

CASE NO

01/16

DATE

10 JUNE 2016

In the matter between

ANC

COMPLAINANT

5 and

PENNY SPARROW

RESPONDENT

COURT Thank you. On this day, 10 June 2016, in the Equality Court for the district of Umzinto held at Scottburgh in the matter between
10 African National Congress, being the complainant, and Penny Sparrow, the respondent, case number 1/2016. Presiding officer, I Khalil. For the complainant, can I just invite counsel?

MR POTGIETER Thank you, Your Worship, I am Adv Denzel Potgieter, I am a member of the Cape Bar. I appear for the
15 complainant in this matter, the African National Congress, on instructions of Mr Williams from Attorneys Robert Charles, also from Cape Town. Thank you.

COURT Thank you, Adv Potgieter. For the respondent? Can I just ask that her name, is there anybody present for the respondent?
20 Yes? Please stand up. You may come forward to the microphone. Yes, your full names, please.

MS COWIE Charmaine Carina Cowie.

COURT Surname again, please, ma'am?

MS COWIE Cowie [spelt].

25 COURT Thank you, yes, and who are you to the respondent?

MS COWIE Her daughter.

COURT Yes, Ms Cowie? May I just perhaps start off by asking where is the respondent? Is she not present at court today?

MS COWIE She is not present, she is sick at the moment with sugar
5 diabetes. It has taken its toll.

COURT Yes, is there anything in particular you wanted to tell the Court?

MS COWIE She is unable to come to court today.

COURT Yes?

10 MS COWIE Because of the stress obviously that this has caused. She did try and get legal counsel and no-one will represent her.

COURT Yes?

MS COWIE So she just doesn't know what to do and the presiding
15 detective on the case phoned me last night and said to me I need to come in today to make an apology and ask for a postponement to find out so that she can actually find out what she can do and how she can make an apology to the Court.

COURT An apology for?

MS COWIE For the comments she made on Facebook.

20 COURT Ms Cowie, is my understanding correct that the respondent had requested you to come to court today?

MS COWIE Yes.

COURT So you don't come of your own accord. You come pursuant to a request from her.

25 MS COWIE Yes.

COURT That's how I have understood you.

MS COWIE And from the policeman.

COURT So the police, did I understand that correctly, asked that the respondent be present or you be present to apologise?

5 MS COWIE She can't be present because of fear of her life. So that's why I'm here.

COURT Yes, is there anything further?

MS COWIE No.

COURT All right, thank you, you may be seated, Ms Cowie. Adv
10 Potgieter, may I just hear the attitude of the complainant?

MR POTGIETER Yes, Your Worship, we note with some surprise what is being told to the Court. The position in this matter is, Your Worship, that every conceivable effort has been made to actually make direct contact with the respondent, with Mrs Sparrow, over a
15 period of time. It has become readily apparent that Mrs Sparrow was evading the attempts to, for example, to serve the papers in this matter on her. Various attempts have been made to serve the papers. In fact, Mrs Cowie, the daughter, has been involved in those attempts to serve papers in this matter on Mrs Sparrow. You will notice, Your
20 Worship, that the returns of service, returns of attempted service in the matter, the operative one you will find on page 37 of the papers.

COURT Yes.

MR POTGIETER That one indicates, Your Worship, that on 25 January this year the process in this matter was – there was an
25 attempt by the sheriff to serve the process in this matter and if you

look at the return the sheriff reports that the process was dealt with as follows. The initial attempt to serve was made on 22 January and there was an attempt to serve the papers on Jawitz Properties.

COURT Yes.

5 MR POTGIETER The sheriff was then told that the respondent no longer works for that business, that is on the 22nd, and the sheriff was directed to South Coast Landscaping. So then the sheriff went on 25 January, three days later, and attempted to serve the papers at South Coast Landscaping, and the sheriff spoke to the defendant's daughter,
10 Mrs Cowie, who is here, and Mrs Cowie told the sheriff that the respondent was in Johannesburg. Then the sheriff later on the same day on the 25th went to the residential address of Mrs Cowie and there the sheriff was told that – or in any case the respondent was not present at the house and that the note says:

15 “Defendant not there, still in Johannesburg as per daughter, Mrs Cowie.”

[Channels mute at 00:09 to 00:10] ...part of the affidavit of Ms Perumal, the local correspondent of Mr Williams.

COURT Yes.

20 MR POTGIETER She has deposed to the affidavit in the application for substituted service. We will get to the substituted service in a minute. On page 32 in paragraph 4 of the affidavit of Ms Perumal it is indicated with regard to these unsuccessful attempts at serving the papers. It says in that second paragraph of paragraph 4, middle
25 paragraph, it starts there:

“The deputy sheriff’s first attempt was to serve on the respondent’s last known place of employment, namely that of Jawitz Properties and was then directed by then to the respondent’s daughter, Mrs C Cowie, at South Coast Landscaping.”

Then it carries on, it says:

“I was informed by deputy sheriff Luke that he had communicated with the respondent’s daughter who had stated that the respondent would be returning from Johannesburg shortly, but she, Cowie, refused to accept service on her behalf. She also stated that her mother was living in fear, therefore she had left this area and was at an undisclosed address in Johannesburg. It is clear from this conversation and from media reports that Cowie was in contact with the respondent but she refused to divulge the whereabouts of the respondent. Her daughter has in all likelihood informed the respondent that the sheriff intends to serve process on her and it is possible that the respondent may wish to avoid service.”

We then take Your Worship to page 40 of the papers, it is Annexure ANC4 of Ms Perumal’s affidavit. That is a report from News 24, the heading reads:

“Penny Sparrow flees her nest.”

And then if Your Worship counts one, two, the third paragraph

of that report it says as follows, on Friday, this report, by the way, if one looks just under the heading “Penny Sparrow flees her nest”, is dated 10 January 2016.

COURT Yes.

5 MR POTGIETER So that was the date of this article and it says then in that paragraph that I have referred Your Worship to:

“On Friday, her daughter, Charmaine Cowie, with whom Sparrow has lived and worked since November...”

10 She has lived and worked with Mrs Cowie since November 2015.

“...told City Press at her landscaping and nursery business in Park Rynie, that her mother had gone underground.”

They quote Mrs Cowie, so Mrs Sparrow has gone underground.

15 Then Ms Cowie says, and I quote her:

“I don’t share her opinions, said Cowie, who was accompanied by a friend.”

And then they quote Ms Cowie again:

20 “Unfortunately that is all I have to say at this time. She has gone underground.”

Then before we get to the substituted service I just want to complete the sheriff’s attempts at serving the papers in this matter and on page 39 of the papers, Your Worship, there is another return of service from the sheriff. That return of service gives the service address, the
25 address at which an attempt was made to serve, on the top, just

before the block with "Notice" written in it, the address is 90 Preston Road, Park Rynie, which we know is the residential address of Mrs Cowie and who we know had her mother living with her since November last year. The return says, just below the block with
5 "Notice" in:

"On 11 February 2016."

So Your Worship will recall that the first attempts were on the 25th at Mrs Cowie's business address and at the same residential address. So the sheriff went back there on 11 February at 12 o'clock,
10 and then the sheriff gives a return of the service and it appears there below the heading of "Fixing", appears there that the sheriff called at that residential address. The last two lines of the section that deals with the service says:

"The premises remain locked and nobody was present
15 on the premises. After a diligent search and enquiry with neighbours no other manner of service is possible and it appears that what the sheriff then did was to affix the papers on the premises."

