

SOUTH AFRICA / JUDGMENT

Arpin-Scholtz and Others v HH Durrheim (Pty) Ltd t.a Medipost Pharmacy and Another (EC2022/007843) [2024] ZAEQC 6 (12 December 2024)

[2024] ZAEQC 6

COURT

Equality Court

BEFORE

Malindi

CASE / FILE NUMBER

EC2022/007843

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REPUBLIC

OF SOUTH AFRICA

IN

THE EQUALITY COURT SITTING AT THE GAUTENG DIVISION

OF

THE HIGH COURT, PRETORIA

and

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

Number: EC2022-007843

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES

DATE: 12/12/2024
In
the matters between:-
LOUIS DE WET
ARPIN-SCHOLTZ
First Complainant
WILLEM JOHANNES
ARPIN-SCHOLTZ
Second Complainant
ATLAS KE NAKO
CHEMICALS (PTY) LTD
Third Complainant
HH DURRHEIM (PTY) LTD
T/A MEDIPOST PHARMACY First Respondent
LOUIS
SCHEEPERS
Second Respondent

JUDGMENT

MALINDI, J

Introduction

- [1] In *Qwelane v South African Human Rights Commission*[1] the Constitutional Court opened its judgment as follows:

“It is a truth universally acknowledged that “[t]o be hated, despised, and alone is the ultimate fear of all human beings”. Speech is powerful - it has the ability to build, promote and nurture, but it can also denigrate, humiliate and destroy. Hate speech is one of the most devastating modes of subverting the dignity and self-worth of human beings. This is so because hate speech marginalises and delegitimises individuals based on their membership to a group. This may diminish their social standing in the broader society, outside of the group they identify with. It can ignite exclusion, hostility, discrimination and violence against them. Not only does it wound the individuals who share this group identity, but seeks to undo the very fabric of our society as envisioned by our Constitution. We are enjoined by our Constitution “to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom”. (Footnotes omitted)

- [2] The complainants instituted proceedings in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act[2] (PEPUDA), and in terms of the prescribed manner, for a declaration that certain utterances constitute unfair discrimination, hate speech and harassment. An inquiry was conducted on 2, 3 and 4 December 2023 by hearing oral evidence from the complainants and the respondents and their respective witnesses. Preceding the inquiry, a pre-hearing meeting was held. Oral argument was presented on 11 December 2023 after written heads of argument were presented by both parties.

Background

[3] The background to the claim is that:

3.1 In terms of a written agreement dated 2 June 2021, Atlast Kenako

Chemicals (Atlast), the Third Complainant, operated a canteen on the premises of Medipost Pharmacy, the Second Respondent. The written agreement was backdated to coincide with the date the Third Complainant actually commenced to operate the canteen, namely 10 February 2021.

3.2 The written agreement expired on 28 February 2022 and Atlast

continued to operate the canteen in terms of a tacit or oral agreement, the terms whereof corresponded materially with those of

the written agreement.

3.3 During March 2022, there were complaints about the lack of hygiene and cleanliness of the canteen and when a patron found a cockroach in their stew purchased at the canteen, Mr Louis Scheepers, the Second Respondent, requested a meeting with Messrs Louis De Wet Arpin-Scholtz and Johannes Arpin-Scholtz, the First and Second

Respondents, respectively. Only the First Complainant attended the meeting which took place on 5 April 2022 in the First Respondent's

boardroom. Also in attendance, was the Respondent's responsible pharmacist, Ms Marelize van Biljon.

3.4 During that meeting, when the First Complainant questioned the decision of Medipost not to extend the contract of Atlast, the Mr Scheepers responded by telling the First Complainant (with reference to the First and the Second Complainants) that 'julle is sif'. It is the use of these words that is under an inquiry as to whether it connotes prohibited speech.

3.5 The Complainants contend that the words 'julle is sif'

('the impugned words') constitute hate speech as contemplated in Section 10(1) of PEPUDA. According to them, the word

'sif' is South African slang meaning disgusting, sickening or nasty. The Complainants allege that it also refers to

the syphilis disease which happens to be claimed as a sickness between homosexual men such as the First and Second Complainants. The Complainants state that, reasonably understood, the word 'sif' is an insult 'directly targeting them for being homosexual in similar fashion as words, for example, "moffie" or "queer" would be regarded'.

3.6 They allege that Mr Scheepers uttered these words in the presence of at least one other person who was seated in the adjoining office to the boardroom while the door was open. The Complainants each seek payment from the Respondents (jointly and severally) an amount of R150,000.00 representing the damages they had suffered as a result of the alleged contumelia.

