

SOUTH AFRICA / JUDGMENT

Amaning and Others v Ackerman

(EQ3/2023) [2024] ZAEQC 2 (10 May 2024)

[2024] ZAEQC 2

COURT
Equality Court

BEFORE
GC Wright

CASE / FILE NUMBER
EQ3/2023

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FLYNOTES:

CONSTITUTION – Equality – Hate
speech –
Communications
between two business associates, one using k word – Unlawful
hate speech amounting to unlawful discrimination
against Black
people – No requirement inherent in verb “communicate”
that offensive words be communicated
widely – Cannot be said
to be in “intimate personal sphere” – Fall
within range of words which may
be “communicated” in
section 10(1) – Equality Act Promotion
of Equality and Prevention
of Unfair Discrimination Act 4 of 2000, s 10(1).
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
SITTING
AS AN EQUALITY COURT
Case
NO: EQ3-2023
(1)
REPORTABLE: YES
(2)
OF INTEREST TO OTHER JUDGES: YES
(3)
REVISED
10

MAY 2024

WRIGHT
J

In the matter between: EMMANUEL
AMANING First
Complainant
NICHOLAS
LIEBMANN Second
Complainant
GARTH
WELLMAN Third
Complainant
and
WILLEM
ACKERMAN Respondent
Headnote – The verb
“communicate“ in section 10(1) of the Equality Act
considered.
Summary – A
business person used the k word when communicating with a
business
associate.
Held
– On the facts of the case, that the communication was
sufficiently public to be “ communicated
“ within the ambit of section 10(1) of the Equality Act.

JUDGMENT

WRIGHT J

- [1] The first complainant is Mr Emmanuel Amaning. He is described in his complaint as a person of Black or African race. The second complainant, Mr Nicholas Liebmman is described in the complaint as a person of White or European race and of Jewish ethnic origin and religion. The third complainant, Mr Garth Wellman is described as of White or European race and not Jewish.
- [2] The respondent, Mr Willem Ackerman is described in the complaint as White and not Jewish.
- [3] Mr Liebmman has withdrawn his complaint.
- [4] The documents in the case are many and relate mostly to business that the parties did together. There is pending litigation regarding that business. I shall cut through that. At the start of the inquiry, it was agreed by Mr Winks for Mr Amaning and Mr

Wellman and Mr Riley and Ms Nadasen for Mr Ackerman that I need not decide the rights and wrongs of that pending litigation.

[5] The business between the parties was at least to some extent run through a company called Caleo.

Legislation

[6] Under section 9 of the Constitution, the right to equality is enjoyed by all. Under section 10, everyone has the right to dignity. Under section 14(d), everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed.

[7] The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 is legislated to give effect to the right to equality.

[8] Under section 1, discrimination is defined as:

“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”

[9] Under section 1, harassment is:

“unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to—

- (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group”

[10] Under section 1, prohibited grounds include:

“race, ethnic or social origin, colour,

religion, conscience, belief, culture, language or

- (b) any other ground where discrimination based on that other ground—

- (i) causes or perpetuates systemic disadvantage;

- (ii) undermines human dignity; or

- (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)“

[11] Under section 6, no person may discriminate unfairly against any other person.

[12] Under section 7(a), “ Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including—

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence “

[13] Section 10(1), as previously legislated, read “ Prohibition of hate speech —(1) 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—

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

[14] On 30 July 2021, the Constitutional Court in *Qwelane v South African Human Rights Commission and others* [2021] ZACC 22 declared that “section 10(1) of the Equality Act is inconsistent with section 1(c) of the Constitution and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word “hurtful” in the prohibition against hate speech.” The Court suspended the declaration for 24 months to give Parliament an opportunity to remedy the

Constitutional defect.

[15] The Constitutional Court ordered that during the period of suspension section 10(1) would read:

“Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.”

[16] The required amendment was legislated with commencement date 3 April 2024.

[17] Under section 11 of the Equality Act no person may subject any person to harassment.

The complaints

[18] The complainants allege four incidents.

[19] The first incident pleaded is that on or about 31 January 2018, at Mr Ackerman’s business premises, Mr Ackerman said to Mr Wellman the following words or substantially the same words - “ the k.....s running this country will just keep f...ing it up as they have done in the rest of Africa.” It is alleged that these words constituted hate speech under section 10(1) of the Act, unfair discrimination on the ground of race under section 7(a) of the Act and

harassment under section 11 of the Act. The harassment is alleged to consist in Mr Ackerman inviting Mr Wellman to enjoy or endorse the words and Mr Ackerman thereby created a hostile or intimidating environment. It is alleged that Mr Amaning was informed of this incident on or about 14 October 2022.

