

SOUTH AFRICA / JUDGMENT

Isimangaliso Wetland Park and Another v Sodwana Bay Guest Lodge and Another (01/2017) [2018] ZAKZDHC 60 (30 November 2018) [2018] ZAKZDHC 60

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Steyn, Ploos van Amstel

CASE / FILE NUMBER

01/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO. 01/2017

REVIEW

OF THE EQUALITY COURT FOR THE DISTRICT OF UBOMBO

HELD

AT UBOMBO

In

the matter between:

ISIMANGALISO
WETLAND
PARK FIRST
APPLICANT
DEPARTMENT
OF
TOURISM SECOND
APPLICANT
and
SODWANA
BAY GUEST
LODGE FIRST
RESPONDENT
ENKI

ANDRE M
SLADE SECOND
RESPONDENT

JUDGMENT

Delivered on 30 November 2018

STEYN J (PLOOS VAN AMSTEL J CONCURRING)

- [1] This matter has been referred to us in terms of s 23(5)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the 'PEPUDA')[1] on review by the magistrate for the district of Ubombo, who heard the matter in terms of PEPUDA in the Equality Court for the district of Ubombo.
- [2] Some time has lapsed since the matter was originally sent on review to the Pietermaritzburg High Court. On 14 August 2018 Van Zyl J returned the review with the following remarks:
- '1. I have been asked by the Office of the Registrar in Pietermaritzburg to advise upon the procedural course to be adopted in placing this matter for review before two Judges in compliance with the memorandum of 31 July 2018 by Koen J.
2. The matter originates from the Magistrate at Ubombo, sitting as the Presiding Officer in the Equality Court and who referred the matter for review in terms of s 23(5)(a) of The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the PEPUDA Act).
3. The section provides that where a review falls into the designated category where it is required to be sent upon review, then that it should "...in the prescribed manner, be submitted to the High Court having jurisdiction for review".
4. The prescribed manner for the submission of reviews presumably equates to the manner in which reviews are submitted for consideration in criminal matters in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA) and which provides for a reviewable matter to be "subject in the ordinary course to review by a judge of the provincial or local division (of the High Court) having jurisdiction".
5. The magisterial district of Ubombo falls within the area of jurisdiction of the High Court of South Africa, KwaZulu-Natal Division, Durban, but the KwaZulu-Natal Division, Pietermaritzburg, being the main seat of the Division, has concurrent jurisdiction in respect of all districts.
6. However, as I understand the position, the "Division" which would "in the ordinary course" consider reviews from the Ubombo district would be the High Court of South Africa, KwaZulu-Natal Division, Durban, which is presumably why the Presiding Officer referred the review to "the Durban High Court" (at record page 230, line 10).

7. I am accordingly of the view that it would be preferable to deal with matters of this nature at the venue where a review from the relevant magisterial district (here Ubombo) would normally be dealt with, save that it be placed for consideration before two Judges of the Division.’
- [3] In compliance with the remarks, two copies of the record were prepared by the clerk of the Equality Court and re-submitted to Durban High Court for the review by two Judges. Whilst I am not in agreement with Van Zyl J’s view regarding the interpretation of the division, since both High Courts enjoy concurrent jurisdiction, it would have served no purpose to delay this matter any further. I am however in agreement that the review should be considered by two Judges as remarked by Koen J on 31 July 2018.

Parties

- [4] The parties before the court a quo were as follows:
- (a) A public entity, the iSimangaliso Wetland Park, the first applicant;
 - (b) The Department of Tourism, the second applicant;
 - (c) The respondents were firstly, the Sodwana Bay Guest House, situated at Sodwana Bay and secondly, the owner of the aforesaid guest house, Mr Slade.
- [5] The applicants laid a complaint in terms of s 20 of PEPUDA read with reg 6(1) of the Act.[2] It was contended by the applicants in the court a quo that certain remarks made by the second respondent contravened ss 9[3] and 10[4] of the Constitution of the Republic of South Africa, 1996 and ss 6, 7 and 10 of PEPUDA. The second respondent represented himself in the proceedings before the court a quo whilst the two applicants were assisted by the Human Rights Commission acting in terms of s 20(1)(f) of PEPUDA. The second respondent elected to represent himself at the enquiry.

The law

- [6] Before I turn to the proceedings before the court a quo it is necessary to look at the applicable law that impacts on matters of equality. In *South African Police Service v Solidarity obo Barnard*[5] Moseneke ACJ said:

‘Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more than record or confer formal equality.’

(Footnotes omitted. My emphasis.)

