

Jurisdictional and Procedural Technicalities in Hate Speech Cases: *South African Human Rights Commission v Khumalo* 2019 1 SA 289 (GJ)

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Abstract

The jurisdiction or competence of the Equality Court to hear a dispute concerning alleged hate speech is affected by various jurisdictional factors. The decision in *South African Human Rights Commission v Khumalo* 2019 1 All SA 254 (GJ) reveals several shortcomings in the provisions regulating jurisdiction in the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 which must be attended to in order to provide clarity and legitimacy in regard to the application of the protection against hate speech.

Keywords

Concurrent jurisdiction; geographical jurisdiction; jurisdictional facts; *locus standi*; hate speech; racial slurs; racism; unfair discrimination.

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1 Introduction

Jurisdiction means the competence of a court, forum or tribunal to entertain a case between parties. Two questions come into play: First, does the court or forum has the power to hear the case? Secondly, can the court determine the particular issue that arises?¹

Several factors can restrict the jurisdiction of the court: the subject matter, the amount being claimed or monetary restrictions applicable to the court or forum, the territory over which the court may preside, the parties and other criteria.² In general, the geographical jurisdiction of a court is determined with reference to the person (the defendant) or the cause of the action. Courts as creatures of statute may entertain what matters are permitted in terms of the enabling legislation.³

The *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (the PEPUDA) confers legal standing in respect of hate speech cases⁴

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¹ *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 2 SA 420 (A) 424; *Spendiff v Kolektor (Pty) Ltd* 1992 2 SA 537 (A) 551.

² *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 2 SA 420 (A) 424 et seq.

³ Harms *Civil Procedure in Magistrates' Courts*; Harms *Civil Procedure in Magistrates' Courts* D26.3 Inherent Jurisdiction.

⁴ The discussion here is restricted to the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA). However, it should be noted that Parliament is considering adopting the *Prevention and Combating of Hate Crimes and Hate Speech Bill* (the Hate Crimes Bill). The second version of the Hate Crimes Bill was published in March 2018 (DoJ 2018 <https://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf> and see the Explanatory Summary published in Gen N 167 in GG 41543 of 29 March 2018), but it has since lapsed, and must be reintroduced for consideration. A further version of the Hate Crimes Bill would also have to take cognisance of the Supreme Court of Appeal judgment that has since been handed down in *Qwelane v South African Human Rights Commission* 2020 2 SA 124 (SCA) (*Qwelane*). The main purpose of the Hate Crimes Bill, contrary to the civil remedies offered by the PEPUDA, is to criminalise acts recognised as hate crimes and as hate speech. Its enactment, to a limited extent, would regulate certain aspects concerning hate speech, but not the civil remedies referred to in this contribution. For more information pertaining to hate crimes see Botha 2019 SALJ. Also see Burchell 2019 *Acta Juridica*. The author investigates the current remedies: the civil law *actio iniuriarum*, the remedies for *crimen iniuria*, approaching the South African Human Rights Commission and the Equality Court in terms of equality legislation. He questions whether a need exists for the introduction of a new criminal statute devised to punish hate speech.

to a variety of persons. Unfortunately, no time bar exists for the institution of a claim in terms of the PEPUDA.⁵ These aspects, therefore, increase the risk that multiple cases by multiple complainants may be instituted in different Equality Courts having concurrent jurisdiction or that several complainants may lodge separate complaints for the same matter.⁶

The purpose of this contribution is to consider what the Equality Court in *South African Human Rights Commission v Khumalo*⁷ (*Khumalo*) refers to as "the procedural evolution of the matter before the court".⁸ Against the backdrop of the judgment, the following issues concerning the jurisdiction of the Equality Court are interrogated:

- (a) the territorial and monetary jurisdiction of the Equality Court;
- (b) whether the cause of action must necessarily resort in the Republic of South Africa for the Equality Court or the South African Human Rights Commission (the SAHRC) to have jurisdiction;
- (c) the requirements for appeals and reviews in the Equality Court;
- (d) whether the Equality Court has jurisdiction over hate speech perpetrated in the workplace or in the execution of duties; and
- (e) different complainants referring complaints and the potential open-endedness of a hate speech case.

First, the salient facts in *Khumalo* are outlined briefly. Thereafter, the legal question that was considered by the Johannesburg High Court sitting as the Equality Court is set out. This is followed by a brief description of the arguments raised, the court's reasoning for its findings, and a discussion of the issues listed in (a) to (e) above.

In the discussion, several pending hate speech cases are referred to. The facts of these cases and their outcomes are often times very controversial. Unfortunately, hate speech cases despite their wide media publicity are

⁵ Although the Equality Court in *South African Human Rights Commission v Khumalo* 2019 1 SA 289 (GJ) para 60 held that it may be inferred that the ordinary prescription rules apply.

⁶ Refer to *South African Human Rights Commission v Khumalo* 2019 1 SA 289 (GJ) para 60 as an example.

⁷ *South African Human Rights Commission v Khumalo* 2019 1 All SA 254 (GJ) (*Khumalo*).

⁸ *Khumalo* paras 4-25.

rarely reported.⁹ *Khumalo*, which was reported, provides valuable insight into some of the discrepancies that may arise in hate speech cases in practice. It is not our objective here to discuss the definition of "hate speech" or when speech would constitute hate speech in terms of the PEPUDA.¹⁰ Rather, we focus on the several jurisdictional and procedural issues that are revealed in *Khumalo*.

It is important to have clarity on the issue of which court or forum has jurisdiction to entertain a matter to save legal costs and to ensure the expeditious resolution of disputes. This would promote the right to access to justice as envisaged in the *Constitution of the Republic of South Africa*, 1996 (the Constitution) and the aim of the PEPUDA to resolve disputes expeditiously.¹¹ It is concluded that legislative amendment is required to address uncertainties and the technical difficulties arising in the application of the PEPUDA. Suggestions for reform are proffered.

2 The facts

On 4 January 2016 Khumalo, a state official who at the time worked as a Sports Officer for the Gauteng Provincial Government, on a social media platform posted the following utterance while participating in an online debate:

I want to cleans [sic] this country of all white people. we must act as Hitler did to the Jews. I don't believe any more that the [sic] is a large number of not so racist white people. I'm starting to be skeptical [sic] even of those within out [sic] 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 f*** heads as we have already seen.

A while later¹² he continued:

Noo [sic] seriously though u [sic] oppressed us when u [sic] 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

⁹ In this case note too, media statements are referred to. We acknowledge that media reports may be misleading, one-sided or exaggerated.

¹⁰ In this regard, see the pivotal decision by the Supreme Court of Appeal in *Qwelane* (fn 4). This needs to be read in conjunction with s 10 of the PEPUDA. Also see the brief discussion in fn 16 and 127 below.

¹¹ Section 34 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution); reg 10 in GN R764 in GG 25065 of 13 June 2003 proposes a simple procedure to expedite the resolution of disputes in the Equality Court.

¹² *Khumalo* para 30. He had posted the first utterance at 05h39. He posted the second utterance after he saw another monkey insult at 11h00.

venom moss. look at Palestine. noo u [*sic*] must be bushed alive and skinned and your off springs used as garden fertiliser.¹³

An initial complaint had been lodged by the current ruling governing political party, the African National Congress (the ANC) on behalf of its white members.¹⁴ The complaint only referred to the first statement that was posted by Khumalo as cited above. This case was referred to the Roodepoort Magistrates' Court acting as the Equality Court. The complaint was framed as one of unfair discrimination on the ground of race, as envisaged in section 7(a) of the PEPUDA.¹⁵ When it was discovered that the complaint actually concerned hate speech and not unfair discrimination, a Notice of withdrawal was filed, but the case was apparently reinstated, absent any formal procedures, when Khumalo subsequently was summoned to appear on charges of alleged hate speech in terms of section 10 of the PEPUDA.¹⁶

¹³ *Khumalo* para 1.

