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# PRO BONO AND HUMAN RIGHTS ALERT

## IN THIS ISSUE

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## Equality Court makes a decisive ruling in the Vicki Momberg hate speech matter.

In June 2016 – and as occurs often nowadays – a storm erupted over racist hate speech posted on social media. With Youth Day on the horizon, a video emerged showing a white woman (Vicki Momberg) unleashing a racist tirade against a black police officer who was attempting to assist her during the course of his duties one evening in the parking lot of a shopping centre. Unprovoked, Ms Momberg used unspeakably racist vitriol, directing her tirade not only at the police officer, Constable Clement David Mkhondo (Constable Mkhondo), but at all black people in general. Most notably, Ms Momberg repeatedly made use of the so called “k word” during her prolonged verbal attack.

Shocked and traumatised by the event Constable Mkhondo approached the South African Human Rights Commission (SAHRC) to seek redress. Concerned not only by the seriousness of the abuse in this instance, but at the recent rise of racist hate speech incidents in the country, the SAHRC (which is expressly mandated to do so) decided to assist Constable Mkhondo in pursuing a claim in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000 (PEPUDA) in the Equality Court and to join in the proceedings as the second applicant. Assisted by Cliffe Dekker Hofmeyr's Pro Bono and Human Rights Practice, and Advocate Usha Dayanand Jugroop from the Johannesburg Bar, Constable Mkhondo

and the SAHRC sought multiple relief against Ms Momberg in these proceedings, including a declaration that her outburst constituted hate speech in terms of s10 of PEPUDA and that this hate speech violated Constable Mkhondo's constitutional rights to human dignity and equality, causing him emotional suffering.

Pursuant to these declarations further relief was also sought in the form of an unconditional written apology, together with an order requiring Ms Momberg to perform community service and to attend a specially designed race sensitivity training programme to be facilitated by the SAHRC. Mr Mkhondo also sought damages for the violation of his rights and pain and suffering.

After numerous delays to facilitate Ms Momberg's legal representation, at a directions hearing held in February 2017, Ms Momberg consented to all the orders sought, except for the prayer for compensation. Her sole defense to having to pay any compensation was that she had been suffering from “temporary non-pathological incapacity” at the time of the incident due to trauma induced by an alleged attempted smash and grab/hijacking earlier on the evening in question.

Having considered the evidence of both Mr Mkhondo and Ms Momberg as well as evidence by Mr Pandelis Gregoriou from the SAHRC and closing argument, on 8 June 2017 the Equality Court handed down an order in which it upheld all the

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relief sought against Ms Momberg. The ruling represents a resounding victory for Constable Mkhondo and a bold affirmation of the important role that our courts can and should be playing in addressing the swelling tide of racism in the country.

Importantly, taking his cue from the powerful judgment of Chief Justice Mogoeng in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (CCT19/16) [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC) 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (8 November 2016) (the SARS judgment) Magistrate Sewnarain rejected Ms Momberg's testimony that although her words had been "objectively hateful", they did not constitute hate speech because she did not have hateful intent.

As appears from the following quotes in the SARS judgment the Chief Justice emphasised the seriousness with which the use of the "k word" had to be viewed and the unapologetic stance that needed to be taken by our courts in playing their role to eradicate racism:

"The term 'kaffir' historically bandied about with impunity, is a term which today cannot be heard without flinching at the obvious derogatory and abusive connotations associated with the term. It is rightly to be classified as an inescapably racial slur which is disparaging, derogatory and contemptuous of the person of whom it is used or to whom it is directed. Considered objectively, its use can only be seen as an expression of racism with a clear intention to be hurtful and to promote hatred towards the

person against whom it is used or to whom it is directed. This brings its use clearly within the ambit of s10 of PEPUDA...

...

The duty to eradicate racism and its tendencies has become all the more apparent, essential and urgent now. For this reason, nothing that threatens to take us back to our racial past should be glossed over, accommodated or excused...

...

Racist conduct requires a very firm and unapologetic response from the courts...courts cannot therefore afford to shirk their constitutional obligation to spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. To achieve that goal would depend on whether they view the use of words like kaffir as an extremely hurtful expression of hatred and the lowest form of contempt for African people or whether the outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack."

The Equality Court found that no regard could be had to Ms Momberg's defence that her alleged trauma that night had been the cause of the outburst. She was found to have been in a state of mind where she could appreciate the wrongfulness of her actions, and was able to target her abuse at her victims. The alleged trauma was merely being used as a convenient excuse to try and escape responsibility and was accordingly rejected by the Court.

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*Magistrate Sewnarain found that this type of conduct was unjustifiable, and cannot be countenanced or condoned.*



The Equality Court found further that Ms Momberg was unrepentant and took no responsibility for her actions. The Court found that she painted herself as the victim, and showed no remorse for her actions. It was clear to the Court that what she harboured in her heart and her utterances that night constitute hate speech. She was found to have undermined not only the dignity of Constable Mkhondo, but also that of the Office of the SAPS.

Taking his cue from the powerful words of the Chief Justice, Magistrate Sewnarain stated that it was the duty of the courts to eradicate such conduct, which cannot be condoned. Whilst finding that this matter was distinguishable from the Penny Sparrow matter as the utterances were made in a somewhat more private sphere (and only happened to be caught on video), Magistrate Sewnarain found that this type of conduct was unjustifiable, and cannot be countenanced or condoned, even if only intended for a private audience, or said outside the realms of social media.

The Equality Court therefore did not hesitate in awarding damages in the amount of R100,000 (one hundred thousand rand) in favour of Constable Mkhondo. Further, in what seems to be a first, Ms Momberg was ordered to attend a programme of integrated community service and sensitivity training. The programme will be administered by the SAHRC, together with affiliate organisations such as the Ahmed Kathrada

Foundation. As part of the programme, Ms Momberg will be required to visit the Apartheid Museum, attend SAHRC community outreach and advocacy programmes, and attend Race Sensitisation Workshops conducted by the Ahmed Kathrada Foundation.

Finally, Ms Momberg was ordered to make an unconditional written apology to Constable Mkhondo, and that this apology shall incorporate an unequivocal retraction by Ms Momberg of all or any racial and/or discriminatory and/or abusive remarks amounting to hate speech made against black persons in general. This apology was ordered to be published on Twitter and Facebook, as well as the SAHRC's website.

This robust order is welcomed and it is hoped that it will send out a strong warning that racist hate speech, which is inimical to our constitutional values and which threatens the very foundations of our young democracy, will not be and cannot be countenanced. It is also hoped that the novel order of requiring Ms Momberg to attend a specially designed sensitivity training/community service programme under the auspices of the SAHRC, will usher in a mechanism that can be made available on a more widespread basis going forward to help address some of the root causes of racism.

*Craig Thomas*

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