So that was the last attempt that was made by the sheriff. So
20 by this stage, Your Worship, at the very least, Mrs Cowie was very well aware of what was taking place. She knew that the sheriff was endeavouring to serve papers on her mother. She knew the whereabouts of her mother. She said to the sheriff in Johannesburg but she also said that her mother has gone underground, so she knew
25 where the mother was. To add to that, Your Worship, the fact that this

matter had consistently received media coverage, prominent media coverage, in the mainstream media, print media, etcetera, etcetera. So one can safely accept, we submit with respect, that the respondent herself, apart from the fact that on the probabilities Mrs Cowie would have told her look here, this is what's going on, they've got papers there for you, the respondent herself must have been aware that this matter has been launched and that the matter is proceeding and that there are attempts to serve papers on her. Well, that was not the end of the complainant's endeavours to make sure that the respondent is given fair notice of this matter, because the complainant came to court here and obtained an order for substituted service of the process and an order was obtained, Your Worship, on 15 March 2016 for substituted service and you will find the substituted service, the manner of substituted service that was affected, you will find in the service affidavit of Mr Williams and the operative part of that affidavit is on page 49, Your Worship, that is what we would like to draw your attention to.

COURT Yes.

MR POTGIETER And Your Worship will notice from there that the substituted service was effected in the following way, the process was advertised in accordance with the court order of 15 March. In the Saturday Star on 9 April 2016. In the Saturday Independent on the same date, 9 April 2016, and in the Sunday Times of the following day, 10 April 2016. So there was publication of the process in those major newspapers.

And you will notice then, Your Worship, in subparagraph 7.4 on that page 49 Mr Williams indicates that a process was also forwarded by registered mail and if Your Worship then goes to page 55 in the papers, that is Annexure PGW5, Your Worship, will find the certificate
5 of posting of the registered notice and Your Worship will notice there that the registered letter was addressed to Ms Penny Sparrow at 90 Preston Road, Park Rynie, 4182. That was the, we know, residential address of Mrs Cowie where we know the respondent was living since November last year. So we submit, with respect, Your Worship, that
10 adequate attempts and steps have been taken to ensure that the fact that this matter is pending in this court was brought to the attention of the respondent.

COURT Thank you, just one moment, Mr Potgieter, but that appears to be almost common cause by virtue of the appearance of Mrs Cowie
15 at court today and she confirms that the respondent is indeed aware that the matter is in court today and is aware of the matter.

MR POTGIETER Yes, in fact, that is the point that we are driving at.

COURT Mmm.

MR POTGIETER And the next point that we want to make, this is
20 made against the backdrop of our submission, this is a delaying tactic, Your Worship. It is absolutely unwarranted.

That is not the conduct of a reasonable person who is concerned about dealing with this matter. Having been aware, as we now know, from what the daughter tells the Court, she does nothing.

25 The daughter comes here after the complainant has gone to all

the expenditure and everything to set this matter up to get it ready to be heard, ripe for a hearing.

She does nothing all this time to approach the Court or to put some version or to indicate what her attitude is towards the matter,
5 nothing. The daughter comes this morning.

That is not the conduct of a reasonable person. We are seriously intending to do something about this matter. Now what does the daughter say, how does Mrs Cowie see it?

She doesn't indicate to Your Worship that the respondent
10 suggests that she's got a defence to this matter.

COURT Mmm.

MR POTGIETER She says well, the respondent wants to find out how she can, what she can do to apologise for her conduct. That is provided for in the relief that the complainant is seeking, Your
15 Worship, exactly that, that one of the items of relief that this Court would be asked to give is for Mrs Sparrow to give a written undertaking that she will never conduct in this kind of detestable, she never engage in this kind of detestable conduct again. So she will get an opportunity to apologise and to say sorry, I've done this, I will
20 never do it again. So that's taken care of, Your Worship.

So there is nothing that she wants to add to the merits of this matter. She is talking to the relief, really, and we are talking the same thing.

We are also saying yes, she should be apologising and yes,
25 she should give a written undertaking, so we agree with her that she

should do that.

Mrs Cowie says that the respondent, amongst other things, is not coming to court because she fears for her life. So she is not going to come to court. She is not saying she is going to come to court, she
5 is never going to come to court because she fears for her life.

So under those circumstances we are saying that there is absolutely no basis for delaying this matter any further. This is a serious matter, Your Worship. There is considerable public interest in this matter. It is in the interest of justice, it is in the interest of the
10 public that we dispose of this matter.

It is in nobody's favour, it doesn't do anybody any good to have this kind of thing hanging in the air. It is bad for all of us and we are submitting with respect that there is no basis, no basis has been given to you why this matter should be delayed any further.

15 It is most of this is common cause, really, and perhaps just to round that off, Your Worship, I have a bundle of authorities that I will be handing to you shortly, but I am just referring you, just in this context, to section 4(1)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act, the Act that we are concerned with in
20 these proceedings, and the Act says in section 4, dealing with the guiding principles:

"In the adjudication of any proceedings which are instituted in terms of or under this Act the following principles should apply.

25 a) The expeditious and informal processing of cases

which facilitate participation by the parties to the proceedings.”

So under those circumstances there is really no case before you, Your Worship. There is just a bold request that the matter should
5 be postponed because the police detective said something last night, but that doesn't take the matter any further. There is no ground to delay and we submit that the matter should proceed, Your Worship. The respondent cannot be prejudiced. In fact, even now with Mrs Cowie present here we don't know where the respondent, she
10 hasn't told us where the respondent is. The complainant is ready to proceed and we therefore ask, Your Worship, that the matter continue.

COURT Adv Potgieter, just a few enquiries by the Court. It seems from what Mrs Cowie has informed the Court today, but for the police officer telephoning her last night, she would not have been present in
15 court today and it seems according to Mrs Cowie that her presence in court today is motivated by some talk by the police officer of a warrant for the arrest of the respondent. Would you – is your understanding the same?

MR POTGIETER That is correct. It is actually, thank you for
20 reminding us.

COURT Yes.

MR POTGIETER That is exactly what she said and that is also a cardinal factor in this matter.

COURT Mmm.

25 MR POTGIETER Yes, we understand it that way, Your Worship, as

well.

COURT It also seems to me and perhaps you can address me on this, that the test in such matters falling within the ambit of the Equality Act and the Equality Court, that a postponement of the hearing, the law seems to place a greater degree of satisfaction before it can postpone a hearing in that, I would understand it in most other matters in law, it would be in the interest of justice to grant or refuse a postponement but in these matters it seems to be compelling reasons or circumstances.

10 MR POTGIETER That is precisely, that is exactly the law, because, Your Worship, in these kind of matters, it is not the kind of matter between two individuals. There is a public interest. The public is affected by this thing.

COURT Mmm.

15 MR POTGIETER So there is a wider interest and that's why there is this provision in the Equality Act that once you deal with these things as promptly as possible, because the longer they fester the worse it becomes, so you have to deal with it, you must nip it in the bud and in the bigger good of society in the country.

20 COURT All right, thank you very much, Mr Potgieter.

MR POTGIETER Thank you, Your Worship.

COURT Mrs Cowie, please come forward, ma'am. You've heard what has been submitted by counsel for the complainant in this matter, Adv Potgieter. Is there anything you would like to say? Anything further?

