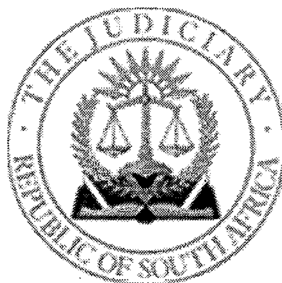
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT AND EQUALITY COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: EQ6/2016 & EQ1/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

5 OCTOBER 2018 **RT SUTHERLAND**

In the matter between

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION **COMPLAINANT**

and

VELAPHI KHUMALO **RESPONDENT**

and

THE LEGAL RESOURCES CENTRE **AMICUS CURIAE**

J U D G M E N T

SUTHERLAND J:

Introduction

[1] On 4 January 2016, the Respondent, Velaphi Khumalo (Khumalo) saw fit to publish on the internet the following two utterances:

> "I want to cleans this country of all white people. we must act as Hitler did to the Jews. I don't believe any more that the 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]

> "Noo seriously though u oppressed us when u were a minority and then manje[1] u call us monkeys and we suppose to let it slide. 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[2] alive and skinned and your off springs used as garden fertiliser." [Sic]

[2] Whether or not these utterances constitute hate speech as contemplated by section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (The Equality Act) is the central controversy to be decided in this case.

[3] However, in addition to that issue, several other complicating aspects also are controversial and must be decided. The principal issues, shorn of their nuances, are:

3.1 Owing to these proceedings, in which the South African Human rights Commission (SAHRC) is the complainant being the second such proceedings,

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[1] "Now" in Zulu.
[2] "burned"

the first such proceedings having taken place at the instance of the African National Congress (ANC), as complainant, in the Roodepoort (Magistrate's) Equality Court, it is lawful and proper that Khumalo is subjected to a second set of proceedings? [3] This controversy embraces a consideration of the doctrine of Autrefoit acquit, Res Judicata and Issue Estoppel and whether the second set of proceedings constitutes an abuse of the court process.

3.2 Owing to the fact that the two sets of proceedings were initiated by the complainants in ignorance of the other complaint, in separate courts, each having jurisdiction over Khumalo, how might that problem be avoided in future?

The procedural evolution of the matter before this Court

[4] The SAHRC lodged a complaint about the first utterance on 22 November 2016. Its founding affidavit states that it approaches the Equality Court in its own right and also in the public interest. The SAHRC has locus standi to initiate proceedings in terms of section 20(f). The provisions of section 25(2) and (3) enjoins the SAHRC to assist in the bringing of complaints on behalf of other persons. The SAHRC received complaints about the utterances, inter alia from the Jewish Board of Deputies. In the complaint lodged by the SAHRC, it is alleged that the first utterance incites genocide against Whites in South Africa, and propagated hatred. The HRC seeks a declarator that the first utterance constitutes hate speech as contemplated in section 10 of the Equality Act.

[3] The Magistrates' Courts and the High court have both been designated as Equality Courts and have concurrent jurisdiction. A person who is alleged to have committed hate speech could therefore be summonsed to appear in either the High Court Equality court where that person is domiciled or to the Magistrate's Equality Court where that person is domiciled.

Relief of various types are sought, including the paying of damages in the sum of R150,000 and a referral of the matter for possible prosecution. Evidence of the dissemination of the utterance and the publicity generated about it were attached as annexures.

[5] An preliminary order was made on 13 February 2017, upon receipt of the complaint by the Registrar of this Court, directing a court hearing. At that hearing, the SAHRC was represented by counsel and Khumalo appeared in person. I was informed that a settlement agreement had been concluded on 14 August 2017. The material; portions of that document state as follows:

> "1. In November 2016 the Complainant instituted proceedings in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') against the Respondent.
> 2. The basis of the complaint was that the Respondent had committed hate speech as defined in section 10(1) of PEPUDA, by publishing the following statement on the social media platform, Facebook, on 4 January 2016 at 05h39:
> [the first utterance is quoted]
> 3. The Respondent did not oppose the proceedings instituted by the Complainant, but availed himself for a meeting at the offices of the complainant on 2 August 2017, on which date the parties agreed to the terms and conditions set out herein.
> **PRINCIPAL TERMS OF AGREEMENT**
> 4. The respondent agrees that the statement he published on Facebook on 4 January 2016 (as quoted above) constitutes hate speech as defined in section 10(1) of PEPUDA.
> 5. The Respondent shall issue an unconditional public apology to all South Africans within 2 weeks of the date of the court order, which apology shall be –
> 5.1 published in full on the Complainant's website and social media platforms;
> 5.2 published in full on all of the Respondent's social media platforms for a period of at least 30 days; and
> 5.3 communicated by the Complainant to South African Media houses.
> 6. The Respondent shall provide the Complainant with a draft of the apology for pre-approval before the apology is published.
> 7. The Respondent shall be interdicted and restrained from publishing, propagating, advocating or communicating hate speech as defined in section 10(1) of PEPUDA.
> 8. The Respondent shall make regular progress reports to the Complainant, for a period of 6 months, regarding the implementation of the attached draft order.

9. The Respondent agrees that he is liable for damages in the amount of R150 000.00 (one hundred and fifty thousand rand), the payment of which is wholly suspended, subject to the following terms –
9.1 The full amount of damages will become due and payable should the Complainant conclude that the Respondent has committed further hate speech as defined in section 10(1) of PEPUDA, following an investigation into any complaint of hate speech made against the Respondent within 12 months from the date of the court order.
9.2 Payment of the amount of damages will be made to an organisation that promotes social cohesion, non-racialism, tolerance and reconciliation in South Africa, which organisation shall be elected by the Complainant.
10. The above Honourable Court shall exercise its discretion in terms of sections 10(2) and 21(2(n) op PEPUDA regarding whether to submit this matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation.

GENERAL

11. This agreement shall be made an order of the above Honourable Court.
12. Accordingly the Respondent accepts, and agrees to be bound by the terms of this agreement, as made an order of court in terms of the draft order attached hereto as annexure "X".

13.....16."

(Signed by SAHRC and Khumalo)

[6] During the exchanges which took place in the directions hearing, I was told that this was the second time that Khumalo had appeared to answer a complaint about the first utterance, the first complaint having been lodged by the ANC in the Roodepoort Equality Court. The SAHRC was ignorant of the Roodepoort proceedings when it initiated these proceedings. It was argued on behalf of the SAHRC that the Roodepoort proceedings were not an impediment to these proceedings. Khumalo declined to give evidence or depose to an affidavit. I postponed the proceedings *sine die* to obtain a copy of the Roodepoort Court File. I received a largely illegible set of documents.

[7] On 9 November 2017 I made this order, of which the material portions state:

"....

The matter shall be set down for a formal hearing in court, upon dates that shall be determined by the Registrar of the Gauteng Local division.

1. At such hearing, the following issues shall be addressed by or on behalf of the complainant, the respondent, and by the *amicus curiae*, to be appointed in terms of paragraph 3.3 of this order.

1.1. Taking into account the referral of a complaint by the African National Congress, in respect of the controversial utterance made by the respondent, in the Equality Court for the District of Roodepoort, in respect of which a settlement agreement, acknowledging contraventions of sections 7 and 10 of PEPUDA by the respondent, was made an order of that court on 10 February 2017; whether it is permissible in law, for the present complaint, lodged by the complainant, before this Equality Court, in respect of the same controversial utterance, allegedly contravening section 10 of PEPUDA;

1.1.1. to be lodged,

1.1.2. or be heard,

having regard to the norms in our law relating to:

(1) double jeopardy,

(2) or res judicata,

(3) or issue estoppel,

(4) or upon a proper interpretation of, and related policy considerations relating to the aims and objectives of, PEPUDA,

(5) or the norms stipulated in the Constitution.

1.2. What might be the appropriate measures to address and manage the prospect of multiple complaints being lodged by several complainants in various Equality Courts:

1.2.1. That might be laid down by the Equality Courts, or,

1.2.2. That might be addressed by amending legislation.

1.3. In the event that it is not permissible to entertain the matter at all, for any one or more reasons, what appropriate order should follow?

1.4. In the event that it is permissible to entertain the matter, in whole or in part, what order should follow to determine the appropriate further procedure to deal with the matter?

1.5. What are the minimum requirements for the enquiry stipulated in section 21 of PEPUDA and regulation 10?

1.6. What are the appropriate requirements for an enquiry into this particular matter; more particularly concerning:

1.6.1. The identification of relevant factors or information pertinent to the assessment of an exercise of the powers of the Equality Court, including,

1.6.2. whether the matter warrants referral for prosecution, or the imposition of any form of sanction by the Equality Court,

1.6.3. whether the proposed settlement agreement between the complainant and the respondent and ancillary draft order presented on 14 August 2017 are appropriate in the circumstances, more particularly, whether such settlement terms:

1.6.3.1. serve the public interest.

1.6.3.2. serve the aims and objectives of PEPUDA.

1.7. The presentation of relevant evidence, if at all, concerning the circumstances under which the utterance was made, including:

1.7.1. the personal circumstances of the respondent,

1.7.2. the motivation of the respondent in making the utterance,

1.7.3. the relevance, if at all, of the respondent's status as a public official in the employ of an organ of state,

1.7.4. the relevance, if at all, of the functional role played by the respondent in his occupation as a youth sports officer.

1.7.5. The effect of such utterance on those to whom it was communicated or came to know of it, directly or indirectly, and evidence of the degree of dissemination of the utterance.

1.7.6. The significance of such an utterance at the time it was made, having regard to racial sensitivities in South African society at that time.

