

IN THE EQUALITY COURT FOR THE DISTRICT OF JOHANNESBURG CENTRAL HELD
AT JOHANNESBURG

CASE NO: EQ 6/2019

In the matter between:

BLACK FIRST LAND FIRST COMPLAINANT

And

FIRST RESPONDENT SECOND RESPONDENT AFRIFORUM KALLIE KRIEL

JUDGMENT

INTRODUCTION

The complainant, Black First Land First (BLF), represented by its president, Mr Andile Mngxitama (Mngxitama), launched a complaint in this Equality Court against the respondents AfriForum and Mr Kallie Kriel (Kriel), the CEO of AfriForum. The complainant is in terms of the provisions of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

The complaint emanates from certain utterances made by Kriel on 14 May 2018 during an interview with Mr Eusebius McKaiser (McKaiser) on Radio 702 and in communications thereafter with News 24, when Kriel attempted to contextualize his earlier utterances.

Mngxitama filed an affidavit in support of the complainant. He alleges in the founding affidavit that Kriel's utterances amount to hate speech as defined in section 10(1) of the Equality Act as the utterances are 'hurtful, harmful and incites propaganda hate towards black people' and 'have negative psychological and emotional effects on black people'. Mngxitama requested the court to grant, amongst other things, orders for payment of damages in the amount of R500 000-00, an unconditional public apology, an order 'restraining further racist conduct amounting to hate speech and the removal of the said offending utterances from view or hearing by the public' and a referral to the Director of Public Prosecutions.

The respondents, in opposing the relief sought, filed an answering affidavit deposed to by Kriel. Kriel contends in the answering affidavit that his utterances do not constitute hate speech and that the complaint should be dismissed with costs.

The matter was set down for a directions hearing, but the complainant failed to attend the hearing. The court directed that the matter would be considered on the papers, subsequent to hearing the parties. The parties were requested to file written heads of argument. The complainant was requested to ensure that the

transcribed record of the relevant radio interview and News 24 article were made available at the hearing. The respondents were granted leave to make a sound clip of the radio interview available at the hearing.

Written heads of argument were subsequently filed by the complainant and the respondents, in compliance with the court's directives.

The hearing commenced on the 26th of September 2019.

Mngxitama, who represented the complainant, confirmed that there was no objection to the matter being determined on the papers and without any oral evidence being presented. He submitted that Kriel's utterances amounted to hate speech and harassment as contemplated in the Equality Act and requested the court to grant the relief as prayed for in the founding affidavit.

Advocate Engelbrecht, who legally represented the respondents during the hearing, opposed the relief sought. Her argument being that the said utterances do not constitute hate speech in contravention of section 10(1) of the Equality Act and that the complaint has to be dismissed with costs, alternatively be referred to the High Court to determine the constitutionality of section 10(1).

As the transcribed record of the radio interview and News 24 article were not available during the hearing, the parties agreed that the complainant would email the News 24 article and that the respondents would email the transcribed record and sound clip of the radio interview to the clerk of the court, for the court to consider as part of the evidential material. I have since received this material and had the benefit of considering it, in addition to the affidavits and arguments presented by the parties.

The possibility of Kriel's utterances constituting harassment was not raised in the papers and this inquiry will accordingly be limited to hate speech.

THE FACTS

The facts giving rise to the issues in this case are undisputed. On 14 May 2018 during an interview hosted by McKaiser on Radio 702 the following exchange occurred between Kriel and McKaiser.

McKaiser: '...Have you guys evolved your views about apartheid for example? Do you think apartheid was a crime against humanity?'

Kriel: 'I don't think it was a crime against humanity, but I think it was wrong...and...'

McKaiser: 'You don't think apartheid was a crime against humanity?'

Kriel: 'Well, then we should declare communism where more than 100 million people...'

McKaiser: 'No, no I'm not talking about communism, I'm just talking about apartheid, was apartheid a crime against humanity?'