¹⁴ *Khumalo* para 16. As the ground to establish its *locus standi* the ANC relied on the fact that Khumalo had in his statement referred in particular to its white members.

¹⁵ *Khumalo* para 14. Section 7(a) of the PEPUDA reads: "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 violence."

¹⁶ *Khumalo* para 18. Section 10(1) of the PEPUDA defines "hate speech" as referred to in this contribution. When judgment was handed down in *Khumalo*, s 10 of the PEPUDA was still unaffected by the judgment delivered by the Supreme Court of Appeal judgment in *Qwelane* on 29 November 2019. Section 10(1) as it was before the amendment pursuant to *Qwelane* read as follows: "[s]ubject 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". However, s 10 must now be read in conjunction with *Qwelane*, in which the Supreme Court of Appeal declared s 10 of the PEPUDA inconsistent with s 16 of the Constitution (the right to freedom of expression). Section 10 of the PEPUDA was therefore declared unconstitutional and invalid. Parliament has been granted 18 months from 29 November 2019 to remedy the defect. The Supreme Court of Appeal as an interim measure amended the wording of s 10 to read as follows: "No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm. 10(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 advocacy of hatred that is based on race, ethnicity, gender, religion or sexual orientation, and that constitutes incitement to cause harm, 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." Also see fn 127 below. In our view, *Khumalo*'s utterances would constitute "hate speech" under the interim definition also.

In the Roodepoort proceedings Khumalo had represented himself.¹⁷ Ultimately a settlement was reached between the ANC and Khumalo, in which Khumalo admitted to being guilty of contravening both sections 7 and 10 of the PEPUDA.¹⁸ In terms of the settlement agreement Khumalo apologised for making the utterance, paid R30 000 to a charity organisation and presented three hour-long talks at schools.¹⁹

Unaware of this first referral, the SAHRC lodged a second complaint against Khumalo in the Johannesburg High Court sitting as the Equality Court, this time in terms of the hate speech provision as contained in section 10 of the PEPUDA.²⁰ Both the cited utterances were placed under scrutiny this time around. The SAHRC, acting on behalf of white South Africans in general and on behalf of victims of the holocaust and their descendants resident in the Republic²¹ argued that Khumalo's utterance incited genocide and propagated hatred against White South Africans.²² Moreover, Khumalo's utterance could be viewed as anti-Semitic as reference was made to Hitler and the Jews during the holocaust.²³ But before the assessment of the utterance could proceed, the Johannesburg Equality Court had several jurisdictional hurdles to traverse. These questions in law are discussed in more detail below.

3 The legal question

The Johannesburg Equality Court (per Sutherland J) in *Khumalo* considered whether a second referral should be heard if two sets of proceedings had been instituted in two divisions of the Equality Court ostensibly on the same subject matter.²⁴ The court was required to consider upon proper interpretation of the PEPUDA in line with its purpose and in the light of the values of the Constitution, whether it should hear the second dispute.²⁵ The question was whether it would be "lawful and proper" for a complaint in terms of section 10 of the PEPUDA to be heard by the Equality Court despite the fact that another complainant had complained about the same utterance in previous proceedings.²⁶

¹⁷ *Khumalo* para 21.

¹⁸ *Khumalo* para 22.

¹⁹ *Khumalo* para 22.

²⁰ *Khumalo* para 6.

²¹ *Khumalo* para 63.

²² *Khumalo* para 4.

²³ *Khumalo* para 4.

²⁴ *Khumalo* para 49.

²⁵ *Khumalo* para 7.

²⁶ *Khumalo* para 3.1.

4 The decision

In making the determination of whether instituting the second round of proceedings constituted an abuse of the court process²⁷ Sutherland J considered three legal doctrines: *autrefois acquit* or double jeopardy, *res judicata* and issue estoppel.²⁸

The court made short shrift of the argument that double jeopardy applies. It was held that *autrefois acquit* does not apply to hearings conducted under the PEPUDA, because its application is restricted to the realm of criminal procedure only.²⁹

As to the potential applicability of *res judicata* and issue estoppel, the court noted that for *res judicata* to be established three circumstances must prevail: the same issue must be aired, between the same parties and the same relief must be sought.³⁰ However, it was not the same complainants in the *Khumalo*-case.³¹

As to whether the nature of the two referrals in *Khumalo* were the same, the judge noted that slight differences existed. The first referral had been brought in terms of section 7³² and section 10³³ of the PEPUDA.³⁴ The second had been referred in terms of section 10 only. However, both allegations were based on exactly the same utterance. Sutherland J held that for the ANC to have framed the initial complaint as one under section 7 of the PEPUDA was not the correct course of action.³⁵ He indicated that a complaint in terms of section 7 for unfair discrimination on the grounds of race is not the same as a complaint of hate speech.³⁶ The ANC ought to have referred the dispute under section 10 of the PEPUDA as the complaint more closely resembled one based on hate speech.³⁷

The court explained that issue estoppel meant relaxing the strict rules of *res judicata* in certain instances where on the facts it would serve the interests

²⁷ *Khumalo* para 50.

²⁸ *Khumalo* para 3.

²⁹ *Khumalo* paras 51-53.

³⁰ *Khumalo* para 54.

³¹ *Khumalo* para 54.

³² Which regulates unfair discrimination.

³³ The hate speech provision.

³⁴ *Khumalo* para 7.

³⁵ *Khumalo* para 17.

³⁶ *Khumalo* para 17.

³⁷ *Khumalo* para 17.

of justice to do so.³⁸ With reference to *Prinsloo v Goldex 15 (Pty) Ltd*³⁹ the court highlighted the three requirements to establish the common law rule of *res judicata*, and indicated that the same requirements apply in respect of issue estoppel.⁴⁰ However, under issue estoppel the courts have acknowledged that strict adherence to the requirement that the respective disputes must be the same and that the same relief was sought would defeat the very purpose of *res judicata*, which was 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."⁴¹ Issue estoppel allows the court to dismiss a case where the same relief is sought by the same parties if a final decision had been taken on the issue in previous litigation.⁴²

The court held with reference to case law in point that a strict application of the *res judicata* rule presents practical problems for complainants.⁴³ In *Carl Zeiss Stiftung v Rayner and Keeler Ltd* it was held:⁴⁴

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?⁴⁵

The court held that whether issue estoppel can be applied is dependent on the particular facts of the matter and must be decided on a case-by-case basis. The court must be mindful not to relax the *res judicata* principles if it could have unfair consequences for subsequent referrals.⁴⁶

In support of the proposition that issue estoppel should be applied, the *Amicus Curiae* in *Khumalo*, the Legal Resources Centre (the *Amicus*), relied upon the decision in *Royal Sechaba Holdings (Pty) Ltd v Coote*,⁴⁷ in which the court held⁴⁸ that, if the facts present, the "same parties" requirement should in principle be capable of relaxation or adaptation. The court has a duty to develop the common law if the interests of justice so require, and

³⁸ *Khumalo* para 54.

³⁹ *Prinsloo v Goldex 15 (Pty) Ltd* 2015 5 SA 297 (SCA) (*Prinsloo v Goldex*).

⁴⁰ *Khumalo* para 55.

⁴¹ *Khumalo* para 3; also see *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 835G.

⁴² *Prinsloo v Goldex* para 23.