2. To facilitate the ventilation of these issues:
   2.1. The registrars of both the Roodepoort Equality Court and of this Equality court shall depose to affidavits:
      2.1.1. to describe the actual referral procedures applied in each court;
      2.1.2. to report whether the current procedures are capable of alerting registrars of Equality courts to referrals being made on the same subject matter to several Equality Courts
      2.1.3. and if not, to recommend what might be appropriate measures to alert Registrars of Equality Courts to the fact of a referral has been made to two or more different Equality courts of a complaint based on the same subject matter.
      2.1.4. Such affidavits are to be filed within 20 days of service of this order upon them.
   2.2. The complainant shall compose a single bundle of the documents filed in this case and in the Roodepoort case, which shall contain legible copies of every document, arranged chronologically. Such bundle is to be filed within 5 days after compliance with paragraph 3.1
   2.3. In light of the respondent not being legally represented:
      2.3.1. Lawyers for Human Rights (LHR) are requested to accept an appointment as amicus curiae; and failing acceptance, the chair of the Johannesburg Bar Council is requested to appoint an appropriately experienced counsel, and the Chair of the Johannesburg attorneys' association is requested to appoint a suitably experienced attorney.
      2.3.2. To this end, the complainant shall communicate this request within 5 days of the date of this order, and monitor the further developments to give effect to the intent of paragraph 3.3.
3. The complainant shall upon receipt of this order:
   3.1. Cause it to be served on the two registrars as soon as possible.
   3.2. Cause it to be served on the respondent as soon as possible.
   3.3. Notify the Minister of Justice and Constitutional Development of this matter and specifically mention the issues described above, with an invitation to present argument, if any, on the issue of multiple referrals to Equality Courts, and such intention, if any, shall be communicated by not later than the next Directions meeting, as referred to in paragraph 4.4
   3.4. ….4.4"

[8] When the parties again appeared, I was informed that Lawyers For Human rights was unable to accept an amicus role and that the Legal Resources Centre (LRC) had volunteered to fulfil it. This substitution was self-evidently wholly appropriate. Khumalo indicated that he now wished to have representation. Later, through the good offices of the LRC, representation *pro bono* was obtained and duly appointed by me to fulfil that role.

[9] Counsel for the SAHRC informed the court that it intended to amend the complaint to incorporate the second utterance, alternatively, lodge a fresh complaint about the second utterance and seek to have both complaints addressed in a single consolidated hearing. Subsequently, a second complaint was lodged on 16 December 2017, which referred to both utterances, supported by an affidavit which replicated the allegations made in the first complaint. No objection was raised to the filing by the SAHRC of second complaint in respect of the second utterance, *per se,* and both utterances were indeed subsequently addressed together.

[10] These arrangements, and timetables for additional affidavits, were provided for in the order granted on 15 December 2017, as follows:

> "1) The Legal Resources Centre is appointed as amicus curiae.
> 2) The Human Rights Commission, the complainant, shall uplift the affidavits of the registrars of this court and of the Roodepoort Magistrate's Court, and circulate them to the parties.
> 3) The list of issues of law and of fact which are set out in my initial order of the 9th November is not a closed list, and it is open to the parties to address any question of law or fact as they deem appropriate.
> 4) The following timeframes shall be adhered to....................
> ....Any question of costs will be deferred until the conclusion of the proceedings."

[11] The hearing took place on 2 and 3 July 2018 in open court. No oral evidence was tendered.

The Roodepoort proceedings

[12] It is necessary to recount the events that occurred in the Roodepoort proceedings.

[13] The information available to me about the Roodepoort proceedings is limited to the contents of the court file from that court. Khumalo made no contribution to explaining the events which occurred in those proceedings. A number of unexplained procedural anomalies are evidenced, which bear mention for the sake of coherence of the narrative. Because of the approach I have adopted, these anomalies, some which seem to be irregularities, shall not effect the outcome of these proceedings.

[14] It is apparent that the ANC responded to the utterances made by Khumalo on 4 January 2016 by instructing attorneys Buthelezi Vilakazi to process a complaint. The procedure requires several prescribed forms to be filled in and processed by the Clerk or Registrar of the relevant Equality Court. The Form 2 was attested to on 18 January, accompanied by a notice of motion dated 19 January and an undated founding affidavit by the ANC's Secretary - General. The complaint lodged was that Khumalo had contravened section 7(a) of the Equality Act. That section provides that:

> " ....no person may unfairly discriminate against any person on the ground of race, including –
> (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;"

[15] The relevant portions of the founding affidavit on behalf of the ANC states the following:

> "6. The ANC was formed in 1912 to defend and advance the rights of the African people after the creation of white supremacy Union of South Africa.

7. In the Course of fulfilling its mandate the ANC was joined in the struggle by coloured and indian communities, who were also oppressed by the colonial rule at the time, and by the white community who supported the struggle of these politically, socially and economically disadvantaged black groups.

8. Currently the ANC has a paid-up membership of approximately 1 (one) million members from all race groups and many more millions of supporters throughout South Africa.

9. In terms of section 20 of promotion of equality and prevention of unfair discrimination act the ANC has locus standi to institute these proceedings as an association acting in the interests of its members more specifically our white members.

THE COMPLAINT

10. On the 7th of January 2016 the Respondent posted through his twitter account the following words "cleanse South Africa of all whites. We must act as Hitler did to the Jews. I don't believe any more that the is a large number of not so racist whit people. I'm starting to be sceptical even of those within our Movement 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 already seen.", A copy of the said utterances is attached herein as annexure "B".

11. The social media post by the Respondent are directly in contravention of section 7(a) of the promotion to equality and prevention of unfair discrimination act, which provides as follows:

"subject to section 6 no person may unfairly discriminate against any person on the grounds of race including the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to or in any form of racial violence.

SUBMISSION

12. It is common cause as seen above that some of our members are white people and hereby duly represented by the ANC in bringing this Application, it is further common cause that Hitler subjected Jews to concentration camps, tortured them and subjected them to painful and most gruesome form of human rights violation. The Respondent is therefore suggesting in his social media post that white people, some who are our members be subjected to the same treatment, that their human rights be violated as Hitler did to the Jews.

> These utterances have an element of inciting violence against a specific race in our country (white people) it is therefore my submission that the Respondent has discriminated unfairly on the grounds of race against our members who are white people."

[16] From this affidavit it is apparent that the ANC moved from the premise that it was an appropriate representative of Whites who were its members. It goes on to draw attention to Khumalo's utterance including his express reference to White ANC members who deserved to be subjected to a Hitlerite holocaust. On that further premise, the deponent contends that there was an element of inciting violence towards the White race which constitutes unfair discrimination " ...against our members who are White people".

[17] Self-evidently, a complaint framed in terms of section 7 is not about hate speech, as defined in section 10, although it is evident that the thrust of the affidavit by the Secretary-General addressed the substance of hate speech.

[18] A Notice of withdrawal of the matter, dated 13 July exists. It is unexplained. On that same date, a prescribed Form 3 notice to Khumalo to appear was issued. In this Form it is alleged that Khumalo committed 'hate speech'. No details are given. No accompanying affidavit is attached. The same case number is assigned. It is not apparent that a fresh complaint was laid by submitting another prescribed Form 2. The impression is that the founding affidavit from the section 7 complaint remained, and the cause of action was re-labelled to allege hate speech. No evidence of a formal amendment exists.

[19] An affidavit by Khumalo, ostensibly attested to on 5 October 2016, but also bearing a further court stamp dated 27 July 2016, stated the following:

> "I, Velaphi Khumalo understand the charges brought before yourselves by the ANC. I also understand the court proceedings by the court.
>
> I would like to indicate to the court that I am willing to cooperate with the process due and will avail myself on dates that the court chooses. I would further would like to let the court that I intend to plead guilty on these charges as brought before you, I have come to understand the seriousness of my comments on social media, I believe that as a young person I should be at the forefront of fighting racism. I also understand the importance of the process taken against me. I believe it seeks to correct my actions while at the same time raising awareness of the scourge of racism black or white.
>
> Though I am willing to participate in the process, I will not be able to satisfy the sanction of R100,000 asked by the organisation I am not in a financial standing to afford this amount asked from this court.
>
> I do however am prepared to serve community service in any program that works towards the eradication of racism as the Court and the African National Congress, and an unconditional apology to South Africa.
>
> My intentions are not to instruct the Court on how it must carry out this case, nor is it to undermine your wisdom. I am pleading for leniency, from the Court and the complainant. I hope this submission will be considered."

[20] The parties were given notice in terms of prescribed Form 4 to appear on 19 December 2016. A manuscript record was kept of the proceedings by the presiding officer. Remarkable is the fact that the proceedings were held in camera. No indication appears which explains that decision. The provisions of section 19(2) of the Equality

Court expressly requires proceedings to conducted in open court unless the interests of the administration of justice so require. It is difficult to think what might have justified the departure. In my view, an irregularity seems to have been committed. This among other factors fuelled a suspicion that these proceedings were "friendly", a topic addressed elsewhere in this judgment.[4]

[21] Several questions of a formal procedural nature were posed at that hearing. Khumalo appeared in person and declined legal representation. The statement by Khumalo, quoted above, was presented. The question of a settlement was raised. It was recorded that there had been no settlement negotiations. The matter was then postponed for " ...hearing and a possible settlement."

[22] On 10 February 2017, the hearing resumed. It is stated that the proceedings were recorded but no such transcript has been made available to me. The Record consists only of writing down the terms of an agreement, marking it "A" and making it an order. The written agreement provides as follows:

> "1. **THE COMPLAINT**
> That the Respondent has contravened section 7 and 10 of Act 4 of 2000 by posting on his twitter/social media profile the following "we should do to white people what Hitler did to the Jews". That the above comments constitute an unfair discrimination on the ground of race and they constituted hate speech.
> 2. **REMEDIAL ACTION**
> 2.1 That the Respondent will pay an amount of R30 000.00 (thirty thousand rand only) towards a charity organisation identified by the Applicant.