25

MS COWIE I don't want to say anything in fear of saying the wrong thing because you've got a layman here versus High Court lawyers. There's just no chance I can say anything, in all fairness. I don't know which way to turn.

5 COURT Would you – perhaps the Court can assist you. Would you like to say anything about the postponement of this case, anything further?

MS COWIE The only reason why I'm asking for a postponement is now the Court is aware that my mother cannot get legal representation
10 because of the high profile of the case and if it is properly investigated, the investigator who has been dealing with us from day one has been in contact with both me and my mom and knows everything and has been quite surprised as to why no-one has contacted him and we have – we just don't know what to do, basically.

15 COURT All right.

MS COWIE If I can state, she is retired, a pensioner, she's got no money. She's quite old, there's no chance of her getting any income either. She is divorced and she is now officially homeless. So it is extremely difficult to pretty much do anything to bring her forward
20 here.

COURT Yes.

MS COWIE I don't want to prolong it either, we also want it to end.

COURT Okay. Thank you, Mrs Cowie. Thank you.

RULING ON APPLICATION

COURT A ruling, this is an application for a postponement of this hearing under the Equality Act. The respondent is not present in court, however, Mrs Cowie, the respondent's daughter, is indeed
5 present in court today.

It is the daughter, Mrs Cowie, who seeks this postponement on behalf of the respondent. The application has been strenuously opposed by counsel for the complainant.

The basis for the application is that the respondent is fearful
10 for her life. It appears that she has been unable to secure legal representation and the reason for her seeking the postponement, it appears from the submissions by Mrs Cowie, is that she would like to apologise.

In clarification Mrs Cowie stated to apologise for the comments
15 posted by the respondent. It is also clear that some investigating officer had contacted either the respondent or Mrs Cowie and asked them to be present in court today, failing which a warrant for the respondent's arrest will be authorised. So I have understood Mrs Cowie.

20 Counsel for the complainant has addressed the Court in detail regarding the diverse occasions on when the sheriff of the court had attempted to serve notice of the institution of the proceedings on the respondent.

In this regard the complaint herein was instituted or lodged
25 with the Court on 29 January 2016. To the extent that the respondent

could not be located by the sheriff of the court, the complainant was then compelled to seek relief from this Court to serve the institution of the application or the complaint on the respondent by way of substituted service which was also done.

5 I do not think it necessary to deal with each of those attempts and the substituted service in any greater detail as it appears that the respondent is well aware of the complaint as well as the hearing today in court.

The respondent had accordingly some four and a half months
10 to either obtain legal representation to contact the complainant's legal representatives or for that matter even the Clerk of the Equality Court to communicate her difficulties. She has not done so, as best it is known.

I am in agreement with counsel for the complainant, that from
15 the submissions made by Mrs Cowie there appears to be nothing to be added to the merits of this matter save for perhaps an apology which in any event is part of the relief that has been sought.

The postponement of matters which are scheduled for hearing, the legislature had decided it could only be granted in compelling
20 circumstances or for compelling reasons.

In most other matters that the courts adjudicate upon the usual or traditional test is what is or is not in the interest of justice. In other words, looking at the rights of the parties and the interest of society perhaps. It is a value judgment that the Court makes, but in Equality
25 Court matters or matters falling under the ambit of the Equality Court,

the legislature had decided to impose a more stringent test, that is one of compelling reasons, before a postponement of the hearing may be granted.

As pointed out by counsel for the complainant, that stands to
5 reason having regard to the guiding principles in the adjudication of proceedings under the Act. That is in section 4(1)(a) which refers to the expeditiousness of the proceedings, as well as the participation of the parties.

When all is said and done it is apparent to me that but for the
10 investigating officer contacting either Mrs Cowie or the respondent yesterday or a few days ago and asking them to come to court or a warrant for the arrest of the respondent will be issues, that is the main reason it appears why the respondent's daughter is at court today.

I am in the circumstances not satisfied that there have been
15 compelling reasons put forward to this Court to have these proceedings postponed. I have also considered the various reasons in totality, quite apart from each reason that has been submitted and I still cannot come to the conclusion that there are indeed compelling reasons to postpone this matter.

20 In the circumstances I accordingly make the following order, that in terms of Regulation 12(4)(a)(ii) under the Equality Act, that is the regulations under the Equality Act, I direct that the proceedings continue in the absence of the respondent. Thank you.

MR POTGIETER As the Court pleases.

COURT Thank you. Mrs Cowie, you may be present throughout these proceedings if you so wish.

MR POTGIETER Thank you. [Channels mute from 00:53 to 00:54] to
5 hand up a copy to Your Worship.

COURT Thank you, Adv Potgieter.

MR POTGIETER Your Worship, we do not intend to present any evidence today. We will just address submission to the Court, Your
Worship.

10 COURT Yes?

MR POTGIETER ADDRESSES COURT Your Worship, it is not exaggerating to make the submission that Sunday, 3 January 2016, was a rather low point in terms of race relations, the start of the year for us as a country.

15 We were all still in the spirit of the festive period and this is the incident that we are confronted with. The post in question that the respondent had placed has been referred to often, Your Worship, one has read through it time and time again, but it does not fail to really evoke the full gambit of emotions if one looks at this thing.

20 It induces a sense of shock. It is hurtful. It evokes rage. It even makes you feel a bit despondent if you think that this was 2016, the beginning of 2016.

So it is not surprising, Your Worship, as we indicate in the Heads of Argument on page 4 when we deal with the consequences of
25 the post, that in the terminology of the social media this thing went

viral.

Because we know, Your Worship, and we will get to the authority in that regard, but we know if a white person calls black people monkeys, we know what it is all about. It is trouble.

5 We can do without it and so apart from this thing going viral, as they say, in that context of social media, it hit the headlines in the mainstream media as well.

It has been publicised over and over because in a sense it is a kind of a sensational thing also. It is not incorrect, Your Worship, to
10 submit that the response from the average reasonable South African was one of outrage, disapproval, and in fact, that is what happened to the respondent because the political party that she had membership of acted swiftly and we refer to it in our Heads of Argument what they did and how she was removed as a member.

15 So there can be little question, debate, about the fallout consequences of this. On page 5 of the Heads, Your Worship, we refer to the statutory provisions and we have included, if you have regard to the index of the list of authorities, there is a copy of the Act. It is item 13 of the bundle and we refer in the Heads, Your Worship, to
20 section 10(1) which obviously Your Worship is aware of, which section 10(1) of the Equality Act which amongst other things prescribes hate speech for obvious reasons.

We refer on page 6 to the prohibited grounds that the section refers to and there are things like race, ethnicity, equality, ethnic
25 origin and things like that. [Channels mute 01:01 to 01:02]

...to that context and we refer you to what on top of page 7 what Chidel and the other authors say in the South African Constitutional Law, that the extract that we want to bring to Your Worship's attention is in the bundle and this is largely trite.

5 We refer to the objects of the Equality Act, to prevent and prohibit unfair discrimination and harassment, promote equality and eliminate unfair discrimination to prevent and prohibit hate speech and to provide for matters connected [channels mute 01:03 for 15 seconds].

10 We refer in paragraph 11 to the fact that the enactment of the Equality Act was foreshadowed in the Constitution in section 9.4 of the Constitution.

Over the page, Your Worship, on page 8, paragraph 12, we give a little bit more of the background. We refer you to *Currie et al*,
15 that comment, and then in paragraph 13 we refer you to what the South African Human Rights Commission said in the matter of Freedom Front versus the Commission.