⁴³ *Prinsloo v Goldex* paras 24-25.

⁴⁴ *Carl Zeiss Stiftung v Rayner and Keeler Ltd* 1966 2 All ER 536 (HL).

⁴⁵ *Carl Zeiss Stiftung v Rayner and Keeler Ltd* 1966 2 All ER 536 (HL) 554G-H.

⁴⁶ *Prinsloo v Goldex* para 26.

⁴⁷ *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 5 SA 562 (SCA); *Khumalo* para 57.

⁴⁸ *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 5 SA 562 (SCA) paras 19-21.

there appears to be no reason why the two other requirements could be relaxed, but not the "same person"-requirement.⁴⁹

The *Amicus* contended that the common law should be developed so that issue estoppel can be applied in an instance where the parties are not the same.⁵⁰ The court referred to *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC*.⁵¹ In that case, the Supreme Court of Appeal (per Wallis JA) remarked that whether Voet⁵² confined "same person" narrowly is unclear. In the court's view it would make no sense to allow someone who had been granted a fair opportunity already where a matter was litigated and decided to litigate *de novo* hoping for a different outcome based solely on the fact that there is some difference in the identity of the complainant.⁵³ Persuasive reasons must exist for the court to relax the "same person" requirement. Fairness and equity must dictate such relaxation. *Res judicata* has as its purpose to promote considerations favouring bringing litigation to finality and avoiding multiplicity in litigation resulting in conflicting judicial decisions on the same issue or issues.⁵⁴

Another argument that was raised in *Khumalo* favouring the relaxation of the *res judicata* rule was that allowing multiple complaints would defeat the purpose of the PEPUDA to resolve the dispute expeditiously.⁵⁵ The court rejected this argument, noting that the requirement in regulation 10 that hate speech enquiries must be conducted speedily in an informal manner is contradicted by various provisions in the PEPUDA. Section 19 of the PEPUDA requires that hate speech proceedings must be heard in an open court and further requires adherence to some of the rules of the High Court or the magistrates' court, which flies in the face of the stated purpose. Moreover, the pre-hearing formalities prescribed in the PEPUDA do not promote speedy finalisation.⁵⁶

⁴⁹ *Royal Sechaba Holdings (Pty) Ltd v Coote* para 19.

⁵⁰ *Khumalo* para 58.

⁵¹ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 6 SA 499 (SCA) para 42.

⁵² Voet in 44.2.7 in *Commentary on the Pandects* 560.

⁵³ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 6 SA 499 (SCA) para 20.

⁵⁴ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 6 SA 499 (SCA) para 21.

⁵⁵ Reg 10 in GN R764 in GG 25065 of 13 June 2003 proposes a procedure uncomplicated by legal technicalities in order to ensure the speedy resolution of disputes in the Equality Court.

⁵⁶ *Khumalo* para 61; see for instance *AfriForum v Malema* 2011 6 SA 240 (EqC) and *South African Human Rights Commission obo South African Jewish Board of*

The *Amicus* contended that the risk existed that the same issue might be decided differently by different courts, which is what the *res judicata* principle aims to prevent. The *Amicus* proceeded that if decided differently, the second proceedings would result in a contradiction between the findings of the two courts on the same facts. The court agreed that that risk indeed existed but remarked that that risk was overridden by other considerations.⁵⁷

It was argued on Khumalo's behalf that it would be an abuse of the court process to hear the second referral, as the two statements on which the claim was based were in fact one.⁵⁸ The court agreed. However, the court noted that this being the case, the utterance should be considered holistically. That the second utterance was added in the second referral militated against relaxing the *res judicata* principle. The court viewed the two utterances as a continuous utterance which should be viewed as one. This had not been done in the Roodepoort proceedings.⁵⁹ As the second part of the utterance had not been included in the original referral by the ANC, the matter, including this second part of the utterance, should be heard in the interest of justice.⁶⁰

It was argued further on Khumalo's behalf that he had been sanctioned already.⁶¹ The court did not feel that this enquiry – whether the sanction that Khumalo received extinguished the possible remedies – should form part of the assessment as to the judiciability of the second complaint. Notwithstanding, the court remarked that in the Roodepoort proceedings the court had not, as it ought to have done, considered all the possible remedies. The court felt that proper consideration would be required in any event to reach the conclusion that there was no further relief that could be ordered in respect of the second enquiry. This also supported the necessity of hearing the second dispute.⁶² Consequently, the court concluded that there would be no abuse of the process as envisaged by the PEPUDA.⁶³

The court also cited several other reasons why it would not be in the interest of justice to relax the principle of *res judicata* so as to disallow the second referral on these facts: there were several procedural deficiencies in the

Deputies v Masuku 2018 3 SA 291 (GJ) which the court refers to as examples of how protracted these proceedings may become.

⁵⁷ *Khumalo* para 62.

⁵⁸ *Khumalo* para 65.

⁵⁹ *Khumalo* para 74.

⁶⁰ *Khumalo* para 66.

⁶¹ *Khumalo* para 65.

⁶² *Khumalo* para 66.

⁶³ *Khumalo* para 68.

Roodepoort proceedings which resulted in the case not being properly ventilated.⁶⁴ As explained, the Roodepoort proceedings started off as an unfair discrimination case based on race, but somehow metamorphosed into a complaint of hate speech. The dispute had been dealt with as a "friendly" complaint, which the court held did not serve the public interest.⁶⁵ The matter was held *in camera*, but the record did not as is required in terms of the PEPUDA indicate any reason why it would be in the interest of justice to deal with the matter in this manner.⁶⁶ The Johannesburg Equality Court held that the Roodepoort Equality Court had not as required in terms of section 21 of the PEPUDA held an "enquiry in the prescribed manner" in order to establish whether hate speech had taken place.⁶⁷ In addition, as no enquiry had been held, the Roodepoort Equality Court had not been in any position to make an order. Absent a proper enquiry, it could not be said that the court had, as it was required to do, after due consideration decided on an appropriate order.⁶⁸

No evidence had been put forward.⁶⁹ Without a substantive enquiry into the merits, it would be impossible for the court to exercise the discretion conferred to it to refer the matter for further criminal prosecution.⁷⁰ There was no indication on the record of the Roodepoort Equality Court proceedings that pointed to the fact that the presiding officer had considered the aptness of the terms of the settlement agreement.⁷¹ Moreover, Khumalo had repudiated his admission that he was guilty of hate speech, which weighed in against upholding the plea of issue estoppel.⁷² Therefore, the court concluded that issue estoppel did not serve as a defence in this instance, and that it had the necessary jurisdiction to hear and decide on the matter.⁷³

5 Discussion

5.1 Geographic or territorial jurisdiction of the Equality Court

In *Khumalo* both of the courts – the Roodepoort Magistrates' Court sitting as the Equality Court and the Johannesburg High Court sitting as the

⁶⁴ *Khumalo* para 72.

⁶⁵ *Khumalo* paras 20 and 69.

⁶⁶ This is a contravention of s 19(2) of the PEPUDA.

⁶⁷ *Khumalo* para 24.

⁶⁸ *Khumalo* para 24.1.

⁶⁹ *Khumalo* para 24.3.

⁷⁰ Section 21(2)(n) of the PEPUDA. *Khumalo* para 24.1

⁷¹ *Khumalo* para 24.3.

⁷² *Khumalo* para 73.

⁷³ *Khumalo* para 75.