[20] The second incident pleaded is that on or about 3 October 2018, at Mr Ackerman's business premises, Mr Ackerman said to Mr Wellman that Mr Liebmann was "that f...ing Jew who only wants to enrich himself in every deal" or words to that effect. These words are alleged to be hate speech and harassment, the latter in that Mr Ackerman thereby invited Mr Wellman to endorse the words and Mr Ackerman created a hostile or intimidating environment. It is alleged that Mr Liebmann was informed of the incident on or about 3 October 2018.

[21] The third incident pleaded is that on or about 23 August 2019 Mr Ackerman sent a text message to Mr Wellman with the words – "Garth after today I might be seen as racist but I will man alone kill every k....r that cross my path. So God help me." This text is pleaded to amount to hate speech, unfair discrimination on the ground of race and to harassment in that by

inviting Mr Wellman to enjoy or endorse the words or by communicating the assumption that Mr Wellman would enjoy or endorse the words Mr Ackerman demeaned Mr Wellman or created a hostile and intimidating environment for Mr Wellman. It is alleged that Mr Amaning was informed of this incident on or about 14 October 2022.

[22] The fourth pleaded incident is that during or about October 2021 in a telephone call Mr Ackerman said to Mr Wellman – "my k.....s know their place." It is pleaded that these words amount to hate speech, unfair discrimination on the ground of race and to harassment. It is alleged that Mr Amaning was informed of these words on or about 14 October 2022.

[23] The relief sought is an order declaring that Mr Ackerman's words amount to hate speech, unfair discrimination based on race and to harassment. Further, an order is sought that Mr Ackerman pay R500 000 to the Ahmed Kathrada Foundation, which has as its core objective the deepening of non-racialism. It is sought too, that Mr Ackerman make a public apology and that Mr Ackerman undergoes fifty hours of racial sensitization training to be conducted by the South African Human Rights Commission or an institution or person nominated by it. Costs are sought.

[24] In his affidavit in answer, Mr Ackerman says that the accusations are a bad faith attempt to defame his good name and they are an attempt to leverage Mr Ackerman into halting the pending litigation. Mr Ackerman alleges that Mr Liebmann and Mr Wellman were in fact running a self-enrichment scheme at Mr Ackerman's expense. They are alleged to have committed fraud.

[25] Mr Ackerman alleges that Mr Wellman asked him for bridging finance for one of Mr Wellman's companies and that Mr Ackerman donated to a charity of Mr Wellman's choice.

- [26] Mr Ackerman alleges that the complainants waited years to lay their complaints.
- [27] Regarding the first incident, Mr Ackerman denies using the alleged word.
- [28] Regarding the second incident, Mr Ackerman admits saying that Mr Liebmann “only wants to enrich himself in every deal” but denies using the words “f...ing Jew”.
- [29] Regarding the third incident, Mr Ackerman says further in his affidavit in answer to the complaints that “I have no knowledge of such a text, or whether I indeed sent same. Accordingly, I deny same and put the Complainants to the proof thereof.” Mr Ackerman says further that on the day in question, 23 August 2019 his wife, daughter and domestic worker were robbed at gunpoint at his residence. His daughter was threatened with gang rape and his domestic worker was viciously beaten. He pleads that he was very upset and that his hatred was directed only at the perpetrators.
- [30] Regarding the fourth incident, he denies the alleged words.
- [31] Mr Ackerman says that a company in which Mr Ackerman has a 40% shareholding employs “75 people of whom 49 are people of colour.” Mr Ackerman says that he has donated towards bursaries for Black persons and that he donates to charity.

The documents and chronology

- [32] The parties prepared a joint bundle of documents for the hearing and prepared full witness statements for all witnesses. It was agreed pre-trial that evidence in chief would consist only in each witness confirming his statement. This latter exercise shortened the length of the hearing considerably.
- [33] The documents are many, mostly relating to the pending litigation. I set out below a chronology of the relevant events as they are reflected in documents. I intersperse the four alleged incidents to show where they fit into the chronology.
- [34] For some years, Mr Amaning, Mr Wellman, Mr Liebmann and Mr Ackerman are in business together in one way or another.
- [35] January 2018 – the alleged first incident.
- [36] 5 February 2018 – Mr Wellman emails Mr Ackerman, saying that he “enjoyed the meeting last week” and referring to Mr Ackerman’s possible exit from Caleo.
- [37] 7 March 2018 – Mr Wellman emails Mr Ackerman, referring to a loan to be made by Mr Ackerman to Caleo.
- [38] 3 October 2018 – the alleged second incident.
- [39] 23 August 2019 – Mr Ackerman’s domestic worker, wife and daughter are robbed at gunpoint at their home.