The commission reminds us in that context that race, gender, ethnicity and to a lesser extent religion were the very lines upon which
20 apartheid society was legally and systematically divided. These divisions the commission says were the fault lines of our society and represented the points at which we were most vulnerable.

Then the commission, and importantly for our purposes, Your Worship, the commission indicates that section 16(2)(c) of the
25 Constitution withholds constitutional protection from hate speech

which accentuates the chasms that were fostered before 1994 and which threatened to tear the society apart.

And then we proceed on page 9, Your Worship, with our submission that what the respondent had engaged in was hate speech
5 in contravention of section 10.

We set out the reasons for that submission from paragraph 14 onwards. We refer Your Worship in paragraph 14, there is reference to footnote number 12. We refer you to the matter of *Strydom v Chilwane* where the obvious point is made that where a white person
10 makes these kinds of remarks concerning blacks it has a racial connotation and a discriminatory import and you will find the references in footnote 12.

There is *Strydom*, it is in the bundle, then there is *Leboa, Platinum Mines*. Perhaps I can ask Your Worship just to make a note
15 by *Leboa Platinum Mines* that the relevant paragraph numbers are 6, 8 and 12.

COURT Thank you.

MR POTGIETER Where that is being dealt with and Your Worship will notice that the last reference in footnote 12 is to an unreported
20 judgment of *Herselman v Kaleba*. It is also in the bundle. In fact, it is item 4, but what we want to ask Your Worship, just to make a note because the layout of that judgment unfortunately is not very easy to follow, but the section that we would like to draw your attention to you will find at paragraph B(2)(a)(b).

25 So if Your Lordship has regard to those paragraphs you will

find the reference to what we submit, with respect.

We then, Your Worship, refer the Court to a few cases which deals with this kind of insult where black people are called baboons, things like that, and we refer you to paragraph 16 in the matter of
5 *Mangope v Asmal & Another*.

These are political figures, I am sure Your Worship will recall these names where the defendant had called plaintiff a baboon and the Court then deals with the import of referring to someone as a baboon.

10 We cite, Your Worship, the extract from page 286I-A from that judgment at the foot of page 9 over onto page 10 where the Court said in the last section:

“Applying that definition it is in my view clear that when the epitaph baboon is attributed to a person when he is
15 severely criticised, as in this case, the purpose is to indicate that he is of a base and extremely low intelligence but I also think it can be inferred from the use of the word in such circumstances that the person mentioned is of subhuman intelligence and not worthy
20 of being described as a human being.”

Then in paragraph 17 we come back to *Strydom v Chilwane* and we unpack that a little bit. This is also a complaint in terms of section 10 of the Equality Act, it was dealt with in the Equality Court where a black employee was called a baboon by his white superior.

25 Then we quote, Your Worship, from paragraphs 13, 14 and 15

of that judgment and we on page 11 we submit you will find the operative parts that are directly relevant to present purposes and the purpose of this matter before Your Worship.

We underline the comment at the top of page 11 from
5 paragraph 14 where it says:

“It follows that the person described as a baboon in those circumstances may rightfully perceive them to be hurtful.”

That is one of the elements of section 10, conduct that is
10 hurtful and then perhaps I can just complete it, importantly, in paragraph 14, the Court finds that:

“The words complained of fall within the definition of hate speech as defined in section 10 of the Equality Act.”

15 And the Court repeats that finding in paragraph 14 where again it says, and we emphasise the words again, the words complained of also falls within the definition of hate speech.

We in paragraph 18 come back to the Herselman matter, the unreported matter, which deals with the same insult and the Court
20 concluded in Herselman that the use of the word baboon amounted to hate speech.

Can we just ask Your Worship in this context, just to make a note that the section that we refer to is on page 8 of that judgment. Your Worship will notice that the judgment itself is actually not
25 paginated.

We have numbered the actual pages from 1 to whatever it is, so we have done the numbering and on our written number 8 of that report Your Worship will find that section.

COURT Yes.

5 MR POTGIETER Your Worship, then we proceed in paragraph 19 dealing with the specific insult in this instance where there was a reference to monkey and we submit, with respect, that it is exactly the same import, it has the same import if you call a person a baboon, if a white person calls a black person a baboon or a monkey, the import is
10 the same and we refer to, in paragraph 19, to the definition in chambers, 20th Century Dictionary, which was used by the Court in the Mangope matter.

We have a copy of the pages in that dictionary in the bundle for Your Worship's convenience and we refer to the definition of
15 monkey which is basically the same.

Over the page in paragraph 20 we refer you to the definition of monkey in the shorter Oxford English Dictionary. We have included a copy of the relevant page in that dictionary in the bundle.

In fact, it is the last item in the bundle and we conclude that
20 section on page 12 in paragraph 21 with the submission that the respondent had patently resorted to hate speech in post by referring to blacks as monkeys. [Channels mute for a few seconds at 01:17]

...adversely on the dignity of blacks and as such caused harm.
We then have a short section on *locus standi* on the bottom of page
25 12, over to page 13, and we submit that the complainant in terms of

those subsection listed in paragraph 23 has *locus standi* to bring this matter to the attention of this Court.

We then say in view of all those submissions at the foot of page 13 that the complainant has made out a case for the relief, the
5 clarity, the relief that is sought in paragraphs 1 to 3 of the Notice of Motion.

COURT Yes.

MR POTGIETER And we then deal with the question of sanction and we refer Your Worship to various matters.

10 COURT Yes.

MR POTGIETER We've got copies of all those decisions for Your Worship's assistance and we just give them to convey some sort of an idea of sanction, quantum and things like that, although we refer Your Worship to what has been said in some of these cases. Obviously it is
15 a discretionary matter.

One can get guidelines from other awards but you deal with the matter of sanction in the light of the particular circumstances and the facts of the matter that is being dealt with.

We refer Your Worship on page 15 in paragraph 27 to a
20 decision in an English case. We've got a copy of that report attached there but it gives an idea of how one pictures the sanction that you impose.

If you under pitch you actually minimise the effect and if you over pitch it is also not appropriate. So you have got to find a balance
25 and as we submit, which you do by having regard to the particular

circumstances.

We submit in paragraph 34 on page 19 of the Heads, Your Worship, that compensation in the sum of R200 000 which is sought in the Notice of Motion is an appropriate sanction in the circumstances.

5 This conduct is particularly egregious, hurtful, uncalled for and it is the kind of instance where – and one would like to think, Your Worship, that it would only be a very small minority of people who would support, endorse this kind of conduct.

10 So we would submit that the Court has to send out a message through the sanction that it imposes. This is unacceptable. It would be dealt with through the appropriate channels so that people do not take the law into their own hands and the sanction should then be a message to the few others that might be like-minded that this does not work in this country at this point in time.

15 COURT Sorry, just on that point. There seems to be an upsurge, at least of reported matters, dealing with the hate speech. So when you make reference to few it seems that it is increasing.

MR POTGIETER It is. It is disconcerting, to say the least, Your Worship. We have referred to some of it in the papers.

20 COURT Yes.

MR POTGIETER Mr Williams and I are dealing with a number of them currently. One can just express the hope that this is not the direction in which we are heading because you are right, there are way too many for comfort.

