



EC/2010/0330

In the matter between

Edward Bikitsha

Complainant

And

Queens College Boys High School

1st Respondent

Department of Education, Queenstown District

2nd Respondent

REPORT

(In terms of Procedure 21 of the Complaints Handling Procedures of the South African Human Rights Commission - promulgated in terms of the Human Rights Commission Act)

1. Introduction

1.1 The South African Human Rights Commission (hereinafter referred to as the ("Commission")) is a state institution established in terms of Chapter 9 of the

Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "Constitution"), to support constitutional democracy.

- 1.2 The Commission is mandated in terms of section 184 (1) (a) - (c) of the Constitution to:

"...promote respect, monitor and assess the observance of human rights in South Africa".

- 1.3 The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.
- 1.4 Section 9(6) of the Human Rights Commission Act, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. The Parties

- 2.1 The Complainant is Mr Edward Bikitsha (hereinafter referred as the "Complainant"), on behalf of his son Jama Bikitsha.
- 2.2 The 1st Respondent is Queens College Boys High School (hereinafter referred as the "1st Respondent") a public school situated in Queenstown.
- 2.3 The 2nd Respondent is the Department of Education: Queenstown District (hereinafter referred as the "2nd Respondent").

3. The Complaint

- 3.1 On or about 26 August 2010 the Eastern Cape Provincial Office of the Commission received a written complaint from Mr Edward Bikitsha, in his

capacity as parent and guardian to his then minor son Jama Biktsha (hereinafter referred as the "Victim"), a learner at the 1st Respondent at that time. .

3.2 The Complainant alleges that his son was called a "*kaffir*" by a fellow white learner, Jarod Stap (hereinafter referred as the "Offender").

3.3 The alleged racial slur took place at the hostel of the 1st Respondent on the 14 August 2010, wherein the offender uttered the following words to the victim:

"why are you staring at me kaffir"

3.4 The incident was subsequently reported to the Housemaster at the hostel, a Mr Pearson. The matter was then escalated to the office of the then Principal, Mr P Harker who dealt with the matter according to the 1st Respondent's Code of Conduct.

3.5 The offender was eventually awarded demerit points as a sanction, attended counselling and apologized to the victim for his actions. The Queenstown District Office of Education endorsed the school's ruling on the matter.

3.6 The Complainant bemoans that the Respondents, in their handling of the matter, trivialised the incident and is not satisfied with the sanction imposed as he viewed it to be very lenient

3.7 As a result of the leniency, the complainant alleges that the offender repeated the same incidence, as he allegedly referred to another fellow learner as a "*kaffir*".

4. Preliminary Assessment

- 4.1 In the preliminary assessment of the Commission, the offender is in *prima facie* violation of:
- a) The right to equality. Section 9(4) of the Constitution stipulates that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).
 - b) The right to dignity. Section 10 of the Constitution stipulates that everyone has dignity and the right to have their dignity respected and protected.
 - c) The right to freedom of expression. Section 16 of the Constitution outlines the right to freedom of expression. However, section 16 (2) limits this freedom in the case of hate speech based on race, ethnicity, gender or religion that constitutes incitement to cause harm. Furthermore, section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (“PEPUDA”) makes unlawful hate speech that is intended to be hurtful, be harmful or to incite harm, and to promote and propagate hatred.
- 4.2 That the alleged violation falls within the mandate and jurisdiction of the Commission.
- 4.3 That the alleged *violation merited a full investigation* in terms of the Commissions Complaints Handling Procedures of the Commission.

Investigative steps taken by the SAHRC

- 4.4 An allegation letter was forwarded to the 1st Respondent on 31 August 2010, requesting a response and the steps taken in addressing the matter.
- 4.5 A response dated 06 September 2010 advising of the steps the school took in addressing the matter was received from the Headmaster of the 1st Respondent.
- 4.6 Further correspondence dated 31 March 2011 was received from the 1st Respondent. In this response, it advised that it had issued the 2nd Respondent, with a full report of the incident and the steps it had taken in dealing with the incident, the SAHRC was referred to the 2nd Respondent for further information and provision of the report.
- 4.7 On the 07 April 2011, the SAHRC dispatched correspondence to the 2nd Respondent, requesting for a copy of the report submitted by the 1st Respondent and its investigative report.
- 4.8 A response dated 09 May 2011 was received from the above office, wherein they advised the SAHRC of their endorsement of the 1st Respondent's handling of the matter.

