In the matter between

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION **COMPLAINANT**

and

VELAPHI KHUMALO **RESPONDENT**

and

THE LEGAL RESOURCES CENTRE **AMICUS CURIAE**

HEADNOTE/SUMMARY

1. This was an application in terms of the Equality Act by SAHRC, seeking a declaration that these utterances constitute hate speech:

> "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 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 alive and skinned and your off springs used as garden fertiliser." [Sic]"

2. The application was opposed on the basis that these utterances were meaningless hyperbole and could not have been understood to incite harm, and further that social context considerations meant that the remarks should not regarded as forbidden. The utterances were made in response to Penny sparrow's 'monkeys on the beach' remarks.

3. The application by SAHRC was the second such application, an earlier application having been made by the ANC in a Magistrates Court where Respondent admitted culpability and was, by way of a settlement, ordered to pay R30,000 to an NGO.

4. The Magistrate's Equality court proceedings dealt only with the first utterance. The proceedings were deeply flawed and several reviewable irregularities were manifest; however as that order had not been reviewed and set aside it had to remain standing.

5. The question arose whether a second application was competent:
   5.1. Autrefoit Acquit was rejected as a competent reason to deny the second application as it was exclusively a rule in criminal matters –
   5.2. Res judicata in classic form failed because the parties were not identical and the cause of action was broader, including the second utterance.
   5.3. Issue Estoppel was not appropriate because the second proceedings were not of the same character as the first proceedings, having regard to several considerations including the special character of the SAHRC, the broader scope of the second proceedings and the recantation of the admission that the speech was indeed hate speech, requiring a definitive decision on that question.
   5.4. The idea that a second proceedings was an abuse of the process rejected, for reasons which included those relevant to the issue estoppel question.

6. An interpretation of section 10 was undertaken:
   The relevant text reads:

   > ….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.

   6.1. Section 10(1) (a) –(c) is to be read *conjunctively* (not disjunctively) and is to be read with Section 16(2)(c) of the Constitution; ie "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" is unprotected speech.
   6.2. This meant that unless incitement to cause harm was evidenced, the "hateful" speech was not proscribed. Decisions in *Geleba* and *Qwelane* to the contrary were not followed.
   6.3. The test in section 10(1) was objective: Could a reasonable person understand the speech to demonstrate an intention to incite harm?
   6.4. The intention of the author was irrelevant, the effect of the text of the utterances was to tested to determine whether incitement of harm could reasonably have been intended.

6.5. Harm in form of reactions was envisaged, including violence and non-violent harm, in particular, the risk of people associating themselves with the hate speech was one form and in respect of group being vilified, it could lead to reactions in kind leading to a spiral of harm, of which this case illustrated that spiral in relation to the earlier hate speech of Penny Sparrow.

6.6. There is no defence to uttering words that meet the test.

6.7. The policy objectives of the Equality Act dictate the proper interpretation; namely:

> " 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 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. 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 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.
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> "In South Africa,…. 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 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."

6.8. The utterances were indeed hate speech and are proscribed by section 10(1): Although the reasonable reader would not take literally the call for a holocaust style pogrom the message of the text was to incite harm towards Whites, including that they be subjected to violence.

6.9. The remedies imposed were:

6.9.1. A declarator, an interdict and an apology were ordered.

6.9.2. No further compensation order was made for several reasons, including the Magistrates order to pay R30,000 in instalments.

6.9.3. The notion that a compensatory order should follow as a matter of course criticised

6.9.4. The notion of imposing crippling financial burdens on a respondent criticised.

6.9.5. The nature of the discretion to refer the matter for a possible prosecution considered; the approach should be that the court was not required to be certain a crime was committed but merely take the view that a crime might have been committed. This matter was referred to the NPA to consider a prosecution.

7. The problem of how to resolve the undesirable consequences of different complainants each lodging a complaint in different courts with concurrent jurisdiction discussed.

7.1. The Equality Court does not have the power that the high court has to order a consolidation of a matter before as Magistrate with a matter before it.

7.2. Various options were referred to, but ultimately the matter left to SAHRC to approach the Minister of Justice to endeavour to resolve it in a practical way.

8. The costs of the SAHRC were ordered to be paid by the respondent.