25 COURT When it comes to assessing the quantum it is obviously

difficult to assess injured feelings and this is, we are talking of millions of blacks in South Africa particularly. Then should the general rule not be that the Court should lean towards more restraint rather than over-emphasising the deterrent effect? I understand what you're saying.

5 There is a balance but it seems to me where it is difficult to assess the Court should lean towards restraint.

MR POTGIETER Yes.

COURT You would agree with that.

MR POTGIETER Yes, Your Worship, we are not asking in this
10 instance for the Court to break the respondent. We do not want revenge. That is not what it is about. There is an element of restoring things and that is why the prayer is that whatever the Court orders in terms of compensation should go for a good cause, goes to institutions. We have given you three names to assist you.

15 COURT Yes.

MR POTGIETER It can go to institutions that will make a difference along these lines because that is really what we want. We don't want money from the respondent. We want to eradicate this kind of thing because it is in all our best interest, so yes, it is a discretionary matter
20 and we have proposed what we have proposed and eventually it is in Your Worship's hands, and it is quite right, I mean, you have to balance things.

I guess, Your Worship, that what we are saying is that when you do this exercise and you do the balancing you have to also throw
25 into the pot the fact that there is a completely unacceptable rise in this

kind of thing.

So there must be an element of deterrence, too, because that is what the *Alexander v Home Office* one says, that if you go too soft on the thing then you are really doing nothing, you might as well do
5 nothing about it. So you have got to find somewhere. We know it is difficult.

COURT Mmm.

MR POTGIETER We do. We leave it in your hands to deal with that one. Your Worship, the rest of the relief we have dealt with there.
10 Perhaps I can just say one or two things about the issue of cost. We did not ask for cost in the proceedings, but cost is in the discretion of the Court. The Court is not bound by what we are saying. So Your Worship is at large if you are minded that it is also appropriate to mark some degree of disapproval with this kind of thing. You are certainly
15 at large to order cost in this matter and if you order cost, although we did not ask for it, we will support that, that is really what we are saying, because of the seriousness of the matter.

In conclusion we can just say, Your Worship, that the efforts of this Court to have expedited this matter and to have gotten it right for
20 the hearing is appreciated. It has been done, we believe, with commendable speed. We thank you for that.

COURT Thank you, Adv Potgieter. Just on the issue of an apology.

MR POTGIETER Yes.

COURT Now obviously that is in terms of the powers of the Equality
25 Court to make such an order, but I just want you to address me on

that. Where an apology is contrived, in other words, through an order of Court, what is the purpose of that? You know, where a person does not come of their own accord and they have enough time to apologise for conduct, and we understand all human beings are fallible, but what
5 is the purpose of the Court making an order that the respondent issues a written apology?

MR POTGIETER Yes, that is a interestingly enough, Your Worship, that was one of the dilemmas that we had when we were doing the Truth Commission.

10 COURT Yes.

MR POTGIETER I was one of the commissioners there.

COURT Mmm.

MR POTGIETER So often, and that was our experience, too, it is just done mechanically.

15 COURT Yes.

MR POTGIETER There is little value in it for the victim, for anybody, and it becomes just a matter of routine, really. So what we are saying, actually, we said in the papers here at the very least what the respondent should do is to undertake a written undertaking so that we
20 have something on record, public record, that she won't repeat this.

COURT Yes.

MR POTGIETER Because she seems to be, you know, she says she wants to apologise.

COURT Mmm.

25 MR POTGIETER She says she wants to apologise, but we said at

least she should be ordered to give that written undertaking.

COURT Yes, I think that point insofar as it pertains to regulating future conduct, but you know, the apology, the person has had so much of opportunity and now the Court makes an order that the person issues a written apology.

MR POTGIETER I see the point. Can I just take instructions?

COURT Yes.

MR POTGIETER No, we are inclined, as I have said, that was my personal experience, we are inclined to leave that in the Court's hands. We are not going to push with that kind of thing. We would be happy for the relief that we are actually asking in the Notice of Motion.

COURT Yes.

MR POTGIETER Ja, thank you, Your Worship.

COURT Thank you, Adv Potgieter. There is one further matter, I propose to deliver a judgment at 11:30. I just want to have a look at a couple of the authorities. I think in particular just two on page 2, is that you have given. There has been an application before me, well, not formally, but I have been informed through the court manager that there was a request to televise the judgment. I just want to hear your views on that before I grant that relief.

MR POTGIETER No, we full heartedly support that, Your Worship. In fact, we feel that it is in the public interest to do so. This is the first one of this line of matters.

COURT Yes.

MR POTGIETER And our client would certainly appreciate it being

dealt with in that sort of public way, really.

COURT All right, thank you very much. The application that was brought to my notice through the court manager to have the judgment televised is hereby granted. So the television crew in the short
5 postponement can do whatever is reasonable and necessary to ensure that that indeed happens, if you all so wish. The matter will stand down for 15 minutes. I will resume at 11:30, is that in order?

MR POTGIETER Yes, that is in order, Your Worship.

COURT Is there any objection to that from any of the court officials?
10 Are you all okay with that. Mr Ngcobo?

MR NGCOBO Yes.

COURT All right, thank you very much. Thank you, Court stands down until 11:30.

SHORT ADJOURNMENT

15 -----

ON RESUMPTIONJUDGMENT

10 JUNE 2016

COURT At the outset I must place on record my indebtedness to Adv Potgieter SC for having prepared such comprehensive Heads of
5 Argument as well as his address in court today.

The Court is also appreciative of the efforts made by the instructing attorney, Mr Williams, for having prepared the complainant's list of authorities together with the authorities themselves.

10 Introduction: In our continued quest towards a society that is just and defensible, human dignity in its various manifestations lies at the heart of all that we yearn for and aspire to as a nation in transition.

This complaint which comes before the Equality Court concerns social conflict arising out of alleged hate speech.

15 The African National Congress, the complainant, a political party duly registered in terms of section 15 of the Electoral Act 51 of 1996 brings this matter both on behalf of itself and a representative capacity in the public interest before the Equality Court.

20 The respondent is an adult white female, estate agent from Scottburgh, a coastal town, some 30 kilometres to the south of Durban.

It is alleged that the respondent at all times material hereto was a member of the Democratic Alliance, a duly registered political party.

25 The complaint arises from the respondent's posting on social

media, her Facebook page, of comments making reference to black people as monkeys and other alleged racist comments pertaining to the use by black persons of public beaches on New Year's Eve.

Facebook is a social networking website that enables users
5 worldwide to communicate with each other. It is perhaps apposite at the outset to refer to the words posted by the respondent, which read as follows:

“These monkeys that are allowed to be released on
New Year's Eve and onto public beaches, towns,
10 etcetera, absolutely have no education whatsoever. So to allow them loose is inviting huge dirt and troubles and discomfort to others. I am sorry to say that I was among the revellers and all I saw was black on black skins. What a shame. I do know some wonderful
15 thoughtful black people. This lot of monkeys just don't want to even try but think they can voice opinions about statute and their way. Dear, oh, dear, from now on I shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same, pick,
20 drop and litter.”

These words were posted on 3 January 2016 and subsequently went viral. It drew unprecedented coverage and publicity, both nationally and internationally.

The complainant contends that the words posted constitute
25 hate speech as defined in section 10 of the Promotion of Equality and

Prevention of Unfair Discrimination Act 4 of 2000, Equality Act, and could reasonably be construed as having been made with a clear intention to be hurtful towards black people in general, namely Africans, coloured and Indians.

