IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER: A22/2021
COURT A QUO CASE NUMBER: EQ1/2019

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: NO
REVISED
13.01.2022

In the matter between:-

S[....] P[....] M[....]
Obo S (MINOR CHILD) Appellant

and

KING'S SCHOOL - WHITE RIVER First Respondent
MARICK COETZEE Second Respondent
COMMISSION FOR GENDER EQUALITY *Amicus Curiae*

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

[1] This is an appeal against the whole of the judgment and order handed down by Magistrate W Baloyi, sitting as an Equality Court ("the court *a quo*").

[2] The court *a quo* was faced with an application for absolution from the instance at the end of the appellant's case (complainant in the court *a quo*, herein referred to as "the appellant"). The appeal follows upon the appellant's criticism of the court *a quo* in granting the first- and second respondents' application for absolution and finding that the appellant had not made out a *prima facie* case of discrimination as required by Section 13(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA").

[3] The central issue in this appeal is whether the court *a quo* correctly applied the test in respect of an absolution from the instance at the end of the appellant's case.

BACKGROUND

[4] The appellant's minor daughter (cited as "S" and referred to as such herein) commenced her studies at **KING'S SCHOOL - WHITE RIVER** (herein referred "the school") during January 2019. During May of the same year, the appellant who resides in Gauteng was called to the school for an urgent meeting with the appellant in order to discuss S. At this meeting the appellant was shown a letter written by S wherein she discloses her sexual orientation and that she is dating a girl. The appellant was requested by the second respondent to take S home with her. It was intimated that such conduct cannot be allowed at the school.

[5] Upon an enquiry as to whether S was suspended or expelled, the second respondent replied no, but she needs to go with the appellant as she need motherly love, to heal. The second respondent advised that she would assist with a transfer letter for S to enable the appellant to find a school close to where they lived.

[6] The appellant was informed that S's class test marks could be used to make up her final exam mark in June 2019 or she could complete her June exams (Term 2) from 7 June 2019 on her own pace. The suggested date of 7 June 2019 was the day after the school had already closed and thus in the absence of the other learners to avoid victimization.

[7] The reason that the school requested that S be fetched from school was demonstrated to be that S wants her mother to take care of her and lover her and that she is dating another girl.

[8] The aforesaid events resulted in the appellant approaching the Equality Court (the court *a quo*) in terms of Section 20 of PEPUDA. In terms of the governing regulations affidavits were exchanged and the matter proceeded to a hearing where oral evidence on behalf of the appellant was received. On closing of the appellants case the respondents sought absolution from the instance.

[9] It is unclear from the record whether a directions hearing as contemplated in Regulation 10 was held. The respondents did however file discovery affidavits together with copies of the documents so discovered.

PROCEEDINGS IN THE EQUALITY COURT

[10] The proceedings and process followed in an Equality Court differs substantially from those which apply in the ordinary civil courts. The Regulations governing the conduct of proceedings in the Equality Court have their own scheme, which impact on what serves as evidence before such a court.

[11] The guiding principles are that proceedings before a Equality Court are expeditious, more informal, intend to be conducted in a conducive environment and guided by the Regulations dealing with the conduct of the direction hearing.[1]

[12] The proceedings of the enquiry must, as far as possible, be interpreted in a manner that gives effect to the guiding principles contemplated in Section 4 of the Act.[2] Section 4 provides that:-

> *"(1) In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:*

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[1] Regulation 10(1) and 10(3) of the Regulations made in terms of section 30 of the PEPUDA published in government notice no. r. 764 of 13 June 2003 (government gazette no. 25065) (here after referred to as "the Regulations")

[2] Regulation 10(2)

(a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings;

(b) access to justice to all persons in relevant judicial and other dispute resolution forums;

(c) the use of rules of procedure in terms of section 19 and criteria to facilitate participation;

(d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature;

(e) the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof.

(2) In the application of this Act the following should be recognised and taken into account:

(a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and

(b) the need to take measures at all levels to eliminate such discrimination and inequalities."

[13] Proceedings are commenced by a complainant by filed a notice which substantially accords with Form 2. The latter requires of a complainant to state the nature of the complaint, how it has affected the complainant, annex documents substantiating the complaint and the relief sought. From 2[3] requires that it be attested do before a commissioners of oaths, thereby enjoying the status of an affidavit.

[14] A respondent is then notified in terms of Form 3[4] and invited to respond to the allegations and submit information. This is normally and in *casu* done by the respondents filing an affidavit.

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[3] Regulation 6(1)

[4] Regulation 6(2)

[15] The clerk of the Equality Court then refers the matter to the presiding officer, who, if he or she does not refer the matter to another forum, will in terms of decide if the matter will be heard in court. The clerk is then required to assign a date for the direction hearing[5]. Thereafter, depending on the outcome of the direction hearing, the matter will be set down for hearing where oral evidence are received.[6]

[16] The relevance and effect of aforementioned is that when the court *a quo* adjudicated the application for absolution, the court had received facts from the evidence in the appellant's Form 2 and through the oral evidence led. The court at that stage had also received facts from the respondents opposing affidavit and discovered documents. Its thus *sui generis*, and practically a hybrid of trial and motion proceedings.