3.7 The Complainants also contend that, as a consequence of the alleged hate speech, Atlast could not successfully negotiate the conclusion of a further contract with Medipost and that as a result they suffered damages in the amount of R5,500,000.00. The Complainants also seek payment of R500,000.00 representing damages it suffered as a result of Medipost's alleged breach of contract during the period 30 March 2022 to 5 June 2022.

3.8 The Respondents contend that the impugned words bear no connotation

to the slang associating being homosexual to being "sif", but were used to refer to the manner in which the Complainants

operated the canteen. They seek to have the Complainants' claims dismissed with costs, and that the Second Respondent's

Counterclaim for payment of R92,974.26 which Medipost contends is owing to it in terms of the contract that existed between Medipost

and Atlast succeed.

The Evidence

[4] Mr Louis Arpin-Scholtz testified that, because the canteen was infested with cockroaches, on 30 March 2022 Mr Scheepers instructed him and Mr Willem Arpin-Scholtz to vacate the canteen. This was to enable a pest controller to spray the canteen.

[5] At the request of Mr Scheepers, Mr Louis Arpin-Scholtz met with Mr Scheepers on Tuesday, 5 April 2022, in the Medipost boardroom. The meeting was also attended by Ms Marelize van Biljon who was employed as Medipost's responsible pharmacist.

5.1 It is common cause that Ms Van Biljon was already in the boardroom

when Mr Louis Arpin-Scholtz arrived. After he entered the Boardroom the door was closed. Scheepers joined thereafter and during the meeting Mr Scheepers told Mr Louis Arpin-Scholtz three times 'julle is sif'.

5.2 According to Mr Louis Arpin-Scholtz when these utterances were

conveyed to him this left him traumatised. He felt as if Mr Scheepers was telling him he should not be there, that he has syphilis and that, even though he is a married man, he sleeps around. In his view, these are attributes attached to homosexual men in a derogatory manner. He felt it was an insult directed at him and at Mr Willem Arpin-Scholtz.

5.3 These utterances made him despondent. They made him feel that there would be no use to negotiate a further extension of the contract. Mr Scheepers' words burned the bridge and he (Mr Louis Arpin-Scholtz) felt that they had reached the end of the road. The use of the word 'sif' was direct discrimination against him and Mr Willem Arpin-Scholtz. Although they needed the new contract, he could not see how they could continue where there was no mutual respect. In other words, he felt that it would be futile to pursue the extension of the contract when Mr Scheepers had already decided that it would not be granted to filthy homosexuals.

5.4 Mr Louis Arpin-Scholtz sought to quantify Atlast's damages

based on Medipost's sales figures for the period June 2021 to March 2023 and on the further basis that Atlast realised a nett profit equal to 45% of turnover.

5.5 Under cross-examination, Mr Louis Arpin-Scholtz conceded that Atlast has no documentation, financial statements or the like, to support his contention that Atlast did realise a nett profit equal to 45% of its nett turnover. He denied that that percentage was pure speculation when this was put to him.

5.6 It is common cause that Medipost required Atlast to provide it with a remedial plan to ensure that the canteen is operated in a clean and hygienic manner for Medipost to consider whether to extend the contract, and that Atlast failed to provide such a remedial plan. Mr Louis Arpin-Scholtz conceded that Medipost would not have agreed to a further agreement with Atlast in the absence of such remedial plan. The purpose of the meeting held on 5 April 2022 was to discuss the manner in which he and Mr Willem Arpin-Scholtz would manage the canteen in accordance with this plan.

5.7 He conceded that the word 'sif' may be used to describe the physical status of an object as filthy or disgusting but denied that Mr Scheepers used the word in that sense.

5.8 It was then put to him that when he first instructed Mr de Beer on 5 April 2022, he did not mention the alleged traumatic incident caused by Scheepers' use of the words 'julle is sif' otherwise, Mr de Beer would have made mention thereof in his email sent at 17:25 on that date.⁴ Louis A-S denied that he did not inform De Beer of that incident, however.