Kriel: Xdisagree that it was a crime against humanity, but it was a system that...

McKaiser: [Loud whistle].

Kriel: Because it was a system that infringed on dignity, and, on the dignity of people...

After the radio interview Kriel called News 24 to explain the context of what he had said during the interview. He informed News 24 that: 'He asked me for my views on apartheid and I stated that we do not justify apartheid. We believed that the system infringed on the dignity of people on the basis of race... Apartheid was wrong... We do not beat around the bush about that. What I said to Eusebius is that a crime against humanity is the gassing of six million Jews in gas chambers. In my view, you cannot equate that to the 700 people that were killed by the security police during apartheid... It was wrong to infringe on the rights of people... [but this] cannot be equated to (Adolf) Hitler or communism. That equation cannot be made. You cannot equate crimes against humanity with apartheid...There was not a mass killing of people.'

COMMON CAUSE FACTS AND ISSUES FOR DETERMINATION

It is common cause that Kriel made the utterances as set out above. What is of particular significance is his statement that he did not think that apartheid was a crime against humanity.

It is further common cause that apartheid is in fact a crime against humanity, both in terms of international law and our domestic law.

The main issue for determination by this court is whether the utterances made by Kriel constitute hate speech in contravention of section 10(1) of the Equality Act, or whether it was a legitimate exercise of his right to freedom of expression, as enshrined in section 16 of the Constitution.

In making this determination the court is called upon to interpret section 10(1) of the Equality Act, while having regard to relevant constitutional rights and principles as well as the context of the dispute and then to apply it to the facts of this matter.

LEGAL POSITION

In *Nelson Mandela Foundation v Afriforum Mojapelo DJP*, in considering the principles applicable to the interpretation of sections of the Equality Act, summarised the position as follows at [122] : '...Sections of the Equality Act, including section 10(1), must be given a meaning which its wording is reasonably capable of bearing. That interpretation must accord with the objects of the Equality Act. Where there are multiple interpretations, the interpretation that is adopted must be consistent with international law. That interpretation can be

assessed against comparative foreign law. It must further take into account the context of the dispute. And, most importantly, it must give effect to the spirit, purport and objects of the Bill of Rights and ensure that sections of the Equality Act are generally consonant with the Constitution

The Equality Act was enacted to give effect to section 9 of the Constitution. Section 9 of the Constitution provides:

‘1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair

The objects of the Equality Act, as set out in section 2 are- ‘(a) to enact legislation required by section 9 of the Constitution;

to give effect to the letter and spirit of the Constitution, in particular—

the equal enjoyment of all rights and freedoms by every person;

the promotion of equality;

(Hi) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2) fc) of the Constitution and section 12 of this Act:

to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

to provide for procedures for the determination of circumstances under which discrimination is unfair;

to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;

to set out measures to advance persons disadvantaged by unfair discrimination;

to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women'.

Section 3 of the Equality Act requires any person who applies the Act to interpret its provisions to give effect to the Constitution, the preamble, objects and guiding objects of the Act, to be mindful of international law and comparable foreign law, as well as to take into account the context of the dispute.

Section 10(1) of the Equality Act prohibits hate speech. It reads as follows.

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 -

be hurtful;

be harmful or to incite harm;

promote or propagate hatred'.

The prohibited grounds, as defined in section 1 of the Equality Act include race, gender, ethnic or social origin, colour, religion and culture or 'any other ground where discrimination is based on that other ground causes or perpetuates systemic disadvantage or undermines human dignity¹.

The proviso in section 12 entails that '...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 in accordance with section 16 of the Constitution, is not precluded...'.

It is clear from this that utterances or statements made in the bona fide exercise of the right to free speech enshrined in section 16 of the Constitution are not prohibited, if such were made in accordance with section 16.

Section 16(1) of the Constitution confer* on everyone the right to freedom of expression, which includes—
freedom of the press and other media.