5 The respondent, it appears, disappeared from public life after the social media comments had gone viral and could not be located for the purpose of serving the complaint on her.

Her Facebook account was also subsequently closed. Pursuant to a substantive application to this Court and having regard
10 to the provisions of section 19 of the Equality Act read with Regulation 7(1) thereunder relating to service of process, leave was granted to serve notice of the institution of the proceedings on the respondent by way of substituted service.

This was done by advertisement in early April in a national
15 newspaper and two provincial newspapers circulating in KwaZulu-Natal and Gauteng.

The respondent's daughter, Mrs Cowie, attended the hearing this morning seeking a postponement. For the reasons placed on record earlier this morning the Court was not satisfied that there were
20 indeed compelling reasons to postpone the matter.

The respondent has elected not to file any opposition or to contest the case in court. It was directed that the proceedings continue in the absence of the respondent in terms of Regulation 12(4)(a)(2) under the Equality Act.

25 The matter accordingly stands unopposed but the Court is

nevertheless obliged to adjudicate the complaint and relief sought. The issue in this case is whether the words posted by the respondent constitute hate speech as contemplated in section 10 of the Equality Act.

5 As pointed out by Adv Potgieter for the complainant the Equality Act does not exist in a vacuum and the complaint lodged must be interpreted in its historical context taking into account the purpose of the Act and our constitutional framework.

 In fact, section 3(3) of the Equality Act obligates any person
10 applying or interpreting the Act to do so.

 I accordingly think it important to appreciate the social interaction of the different races in South Africa and to set out some historical facts in relation thereto in broad outline. See *Du Toit v Minister for Safety and Security* 2010 (1) SACR 1 (CC) 53.

15 Background: Our history has been shaped by segregation, violence, intolerance and systematic discrimination. Perhaps South Africa stands out amongst the nations of the world as a country which drew a system of apartheid, brutally institutionalised discrimination against the majority of its people.

20 Racist laws, mostly willingly enforced by the courts and other State institutions separated people on the basis of race.

 This, to a large extent, promoted the evil and abhorrent notion of race superiority by the privileged white minority over the black minority. They were favoured simply because they were white. That
25 is a historical fact.

The Native Land Act of 1913 and Separate Amenities Act of 1952 are but two relevant examples of repressive laws that affected social behaviour and patterns of life.

Millions of black people were forcibly removed from their homes and condemned to isolated existences and a life that was
5 overshadowed by poverty and misery.

Many of the well-maintained amenities, including the beaches at popular resorts and larger cities were reserved for the exclusive use of the white minority.

10 The use and enjoyment of many beaches in and around Durban, including Scottburgh, was no different. In fact, it was criminalised for black people to use amenities reserved for the white minority.

The South African nation was thus characterised by gross
15 violations of fundamental human rights and with it came enormous inequality between the races.

However, much of what transpired in this shameful period is shrouded in secrecy. See *Azanian People's Organisation AZAPO & Others v President of the Republic of South Africa & Others* 1996 (4)
20 SA 671 (CC).

The devastating effects of initial colonialism and subsequently the inhumane and degrading system of apartheid is perhaps best summed up in the final report of the Truth and Reconciliation Commission 1998 (1) Chapter 2, paragraph 44, which reads:

25 "Amongst its many crimes perhaps its greatest was the

power to humiliate, to denigrate and to remove the self-confidence, self-esteem and dignity of millions of its victims. What followed was a negotiated transition which the interim constitution identified as a historic
5 bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful coexistence.”

To pursue these sentiments and help our nation heal the
10 Promotion of National Unity and Reconciliation Act 34 of 1995 was enacted.

In the words of LANGA CJ in the *Du Toit* case in paragraph 22 the purpose was to bring closure and understanding as well as the cleansing of conscience.

15 Subsequently the adoption of the Republic of South Africa Act 108 of 1996, the Constitution, heralded a radical and decisive departure from the past.

The Constitution envisages a society where all South Africans are equally treated and equally capable of enjoying the opportunity
20 and benefits in the country.

At its most optimistic it envisages a society based on social justice where the integrity and dignity of every human being is restored and protected and where difference is celebrated rather than tolerated as part of our beloved country's rich diversity with all its
25 people having a place under the African sun.

The constitutional aspirations are contained in the preamble to the constitution which, while recognising the injustices of the past, envisages a conciliatory vision going forward in a climate of peaceful coexistence.

5 During this transitional period people of different races who live separately and who were not accustomed to each other commenced associating and interacting with each other as equals.

In effect all persons in the country were as a constitutional imperative required to interact as a unified society at social, political
10 and economic levels. See *AfriForum v Malema* 2010 (5) SA 235 (GNP) 11-12.

Whilst most members of society readily accepted and embraced the concept of a new society others found it difficult and still currently do to readjust and difficult to give up privileges and practices
15 which they held near and dear.

Perhaps not unexpectedly with transformation came social conflict and the constitution recognised the need to put into place mechanisms to overcome reluctance to change and conduct regarded as unacceptable in a new society founded on human dignity, equality
20 and freedom. See *The Constitution Chapter 1 Founding Provision* (1)(a).

The Constitution: Chapter 2 of the constitution contains a bill of rights which sets out the various rights of application. Amongst such rights relevant to the matter at hand are:

25 Section 9(1) which provides that everyone is equal before the

law and has the right to equal protection and benefit of the law. Section 10, which deals with human dignity, provides that everyone has inherent dignity and the right to have their dignity respected and protected.

5 The only specific difference in the formulation of this right in the final text when compared to the interim constitution is that section 10 now proclaims that dignity is inherent.

 In other words, a person's dignity is intrinsic to his or her existence as a human being.

10 Human dignity in the final text is also the foremost foundational value when compared to the interim constitution.

 Section 15(1) provides for freedom of opinion and section 16(1) provides that everyone has the right to freedom of expression. Subsection 16(2)(a) and (b), however, qualify the extent and scope to
15 the right of freedom of expression to the extent that propaganda for was and incitement of imminent violence falls outside the scope of protection.

 So, too, in terms of section 16(2)(c) is the advocacy of hatred. If it is based on race, ethnicity, gender or religion also placed outside
20 the scope of constitutional protection.

 This latter subsection, however, adds the further requirement that such advocacy must constitute incitement to cause harm. There is inevitably a tension between the constitutional rights to freedom of expression, section 16, and the right to human dignity, section 10.

25 The importance of the right to freedom of expression appears

to have been initially widely interpreted by the Constitutional Court as a web of mutually supporting rights, which, if taken together, protect the rights of individuals not only individually to form an express opinions of whatever nature, but to also establish associations and groups of likeminded people, even where these views are controversial. See *South African Defence Force v Minister of Defence* 1999 (6) BCLR 615 (CC).

In the further development of jurisprudence around the right to freedom of expression a more balanced approach appears to have been adopted.

While recognising the freedom of expression is fundamental to a constitutional democracy, the Constitutional Court held that it was not a preeminent right ranking above all others, nor is it an unqualified right which automatically trumps the right to human dignity and it does not enjoy superior status on our law. See *S v Mamabolo* 2001 (5) BCLR 449 (CC).

When interpreting the bill of rights the interpretive command in section 39 of the constitution compels a Court to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. The Court must also consider international law and may consider foreign law.

The right to dignity is a core fundamental human right which is reflected explicitly in many international law instruments and constitutes the moral justification for many other universally accepted fundamental rights.