5.9 It was also put to Mr Louis Arpin-Scholtz that, if the Complainants

did understand Mr Scheepers' use of the words 'julle is sif' in the manner they allege, they would have instructed De Beer accordingly and the latter:

5.9.1 would have referred to the incident immediately in his email dated 5 April 2022 which was sent immediately after the incident occurred;

5.9.2 would not in his emails to Scheepers dated 8 April 2022, and on 28 April 2022 requested Scheepers to explain what Scheepers meant when he stated that 'Mr Louis Arpin is "sif";

5.9.3 would not have concluded his email to Scheepers dated 8 April 2022 with the following remark: ‘Our members are looking forward to an ongoing relationship with your company under this proposal in mind’; and

5.9.4 would in his email dated 14 April 2022 not have failed to refer to the alleged hate speech and trauma that was caused as a result.

5.10 Mr Louis Arpin-Scholtz conceded that the meeting on 5 April 2022 was held in private and when the words ‘julle is sif’ were used, the door was closed. He insisted that the walls of the Boardroom were not soundproof because he could hear Mr Scheepers talk outside before the meeting started.

5.11 He did not dispute that Atlast owes Medipost R92,974.26 as set out in the Medipost’s reconciliation. He agreed that the only issue that falls to be determined is whether the Court has jurisdiction to entertain Medipost’s counterclaim. In the heads of argument, the Complainants advanced an argument that a counterclaim should also be within the ambit of a contention of hate speech by the respondent. In my view, this argument is unsustainable as the Complainants advance a damages claim flowing out of the alleged hate speech. The respondents are therefore permitted to claim in counter on the same basis. In any event it had been agreed that the court has jurisdiction on the counterclaim.

5.12 Mr Willem Arpin-Scholtz’s evidence was very short. He was not in the meeting of 5 April 2022. He associated himself with Mr Louis Arpin-Scholtz’s understanding of the use of the impugned utterances.

5.13 An argument is advanced in the heads of argument and in oral argument that the court should have a broad overview of the circumstances that led to the state of the canteen, mainly regarding Medipost’s

own failures in adhering to its legislative and regulatory obligations. It is submitted that the Responsible Pharmacist, Ms Van

Biljon, required of her to ensure compliance with cleanliness and hygienic conditions of the canteen as it was part of the pharmacy

premises. The court would be overreaching if it went beyond the pleadings and sought to broaden the inquiry.

[6] The respondents tendered the evidence of Ms Pearson of Tsebo Cleaning Services. She was qualified as a specialist on cleaning and hygiene of health care services and catering services. She provided a statement to which she attached a report on the work done by Tsebo at Medipost on 5-15 April 2022. She confirmed the content of her witness

statement as true and correct.

- [7] Ms Pearson confirmed that when she first inspected the canteen during the end of March 2022, the canteen was extremely dirty. Cleaning commenced on 5 April 2022 and was completed on 15 April 2022 and required the combined effort of 30 employees.
- [8] Ms Pearson's evidence was not seriously contested during cross-examination. The court can only accept the state of the canteen as set out in the Tsebo report. The photographs provided a visual state of extreme filth for a canteen.
- [9] Mr Louis Scheepers' witness statement was tendered and he confirmed the content thereof as true and correct. He also testified that when he arrived at the Boardroom on 5 April 2022, the door to the Boardroom was open. He entered and then closed the door.
- [10] He confirmed that the purpose of the meeting was to discuss the filthy state of the canteen and to determine what steps the Complainants would take to remedy it. It was in that context that Mr Scheepers told Louis Arpin-Scholtz "julle is sif". By that he was referring to the manner in which Mr Louis Arpin-Scholtz operated the canteen. He testified that he has known the word 'sif' from school days and at university and that it means 'disgusting' or 'filthy'. He did not know that the word derived from the word 'syphilis'.
- [11] He further testified that because the boardroom was made soundproof, it is impossible if the door is closed, to hear conversations from outside the boardroom. The only reason why Mr Louis Arpin-Scholtz could overhear his conversation outside the boardroom, is because the boardroom door was open at that stage.
- [12] Mr Scheepers confirmed that because Atlast failed to provide Medipost with a remedial plan, he would not have agreed to negotiate a further contract with that entity.
- [13] Regarding Medipost's counterclaim, he confirmed that certain Medipost's Invoices remained unpaid and that they amounted to R92,974.26.
- [14] Ms Marelize van Biljon confirmed the contents of her witness statement as true and correct. She testified that when Mr Louis Arpin-Scholtz joined her in the boardroom on 5 April 2022, the door to the boardroom was open. When Mr Scheepers arrived, he closed the door and the meeting commenced.
- [15] The Complainants did not dispute Ms Van Biljon's version and she was not cross examined thereon.
- [16] Ms van Biljon confirmed that she understood the word 'sif' to mean 'extremely filthy' or 'extremely off'. In response to a question by the Court, she stated that she did not know that the word derived from the word 'syphilis'.