- [40] Later the same day – Mr Ackerman sends a Whatsapp text message to Mr Wellman reading “ Garth after today I might be seen as a racist but I will man alone kill every k....r that cross my path. So God help me.” The full k word is used and is spelled with two f’s.
- [41] Later the same day – Mr Wellman sends a text message to Mr Ackerman advising him to stay away from social media and containing the words “ This is what can destroy you. “
- [42] Later the same day – Mr Ackerman sends a text message to Mr Wellman reading “ Deleted it Was in an extremely emotional state. “
- [43] 24 August 2019 – Mr Wellman sends a text message to Mr Liebmann, referring to Mr Ackermann and including the words “ I feel for him but this is not an out of character break out. This is who he is. I am really finding it hard to have this caliber of human as my shareholder. He is governed purely by his emotions “ and “ We need to write a letter to each other, discussing his exit as a result of this. “
- [44] 25 August 2019 – Mr Liebmann emails Mr Wellman, copying Mr Amaning and saying, in reference to Mr Ackerman “ He has shown disloyalty; untrustworthiness and above all discrimination and in fact contempt for humanity in the form of outright racism. “
- [45] 28 August 2019 – Mr Wellman emails Mr Liebmann, empathising with Mr Ackerman about the attack on his family and saying “ it does not excuse the language nor the attack on whatsapp “ and saying “ We have experienced several irresponsible events in his behaviour before. I would like to proceed with his exit from the business. “
- [46] 30 July 2021 - The Constitutional Court hands down judgment in Qwelane. The wording of section 10(1) of the Equality Act changes as set out above.
- [47] October 2021 – the alleged fourth incident.
- [48] 30 September 2022 – Mr Wellman sends a letter to Mr Ackerman. The letter includes the words “ I would like to extend my gratitude to you and Lydia [Mr Ackerman’s wife] for your clientship and years of relationship. I see no wrongdoing from any party that requires hostile and unnecessary departure from the current relationship. What has transpired has had consequences in the relationship and I would like to think we can all move forward positively from today. “ The letter also contains the words “ Non aggressive communication will result in a better outcome for everyone. “
- [49] 14 October 2022 – Mr Wellman informs Mr Amaning of Mr Ackerman’s texts to Mr Wellman.
- [50] 25 January 2023 – Mr Liebmann sends a letter to the Financial Service Council Ombud about Mr Ackerman. In paragraph 30, Mr Liebmann writes “ We know that, from previous conduct, Mr Ackerman had a problem with Jews, in his view, apparently for their self-enrichment, blacks, in his view, apparently for their entitlement and Mr Wellman because Mr Ackerman feels that Mr Wellman turned his back on him.”

- [51] 20 February 2023 or shortly thereafter – Ms Rothman of the Financial Advisory Intermediary Services writes to Mr Ackerman, per his wife, Lydia Ackerman. This letter is in response to a complaint laid by Mr Ackerman about the financial behaviour of the complainants. Ms Rothman says that she will close her file as there are disputes of fact and the matter is better raised in a court.
- [52] 14 February 2023 – the present case is instituted.
- [53] 1 March 2023 – Mr Ackerman deposes to his affidavit in answer to the complaints, saying that he has no knowledge of the text of 23 August 2019 and denying that he sent the text. Mr Ackerman denies using the k word.
- [54] 7 June 2023 – Mr Amaning’s discovery affidavit is delivered. It lists the text exchanges between Mr Wellman and Mr Ackerman.
- [55] 20 June 2023 - Mr Ackerman signs his witness statement. In paragraph 31, he says that “ Regarding the alleged Whatsapp message, as was stated in my answering affidavit, I had no knowledge of such text, or whether I indeed sent same. “ In paragraph 32.2 he says “ As a deeply religious man, I used the word “ K....r “ [spelled with two f’s] in the sense that it means disbeliever in God. It was not meant against any race, but only against those persons that committed the heinous crime.”
- [56] 3 April 2024 – Section 10(1) of the Equality Act is amended as set out above.

Mr Amaning’s witness statement

- [57] Mr Amaning was born in Ghana and raised in South Africa. He grew up in the small town of King Williams Town where racial inequalities were starkly visible. His early life was heavily influenced by the racial disparities that mark our society. His formative years were spent at Dale College Boys High School, a beacon of hope for racial democracy. Mr Amaning was an active participant in the discourse on racial equality.
- [58] Mr Amaning has experienced racism. Once, he went to Muizenberg on holiday and entered a shop. He was a shopper like any other. As he moved around the shop he was followed as if he was a common thief. He felt stripped of his dignity. This was not an isolated event.
- [59] In mid-2022, Mr Amaning was called an “ effing k....r “ in an incident on the road. Mr Amaning traced the perpetrator, a man, by his number plate. He attempted to receive an apology. The perpetrator denied the accusation and Mr Amaning never received an apology.
- [60] Mr Amaning was copied on Mr Liebmann’s email of 25 August 2019. Mr Amaning did not dig deeper into it, merely assuming that what was referred to by Mr Liebmann was a statement made by Mr Ackerman like that commonly made by older White people, such as “ this country is going to the dogs. “

- [61] On 14 October 2022, Mr Wellman, speaking to Mr Liebmann and in the presence of Mr Amaning referred to Mr Ackerman's text message of 23 August 2019. On enquiry by Mr Amaning, Mr Wellman showed Mr Amaning the message. A wave of anger surged within Mr Amaning and a storm of emotion was ignited. Simultaneously, Mr Amaning felt sad at the persistent injustice and discrimination. Fear and anxiety gripped Mr Amaning. Mr Amaning felt alienated.
- [62] Mr Amaning also had to deal with a financial burden. Mr Amaning had undertaken to buy out Mr Ackerman's shares. Mr Ackerman thought that he was doing Mr Amaning a favour.
- [63] Mr Amaning will not be defeated by the incidents. He resolves to fight for understanding, tolerance and equality.