[4] See infra paragraph 69 of this judgment.

2.2 That the amount will be paid in monthly instalments of R1000.00 (one thousand rand only) into the Applicant's attorneys of record trust account from the 28 February 2017 until the debt is extinguished (30 months).

2.3 That the Respondent will provide 1 hour grooming sessions/talks against racism in 3 (three) schools identified by the Applicant.

3. FULL AND FINAL SETTLEMENT

This agreement is binding on the parties upon signing thereof and supersedes all prior arrangements entered into between the parties and save for the above, neither party shall have any claims against the other arising contractually or otherwise and this agreement is in full and final settlement of all obligations owed or owing by the parties to each other.

4. NON-VARIATION OR AMENDMENT

The provisions of this agreement shall not be capable of being varied, save by a court of competent jurisdiction, amended, added to, supplemented, novated or cancelled unless this is contained in writing and signed by both parties.

5. INDULGENCE, WAIVER AND/OR ABONDONMENT

No indulgence, waiver, relaxation by either party shall constitute a waiver or abandonment of any right the other may have consequent to each party's breach."

[23] What is described is the entirety of the material events in the Roodepoort proceedings.

[24] The question arises whether an "enquiry" was conducted as required by the Equality Act. Section 21 of the Equality Act provides that:

> "The Equality Court .....must hold an enquiry in the prescribed manner and determine whether ....hate speech... has taken place as alleged."

24.1 This provision requires a *determination* after holding an *enquiry.* The clear implication is that the issue is not a private matter between the parties but requires judicial intervention. Indeed, given the public interest rationale for the Equality Act, a complaint is always a matter of public importance. Moreover,

given the wide powers conferred on the Equality Court in terms of section 21(2) and the clear implication that one or more such orders have to made *after considering* whether one or another is "appropriate", that leg of the court's function cannot be performed without a substantive enquiry. This is particularly so in respect of section 21(2)(n) which requires the exercise of a discretion to refer a matter for possible prosecution. In *Manong & associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape & others (No 2) 2009 (6) SA 589 (SCA),* a case which addressed the procedures in terms of the Equality Act, held that the failure of an Equality Court to apply its mind to various peremptory procedures constituted irregularities.

24.2 Ostensibly the settlement agreement was rubber-stamped by the presiding officer. There is no indication the presiding officer applied his mind to the propriety of the settlement order, nor indeed, to an assessment of the utterances. Given that judicial officers, both magistrates and judges are required in terms of section 16(2)(a) to be certified to sit in the Equality Court after having been trained in the provisions of the Equality Act, this lapse is especially regrettable.

24.3 In my view, what is evidenced in the Roodepoort Court exhibits several irregularities. No enquiry took place. Contrary to the provisions of the Equality Act, the so—called proceedings were held in private. No evidence was adduced whether oral or on affidavit. The fate of the affidavit of the ANC's secretary-general is unknown but does not seem to have played any role, still

less how the complaints metamorphized from a section 7 to a section 10 complaint.

[25] However, notwithstanding all of these criticisms, the order of the Roodepoort Court, even if irregular for want of adherence to the provisions of the Equality Act, remains standing until formally set aside. No steps to achieve that have been set in motion.

The amplifying affidavits in the proceedings in this Court

[26] Khumalo, assisted by counsel *pro bono*, filed an answering affidavit to the founding affidavits of the SAHRC. The SAHRC filed a replying affidavit. The amicus filed an affidavit and report by Professor Malose Langa, a Psychologist. The Minister of Justice filed no affidavit, but set out the views of the Department in heads of argument. Counsel for the SAHRC, Khumalo and the Amicus each filed comprehensive heads of argument.

Khumalo's affidavit

[27] The significance of the affidavit is that Khumalo retracts his several admissions that the utterances were hate speech, and in any event asserts that the two utterances ought to be seen as part and parcel of one single act, and therefore alleges that it is improper for these proceedings to continue owing to the fact of the Roodepoort case, and were they to do so, it would be an abuse of process. Khumalo also seeks

exoneration for any moral culpability for the utterances, despite offering, what in this context must, inescapably, be a hollow apology.

Explaining why

[28] Khumalo explains that he published the utterances in a state of extreme agitation, without reflection. He is sorry he did so and promises not to do so again. He says the utterances were issued:

> '...in a state of anger created by an instance of racism which I was in the process of dealing with myself. I was reacting to Penny Sparrow's well – known facebook publication in which she referred to Black people as 'monkeys'.....I was deeply hurt and extremely upset. My facebook posts were a knee-jerk reaction to that anger. They were not intended to hurt anyone. No reasonable person would have thought that I intended to incite or carry out any of the conduct described in them. The fact that they were so over the top demonstrates that they were not the sort of speech to which section 10 addresses itself...."

[29] Khumalo claims that the same morning he published the utterances he was sent a copy of sparrows 'monkeys' insult, describing as he understood it, to say that the crowd of Blacks on the beach made it dirty.

[30] The first utterance was posted at about 05h39. He remained online and participated in a political debate. He was affronted by other posts which either agreed

with Sparrow or "...sought to justify her views on the basis that she was expressing herself and entitled to exercise her right to freedom of speech." He came across another monkey insult. At 11h00 he posted the second utterance.

[31] Khumalo sets out an account of growing up under apartheid, in poverty, and experiencing acts of racism. The account is an all too familiar one experienced by Black South Africans. He describes his political awakening, the optimism engendered by the 1990-1994 democratic revolution and the burden of disillusion in the years thereafter. In 2008 he founded a civil society organisation called 'ichange' whose function was to empower with information. In 2013 he was employed as a sports officer by the Gauteng Provincial Government.

[32] He says that his life experience is pertinent to comprehending his reaction to Sparrow's infamous 'monkeys' insult. He says:

> ".... it was a slap in the face to the efforts of Black people, who, like me had forgiven the atrocities committed during apartheid and who had chosen to work at reconciliation. I particularly found her use of the word 'monkey' hurtful. It was offensive to me and was akin to being called a 'kaffir'...." When he saw her getting support of 'a significant amount of white people' he became infuriated. He says: " I was also upset with ANC members who are White, as some of them on the Political Debate SA [ie the online platform] supported her. It was disguised support to the effect that she had the right to freedom of expression, but it was support never the less."

[33] He states further as to the first utterance:

> "I want to state categorically that I do not hate White people and I have no intention to harm, be hurtful or incite harm towards White people. I have apologised, been sanctioned at work and I have performed in terms of my settlement agreement with the ANC. Looking back on the incident, I see that my comments were triggered by instantaneous rage and fury...."

[34] As to the second utterance he states that he extends these sentiments to it too:

> "I submit that the second statement was similarly precipitated by rage. I drew parallels between Jews and Palestinians to White people in South Africa to the extent that comparisons have historically been made about a privileged minority oppressing a majority. My point was in no way that Jews deserved to be killed. I deny that it was a call to genocide and I deny that it was anti-Semitic."

[35] After these utterances were disseminated in the public domain, his employer, the Gauteng Provincial Government, made a public statement condemning Khumalo's conduct and announcing that disciplinary steps would be taken. Khumalo's job was that of a Sports Officer, taking care of youth. This is a point of some importance in the matter. Subsequently, his employer suspended him and eventually issued him with a final written warning because:

> " .... You conducted yourself in an improper, disgraceful; and unacceptable manner in that....you made the following derogatory, demeaning and or racist remark posted

on your facebook in your capacity as an employee of the department of sport arts culture and recreation."

[36] Khumalo acknowledges the events in the Roodepoort proceedings and his admission there that the utterances were indeed hate speech. However, he says:

> "... I was unrepresented. I was not aware what the legal requirements of 'hate speech' are, and simply wanted to put the complaint behind me and move on with my life. Had I been properly advised at the time, I would have not conceded that my facebook posts constituted 'hate speech' because properly interpreted, in context. they do not."

[37] As regards the settlement agreement with the SAHRC, the same recantation is made.

The Tender of apologies by Khumalo

[38] The apology offered, at various times is the subject of a discrete controversy. It is dealt with accordingly.

[39] In the founding papers by the SAHRC a reference was made to a Sowetan live media report in which Khumalo is said to have apologised. The report was published on 8 January and was written by Jeanette Chabalala. In the report the following appears:

> "Velaphi Khumalo, the man who called for black South Africans to do to White people what 'Hitler did to the Jews' has apologised.

In an email addressed to South Africans, the [ANC] and the Gauteng government, a man identifying himself as Khumalo said it was not his intention to stir up tension in the country.

[The first utterance is cited]

On Thursday, Khumalo said he hoped the people of South Africa would find it in their hearts to forgive him.

'I would like to aplogiese (sic) to the Gauteng Government for my emotional comments that I made on a public platform. I further want to apologise to the ANC for the comments I made that do not reflect the ideologies of a Democratic society that are out ideals' he wrote.

He admitted that his comments were offensive and "uncomfortable".

'I have seen first hand what racism and oppression of any race can do to a country and would not want my son to grow up in such a society' Khumalo said. ...."

[40] The SAHRC contends that the apology was only to the Gauteng Government and the ANC and not to all South Africans.

[41] Instead of presenting a copy of the email in question, Khumalo drafted, allegedly from independent and unreferenced recollection, a text. He stated that he could not retrieve this email from his own computer. This reconstruction was only revealed during argument, and the passage in his affidavit did not qualify the text in this regard and appeared as if was the exact text sent by email. His reconstruction included this statement: 'I would like to apologise to the people of south Africa for the pain caused...'