(t) freedom to receive or impart information or ideas;

(C) freedom of artistic creativity; and

academic freedom and freedom of scientific research.

However, this right is not untrammelled. Section 16(2) of the Constitution provides that the right does not extend to -

propaganda for war.

incitement of imminent violence; or

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

In *Democratic Alliance v African National Congress* it was said that the right to freedom of expression '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 the 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'.

Section 10(1) of the Equality Act must be considered in conjunction with section 16 of the Constitution. Should section 10(1) be interpreted to allow a limitation of the right to freedom of expression which is broader or more restrictive than the limitations imposed by section 16(2) of the Constitution, it may not pass constitutional muster.

In *Masuku & Another v SAHRC* the SCA expressed a concern that the provisions of section 10 of the Equality Act have the effect of condemning speech that is protected under section 16(1) of the Constitution. The concern is based, amongst other things, on the fact that 'it

uncouples hurt and harm from incitement to cause harm'.¹ The court, in considering whether statements such as 'we must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity and 'any South African family who sends its son or daughter to be part of the Israeli Defence Force must not blame us when something happens to them with immediate effect', constituted hate speech, concluded that it was nothing more than political speech. They explained that ... The fact that particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection. Public debate is noisy and there are many areas of dispute in our society that can

provoke powerful emotions. The bounds of constitutional protection are only overstepped when the speech involves propaganda for war, the incitement of imminent violence, or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm’.

From the principles laid down in *South African Human Rights Commission v Khumalo* it is clear that section 10(1)(a)- (c) must be read conjunctively (not disjunctively) and together with section 16(2)(c) of the Constitution. It means that unless incitement to cause harm is evidenced the “hateful” speech is not proscribed. The test in section 10(1) is objective-. Can a reasonable person understand the speech to demonstrate an intention to incite harm?

In *Freedom Front v South African Human Rights Commission* the SAHRC said that. ‘The issue in respect of section 16(2)(c) of the Constitution is whether a reasonable person assessing the advocacy of hatred on the stipulated grounds within its context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm. The closer the proximity or causal link between the advocacy of hatred on the stipulated grounds and the harm, the more likely it is that the expression would be deemed to be hate speech. The more tenuous the proximity of the causal

There must be a real likelihood that the expression causes harm before it can be deemed hate speech’.

5 APPLICATION OF THE LAW TO THE FACTS

in considering whether to grant the relief sought, the court must in essence determine whether reasonable people would construe Kriel's statement that he did not think that apartheid was a crime against humanity to demonstrate a clear intention to advocate hatred and incite harm, as against black people, while taking into account the context of the dispute.

Context of the dispute

The court must evaluate Kriel's utterances within the factual context of the interview, while being mindful of the historical context.

I find it convenient firstly to deal with the historical context, as evidenced in Mngxithama's founding affidavit and the legal authorities. While it is not in dispute that apartheid is recognised as a crime against humanity in terms of international law and our domestic law, it is necessary to refer to the history that resulted in this classification.

Historical context

The South African Government's discriminatory racial policies- known as apartheid- lasted from 1948 to 1990.

In the founding affidavit Mngxithama describes apartheid as the black genocide via for instance landlessness, poverty, oppression, exploitation, social discrimination, hunger and exclusion* . ,0

In Nelson Mandela Foundation Mojapelo DJP made the following remarks about the apartheid system and its underlying laws and policies:

- 'It was control from cradle to grave'.

. urban areas were reserved for white people Black people coukt only lawfully enter and remain in urban areas as labourers for white masters. Black people were labourers and white people were masters. Almost every white person had their own black person(s) as labourers). A situation not very much different from slavery '

- With reference to the memories of the complainant, Mr Hatang, who described being called the "k" word as a child and his grandmother being labelled a *bobejaan' by white children, he remarked that 'the feelings and evidence could have been that of any Other black person to whom apartheid rule and oppression represented a painful reality. No exaggeration'.'