Mr Wellman's witness statement

- [64] Mr Ackerman never shies away from expressing his views. Mr Ackerman frequently adopted a disparaging tone, especially when addressing the topic of BEE.
- [65] Around 2018, Mr Ackerman's strident opinions began to display an increasingly disturbing racial undertone. In the years that followed, their relationship deteriorated due to Mr Ackerman's bigoted statements, sometimes placed on social media.
- [66] Mr Wellman speaks of his shock at the four incidents. It was no easy matter standing up to Mr Ackerman because of their business relationship and Mr Ackerman's being prone to litigation and having an aggressive demeanour.
- [67] In 2018, in an attempt to alleviate the mounting tension, Mr Liebmann reached out to Mr Ackerman. Mr Ackerman was dismissive and disrespectful, telling Mr Wellman "to tell that Jew boy not to flirt with me."
- [68] Mr Wellman did not send the text message of 23 August 2019 to Mr Amaning as he did not want Mr Amaning to be hurt.
- [69] During the time when the parties were splitting, Mr Ackerman patronizingly told Mr Amaning that "I am doing you a favour."

Mr Ackerman's witness statement

- [70] In Mr Wellman's letter of 30 September 2022, Mr Wellman wrote, as set out above, that he, Mr Wellman "sees no wrongdoing" by Mr Ackerman.
- [71] Mr Ackerman was used by Mr Liebmann and Mr Wellman as merely a funding instrument. Often, Mr Ackerman was at odds with Mr Liebmann and Mr Wellman over business. Mr Ackerman says that their company was used as a self-enrichment scheme. Mr Ackerman accuses Mr Liebmann and Mr Wellman of fraud.

- [72] Mr Ackerman denies the first incident. Mr Ackerman says that Mr Wellman asked Mr Ackerman for bridging finance after the alleged first incident. Mr Ackerman says that in the light of this request the complaints make no sense.
- [73] Mr Ackerman admits that he has said of Mr Liebmann that he only wants to enrich himself. Mr Ackerman denies using the words “f...ing Jew.”
- [74] Mr Ackerman speaks of the robbery at his house. He has no knowledge of having sent the text to Mr Wellman on 23 August 2019, shortly after the robbery. He says that “As a deeply religious man, I used the word K....r in the sense that it means disbeliever in God. It was not meant against any race, but only against those persons that committed the heinous crime against my family and our domestic worker, who I consider to be part of our family.” Mr Ackerman spells the k word with two f’s. Mr Ackerman was traumatised by the attack.
- [75] Mr Ackerman denies the fourth incident.
- [76] Mr Ackerman refers to his company’s BEE status, its employing 49 people “of colour” out of 75 people. He helps young persons with bursaries, including women and persons with disabilities. Mr Ackerman donates to charity.
- [77] Mr Ackerman is not a racist, nor does he hate Jewish people. Mr Liebmann has repeatedly called Mr Ackerman an “f...ing Dutchman.”
- [78] The complaints are laid in bad faith to divert attention from the self-enrichment scheme that the complainants are running and from the pending litigation.
- [79] The delay in raising the complaints and the requests for a donation and a loan evidence the falsity of the complaints.

Mr Wellman’s testimony

- [80] Mr Wellman was called to testify first. In evidence in chief, Mr Wellman confirmed the correctness of his witness statement.
- [81] The cross-examination of Mr Wellman was long and probing. Mr Wellman conceded that there had been friction in the business between the parties from about 2018. Mr Wellman conceded that after the first incident in January 2018 he requested a loan from Mr Ackerman for their business. Mr Wellman conceded that he did not immediately challenge Mr Ackerman at the first incident as he felt that he was in a difficult position as Mr Ackerman was at the time co-shareholder with Mr Wellman in Caleo and Mr Ackerman was also a client of Caleo. Mr Wellman conceded that he should have challenged Mr Ackerman straight away. Mr Wellman said that money is an enabler. Mr Wellman testified that because Mr Ackerman was stronger financially than Mr Wellman, Mr Wellman was reluctant to confront Mr Ackerman. Mr Wellman said that the k word can’t

come out unless it is already there.