Equality Court – in principle had jurisdiction to entertain the dispute.⁷⁴ The Minister may in terms of the PEPUDA⁷⁵ define, restrict or extend the area of jurisdiction of each Equality Court. But currently all of the magistrates' courts in the nine provinces of South Africa have been designated as equality courts by the Department of Justice and Constitutional Development.⁷⁶ Particular magistrates or judges are appointed to preside in equality courts.⁷⁷ But, despite the existence of regulations promulgated to regulate the area of jurisdiction in terms of section 2 of the *Magistrates' Court Act* 32 of 1944,⁷⁸ problems are still encountered in practice.⁷⁹ The problems enumerated by the court in *Khumalo* are the fact that there is no time limit for the referral of a hate speech complaint, and the absence of a registrar or administrator with capacity for the Equality Court.⁸⁰

In terms of the *Magistrates' Court Act* 32 of 1944 "[e]xcept where it is otherwise by law provided, the area of jurisdiction of a court shall be the district, sub-district or area for which such a court is established."⁸¹ Despite being proclaimed, the areas of jurisdiction of the court are in a state of flux and uncertainty.⁸² To establish which court has jurisdiction is not a simple endeavour.⁸³

A potential problem that may arise in practice is a consequence of the fact that some equality courts appear to share geographical jurisdictions. There are currently 382 designated equality courts.⁸⁴ In terms of section 16(1)(a) of the PEPUDA, the High Courts in the nine provinces are all equality courts

⁷⁴ Notably, the recent decision *Nelson Mandela Foundation Trust and AfriForum* 2019 4 All SA 237 (EqC) was adjudicated under the auspices of the High Court and as the Equality Court in the same matter. The reason why the High Court enjoyed simultaneous jurisdiction with the Equality Court was because the constitutionality of s 10 of the PEPUDA had been questioned, which was not at issue in *Khumalo*.

⁷⁵ Section 16(1)(c) of the PEPUDA.

⁷⁶ "Designation of Magistrates' Courts as equality courts; defining the area of jurisdiction; and appointment of places for the holding of equality court sittings" - GN R859 in GG 32516 of 28 August 2009. See also GN 878 in GG 25091 of 13 June 2013.

⁷⁷ See GN 878 in GG 25091 of 13 June 2003. Currie and De Waal *Bill of Rights Handbook* 247-248.

⁷⁸ GN 878 in GG 25091 of 13 June 2013. There are for instance overlaps in the areas of jurisdiction of the Johannesburg Equality Court (which covers the whole of Johannesburg) and the Randburg Equality Court under which Roodepoort resorts (and also Krugersdorp, Oberholzer, Randburg, Randfontein and Westonaria).

⁷⁹ *Khumalo* para 118.

⁸⁰ *Khumalo* para 118.

⁸¹ Section 26(1) in Part II of the *Magistrates' Court Act* 32 of 1944 dealing with civil matters.

⁸² Harms *Civil Procedure in Magistrates' Courts* D26.6.

⁸³ See for instance *R v Pretoria Timber Co (Pty) Ltd* 1950 3 SA 163 (A).

⁸⁴ DoJ Date Unknown http://www.justice.gov.za/EQCact/eqc_courts.html.

for their jurisdictional area. The High Courts have jurisdiction to hear disputes in the defined provincial areas in which they are situated.⁸⁵ Section 6(3) of the *Superior Courts Act* 10 of 2013 mandates the Minister to establish areas of jurisdiction of the different provincial divisions. However, in areas where there is more than one seat in the province, the courts in terms enjoy concurrent jurisdiction.⁸⁶ It is required that the Judge President must in courts having concurrent jurisdiction compile a single court role for the entire division.⁸⁷ If a similar approach were to be followed in hate speech cases referred to the Equality Court, the problems related to the referral of different cases based on the same incident of hate speech should be addressed.

Although the SAHRC has begun consolidating multiple complaints received in some cases, it has proven not to be very efficient. Several serious hate speech cases have apparently been left unattended, while others for reasons unbeknown to the authors have been pursued avidly.⁸⁸ The SAHRC has also been subject to criticism regarding the uneven-handed way cases involving white as opposed to black perpetrators have been handled.⁸⁹ If a formal directive were to be issued that all complaints are to be lodged with the SAHRC, and the SAHRC only consolidates the complaints instead of screening the cases, that might provide a solution.

5.2 Jurisdiction of the SAHRC

The SAHRC may in terms of its latest Complaints Handling Proceedings on own initiative or after receiving a complaint investigate any human rights violation.⁹⁰ The SAHRC has discretion whether to investigate or not, but this determination must be made in a manner which is fair.⁹¹ It must provide

⁸⁵ Section 6 of the *Superior Courts Act* 10 of 2013. There are fourteen Provincial Divisions of the High Court: Eastern Cape: Bhisho, Grahamstown, Mthatha, Port Elizabeth; Free State: Bloemfontein; North Gauteng: Pretoria; South Gauteng: Johannesburg; KwaZulu-Natal: Durban, Pietermaritzburg; Limpopo: Thohoyandou; Northern Cape: Kimberley; North West: Mafikeng, Mmabatho; Polokwane Circuit Court of the North Gauteng High Court, Pretoria and the Western Cape High Court: Cape Town.

⁸⁶ Section 6(4) of the *Superior Courts Act* 10 of 2013.

⁸⁷ Section 6(4)(c) of the *Superior Courts Act* 10 of 2013.

⁸⁸ Brink and Mulder 2017 <https://solidariteit.co.za/wp-content/uploads/2017/10/Racism-hate-speech-and-double-standards-by-no-means-a-mere-matter-of-bla....pdf>.

⁸⁹ Bosman 2019 <https://maroelamedia.co.za/debat/meningsvormers/menseregte-kommissie-skeer-nie-almal-oor-dieselfde-kam/>.

⁹⁰ Chapter 2 s 3(1) of SAHRC 2018 <https://www.sahrc.org.za/home/21/files/Complaints%20Handling%20Procedures%20-%20SAHRC%20-%20Public%20-%201%20January%202018.pdf> (the Complaints Handling Procedure).

⁹¹ Chapter 2 s 3(2) of the Complaints Handling Procedure.

reasons if it is unwilling or unable to entertain a dispute.⁹² One reason that is provided in section 3 itself is that the SAHRC may if a complaint is lodged longer than three years after the hate speech (or other human rights violation) had occurred decline to deal with the complaint.⁹³ However, if subsequent to a preliminary investigation the SAHRC should find that there is merit in a complaint, it must do what it reasonably can to assist the complainant to secure redress.⁹⁴

The only expressed restriction on the jurisdiction of the SAHRC is in Chapter 2 section 3(5) of the Complaints Handling Procedures, which determines that the SAHRC does not have jurisdiction to entertain complaints concerning human rights violations which occurred before 27 April 1994.

However, whether a case based on hate speech can be pursued by lodging a complaint to the SAHRC only if the utterance was made in the Republic of South Africa is not clear. In a media report the Afrikanerbond indicated that it had referred a complaint to the SAHRC concerning racist remarks against whites that had been made by a previous South African Minister, Essop Pahad, during a visit to Beijing in China in August 2008.⁹⁵ The SAHRC had declined to pursue that matter. At the time the SAHRC had reasoned that section 184(1)(c) of the Constitution requires it to "monitor and assess the observation of human rights *in the Republic*" and not infringements that took place outside of its borders.⁹⁶ Apparently the Afrikanerbond had appealed against the decision of the SAHRC to no avail. The Afrikanerbond felt that the narrow interpretation that the SAHRC attributed to its mandate set an extremely dangerous precedent. In effect, they contended, the approach that had been adopted by the SAHRC meant that every South African could undermine the principles contained in the Bill of Rights if they were to do so outside of South Africa's borders. The Afrikanerbond argued that although the comments had been made outside

⁹² Chapter 2 s 3(3) of the Complaints Handling Procedure.