[42] No suggestion is made that the email could not be obtained from Ms Chabalala, whose byline offered a ready point of contact. The passage in the affidavit was criticised for lack of candour. In my view that criticism is justified. Moreover, the failure to secure a

copy from the source who published the report is unsatisfactory when such heavy reliance was to be placed on the scope of the apology. Therefore, the only reliable evidence available is that as published in Sowetan Live. Second hand though it may be, Chabalala's report is what reached the South African People. She wrote that he hoped that the people of South Africa'...would find it in their hearts to forgive him'. That statement albeit second hand can only be reasonably read to mean he did tender an apology to everyone. The fact that the text formulated by him, and cited in the report, refers expressly only to his employer and the ANC does however point to his subjective notions of who was really important.

[43] In the various other documents to which he has put his name further apologies have flowed. However, what is of significance is his recent recantation of the admission that the utterances constituted hate speech. If the utterances were not hate speech then they are utterances within the bounds of freedom of expression for which no apology is warranted. It is not logical to recant that it was hate speech and yet apologise. Again, logically, a recantation that he committed hate speech inescapably implies a tacit withdrawal of the substantive apology. The husk of an empty apology carries no weight. No doubt he regrets the publicity and the criticism visited upon him and its attendant humiliation, but this is to be distinguished from an apology for wrongdoing.

The SAHRC replying affidavit

[44] In large part, the reply is a critique of Khumalo's affidavit. No allegations of fact are rebutted.

[45] It is stated that the Court's enquiry is into the *effect* of the utterances and not into the intention of the author. This point is correct and is taken up when addressing the arguments. The reliance placed on the Sparrow insults by Khumalo is said to be misdirected, another point to be addressed directly in relation to the arguments.

[46] Additional information about the vulnerability of Whites to violence is offered. The example offered is the experience of a White farming family subjected to gratuitous violence during a robbery. A brief exposition is given of anti-semitism, and the rigours of the holocaust. Mention is made of the fact that a sizeable proportion of South African Jews are the descendants of Holocaust victims and survivors.

The affidavit of the amicus Curiae

[47] This affidavit, as behoves the role of an amicus curiae, addressed, inter alia, the social context and was accompanied by the report of a psychologist, Professor Langa.

[48] Professor Langa did not interview Khumalo. The report expresses his professional opinion based on a reading of the papers filed in the matter. Axiomatically, in the absence of a clinical examination, it is not an opinion about Khumalo personally, rather it is a survey of the social context of the lived experience of an African person during Apartheid and during its aftermath. It is, as I read it, more sociological than psychological, but to quibble about where sociology ends and socio-psychology begins is pointless. My impression from reading the report was that I learnt nothing that a

reasonably well informed South African with an interest in the socio-economic and socio-political condition of society would not be aware of. The circumstances do not warrant an extensive exposition, as they are the all too frequent experience of deprivation and humiliation and echo, self-evidently, Khumalo's own description of his life, which has already been addressed and upon which account the report is based.

Should the HRC complaint not be heard because of the Roodepoort proceedings?

[49] Criticism of the Roodepoort proceedings *per se* have been addressed elsewhere. Here the problem of two sets of proceedings ostensibly about the same subject matter is addressed.

[50] There are three defences which have been put up a possible reason why the SAHRC complaint ought not to be heard: (1) Double jeopardy or *autrefoit acquit*, (2) Res judicata or Issue Estoppel, and (3) the notion that the HRC case is an abuse of the Court process.

Autrefoit Acquit

[51] Alone among the arguments that were advanced, was that on behalf of the Minister of Justice that *autrefoit acquit* applied. In argument that contention was withdrawn, in my view, correctly so. The doctrine of *autrefoit acquit* belongs exclusively to the realm of criminal procedure. The public policy choice that a person be tried only once for an alleged crime is axiomatically correct.

[52] The point about the proper realm within which the doctrine of *autrefoit aquit* should dwell was alluded to in *NDPP v Swart 2005 (2) SACR 186 (SE.)* That case dealt with an application to seize assets under the Prevention of Organised Crime Act 121 of 1998 (POCA). In criminal proceedings before a magistrate, a prosecutor had not invoked section 48 of POCA to seek a forfeiture order. The application for the forfeiture was launched afterwards. Leach J rejected the argument that Swart was being subjected to double jeopardy. In *State v Parkins 2017 (1) SACR 235 (WCC)* the question was raised on appeal whether issue estoppel was part of our criminal law. In an earlier criminal trial on an unrelated charge, the Accused had successfully gotten a ruling excluding certain evidence. That same evidence was tendered in the later criminal trial. The Full Bench held that the earlier judicial decision did not bind the court in the later case and the evidence was admissible.

[53] Proceedings in terms of the Equality Act are not akin to criminal proceedings, and because, among the Court's powers, there is a discretion to consider a referral of the matter to the National Prosecuting authority for it to exercise its discretion about any prosecution, the statute is truly concerned only with the civil dimension of the controversy.[5] No power exists to impose a sanction resembling a criminal sanction. An order to pay damages to an 'appropriate body' is not akin to a fine nor indeed even to an administrative fine.[6]

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[5] See: Section 10(2) and Section 21(2)(n). of the Equality Act.
[6] See: Section 21(2)(e) of the Equality Act.

Res Judicata and issue Estoppel

[54] The parties were in agreement that the application of the classic Res Judicata formula of the same issue, the same relief sought, and the same parties, must fail because the complainants were different and were wholly unrelated parties. What was controversial was whether Issue Estoppel, as understood in our law, could succeed. Issue Estoppel, in its South African garb, is the exercise of a judicial discretion in the interests of justice to relax the strictures of the classic Res judicata formula on a fact-specific case by case basis.

[55] The authoritative formulation of our doctrine of issue estoppel is that by Brand JA in *Prinsloo v Goldex 15 (Pty) Ltd and another 2015 (5) SA 297 (SCA). At [23] – [26]:*

> "[23] In our common law the requirements for res iudicata are threefold: *(a)* same parties, *(b)* same cause of action, *(c)* same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in *(b)* and *(c)* may result in defeating the whole purpose of res iudicata. That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties.
> [24] At the same time, however, our courts have realised that relaxation of the strict requirements of res iudicata in issue estoppel situations creates the potential of causing inequity and unfairness that would not arise upon application of all three requirements. That potential is explained by Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1966] 2 All ER 536 (HL) at 554G – H when he said:
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> > 'The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought?'
>
> [25] One can also imagine a situation where a purchaser seeks confirmation of his or her purported cancellation of the sale in motion proceedings. The seller may decide that the

expensive and time-consuming game is not worth the candle and thus decide not to oppose. But if the purchaser were then to sue for substantial damages the application of issue estoppel in the second case may cause clear inequity. The same situation will not arise in the case where all the requirements of res iudicata are satisfied. In that event the relief sought in both cases will be the same. The seller will have to decide whether to speak up in the first case or hold his or her peace in the second.
[26] Hence, our courts have been at pains to point out the potential inequity of the application of issue estoppel in particular circumstances. But the circumstances in which issue estoppel may conceivably arise are so varied that its application cannot be governed by fixed principles or even by guidelines. All this court could therefore do was to repeatedly sound the warning that the application of issue estoppel should be considered on a case-by-case basis and that deviation from the threefold requirements of res iudicata should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent proceedings (see eg *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* supra at 676B – E; *Smith v Porritt* supra para 10). That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution."

[56] This statement of the law was followed in *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others 2014 (5) 466 (SCA)*. In that matter Lewis JA upheld an appeal rejecting the issue estoppel defence where the same parties were litigating in a trial against one another over a breached lease agreement about damages for fraudulent misrepresentation by the lessor. The parties had previously litigated against each other over the same lease in motion proceedings for cancellation of the lease and eviction. The lessor had succeeded in getting an eviction order and in the course of those proceedings, a finding in the motion court had been made that no fraud by the lessor had occurred. It was held on appeal that the circumstances were a proper case to reject issue estoppel because a different result might follow on a trial as distinct from motion proceedings and because the finding of an absence of fraud on affidavit was not sustainable.

[57] In this case, in support of the proposition that issue estoppel should be applied in this case, the Amicus has relied heavily on the decision in *Royal Sechaba Holdings*

(Pty) Ltd v Coote and Another 2014 (5) SA 562 (SCA). The facts in that matter were that two ex-employees of Sechaba, Coote and Engelbrecht, were sued by their former employer for damages arising out of their alleged breach of fiduciary duties to Sechaba. Their misconduct was allegedly the wrong payment of generous sums to one Jones, another ex-employee. Coote and Engelbrecht pleaded issue estoppel. Earlier, Sechaba had sued Jones for wrongful receipt of payments. That dispute was adjudicated and the finding was that Jones was entitled to what he was paid; ie what Coote and Engelbrecht had authorised to be paid to him. The contention in support of Issue Estoppel was that the question of the validity of Jones receipts was the same issue that was central to the question of whether Coote and Engelbrecht were in the wrong. Although on appeal the plea failed on the facts, the Court held at [19] – [21]:

> "[19] It is, however, the view of this court that the 'same parties' requirement is not immutable and may in appropriate cases, and in line with this court's duty to develop the common law, be relaxed or adapted in order to address new factual situations that a court may face. There is no reason in principle why a court cannot relax the same-person requirement for the very reasons that the two other requirements have, over time, been relaxed. In *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* Brand JA put the matter thus:
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> [the passage cited above is quoted]
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> [20] Most recently, in *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others*, Wallis JA stated that it was not clear that Voet confined 'same person' narrowly to those who 'derived their rights from a party to the original litigation' and continued:
>
> > 'It may be that the requirement of the same persons is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.' 17
>
> [21] In order to develop the common law, by either relaxing or extending the 'same person' requirement, persuasive reasons must be placed before the court for doing so. If fairness and equity dictate a development of the law, and to do otherwise would defeat the very purpose of the defence, consideration should be

> given to allowing issue estoppel as a defence even where there is not, strictly speaking, identity of parties. The doctrine of res judicata is founded on the policy considerations that there should be finality in litigation and an avoidance of a multiplicity of litigation or conflicting judicial decisions on the same issue or issues. As Brand JA in *Prinsloo* said, our courts have recognised that rigid adherence to the requirements of same cause of action and same relief would defeat the purpose of res judicata. There is no reason why a similar approach should not be adopted for the same-parties requirement. But in this matter it was not argued why the requirement should be relaxed or extended, since counsel for the respondents persisted with the contention that the respondents were privies of the parties to the arbitration. He also disavowed any suggestion that the institution of action against the respondents amounted to an abuse of the court's processes."

