AfriForum on the losing end of legal dispute – Kill/Kiss the Boer

AfriForum has been in the news recently after calling the competence and impartiality of the South African judiciary into question. This is a dangerous allegation to make, and if raised should be strongly substantiated.

I break down and summarise a sequence of events leading up to this point.

AfriForum brought Julius Malema (JM) and the African National Congress (ANC - the party of which he was a member at the time) before the Equality Court in 2010 after JM sang Dubula ibhunu. The matter was brought on appeal before the Supreme Court of Appeal (SCA) where the matter was settled between the parties, with no declaration of the singing of the song being classified as hate speech but largely agreeing that all parties should be sensitive to potentially inflammatory remarks/songs and to act with restraint.

Later, in 2022, AfriForum again brought JM before the Equality Court, this time as a member of the Economic Freedom Fighters (EFF), together the EFF and Dr Ndlozi. The matter primarily involved JM and Dr Ndlozi singing Dubula ibhunu and Shisa Iamabuna respectively, wherein AfriForum requested that the respondents' singing of the songs be deemed as hate speech and that they be banned from singing the song in the future.

The Equality Court held that AfriForum had failed to "make out a case that the lyrics of the impugned songs constitute hate speech as envisaged in section 10(1) and 7(a) of the Equality Act", and dismissed the application in 2022.

AfriForum then applied to the Supreme Court of Appeal (SCA) for leave to appeal against the Equality Court judgment, which leave was granted. The matter was then heard in the SCA.

Regarding appeals in general against court decisions, they work was follows:

1. An appeal can be heard in the same court (by more judges), or in a higher court
2. The application for leave to appeal should be brought within a specific time period
3. The appeal must be in respect of:
   3.1. The court not following the proper procedure in arriving at the judgment; or
   3.2. The court making an incorrect finding based on the evidence presented
4. The default position is that new evidence cannot be admitted on appeal

4.1. The appeal is against the court incorrectly making a finding based on the evidence initially before it. It would be unfair to judge a court's decision by taking newly presented information into account.

The matter was then heard in the SCA where both parties raised the following further points:

- AfriForum applied for the recusal of one of the judges, claiming bias, but this was dismissed. Recusal is defined as the removal of a judge due to the judge being unqualified, a conflict of interest or bias.

- JM claimed that the matter had already been settled previously (as per the settlement agreement with AfriForum in 2012) and therefore he could not be brought before the court again by the same party for the same matter in which the same relief is sought, however, AfriForum contended that JM was in breach of the settlement agreement, and together with the court concluding that the Constitutional matter balancing potential hate speech with freedom of expression (which are both enshrined in our Constitution) was in the public interest, the SCA held that it would be unfair to AfriForum to deprive them of the opportunity to appeal the matter.

However, AfriForum in its appeal to the SCA prayed for a more far-reaching order than initially requested in the Equality Court, and had to concede this position.

The SCA, in passing judgment reiterated the parameters contained in the Constitution and the Equality Act for matters to be declared hate speech, while at the same time pointing out those aspects of the Constitution which protects freedom of speech and the operation of political parties – both aspects of which are crucial to a functioning democracy. The SCA states that speech that is unpopular or offensive does not necessarily amount to hate speech.

The SCA stated that AfriForum failed to substantiate its case in its written papers submitted to the Equality Court, and relied primarily on "expert" evidence at the trial stage, the quality of

which experts were called into question – AfriForum's main witness, Mr Ernst Roets testified as an "expert witness", but his status as an expert was rejected by the Equality Court.

Mr Roets was an employee of AfriForum, confirmed that he had a vested interest in the outcome of the matter, was unqualified to provide statistical analysis upon which AfriForum was relying in this case, and based his testimony largely on his book (which does not connect farm killings to the singing of any songs) and hearsay evidence.

AfriForum's two other expert witnesses were also rejected by the Equality Court.

AfriForum's two other lay witnesses, who were victims of attacks on farms did not help their case either as:

- The first witness could not link the singing of the song to the attack, which she testified appeared to be a robbery; and

- The second witness was attacked in 2008, before the singing of the song which forms the basis of this case. Accordingly, there cannot be a link between the singing of the song and his attack.

AfriForum alleged that farm fires following the singing of the songs by the Respondents were as a result of their disputed utterances, but these allegations were disproved.

AfriForum abandoned large parts of their case brought before the Equality Court when appearing in the SCA – this is not unusual as an appeal is generally not a re-trial of the entire, but in this instance, it may indicate weakness in their original case.

On the other hand, respondents' expert witness, Professor Gunner, was held to be a reliable witness and provided testimony regarding the importance of songs in communication as well as its figurative interpretations and importance, taking context of the song into account.

The SCA held that:

1. AfriForum failed to prove hate speech committed on behalf of the Respondents;
2. the aspects of the song to which AfriForum takes offence should be interpreted in the context of the whole song as well as the political setting in which it is sung; and

3. that a reasonable person understands that the song is to be interpreted metaphorically as part of the EFF's political goals of wealth redistribution in South Africa.

The SCA accordingly dismissed AfriForum's appeal in 2024.

AfriForum then applied to the Constitutional Court for leave to appeal against the SCA judgment. The Constitutional Court, after considering AfriForum's application and the aforementioned course of events, did not grant leave to appeal in March 2025 as the matter bears no reasonable prospects of success. AfriForum therefore has no further legal recourse in this matter against JM.

It is possible that the outcome may have been different had AfriForum taken more care in formulating their case, and the SCA clearly pointed out the holes in their case, which holes AfriForum fails to mention when addressing the media.

In light of the above, I submit that AfriForum is now wrongfully calling into question the integrity of South Africa's judiciary, and the media should themselves take more care when publicising one-sided complaints from parties who suffered defeat in our courts.

Links to the two judgments are enclosed below for your perusal in order for you to form your own conclusions – always refer to the source of information:

Equality Court judgment - https://www.saflii.org/za/cases/ZAEQC/2022/2.html

Supreme Court of Appeal judgment - https://www.saflii.org/za/cases/ZASCA/2024/82.html#_ftn1