Mr Amaning's testimony

[82] Mr Amaning confirmed the correctness of his witness statement.

[83] The cross-examination of Mr Amaning was long and severe. Mr Amaning spoke of the anger and hurt felt by him and Black people at the use of the k word. Mr Amaning said that if he had received Mr Liebmann's email of 25 August 2019, he did not act upon it as Mr Amaning was at that time off work for about a year. Mr Amaning and his wife had lost their son and their daughter was seriously ill in hospital. Had Mr Amaning been aware of the email and in a stronger position to deal with it, he would have dealt with it.

[84] Mr Riley suggested to Mr Amaning that Mr Amaning's entire witness statement is a fiction and that Mr Amaning is a racist. Mr Amaning held his dignity throughout.

[85] Mr Amaning emphasised that he sought not retribution but only a better society.

Mr Ackerman's testimony

[86] Mr Ackerman confirmed the correctness of his statement, subject to two minor changes. Mr Ackerman said that after the robbery, speaking with his wife, and later that evening with Mr Wellman, he used the k word, with one f, which he pronounced in court with the stress on the i rather than on the a, as in the infamous South African pronunciation. Mr Ackerman said that he was referring only to the perpetrators of the robbery, as non-believers. Mr Ackerman said that this was the first time in many years that he had used the k word.

[87] It is unusual for a witness to be evasive in examination in chief. Mr Riley asked Mr Ackerman when he had previously used the k word. Mr Ackerman evaded the question. Mr Riley tried again and Mr Ackerman said that the previous occasion was some forty years earlier, during interaction with his pastor when Mr Ackerman was being inducted into his church just after he had finished school. Mr Ackerman said that he could not remember sending the text of 23 August

2019. Mr Ackerman denied sending the text.

[88] In cross examination, Mr Ackerman was often evasive.

[89] Mr Ackerman said in cross examination and somewhat out of the blue that Mr Wellman must have used a fake Whatsapp to manufacture the texting between Mr Wellman and Mr Ackerman. There was no basis for this allegation.

Findings

- [90] Regarding the first incident, on or about 31 January 2018, it is most unlikely that the correspondence between Mr Liebmann and Mr Wellman was manufactured so as to create a basis for the present case. Everything about that correspondence points to genuine concern on the part of Mr Liebmann and Mr Wellman about the manner and speech of Mr Ackerman. It is probable that on 31 January 2018, Mr Ackerman used the k word to Mr Wellman as alleged.
- [91] I do not deal with the second incident of 3 October 2018 relating to Mr Liebmann and to his being Jewish as Mr Liebmann withdrew his claim.
- [92] Regarding the third incident on 23 August 2019, the evidence of Mr Ackerman is so far removed from the reality of everyday life in South Africa that it cannot be true. Mr Ackerman spelled the k word with two f's in his text of 23 August 2019. Mr Ackerman, on 24 August 2019 deleted his message of the day before and said that it had been made by him in an emotional state. If Mr Ackerman thought that his text was innocuous he need not have deleted it nor explained why he sent it. Mr Ackerman's use of the words " I might be seen as a racist " in his text on the day of the robbery at his house shows conclusively that Mr Ackerman used the k word in its infamous South African sense.
- [93] It is most unlikely in the circumstances that Mr Wellman would manufacture a false allegation about a text message which could easily be exposed as false by Mr Ackerman simply proving his text history.
- [94] It was argued for Mr Ackerman that the texts allegedly sent by Mr Ackerman had not been proved, apart from Mr Wellman's alleged dishonesty generally, for want of compliance with the provisions of the Electronic Communications and Transactions Act 25 of 2002.
- [95] Under section 1 " data " is defined as " electronic representations of information in any form. " Data message " is defined as "data generated, sent, received or stored by electronic means and includes—
- (a) voice, where the voice is used in an automated transaction; and
 - (b) a stored record "
- [96] Section 15 reads - "Admissibility and evidential weight of data messages.—(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence—
- (a) on the mere grounds that it is constituted by a data message; or
 - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of a data message must be given due evidential weight.
- (3) In assessing the evidential weight of a data message, regard must be had to—

- (a) the reliability of the manner in which the data message was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the data message was maintained;
 - (c) the manner in which its originator was identified; and
 - (d) any other relevant factor.
- (4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract. “

[97] The argument is in my view bad in law. Firstly, and assuming in favour of Mr Ackerman but without deciding the point, that the texts are not “ in its original form “ as contemplated in section 15(1)(b), the evidence of Mr Wellman that he received the texts from Mr Ackerman is clearly the “ best evidence that the person [Mr Wellman] adducing it could reasonably be expected to obtain.” It would be unreasonable to expect Mr Wellman to need to call an IT expert or experts to prove a chain of data, possibly involving data transfers when getting a new cellphone, when Mr Wellman could and did testify to something that he specifically remembered. Mr Wellman did not rely on the texts to jog his memory. The chances of the texts appearing randomly during a cellphone update are zero. There are only two notional possibilities. Either Mr Wellman is telling the truth or he is lying. In my view, he is telling the truth. Secondly, with the provisions of section 15(3)(d) in mind, the texts should carry significant weight as Mr Wellman and Mr Ackerman were well known to each other, they had communicated by text before and Mr Wellman knew precisely who was communicating with him. In the context of the case as a whole, particularly the events during and shortly after the robbery, the texts are proven and carry significant weight.