[58] In urging the application of the defence of issue estoppel, several contentions are advanced by the Amicus. The arguments are underpinned by the strong dictum in *Royal Sechaba* that identity of parties should not be slavishly adhered to in an appropriate case and by the submission that this case is ripe to be used to develop the common law. I deal with them in turn.

[59] Section 21(5) of the Equality Court confers power on an Equality Court to regulate its own procedure. It is contended that the utilisation of the common law defence of issue estoppel is therefore competent. I agree, it is plainly so.

[60] It is contended that the Equality Act is framed to allow standing to many and varied parties, and therefore the risk of multiple cases is acute. This could occur not only as evidenced in this very case, where two complaints were instituted in two courts with concurrent jurisdiction, but also the broad range of competent complainants could flood a given court with case after case resulting in harassment. There is no time bar in the Equality Act by when a complaint can be instituted, though it may be inferred that the ordinary principle of prescription would apply. If so, an interesting question is

whether a delay, until the brink of prescription, might not trigger a secondary consideration about bringing a complaint within a reasonable time. What constitutes a reasonable time is determined by an *ex post facto* specific assessment made on a conspectus of considerations, including the identity and means of the complainant. This perspective about the enhanced risk of multiple complaints and different outcomes is therefore correct. The risk is systemic and peculiar to the process created by the Equality Act. However, in my view, it is not a factor which satisfies the type of enquiry contemplated in *Prinsloo v Goldex.* The shortcomings of the Equality act procedures are addressed directly elsewhere in this judgment.

[61] Allowing multiple complaints could defeat the norm of expeditiousness expressed in regulation 10 of the Equality Act. Regulation 10 provides that the enquiry must be conducted in an expeditious and informal manner which facilitates participation by the parties. This injunction is inconsistent with section 19(2) of the Equality Act which requires proceedings to be in open court. Moreover, Section 19(1) which incorporates certain of the rules of Court of the High Court or the Magistrates Court, depending on which is performing the role of an Equality Court, is a contrary indication of informality. The Regulation, if read to be peremptory, is probably *ultra vires.* None of what is stated here should be understood to be dismissive of expeditiousness. However, that aspiration is seldom achieved in legal proceedings because it is, in my view, not a goal that can be attained because of an injunction but rather, because the parties will it. The laborious pre-hearing procedure of the Equality Act is at odds with any realistic attainment of expeditiousness, as are considerations of the public interest, as illustrated,

for example by cases such as *Afriforum v Malema 2011 (6) SA 240 (EqC) and South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2018 (3) SA 291(GJ), both of which were protracted.

[62] It is contended by the amicus that the risk is run of different outcomes on the same issue, which is exactly the mischief that the principle of res judicata is designed to avoid. This case, it is argued, is exactly such an example because the finding of hate speech in the Roodepoort Proceedings stands and if the denial by Khumalo, who now contests such a finding of hate speech, succeeds, there will be a contradiction on the same facts by two courts. I agree. However, it is in this very realm that issue estoppel functions with regard to the specific factual matrix. These peculiar facts must evaluated *ad hoc* to determine if that risk is not overridden by other more telling considerations.

[63] The SAHRC, *qua* Complainant, it is argued, has 'no skin the game' and Khumalo has already been sanctioned and apologised; *ergo*, no useful purpose can be achieved in what must be a 're-hash' of the matter. This is an inaccurate appreciation of the role of the SAHRC. The standing of the SAHRC, is in my view, is not that of a typically disinterested party. The SAHRC's statutory mandate is to promote certain values in society. The Equality Act is one of mechanisms available to do so, and the statute specifically enjoins the SAHRC to play an active role. SAHRC's role, and the role of the ANC in the Roodepoort Proceedings, are quite distinct. This case is not an example of two public interest organs both seeking to achieve the identical purpose and thus engaged in a genuine duplication of effort. The ANC's interest as evidenced in the

secretary-general's affidavit (whether it ever reached the presiding officer in the Roodepoort Court or not) is to stick up for its White members. The ANC does not purport to prosecute the complaint on behalf of the general public. Moreover, it is not to be assumed that only White South Africans, in or out of the ANC, might be scandalised by the utterances, and the probability exists that South Africans of all hues took umbrage at the utterances, including Blacks in the ANC, as can be inferred by the views expressed by the Secretary- General in his affidavit. The ANC complaint does not address this dimension of the controversy.

[64] Whether or not the SAHRC's stance is merited is an issue separate from the issue of whether it should be allowed to prosecute a complaint. The merits of its stance are addressed elsewhere in this judgment.

Is a second enquiry is an Abuse of the Process?

[65] The Respondent's case does not rely on issue estoppel. The argument is twofold. The first point is that the two statements are in reality one, the second being merely a continuation of the first. The second point is that a full apology has been given, the Roodepoort court has sanctioned him and no more is either necessary or appropriate. On that premise it is contended that the Court should either dismiss or stay the SAHRC complaint proceedings.

[66] As to the two utterances being part and parcel of one continuing 'act,' I agree. Indeed, the second utterance is fully comprehensible only when read together with the first utterance. The vitriol is in the same vein with the imagery ratcheted-up to a further degree. That consideration, though it means that both utterances must be considered holistically, is not the end of the matter. The fact that in the Roodepoort proceedings that court did not deal with the second utterance in a material fact. Moreover, the serious flaws in the Roodepoort proceedings also is relevant.

[67] As regards the notion that there is no more relief that could appropriately be granted I disagree that this idea belongs to the enquiry into whether or not to entertain the complaint. In respect of the enquiry process, a *proper enquiry* ought to consider the full range of options. That plainly was not done in the Roodepoort proceedings. It might well be that on a proper consideration, no further relief is indeed appropriate, but it cannot be said that that assumption can be relied upon to *prevent* a second enquiry.

[68] In my view, there is no abuse of the process. The systemic problems inherent in the procedures of the Equality Act which allow two complaints to be prosecuted in ignorance of one another are addressed elsewhere in this judgment.

[69] It was suggested on behalf of the SAHRC that the Roodepoort proceedings should be cautiously looked at because they seem to bear the characteristics of a 'friendly' complaint. The criticism is not undeserved. Mention has been made of the proceedings taking place in camera, a plain irregularity that can only be understood to be a device to evade publicity. The Locality of the Magistrate's court, Roodepoort, in which to bring the proceedings also lent itself to diminished risk of publicity, albeit

obviously there was no impropriety *per se* in going to that Court. Ostensibly, no press statement was made afterwards to draw attention to the event. The inference that an embarrassing episode was being quietly tucked away is reasonably made. However, whatever impression is created by these circumstances, it cannot be suggested that the ANC were not sincerely aggrieved and affronted by the utterances, as is evidenced by the immediate public repudiation. Given the wide publicity to the utterances and the apparent silence about the Roodepoort proceedings, the public interest was not served. Nonetheless, I am unpersuaded that the criticism of these events goes beyond these observations.

Reasons why the HRC complaint should be heard

[70] The SAHRC riposte to the respondent and to the arguments advanced by the amicus is directed at two themes. The first is the fact that there are two different complainants wholly unrelated, a self-evident point and a weighty one. The second theme is Khumalo's repudiation of his admission that the utterances were hate speech.

[71] As regards, issue estoppel, the approach in *Prinsloo v Goldex* is plainly a holistic one. In my view there are indeed several reasons which warrant my discretion being exercised against upholding that plea.

[72] I have elsewhere alluded to the patent deficiencies of the Roodepoort proceedings. I do not repeat those criticisms; rather, I emphasis simply that the issues

were not properly ventilated in that Court. This is a salient factor and resonates with what was addressed in *Hyprop v NSC.*

[73] Perhaps the most significant reason to dismiss the defence of issue estoppel is Khumalo's repudiation that his utterances are hate speech. That question of whether the utterances are indeed hate speech needs to answered.

[74] The addition of the second utterance is a factor which militates against upholding the defence of issue estoppel. As already alluded to, it is part of a continual series of expressions and cannot be properly assessed in the absence of the first utterance. No objection is raised to the second complaint in respect of the second utterance which is not remotely an issue addressed by the Roodepoort proceedings.

Conclusion on this question

[75] Accordingly, in my view the defence of issue estoppel must fail, as must the contention that a second enquiry, in the specific circumstances, constitutes an abuse of process.

ARE THE UTTERANCES HATE SPEECH AS CONTEMPLATED IN SECTION 10 (1)?