- [17] Ms Luthando Boikanyo sits in the office adjoining the boardroom. She confirmed the contents of her witness statement as true and correct. She testified that before the meeting started on 5 April 2022, the door to the boardroom was open. When Mr Scheepers arrived he closed the door and the meeting commenced. As a result of the door being closed, she could not hear what was said inside.
- [18] The Complainants did not dispute Ms Boikanyo's above version and she was not cross examined thereon.

Burden of proof

- [19] Section 13 of PEPUDA provides:

“(1) If the complainant makes out a prima facie case of discrimination-

- (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
 - (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.
- (2) If the discrimination did take place-
- (a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;
 - (b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair-
 - (i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and
 - (ii) unless the respondent proves that the discrimination is fair.”

Discussion

- [20] When Mr Louis Arpin-Scholtz was under cross examination it was put to him that if he and Mr Willem Arpin-Scholtz found the impugned utterances to constitute hate speech, discrimination or harassment, Mr De Beer, who represented the Complainants, would have mentioned this in his letters to Medipost and would not after 5 April 2022 have written in terms that still envisaged negotiations to extend or renew the contract. The latter assertion being a counter to his evidence that after the impugned utterances on 5 April 2022, he had become despondent about prospects of successfully negotiating a new contract. Mr De Beer had only referred to the impugned words in his letters of 8 and 28 April 2022 as an enquiry as to what Mr Scheepers meant thereby. The response to this enquiry was that the matter has been referred to Mediposts' legal services. No response was

received and these proceedings ensued.

- [21] These assertions do not take into account that the Complainants' primary objective was to secure this contract and their advisers would logically have steered away from being too antagonist towards Medipost and would have chartered a path towards successful negotiations. This criticism is not sufficient to suggest that the Complainants did not consider the utterances as a slur directed at them as a homosexual couple and that the slur was intended to correlate their sexuality which is considered filthy and disgusting with the filthy condition of the canteen.
- [22] Mr Scheepers' denial that he made the above correlation is not sincere. He testified that he knew from school and university about the word "sif". Mr De Beer properly put it to him that if his assessment of the state of the canteen was purely about its cleanliness and hygienic condition, he would have used any available everyday synonyms for dirty or filthy. Instead, he chose a word so closely related to a disease associated with being homosexual by its historic prevalence among male homosexuals. Dr Petrus Bekker, the Complainants' doctor, agreed with the historical perception of syphilis being considered a gay disease although medically it is a disease that afflicts all sexually active groups of people. His agreement with Mr Stoop, for the respondents, that the word "sif" also connotes filthy or disgusting does not detract from its primary reference to being infested with syphilis among the users of the slang.
- [23] Mr Scheepers became visibly uncomfortable when the deliberate use of the word was said to be an association with syphilis and homosexual sex. I find that he was not candid with the court in this regard. The fact that he had known all along that the Complainants are homosexual does not mean that he is immune from being homophobic in the manner that he displayed in the meeting of 5 April 2022 with Mr Louis Arpin-Scholtz. What is telling is that he directed the words at the Complainants as "You are filthy" as opposed to "The canteen is filthy."
- [24] Furthermore, by referring the enquiry about what Mr Scheepers meant by referring it to the legal services leads to the conclusion that he was aware that it connotes a slur against homosexuals. Had he have used the words as innocently as he purported in evidence he would have responded so.
- [25] Having said the above about Mr Scheepers' evidence on this aspect I proceed to discuss the law. Prohibited unfair discrimination is discrimination on the grounds of race, gender and disability. Prohibited hate speech is speech that is harmful or incites harm and which promotes or propagates hatred. Prohibition of harassment is a prohibition against the creation of an unbearable environment which is related to sex, gender, or sexual orientation; or a person's membership or presumed membership of a target group.
- [26] Hate speech is the publication, propagation, advocating or communication of words against any person that could reasonably be construed to demonstrate a clear intention to harm or incite harm or promote or propagate hatred.

