



THE REPUBLIC OF SOUTH AFRICA  
**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: EC13/2013

Before The Hon. Mr Justice Bozalek  
Hearing: 14 May 2018  
Judgment Delivered: 18 May 2018

In the matter between:

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

**Applicant**

**and**

**OSCAR PETER BOUGAARDT**

**Respondent**

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**JUDGMENT**

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**BOZALEK J**

[1] This is an application brought in the Equality Court for the respondent to be declared to be in contempt of this Court for failing to comply with an earlier Court Order.

[2] The applicant is the South African Human Rights Commission established in terms of Chapter 9 of the Constitution whilst the respondent is an adult male ordained minister of Strandfontein. The respondent opposes the application and filed an opposing affidavit and a further affidavit in reply to the applicant's replying affidavit.

## Background

[3] This is not the first occasion on which the parties have joined issue in the Equality Court. In October 2013 the applicant brought a complaint against the respondent in this Court following the receipt of a range of complaints from various individuals. These complaints involved the respondent sending unsolicited emails in which he made denigratory and offensive remarks regarding gay and lesbian people. It was also alleged that he made similar remarks in Facebook postings. In so doing, it was alleged, he infringed sec 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ('the Equality Act') which provides that 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 -*

(a) *be hurtful;*

(b) *be harmful or incite harm; or*

(c) *promote or propagate hatred*

*where the prohibited ground relied on was that of 'sexual orientation' in sec 1(xxii) of the Equality Act.'*

[4] That complaint was eventually settled between the parties following a mediation exercise mandated by the Equality Court. The agreement reached between the parties was made an order of the Equality Court on 11 August 2014. It interdicted the respondent from publishing statements that are discriminatory or incite hatred or harm on the grounds of sexual orientation. The agreement provided inter alia as follows:

'4. *(Respondent) admits that he has not carefully thought through his statements and properly taken account of the fundamental rights of others in particular the right not to be discriminated against.*

*(respondent) understands that these statements in circumstances where gay and lesbian persons have historically suffered and continue to suffer marginalisation, discrimination and persecution, are likely to encourage hatred and cause emotional psychological and physical harm to members of this community*

...

6. *(Respondent) ... undertakes not to make such statements in the future. In particular he will not make statements in which he*

6.1. *blames gay and lesbian persons for social problems or disease;*

6.2 *advocates hatred towards them, their removal from communities or institutions, or any harmful behaviour towards them.*

7. *(Respondent) undertakes not to make statements that go beyond what the Bible says in respect of these matters or in a manner that will incite hatred and harmful behaviour towards gay and lesbians.*

...

10. *The parties agree to the following order in full and final settlement of their respective claims:*

10.1. *The settlement agreement is made an order of Court;*

10.2. *(Respondent) is interdicted from publishing statements that are discriminatory or incite hatred or harm on the grounds of sexual orientation'.*

[5] The settlement agreement was signed in person by the respondent on 28 July 2014.

[6] In the present application, launched in July 2017, the applicant complains of more statements allegedly made by the respondent between July 2015 and December 2016 which breached the terms of the Court Order. I set out hereunder the statements

complained of and the respondent's response to the complaint as contained in his opposing affidavit.

## A

[7] In an article published on News24, an internet site, on 30 December 2016 dealing with the respondent's collaboration with a US Pastor who was prevented by the Department of Home Affairs from entering South Africa because of his allegedly anti-homosexual sermons, the respondent was quoted as saying the following regarding homosexual people:

*'Why should we be tolerant of their criminal lifestyle? Ninety-nine percent of paedophiles stem from homosexuality'.*

*'I'm saying so because it is proven that 99% of the paedophiles have a homosexual background. They are blaming their previous lifestyle on what happened. Go and read up on it.'*

[8] The respondent states that he was misquoted in this section of the interview and that he actually said that 99% of paedophiles claim they were either abused or in a homosexual relationship. The difference between these two statements is very limited and the written apology from the journalist who wrote the original article, which the respondent attaches as proof that he was misquoted, does not support the respondent's version. The journalist states therein that she misunderstood his quote and that he *'actually said 99% of paedophiles are homosexuals'*. In effect she confirms the thrust of what the respondent was originally quoted as having said.

