Which is the appropriate forum when hate speech occurs in the workplace: The equality court or the labour court?

Strydom v Chiloane 2008 (2) SA 247 (T)

Introduction

One of the purposes of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter 'the Equality Act') is to address and combat unfair discrimination, harassment, and hate speech (see ss 2(b) and 2(c) of the Act). The Equality Act established equality courts which were empowered to hear cases dealing with unfair discrimination, hate speech and harassment (ss 16 and 31 of the Act, read with s 21). At that point, the Employment Equity Act 55 of 1998 had been in place for a number of years. The Employment Equity Act addresses unfair discrimination in the workplace environment (see the Preamble, ss 2(a) and 6 of the Act). As both Acts address unfair discrimination, section 5(3) of the Equality Act provides that the Equality Act does not apply to any person to whom, and to the extent to which, the Employment Equity Act applies. This seemingly straightforward provision is not always easy to interpret, as the facts in *Strydom v Chiloane* 2008 2 SA 247 (T) illustrated.

Legal question

Strydom v Chiloane raised the following question: If hate speech occurs in the workplace environment, which court(s) are empowered to hear the dispute? Should an equality court hear the matter, established in terms of the Equality Act, or should the matter proceed in the labour courts in terms of the Employment Equity Act 55 of 1998?

Facts

C, a shop steward at a mine, attended a meeting in the office of S, a mine captain. During this meeting the attendees discussed a proposed

change in '"off" procedures' as C described it. S apparently became angry during the meeting and allegedly said the following to C in Fanakalo: 'Look here! All the baboons are wanted on duty this weekend. No one will be off duty. You must always be in the know that those baboons that will not be on duty this weekend will be dismissed by Monday. This baboon-government of yours will provide you with some jobs.' C lodged a claim in the equality court. S raised a special plea, alleging lack of jurisdiction, and argued that the correct forum to hear the matter was the Labour court in terms of the Employment Equity Act. The presiding equality court magistrate held that the words used by the mine captain constituted hate speech in terms of the Equality Act, that the Employment Equity Act did not provide for the determination of hate speech, and that the equality court would therefore have jurisdiction. S appealed against the dismissal of the special plea.

Judgment

The High Court upheld the appeal and found that the claim should have been heard in the Labour court. The High Court then referred the matter back to the magistrates' court, sitting as equality court, so that it could refer the matter to the Labour court in terms of section 20(3)(a) and (b) of the Equality Act. It reached this conclusion on the following basis:

1 Section 9(3) and 9(4) of the Constitution is the reason why both the Equality Act and the Employment Equity Act were put in place (para 9 of the judgment).
2 When S, a white man, uttered the words concerning C, a black man, the words had a racial connotation and a discriminatory import. The court relied on *Lebowa Platinum Mines Ltd v Hill* [1998] 7 BLLR 666 (LAC) to reach this conclusion (at para 10).
3 The equality court magistrate had to decide what the complaint really constituted. The magistrate's finding that the words used by S constituted hate speech in terms of section 10 of the Equality Act was correct, as it is hurtful to describe someone as a 'baboon' in the circumstances in which S uttered the insult (paras 12-14).
4 However, based on the *Lebowa Platinum Mines* decision, the words are, in addition, racially discriminatory in terms of section 6 of the Employment Equity Act (para 14).
5 In terms of section 5(3) of the Equality Act, the Equality Act does not apply to any person to whom, and to the extent to which, the Employment Equity Act applies (para 2).

6 Racially discriminatory conduct is more serious than hate speech, but at the same time hate speech is one of the elements of discriminatory conduct. Where the conduct in question is the most serious of more than one complaint, and that conduct falls within the scope of section 6 of the Employment Equity Act, then the Labour court should hear the matter (paras 16 and 17).
7 Even if the equality court and labour court could conceivably have dual jurisdiction, section 49 of the Employment Equity Act provides that the Labour court has exclusive jurisdiction to decide on jurisdiction. The equality court magistrate should therefore have referred the case to the Labour court in terms of section 20 of the Equality Act (para 17).
8 As an aside, the court mentioned that nothing would have prevented C from instituting an action in an ordinary civil court, based on *iniuria* (para 12). The court further pointed out that C would be 'quite entitled to ask why he cannot proceed with his action against the employer in the labour court and with his action against S in the equality court' (para 15).

Comment

As stated above, in terms of section 5(3) of the Equality Act, the Equality Act does not apply to 'any person to whom and to the extent to which the Employment Equity Act ... applies'. In terms of this section, dual jurisdiction cannot exist and the finding in paragraph 17 of the judgment that dual jurisdiction may exist, cannot be supported. If the Employment Equity Act applies then the Equality Act does not find application, and it follows that if the Employment Equity Act does not apply, then it is the Equality Act which applies.