- [7] Van der Westhuizen J in support of the majority judgment in *Barnard supra*, succinctly placed the emphasis on human dignity in the consideration of race. At paras 172 and 173:

[172] Philosophical thinking on human dignity by, for example, Immanuel Kant has influenced this court's jurisprudence, including the emphasis that "human worth is impaired when persons are treated, not as ends in themselves, but as mere objects". Human dignity is not only concerned with an individual's understanding of her self-worth, but more broadly affirms the inherent – and equal – worth of all human beings. The recognition of this right represents a break from a past which systematically denied the dignity of most South Africans. Because the right to human dignity affirms the intrinsic worth of every person, it is foundational to several other rights in the Bill of Rights. The right to and value of dignity therefore also inform constitutional interpretation and adjudication at multiple levels.

[173] The value of the individual is safeguarded in our jurisprudence. Every person should be treated as an end in herself and not as a means to an end only. This is what blunt utilitarianism would allow. The concept of dignity also concerns an individual's sense of self-esteem, and encompasses the idea that one is permitted to develop one's talents optimally.[6]

(Footnotes omitted. My emphasis.)

In my view it is necessary to underline the concept of dignity in consideration of this matter. Not only does s 9(1) of the Constitution recognise equality before the law, s 10 recognises that everyone has inherent dignity and has the right to have their dignity respected and protected. Dignity concerns the status of human beings and their value in life.[7] Some scholars contend that by upholding dignity one believes that all human beings have an intrinsic value and that every person, regardless of rank or importance, is entitled to consideration.[8] Racial discrimination and racial prejudice effectively disregards the right of every citizen to be fundamentally equal and to receive

dignified treatment irrespective of their race or gender. The importance of the right to dignity in a constitutional framework was eloquently defined by O'Regan J in *Dawood and Another v Minister of Home Affairs*:[9]

[T]he Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs

the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional

value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.[10]

[8] Recently, the Department of Justice and Constitutional Development has attempted to combat racism and racial discrimination by adopting a draft National Action Plan which is aimed at building a non-racial, non-sexist society based on the values of human dignity, equality and the advancement of human rights and freedom.[11] The draft contains a definition of racial discrimination, which reads:

‘Racial discrimination: 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.’

[9] In evaluating the proceedings before the court a quo, I am mindful of the direction given by the SCA in *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, & others (No 2)*[12] para 29:

‘As will become apparent in due course, the Equality Court is important in meeting these objectives and in particular in determining whether discrimination has occurred and if so, whether it is unfair.’

In order to understand the guidance given by the SCA it is necessary to consider the objectives of PEPUDA as listed in s 2.[13] What was expected of the magistrate was to fulfil the aims listed in the section, determine whether the conduct complained of took place, and if so, then decide whether it is discriminatory in nature and whether it was unfair. At the enquiry it is expected of the presiding officer to apply the principles as per s 4 of PEPUDA and to act within the rules of an equality court as stipulated in s 19 of PEPUDA and exercise the powers and functions as provided for in terms of s 21 of PEPUDA read with the various regulations that are applicable.

The offending conduct

[10] The applicants complained of the following offending remarks that were made:

(a) An email that reflected the following:

‘We do not accommodate blacks or government employees any longer

Sodwana Bay Guest House

Enki Andre M Slade

The Book of Revelation 10. . .’

(b) The second complaint relates to discriminatory comments that were made in an interview by the second respondent and to a presenter of ‘Vuma FM’:

‘1. We work according to Gods law and according to Gods law, we have to have some sort of segregation between the creation that he left here. . .the law you have in South Africa is Satan’s law.

2. Black people were servants and the Bible made it very clear. . .his Bible said he could not mix with another race. . .
3. We do not have the same blood, skin, hair and there are about 300 differences between you and me. . .
4. You are classified in the Bible as an animal, you are not homosapien.
5. Black people were not people. . .’

[11] At the equality enquiry the former CEO of Isimangaliso Wetland Park as well as the Chief Director of the Department of Tourism testified in support of the complaints. The owner of the Sodwana Guesthouse, second respondent, testified in opposition of the complaints and he called two witnesses supporting the various utterances as justified. After hearing all the evidence, the court concluded that the utterances were discriminatory and made an award. The respondents thereafter elected to exercise their right to make written representations to the review court.