## B

[9] On 27 July 2015 the respondent published a comment in response to an article in MamboOnline, a South African gay online publication, that gay sex is illegal in Nigeria,

that certain states in that country allow homosexuality to be punished by death by stoning and that the President of Nigeria had stated that homosexuality would not be tolerated in Nigeria. The respondent commented as follows:

*'I salute and congratulate the Nigerian president for taking a stance against homosexuality. Keep on doing what is right for your country. To hell with homosexuals they want to take over all over the world. Their lifestyle is an abomination to God but Christians in South Africa are too scared to speak out against these perverted relationships. If I was a president of my country I will lock them in cages where they belong. They behave worst (sic) than animals in bed, and don't even deserve a prison Cell with prisoners. They belong in a cage. Homosexuality is forced on God fearing people. If others are scared to speak out, I will speak out. Homosexuals make me sick and I wish South Africa will deal with them like Nigeria.'*

[10] The respondent admits making the comments in question and states that he has the Constitutional right to express his views and opinions.

## C

[11] On 3 August 2015 the respondent was again quoted in MamboOnline in response to an article about a Senegalese journalist who had been jailed for six months on homosexuality charges. The respondent was said to have commented as follows:

*'Six months too short for animal like behaviour. We need more countries that is bold enough to take a stance against perverts'.*

[12] The respondent admitted making the comment, once again stating that he was merely expressing his opinion.

**D**

[13] On 24 September 2015 the respondent was reported in an article in MamboOnline as having made the following comment in response to a report about the execution of nine men and a boy for homosexuality by ISIS radicals in Syria.

*'We need ISIS to come to countries who are homosexual friendly. ISIS please come rid South Africa of homosexual curse'.*

[14] The respondent does not appear to dispute the comment, only its interpretation and his intentions. He states he did not invite ISIS to South Africa and was responding to an article available *'in the public'*. He never invited or intended that ISIS must come to kill or harm any person in South Africa.

[15] In his opposing affidavit the respondent denies encouraging violence against homosexuals. He states that labelling homosexuals *'perverts'* or *'animals'* cannot be construed as inciting violent acts against them. He states that just as homosexual persons have a Constitutional right to live their lifestyle, he has the right to disagree with it as well as the right, in terms of sec 15 of the Constitution, to freely express his *'religious beliefs and opinions'*.

**Requirements for finding a contempt of Court**

[16] In *Fakie NO v CC II Systems (Pty) Ltd*<sup>1</sup> it was held that the applicant in an application such as the present has to prove the requisites of contempt, namely the order, service or notice, non-compliance and wilfulness and mala fides beyond a reasonable doubt but that, once the applicant has proved the order, service or notice and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala

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<sup>1</sup> 2006 (4) SA 326 (SCA).

fides; should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

[17] I turn now to consider whether the applicant has proved the requisites of contempt.

[18] Firstly, there is no dispute as to the existence of the order of Court which was made on 11 August 2014 and which required the respondent not to publish statements that are discriminatory or incite hatred or harm on the grounds of sexual orientation.

[19] As regard service or notice of the order, this requirement is met by the combined weight of the following circumstances:

- (i) In the settlement agreement the respondent agreed that it would be made an order of Court ;
- (ii) A copy of the order of Court was sent to the respondent by the Registrar of this Court by registered post on 14 August 2014;
- (iii) The parcel tracking result indicates that the item was probably delivered to the respondent;
- (iv) In his affidavit replying to the allegation that the Court Order was sent to him by the Registrar by registered post the respondent merely '*notes*' the contents of these paragraphs;
- (v) The applicant established, that on 18 September 2014 it sent an email letter to the respondent attaching a copy of the order of Court in question and advising that it had received a further complaint against the respondent of breaching the order through comments made by him on 2 September 2014. In his reply to these allegations the respondent in effect admits receipt of the emailed letter but states that he did not know that it was '*an order of Court*'. In this regard it should be noted that the letter in question expressly states, '*Please find attached a copy of the order of Court*' ... and refers to the

settlement agreement which *'forms part of the order of Court and in terms of which you were interdicted from making certain statements'*.