6. Steps taken by the Respondents

- 6.1 The 1st Respondent advised the Commission that it acknowledged the seriousness of the incident and that it had accordingly addressed the incident in that:
- (a) The offender had been awarded 10 demerit points as per the school's Code of Conduct;

- (b) Further, the offender was placed on a programme of counselling with the school counsellor;
- (c) The offender had apologised to the victim;
- (d) The school had completed a detailed report outlining the steps they had taken and submitted same to the 2nd Respondent.
- (e) In view of the above the school considered the matter finalised and closed.
- (f) The Commission forwarded to the 1st Respondent correspondence dated 17 July 2012 advising that according to their Code of Conduct, hate speech and or racial misbehaviour was not recognised as a serious matter but rather treated as a minor offence.
- (g) The Commission recommended that taking into account the ramifications of racism and considering that hate speech is unlawful conduct as per PEPUDA, the school needs to review and amend its Code of Conduct to address racial misbehaviour.
- (h) A response was received that the Code of Conduct has been reviewed and amended. Hate Speech is listed as a serious offense to be dealt with at Governing Body (hereinafter "SGB") level. The reviewed and amended Code of Conduct has been functional as from the beginning of the 2013 school year.

7. Applicable Law

The following law is applicable to this matter:

7.1 International Legal Instruments

7.1.1 International Convention on Civil and Political Rights¹

Article 20(2) asserts that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

7.1.2 International Convention on the Elimination of All Forms of Racial Discrimination²

Article 1 states that:

"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Article 2 states:

"States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races"

Article 3 states:

"States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

¹ General Assembly Resolution 2200A of 16 December 1966

² General Assembly Resolution 2106 (xx) of 21 December 1965

7.1.3 United Nations Convention on the Rights of the Child³

Article 2 states:

"States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".

7.2 Regional Legal Instruments

The African Charter on Human and People's Rights

Article 2 states:

- 1) *" Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status"*

Article 5 states that:

- 1) *"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status."*

7.3 Constitutional Provisions

7.3.1 Section 9(4): *Equality – 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.*

7.3.2 Section 10: *Human Dignity – Everyone has inherent dignity and the right to have their dignity respected and protected*

³ General Assembly Resolution 1386 (XIV) of 10 December 1959

7.3.3 Sec 16 (2) (c): *Freedom of expression – the right in subsection (1) does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

7.4 Domestic Legislation

7.4.1 The Promotion of Equality and Prevention of Unfair Discrimination Act⁴

Section 10 provides that:

"...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:

- (a) be hurtful;*
- (b) be harmful or to incite harm*
- (c) promote or propagate hatred."*

7.4.2 South African School's Act⁵

Section 8 provides that:

Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

(2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

⁴ Act 4 of 2000

⁵ Act 84 of 1996

Section 9 provides that:

(1) Subject to this Act and any applicable provincial law, the governing body of a public school may, after a fair hearing, suspend a learner from attending the school:

- (a) as a correctional measure for a period not longer than one week; or*
- (b) pending a decision as to whether the learner is to be expelled from the school by the Head of Department.*

(2) Subject to any applicable provincial law, a learner at a public school may be expelled only:

- (a) by the Head of Department; and*
- (b) if found guilty of serious misconduct after a fair hearing.*

7.4.3 Eastern Cape Schools Education Act ⁶

Section 50 provides that:

(1) The control, discipline and suspension of learners at a public school shall be handled in accordance with the provisions of the 1996 Act⁷.

(2)(a) A learner may be expelled from a public school only on grounds of serious misconduct as determined in regulations made by the governing body concerned and adopted in consultation with the Department and the school community.

⁶ Act 1 of 1996

⁷ South African Schools Act

7.4.4 Eastern Cape Regulations Relating to Behaviour by learners which constitutes Serious Misconduct⁸

Section 2 provides that:

Serious Misconduct:

A learner at a school who: ...

- i) Uses hate speech, makes himself or herself guilty of racism or applies harmful graffiti*

8. Case Law

8.1 Afri-Forum and another v Malema and another⁹

"Words are powerful weapons which if they are allowed to be used indiscriminately can lead to extreme and unacceptable action"

8.2 Ciliza v Minister of Police and Another¹⁰

James JP stated as follows:

"It follows that in my opinion one of the recognized meaning which the word 'kaffir' now bears in South Africa is that such a person is uncivilized, uncouth and coarse and that if one calls a person a 'kaffir' this will in certain circumstances constitutes an iniuria"

8.3 Mbatha v Van Staden¹¹

Didcott J stated as follows:

⁸ Eastern Cape Department of Education Regulations Relating to Behaviour by Learners at Public Schools: Gazette No: 415 Notice No:32

⁹ 2011 (6) SA 240 (EqC)

¹⁰ 1976 (4) SA 243

¹¹ 1982 (2) SA 260(N)

"The tirade's worst feature was the use of the epithet "kaffir". Such alone can amount today to an actionable wrong"

8.4 S v Puluza¹²

"When a black man is called a kaffir by somebody of another race as a rule the term is one which is disparaging, derogatory and contemptuous and causes humiliation.

8.5 Le Roux v Dey¹³

Yacoob CJ stated the following:

"I do not think it is ordinarily appropriate for civil claims to brought to court to punish children, especially where, like in this case, criminal proceedings and school disciplinary processes are available and have been used. The service of the summons on the children would probably have been far more painful to them than the publication of the image should have been to Dr Dey."

