

IN THE EQUALITY COURT FOR THE DISTRICT OF BLOEMFONTEIN
HELD AT BLOEMFONTEIN

CASE NUMBER 01/2014

In the matter between

MOLOEDI ELIAS LECHOANO

COMPLAINANT

And

NATASHA LOUWS

RESPONDENT

JUDGMENT

BACKGROUND

1. This is an application by Mr. Lechoano (the Complainant) in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000, (the Act). The application was filed against Mrs. Louws (the Respondent).
2. According to an affidavit filed by the Complainant in terms of Section 20(1) of the Act, the Respondent rendered broker services and financial advice at the Complainant's business called Lechoano Financial Services.
3. During the course of their business relationship, the Financial Services Board withdrew the Company's Operating license. This led to the need for the employees, including the Respondent, being advised to seek alternative employment.

4. Despite the cessation of trading by the Company, Assupol Insurance Company continued to deposit certain monies into the Company's business account. The Respondent insisted on being paid her commission therefrom. The complainant informed her that it was not prudent to use this money as it was against FSB regulations.
5. Respondent then took legal action against the Complainant. Before a meeting between them and their respective attorneys could take place, the Respondent then started to send offensive text messages to the Complainant's cellphone. He did not respond.

THE VIOLATION

6. The various text messages and the dates and times on which they were sent, are all contained in the affidavit. They included
"Go pay my money God has eyes"
"I am gonna take your house and car"
"Poes kaffer"
"Fuk u"
"Ui moet betaal kaffer"
7. The Complainant avers that these text messages and Respondent's conduct were unlawful and discriminatory. He felt humiliated by being called "kaffir" and he averred that her text messages were racially motivated and offensive.

THE RESPONDENT'S RESPONSE

8. In her affidavit, she confirmed the working relationship between herself and the Complainant. She also confirmed that as a result of the cessation of the

business of the company, her commission was not paid. She fell into arrears with her rent, water and lights, motor vehicle payments, as well as other accounts.

9. The resultant frustration led to depression and she began drinking liquor.
10. She averred that the Complainant also swore at her in Sesotho.
11. She denied that the text messages she sent to the Complainant were offensive. She continued that when she sent the other text messages on 8th March 2014 she was heavily under the influence of liquor and she was thus not conscious of her actions.
12. She denied that she injured the Complainant's dignity. He had in turn called her a "Masiepa boer". However, she sent to the Complainant an apology.

PURPOSE OF THE ACT

13. The purpose of the Act includes, *inter alia*, to further the objective and purport of the Constitution like, the promotion of equality, the value of non-racialism, the prevention of any unfair discrimination and the protection of human dignity, to provide measures that will ensure the total eradication of unfair discrimination especially on the grounds of race, gender and disability.

The Preamble to the Act states "This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

THE HEARING

14. On 20 April 2015 the matter was heard before Court. The Complainant was represented by Mr Buang Jones from the Human Rights Commission, and the Respondent was represented by Advocate Van Amsteling, duly instructed by Van Eeden Attorneys. For the purpose of this judgment I find it prudent not to evaluate the evidence regarding the merits of the applications for reasons which appear hereunder.
15. Mr. Jones and Advocate Van Amsteling reached a settlement and agreed on the merits which are that the content of the Respondent's text messages to the Complainant did in fact constitute prohibited conduct in terms of the Act. It was agreed that argument would be heard on the quantum and the relief sought by the Complainant.
16. The court was addressed in this regard on 11 May 2015. Mr Jones submitted as follows :
 - That after the Respondent briefed Counsel they conceded that they had no case on the merits. That the Respondent was not in a position to discharge the burden of proof as set out in terms of the Act.
 - That the amount of R100, 000.00 claimed by the complainant should stand and should be awarded by the Court.
 - That the complainant is a black person, and that his history as such should be considered by the Court. That even after 21 years of democracy, racism continues to rear its ugly head and that the Equality

Court was established to cure racial attitudes and stereotypes which are still the order of the day.