[20] In the circumstances there can be no doubt that the applicant has proved service or notice of the Court Order.

### **Non-Compliance**

[21] Save in one instance, not only is there evidence of the respondent making the statements complained of but the respondent admits doing so. In the one case in which he disputes what was allegedly said by him his alternative explanation makes no material difference to what was said and, in any event, is not supported by the explanatory email which he attaches to his affidavit. Thus the question of whether there has been non-compliance with the terms of the Court Order involves only an evaluation of whether the statements made were *'hurtful or incite hatred or harm or propagate hatred'* on the grounds of sexual orientation and, more particularly, echoing the terms of paras 6.1 and 6.2 of the Court Order *'blame, gay ... persons for social problems or disease ... or advocate(s) hatred towards them, their removal from communities or institutions or a harmful behaviour towards them'*.

### **The first statement 20 December 2016**

[22] The respondent described the lifestyle of gay and lesbian people as *'criminal'* and that 99% of paedophiles have a *'homosexual background'*. By so doing he blames this community for the social problem of paedophilia and by implication advocated harmful behaviour towards that community when he asked why people should be tolerant of their lifestyle. His statement is thus discriminatory and incites hatred or harm on the grounds of sexual orientation.



**27 July 2015**

[23] The respondent describes relationships between gay and lesbian persons as *'perverted'* and expresses the view that they should be locked *'in cages where they belong'*. His statement that he wishes that South Africa will deal with them *'like Nigeria'* advocates the criminalisation of gay sex including by implication, punishment by death through stoning. Not only do such statements dehumanise gay and lesbian people, they advocate hatred towards them, their removal from communities or institutions and harmful behaviour towards them. Undoubtedly such statements are discriminatory and incites hatred or harm on the grounds of sexual orientation.

**3 August 2015**

[24] Once again in describing members of the gay and lesbian community as *'perverts'* and homosexual behaviour as *'animal like'* the respondent advocates hatred towards members of this community, their removal from communities or institutions and harmful behaviour towards them. The statement is clearly discriminatory and incites hatred or harm on the grounds of sexual orientation.

**24 September 2015**

[25] The respondent's call for ISIS to *'come rid South Africa of homosexual curse'* read in the context of a response to a report about the execution of ten persons for homosexuality by ISIS in Syria, clearly advocates hatred towards members of this community, their removal from communities and harmful behaviour towards them. Again the statement is discriminatory and incites hatred or harm on the grounds of sexual orientation.

[26] In the circumstances I find that the applicant has established beyond all doubt the respondent's non-compliance with the order of Court.

[27] What remains before a finding of contempt of Court can be made are the requirements of wilfulness and mala fides, where the respondent bears an evidential burden. In this regard the respondent raises several defences. The first such defence is his claim that he was not informed that the settlement agreement would be made an order of Court or the consequences of breaching the settlement agreement; secondly, the respondent contends that he merely '*expressed his opinion*' in the various articles, that he enjoys the right to freedom of speech and in particular to express his religious beliefs.

[28] As to the first defence raised by the respondent there are ample indications that the respondent knew or must have known that the agreement would be made an order of Court and that should he breach same he would be in contempt of Court. The settlement agreement which the respondent signed makes express provision on two separate occasions for the agreement to be made an order of Court. Over and above this the full Order was sent to the respondent by the Registrar of this Court shortly after it was granted. For good measure on 18 September 2014 the applicant sent a copy of the Court Order to the respondent and warned him of a further investigation by the applicant following an apparent breach by him of the terms of the order. The respondent holds a position of authority in his community and appears to be an educated person. In these circumstances it is completely disingenuous of him to suggest that he was unaware that, should he breach the terms of the order of Court, this could lead to legal consequences or constitute contempt of Court.