[17] This is a situation a presiding officer would ordinarily no be faced with in ordinary civil court. Although guided by the procedural regulations and objectives of PEPUDA, a presiding officer in the Equality Court is also required to be alive to the fact the proceedings are a hybrid. Particularly, when called upon to adjudicate an absolution from the instance application.

[18] A ordinary civil court presiding officer would only face an absolution of the instance application in trial proceedings. By implication the court will normally only have heard the oral evidence of the plaintiff when adjudicating the absolution from the instance application. There is some instances where affidavits might be part of the evidence presented or been referred to in cross-examination but the only evidence received and to considered would be that adduced on behalf of the plaintiff.

APPROACH IN COURT A QUO

[19] The court *a quo* commenting that it is a two stage process, and *"who alleges must prove*", approached the application from the premise of that set out in Section 13 of PEPUDA. Section 13 states:-

> "*13 Burden of proof*

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5 Regulation 6(5)

6 In terms of regulation 10(8) such evidence is received pursuant to administering of the oath.

(1) If the complainant makes out a prima facie case of discrimination –

(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) *the respondent must prove that the conduct is not based on one or more of the prohibited grounds*."

[20] The court *a quo* found that based on the totality of the evidence (being the filed affidavits with attached documents, oral evidence by the appellant and Mrs Makhumba, and the contents of Exhibit "B", "C" and "D") "*it cannot be found that the second respondent directly or indirectly discriminated against the learned child S.*"

[21] The court *a quo* was seemingly not alive to the hybrid nature of the hearing. The absolution of the instance application was adjudicated by considering the evidence of both the appellant and the respondents. This much is clear in the recordal made in the reason for the judgement, such as:

"*Both the complainant and respondents' affidavits are evidence before court*…

After due consideration of the totality of the evidence being: the filled affidavits with attached documents, oral evidence by complainant and Ms Makhumba and the contents of exhibit B, C and D…"

[22] The specifically had regard to the evidence of the respondents when the schools code of conduct was dealt with which formed part of the respondents affidavit and discovered documents.

ABSOLUTION FROM THE INSTANCE

[23] In considering the application for absolution, the court *a quo* was required to apply the test as to whether there is evidence upon which a court (applying its mind reasonably to such evidence) could or might (not should, nor ought to) find for the

plaintiff/complainant.[7] The court *a quo* had to clear its mind of all the facts placed before it in the respondents' opposing affidavit and discovered documents.

[24] In terms of Section 1 of PEPUDA "*discrimination*" is defined as follows:-

> *"[it] means any act of omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-*
>
> *(a) imposes burdens, obligations or disadvantage on; or*
>
> (b) *withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds*."

[25] "*Prohibited grounds*" are defined as:-

> *"(a) race; gender, sex, pregnancy, marital status, ethnic or social origin, colour; sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or*
>
> *(b) any other ground where discrimination based on that other ground -*
>
> *(i) causes or perpetuates systemic disadvantages;*
>
> *(ii) undermines human dignity; or*
>
> *(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).*"

[26] What the appellant thus had to show was that S was treated different to other learners based on or as a result of her sexual orientation.

[27] In summation, the evidence disclose that, the appellant was informed to 'take S away' from school. It is clear the taking meant that S should not attend the school any more. The appellant was so informed pursuant to the content of the letter

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7 **Claude Neon Lights (SA) Ltd v Daniel** 1976 (4) SA 403 (A) at 409G-H

becoming known. The content disclosed S's sexual orientation. By the instruction to take S away from school, S was not allowed to complete her June exams together with other learners, but provided with the option write it during school holidays.

[28] Differently put, if not for the content of the letter S would seemingly been allowed to remain at the school and complete her examinations together with the other learners. This in my view demonstrates that S was treated differently that other learners due to her sexual orientation to survive absolution and the court could or might find in favour of the appellant.[8] and the appeal must succeed.

DE NOVO BEFORE A DIFFERENT PRESIDING OFFICER

[29] It bears mention that in addition, the appellant, in her heads of argument, seeks that the matter ought to be referred back to the Magistrate's Court sitting as an Equality Court, to be heard afresh (*de novo*). The appellant further contended that the matter ought not to be heard by the court *a quo*, but that it should preside before a different magistrate.

[30] There is no justification before this court for an order that the matter should commence *de novo*, and/or before a different magistrate.

[31] In the premises the following order is proposed:-

1. The appeal is upheld with costs.
2. The order of the Equality Court *a quo* is set aside and replaced with the following order:-

"The application for absolution is refused."

3. The matter is referred back to the Equality Court *a quo* to proceed with the trial.

4. The clerk of the Equality Court is directed to assign a date of hearing for the matter to proceed as per 3 above.

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8 **De Klerk v Absa Bank Ltd** 2003 (4) SA 315 (SCA)

D GREYLING-COETZER
Acting Judge of the High Court of South Africa

I agree and it is so ordered

B A MASHILE
Judge of the High Court of South Africa

DATE OF HEARING:	15 October 2021
DATE OF JUDGMENT:	13 January 2022
FOR THE APPELLANT:	**South African Human Rights Commission** E-mail: smlombo@sahrc.org.za Ref: mp/2021/0059
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