8.6 Queens College Boys High School v MEC: Department of Education, Eastern Cape¹⁴

"Whilst it is legitimate under these provisions to expect public schools to consider rehabilitative options in relation to disciplinary infractions (even serious ones), the responsible member for education must also always have due regard to the fact that expulsion from a school is an appropriate option in cases of serious misconduct".

9 Issues for determination

¹² 1983 (2) P. H. H 150. (E)

¹³ 2011 (3) SA 274 (CC)

¹⁴ (454/08) [2008] ZAECHC 165 (21 October 2008)

The Eastern Cape Provincial Office determined that the following aspects require legal determination:

- 9.1 Whether the 1st Respondent in its handling of this matter, trivialised the matter.
- 9.2 Whether the 1st Respondent's Code of Conduct takes cognisance of hate speech and or racial abuse as serious misconduct.

10. Legal Analysis

- 10.1 It is not disputed that the offender racially insulted the victim by *inter alia* calling him a "kaffir".
- 10.2 The word "kaffir" constitutes hate speech and has been described by the courts as offensive term, which has racial connotations as evidenced by *Ciliza v Minister of P Police and Another*, *Mbata v van Staden* and *S v Puluza*¹⁵.
- 10.3 Further, In *R v K Keegstra*¹⁶ – the Canadian court describes harm that may result from hate speech. The Court stated that emotional damaged caused by words may have grave psychological and social consequence. A response of humiliation and degradation from the individual targeted by hate propaganda is to be expected. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on an individual's sense of self worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with outsiders or adopting attitudes and postures directed towards assimilation with the majority. These are undesirable consequences in a nation that prides itself on tolerance and the fostering of human dignity through, amongst other things respect for the many racial, religious and cultural groups in society.

¹⁵ *Supra*

¹⁶ 1990 (3) S.C.R 697

- 10.4 PEPUDA, in section 10, explicitly prohibits advocacy of hatred based on one or more prohibited grounds, in this instance being race, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, promote or propagate hatred.
- 10.5 According to the 1st Respondent's code of conduct, demerit points are awarded to minor negative infringements and misdemeanours. Demerits do not necessarily lead to punishment as they can be balanced by merits.
- 10.6 In the 1st Respondent's Code of Conduct racial abuse and or misbehaviour is not listed in serious matters but is rather treated as a minor offense.
- 10.7 On the account of evidence submitted by the 1st Respondent it is evident that this matter was solely handled by the then Principal, Mr C P Harker and was not reported and/or handled by the school disciplinary committee.
- 10.8 The complainant justifiably submitted that the sanction imposed to the offender, the awarding of 10 demerits, is inappropriate and lenient taking into account the seriousness of the violation of the victim's fundamental rights, notwithstanding that the offender apologised to the victim.
- 10.9 As a direct consequence of the leniency, no accountability was taken by the offender for his grave actions hence he allegedly repeated his actions.
- 10.10A review of the Code of Conduct is warranted in the circumstances.

11. Finding

On the basis of the analysis set out in the preceding section, the Commission makes the following findings:

- 11.1 The 1st Respondent does not have a standard system in place to deal with matters of hate speech.

- 11.2 Hate speech and or racism is not listed as misconduct/offence in the School's Code of Conduct.
- 11.3 Awarding of 10 demerit points as a sanction to the offender was not proportional to the offence committed and as thus the sanction not adequate.
- 11.4 No form of support and or counselling was afforded to the victim by the 1st and 2nd Respondent, notwithstanding that same was provided to the offender.
- 11.5 The 1st and 2nd Respondents, in their handling of the matter, did not treat the matter with the seriousness it deserved.
- 11.6 The 1st Respondent's mere acknowledgement of the seriousness of the offense does not suffice.

12. Recommendations

- 12.1 However, notwithstanding that Hate Speech and racial misbehaviour is now listed as a serious offence in the Code of Conduct, the Commission recommends that the sanction for such offense be explicitly stipulated on the Code of Conduct.
- 12.2 Further, the sanction imposed should take cognisance of the seriousness of hate speech and be proportional to the offense.
- 12.3 The Commission further recommends that the Code of Conduct explicitly mention expulsion as a possibility in cases of racial misbehaviour.
- 12.4 Moreover, the Commission recommends that a sensitisation workshop, to be facilitated by the Commission, on the issue of hate speech and or racism needs to be conducted at the school for the staff, learners and members of SGB. Such workshop to take place within the next **three (3) months**.
- 12.5 The 1st Respondent to report to the Commission every **six (6) months** on hate speech and or racism incidences that have occurred at the school, if any, and how they have been dealt with by the school.

13. APPEAL

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

The Chairperson
Adv. M.L. Mushwana
SAHRC
Private Bag X2700
HOUGHTON
2041

Signed at BRAAMFONTEIN on the day 17 of JUNE 2014.



Commissioner L. Mokate

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