⁹³ Chapter 2 s 3(6) of the Complaints Handling Procedure.

⁹⁴ Chapter 2 s 3(4) of the Complaints Handling Procedure.

⁹⁵ Minister Pahad had, during a press conference in Beijing, allegedly stated that "white South Africans would like to see the 2010 Soccer World Cup flop". The Afrikanerbond argued that even though the statement was limited to some white people only, it was "a form of irresponsible incitement and hate-speech" and that Pahad ought to have known better. See Staff Reporter 2008 <https://mg.co.za/article/2008-09-11-afrikanerbond-appeals-pahad-hate-speech-decision>.

⁹⁶ Kgosana 2019 <https://citizen.co.za/news/south-africa/courts/2136394/human-rights-commission-wants-catzavelos-in-equality-court-for-hate-speech/>; Bosman 2019 <https://maroelamedia.co.za/debat/meningsvormers/menseregtekommis-sie-skeer-nie-almal-oor-dieselfde-kam/>.

of South Africa, the consequences of the Minister's utterances were felt in South Africa. In the result, it was contended that the utterance ought to fall within the ambit of the SAHRC's jurisdiction.⁹⁷

Recently, in the Catzavelos' case, the alleged perpetrator was on holiday in Greece when he made a racist utterance.⁹⁸ However, the SAHRC argued that the video in which the utterance was recorded had also been posted on social media which were accessible to people in South Africa, rendering Catzavelos' conduct sanctionable in South Africa. Consequently, the SAHRC promptly lodged a complaint with the Equality Court on the basis of alleged hate speech.⁹⁹ May one then assume that the SAHRC took heed of its responsibility to address hate speech that is perpetrated outside the borders of the Republic in instances where the effect of the utterance can be felt in South Africa?

Another recent incident may provide some clarity. Zindzi Mandela-Hlongwane, the daughter of the iconic late former President of South Africa, Nelson Mandela, and Winnie Madikizela-Mandela, posted several seemingly demeaning tweets about white South Africans on her Twitter account during a land debate. Mandela-Hlongwane did so while she was the South African ambassador to Denmark. The utterances were made while she was in Norway in June 2019.¹⁰⁰ An official complaint has been lodged with the SAHRC.¹⁰¹ The SAHRC has not dealt with the matter yet, but it did state on its official website that "the history of Zindzi Mandela and

⁹⁷ Staff Reporter 2008 <https://mg.co.za/article/2008-09-11-afrikanerbond-appeals-pahad-hate-speech-decision>.

⁹⁸ He stated in the video: "Not a f***en [k-word] in sight. Heaven on earth".

⁹⁹ Mattushek 2019 <https://www.sabreakingnews.co.za/2019/07/11/racist-catzavelos-hit-with-r200k-fine-pleads-poverty/>. Catzavelos has since reached a settlement agreement with the SAHRC on the hate speech charge. In terms of the agreement he has to pay R150 000 over a period of 30 months and had to issue an apology to the public for his comments. Lawrence *Beeld* 10. Notably, the political party, the Economic Freedom Fighters (the EFF) also instituted criminal charges based on *crimen injuria* against Catzavelos. Catzavelos pleaded guilty to the charges of *crimen injuria* in December 2019 and was sentenced on 28 February 2020 to pay an amount of R50 000 fine or face a suspended two-year jail term, both of which were suspended for five years. As the case has not been officially reported, we are reliant on media statements for information. See e.g. Anon 2020 <https://ewn.co.za/2020/02/13/adam-catzavelos-back-in-court-for-sentencing-over-racist-comments>; Citizen Reporter 2020 <https://citizen.co.za/news/south-africa/courts/2247974/im-grateful-for-judgment-and-ruling-adam-catzavelos-after-getting-r50k-fine/>. Apparently, he is also being prosecuted for hate speech in Greece, where the utterance was made.

¹⁰⁰ Maroela Redaksie 2019 <https://maroelamedia.co.za/nuus/sa-nuus/eff-beaam-zindzi-mandela-se-uitlatings/>.

¹⁰¹ Cornelissen 2019 <https://maroelamedia.co.za/nuus/sa-nuus/klagte-teen-zindzi-mandela-by-menseregtekommissie-ingedien/>.

her family needs to be taken into account during any investigation into her tweets on land reform."¹⁰² It will therefore be interesting to see how the SAHRC proceeds in this matter, in view of its expressed approach in the recent Catzavelos case.

5.3 Monetary restrictions to the jurisdiction of the different equality courts

As mentioned above, what relief is being claimed can also play a role in determining whether or not a court has jurisdiction.¹⁰³ In a settlement agreement in *Khumalo* the SAHRC opted for an amount of R150 000 to be paid should Khumalo commit hate speech again within a 12-month period.¹⁰⁴ The settlement was later aborted, and the SAHRC sought payment of that amount as compensation.¹⁰⁵ The Johannesburg Equality Court linked the amount to the amount of R150 000 that the late Penny Sparrow had been required to pay¹⁰⁶ shortly before the matter was heard. The court in *Khumalo* noted that Sparrow's personal financial circumstances had not been considered in arriving at R150 000. Khumalo likewise had not provided any information regarding his financial position.¹⁰⁷ During the previous referral by the ANC to the Roodepoort Equality Court, Khumalo had indicated that he was not in a financial position to pay the R100 000 that he was then asked to pay.¹⁰⁸ In the end, an agreement had been reached between the ANC and Khumalo that Khumalo could pay a decreased amount of R30 000 in down-payments of R1000 per month to a charity organisation instead. In the subsequent proceedings in the

¹⁰² SAHRC 2019 <https://sahrc.org.za/index.php/sahrc-media/news/item/2030-sahrc-will-consider-probe-into-zindzi-mandela-tweets>.

¹⁰³ *Estate Agents Board v Lek* 1979 3 SA 1048 (A) 1063; *Gulf Oil Corp v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 2 SA 10 (T) 18. Also see Harms *Civil Procedure in Magistrates' Courts* D26.2 Part II-Civil Matters, Ch VI: Civil Jurisdiction. *Khumalo* para 5.

¹⁰⁴ *Khumalo* para 110.

¹⁰⁵ In 2016, Penny Sparrow, an estate agent, was found guilty of hate speech for posting the following in Facebook: "These monkeys that are allowed to be released on New years Eve [sic] and new years day [sic] on to [sic] the public beaches towns etc obviously have no education what so ever [sic] so to allow them loose is inviting huge dirt and discomfort to others. I'm sorry to say I was amongst the revellers and all I saw was black on black skins what a shame [sic]. I do know some wonderful thoughtful black people. This lot of monkeys just don't want to even try. But, think they can voice opinions about statute and get their way dear oh dear. From now on I shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same, pick and drop litter". Anon 2016 <https://www.enca.com/south-africa/penny-sparrow-feels-twitter-wrath>.

¹⁰⁶ *Khumalo* para 111. The court remarked that the amount "has gained some sort of notorious default status".

¹⁰⁷ *Khumalo* para 22.

Johannesburg Equality Court, the court did not consider it appropriate to order him to pay an additional amount of compensation.¹⁰⁹ The Equality Court in *Khumalo* held that imposing exorbitant amounts of monetary compensation to punish the respondent¹¹⁰ is not what the PEPUDA envisages. Considering the rehabilitation motive of the legislation, doing so would be counter-productive. Consequently, instead of the R150 000, the court ordered Khumalo to pay the SAHRC's costs,¹¹¹ as the SAHRC is funded by the taxpayers.¹¹² But is there a limitation on the amount that the Equality Court can order the perpetrator to pay?