I cannot endeavour to describe all the atrocities committed to black South Africans under the apartheid rule. It was a system characterised by racial inequality and gross human right violations. The inhuman and degrading treatment of black people was the norm, rather than the exception.

The General Assembly of the United Nations, and later the Security Council, as welt condemned apartheid regularly. In 1966 the General Assembly labelled apartheid as a crime against humanity. The Convention on the Suppression and Punishment of the Crime <* Apartheid came into force on 18 July 1976. It was adopted with 91 votes. As of August 2008 it has been ratified by 107 States. This convention is significant, as it not only condemned apartheid as contrary to the Charter of the United Nations, it criminalised apartheid. It dedared that apartheid was a crime against humanity. It defined apartheid as 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'. The acts that fell within the ambit of this crime included murder, torture, inhuman treatment and arbitrary arrest of members of a racial group, deliberate imposition on a racial group of living conditions calculated to cause it physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields; measures that divide the population along racial

hnes by the creation of separate residential areas for racial groups, the prohibition of interracial marriages; and the persecution of persons opposed to apartheid.¹⁴

Several other international instruments recognise the unlawfulness and criminality of apartheid. The 1977 Additional Protocol I of the Geneva Conventions of 1949 classifies apartheid as a grave breach' of the Protocol.¹⁵ The Rome Statute of the International Criminal Court (2002) included the crime of apartheid in the list of crimes against humanity. ⁶

The South African parliament incorporated the Rome Statute into our domestic law by passing the Implementation of the Rome Statute of the International Criminal Court Act¹⁷ (the ICC act). The ICC act adopted the Rome Statute in its entirety, as a schedule to the act. The Geneva Conventions and the Additional Protocols I and II were incorporated into the Republic's domestic laws by the promulgation of the Implementation of the Geneva Conventions Act¹⁸ (the Geneva Conventions act).

In *S v Basson*⁹ the Constitutional Court stated that it is clear that the practice of apartheid constituted crimes against humanity ²⁰

Factual and social context

In having regard to the factual and social context in which the utterances were made the identity of the respondents and complainant is of importance.

Mngxltms wtio deposed the founding *rffkl*/rt. is Uio president of tb© applicant, BLF Ha describes f;l I ttn a Black Qpnsclouansss. Pan AfrlkariJSt movement which embraces the bunkami IttaiktthW ethos. '

In llio respondents' anawanng affidavit Kriel atad that ha waa the Chiaf Executive Officer of Afni orum, a non profit company vitaMthod to promote the rule of law, human rights. minority ttyfita and tbo promotion of the onslitptionglryhti of all ■Jouth Afrlcoruitizom'y/

Tha complainant requested tha court alao to hava regard to tha description of AfriForum, aa aat out In Nelson Mandela Foundation Afrfforum It a non-profit company, which wat rogletorod In 2000 According to tit wobelto, H la a non-governmental organisation whose vlalon la "that Afrlkanara - who hava no othar homa • ara abla to load a meaningful and sustainable axlatanca, In peaca with othar communHlea, hare on the aouthernmoat tip of Africa" 1(8 Hinted mlatlon la on follows "Afrlforum works to ensure that the hemic prerequisites for (ho oxlotonce of Afrlkanara are met, by acting aa a credible Afrikaner interest organisation ond civil rights watchdog * aa part of the Solidarity Movement - outside the workplace on national and local level to handle the Impact of the

current political realities facing Afrikaners and to influence those realities, while working simultaneously to establish sustainable structures through which Afrikaners are able to ensure their own future " According to this Afroforum is essentially about Afrikaner Interests'^