- That the amount claimed is justifiable. The Equality Court needs to send out a clear message to all citizens that racism no longer has a place in our constitutional democracy.
- That this amount prayed for will act as a strong deterrent to individuals who still regard black people as inferior, using derogatory terms against them and eroding their dignity.
- That the complainant has experienced the effect of apartheid and that being referred to as a “kaffir” affected him immensely and it has had an adverse impact on his psychological well-being.
- That in terms of Section 21(2)(d) of the Act, the court should also make an order that the Respondent should hand down a written apology.
- That as a result of the emotional pain and indignity that the Complainant endured, the amount of R100 000.00 would be appropriate.
- The Court should make it clear that this process is not about whether or not the Respondent can afford the amount. The aim is to restore the dignity and the rights of the Complainant and to transform society.

17. On the other hand, Advocate Van Amstelling submitted as follows :

- That he is in agreement with what the objectives of the Act are, but that the court should consider a matter based on its own merits. In this matter,

he submitted, the amount of R100 00.00 claimed by the Complainant is “exorbitant, serves no purpose for transformation”.

- He proceeded to outline the emergence and nature of the parties work relationship, which I have already alluded to above. As a result thereof, the Respondent endured substantial amounts of frustration due to the late payment of commission due to her, in that she even had to resort to borrowing money in order to cater for her basic household necessities.
 - He also submitted that this was an isolated incident and that the parties have no previous bad blood between them, even though there is no excuse for the Respondent’s behaviour. He added that if the court awarded the claimed amount, this would not send the right message, as the court’s duty is not to “punish”, but to “educate”. In addition, he submitted that he “cannot see how equality can be promoted by payment of this money judging by the history between the parties”.
 - According to him, an order that the Respondent make an “unconditional apology” should suffice and an amount of between R3000.00-R4000.00 compensation to the complainant.
 - He also submitted that the Respondent was under a lot of emotional stress which led to excessive drinking, frustration and medical problems. He also stated that the racial slurs were not accompanied by any violence and that the Respondent merely sent text messages.
18. Ms Jones countered there submissions by stating that Mr. Van Amstelling omitted to mention that the Act is aimed at prevention of unfair discrimination and that it provides remedies for victims of unfair discrimination. Nor did he

mention that Section 4 of the Act refers to deterrence. The Act does not provide that the racial slurs must be accompanied by violence. The key issue here is that the Complainant was called a “kaffir”. He added that everybody gets frustrated at some stage, but do not engage in racially offensive behaviour towards their fellow South Africans.

19. I think at this point it is opportune to state the unique and peculiar circumstances that obtain in this matter.
20. After the Respondent had conceded on the merits in this matter, argument was heard and supplementary documents (financial) were filed by the parties with regard to *quantum*, on 11 May 2015. The matter was then postponed to 02 June 2015 for judgment on *quantum*. On 24 May 2015, and before judgment could be handed down, the Respondent passed away.
21. The immediate view by the Court was that the death of the Respondent constituted an intervening cause, as a result of which judgment could not be delivered and the matter would be closed. To this end, the court requested the parties’ legal representatives to file additional Heads of Argument with relation to this issue. I pause here to mention that Mr Jones was adamant that judgment ought to be delivered.
22. The Heads of Argument were duly filed on 21 August 2015. Mr. Jones submitted that a court only becomes *functus officio* after making a final decision. “Finality is a point arrived at when the decision is published, announced or otherwise

conveyed to those affected by it” (Paragraph 8). He correctly made reference to Rule 52(3) which provides that “if a party dies... the action shall thereby be

stayed until such time as an executor... or other competent person has been appointed in his or her place..." He added that the Respondent's estate has already been reported at the Master of the High Court under reference 6374/15.