- [27] Hate speech and harassment are not subject to determination of fairness. Section 14 provides criteria for determining fairness or unfairness in respect of unfair discrimination. However, the test is objective.
- [28] If the complainant makes out a prima facie case of discrimination, the respondent bears the burden of proof that the discrimination did not take place as alleged or that the conduct is not based on one or more of the prohibited grounds. If the complainant establishes that the discrimination did take place in terms of para (a) of the definition of “prohibited grounds” then it is unfair unless the respondent proves that it is fair.
- [29] Section 21 of PEPUDA provides for the powers of the Equality Court and the remedies to complaints under the Act. Section 21(2) empowers the EC to make an appropriate order including an order under paragraph (d) for:
- “an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the unfair discrimination, hate speech or harassment in question.”*
- [30] An appropriate order for hate speech that has given rise to impairment of dignity, pain and suffering or emotional and psychological suffering, is an order for the payment of damages.
- [31] Paragraph (o) of section 21(2) provides for an appropriate costs order. Regulation 12(2) provides that each party bears his or her own costs unless the presiding officer directs otherwise.

The Qwelane

Judgment

- [32] At first blush the remedy provided for in section 21(2)(d) may appear to be available to an individual who complains that prohibited speech in terms of section 10(1), being speech intended to be harmful or to incite harm or to promote or propagate hatred, directed at them avails the remedy in section 21(2)(d).
- [33] The final word on the interpretation of section 10(1) of the Act is that of the Constitutional Court in Qwelane having declared Qwelane’s offending statements made against the LGBT+ community to be harmful, and “to incite harm and propagate hatred; and amount to hate speech”.^[3]
- [34] Having excised “hurtful” from the prohibition against hate speech as a subjective feeling it concluded that the assessment of “harmful”, “inciting harm”, and “propagating hatred” are susceptible to only an objective reasonableness test.^[4] The test requires that a clear intention be reasonably construed when assessing section 10(1) in terms of section 14. The assessment must be through the eyes of an objective reasonable person, not considering mere inferences or assumptions made by the targeted group, but considering and relying on the facts and circumstances surrounding the expression or speech.

[35] It said at [96]:

“Before this Court, the parties debated whether the phrase “that could reasonably be construed to demonstrate a clear intention” postulates a subjective or objective test. In my view, it is plainly an objective standard that requires a reasonable person test. This is based on the gloss “reasonably be construed” and “to demonstrate a clear intention”, implying an objective test that considers the facts and circumstances surrounding the expression, and not mere inferences or assumptions that are made by the targeted group.”

[36] The Constitutional Court recognises that “the ultimate fear of all human beings” is to be hated, despised and alone “and, that expression can” denigrate, humiliate and destroy”.^[5] However, the Constitutional Court has held that section 10(1) requires that the alleged hate speech “plainly requires that

the speaker transmit words to a third party”.^[6] The speech or expression has to be a call upon a third party to act in concert with the speaker in causing harm, or inciting harm, or promote or propagate hatred against the group, and not spoken in private. It therefore does not suffice to institute proceedings in terms of section 10(1) of the Act if hate speech was directed only at the victim or recipient of the utterances. It has to be to third parties with the intention of inculcating similar hate as the speaker towards the group. Publication of words to third parties is therefore crucial.

[37] In rejecting the subjective test, the Constitutional Court said:

“Importantly, an objective standard gives better effect to the spirit, purport and objects of the Bill of Rights. On the one hand, if it were based on the subjective perception of the target group, it would unduly encroach on freedom of expression, since claims could be based on “a multiplicity of trivial actions by hypersensitive persons”. On the other hand, if it were based on the subjective intention of the speaker, the threshold for civil liability would be considerably higher than usual.”^[7]

[38] The Constitutional Court further said:

“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.”^[8]

[39] Hate speech prohibitions are concerned with the impact and effect or adverse consequences of the hate speech. Its purpose is to protect a “target group’s dignity, social standing and assurance against exclusion, hostility, discrimination and violence” and “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 ...”.^[9] Therefore section 10 of the Act does not avail an individual

against whom hate speech is directed but to a target group or broader societal well-being. As the Constitutional Court said:

“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”[10]