[12] The representations were furnished to the clerk of the Equality Court and placed before us for consideration. The findings of the magistrate are inter alia challenged by the respondents on the following grounds:

- (a) That the enquiry was not dealt with in the prescribed manner;
- (b) That the presiding officer erred in his judgment since he failed to understand the religious contentions;
- (c) That the court failed to sufficiently recognise the respondents’ right to human dignity, freedom and equality;
- (d) That insufficient recognition was given to s 16[14] of the Constitution that justifies the respondents’ conduct; and
- (e) That the order issued by the court a quo is unlawful and unfair. It punishes ‘the Son of God for doing His work, for being a witness of the truth’.[15]

[13] In the representations, the second respondent joined the manageress of the guest house as the first respondent, despite the fact that she was not a party to the proceedings. She was however called as a witness by the second respondent. In this review I shall deal with the parties as they were cited in the papers and not as the respondents wish them to be.

The proceedings before the Equality Court

- [14] The proceedings before the Equality Court, in my view, cannot be criticised for not being in accordance with the prescripts of the Act. The judgment of the learned magistrate shows that the evidence was duly evaluated and that the provisions of PEPUDA were correctly observed and adhered to. The respondents failed to persuasively challenge it on any misdirection of fact or law. The learned magistrate based his decisions on the evidence before court and applied the applicable legal principles to the case.
- [15] The respondents submitted that the court a quo failed to follow the procedure as required in terms of PEPUDA and that they were denied their constitutional right to present evidence. This complaint should be considered and measured against reg 10 read with s 4 of the Act. In my view the presiding officer complied with the said provisions and fairly adjudicated the matter. The second respondent was given the opportunity to call witnesses and he elected to call firstly, Katarina Krizaniova his 'wife' in order to give reasons for making the racial statements and secondly, Silindile Mthiyane, an employee of his, in support of his case. After the testimony of the two witnesses, the second respondent confirmed that he had no more witnesses to call and closed his case.
- [16] The matter was then adjourned until 22 November 2017 to be argued. Inasmuch as the matter was adjourned until 13 February 2018, the second respondent requested to hand in a written document authored by his 'wife', which forms part of the record.[16] Having considered the proceedings I am of the view that the magistrate did not close the case of the respondents nor were either

party deprived of an opportunity to present their case. There is absolutely no merit in this submission.

- [17] Another issue is that the presiding officer ignored the respondents' right to freedom of expression when he considered the conduct of the respondents, more specifically the remarks uttered by the second respondent. The judgment shows that the court was alive to the right of expression and the limitations thereof:

'However if such freedom of expression incites violence or hatred, and is based on, amongst others, race and religion, and which incites harm, then he is deprived of the protection offered by section 16(1). Section 16(2)(b) and (c) will offer the resistance to such freedom of expression.

Remarks such as:

"... Blacks are not regarded as human beings but animals

... they are uncivilised

... Blacks were servants

... Whites are children of God but not Blacks

... their birth is rate uncontrollable and they are responsible for high rate of crime such as rape and murder of white farmer's"

amounts to Hate Speech in terms of section 10 of the Equality Act.

Stir up emotions of hatred between Blacks and Whites and are catalysts for the incitement of violence not only towards him but also towards innocent whites' amongst whom, are those who fought for freedom which we so dearly enjoy today.

He went to great lengths to justify his discrimination against the Blacks by comparing the many physical characteristics and attributes

that exists between the brain sizes, cubic capacity of the brain, blood type, bone density, different bodily features etc. The

conclusion reached by the respondents is that a black person has limited mental intellect.'[17]

And

'Mr Slade did not provide this court with any scientific evidence to authenticate or to back up his research other than to refer this court to certain verses of his Bible or Tora which he interpreted to suite his dogma. This is contrary to the moral and ethical principles of humanity.

By not regarding Blacks as human beings but as animals, he strips them bare of their dignity and falls outside the protection of the Constitution and are contravention of section 10 of the Equality Act as it relates to Hate Speech.'[18]

[18] After an evaluation of all of the evidence the magistrate concluded that the utterances were made and constitutes:[19]

- (a) Unfair discrimination on the ground of race as defined in terms of s 9 of the Constitution and ss 6 and 7 of PEPUDA.
- (b) Hate speech as defined in s 10 of PEPUDA.
- (c) Impairment to the human dignity of Blacks and Government employees in terms of s 10 of the Constitution.

The respondents failed to show that the conduct which is discriminatory in nature was fair, as is required in terms of s 14(2) of PEPUDA.[20]

[19] Pursuant to the aforesaid findings, the court made the following order:

'1. In terms of section 21(2)(e) of the Equality Act, I order that Mr Slade to pay an amount of R50 000 as damages in the form of an award to Mpilonhle, a non-profitable organisation based at Mtubatuba, which is dedicated to identifying and implementing innovative solutions for the health and social problems faced by the youth of South Africa. The amount is payable within 60 days from date hereof. The Clerk of the Court to provide Mr Slade with the necessary particulars regarding the Organisation.