Section 6 of the Employment Equity Act prohibits unfair discrimination against any employee in 'any employment policy or practice.' Admittedly the definition of 'employment policy or practice' in the Employment Equity Act contains a list of situations where unfair discriminatory practices may occur - recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal; and dismissal - but none of these listed situations seems to contemplate insulting speech.

The drafters of the Equality Act made a clear distinction between 'unfair discrimination' on the one hand and 'hate speech' on the other. 'Unfair' discrimination is prohibited in section 6 of the Equality Act and defined in sections 1(1)(viii) and 1(1)(xxii). 'Hate speech' is prohibited in terms of section 10 of the Equality Act. In terms of section 15 of the Equality Act, it is not open to a respondent to argue that hate speech was fair. If hate speech in the workplace is to be included in the definition of 'employment policy or practice' in section 6 of the Employment Equity Act, anomalous results will follow, depending on where the hate speech occurred. If hate speech occurred in the workplace, a defence of 'fair' discrimination (or hate speech) could be raised by a respondent in terms of section 6 of the Employment Equity Act. If hate speech occurred *outside* of the workplace, a respondent could *not* argue that the hate speech was fair. These different outcomes, depending on which Act applied, amount to a conflict between the two Acts. In terms of section 5(2) of the Equality Act, 'if any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.' The High Court in *Strydom* should therefore have found that the provisions relating to hate speech as found in the Equality Act prevail over the (possible) provisions relating to hate speech in the Employment Equity Act. Put differently, by expressly referring to hate speech in the Equality Act, and by expressly excluding a defence of 'fair hate speech', while at best implicitly including hate speech in the definition of 'employment policy or practice' in the Employment Equity Act, Parliament wished to convey the intention that all hate speech-related matters should be resolved in terms of the Equality Act.

It is very difficult to make sense of the High Court's finding in paragraph 17 of the judgment that 'where the conduct constitutes the more serious of more than one complaint, and that conduct falls within the ambit of section 6 of the Employment Equity Act the correct forum to deal with the matter is the Labour court'. This finding should presumably be read with the court's observation in paragraph 16 that racially discriminatory conduct is more serious than hate speech, but that hate speech may be one of the elements of such racially discriminatory conduct. The court uses the example of the offences of assault with intent to do grievous bodily harm and common assault - the element of conduct is common to both and the same act could amount to both offences. It seems as if the court is suggesting that the use of racially derogatory words amounts to

discrimination; discrimination is more serious than hate speech; and, therefore, the labour court has jurisdiction to hear hate speech matters. Using the assault example, this would supposedly mean that if a court is empowered to try the offence 'assault with intent to do grievous bodily harm', it will also be empowered to try the offence 'common assault'. However, this analogy does not hold for hate speech and discrimination for two reasons.

The first reason is that hate speech is not necessarily less serious than racial discrimination. Could one say, for example, that to be passed over in a queue in a shop in favour of the customer behind you, who happens to be of a different colour, will always be more serious than whatever racial abuse is thrown at you? The second reason is that the elements of the two causes of action do not overlap - it does not follow that because a person publicly expresses very stereotypical and degrading views about other groups, that he will automatically discriminate - withhold benefits or impose burdens - against members of these groups.

Lebowa Platinum Mines is not authority for the finding that the use of the word 'baboon' is racially discriminatory in terms of section 6 of the Employment Equity Act. *Lebowa Platinum Mines* was heard in terms of the Labour Relations Act 28 of 1956. The respondent in that case was found guilty of using the word 'baboon' in a disciplinary hearing and given a final warning. When the majority union demanded that the respondent be dismissed, failing which a strike would be called, the employer dismissed the respondent. The issue in *Lebowa Platinum Mines* was whether the *dismissal* was procedurally and substantively fair, not whether the use of the word 'baboon' constituted racial discrimination. The court in *Lebowa Platinum Mines* found the use of the word 'baboon' to have been 'insulting and abusive' (para 12); 'racist in its connotation' (para 12); 'derogatory and racist language' (para 41); 'serious misconduct which, specifically, embraced racism' (para 58); and 'racial abuse' (para 58). These findings tend to give support to the argument that the use of the word 'baboon' constitutes hate speech, not discrimination. Nowhere in the judgment does the court refer, nor could it have referred, to section 6 of the Employment Equity Act. Tellingly, the court in *Strydom* refers to *Lebowa Platinum Mines* in general terms and does not indicate which specific part of *Lebowa* is supposed to be authority for the finding that the use of the word 'baboon' constitutes discrimination in terms of section 6 of the Employment Equity Act.

It could perhaps be argued that the use of a word such as 'baboon' by a white person to refer to a black person does amount to discrimination because it imposes psychological harm on the black person who was described as a baboon, as opposed to a white person who would not have experienced the same psychological harm when referred to as a baboon by either a white or black person. But if this argument is accepted, it allows a respondent to argue that the 'discrimination' was fair. The better approach would be to treat all racially derogatory terms as hate speech in terms of section 10 of the Equality Act, and to disallow a defence based on fairness.