Magistrates' courts are divided into district and regional courts. Both may entertain civil cases and criminal cases. District Courts usually have a limitation on the quantum of damages that they can impose, which is currently set at R120 000. They can impose prison sentences not exceeding three years. The maximum fine amount in the Regional Court is now R600 000, and this court may hand down a maximum prison sentence of fifteen years. Different from the position in the ordinary Civil Courts, the magistrates' courts acting as equality courts have the same jurisdiction to make orders as the High Courts acting as equality courts.¹¹³ A magistrates' court is afforded additional powers to order a remedy exceeding the court's inherent jurisdiction in terms of section 21(2) of the PEPUDA provided that the High Court confirms the making of such a higher award. In terms of section 19(3)(a) of the PEPUDA, if a magistrate's court makes an order exceeding its ordinary monetary jurisdiction, it must be confirmed by a High Court. Regulation 9 of the Regulations¹¹⁴ determines

- (1) If a magistrates' court, sitting as a court, makes an order which exceeds the monetary jurisdiction of the said court, the clerk must within seven days after the order becomes available—

¹⁰⁹ *Khumalo* para 111.

¹¹⁰ The payment of damages whether to the complainant or to a suitable organisation is but one of the wide range of remedies mandated in terms of s 21 of the PEPUDA.

¹¹¹ As to legal costs, the default position in the Equality Court appears that each party should pay its own costs in the Equality Court. Regulation 10 of GN R764 in GG 25065 of 13 June 2003. Regulation 12 determines that there are no costs associated with the initiation of proceedings in the Equality Court. In so far as the costs of legal representation is concerned, each party is responsible for the payment of their own costs, save in instances where the presiding officer directs otherwise.

¹¹² *Khumalo* para 111.

¹¹³ Kok 2008 SAJHR 451.

¹¹⁴ GN R764 in GG 25065 of 13 June 2003.

- (a) inform the respondent that—
 - (i) the order is to be submitted to the High Court, for confirmation; and
 - (ii) he or she has the right to submit to the clerk any statement or argument within three days after receipt of the notification; and
 - (b) forward to the registrar of the High Court, the record of the proceedings or a copy thereof certified by the clerk, together with any statement or argument submitted by the respondent in terms of paragraph (a) (ii).
- (2) The registrar must lay the record of the proceedings referred to in subregulation (1) before a judge of the High Court for confirmation.

It is clear that there is no restriction on the compensation amounts that the Equality Court may order, whether it is a designated magistrates' court or a High Court. In practice it appears that many of the settlements that are reached by the SAHRC involve the payment of large amounts of money. For instance, the SAHRC proposed an amount of R200 000 to settle the Agrizzi hate speech matter out of court.¹¹⁵ Subsequently, the SAHRC in a newspaper article indicated that it sought at least R200 000 in damages¹¹⁶ from Catzavelos, referred to above, for his alleged hate speech, even though he had made it clear that he could not afford to pay it.¹¹⁷ The amounts appear to be on the increase, and the SAHRC sees it as setting of a precedent for future cases. This goes against the purpose of the PEPUDA. Moreover, in the light of the progress that has been made in South Africa since 1995 to promote debtor protection,¹¹⁸ not factoring in whether the perpetrator is able to pay in deciding on a suitable sanction is unfathomable. In terms of the PEPUDA¹¹⁹ the Equality Court is provided with a wide

¹¹⁵ Mattushek 2019 <https://www.sabreakingnews.co.za/2019/07/11/racist-catzavelos-hit-with-r200k-fine-pleads-poverty/>.

¹¹⁶ The Chairperson of the SAHRC in Gauteng, Buang Jones, indicated that the reason for setting the amount at R200 000 was that it could not accept a lesser amount due to the precedent which had been set in the Agrizzi-case and another case in Springs. Seleka *Beeld* 6.

¹¹⁷ Nicodamus 2019 <https://sadcnews.org/2019/07/11/adam-catzavelos-not-able-to-pay-sahrc-r200-0000-fine/>.

¹¹⁸ See for instance the decision in *Coetzee v Government of the Republic of South Africa: Matiso v Commanding Officer, Port Elizabeth Prison* 1995 4 SA 631 (CC), in which the Constitutional Court declared unconstitutional ss 65A-M of the PEPUDA for violating the right to personal freedom. In so doing, civil imprisonment for the inability to pay judgment debts was abolished. The enactment of the *National Credit Act* 34 of 2005 and the *Consumer Protection Act* 68 of 2008 further bolsters the belief that the financial ability of the respondent in a hate speech case is an important factor to consider before an amount is decided upon.

¹¹⁹ Section 21(2) of the PEPUDA.

discretion to correct the wrong. The aim is not to dish out a punishment, but rather to seek a remedy that will rectify the problem by rehabilitating the perpetrator. This is evident from the fact that the court can issue an interdict to prevent racism or require the utterer to make a public apology.¹²⁰ This means that the compensation amount should be considered on a case-by-case basis and that the financial circumstances of the perpetrator must be considered.

Besides the financial circumstances of the respondent, another factor that should be considered in determining the *quantum* of damages is whether he or she is remorseful of the conduct. Given the remedial purpose of the wide range of interventions on offer in terms of the PEPUDA it would make sense that a genuine apology, whether in terms of the court order or otherwise, should impact favourably and the amount of damages ordered should decrease. On the flipside, where the court finds, as in *Khumalo*, that no genuine apology has been tendered, the amount should be higher.

5.4 Appeals and reviews

We agree that the victims in *Khumalo* deserved to have their case heard. However, the fact that there were many procedural irregularities in the Roodepoort proceedings in *Khumalo* would be grounds for review of the case. No review application was brought. That the court may have reached a different conclusion on the facts – since the court considered the utterance to be a single utterance – would be a ground for appeal. No appeal had been lodged in *Khumalo*. It does not appear to be the correct course of action for the court *mero motu* to address the apparent shortcomings in a second hearing. The reason for doing so in *Khumalo* appears to be the fact that, despite several proposals that would bring practical solutions to problems experienced in practice when applying the PEPUDA,¹²¹ nothing is being done to address the problems. The court comments that this case is a good example of how complaints can be referred by different persons aggrieved by hate speech to different equality courts. It would have been better, in the court's view, if the different complaints could be heard in a single hearing.¹²² Sutherland J laments the fact that the task of amending the PEPUDA has apparently been placed on the back burner, and that regulations could simply be promulgated to alleviate the glitches.¹²³ Notably,

¹²⁰ Thabane and Rycroft 2008 *ILJ* 43, 46-47; also see *Khumalo* 2018 *SA Merc LJ* 393.

¹²¹ See for instance Bohler-Muller and Tait 2000 *Obiter*; Kok 2008 *SAJHR*; Botha and Govindjee 2017 *PELJ*.

¹²² *Khumalo* para 115.

¹²³ *Khumalo* paras 115-116.

the court invited the Minister of Justice to make submissions as to possible ways of addressing this problem. While recognising the existence of the problem, the Minister indicated that the Equality Review Committee was doing a comprehensive assessment of the PEPUDA, which would take some five years to complete. The Department of Justice would not respond before the assessment had been completed.¹²⁴

If one of the parties to a dispute under the PEPUDA is aggrieved by the outcome, it is possible to refer the matter for review or appeal.¹²⁵ The appeal is made to the High Court or Supreme Court of Appeal having jurisdiction.¹²⁶ The High Court or Supreme Court of Appeal may subsequent to an appeal or review make any order that it deems fit. If the circumstances dictate, it is also possible to appeal directly to the Constitutional Court.¹²⁷

Regulation 19 of the *Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination*¹²⁸ (the Regulations) in Chapter V entitled "Appeals and Review" prescribes the process to follow in appeals from the magistrates' court sitting as an Equality Court to the High Court or from the High Court to the Supreme Court of Appeal. The whole or only a part of the order may be the subject of an appeal.¹²⁹ In terms of regulation 19(7)(a) an appeal in the Equality Court must be handled like an appeal against a decision of a magistrate in a civil matter. The rules regulating the conduct of the proceedings of the several provincial and local divisions of

¹²⁴ Khumalo para 116.