2. In terms of section 21(2)(f) you are ordered to remove all materials from your website which are discriminatory and demeaning to Blacks and which has racial undertones as they are open to the public domain and have the potential of propagating further discrimination and hurt.
3. You are also ordered to stop distributing or publishing any material which discriminates, incites hatred, demeans, embarrass, and humiliates Blacks in general.

You are accordingly ordered to stop distribution and further publication of your book titled “Where to from here, Cognition” as its content contravenes the provisions of section 12 of the Equality Act as certain Chapters of the book discriminates against Blacks.

4. The publisher of this book viz Xlibris is ordered not to publish or distribute the said book in South Africa. The Clerk of the Court is to serve the copy of the court order on the Publisher, Xlibris.
5. I also direct the Film and Publication Board of South Africa to monitor the publication, distribution and possession of the book:-

“Where to from here, Cognition” thus ensuring that the book does not surface within the borders of South Africa. The Clerk of the Court to serve a copy of this order on the said Board.’[21]

- [21] The magistrate considered the relief sought by the applicants and was clearly of the view that a higher amount for damages should be awarded in the light of the extreme racist views of Mr Slade.[22] I agree with the sentiments of the magistrate but am mindful that Mr Slade terminated the guesthouse on 27 June 2016 which appeared to have been his sole income. As much as the proceedings of an Equality Court are sui generis to a certain degree, it has many features of civil litigation and based on the civil litigation norm I would also have granted an order that conforms with the relief sought by the applicants.
- [22] In my view, the proceedings were in accordance with justice. The relief sought by the applicants for the violation of the said rights is not unjust when the nature of the conduct of the second respondent and his lack of remorse is taken into account. As much as the Constitution in terms of s 15(1)[23] recognises the right to religious freedom, it does not grant the right to discriminate against other human beings in the name of such a belief system.[24] Simply put, the right to religion and freedom of association cannot be used as tools to destroy the right to equality and human dignity. The respondent’s biblical beliefs that blacks are inferior to whites, less intellectual than whites and less human than whites are not only demeaning in the extreme but is without any substance. The conduct of the second respondent can never be tolerated in an equalitarian, democratic society based on human dignity.[25] Such tolerance, in my view, was emphasised in *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae) Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*: [26]

‘A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are.

To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality.

Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference and acceptance of difference. At the very least, it affirms that difference

should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings

(genetic and sociocultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.’

(Original footnotes omitted, my emphasis.)

[23] Accordingly the judgment and order made by the magistrate on 13 February 2018 are hereby confirmed.

STEYN J

PLOOS VAN AMSTEL J

[1] Section 23(5)(a) reads: ‘If a presiding officer in a magistrates’ court makes a determination relating to a ground of discrimination referred to in paragraph (b) of the definition of “prohibited grounds”, the decision must, after the finalisation of the proceedings and in the prescribed manner, be submitted to the High Court having jurisdiction for review.’

[1] Section 23(5)(a) reads:

‘If a presiding officer in a magistrates’ court makes a determination relating to a ground of discrimination referred to in paragraph (b) of the definition of “prohibited grounds”, the decision must, after the finalisation of the proceedings and in the

prescribed manner, be submitted to the High Court having jurisdiction for review.’

[2] Section 20(1)(f) provides for the South African Human Rights Commission to institute proceedings in terms of PEPUDA.

[3] Section 9 of the Constitution reads: ‘9. Equality –

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) 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.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

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- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) 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.

[5] Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

[4] Section 10 of the Constitution reads: ‘10. Human dignity. – Everyone has inherent dignity and the right to have their dignity respected and protected.’

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[5]South African Police Service v Solidarity obo Barnard 2014

(6) SA 123 (CC) para 28.

[6] Also see para 176 that reads: ‘Dignity is connected to equality. This court has held that unfair discrimination is constitutionally unacceptable, because it involves treating people “differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity”. We care about equality – both formal and substantive – because we recognise the equal and inherent worth of all human beings. Apartheid was more than discrimination – it was the systemic denial of human dignity.’ (Footnotes omitted)

[6] Also see para 176 that reads:

‘Dignity is connected to equality. This court has held that unfair discrimination is constitutionally unacceptable, because it involves treating people “differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity”. We care about equality – both formal and substantive – because we recognise the equal and inherent worth of all human beings. Apartheid was more than discrimination – it was the systemic denial of human dignity.’ (Footnotes omitted)

[7] For a discussion of the right, see Constitutional Law of South Africa 2nd ed Juta (2014) Vol 3 at chapter 36.