McKaiser invited Kriel, together with Professor Habib (Habib) of Wits University and Professor Elmien du Plessis of Northwest University to an interview on his radio show. Not long before the interview Habib had compared Kriel to Hitler, in a tweet. During the radio discussion relating to the purpose of AfriForum and its role in society AfriForum and Kriel were accused of being racist. Kriel denied these allegations and he objected to Habib's comparison of him to Hitler. When the issue of farm murders was discussed, Johan Pienaar phoned in and criticized AfriForum. Kriel responded by remarking that Pienaar was hypocritical and that he had in the past been politically intolerant. McKaiser alluded to the possibility of political views evolving. He asked Kriel if he thought that apartheid was a crime against humanity. Kriel answered that "I don't think that it was a crime against humanity, but I think it was wrong.. and. " McKaiser

in founding affidavit para 2

12 of First and Second Respondent's answering affidavit para 121 Nelson Mandela foundation (supra) para 17

expressed surprise and repeated his question, to which Kriel responded. Kriel disagreed that it was a crime against humanity, but it was a system that... because it was a system that infringed on dignity and on the dignity of people. . "u

News 24 reported that Kriel told them after the interview that "I've do not justify apartheid. I've believed that the system infringed on the dignity of people on the basis of race. Apartheid was wrong'. Kriel, in an attempt to contextualise his view regarding apartheid, also mentioned that 'What I said to Eusebius is that a crime against humanity is the gassing of six million Jews in gas chambers. In my view, you cannot equate that to the 700 people that were killed by the security police during apartheid... It was wrong to infringe on the rights of people... [but this] cannot be equated to (Adolf) Hitler or communism. That equation cannot be made. You cannot equate crimes against humanity with apartheid... There was not a mass killing of people".

Pan Kriel's utterances reasonably be construed to demonstrate a clear intention to promote or propagate hatred and to incite harm against black people?

Kriel's subjective intention in uttering the words is not relevant. Of importance is how reasonable people would interpret his intention in making the utterances.

I have no doubt that the majority of South Africans, fully apprised of the history of this country, will find Kriel's opinion that apartheid was not a crime against humanity offensive. In addition to that his reference to the 'killing of 700 people by the security police' shows a lack of appreciation on his side of the multitude of atrocities committed during the apartheid regime.

However, the fact that the words were offensive, distasteful or hurtful does not on its own constitute hate speech. The hate speech threshold can only be met if a clear intention to advocate or propagate hatred and incite harm can also reasonably be attributed to Kriel and AfriForum.

I have pondered over the complainant's argument that the reasoning applied and inferences drawn in Nelson Mandela Foundation²⁸ can also be applied in this case to conclude that Kriel's words constituted hate speech.

The Constitution provision for the enjoyment of rights of all persons in the preamble of the Constitution reads as follows

I, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for Justice and freedom in our land;

Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on

timeliness. We affirm that all citizens are equal and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in

the family of nations'.

RULING

Kriel's utterances did not constitute hate speech as contemplated in section 10(1) of the Equality Act.

ORDER

The complaint is dismissed. Each party is to pay its own costs.

Additional Magistrate

Equality court. District Johannesburg Central
2019 -10- 29

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Suppression Kid Punishment of due Crime of Apartheid. No* York, 30 November
1973'.

' reticle 15. para 4(c)

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"* of 2012.

"200S(I)SA 171 (CO para 37

• vla swart "The Wooer Basson Prosecution; The closest Sooth Africa came to
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Hoddberg Jomrna! of /waarwjrimu1 Lg* l'Zod/tKf 209 the prosecution's raihar
torch on Inremaooaai Law principles during the trial in the High Court was
discussed. Wouter Basson freed 67 coiats. These included drag possession, drag
wfficthg fraud ad embezzlement. theft, tarter and conspiracy to comma murder.
Diving Basson allegedly engaged in surrealistic medical experiments while he was
head of South Africa's Chemical ad Biological warfare programme. Evidence
presented during the trial reflected Basson's involvement fa the dev elopment of
murder weapons such as anthrax contaminated cigarettes. One of the charges
described Basson as having disposed of political prisoners by throwing them out
of a helicopter into the sea. h was the first prosecution for acts consirded fry the
apartheid government that readied the South African Constitutional Coun.