- [40] Accordingly, “[e]xpressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech. ... the prohibition of hate speech is not aimed at merely offensive speech, but that offensive speech is protected by freedom of expression”.^[11]
- [41] In this case the complainants allege publication or dissemination of the alleged hate speech to a secretary who was sitting in an adjoining office to the boardroom where Mr Scheepers uttered the offensive words to Mr Louis De Wet Arpin-Scholtz (the first complainant). It is alleged that the door of the office that leads to the boardroom was open and Ms Boikanyo was sitting therein. Mr Scheepers denies that the door was open after he entered the boardroom. He further testified that the partitioning walls of the boardroom have been made soundproof and that with the door between the adjoining office and the boardroom closed, a person outside the boardroom would not hear what is discussed in the boardroom.
- [42] Ms Boikanyo also testified and denied having heard the utterance, and confirmed that she was not sitting in her office at the time but entered it after the boardroom door had been closed and that speech from the boardroom does not permeate to her office.
- [43] There is no reason to reject the denials of Mr Scheepers and Ms Boikanyo. Mr Louis Arpin-Scholtz could not testify positively that Ms Boikanyo heard the utterances. As stated by the Constitutional Court, inferences and circumstantial factors are not to be taken into consideration when assessing whether speech is hateful, and as such it cannot be for consideration in assessing whether factually Ms Boikanyo heard the alleged hate speech. In any event even if she heard these offensive words they were not directed at her to hear and were not meant as a call to her to hold the complainants in contempt, disdain and to bring about adverse consequences against them, hostility, discrimination and violence.
- [44] In regard to claims 1 and 2, the complainants allege discrimination on the grounds of sexual orientation, the consequences of which was the Respondent’s refusal to renew their contract. The established reason for the non-renewal of the contract and the collapse of negotiations in contemplation of renewal was that the canteen was cockroach infested as a result of general grime and filth. The respondents demanded a remedial plan from the complainants which was due on 5 April 2022 and was not available at the meeting on the day. The complainants allege that as a result of the offensive words being uttered they saw no point in further negotiations. They became despondent. They lost hope or courage that there would be constructive negotiations as a result. It would be speculative to conclude that

a new contract would have been entered into if the offensive words were not uttered. The complainants would still remain with not being able to provide a remedial plan. It is therefore open

to conclude that it was as a result of hate speech or harassment that the contract was not entered into.

[45] It was known by both the respondents that the complainants are homosexual and their sexuality had never been an issue. Mr Scheepers' utterances do not fall within the definition of harassment, which is:

“harassment” means 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 –

- (a) sex, gender or sexual orientation; or
- (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;”

[46] The utterances were not aimed at driving them out through hostility or intimidation. Their contract had already expired and were in the process of renewing it or acquiring a new contract. Nor were they calculated to induce submission to any demands. Harassment on the grounds of sexual harassment is not available to the complainants either.

[47] It would be hard for the complainants to show that their contract was not being extended or renewed on the grounds of discrimination. They had already enjoyed a business relationship with Medipost for a few years and do not complain of discrimination in those years. Discrimination is defined as:

“discrimination” means 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;”

[48] There is no evidence that Medipost or Mr Scheepers did anything by his utterances that imposed burdens, obligations or disadvantages on the complainants on the basis of their sexual orientation or that the opportunity to extend the contract was withheld for this reason. There is no causal link between the utterance and the non-extension of the contract.

[49] Claims 1 and 2 are also bound to fail.

Costs

[50] Although regulation 12(2) provides that each party bears his or her own costs in proceedings in the equality court, it goes further to state that it is so “unless the presiding officer directs otherwise”. Furthermore, section 21(2)(o) provides that an appropriate order as to costs may be made in the circumstances. The major component of this inquiry, or at least in value of the claims, constituted a damages claim. The engagement of senior counsel was justified. The Complainants failed woefully to support their claim. In as far as this component is concerned, section 21(2) provides that this court’s order has the effect of an order made in a civil action. There is no reason why a costs order should not follow the result. The appropriate scale for engaging senior counsel in a complex matter will apply.

Order

[51] Therefore, the following order is made.

1. Claims 1, 2 and 3 of the application are dismissed.
2. The complainants are to pay the respondent R92 974.26 in terms of the counterclaim, jointly and severally, the one paying and the other to be absolved.
3. The complainants are to pay the costs of the application jointly and severally, the one paying and the other to be absolved, including the costs of counsel at C scale.

MALINDI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard on:

2, 3 and 4 October 2023

Oral Argument:

11 December 2023

For the Applicants:

Reyno Dawid De Beer a member of Liberty Fighters

Network

For the Respondents:

Adv BC Stoop SC

Instructed by:

Couzyn Hertzog & Horak Attorneys

Date of Judgment:

12 December 2024

- [1] 2021
- (6) SA 579 (CC) at [1]
- [2] Act 4 of 2000
- [3] Order: para 2(d)
- [4] at [101], [96], [100], [150]
- [5] at [96], [100]
- [6] at [116]
- [7] at [99]
- [8] at [118]
- [9] at [118]
- [10] at [119]
- [11] at [103]
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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/arpin-scholtz-and-others-v-hh-unknown-topic-aeqc-2024--6a3ea51e3b1caa91298147f2>

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