IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No: EQ 04/2020

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: NO

04 October 2022

In the matter between:

AFRIFORUM	Complainant
and	
ECONOMIC FREEDOM FIGHTERS	1st Respondent
JULIUS SELLO MALEMA	2nd Respondent
MBUYISENI NDLOZI	3rd Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 04 Octber 2022.

LEAVE TO APPEAL: JUDGEMENT

Molahlehi J

[1] Following upon the complainant, by the applicant that the two songs, "Kill/Kiss the Boer" and "Biza a ma'firebrgate" sung by the respondents constitute hate speech and unfair discrimination in terms of sections 10 and 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Equality Act) this court made the following order on 25 August 2022:

(1) The complaint that the first impugned song, "Kiss the Boer/ Kiss the farmer" constitutes hate speech, and unfair discrimination is dismissed.

(2) The complaint that the second impugned song, "Bizan'ifire brigade" ("call the fire brigade"), constitutes hate speech and unfair discrimination is dismissed.

(3) The Complainant is to pay the costs of the suit.

[2] Before dealing with the merits of this application, I need to correct the patent error that appears in paragraph [47] of the judgment whereby the word **"not"** was erroneously omitted from the second sentence. The paragraph as varied now reads as follows:

"[47] The highest qualification that Mr Roets holds is an LLM degree. This qualification does **not** provide him with the necessary qualification to be an expert on the subject matter and more particularly on the statistical analysis, an issue that formed the core of Afriforum's case."

[3] I turn to the application for leave to appeal which is opposed by the respondents. The applicant contends that the order was erroneously made and is

accordingly seeking leave to appeal against the whole of the judgment and the above order.

[4] In its notice of leave to appeal, the applicant has raised several grounds of appeal. The grounds of leave to appeal are detailed in the notice of leave to appeal, thus, there is no need to repeat the same in this judgment.

[5] An application for leave to appeal is governed by Section 17(1) of the Superior Court Act 10 of 2013, which stipulates that:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
>
> (a) (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter t1nder consideration;
>
> (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[6] The test for leave to appeal, as set out in the above section is now well known in our law. It is also well established that the test as envisaged in this section is more stringent or requires a higher standard than the previous test.[1] The approach which

[1] Mont Cheveaux Trust (IT2012/28) v Tina Goosen and 18 Others and the Acting National Director of Public Prosecutions and 3 Others v The Democratic Alliance, Case No. 19577/09 (24 June 2016).

was adopted in the previous test of determining the possibility of another court holding a different view no longer applies. The correct threshold for leave to appeal is now whether there are reasonable prospects of success on appeal to be determined on a rational basis.[2] Consideration should also be had to whether there are other compelling reason/s which would include other issues of public interest.

[7] In considering this application, I have had regard to the submissions made by both parties and, in particular, the contentious debates concerning the binding effect of Afriforum and Another v Malema and Others,[3] on this court and whether the test for determining harm was properly applied including issues of public interest.

[8] Applying the test for leave to appeal as envisaged in section 17 of the Superior Court Act, I am satisfied that the applicant has made out a case that there are reasonable prospects of success on appeal. This matter, in my view, has elements of public interest and thus leave to appal deserve to be granted to the Supreme Court of Appeal.

Order

[9] In the circumstances, the following order is made:

1. The application to the Supreme Court of Appeal is granted.
2. Costs to be costs in the appeal.

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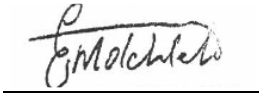
[2] Land and Agricultural Development Bank of South Africa and Another v Van den Berg and Others (1955/2016) [2021] ZAFSHC 285; [2022] 1 All SA 457 (FB) (8 November 2021).

[3] 2011 (6) SA 240.



E Molahlehi

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, GAUTENG DIVISION,

JOHANESBURG.

Representation:

For the Complainant: J Gauntlett SC

Instructed by Hunters Spies Attorneys.

For the Respondents: Ian Levit Attorneys.

Date of hearing: 29 September 2022

Delivered: 04 October 2022.