23. It is common cause that the court had not yet granted a final order at the time of the Respondent's death. This lends credence to Mr Jones' submission alluded to above. The Complainant has right of recourse against the executor of the deceased Respondent's estate in terms of execution, with regard to any order the court will make.
24. On the other hand, Mr. Van Eeden for the Respondent submitted in paragraph 2 of his Heads of Argument that the Respondent passed away on 24 May 2016. He attached a copy of her death certificate. He concluded that in the light of such, "The matter should be formally disposed". Needless to emphasise this submission cannot stand. This matter has to be seen to finality by the court. The Respondent's death has not constituted any valid "stopping" of the proceedings.
25. What now remains is for the court to make a determination of an appropriate redress and compensation for the complainant in respect of the conduct of the Respondent in this matter. I have already alluded to the submission of the parties' legal representatives in this regard. The acts of sending text messages to the Complainant happened repeatedly. Several derogatory and racially laced text messages were sent to him by the Respondent.
26. Admittedly, explanations were advanced as to her mental condition. Whether or not such offers sufficient justification for her to have sent these text messages is of no moment. What is paramount here is the effect of these text

messages on the psyche, dignity, and integrity of the Complainant. The prohibition of unfair discrimination is not concerned with abstract inquiries into the form of conduct, but requires the court to examine the consequences of conduct on the complainant. It is the Complainant who is at the centre of the inquiry.

27. The Preamble of the Act refers to the need for special measures to address inequality and it sets out the need for a new society, based on various principles enunciated thereunder. Section 4(1)(d) of the Act provides for “The use of corrective or restorative measures in conjunction with measures of a deterrent nature” (my emphasis). These measures should be designed to ensure that this Act will provide effective justice and that the parties will see the value of the court to affirm their equality rights. Mr. Lechoano is entitled to this. Section 3(1) also provides that in applying the Act, the Court is obliged to give effect to the Constitution, including the provisions that promote equality through legislative and other measures, in order to protect or advance persons who are disadvantaged by current and past unfair discrimination. Needless to mention, the Complainant, being a black person, has a past history of unfair discrimination that was based on certain grounds, including race. He is clearly protected by the current legislative measures that are now in place, namely the Act and the Constitution.

28. The court cannot fail in its duty to positively and decisively affirm his rights in the present matter. It will be failing in this duty if it accedes to Advocate Van Amstelling’s submission that a fair amount that the court can order is between R3000.00 and R4000.00. He also submitted that a written apology by the complainant should be made. He referred to previously decided cases where the courts awarded amounts ranging from R2000.00 to R45 000.00. He also filed with court, the Respondent’s financial statements as proof that she would

not be able to afford to pay the amount of R100 000.00 prayed for by the complainant. He added that even if she can afford that amount, it does not mean that the court should impose it. He went on to submit that the Complainant has to admit that the Respondent has suffered a lot and that her expenditure clearly indicates that she is not living an exorbitant life and also that an apology should be sufficient.

29. Mr. Jones added in his submissions that the court should grant a sufficiently deterrent remedy "that will affirm the dignity of the Complainant, that will combat racism in the Free State, and that will deter fellow compatriots.

30. The court is in agreement that a remedy that should be afforded to the Complainants in such cases, should be one that affirms the human dignity of Complainants, affirms their existence as citizens of equal stature with other races, that will give effect to the letter and spirit of the Act and the Constitution. It cannot be a remedy that makes mockery of these considerations, nor should it be one that undermines these considerations even further.

In the result, the court makes the following order :

1. That the Respondent/Executor of her deceased estate, should compensate the Complainant in the amount of sixty thousand rand (R60 000.00).
2. That such compensation should be paid over on or before 15 September 2016.

3. That the Complainant should pay the said amount to a charity of his choice, as indicated in his papers.

DONE AT BLOEMFONTEIN ON THIS 14TH DAY OF JUNE 2016.

L. P. MBASSA

SENIOR MAGISTRATE : BLOEMFONTEIN

TO : CLERK OF THE EQUALITY COURT

BLOEMFONTEIN

And to : MR BUANG JONES

HUMAN RIGHTS COMMISSION

18 KELLNER STREET

BLOEMFONTEIN

And to : VAN EEDEN, ATTORNEYS

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