DOES CALLING SOMEONE A "COCKROACH" AMOUNT TO HATE SPEECH UNDER SECTION 10 OF THE EQUALITY ACT?

Category: Media and OTT
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This question was addressed in the recent judgment of _Kunene and Another v Malema and Another_ [2024] JDR 0223 (GP),[1] where the High Court was asked to consider whether calling a political opponent a "cockroach" during a televised political debate amounted to hate speech in terms of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("**the Equality Act**").[2]

Background

The case arose from comments made by Mr Kenny Kunene, Deputy President of the Patriotic Alliance. During a televised interview, he responded to Mr Julius Malema's remarks that the ANC had entered into a coalition with "a party of criminals" (referring to Mr Kunene's party). Mr Kunene lashed out, stating:

"Julius is just an irritating cockroach that now I must deal with publicly…" and,
"Julius is a criminal, and I am going to show South Africans the real truth why I left the EFF – because of this cockroach."[3]

Mr Malema lodged a complaint with the Equality Court, arguing that these remarks constituted hate speech under section 10(1) of the Equality Act.[4]

The Equality Court's Findings

The Equality Court found that the words "cockroach", "criminal" and "little frog" amounted to hate speech and ordered Mr Kunene to apologise and refrain from using similar language in future. The matter was also referred to the Director of Public Prosecutions for further investigation.[5]

The Appeal

On appeal, Mr Kunene and the Patriotic Alliance argued that:

1. political ideology or affiliation is not listed as a prohibited ground in section 1 of the Equality Act;
2. Mr Kunene's comments were personal attacks directed at Mr Malema and did not constitute a violation of rights under the Act; and
3. the statements did not incite violence or cause actual harm, and political speech should enjoy greater tolerance.[6]

The High Court's Analysis

The High Court reaffirmed that while the Constitution protects freedom of expression (section 16(1) of the Constitution),[7] it does not protect expression that amounts to "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" (section 16(2)(c)).[8]   In addition, section 36 of the Constitution[9] permits reasonable limitations of rights in an open and democratic society.

Section 10(1) of the Equality Act[10] further prohibits speech that can reasonably be construed to: "… demonstrate a clear intention to be hurtful; be harmful or to incite harm; promote or propagate hatred."

This must be based on one or more of the prohibited grounds listed in section 1, which includes race, gender, sexual orientation, and religion, as well as analogous grounds that result in systemic disadvantage or impair human dignity.[11]

The court explained that hate speech under section 10 targets objective harm, and not merely subjective offence. Harm may be either direct (e.g. psychological harm) or indirect (e.g. undermining equality in social relations).[12]

Application to Mr Kunene's Comments

The court found that the term **"cockroach"**, used repeatedly by Mr Kunene, had serious implications. It held that: "The political use of the term is always and everywhere a call to treat those to whom the term is directed as objects of hate."[13]

The court applied the reasonable person test, asking whether an objective observer would have understood the word "cockroach" as intended to harm or incite hatred against Mr Malema based on his political beliefs or conscience. It concluded that:

"… a reasonable observer would have understood the use of that term in the context in which it was deployed as being clearly intended to promote hatred of and incite harm against Mr Malema for no reason other than that his political conscience and beliefs were not those of Mr Kunene."[14]

The court noted that the term "cockroach" has a well-documented genocidal history, notably in Rwanda, and is associated with the dehumanisation of political opponents.[15]

Even though political affiliation is not explicitly listed in section 1, the court held that it may constitute an analogous ground where discrimination based on it undermines human dignity or adversely affects equal enjoyment of rights. [16]

However, the court did not find the words "criminal" or "little frog" to be hate speech. It reasoned that such terms, while insulting or hostile, fall within the bounds of heated political debate. It ruled that: "Courts must be slow to police speech merely because it is angry in tone or conveys hostility."[17]

Outcome

The High Court upheld the Equality Court's core finding: the repeated use of the word "cockroach" by Mr Kunene amounted to hate speech under section 10 of the Equality Act. However, it overturned the referral to the National Prosecuting Authority, finding that: "Criminal sanction of unlawful expression is a measure of last resort... The primary aim should be to repair the social breach the speaker caused."[18]

Conclusion

This case confirms that even in political discourse, there are constitutional limits to freedom of speech. The term "cockroach," particularly when used in a political context, carries a deeply harmful and dehumanising meaning. As the court stated, the threshold for hate speech is not whether the speaker intended harm, but whether a reasonable person would understand the words to incite harm or hatred on a prohibited or analogous ground.

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[1] *Kunene and Another v Malema and Another* [2024] JDR 0223 (GP).

[2] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[3] Supra note 1 at para 1.

[4] Supra note 2.

[5] Supra note 1 at para 3.

[6] Supra note 2 at para 4.

[7] The Constitution of the Republic of South Africa, 1998.

[8] Ibid.

[9] Ibid.

[10] Supra note 2.

[11] Supra note 1 at para 14.

[12] Ibid at para 14.

[13] Ibid at para 28.

[14] Ibid at para 35.

[15] Ibid at para 27.

[16] Ibid at para 28.

[17] Ibid at para 24.

[18] Ibid at para 27.