It is not necessarily still open to C to institute an action based on *iniuria* in an ordinary civil court, as suggested by the court in *Strydom*. In its first judgment relating to the Equality Act, the Constitutional Court in *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) held that 'claims brought under the Equality Act must be considered within the four corners of that Act ... absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins' (para 40). The definition of hate speech in section 10 of the Equality Act (words based on one or more of the prohibited grounds that could reasonably be construed to demonstrate a clear intention to be hurtful; to be harmful or to incite harm; or to promote or propagate hatred) could be read to replace the common law cause of action of an intentional infringement of the claimant's dignity, where the infringement is based on a prohibited ground. In such a case, an argument could be made that the claim *must* be brought in terms of the Equality Act, and that the common law cause of action is no longer available. Where the claimant was insulted in terms that could not be traced back to one or more of the prohibited grounds in the Equality Act, the ordinary common law cause of action would still be available.

It is not clear from the judgment whether the High Court sat in its capacity as an ordinary High Court, or as an equality court. The original magistrates' court that heard the matter certainly sat as an equality court (paras 1 and 2). When the equality court found against S, he appealed to the High Court (para 4). Section 23(1) of the Equality Act provides that 'any person aggrieved by any order made by an equality court in terms of or under this Act may ... appeal against such order to the High Court having jurisdiction ... '. The Act does not explicitly provide that the High Court, when hearing such an appeal, also sits as an equality court, but it would certainly be

anomalous if the court hearing the appeal were not also an equality court. Equality court presiding officers, for example, are expected to have completed a training course before they may be designated as equality court presiding officers (ss 16(1) and 16(2) of the Equality Act). Why would Parliament have expected the original equality court to be staffed by a trained presiding officer, but then allow the appeal to be heard by an untrained presiding officer? If the High Court then sat as an equality court, why did it not refer the matter to the labour court? Why was the matter referred back to the original equality court in order to have the original equality court refer the matter to the labour court? The Equality Act and the Regulations issued in terms of the Act do not explicitly allow for the court hearing the appeal to refer the matter to an appropriate forum but, at the same time, one of the founding principles of the Equality Act is the expeditious finalisation of matters (s 4(1)(a)). Perhaps the court could have utilised section 21(2) of the Equality Act, which allows an equality court to make any 'appropriate' order, to refer the matter to the labour court. The counter-argument would be that as the High Court found that the Equality Act did not apply, it would not have jurisdiction to hear the matter, and could not, therefore, utilise the remedies reserved for equality courts in section 21(2). But if this was so, the court could also not refer the matter back to the original equality court, as it did not have jurisdiction to hear the matter. A referral can only take place if the equality court has jurisdiction to hear the matter, because the equality court keeps its jurisdiction in terms of the section regulating referrals (s 20(8)). The correct order would then have been to dismiss the claim based upon lack of jurisdiction.

Conclusion

I attempted to highlight a number of problematic features of the judgment above. Perhaps the outcome of the case is not that disadvantageous to the complainant - his entire complaint will now be heard by a single forum, and no costs order was granted against him for choosing the wrong forum. The court may have felt, intuitively, that the matter should not be decided in a piecemeal fashion, with part of the dispute heard in the Labour court (C's claim against his employer that S be dismissed) and part of the dispute heard in the equality court (C's claim against S, based on hate speech), and therefore decided to have the entire dispute referred to one forum. However, Parliament must have envisaged the splitting

of claims when it enacted section 5(3) of the Equality Act and when it set up equality courts after the labour court system had already been established. The Canadian and Australian anti-discrimination systems, by contrast, decree that all discrimination-related disputes (discrimination, publication of discriminatory material, harassment, vilification, retaliation and the like), whether employment-related or not, be heard by a single forum. (See, eg, the Canadian Human Rights Act (available at http://laws.justice.gc.ca/PDF/Statute/H/H-6.pdf) which prohibits discrimination in the provision of goods and services, accommodation, and employment (ss 5-11), and also prohibits hate messages (s 13), harassment and retaliation (s 14)). The Canadian Human Rights Commission is empowered to deal with these complaints (s 40). If the Commission is satisfied that a hearing of the complaint is justified, the matter is referred to the Canadian Human Rights Tribunal (s 49). For more information on the Australian system, see Bailey and Devereux 'The operation of anti-discrimination laws in Australia' in Kinley (ed) *Human rights in Australian law: Principles, practice and potential* (1998) 292-318.)

If anything, the *Strydom* judgment illustrates the kind of problems that may be experienced by a litigant who has to navigate his or her way through two Acts, both dealing with discrimination-related causes of action. The ideal approach would be to follow the example of other jurisdictions by creating a single forum to hear all discrimination-related causes of action. (*Contra* Albertyn, Goldblatt and Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 11 who argue that it is logical for the two Acts to 'operate side by side and apply to different sectors of society'.)

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