The Text of the relevant statutes

[76] The Objects of the Equality Act are set out in Section 2 and, inter alia, it provides:

76.1 In section 2(b) (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.

76.2 in Section 2(c):

"to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of racer, gender and disability;"

76.3 And in section 2 (f):

"to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;"

[77] The text of section 10 of the Equality Act reads:

"Prohibition of hate speech
(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

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

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) *(n)* and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

[78] The proviso in Section 12 of the Equality Act provides:

"....provided that *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 the Constitution, is not precluded by this section."

[79] The prohibited grounds are defined in Section 1 of the Equality Act:

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual
orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or

(b) any other ground where discrimination based on that other ground-
(i) causes or perpetuates systemic disadvantage;
(ii) undermines human dignity; or
(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph *(a)*;[7]

[80] Section 16 of the Constitution provides:

(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
(b) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The Analysis of the statutes and the utterances

[81] Plainly, complete freedom of speech is deliberately compromised, a policy choice made to address our society's social conditions. In *Islamic Unity Convention v Independent Broadcasting Authority* the function that section 16 serves is elaborated.[8]

> "[31] Section 16 is in two parts. Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right.
> [32] How is s 16(2) to be interpreted? The words '*(t)*he right in ss (1) does not extend to . . . . imply that the categories of expression enumerated in s 16(2) are not to be regarded as constitutionally protected speech. 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

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[7] Paragraph *(a)* was amended by Section 30 of Act 8 of 2007 wef 2 August 2017 to add HIV/AIDS Status.

[8] See Islamic Unity Convention Independent Broadcasting authority 2002 (4) SA 294 (CC) at [32] –[33] and [45].

> 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."

[82] Plainly, section 10 of the Equality Act must be read consistently with section 16 of the Constitution. In order to achieve that result, all parties are agreed, that all three subsections of section 10(1) must be read conjunctively rather than disjunctively to achieve the alignment that produces that consistency. As a result the factor of "incitement' must be present in the prohibited utterances.

[83] There are, however, decisions to the contrary. In *Herselman v Geleba [2011] ZAQC 1*, an appeal from a Magistrate's Equality court to the Eastern Cape High Court held that section 10(1) should read disjunctively.[9] However that decision did not consider the impact of section 16(2)(c) of the Constitution. For that reason, in my view, having omitted an important factor that had to considered, the decision is unsafe, and for further reasons, is with respect, clearly wrong. Furthermore. In *SAHRC v Qwelane 2018(2) SA 149 (GJ) at [53] p176E]* it was held incitement need not be proven for all of the Section 10(1) subsections because, ostensibly, section 10(1) is wider than section 16 of the Constitution. In my view this conclusion cannot be correct as the effect of Section 16 is to establish the perimeter of what may be proscribed in section 10(1). Absent consistency with section 16 of the Constitution, the section 10(1) provisions would be unconstitutional. Section 2(b)(v) of the Equality Act expressly subordinates the Equality Act to section 16(2)(c). The view that section 10(1) be disjunctively read is

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[9] Curiously, reviews and appeals from Magistrate's Equality courts do not lie to the High court sitting as an Equality court, rather it is the High Court, *per se*, that hears them. See Section 23(5) of the Equality Act.

also espoused by authors of Constitutional Law of South Africa: (Juta) (CLOSA) OS 06-08 ch 42 p87, but they too, assume a disjunctive reading without explaining why it is consistent with section 16. As a result, in my view, the contentions on behalf of the parties in this matter are therefore well made and I endorse them and do not follow these decisions.

[84] The critical controversy for decision is whether *Mr Wilson,* who appears for Khumalo, is correct in submitting that the utterances of Khumalo were mere hyperbole and did not constitute incitement to cause harm and, thus, no one could reasonably construe the utterances to demonstrate a clear intention to incite harm. To test this proposition, it is necessary to properly interpret section 10 and relate that interpretation to the proper meaning of the utterances.

[85] The Equality Act, like all legislation, uncontroversially, must be interpreted purposively.[10] The value choices and policy options evidenced by the statute govern and dictate the proper meaning to be attributed to its provisions. Why is the Equality act thought to be necessary?

[86] South African society is, manifestly, a community that exhibits significant social strains in which, amongst other social distinctions, we are marked off and categorised by race and personal appearance. A significant inter-racial tension exists, derived from several circumstances, not least from inequality and the persistence of some degree of inter-racial hostility. This unhappy and regrettable condition is our historical legacy. The

[10] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]

Constitution has proclaimed that we recognise the fractured character of our community and set about transforming our society towards a goal that unequivocally repudiates inter-racial hostility so that we may build a nation upon a consensus that every South African deserves dignity and that our whole community, through sharing resources and through respect for one another, can experience social cohesion. The preamble to the Equality Act states that among its objectives is an endeavour

> " ....to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom."[11]

[87] An important factor to weigh in the interpretation of the Equality Act, and more especially section 10, is that it is not a criminal statute. The articulation of hate speech as contemplated by section 10 is not, in terms of section 10, a crime.[12] The provisions of section 10(2) which empower a court to refer a matter to the NPA to consider whether a crime has also been committed is, plainly, an indication that criminal sanctions have no role in the application of section 10 or its remedies whatsoever. The implication of this fact is that the statute must be interpreted as the civil statute that it is, and considerations pertinent to criminal sanctions do not become relevant. In short, in interpreting what the scope of the provisions are and the possible remedies, the danger of interference with personal liberty is absent.

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[11] See CLOSA 05 06-08 ch 42, pp78-79, where these issues are discussed. At present a Draft Bill has been circulated, but its fate is wholly uncertain.

[12] The current debate about whether "hate speech' however defined, ought to made a crime is of no assistance in dealing with the Equality Act in its present form.

[88] The test for hate speech is whether Khumalo's utterances "….could be reasonably construed to demonstrate a clear intention to 'incite harm'. This is a tortuous phrase. It postulates a reasonable reader. It asks what a reasonable reader *could* think about the speech. If a reasonable person reading the text could understand it to mean an incitement to cause harm, the test is met. What is assessed by the reasonable reader is the *effect* of the utterances on readers in general. The word "could" in section 10(1) must be emphasised too because the perspectives of 'reasonableness' inevitably are located within a band of reasonableness, and the test corresponds to that reality. The test is plainly objective, despite the tortuous phraseology. The subjective intention of the author is irrelevant.[13] The Constitutional Court in *Sidumo & other v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC)* construed the test for a review of the award of an arbitrator as being whether no reasonable arbitrator *could* reach the given conclusion. The standard of the reasonable person, applied to section 10(1), means, therefore, whether a reasonable person could conclude (not inevitably should conclude) that the words mean the author had a clear intention to bring about the prohibited consequences. Words obviously mean what they imply.

[89] What is the scope of the term "incite" in its various usages in both Section 16 of the Constitution and section 10(1) of the Equality Act? In the *OED,* for example, its meaning is given as, "spur on, rouse, to stir up, to urge, instigate, stimulate others to action".[14] Purposive interpretation makes it inappropriate to airlift a word out of a passage, then, *in vaccuo*, attribute a meaning to it, and then parachute that meaning

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[13] SAHRC v Masuku 2018 (3) SA 291 (GJ, Eqc) at [47] where it is held that the intention of the speaker of the prohibited words is irrelevant..
[14] Shorter Oxford English Dictionary.

back into the text. Moreover, a single word cannot have an *applied meaning* outside the context in which it is used in a phrase and a sentence within a statute. Moreover, it is a false interpretation that emasculates a statute and inhibits the achievement of its value and policy objectives. The objective test in section 10(1) implies in the terminology used to articulate it, that an intention shall be deemed if a reasonable reader would so construe the words. Because the objective test of the reasonable reader is to be applied, it is the effect of the text not the intention of the author that is assessed. In other words, does the *text* incite? On this understanding, it must be asked if harm can be incited by the effect of the utterances on readers.

[90] The reasonable reader, ie the person online at the computer desk in the Parkhurst Library, does not parse the text to divine meaning for that person is not an analytic philosopher. The reasonable reader is struck by what is the dominant impression derived from the words. What does the reasonable reader see?

[91] What Khumalo does is invoke the 20th century's most iconic human tragedy to colour his rage at Whites. He exhorts "we" (presumably fellow Blacks) to "....act as Hitler did to the Jews". I agree with *Mr Wilson* that the diatribe cannot be understood to mean literally a call for a copycat pogrom of whites, though it certainly purports to legitimise violence towards Whites. The outrageous and extravagant imagery cannot disguise the reality of the message. Khumalo proclaims his opinions: ie, all Whites are untrustworthy because they, so he believes, all harbour pejorative views about Blacks. He wants them all to be gone from the Land. Even Whites within the Liberation Movement are, in truth, racist which is evidenced by their audacious defence of the right

of freedom of expression and in so doing toleration of the expression of views which disparage Blacks. Khumalo will cut himself off from all whites. Whites are so despicable that they deserve the same fate as the Jews who were butchered during the holocaust. Whites in general, and Jews in particular, as evidenced by the Israelis' treatment of the Palestinians, share the same deep-seated racist attributes. What they all deserve is to be incinerated and the remains of their incinerated children used as ground fertiliser. The thrust of this message is that Whites should be ostracised, marginalised, excluded, indeed, totally 'othered', de-humanised, and legitimately be subjected to violence[15]

[92] Could this message have the effect of inciting harm or constitute incitement to cause harm in the eyes of the reasonable reader? Of course, the 'reasonable' reader would, by definition, not share the views of Khumalo, but it is the reasonable reader's understanding of *the effect of the utterances* that forms the substance of the test. Moreover, the category of the reasonable reader in not confined to being a member of the group being vilified; reasonable people anywhere and everywhere are envisaged, regardless of racial identity. [16]

[93] What kind of 'harm' does the statute envisage? Is it limited to physical harm, self-evidently in the form of some degree of violence? In my view, the statute is not limited to physical harm to the category of persons against whom the hatred is directed. The *Intimidation Act 72 of 1982*, in any event, creates a criminal offence in Section 1(1)(b)

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[15] Compare, in *Afriforum v Malema* (Supra) at [108], where the Court addresses the expression of hatred against Afrikaners by the singing of the song " kill the Boer"; hotz & Others v University Of Cape town 2017(2) Sa 485 (SCA), where the Court addressed the case of a person wearing a T-shirt with the inscription " Kill all whites".

