairly Discrimination Act 4 of 2000.

The Commission contends that the contents of four statements made by the first respondent were aimed towards Jewish people and to propagate hatred and violence towards them.

The first respondent's contention is that none of the offending statements, individually or collectively, constitute hate speech or incite harm or physical violence or propagate hatred. He, in essence, relies on the right to freedom of expression as enshrined in the Bill of Rights and maintains the offending statements constitute fair comment on matters of public interest; the first respondent's bona fide beliefs in Zionism; and the plight of the Palestinian people.

The making of the offending statements is common cause. The only divergence of the versions is the context in which the offending statements were uttered and, their proper interpretation. The essential issue for determination remains whether the offending statements fall within the purview of s 10(1) of the Equality Act, when having regard, objectively, to all the relevant circumstances and complete factual matrix in the proper context.

The impugned statements were made by the first respondent representing the second respondent (COSATU) at a rally held by the Palestinian Solidarity Committee (PSC) at the Wits University campus. The atmosphere was rather tense. The Commission maintains that the statements in their utterance, singularly or collectively, numerous amount to anti-semantic remarks which

should be understood to incite violence and hatred against the Jewish community and the students present.

The evidence does not show any significant violent conduct by the Jewish audience or population following the statements by Masuku; neither does it show any subsequent criminal activity; what it does show is that the impugned statements were offensive and targeted at the Jewish community whether present or not during the utterances. When considered properly in context, the only reasonable probability is that Masuku in fact meant that some form of 'harm' will befall the Jewish people if they do not conform, whatever it may have been.

Section 13 of the Equality Act, which deals with the burden of proof, provides that, the complainant must make out a *prima facie* case of discrimination, and that the respondent, on the other hand, must prove, on the facts presented, that the discrimination did not take place as alleged; or that the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

The defences raised by Masuku, namely that the impugned statements are true, fair comment, and in the public interest, and based on Masuku's beliefs, have no merit at all, and the defences are untenable, in the circumstances of this matter. The defences are plainly not permissible under the Equality Act, and having regard to the provisions of s 16 of the Constitution. The utterances, individually or cumulatively considered, amount to hate speech,

and do not add any value to the public discourse or contribute to the greater debate in a meaningful manner, whatsoever.

When properly viewed, interpreted contextually, and having due consideration to all the relevant circumstances, the statements undoubtedly amount to hate speech. The statements clearly fall outside the right to freedom of expression, and are consequently, to be separated from the purview of constitutional protection since the statements infringe, negatively, on the right to dignity of the Jewish and Israeli community, and probably cause harm. To recall, the content of the statements is rather profound, and not merely mundanely offensive. The statements were made to an extremely tense audience and in a tense political climate. The statements conveyed more than ordinary detestation for the Jewish and Israeli community and their origin and religion, and were accompanied by threats of potential violence, and aim to subject this minority targeted group to probable mistreatment, based purely on their religious and ethnicity affiliation.

The impugned statements historically, do not even persuasively traverse the internal limitations in s 16(2)(c) of the Constitution, which makes it unnecessary for the Court, for present purposes, to consider the balancing enquiry envisaged in s 36 of the Constitution. It is further unnecessary to consider the question in detail whether the hate speech under discussion, resides in any one or more of the prohibited categories envisaged in s 10 of the Equality Act.

There is an obligation on Equality Courts to impose effective remedies which practically will translate to equal enjoyment of all rights and freedoms as enshrined in our law and the Constitution. Due to the fact that the impugned statements in this case received wide publication, in a tense atmosphere, and an immense response, the Court deems it fair, proper and equitable that an order for an unconditional apology should be issued. The details of such apology must be negotiated by the parties and agreed to.

The issues raised are of great public interest. The litigation and the trial involved extensive evidence, including that of expert witnesses from overseas. The parties chose to litigate luxuriously. The trial was of long duration, with the Court permitting it, in the interest of promoting the advancement of the objectives of the Equality Act. However, in general, complainants who approach the courts in constitutional matters, and of public interest, should not readily be mulcted with costs, especially meritorious litigation. In the Court's considered view, and in the exercise of its discretion, the respondents should pay the costs of this litigation.

In the result the Court ordered the following:

1. The impugned statements are declared to be hurtful; harmful; incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Equality Act 4 of 2000;
2. The complaint against the respondents succeeds with costs; and
3. The respondents are ordered to tender an unconditional apology to the Jewish Community within thirty (30) days of this order, or within such

other period as the parties may agree. Such apology must at least receive the same publicity as the offending statements.