[8] See S Liebenberg ‘The Value of human dignity in interpreting socio-economic rights’ SAJHR (2005) 21 at page 31 and T Soutphommasane ‘Race, dignity and the responsibility of lawyers’ speech given at the Wellness for Law Conference,

University of Adelaide Law School (16 February 2017) <https://www.humanrights.gov.au/news/speeches/race-dignity-and-responsibility-lawyers>

accessed on 30 August 2018. For a discussion of the multifaceted meanings of the right, see D Davis ‘Equality: The Majesty of Legoland Jurisprudence

(1999) 116 SALJ 398 at 413.

[9]

[2000] ZACC 8; 2000 (3) SA 936 (CC) at para 35.

[10] At 961F to 962B.

[11] The Department of Justice and Constitutional Development “National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2016 – 2021) - Draft for public consultation” <http://www.justice.gov.za/docs/other-docs/nap.html> accessed on 30 August 2018.

[12] *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, & others (No 2)* 2009

(6) SA 589 (SCA).

[13] Section 2 provides: “The objects of this Act are –

(a) to enact legislation required by section 9 of the Constitution;

(b) to give effect to the letter and spirit of the Constitution, in particular –

(i) the equal enjoyment of all rights and freedoms by every person; (ii) the promotion of equality; (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution; (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

(v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16 (2) (c) of the Constitution and section 12 of this Act;

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the

grounds of race, gender and disability;

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming

unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been

infringed;

(g) to set out measures to advance persons disadvantages by unfair discrimination;

- (h) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.’

[13] Section 2 provides:

‘The objects of this Act are –

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- (b) to give effect to the letter and spirit of the Constitution, in particular –
 - (i) the equal enjoyment of all rights and freedoms by every person;
 - (ii) the promotion of equality;
 - (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
 - (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
- (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16 (2) (c) of the Constitution and section 12 of this Act;
- (c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;
- (d) to provide for procedures for the determination of circumstances under which discrimination is unfair;
- (e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;
- (f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;
- (g) to set out measures to advance persons disadvantages by unfair discrimination;
- (h) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.’

[14] I consider it necessary for purposes of this review to quote the section in full since the second respondent claims that this section gives him the right to make these statements. Section 16 reads: '16. Freedom of expression. – (1) Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
- (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

[14] I consider it necessary for purposes of this review to quote the section in full since the second respondent claims that this section gives him the right to make these statements. Section 16 reads:

'16. Freedom of expression. – (1) Everyone has the right to freedom of expression, which includes –

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- (2) The right in subsection (1) does not extend to –
- (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

[15] See record at 232 to 241.

[16] See record at 198 to 206.

[17] See record at 221 to 222.

[18] See record at 223.

[19] See record at 227.

[20] Section 14(2) of PEPUDA reads: 'In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

- (a) The context;
- (b) the factors referred to in subsection (3);
- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectivity determinable criteria, intrinsic to the activity concerned.' See MEC for Education, KwaZulu-Natal and Others v Pillay [2007] ZACC 21; 2008 (1) SA 474 (CC) at para [40] how claims under PEPUDA should be considered.

[20] Section 14(2) of PEPUDA reads:

'In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

- (a) The context;
- (b) the factors referred to in subsection (3);
- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectivity determinable criteria, intrinsic to the activity concerned.'

See MEC for Education, KwaZulu-Natal and Others v Pillay [2007] ZACC 21; 2008 (1) SA 474 (CC) at para [40] how claims under PEPUDA should be considered.

[21] See record at 229 to 230.

[22] At 229, the following was said: 'The Applicants also seek an order that Mr Slade pay an amount of R50 000.00 to Mpilonhle, a non-profitable organisation based in Mtubatuba. I am surprised that such paltry amount is asked for in view of the extreme racist's views that Mr Slade hold of Blacks. I would have awarded an amount of between R150 000 to R200 000 as damages but I am confined to the amount that the applicants ask for.'

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[24] See *Islamic Unity Convention v Independent Broadcasting Authority*

[2002] ZACC 3; 2002 (4) SA 294 (CC) at para 32 where Langa DCJ, as he then was, held: 'Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.'

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[25] See *Harksen v Lane NO & others*

[1997] ZACC 12; 1998 (1) SA 300 (CC) paras 42 to 54 for an analysis of equality jurisprudence. Also see *Hoffmann v South African Airways* 2001

(1) SA 1 (CC) at para 27 where the court held: 'At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated

against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated

against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim.'

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[26]

[2005] ZACC 19; 2006

(1) SA 524 (CC) at para [60].

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