[16] It was argued on behalf the amicus that the reasonable reader is a person from the group being vilified. In my view this is not correct; the reasonable reader is not only a person who may feel wounded by the hate speech. The reasonable reader would, *inter alia*, contemplate the effect of the speech on a member of the vilified group in forming a view and also on others who may be stirred up by such speech.

which caters for that sort of harm, although the harm contemplated in that statute can also be wider.[17] A superfluous duplication of function in legislation ought not to be lightly inferred in the exercise of interpretation.

[94] 'Harm' must be construed in the context of the statute's aims. The harm envisaged that derives from inter -racial hostility cannot be limited to violence alone. Our society's demands contemplate the prohibition of non-physical harm too. Moreover, the rehabilitative objectives of the Equality Act suggest a broader ambit. The risk of harm exists in several forms, but all forms that may eventuate, are, necessarily, a *reaction* to the utterances.

[95] First, is the reaction of persons who read the utterances and who are inclined to share those views and be encouraged by them to also shun, denigrate and abuse the target group, ie Whites as being unworthy, hypocritical, racist pariahs. It cannot be gainsaid that Black South Africans have a great deal to be justifiably resentful about regarding some of the collective past and present behaviour of their White compatriots. Many people, who share Khumalo's frustrations are likely to be susceptible to being stirred up by such inflammatory talk.

[96] Second, harm can arise in form of reactions by persons from the target group. There are two forms of harm in this regard. First, to experience demoralisation and physiological hurt.[18] Damaging as that kind of harm may be, it not harm that is triggered

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[17] In Moyo & Others v Sonti & Others [2018] ZASCA 100 (26 June 2018) the SCA dealt with these provisions in the Intimidation Act.

[18] In R v Keegstra (1990) 3 CRR 227- 228, The Canadian High Court articulated the position thus:

" A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or

by incitement. The second kind of harm, which what is relevant in this context, is the harm caused from responding in kind, thereby creating a spiral of invective back and forth. Indeed, proof of that proposition is the very trigger for this case: Khumalo says his utterances were a response to Penny Sparrow's notorious, vile utterances about Blacks littering beaches and behaving like 'monkeys' which she proclaimed that henceforth would be her name for Blacks.[19] This is a classic illustration of a spiral of invective as a result of an incitement by a text sprouting hatred and contempt.

[97] Third, there is harm to social cohesion in South African society caused by either or both of the former two forms of reaction, which on a large enough scale, undermines the nation building project.[20].

[98] A significant aspect about the conduct prohibited by section 10 is that there can be no defence or escape from accountability.[21] If one has uttered words that are prohibited, the utterer is liable. The Equality Act imposes civil liability on an individual in

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> she belongs. . . . The derision, hostility and abuse encouraged by hate propaganda therefore have a severe impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, amongst other things, respect for the many racial, religious and cultural groups in our society.[18]

[19] The proceedings of the Equality Court into Penny Sparrow's utterances are available on SAFLII at [2016] ZAEQC 1 (10/06/2016)
[20] See CLOSA 05 06-08 ch 42 pp75-76; also *Islamic Unity* (Supra) at [33] – [34]
[21] *Afriforum v Malema* (supra) at [9] – [10] – "justification is not a defence; *SAHRC* v *Masuku* at [47] - 'Fair Comment' is no defence.

respect of that individual's conduct. In other words, if you utter words which have the effect of inciting the causation of harm, even if that was not your intention, the liability under section 10 shall have been established. The proviso in section 12, which must be applied *mutatis mutandis* to the articulation of the utterances provides for obvious exceptions. [22]

[99] I have had the valuable assistance from the amicus of being referred to various examples of literature, including learned articles from abroad addressing hate speech in other jurisdictions and in international instruments. Predictably, different laws in other countries frame the debate about values and policy differently because, not only are their statutory provisions different to ours, but their value choices are often different too. In Germany and France it is a crime to question the occurrence of the holocaust, yet in the USA neo-nazis may freely parade their swastikas deliberately through predominantly Jewish neighbourhoods or threaten revenge if the state does not stop the so-called oppression of Whites.[23] Those societies frame laws to address their social circumstances as do we. Thus, we differ.

[100] The main thrust of the argument advanced on behalf of the amicus is that the final value judgment about whether a given set of remarks can constitute hate speech is properly to be determined by the social context in which it is uttered. The literature is heavily weighted in favour of this approach. However, in drawing upon the literature two

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[22] Discourse that is directed at discussing hate speech cannot obviously be a perpetration of hate speech even though the speech *per se* is made known, even widely.

[23] National Socialist Party of America Village of Stokie 432 US 43 (1977); Brandenburg v Ohio 395 US 444 (1969). See too: W B Fisch "Hate speech in the Constitutional Law of the United States" 50 Am. J.comp law 463 (2002) As to European jurisdictions See: " comparative Hate speech Law: annexure, (2002) accessible at: Oxford Pro Bono Publico http://www.law.ox.ac.uk/opbp, p14ff.

caveats are important. First, the phrase "hate speech" is not a legal concept and moreover, it is a phrase which can have a very broad meaning. Secondly, the formulations in other jurisdictions of what is prohibited and whether or not what is prohibited constitutes a crime renders the utility of comparisons very difficult. Many "hate Speech" prohibitions are directed at shutting down expressions of hatred whether they incite harm or not. Many jurisdictions require *mens rea* by the speaker to cause harm, unlike the Equality Act. In such a broad range of options the relevant notions of and thresholds of tolerance are likewise varied.

[101] Among the more complex and controversial value choices is the differential treatment of hateful speech by different segments of a society; ie if a person from a marginalised community speaks roughly it is thought that the exuberance and venom ought to be overlooked, but the same conduct by a person who is understood to be a member of a dominant community in a given society is intolerable. Following on that paradigm, if a person uses terminology which is insulting of others in the course of a 'serious' debate on a given issue, it has been held not to be hate speech.[24]

[102] In South Africa, however, our policy choice is that utterances that have the effect of inciting people to cause harm is intolerable because of the social damage it wreaks and the effect it has on impeding a drive towards non-racialism. The idea that in a given society, members of a 'subaltern' group who disparage members of the 'ascendant' group should be treated differently from the circumstances were it the other way around

[24] See, *Gundez v Turkey* app no 3507/1997 [EFtHR, 4/12/2003] where the European court of Human rights took the view it was not hate speech when a speaker in a televised debate used derogatory terminology about the offspring of non-Islamic marriages. The rationale is that 'robust' debate of this sort was acceptable.

has no place in the application of the Equality Act and would indeed subvert its very purpose. Our nation building project recognises a multitude of justifiable grievances derived from past oppression and racial domination. The value choice in the Constitution is that we must overcome the fissures among us. That cannot happen if, in debate, however robust, among ourselves, one section of the population is licensed to be condemnatory because its members were the victims of oppression, and the other section, understood to be, collectively, the former oppressors are disciplined to remain silent. The reality is that, given our history, White South Africans collectively have a lot to answer for. However, being relaxed about vituperative outbursts against Whites, on those grounds, contributes nothing of value towards promoting social cohesion. Reference has already been made to the risk of spiralling invective with uncertain but frightening possibilities. There can never be an excuse that absolves any one of us from accountability in terms of section 10(1). There may be surrounding circumstances which aggravate the utterances or mitigate the likelihood of incitement to cause harm; these are matters fall to dealt with when remedies are considered.

[103] To sum up, section 10 must be understood as an instrument to advance social cohesion. The "othering" of whites or any other racial identity, is inconsistent with our Constitutional values. These utterances, in as much as they, with dramatic allusions to the holocaust, set out a rationale to repudiate whites as unworthy and that they ought deservedly to be hounded out, marginalised, repudiated, and subjected to violence in the eyes of a reasonable reader, could indeed, be construed to incite the causation of harm in the form of reactions by Blacks to endorse those attitudes, reactions by Whites to demoralisation and rachet up the invective by responding in like manner, and thus by

such developments, on a large enough scale, derail the transformation of South African Society.

[104] Accordingly, Khumalo's utterances are statements prohibited by section 10(1) of the Equality Act.

Considerations pertinent to an appropriate order

[105] Section 21 of the equality Act prescribes the possible orders that an Equality court may make to deal with an instance of hate speech.[25] These arec all civil remedies

[25] Section 21: Powers and functions of equality court

(1) The equality court before which proceedings are instituted in terms of or under this Act must hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.

(2) After holding an inquiry, the court may make an appropriate order in the circumstances, including-

(a) an interim order;

(b) a declaratory order;

(c) an order making a settlement between the parties to the proceedings an order of court;

(d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;

(e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;

(f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;

(g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;

(h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;

(i) an order directing the reasonable accommodation of a group or class of persons by the respondent;

(j) an order that an unconditional apology be made;

(k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;

(l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;

(m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;

and are wide in nature. The philosophical point of departure is a blend of remedial action for the victims and in respect of the perpetrator, atonement for proscribed behaviour and rehabilitation.