¹²⁵ Section 23 of the PEPUDA.

¹²⁶ Section 23(1) of the PEPUDA. See, for instance, *South African Human Rights Commission v Qwelane* 2018 2 SA 149 (GJ). The South Gauteng High Court and the Johannesburg Equality Court found Qwelane, formerly an ambassador to Uganda, guilty of hate speech in 2017. This followed an article that he published in the *Sunday Sun* newspaper column on 20 July 2008 titled "Call me names - but gay is not okay". The court found that his offending statements made in the column amounted to hate speech as contemplated in s 10(1) of the PEPUDA as it read at that time. On appeal, Qwelane succeeded in his application seeking to have s 10(1), read with ss 12 and 1, and s 11 of the PEPUDA declared unconstitutional for being inconsistent with s 16 of the Constitution (the freedom of expression provision). Mabuza 2018 <https://www.timeslive.co.za/news/south-africa/2018-04-20-qwelane-to-appeal-judgment-on-his-gay-bashing-column/>; SABC Digital News 2019 <https://www.youtube.com/watch?v=65fHMgMB2C8>. The Supreme Court of Appeal in *Qwelane* upheld the appeal and declared s 10 of the PEPUDA unconstitutional and invalid. The complaint lodged by the SAHRC against Qwelane was dismissed. Parliament was given a period of 18 months from 29 November 2019 to remedy the defect. S 10 has been reworded in the interim until Parliament amends the flaws. See fn 7 above. As already mentioned, it is not our intention here to discuss what would or could constitute "hate speech".

¹²⁷ Section 23(3) of the PEPUDA.

¹²⁸ N R764 in GG 25065 of 13 June 2003.

¹²⁹ Reg19(b), (d) of GN R764 in GG 25065 of 13 June 2003.

the High Court in so far as they relate to civil appeals from the magistrates' courts apply, with the necessary changes, to the appeal. On top of that, the uniform Rules of Court would apply with the necessary changes for purposes of an appeal.¹³⁰ Regulation 20 sets out the procedure for the review of an order of the Equality Court.

5.5 Hate speech inside or outside the workplace

In *Khumalo* the offending utterance had been made via social media, outside of the workplace and not in the performance of Khumalo's duties. Would it have affected the judiciability of the dispute had the utterance been made by Khumalo in the work context?

The provisions of the PEPUDA do not apply if the *Employment Equity Act* 55 of 1998 (the EEA) applies.¹³¹ A dispute concerning alleged unfair discrimination must be referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation within six months after the alleged discriminatory conduct.¹³² If attempts at conciliation fail, a claim for alleged unfair discrimination or harassment can be arbitrated by the CCMA provided that the employee earns below the threshold amount as stipulated in section 6(3) of the *Basic Conditions of Employment Act* 75 of 1997 (the BCEA), or otherwise by the Labour Court.¹³³ The wording of section 5(3) suggests that as soon as the EEA is applicable, the PEPUDA does not cover the case and the Equality Court would not have jurisdiction.¹³⁴

But the EEA does not include any protection against hate speech. The only provision that is related to making racial utterances is section 6 of the EEA. Section 6 of the EEA expressly provides that no person may unfairly discriminate, whether directly or indirectly, against an employee in any *employment policy or practice*, on any one or more of the grounds listed in the legislation.¹³⁵ The section further prohibits unfair discrimination on the grounds of "race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground." Subsection 2 provides for

¹³⁰ Regulation 19(7)(b) of GN R764 in GG 25065 of 13 June 2003.

¹³¹ Section 5(3) of the PEPUDA; also see Kok 2009 *SA Public Law* 651, 653.

¹³² Section 10 of the *Employment Equity Act* 55 of 1998 (EEA); Basson *et al* *New Essential Labour Law Handbook* 253.

¹³³ Basson *et al* *New Essential Labour Law Handbook* 401.

¹³⁴ Currie and De Waal *Bill of Rights Handbook* 245 fn 182.

¹³⁵ Basson *et al* *New Essential Labour Law Handbook* 233.

two instances in which it will not constitute unfair discrimination on one of these grounds, namely if it is done in accordance with a valid employment equity (of affirmative action) plan, or if it is justifiable for reasons of an inherent requirement of the job. Section 6(3) of the EEA prohibits the harassment of an employee based on any or a combination of these listed grounds and extends the ambit of what qualifies as unfair discrimination also to include discrimination on unlisted grounds.¹³⁶

Although the definition of "employment policy or practice"¹³⁷ as used in section 6 of the EEA is expressly stated not to be exhaustive, none of the items that are listed in the definition relates in any way to hate speech. Kok argues correctly that because the EEA does not include any reference to hate speech, all hate speech cases, whether perpetrated inside or outside of the workplace should be decided on by the Equality Court.¹³⁸

Given that it is inconceivable that the legislature intended to restrict rather than extend the net of protection against unfair discrimination, hate speech and harassment through the enactment of the PEPUDA,¹³⁹ it is suggested that the application clause in the PEPUDA should be amended to read: "The PEPUDA does not apply to a person to whom the *Employment Equity Act* 55 of 1998 applies to the extent to which that Act (the EEA) applies." This would mean that employees would be able to use the hate speech protection in the PEPUDA, which is not provided for in the EEA.

5.6 The issue of different complainants and the potential open-endedness of complaints

In *Khumalo*, in deciding whether it should hear the second referral of the dispute, the court considered the status of the SAHRC as a complainant as opposed to the ANC. The SAHRC had acted on behalf of all white South

¹³⁶ See for instance *Gumede and Crimson Clover 17 (Pty) Ltd t/a Island Hotel* 2017 38 ILJ 702 (CCMA) paras 22, 27 and 30 in which the employer's grounds for discriminating against the employee, i.e. that he was smelly and his clothes were dirty, were ruled to be irrational and unfair on arbitrary grounds. Botha 2018 *THRHR* 674.

¹³⁷ Section 1 of the EEA defines the concept as follows: "'employment policy or practice' includes, but is not limited to— 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."

¹³⁸ Kok 2009 *SA Public Law* 654.

¹³⁹ The PEPUDA extends the protection provided under the Constitution against unfair discrimination. Currie and De Waal *Bill of Rights Handbook* 244-245.

Africans and the South African Jewish community. The ANC represented its white members only. Much of the decision regarding whether the second referral should be entertained revolved around the question of whether the referral was made by the "same person".

Section 20 of the PEPUDA regulates the legal standing of persons, groups, associations or institutions in the Equality Court. A complainant may act in his own interest, or on behalf of someone else who is unable to act on his own. A complaint may also be lodged on behalf of a particular group or class of persons or an association. Moreover, complaints may be lodged by the SAHRC and the Commission for Gender Equality.