[98] Mr Ackerman said in evidence, implausibly, that he did not check his text history. He also, later in his evidence attempted equally implausibly to explain that he lost data when he upgraded his phone. It may well be that people sometimes lose data when upgrading but Mr Ackerman’s attempt to blame loss of data is undermined by his false evidence that he did not check his text history in the first place.

[99] Mr Wellman and Mr Amaning could easily and at no cost simply have exposed Mr Ackerman’s texts on social media. The consequences for Mr Ackerman would have been immediate and damning. Instead Mr Wellman and Mr Amaning chose the slower, more expensive route of court proceedings.

- [100] Regarding the fourth incident, around October 2021, it is common cause that at that time workers in a business of Mr Ackerman were on strike. It is probable that Mr Ackerman used the k word to Mr Wellman as alleged. Mr Ackerman's false evidence about the third incident hardly instils confidence in his evidence about the first and fourth incidents.
- [101] Both Mr Wellman and Mr Amaning made occasional minor mistakes of no consequence in their evidence. Mr Wellman and Mr Amaning seemed prepared readily to admit these errors when the correct facts were pointed out to them.
- [102] Mr Amaning is an honest person who not only has endured racism but has been put through an unpleasant court process to obtain justice. Mr Amaning remained dignified throughout his testimony, even when subjected to severe cross-examination.

The defence of private communication

- [103] It was argued for Mr Ackerman that the communications between Mr Ackerman and Mr Wellman were private and could not amount to hate speech as envisaged by section 10(1) of the Equality Act. Reliance was placed in particular on the judgment in Qwelane and on the judgment of the Supreme Court of Appeal in Afriforum NPC v Nelson Mandela Trust and others (371/2020) [2023] ZASCA 58 delivered on 21 April 2023.
- [104] In Qwelane, Justice Majiedt wrote for a unanimous court. In paragraph 116 of the judgment the learned Justice wrote:

"In contradistinction to the other verbs in the impugned provision – such as "publish"; "propagate" or "advocate" that all inherently require some form of public dissemination – "communicate" is capable of both being public and private. But, "communicate" in terms of section 10(1) plainly requires that the speaker transmits words to a third party – there must be communication, the transmission of information. And the conjunctive reading required here entails that "communicate" must be read in light of what appears in section 10(a)-(c). The concepts "promote" and "propagate" in (c) connote the dissemination of information and do not fit the notion of communicating in private. And on a reading that accords with section 39(2), one would – in any event – have to read "communicate" to mean communication that excludes private conversations."

- [105] Paragraph 117 of Qwelane reads:

"Our most private communications – and being able to freely communicate in one's private and personal sphere – form part and parcel of the "inner sanctum of the person" and are in the "the truly personal realm". This approach resonates with Canadian jurisprudence. I hasten to acknowledge that their jurisprudence must be understood in view of the fact that section 319 of the Canadian Criminal Code extends to private conversations. It is nonetheless useful to consider it with that caveat in mind."

- [106] Paragraph 118 reads:

"Hate speech prohibitions, even those that attach civil liability, should not extend to private communications, because that would be incongruent with the very purpose of regulating hate speech – that public hateful expression undermines the target group's

dignity, social standing and assurance against exclusion, hostility, discrimination and violence. Furthermore, the purpose of hate speech prohibitions is “to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination. It is improbable that most private conversations will have this effect.”

[107] Paragraph 119 reads:

“Ultimately, hate speech prohibitions are concerned with the impact and effect of the hate speech and protecting the public good; this is inevitably limited when communicated in the private sphere. Therefore, true hate speech presupposes a public dissemination of some sort, or at the very least it cannot be conveyed in mere private communications. Indeed, “the regulation of hate speech which occurs publicly sets a normative benchmark and has the potential to shape future behaviour”.”

[108] Paragraph 120 reads:

“This approach accords with the requirement of a constitutionally compliant interpretation in terms of section 39(2) of the Constitution. And this restrictive interpretation is justified on the basis of the eusdem generis canon of construction (of the same kind, class, or nature): when general words follow specific words in a statute in which several items have been enumerated, the general words are construed to embrace only objects similar in nature to the objects enumerated by the preceding specific words of the statute.”

[109] In my view, the words of Justice Majiedt as set out above were said in passing, Qwelane being a case about a widely disseminated newspaper publication. I am fortified in this finding by the words in paragraph 73 of the judgment in Afriforum referred to below. Be that as it may, the passages quoted from Qwelane do not assist Mr Ackerman.

[110] The present case concerns communications between two business associates, one of whom is participating by using the k word. It may be, and I make no finding thereon, that if Mr Ackerman had used the k word in communicating with his wife and daughter immediately after the robbery, or perhaps even before it, such communication might be considered to have been made within the “inner sanctum of the person “ as those words were used in paragraph 117 of Qwelane.

[111] Afriforum concerned a public display of the old South African flag. Justice Schippers spoke for the Supreme Court of Appeal. In paragraph 72 the learned Justice wrote:

“Afriforum relies on Qwelane for its submission that the high court erred in declaring private displays of the old flag as hate speech. The Constitutional Court stated that the concepts to ‘promote’, and ‘propagate’ hatred in s 10(1)(c) of the Equality Act ‘do not fit the notion of communicating in private’; and the word, ‘communicate’ in s 10(1) excludes private conversations. The Court went on to say that our most private communications form part of the ‘inner sanctum of the person’, which is in the ‘truly personal realm’ and are thus protected by the right to privacy. The prohibition of hate speech should not extend to private communications.”

[112] In paragraph 73 of Afriforum, Justice Schippers wrote:

“However, Afriforum’s reliance on these statements by the Constitutional Court, merely underscores the inappropriateness of deciding, in the present case, the question whether private displays of the old flag contravene the Equality Act. This however, is not to say that a private display of the old flag can never breach the provisions of the Equality Act. It is hard to see how a display of the old flag in the privacy of a home to which, for example, family members, children or young people are invited and indoctrinated in racism and white supremacy, would not entitle a person to institute proceedings in the Equality Court for an order that there has been a breach of the Act. But that is a case for another day.” (My emphasis.) These words were said in passing.

[113] Technically, it would be wrong to judge Mr Ackerman’s conduct regarding the first and third incidents against the law as it now stands. That would entail retrospective operation of the amended section 10(1). There is no warrant for such a reading. I would use the old section 10(1) as the yardstick against which to measure Mr Ackerman’s conduct relating to the first and third incidents. However, at least for present purposes the relevant part of section 10(1) is the same now as it was pre-amendment.

[114] The verbs “publish, propagate, advocate or communicate” are used in the old section 10(1) and in the amended section 10(1). I shall assume in favour of Mr Ackerman, but without making a finding, that the words used in the present case were not published, propagated or advocated in the sense of being publicly disseminated

as described in paragraphs 116 and 119 of Qwelane. I focus on the verb “communicate”.

[115] As Justice Majiedt said in paragraph 116 of Qwelane, “communicate” in terms of section 10(1) “plainly requires that the speaker transmits words to a third party.”

[116] There is no requirement inherent in the verb “communicate” that the offensive words be communicated widely. It is sufficient that one person be addressed. A person, intent on promoting hate speech might address one person at a time.

[117] In the present case, what Mr Ackerman did was precisely to expose Mr Amaning and all Black persons “to hatred and was likely to perpetuate negative stereotyping and unfair discrimination” as stated in paragraph 118 of Qwelane. In the same paragraph, it was stated that “It is improbable that most private conversations will have this effect.” (My emphasis). The use of the word “most” allows that in some cases, conversations or “communications” otherwise considered private would indeed have the effect feared. This seems to be the import of paragraph 73 of Afriforum.

[118] Taking my cue from Qwelane and Afriforum and taking a purposive approach to interpretation, I hold that the communications in the present case are sufficiently public “communications” for the purposes of section 10 (1) in that they do not fall within the “inner sanctum of the person”, which latter words I read as the kernel of the judgment in Qwelane on this point.

[119] On the facts of the present case, I would find it difficult to hold that the Legislature, the Constitutional Court in Qwelane and the Supreme Court of Appeal in Afriforum all meant to exclude from the ambit of section 10(1) of the Equality Act communications, such as those in context here, between two White business associates, one gratuitously using the k word. I would have thought that one of the purposes of the Constitution and the Equality Act would be to move any White persons who may still be in an apartheid comfort zone out of such a space. In effect, Mr Ackerman relied on what he assumed would be the like mindedness of Mr Wellman. This is precisely one of the assumptions that the Constitution and the Equality Act seek to displace.

[120] To interpret section 10(1) as suggested for Mr Ackerman would not be to “promote the spirit, purport and objects of the Bill of Rights” as required by section 39(2) of the Constitution.

[121] In AmaBhungane Centre for Investigative Journalism NPC and another v Minister of Justice and Correctional Services and others (Media Monitoring Africa Trust and others as amici curiae) and a related matter 2021

(4) BCLR 349 (CC), Justice Madlanga wrote for the majority of the Court in a case dealing with State interceptions of private communications. At paragraph 23 the learned Justice wrote:

“The interception and surveillance of an individual’s communications under RICA is performed clandestinely. By nature, human beings are wont – in their private communications – to share their innermost hearts’ desires or personal confidences, to speak or write when under different circumstances they would never dare do so, to bare themselves on what they truly think or believe. And they do all this in the belief that the only hearers of what they are saying or the only readers of what they have written are those they are communicating with. It is that belief that gives them a sense of comfort – a sense of comfort either to communicate at all, to share confidences of a certain nature, or to communicate in a particular manner. Imagine how an individual in that situation would feel if she or he were to know that throughout those intimate communications someone was listening in or reading them.”

[122] Paragraph 24 reads

“If there ever was a highly and disturbingly invasive violation of privacy, this is it. It is violative of an individual’s inner sanctum. In Hyundai Langa DP held that “privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings and less intense as it moves away from that core”. What I have typified – in so far as it relates to the sharing of intimate personal confidences – certainly falls within the “intimate personal sphere”. RICA allows interception of all communications. The sanctioned interception does not discriminate between intimate personal communications and communications, the disclosure of which would not bother those communicating. Nor does it differentiate between information that is relevant to the purpose of the interception and that which is not. In other words, privacy is breached along the entire length and breadth of the “continuum”. And this intrusion applies equally to third parties who are not themselves subjects of surveillance but happen to communicate with the subject. That means communications of any person in contact with the subject of surveillance – even children – will necessarily be intercepted.”

[123] I emphasise the following words of Langa DP in Hyundai quoted above:

“privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of life of human beings and less intense as it moves away from that core.”

[124] These words underline the need to differentiate between degrees of privacy, or put differently, where along a continuum an alleged right in a particular case sits.

[125] In the present case, the communications by Mr Ackerman to Mr Wellman cannot be said to be in the “intimate personal sphere” at least for the purposes of section 10(1).

[126] In *Bernstein and Others v Bester NO and Others* (CCT23/95)

[1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996), a case dealing with insolvency examinations, Justice Ackermann wrote, in paragraph 67:

“The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.” (My emphasis)

[127] It may be that the words of Mr Ackerman do not fall within the meaning of “publish, propagate or advocate” under section 10(1). I find however, that they do not enjoy protected privacy under section 14(d) of the Constitution and were not communicated from the “inner sanctum of the person”. They therefore fall within the range of words which may be “communicated” in section 10(1) of the Equality Act.

Remedy

[128] When the case was launched, an order was sought that Mr Ackerman pay R500 000 to the Ahmed Kathrada Foundation. Later, Mr Liebmann withdrew his complaint. I recognize the withdrawal of Mr Liebmann’s complaint. I do not attempt to place a value on Mr Liebmann’s withdrawn complaint for any purpose. In my view, the sum of R500 000 is fair, to the limited extent that money may right the wrongs of this case. Mr Ackerman is a relatively wealthy man who is unrepentant. This case is about equality and dignity, not money. Mr Ackerman may benefit from racial sensitization training and might embrace the society envisaged by our Constitution as a result of such training.

Costs

[129] Mr Amaning and Mr Wellman were put through the ordeal of an unpleasant hearing when all they sought originally was an apology and a recognition by Mr Ackerman of wrongdoing. A long, convoluted and dishonest defence was put up. Punitive costs follow.

[130] A new Rule 67A, relating to the scale of costs in a party and party bill became effective on 12 April 2024. See Government Gazette No 50272, R 4477 published on 8 March 2024. The new rule, as part of the Rules “Regulating the Conduct of the Proceedings of the Provincial and Local Divisions of the High Court” is not presently relevant, at least for the reason that my order is for attorney and client costs. See *Mashava v Enaex Africa (Pty) Ltd* (2022/18404)

[2024] ZAGPJHC 387 (22 April 2024) at paragraph 5. It is accordingly not necessary for me to determine whether or not Rule 67A applies to Equality Court costs.

Order

1. It is declared that Mr Ackerman, on or about 31 January 2018 and 23 August 2019 and during or about October 2021 used the k word when speaking to or texting Mr Wellman.
2. It is declared that this speech is unlawful hate speech, amounts to unlawful discrimination against Black people, including Mr Amaning and constituted unlawful harassment of Mr Wellman.
3. Mr Ackerman is to pay R500 000 to the Ahmed Kathrada Foundation.
4. Mr Ackerman is to make a public apology to Mr Amaning and Mr Wellman within five calendar days of the date of this judgment.
5. Mr Ackerman is to undergo fifty hours of racial sensitization training to be conducted by the South African Human Rights Commission or an institution or person nominated by it.
6. Mr Ackerman is to pay the costs of Mr Amaning and Mr Wellman on the attorney and client scale including those of counsel.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg sitting as an Equality Court.

HEARD : 22 – 25 January 2024 and 19 April 2024

DELIVERED : 10 May 2024

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