[106] Khumalo is a State Official employed by the Gauteng Provincial Government whose role as Sports Officer is to engage with the Youth. He is otherwise an anonymous member of Society. He published the utterances while participating in an online political chat platform. He thus published these remarks widely. His actions were re-active, as distinct from initiating a controversy by the utterances.

[107] The obvious orders that appropriately follow on these findings include a declarator that the utterances do constitute prohibited speech and an interdict against repetition.

[108] An apology should also be compelled, though what true value an apology under compulsion has is difficult to pin down. In this case, an apology was given soon after the publication, a further apology was given in the Roodepoort case and yet another in the aborted settlement discussions with the SAHRC. In these proceedings, owing to the

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(n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
(o) an appropriate order of costs against any party to the proceedings;
(p) an order to comply with any provision of the Act.

(3) An order made by an equality court in terms of or under this Act has the effect of an order of the said court made in a civil action, where appropriate.

(4) The court may, during or after an inquiry, refer-
(a) its concerns in any proceedings before it, particularly in the case of persistent contravention or failure to comply with a provision of this Act or in the case of systemic unfair discrimination, hate speech or harassment to any relevant constitutional institution for further investigation;
(b) any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.

(5)....

contention advanced that no hate speech was perpetrated, of course, no apology is logically possible.

[109] Khumalo undoubtedly regrets making the utterances because of the consequences that have followed. His employer has sanctioned him, albeit it perfunctorily. His political organisation has repudiated his behaviour and at its insistence he must pay a compensatory sum of R30,000. On top of that there is also these proceedings which have been a burden to him. The apologies made and the sincerity with which they were made, if any, are subject to doubt now that he has denied any wrongdoing at all. However, it would be wrong for a court not to appreciate that that his stance adopted in these proceedings, as contrasted with his stance previously, were actuated by legal advice that a legal argument could be mounted that might serve to exonerate him. That prospect has not borne fruit, and it must be appreciated that he cannot be condemned for accepting the advice and acting accordingly. However, the result remains that he repudiatd the apologies given and he must be held to account on that footing, the outcome of his own choice.

[110] The notion that an order in terms of section 21(2)(n) that compensation be paid requires close scrutiny. The SAHRC contends a sum of R150,000 be paid, and unlike the now aborted settlement in terms of which that payment was to be suspended, it is now argued that it should be paid. There are two aspects to reflect upon.

[111] First, it seems to me that the sum of "R150,000" has gained some sort of notorious default status. This was the sum imposed on Penny Sparrow and received

much publicity. Why that sum was thought appropriate does not emerge from the Magistrate's judgment. Indeed, as the judgment was given by default in the absence of Sparrow, and no information about her wealth or income was adduced, it seems not be bear any relationship to the circumstances of her capacity to pay and what impact that diminution in her estate would mean to her. It seems that the sum was a thumb-suck intended to serve as a measure of Society's indignation. Such an approach is crude and underserving of endorsement. In this matter, Khumalo has given no information about his financial position and the SAHRC has not sought to compel such information to be revealed. I am in no position to determine the effect of any sum that might be imposed on Khumalo. Imposing the payment of sums of money which may be ruinous to a respondent does not achieve an outcome the Equality Act encapsulates. In as much as rehabilitation of persons who fall foul of its provisions are concerned, huge money payments are counter-productive. As regards the costs of these proceedings *per se*, in my view, justice will be done if Khumalo is ordered to bear the costs of the SAHRC. The SAHRC is funded by the taxpayers to whom, among others, the apology is owed.

[112] The second aspect is the utilisation of section 21(2)(e) in principle. There seems to be no reason why that section should be invoked as a matter of routine. For example, in neither *Masuku* nor *Qwelane* did Moshidi J make such an order.[26] As matters stand, the order of the Roodepoort Equality Court stands, and Khumalo is already paying off a R30,000 compensation award. Were it appropriate to use a compensation award as the central device of rebuking Khumalo, it must be weighed that he has already had such

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[26] Masuku *supra* at [65]; Qwelane *supra* at [191]

an order made against him. In my view, an additional order to pay money is inappropriate for that reason.

[113] Whether or not it is appropriate to refer the matter to the NPA as envisaged in section 21(2) (n) is the next matter to be considered. The power to do is discretionary. How that discretion is to be exercised must be considered. It seems to me that it is unnecessary for the Equality court to come to the conclusion that a crime has indeed been committed; rather, if a crime *might* have been committed, that is a sufficient threshold, whereas if it is plain that no crime has been committed it would be an improper exercise of discretion to cause the matter to be referred. Naturally, the fact that an Equality Court does not refer as matter does not inhibit other persons, including the SAHRC from doing so, if they deem it appropriate.

[114] The serious hatred patent in the utterances and the insulting nature thereof does justifiably provoke the thought that a crime may have been committed. For example, do the insulting remarks satisfy the test for Crimen Injuria? I cannot conclude that it is obvious no crime has been committed, and moreover it is within the discretion of the Director of Public Prosecutions to assess that matter, rather than this Court. Moreover, any possible prosecution is not limited to the information available to me in this Court. It seems appropriate that a referral indeed be made for a consideration of whether or not to allege a crime and prosecute it.

The management of the risk of multiple referrals to different Equality courts having concurrent jurisdiction

[115] The fact that different aggrieved persons can refer complaints to different courts is well illustrated by the facts of this matter. Axiomatically, it would have been preferable to have all complaints adjudicated in a single consolidated proceeding. The SAHRC was ignorant of the ANC's referral. How might this undesirable risk be eliminated.

[116] It was to address this problem, in the future, that I invited the Minister of Justice to make submissions. Counsel for the Minister filed heads of argument. In that argument the problem was recognised. The response was that the Equality Review Committee, a statutory authority, is at present undertaking a comprehensive assessment of the Equality Act and the ramifications of its functionality. The process in which it engaged is to take about five years to complete. No earlier response by the Department of Justice can be expected. I express my disappointment that an organ of state can be so indifferent to a practical problem, and indeed one which could be addressed by the promulgation of regulations.

[117] The SAHRC, in addressing this question, points out that there seems to be no legal foundation for a matter filed in a Magistrate's Equality Court and one filed in the High Court Equality court to be consolidated. In part, this because the High Court Equality Court is a creature of statute and does not, as a High Court has, enjoy inherent jurisdiction to address the process. In my view these submissions are well made. The

suggestion made by the SAHRC is that a central registry be established of all referrals throughout the Country, so that multiple complaints can be identified. However, who is keep such a registry? At present no central control is exercised over the Equality Courts.

[118] Some basic problems must be recognised. First, there is no prescribed time limit for a referral of a complaint to an Equality Court (save possibly prescription or the elapse of a reasonable time) and second, the lack of capacity of the several clerks or registrars of the Equality Courts (all part time appointees who have other duties), to operate an administrative system that would reliably transmit information and reliably ensure it gets attention when received.

[119] Having considered the problems and the possibilities to alleviate the risk, it had occurred to me to make a practice directive that the SAHRC be served with a copy of every complaint. This however, would be burdensome, and the SAHRC has not expressed a view that such a procedure is appropriate, given its resources.

[120] The upshot is that, in my view, it is inappropriate to try to resolve the problem through judicial intervention. The matter might usefully be addressed in deliberations between the SAHRC and the Minister of Justice. Perhaps if the Minister of Justice is himself approached the appropriate degree of insight can be applied to the question, rather than be fobbed off with bureaucratic insensibility.

Conclusions

[121] In summary;

121.1 The Roodepoort proceedings are not a bar to these proceedings and an application of issue estoppel is not appropriate.

121.2 The utterances are declared to be hate speech.

121.3 Khumalo shall be interdicted from a repetition

121.4 Khumalo should be ordered to apologise to all South Africans.

121.5 The matter shall be referred to the NPA by the Registrar of the Court.

121.6 No further order requiring payment of compensation shall be made.

[122] I express my gratitude to all Counsel for their helpful and constructive arguments, and in particular, I thank counsel who have appeared *pro amico* and on behalf of the *amicus curiae*, whose efforts to assist the Court are likewise appreciated.

THE ORDER

(1) The utterances of the respondent are declared to be speech prohibited in terms of section 10(1) of the Equality Act.

(2) The respondent is interdicted from repeating the utterances.

(3) If not already done, the respondent shall remove all references to the utterances from any social media or other form of public communication.

(4) The respondent shall within 30 days of the date of this order publish a written apology directed at all South Africans in which he acknowledges that the

utterances were hate speech, that he was wrong to utter them, and undertakes never again to utter any remarks prohibited by section 10(1) of the Equality Act.

(5) The apology shall be communicated to the South African Human rights Commission for further dissemination.

(6) The respondent is interdicted from uttering any repetition of the remarks or similar remarks declared hate speech in this matter.

(7) The Registrar of this Court shall within 30 days of the date of this order prepare a dossier of the papers filed in this matter together with a copy of this judgment and submit a copy of the dossier to the Director of Public Prosecutions, Johannesburg and another copy to the South African Human Rights Commission; and furthermore, submit a report to Sutherland J that this has been done.

(8) The respondent shall pay the costs of the Complainant in these proceedings.

ROLAND SUTHERLAND
Judge of the Equality Court
Gauteng Local Division, Johannesburg

Date of Hearing: 2-3 July 2018
Date of Judgment: 5 October 2018

For the Complainant (South African Human Rights Commission):
Adv M Oppenheimer and Adv SA Nakhjavani,
instructed by Werksmans Attorneys

For the Respondent (Pro amico):
Adv Stuart Wilson and Adv Ofentse Motlhasedi

For the Minister of Justice:
Adv TR Ntoane,
Instructed by the State Attorney

For the Amicus Curiae:
Adv I De Vos,
Instructed by the Legal Resources Centre (Amicus)