The universal declaration of human rights in the preamble begins with the assertion that the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace.

5 Section 5 of the African Charter on Human Rights and people's rights provides that every individual shall have the right to the respect of the dignity inherent in a human being.

 So, too, does section 1 of the Universal Declaration of Human Rights provide that all human beings are born free and equal in dignity
10 and rights. See *Fundamental Rights in The Constitution, Davis et al*, page 71.

 The Equality Act: To promote the achievement of equality and to prevent unfair discrimination the constitution in section 9(4) obligates the State to enact national legislation.

15 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Equality Act, which came into effect significantly on 16 June 2003, National Youth Day, is a manifestation of this constitutional obligation on the State.

 It is against this constitutional framework and historical context
20 described above that the relevant provisions of the Equality Act should be considered in deciding whether the words posted by the respondent amounts to hate speech.

 The Equality Act in the preamble, while recognising that significant progress has been made in restructuring and transforming
25 society, however, acknowledges that unfair discrimination remains

deeply embedded in social structures, practices and attitudes which undermine the aspirations of our constitutional democracy.

In the main the Equality Act endeavours to facilitate the transition to an all inclusive society marked by human relations that
5 are caring and compassionate.

Section 10(1) of the Equality Act prohibits hate speech and provides:

“No person may publish, propagate, advocate or communicate words based on one or more of the
10 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 and c) promote or propagate hatred.”

The prohibited grounds are defined in section 1 of the Equality
15 Act as including *inter alia* race, ethnical region and colour, listed grounds or any other grounds unlisted where discrimination based on that other ground, amongst other things, undermines human dignity or adversely affects the equal enjoyment of a person’s rights and freedom in a serious manner.

20 The word “person” is also defined in section 1 and includes a juristic person, a non-juristic entity, a group or a category of persons.

The use of the word “blacks” by the respondent is clearly a reference to race, ethnical region or colour of a category of persons and as such falls squarely within the definition in section 1 of the
25 Equality Act.

The words, or do the words constitute hate speech? The words posted by the respondent on her Facebook page consist of 118 words in total and the word “monkey” in reference to black people is used four times.

5 In determining the natural and ordinary meaning of words posted by the respondent account must be had not only of what the words expressly say but also of what they imply. See *Argus Printing and Publishing Company Limited & Others v Esselen’s Estate* 1994 (2) SA 1 (A).

10 It is also useful to consider the approach adopted in the law of defamation, namely an objective test which is also the approach in International Law.

 What would a reasonable person aware of the context and circumstances understand by the words in their natural and ordinary
15 meaning?

 See *Saskatchewan Human Rights Commission v William Watcot & Others* 2013 (276) Canadian Rights Reporter 270 (SCC).

 In the Concise Oxford English Dictionary 11th Edition revised on page 922 the word “monkey” is defined as:

20 “A small to medium sized primate living in trees in tropical regions. Colloquially a mischievous person, especially a child, archaic ape, someone who appears ridiculous and burdensome.”

 In the shorter Oxford English Dictionary, 5th Edition, page 1818
25 “monkey” is defined as:

“Any of numerous primates including baboons, a monkey, colloquially, humiliate by making appear ridiculous, monkey chaser (US slang), racially offensive, a black person from the West Indies or other tropical region.”

Clearly the words posted by the respondent, a white female, of and concerning black people, had a racial connotation and a discriminatory import.

The words convey the message build explicitly and implicitly to the reader of ordinary intelligence the following:

- a) Reference to black people as monkeys conveys the explicit message that black people are not worthy of being described as human beings. Implicit in this is that they have subhuman or low intelligence.
- b) Use of the terms “allowed to be released and allow them loose” in the context in which the expressions were used is indicative of the respondent’s view that black people should have restricted freedom of movement.
- c) People who are black are generally uneducated.
- d) Black people are wild and should not be allowed on public beaches and towns.
- e) Black people exhibit characteristics of monkeys in that they “pick, drop and litter.”
- f) To be a black[?] person in a crowd of black people is shameful and causes discomfort and troubles to others who

are not black.

In *Mangope v Asmal & Others* 1997 (4) SA 277 (T) 286J-A the view was expressed that if a black person is called a baboon, which is akin to monkey, when severely criticised the purpose is to indicate
5 that the person is base and of extremely low intelligence.

The Court accepted that the person may also rightfully perceive such words to be hurtful.

In *Strydom v Chilwane* 2008 (2) SA 247 (T) in an appeal from a decision in a Magistrate's Court sitting as an Equality Court, it was
10 held that reference to the complainant as "baboon" and words to the effect that this "baboon" government of yours will provide you with some jobs fall within the definition of hate speech as defined in section 10 of the Equality Act.

Similarly in the case of *J R Hesselman v K E Belepa*, an
15 unreported case, Eastern Cape High Court, Grahamstown local division under case number 231/2009, the Court held that the use of the word "baboon" amounted to hate speech.

The Constitutional Court has acknowledged that the term "harm" as used in section 16(2)(c) of the constitution is not limited to
20 physical harm.

LANGA CJ held in *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (5) BCLR 433 (CC) the following:

"Implicit in its section 16(2) provisions is an
25 acknowledgement that certain expression does not

deserve constitutional protection because amongst other things it has the potential to impinge adversely on the dignity of others and cause harm.”

That psychological, emotional and social harm can be caused
5 by hate speech was also accepted by the Supreme Court of Canada in
R v Cighstra 1993 (SCR) 697 wherein it was stated that:

“A person’s sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded to the group to which a person
10 belongs.”

In *R v Andrews* 43 CCC 3rd 193 CORRIE JA defined hatred as follows:

“Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill will
15 and malevolence in another.”

The words posted by the respondent directly invokes enmity and ill will towards black people simply because they belong to a particular race, ethnic origin or colour.

As such that must amount to the advocacy of hatred based on
20 a prohibited ground. The proviso in section 12 of the Equality Act relating to expression which does not attract liability refers to *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of
25 the constitution are clearly not applicable in this case.

The words posted by the complainant are accordingly not protected as envisaged in section 12 of the Equality Act. By posting the offensive words on her Facebook page the respondent thereby communicated the words to third parties.

5 As such, her conduct in so acting amounts to publication. In any event section 10 of the Equality Act is wide in that it prohibits not only the publication of but also the propagation, advocacy and communication of hate speech.

The respondent knew or ought reasonably to have known and
10 anticipated that the words posted by her would be republished on social media and the press.

She should accordingly also be held responsible for the secondary publication of the words posted by her. The question of fairness does not apply to hate speech in terms of section 15 of the
15 Equality Act.

Accordingly a determination of the fairness or unfairness of the words posted by the respondent is of no relevance.

The consequence: The words posted by the respondent received unprecedented coverage nationally and internationally. With
20 it came a great deal of hurt, suffering, shame, embarrassment and anger for South Africans of all races.

Of recent there has been a dramatic increase of reported incidents of open racism and hate speech in South Africa. The South African Human Rights Commission has publicly reported that in this
25 year alone over 230 cases of racism were registered with the

commission.

At the same time there can be little doubt that there are many other instances of racism that are never reported and which never reach the public domain, either through social media or the
5 mainstream media and which never see the light of day in our Equality Courts.

The words published by the respondent are also highly inflammatory. There must have been a realisation on the part of the respondent that members of the society would be enraged on the
10 comments posted.

The memories of humiliation, suffering and indignity endured by black people for so long would have come flooding back, given our history described above.

There was not surprisingly a huge public outcry and members
15 of the community were deeply hurt, offended and enraged.

We would do well as a nation in transition to remember that words are powerful weapons which, if used indiscriminatory, can lead to extreme and unacceptable action.

Retaliation by members of affected race groups could possibly
20 be violent, resulting in racial conflict, strife and general chaos on a national scale in South Africa.

Hate speech by itself has the potential of undoing the significant gains made since 1994. Hate speech from wherever it comes cannot be underestimated.

25 In his book, *Democracy of Balance* by Stefan Brown on page

62 there are four reasons postulated why hate speech at a social level is prohibited:

- a) To prevent disruption to public order and social peace stemming from retaliation by victims.
- 5 b) To prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in the community and contribute to society.
- c) To prevent visible exclusion of minority groups that would deny them equal opportunities and benefits.
- 10 d) To prevent social conflagration and political disintegration.

As best it is known no public apology has been forthcoming from the respondent following this incident. She had four and a half months at least to do so.

In my view this serves to aggravate her conduct and adds
15 insult to the great hurt caused. In deciding the question of an appropriate award I take into account that the conduct of the respondent's was particularly offensive and hurtful.

The comments posted attracted much publicity and was widely circulated. A reference to case law serves as a useful guide in
20 determining the award.

In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 (4) SA 510 (EC) the North Gauteng High Court sitting as an Equality Court *inter alia* awarded an amount of R75 000 for the
25 impairment of the complainant's dignity as well as emotional and psychological suffering for having been unfairly discriminated against

on the ground of sexual orientation.

In *Zonke Gender Justice Network v Malema* the Magistrate's Court sitting as an Equality Court in Johannesburg under case number 2/2008 ordered the respondent to pay R50 000 damages for his
5 utterances constituting hate speech and harassment.

In *N G Kempton v André van Deventer* the Magistrate's Court in Cape Town sitting as an Equality Court under case number 9/2013 ordered the respondent to pay R50 000 damages for hate speech which was racially motivated.

10 The above cases were in my view comparatively less serious than the present matter.

I am in agreement with counsel for the complainant that an appropriate award should, amongst other things, be determined in the light of the prevailing conditions, taking into account that in the more
15 than 20 years that South Africa has become a democratic state racism is still pervasive in our society and that the time has come for courts to act more decisively.

At the same time I bear in mind that because it is difficult to assess the monetary value of injured feelings, awards should
20 generally be restrained but should also at the same time serve as a deterrent.

Hate speech *per se* is not a criminal offence in South Africa. It is perhaps a move in the right direction that there are steps being taken to criminalise such conduct.

25 After all, laws are made to meet the social demands of our time

and to regulate conduct. Sections of society that are painfully slow to change or that refuse to, given our disgraceful history, should perhaps be compelled to do so under the threat of criminal sanction.

Persons who transgress would then be more cautious to act in
5 a way which the courts respect for the dignity of fellow human beings.

Conduct such as that of the respondent and other likeminded people has the potential to ignite racial conflict and cause instability on a national scale.

Tolerance levels are quickly waning. The sooner this is
10 realised the better it is for our country in moving forward or towards a society where the dignity of all who live in it are restored and protected.

Section 25(1)(c) of the Equality Act obligates the State, where necessary, with the assistance of the relevant constitutional
15 institutions to *inter alia* develop action plans to address hate speech and conduct information campaigns to popularise the Equality Act.

It is expected that the National Action Plan currently in a draft form against racism and other forms of discrimination will assist in our country overcoming the challenges we currently experience,
20 particularly in relation to hate speech.

Regulation 12(2) under the Equality Act provides that each party shall bear his or her own costs unless the Court directs otherwise. However, where the respondent fails to appear without reasonable notice Regulation 12(4)(a)(ii) provides that the respondent
25 may be ordered to pay the costs.

The question of cost is accordingly in the discretion of the Court. In as much as the complainant has not sought an order for cost in the event of non-opposition and bearing in mind that parties should not be discouraged from approaching the Equality Court for fear that cost may be awarded against them, considering the particular circumstances of this case, including the non-attendance of the respondent at the hearing and to mark my disapproval of the reprehensible conduct of the respondent, in my view warrant an order for cost against the respondent.

10 See *Biowatch Trust v The Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC) 16.

In all these circumstances and having regard to the powers conferred on the Equality Court under section 21 of the Act I make the following orders.

15

ORDER

10 JUNE 2016

- 1) The words posted by the respondent on her Facebook page on 3 January 2016 constitute hate speech as defined in section 10 of The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Equality Act.
- 2) The words posted constituted a serious affront to the human dignity of members of the complainant and black people in general, namely Africans, coloured and Indian.
- 3) The respondent is interdicted and restrained from publishing, propagating, advocating or communicating hate speech as

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defined in section 10 of the Equality Act in any form whatsoever.

- 4) The right to freedom of expression entrenched in section 10 of The Constitution of the Republic of South Africa Act 108 of 1996 does not extend to racist utterances as prescribed by the constitution as well as unfair discrimination as hate speech as prescribed by Act 4 of 2000 Equality Act.
- 5) Payment of damages in the sum of R150 000 as an award contemplated in section 21(2)(e) of the Equality Act payable by the respondent within 60 days of the date of service or publication of this order to the Oliver and Adelaide Tambo Foundation (OATF) which promotes non-racialism, tolerance, reconciliation and social economic upliftment in South Africa.
- 6) The clerk of the Equality Court is directed to submit this matter in its entirety to the Director of Public Prosecutions KwaZulu-Natal for consideration regarding the institution of criminal proceedings, either in terms of the common law or relevant legislation.
- 7) The respondent is ordered to pay costs.
- 8) There is one further matter relating to the non-appearance of the respondent at this hearing and her present whereabouts. The clerk, in terms of Regulation 12(4)(b) must inform the respondent in writing of the order in the preceding paragraph. I propose to direct that the orders herein be served on the respondent via the sheriff or Clerk of the Court and if the respondent cannot be located it be brought to the respondent's notice by publication in two provincial newspapers circulating in KwaZulu-Natal and

Gauteng and a national newspaper.

It is accordingly so ordered. Finally, Mr M Shizana[?], the Court is indeed indebted to you for having interpreted for such a long stretch as well as all the other Court staff members who have
5 sacrificed their lunch break so that we could finalise this matter. I am indeed indebted to all of you. Thank you. Court is adjourned.

CERTIFICATE OF VERACITY

This is, to the best abilities of the transcriber, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

ANC and PENNY SPARROW

CASE NO	:	01/16
COURT OF ORIGIN	:	SCOTTBURGH
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**IN THE MAGISTRATES COURT FOR
THE DISTRICT OF UMZINTO**

HELD AT SCOTTBURGH CIVIL COURT

CASE NO : 01/16

DATE : 10 JUNE 2016

BEFORE : MR I KHALIL

PLAINTIFF : ANC

RESPONDENT : PENNY SPARROW

ON BEHALF OF PLAINTIFF : ADV POTGIETER (SC)

ON BEHALF OF RESPONDENT : *IN ABSENTIA*

INTERPRETER : MR SHIZANA

REPORT ON RECORDING

Clear recording with the exception of all channels muting at intervals of a few seconds each resulting in parties being inaudible. (Time codes indicated in transcript).

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