[29] As regards the respondent's defence that, in effect wilfulness and mala fides were absent inasmuch as he believed he was exercising his right to freedom of speech and in particular to air his religious beliefs, these claims too cannot be sustained. In the original settlement agreement the respondent acknowledged that his statements harmed the dignity of gay and lesbian persons and were likely to *'encourage hatred and cause emotional, psychological and physical harm to members of this community'*. He apologised for making these statements and undertook not to make similar statements in future. Although he reserved his right to *'preach the word of God and what the Bible directs'*, he undertook not to make statements going beyond these limits in relation to gay and lesbian persons. No attempt was made in these proceedings, and correctly so, to justify the statements made by the respondent on biblical or religious grounds. The respondent has a right to freedom of speech and to his religious beliefs and to express these but none of the statements made by him which are the subject of these proceedings fall within those parameters. In short they dehumanise and demonise gay and lesbian persons and, without a shred of proof, make wide and damaging assertions that members of such community engage in criminal or anti-social conduct.

[30] For these reasons I find that the applicant has proved beyond reasonable doubt that the respondent is in contempt of the order of Court granted on 11 August 2014.

### **Sanction**

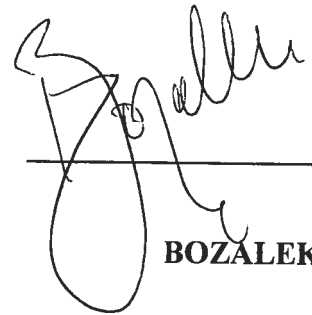
[31] The applicant initially sought a suspended order that the respondent be committed to prison for a period of thirty (30) days as well as a fine, in the amount of R500 000.00. In argument the applicant did not press for the fine, merely an order committing the respondent to prison for a period of thirty (30) days, such order to be suspended for a period of two (2) years). On behalf of the respondent Ms Verster, who, to her credit,

appeared pro bono on behalf of the respondent, set out his personal circumstances the most material of which are that he earns no appreciable income from his position as a pastor and that his family, including his three children, are dependent on the earnings of his wife, a nurse. Encouragingly, Ms Verster advised that the respondent has decided to steer clear of online platforms where in the past he has published his discriminatory and provocative statements. In addition the respondent will draft an apology for his statements and submit this to the scrutiny of the complainants for appropriate publication. Finally, it was advised that the respondent is ending or had ended his association with the American pastor notorious for his anti-gay and lesbian community statements and preachings.

[32] Notwithstanding these positive indications it is clearly appropriate for a suspended committal order to be made to ensure that the respondent does not, yet again, breach the terms of the original Court Order. A period of thirty (30) days imprisonment should in my view suffice to bring home to the respondent the seriousness with which he must approach an order of the Equality Court and serve also as an expression of the serious light in which his highly insulting, demeaning and uncharitable views about the gay and lesbian community are viewed. Although the applicant initially asked that the order be suspended for a period of two years, in my view this period should be extended to one of five years to ensure that over that period the respondent will not again lightly breach the terms of the Court Order.

[33] In the result the following order is made:

1. The respondent is found to have been in contempt of this Court's Order of 11 August 2014 and he is committed to prison for a period of thirty (30) days in respect thereof;
2. The committal order is suspended for a period of five (5) years on condition that the respondent does not again breach the terms of the Court Order during such period.



BOZALEK J

<i>For the Applicant</i>	:	<i>Adv M Norton (SC)</i>
<i>As Instructed by</i>	:	<i>Adv M Ngumbela</i>
		<i>South African Human Rights Commission</i>
<i>For the Respondent</i>	:	<i>Adv C Verster</i>
<i>As Instructed by</i>	:	<i>De Kock &amp; Co</i>