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“What constitutes hate speech?” – the equality court answers

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On 5 October 2018, Sutherland J handed down an important judgment in the discourse of what constitutes hate speech in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“Equality Act”). In this matter, the South African Human Rights Commission (“Commission”), represented in this instance by the pro bono department of Werksmans Attorneys, referred a complaint against Velaphi Khumalo (“Khumalo”) to the Johannesburg High Court (sitting as an Equality Court). The principle issue before the Court was whether or not certain statements made by Khumalo on social media constituted hate speech as defined in section 10(1) of the Equality Act.

On the morning of 4 January 2016, Khumalo made two controversial statements. His first statement, which was widely publicised, reads:

“I want to cleans (sic) this country of all white people. we must act as Hitler did to the Jews. I don’t believe any more that the (sic) is a large number of not so racist white people. I’m starting to be sceptical even of those within out Movement of the ANC. I will from today unfriend all white people I have as friends from today u must be put under the same blanket as any other racist white because secretly u all are a bunch of racist fuck heads. as we have already seen (sic).”

His second statement, which followed a few hours later (and was seemingly not as widely publicised as the first statement), reads:

“Noo seriously though u oppressed us when u were a minority and then manje [now] u call us monkeys and we suppose to let it slide (sic). white people in south Africa deserve to be hacked and killed like Jews. U have the same venom moss. look at Palestine. noo u must be bushed alive and skinned and your off springs used as garden fertiliser (sic).”

Following the publication of Khumalo’s statements, the Commission received numerous complaints from members of the public, regarding the widely publicised first statement in particular. Accordingly, the Commission referred a formal complaint of hate speech to the Equality Court based on the first statement. In response to the complaint, Khumalo met with the Commission with a view to concluding a settlement agreement to resolve the complaint. This meeting resulted in the conclusion of a settlement agreement between the Commission and Khumalo wherein he agreed, amongst other things, that his statement constituted hate speech and that he would issue a public apology for having made the statement.

Subsequently (and before the settlement agreement could be made an order of court), the Commission learnt that the African National Congress (“ANC”) had independently referred a complaint of unfair discrimination (in terms of section 7 of the Equality Act) based on the same (first) statement in the Roodepoort Magistrates Court (sitting as an Equality Court), which had resulted in the conclusion of a settlement agreement between the ANC and Khumalo. In terms of that agreement, Khumalo accepted that his statement was discriminatory and constituted hate speech and, amongst other things, agreed to pay R30,000.00 to a charitable organisation. The ANC complaint and settlement agreement pre-dated that of the Commission.

In light of this development, the Equality Court (Johannesburg) issued extensive directions for the further conduct of the matter which included, amongst other things: inviting Lawyers for Human Rights (“LHR”) to join in the matter as *amicus curiae*; and inviting the Minister of Justice and Constitutional Development to make submissions regarding how to address the issue of multiple Equality Court referrals. LHR were unable to accept the role of *amicus*, and the Legal Resources Centre (“LRC”) joined

the matter instead. With some assistance by the LRC, Khumalo, who was unrepresented at this stage, was able to acquire pro bono legal representation to act on his behalf.

The Commission at this stage then referred a second hate speech complaint to the Equality Court (Johannesburg) dealing specifically with the second statement. The two complaints were thereafter dealt with together. Having obtained legal representation, Khumalo then elected to oppose both complaints. In his opposition, he outlined the context of the circumstances under which he made the statements, including, for example, that they were made in a state of extreme agitation in direct response to the racist remarks that Penny Sparrow had made regarding black people, just a day before.

In addition to the aforementioned principle issue, the Court had to consider whether it was barred from dealing with the matter based on the defences of *res judicata* and *issue estoppel*, given that there was a pre-existing complaint relating to the same (first) statement. The Court held that in the circumstances it was not barred from dealing with the complaints by the Commission, and that the aforementioned technical legal defences did not apply.

A further ancillary issue the court was required to consider is how the definition of hate speech should be interpreted. To provide context, the definition of hate speech in section 10(1) of the Equality Act reads as follows:

"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."

Notably missing from this definition is either the word *"and"* or the word *"or"* between paragraphs (b) and (c). The effect of this omission is that an inadvertent practical ambiguity was therefore created regarding the proper interpretation of the definition of hate speech in section 10(1). The pertinent legal question was therefore whether the definition should be interpreted conjunctively (using the word *"and"*) or disjunctively (using the word *"or"*). By comparing the definition of hate speech as used in section 16 of the Constitution, the Court found that the definition in section 10(1) should be read conjunctively to align itself with the Constitution. Therefore, all three aspects of the definition must be present for the words to constitute hate speech. In this regard, the Court provided much needed clarity on this issue.

Having considered all of the above, the Court held that, objectively considered, Khumalo's comments constitute hate speech.

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