This provision leaves the door wide open for the referral of multiple hate speech complaints by different parties based on the same utterance. A troubling admission that is made in *Khumalo* is that this would be the case subject to the restrictions in the *Prescription Act* 68 of 1969.¹⁴⁰ The *Prescription Act*'s provisions restrict the right in section 34 of the *Constitution of the Republic of South Africa*, 1996 to litigate a matter after a period of three years from the act or omission that gave rise to the action.¹⁴¹ This corresponds with the time limit in section 3(6) of Chapter 2 of the SAHRC's *Complaints Handling Procedures*,¹⁴² which reads:

The Commission may decline to investigate a complaint where the alleged violation occurred more than 3 years prior to the lodging of the complaint with the Commission. In instances where a complaint is rejected on this ground, the Commission will provide the complainant with written reasons for its decision.

We agree with the court that the PEPUDA is a civil statute which provides civil remedies.¹⁴³ Double jeopardy, which is applicable in criminal cases only, would consequently never apply to instances where the court must consider whether or not a second referral should be entertained. However, to allow different complainants to approach the court for a period of (probably) three years to argue as to whether the circumstances could fall in the confines of the *res judicata* principle or of its relaxed nephew, issue estoppel, to be decided on a case-by-case is equally untenable.

In conducting of its own investigations the SAHRC appears not to be effective. In particular, the SAHRC is not efficient in the screening of hate

¹⁴⁰ *Khumalo* para 60.

¹⁴¹ Sections 10(1), 11 and 12 of the *Prescription Act* 68 of 1969; also see *Road Accident Fund v Mdeyide* 2011 1 BCLR 1 (CC) para 10.

¹⁴² Chapter 2 s 3(6) of the *Complaints Handling Procedures*.

¹⁴³ *Khumalo* para 87.

speech cases. In several cases they ascribe the delays in acting against alleged perpetrators of hate speech to the fact that they must consolidate the complaints lodged by victims.¹⁴⁴ We propose that instead of taking on the responsibility of screening cases, the SAHRC should become the administrative body that accepts pleadings in all cases related to alleged hate speech.¹⁴⁵ The SAHRC could in the mainstream media publish legal notices of hate speech cases accepted by it, to notify the public. This would accord with the acknowledgment in the PEPUDA that hate speech has a public interest dimension.¹⁴⁶ Instead of the situation presently prevailing, where these pending cases are reported upon in the newspapers and in social media, the SAHRC should on their official website¹⁴⁷ inform the public of the details of the cases and invite the public to lodge complaints. Doing so would address the skewed reporting of only certain hate speech cases in the quest for sensation¹⁴⁸ and promote accuracy in the reporting of these matters. Allowing members of the public access to the correct information and to lodge their own complaints would also promote the right to access to justice as envisaged in the Constitution.¹⁴⁹

Time limits must be set for the lodging of complaints. The time period for the referral of an unfair discrimination case in terms of the EEA,¹⁵⁰ i.e. six months from the date of the alleged hate speech, may serve as a guideline, although it might be too short, considering that hate speech cases involve groups of victims and not individual litigants.¹⁵¹ We suggest that one year would be a reasonable time for the lodging of hate speech complaints in terms of the PEPUDA.¹⁵² Thereafter, the SAHRC should consolidate the

¹⁴⁴ See the discussions of Khumalo, Sparrow and ex-President Zuma. Brink and Mulder 2017 <https://solidariteit.co.za/wp-content/uploads/2017/10/Racism-hate-speech-and-double-standards-by-no-means-a-mere-matter-of-bla....pdf>.

¹⁴⁵ For a discussion of the various functions of the human rights commissions in different jurisdictions see Geldenhuys 2019 TSAR 659-665.

¹⁴⁶ Section 19(2) of the PEPUDA requires that hearings in hate speech matters must be held in public.

¹⁴⁷ See SAHRC 2020 <https://www.sahrc.org.za/>. This would conform with the SAHRC Complaint Handling Procedures Ch 1 s 1(1), which determines that "[t]he South African Human Rights Commission (the SAHRC/Commission) must make known publicly the particulars of the procedure to be followed in conducting an investigation of any alleged violation of human rights."

¹⁴⁸ The research conducted by Brink and Mulder suggests that media reporting of hate speech complaints is often skewed along racial lines. See Brink and Mulder 2017 <https://solidariteit.co.za/wp-content/uploads/2017/10/Racism-hate-speech-and-double-standards-by-no-means-a-mere-matter-of-bla....pdf>.

¹⁴⁹ Section 34 of the Constitution.

¹⁵⁰ Chapter 2 s 10 of the EEA.

¹⁵¹ Botha and Govindjee 2017 PELJ 17.

¹⁵² The possibility of bringing an application for condonation should not be excluded. This could be introduced by means of an appropriate adaptation of Ch 2 s 8 of the

complaints and refer the cases with the complainants properly consolidated to the relevant Equality Court. Should the SAHRC provide reasons within its discretion for declining to refer the dispute based on hate speech to the Equality Court, a petition procedure should be available to complainants.¹⁵³

6 Conclusion

The jurisdiction of different equality courts is wrapped in uncertainty. It appears that there are designated equality courts with overlapping jurisdictional territories, leading to concurrent jurisdiction.

Whereas the SAHRC has on an informal and rather *ad-hoc* basis apparently taken on the role of consolidating disputes involving alleged hate speech, it has not been appointed formally to do so. Moreover, there is no administrative body in South Africa that is currently responsible for accepting hate speech complaints and advising the public of their existence or of the details.

No monetary restrictions are placed on the jurisdiction of the designated equality courts, whether they are magistrates' courts or Higher Courts. Considering the rehabilitative purpose of the PEPUDA, the amount of compensation should be decided on a case-by-case basis, considering the financial circumstances of the perpetrator. The amounts used in settlements should not be set as precedents and used indiscriminately in future cases. Other factors, such as the financial ability of the respondent in a hate speech case, and whether in the court's view he or she has shown remorse for the hate speech, should be taken into account to avoid the levying of exorbitant compensation amounts, which is contrary to the laudable aims of the PEPUDA.

Instead of shirking the procedures that are prescribed for reviews and appeals, the problems that have been identified must be addressed. To remove the uncertainty regarding whether hate speech perpetrated in the work context is judiciable, we recommend an amendment of section 5(3) of the PEPUDA. Instead of perpetuating the problem relating to multiple complaints being referred by different complainants to different equality

Complaints Handling Procedures, which provides the procedure for the condonation of the late lodging of a complaint with the SAHRC, i.e. after the 3-year period following the human rights violation has elapsed.

¹⁵³ This could be fashioned to Rule 4 of the *Rules Regulating the Conduct of Proceedings in the Labour Appeal Court* (GN 1666 in GG 17495 of 14 October 1996) as amended.

Courts for what seems to be at least three years or potentially a longer period, we proffer several suggestions:

- (a) The SAHRC should formally be appointed as the central registry to accept all hate speech complaints by directive.
- (b) The SAHRC should inform the public of all complaints received in legal notices in mainstream newspapers and issue formal statements on their official website to provide accurate facts concerning the complaints. The public should be invited to lodge complaints related to the referrals.
- (c) A clear time limit should be set for the lodging of complaints.
- (d) The SAHRC should refer complaints properly consolidated to the Equality Court; and
- (e) A petition procedure should be introduced for instances where the SAHRC declines to refer a hate speech case to the Equality Court.

All victims of alleged hate speech deserve their day in court. However, the Equality Court cannot deviate from the procedures that are prescribed for the review and appeal of judgments. As they say, two (or in this case many) wrongs do not make a right.

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ANC	African National Congress
BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation, Mediation and Arbitration
DoJ	Department of Justice
EEA	Employment Equity Act 55 of 1998
EFF	Economic Freedom Fighters
ILJ	Industrial Law Journal
PELJ	Potchefstroom Electronic Law Journal
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SAHRC	South African Human Rights Commission
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg