

Being (im)polite: a forensic linguistic approach to interpreting a hate speech case

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Abstract

In a hate speech case a court might have to determine whether a person's words were hurtful or harmful. Would it be possible to determine whether words are hurtful or harmful by using linguistics? This article offers a linguistic perspective on a court's interpretation of the Equality Act in a hate speech case and focuses on speech acts and politeness. If the speech acts of a verbal exchange are studied and the levels of politeness are gauged, a court would be able to affirm the hurtfulness or harmfulness of the speaker's words. The article begins with a brief discussion on the potential role of the linguist in a courtroom; this is followed by a summary of the facts of the case. Then the court case is analysed and discussed in terms of speech acts and politeness. By employing principles in pragmatics the author reaches the same conclusion as the court.

Keywords: baboon; Equality Act; face; forensic linguistics; hate speech; *Herselman v Geleba*; politeness; speech acts

Introduction

On the 18th of April 2013 *The Herald* reported that a white man allegedly referred to his black neighbours as 'Zuma's baboons' after they refused to turn their music down (Kimberley 2013); a year later the *Sunday Times Live* reported that a man was sentenced to work in a mortuary for calling a woman a baboon as well as the so-called k-word (Mabuza 2014). Calling a black person a baboon can be seen as idiotic, considering the history of South Africa and the changes that have taken place since 1994. You would most likely think that calling a black person a baboon in public is an isolated incident. It is not. In 1998 a

foreman used the word *bobbejaan* to address one of his miners (*Lebowa Platinum Mines Ltd v Hill*) and in 2007 a magistrate called a cleaner a baboon for scratching a door while cleaning (*Herselman v Geleba*). There should be many more examples, not only of black people being on the receiving end, but of all South Africans in general.

A lot has been written about the close and co-dependent relationship between law and language. Any law practitioner who is worth his or her salt will tell you that to practise law requires a proper command of language. Furthermore, it is not surprising that language is repeatedly at the centre of litigation. The case *Herselman v Geleba* (hereinafter referred to as *Herselman*) is therefore no exception. In *Herselman* the interpretation of the word ‘baboon’ comes under scrutiny. When the meaning of a word or phrase is disputed in court, it not only becomes a matter of the law, but also becomes an obvious issue of semantics. Why then do the courts not make use of linguistic means in order to solve legal-linguistic problems?

Having studied the judgement in *Herselman*, it has become apparent that a linguistic perspective could have added value to the court’s analysis as well as reaffirmed its opinion. I find it a bit disconcerting that, in this instance, judgement is based on the meaning of a word, yet aspects of the semantics involved are mostly ignored.

From the outset it should be stressed that the purpose of this article is not to discuss the intrinsic legal principles applicable to the facts. As a linguist I would rather leave that to law experts to debate. Moreover, it is not the aim of this discussion to try and prove to what extent the court’s decision was misguided. In fact, I have come to the same conclusion as the court. This article will focus on a purely linguistic approach that might illustrate the curious nature of certain language problems which law practitioners are sometimes faced with. Hopefully it will also help to indicate the importance and added value of linguistic expertise in court cases.

This contribution is structured as follows: firstly, it provides a short background discussion on forensic linguistics in a courtroom, explaining the need for collaboration between law and language scholars. This is followed by a summary of the facts of the relevant court case and a description of the subsequent issue to be dealt with in the body of the paper; that is to say whether the appellant was being hurtful and or harmful and the ways in which linguistics might provide clarity. Thereafter, hurtfulness and harmfulness is discussed in terms of two

focus points, namely speech acts and the matter of face and politeness. These focus points serve as a potential linguistic approach to interpreting a hate speech case, such as the court case discussed in this article.

It should be kept in mind that the arguments put forth in this article are applied to one specific court case. This paper does not suggest that the same approaches will necessarily hold for all hate speech cases. It should go without saying that different linguistic approaches could lead to different interpretations.

The linguist in a courtroom

Law is language. As a result, the law practitioner is, by implication, a language practitioner. Despite having an excellent command of language, the law practitioner's primary skill and knowledge is ultimately law and not language (Shuy 2008, 4-5). According to Shuy (2008, 4-5), most jurists are not aware of linguistics or the contribution it can make to solving law-related problems. South African courts follow a tradition of calling on prominent linguists to gain from their expertise, especially in trademark disputes (Hubbard 1992; Sanderson 2007), high profile semantic issues and author identification cases (Hubbard 1994; 1995; Kotzé 2007; 2010). However, this tradition is weak in comparison to the United States and countries in Europe. This can be attributed to two factors in particular, that is to say (1) the lack of reporting on linguistic contributions by linguists themselves, and (2) jurists' confidence in their own linguistic knowledge. The former is responsible for the lack of a proper corpus of reference, whereas the latter sometimes leads to careless mistakes in the interpretation of the law.

Courts use set theories to help them interpret statutes and make sense of the cases brought forward. These theories provide some guidelines as to how courts may deal with the meaning of words. Amongst the most common practices within the South African legal process, two types of linguistic evidence stand out: the use of dictionaries and reference to previous court cases that dealt with similar legal issues and semantic problems. Generally, courts tend to depend on dictionaries and previous cases far too often (Botha 1998, 103; Christensen and Kübbeler 2011, 1, 3-5; Hutton 2009, 86-87; Kloosterhuis 2007, 262; Mouritsen 2010; Solan 1993, 50; Thumma and Kirchmeier 1999). Dictionaries are limited and should be studied as one of many linguistic tools in search of ordinary or complex meaning,¹ while previous cases

are not always trustworthy linguistic sources, and do not necessarily shed light on linguistic problems (Carney 2012).

Forensic linguistics is a fast-growing sub-discipline of applied linguistics and many of its pioneers have proven the (sometimes indispensable) value of linguistics in matters of law, particularly in court cases. As Cunningham, Levi, Green and Kaplan (1994, 1568) explain:

...it is true that linguistics has made considerable progress in finding and analyzing predictable order in the seemingly infinite variety of speech. The same exploratory methods that have enabled linguists to make significant scientific progress in recent decades can also assist judges in finding and analyzing predictable order in the complex textual issues which so frequently make cases hard.

This is not to say that linguistic expertise needs to be sought for every case involving words, phrases or sentences or even matters concerning trademarks and author identification. However, the South African judicial system can, undoubtedly, benefit from consultation with linguists on tricky language matters. Pearce (1974, 1) estimates that 40 per cent of court cases in the United Kingdom and Australia had to base their judgements on the meaning of a word or phrase. South African courts could quite possibly deal with similar percentages. Linguistic intervention could assist the presiding officer in arriving at a clear and satisfactory opinion.

Herselman v Geleba: the facts of the case

The case was heard by the court of first instance (hereinafter referred to as the court *a quo*) on 18 January 2007 in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act, (hereinafter referred to as the Equality Act). It was later heard on appeal by judge Dawood at the high court in Grahamstown. Geleba, the respondent in *Herselman*, accused Herselman, the appellant, of hate speech after the latter referred to the former as a baboon (*Herselman* 2011, 2). According to Herselman he said, '*Moenie soos 'n bobbejaan wees nie, jy is besig om die gebou te beskadig...*' ('Don't be like a baboon, you are damaging the building...'), subsequent to Geleba scratching an office door with his broom (*Herselman* 2011, 2, 4). Herselman contended that he uttered an Afrikaans expression which means that someone is doing something stupid (*Herselman* 2011, 5). The magistrate rejected Herselman's defence that he used an Afrikaans expression, referring to his opinion in par gg

1 (*Herselman* 2011, 5). According to the court *a quo* the perceptions of the receiver's (listener's) community must prevail and not that of the sender (speaker). This view was supported by judge Dawood.

On appeal judge Dawood cited a number of court cases in support of the function and role of the Equality Court. He also had to determine whether the complaint fell within the ambit of the law and whether the prohibited grounds in terms of the provisos in (a), (b) and (c) of section 10 (1) of the Equality Act had to be read conjunctively or disjunctively. Judge Dawood went on to mention other important issues, such as the fact that the word 'baboon' was uttered by a white man to a black man as well as the fact that the word 'baboon' is historically race-sensitive in South Africa and could affect a person's dignity upon hearing the word spoken to them (*Herselman* 2011, 12). In addition, the judge had to address technical points that Herselman felt had to be dealt with by the court *a quo*, but which were not (*Herselman* 2011, 28-30). Judge Dawood concurred with the court *a quo* and found Herselman guilty of hate speech following his clear explanation on the reasons why the word 'baboon' should be considered as hate speech within the boundaries of the Act.

Being hurtful or harmful: the focus of the article

There are a number of issues that could be critiqued on linguistic grounds: the court *a quo* found that the ordinary meaning of words may not be sufficient in the understanding of the social context of meaning (in this case 'baboon') (*Herselman* 2011, 5), yet reference to how and in which context the Afrikaans expression is used was rejected by the court. Only Geleba's metaphorical interpretation of the word 'baboon' was considered by the court, whereas Herselman's claim to have used a metaphorical expression was ignored by both the court *a quo* and on appeal.

Paralinguistic and kinesic information, such as Herselman's tone of voice and body language, could have helped to determine his intended meaning. However, since the court did not take any of this into consideration and consequently went unreported by the witness, I will not address these matters here.

In this paper I will focus on the main question dealt with by the court, namely whether Herselman had been hurtful and or harmful. Directly related to this is the court *a quo* and the

appeal court's prioritisation of the hearer's (the receiver's) perception. According to the court, the hearer's perception must be seen as the only valid one to be considered and must prevail; to do otherwise would, apparently, be to defeat the purpose of the Act. This means that the hearer's perception must be used to determine the hurtfulness and harmfulness of the speaker's utterance. At face value it seems to be a just approach; the Act is there to protect those who are on the receiving end of hate speech, for example. Though, how can the court be certain that a listener is honest or reasonable about his or her interpretation of a word or phrase? If a court based its report on the hearer's utterance, then the Act would have to be applied to every South African every minute of the day. Every spoken word can be construed as hate speech, and hurtful and harmful if the court insists that only the listener's perception and culture should prevail. To rely solely on the hearer's perception of an utterance can be highly problematic.

In determining to what degree the use of the word 'baboon' is hurtful and or harmful, the court refers to the prohibited grounds as stated in the Equality Act:

- (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 disadvantage;
 - (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).

With the prohibited grounds in mind, I will argue in favour of employing linguistic means to help assess whether Herselman's verbal exchange was hurtful and or harmful. The next section proposes the study of speech acts as one of the alternatives to the dubious perception of the hearer.

Speech acts

Why would speech acts be a suitable alternative? Utterances can simultaneously have more than one meaning, and knowing this could make a difference in the interpretation of certain hate speech cases. During a series of lectures in 1955, Austin (1962) was one of the first to

suggest that by making statements, speakers are also performing acts. He classified the speech acts according to what he called locutionary (what is said), illocutionary (what is meant) and perlocutionary (the effect) acts. His essays would pave the way for many more studies on the topic of speech acts and lead to the likes of Grice (Gricean maxims) and Searle (indirect speech acts) delivering influential contributions.

Grice (1996) argued for what he called a *Cooperative Principle*, a general rule that needs to be observed in order for verbal exchanges between two or more parties to succeed. This is accomplished by means of implicature and related maxims. Grice (1996, 124-125) identified four implicatures: quantity, quality, relation and manner. The category of quantity dictates the amount of information to be provided; never provide too much or too little information. When asked by a colleague what a return trip on the Gautrain will cost between Hatfield and Midrand stations, you should only provide information on the fare between those two stations. Quality comprises truth related maxims, which expect participants to tell the truth and not to provide information for which one has no evidence. If you never use the Gautrain and you do not know how fares are calculated, you should be honest instead of giving your colleague an estimation of what you think the fare might be. The third category, relation, consists of a single maxim, i.e. to be relevant. You will be doing your colleague no favour in providing the fare for Hatfield to Rosebank. Lastly, manner provides guidelines as to how things need to be said. Maxims for manner dictate that one needs to be brief and orderly and to avoid ambiguity and obscurity of expression. In other words, one has to be very clear. You can answer your colleague by saying: ‘A return trip between Hatfield and Midrand will cost R64.’ Alternatively you may respond by saying: ‘I’m afraid I don’t know.’

Related to Grice’s implicature and maxims is Searle’s (1991) and Clark’s (1991) respective work on indirect speech acts. Searle builds on Austin’s ideas that statements or utterances are performances that do more than merely state the obvious. According to Searle (1991, 266) it is possible to perform one illocutionary act by means of performing another. The clichéd example of ‘Can you pass the salt?’ illustrates this point. It is not only a question about the hearer’s ability to reach the salt shaker, but also serves as a request to pass the salt. You say one thing but actually mean something else as well. Consider the examples in Table 1 (adapted from Saeed 2009, 242):

Table 1

Utterance	Direct act	Indirect act
Would you pass the butter?	question	request
Leave me alone!	imperative	request
I detest smoking in my house.	statement	threat
If you tell, I will kill myself.	statement	threat

Clark (1991, 200-201) takes this one step further by identifying six properties of indirect speech acts. The first is what he refers to as the multiplicity of meanings. Direct speech acts usually only have one meaning. In uttering ‘The sky is blue’ as a direct speech act, you simply mean to say that you see a cloudless sky. Indirect speech acts can have more than one meaning. When you say ‘I am hungry’ while sitting at a set table, you are not only stating that your tummy aches with hunger, but you are also saying ‘bring the food’ or ‘feed me’.

The second property which Clark identifies is the logical priority of meanings. The understanding is that the multiple meanings of indirect speeches occur in a chain or sequence. When you ask ‘Can you pass the salt?’, the first logical meaning is your enquiry into the hearer’s proximity to the salt. The second logical meaning is the request to pass the salt.

The third property is rationality. Indirect speech acts have a rational basis. This means that the speaker and hearer must share the same background knowledge in order for them to be on the same page, so to speak. It would make more sense for the speaker to say ‘Can you pass the salt?’ if he or she were sitting at a table eating supper. It would make no sense if speaker and hearer were only sitting next to one another in front of their respective computers.

Clark identifies conventionality as the fourth property (which Searle (1991, 270) refers to as idiomatic expressions). This means that the wording of indirect speech acts can sometimes be bound by convention. It is more conventional to ask ‘Can you pass the salt?’ than ‘Is it possible for you to pass the salt?’ The same goes for the potential reactions to indirect requests. If you ask ‘Can you tell me what the time is?’ the conventional answer would be ‘It’s half past ten’ instead of ‘Yes, I can. It is half past ten’.

Politeness is the fifth property. Indirect speech acts are more polite than direct speech acts. They offer the hearer options on how to react to, for example, a polite request and normally do not lead to impositions.

The last property is purposefulness. Speech acts all have a purpose, because the speaker has a goal that he or she wants to achieve. Speech acts form part of the speaker's plan to have his or her goals realised.

Knowing what kind of speech act is involved is especially important to the listener. By interpreting the speech act directed at him or her, the listener will understand what is expected of him or her. To see to what extent sentence (1) can be considered as an indirect speech act, I will apply Clark's six properties. I will also briefly assess to what degree Gricean maxims have been violated. For the purpose of this discussion I have decided to use the utterance by Herselman, because Geleba delivered three different accounts of what was said (see par 2 j and 3.1 v) whereas Herselman's account stayed constant:

- (1) 'Moenie soos 'n bobbejaan wees nie, jy beskadig die gebou...'
(‘Don't be like a baboon, you are damaging the building...’) (*Herselman* 2011, 4, 7)

The utterance in (1) has more than one meaning, and a logical chain of meaning can be indicated. The first logical meaning is for Geleba to stop acting silly and to quit scratching the door with his broom. The sentence types in (1) are an imperative followed by a statement. By means of this imperative, Geleba is requested to stop what he is doing. This forms an indirect speech act. The first part of the utterance cannot be a direct speech act, given the context in which it was uttered. There is no evidence that Geleba was crouching on the floor in front of Herselman making animalistic sounds associated with primates. Therefore, the imperative cannot be seen as literal, whereby the hearer is ordered to stop his physical mimicry of a baboon. However, the second part of the sentence is a statement which indirectly accuses Geleba of destruction; it can therefore be viewed as an indirect speech act. The utterance in (1) is rational in the sense that both Herselman and Geleba know what Herselman is talking about. It is not a mystery to Geleba. Both speaker and hearer are present when the incident happens. Herselman's verbal intervention comes as a result of Geleba's actions. There is a cause and effect present.

I dare say that calling someone an ape when doing something wrong is conventional in Afrikaans. Many Afrikaans expressions use the words 'ape' or 'baboon' and refer to 'being silly', 'knowing nothing' or 'being stupid' (see Prinsloo (2004) for examples).² Herselman's utterance can be semantically related to the English expression 'monkey business'. However, it has to be kept in mind that Geleba does not speak Afrikaans as a first language and would not necessarily know of this convention. Herselman's speech act can furthermore be seen as purposeful. He is saying these words to try and prevent similar (destructive) behaviour in the future.

The short discussion above might give the impression that Herselman is innocent due to the fact that he meant something different to what he actually uttered, yet the moment this indirect speech act is gauged in terms of Gricean maxims, the end result looks different. By means of his indirect speech act Herselman violated all four implicatures.

The imperative in (1) can be seen as additional information that is not required by the situation. The situation simply called for a reprimand, not an insult. Referring to Geleba as a baboon or an idiot is also a personal opinion, which makes the indirect speech act partially subjective and questionable in terms of the truth maxims. Furthermore, when one considers the imperative's baboon reference, its relevance becomes obscure. Is calling someone a baboon or an idiot relevant when being reproached? Giving Geleba a direct imperative would have been much more relevant and effective in their exchange.

The most obvious violation is perhaps that of unambiguous language. Herselman's indirect speech act is without a doubt ambiguous, as is apparent from the dissimilar arguments put forth by both parties. By using a polysemous word like 'baboon' as part of his imperative, Herselman created the conditions for miscommunication. The ambiguousness of 'baboon' and its relevant context makes any reasonable interpretation difficult. If Herselman had rather uttered a direct speech act that was simple, straightforward and free from ambiguity, he might have saved himself from any warranted accusations.

Nevertheless, according to Clark's fifth property, indirect speech acts tend to be more polite than direct speech acts. In the next section I will try to assess whether this is indeed the case in *Herselman*.

Face-saving strategies and politeness

According to the principles of pragmatics, it is often not *what* you say, but *how* you say something that matters in a verbal interchange. The level of politeness is often determined by the way the speaker expresses him or herself. Politeness is based on the social construction of the self, as defined by Goffman (1967, 5). Goffman refers to this phenomenon as *face*, the public self-image which an individual seeks to project or claim for him or herself. Goffman (1967, 6-7) sees face as something that one has and needs to maintain. As such, a person's face is constantly under threat. When someone has face, that person acts with confidence and is assured. These feelings go along with a sense of security and relief. However, when a person loses face, he or she may feel ashamed or inferior, especially as he or she relies on an encounter 'to support an image of self to which he has become emotionally attached and which he now finds threatened' (Goffman 1967, 8). Goffman further implies that participants in the communication process may have more than one face, depending on the encounter and the social circumstances. Face is also constructed by other parties' perception of an individual. In other words how other people see you (or how you think they may view you) often influences the way you see yourself.

In order to maintain face, a person employs a number of face-saving strategies. Goffman (1967, 13) argues that participants in the communication process may not always be aware of these face-saving practices due to the fact that they become standardised. Examples of standardised practices may be the use of hedges in softening a request or imperative.

The work of Goffman laid the foundation for many other studies on politeness and indirect speech acts. The two articles that proved to be the most influential on this topic are those of Lakoff (1973) and Brown and Levinson (1987). Lakoff suggested that Gricean maxims be reformulated as pragmatic rules and Brown and Levinson used Goffman's concept of face to formulate a set of strategies to maintain positive and negative politeness. The work of Brown and Levinson has been severely criticised and 'improved' over the years by the likes of Fraser and Nolan (1981), Fraser (1990), Leech (1983), Watts (2005) and Werkhofer (2005), to name but a few. Despite the criticism and concerns, I find the distinction between face threatening acts as well as the concepts of positive and negative politeness constructed by Brown and Levinson relevant in determining whether Herselman is guilty of threatening the

face of Geleba. I will also refer to Janney and Arndt's (2005) distinction between intracultural and intercultural tact.

Brown and Levinson's (1987, 61) notion of face is something which is emotionally invested and must be constantly attended to during interactions with others. A person's face can basically only be maintained if that person goes to some lengths in upholding the face of everyone else. A person must be heedful, according to Brown and Levinson (or perceptive, according to Goffman (1967, 13)) in the ways he or she interacts with others. Brown and Levinson (1987, 61) differentiate between negative and positive face. Negative face is seen as freedom of action and freedom from imposition, which means that the person is not violated but self-determining, whereas positive face is the positive self-image which is claimed by interactants, which includes the need to feel accepted, appreciated and respected (cf. Janney and Arndt 2005, 28-29). In other words, negative face is characterised by a person's need to be unimpeded by others, or rather one's fear of being forced into unwanted and uncomfortable situations, whereas a person's positive face is characterised by a need to have attributes or possessions that are desirable to others.

When it comes to face threatening acts, Brown and Levinson (1987, 65-68) make two distinctions, namely between (1) the kinds of face threatened and (2) the threats to H (**H**earer - the addressee) versus threats to S (the **S**peaker). It is the first distinction that is of concern in *Herselman*. The acts that pose a possible threat to the addressee's (H's) negative face, indicating that the speaker (S) has no intention to avoid impeding H's freedom of action, include (Brown and Levinson 1987, 65-66):

(1) Those face threatening acts that determine some future performance (**A**ct) by H, and in so doing put some pressure on H performing (or refrain from performing) A, for instance:

- (a) orders and requests (S wants H to do or refrain from doing something);
- (b) suggestions and advice (S wants H to (perhaps) perform A);
- (c) reminders (S wants H to remember to perform A);
- (d) threats, warnings, dares (S will instigate sanctions if H doesn't perform A).

The acts that threaten positive face indicating that S does not care about the feelings or desires of H (in some respect S does not have the same needs as H), can include the following (Brown and Levinson 1987, 66-67):

- (1) Those face threatening acts which show that S has a negative evaluation of some aspects of H's positive face, for instance:
 - (a) expressions of disapproval, criticism, contempt or ridicule, complaints and reprimands, accusations, insults;
 - (b) contradictions or disagreements, challenges.
- (2) Those face threatening acts which show that S doesn't care about (or is indifferent to) H's positive face, for instance:
 - (a) expressions of violence;
 - (b) irreverence, mention of taboo topics, including those that are inappropriate in the context;
 - (c) bringing of bad news about H or good news about S (boasting);
 - (d) raising of dangerously emotional or divisive topics, like politics, race, religion, women's liberation;
 - (e) blatant non-cooperation in an activity, like disruptively interrupting H when he or she speaks or showing non-attention;
 - (f) use of address terms and other status-marked identifications in initial encounters (this may either happen intentionally or accidentally).

When we consider the case of *Herselman*, it immediately becomes apparent that Herselman (Speaker) is guilty of a number of face threatening acts concerning both Geleba's (Hearer's) negative and positive face. For example, Herselman puts pressure on Geleba's positive face by referring to the latter as a baboon in his request to refrain from damaging the building; as a result, Geleba's need for acceptance, appreciation and respect is compromised. If we had insight into Herselman's tone and body language, we would have a much clearer picture of how the request was executed. But his utterance was not a reminder to be more careful in future or a suggestion on how to avoid destructive and clumsy behaviour the next time Geleba cleans the building. Depending on the tone and the body language, Herselman's request could possibly have been interpreted as an accusation or a warning.

Concerning Geleba's positive face, his feelings of acceptance and self-respect, Herselman indicates that he has a negative evaluation of Geleba. He does not care about Geleba's positive face. His request, which also functions as a reprimand and a complaint, quickly results in insult and ridicule due to the use of the word 'baboon'. By saying that Geleba

should refrain from acting like a baboon, he is actually equating Geleba to a baboon.³ Using the word 'baboon' in reference to a black person can be considered as a taboo topic owing to South Africa's historic past and the race-sensitive sense of the word. By using the word 'baboon', Herselman indicates that he does not value Geleba's set of values and his need to feel accepted. Though Herselman did not use the word as a term of address, it does function as a status marker in the given context. In referring to someone as a baboon, you are lowering that person to the status of an animal, implying that he or she has animalistic tendencies and behaviour.

Whether Herselman was being deliberately racist is a different matter, which will be difficult to prove. But Herselman was deliberate in ignoring the negative and positive face of Geleba. Herselman clearly did not follow any personal or conventionalised strategy to minimise threats to Geleba's face. Herselman had many avenues that he could have chosen to not only save Geleba's face, but his own. Instead he had no regard for either.

In their study of intracultural tact versus intercultural tact, Janney and Arndt (2005, 22-24) distinguish between social politeness and tact. Social politeness refers to 'people's need for smoothly organised interaction with other members of their group.' It is the strategies that allow one to get into and out of recurring social situations, for instance to initiate, maintain and end a conversation. Tact on the other hand is the individual's need to maintain face, mostly out of fear of losing his or her face or affecting the face of others. According to Janney and Arndt (2005, 23), tact is not only the avoidance of conflict and the regard for rules; it is also a matter of behaving in an interpersonally supportive way. This means, for example, that you will rather sympathise with another individual than hurt his or her feelings or offend and threaten him or her.

When we consider the interaction of two people who belong to two different cultural groups, it is tact that becomes of interest to us and not so much the social politeness which involves the individual's own group. As Janney and Arndt (2005, 25) point out, communicative skills are mostly culture-bound and therefore sometimes misinterpreted by members of other cultural groups. The desire to maintain face and the fear of losing it is seen as universal, transcending ethnicity, sexuality, religion, economy and geographical as well as historical boundaries. Janney and Arndt (2005, 28) argue that being tactful is the only way to avoid threats to face in all cultures. Ways to achieve this are to be friendly, not to impose and to

respect your interactant's need to feel accepted and appreciated (also see Lakoff's rules of politeness: Do not impose, Give options, Be friendly – Lakoff (1973, 298).

Misunderstandings can occur when the individual does not know how to communicate feelings and attitudes tactfully. A person's assumptions about the prerequisites for being tactful in his or her own culture can include (Janney and Arndt 2005, 31):

- (a) basic human needs, drives, feelings, motives, intentions, etc., and how these may be inferred from behaviour in different situations;
- (b) verbal, vocal, and kinesic communication in the culture, and about how signals in different modes can be used to avoid conflicts in different situations.

Griffen and Mehan (1981, 99) are of the opinion that once assumptions such as these are formed, they tend to remain relatively stable and almost automatically influence the social interactions that follow. But to assume that they are necessarily universal would be wrong. It is often these assumptions that lead to intercultural misunderstandings. Herselman claimed that he made use of an Afrikaans expression to indicate that Geleba was acting carelessly. By using this expression, he supposedly assumed that Geleba would know the expression and understand what was meant by it and that if Geleba had a thorough knowledge of the Afrikaans language, he would have known that Afrikaans idiomatic expressions often contain references to animals, especially primates. But this would be a careless assumption. It would be equally careless to assume that Afrikaans speakers would know that much about Afrikaans expressions. And who is to say that an Afrikaans speaker would not be offended by hearing the same expression directed at him or her?

Herselman was in fact not being tactful; instead, he was being impolite; he was being rude. Culpeper (2011, 1) says impoliteness often seeks to damage a person's identity. The fact that Geleba took Herselman to court on the basis of hate speech implies that Geleba was angry or upset, emotions that are triggered by impolite language (Culpeper 2011, 1). Different cultures have different sets of norms and values and it is these different sets of norms and values that tend to lie at the heart of impoliteness (Culpeper 2011, 12). Impoliteness is mostly in the eye of the beholder; it depends on how you perceive what is said and done (Culpeper 2011, 22). Geleba perceived Herselman's expression as being racist, although it might not have been

Herselman's intention to be racist. However, can verbal intercourse only be seen as impolite if what was said was intentional?

As I pointed out earlier, Goffman saw face as something that was as much dependent on how you see yourself as how you are seen by others. When you lose face, you also feel bad about the ways in which you are viewed. Geleba would then see himself as Herselman sees him: an animal or creature of lower intelligence. His social identity is compromised. Spencer-Oatey (2002, 540) refers to quality face and social identity face. Quality face is defined as a fundamental desire of people to be evaluated by others in a positive manner in terms of personal qualities (competence, abilities, appearance). It is closely associated with our self-esteem. Social identity face is defined as a fundamental desire of people to acknowledge and uphold our social identities or roles (close friend, loyal customer, group leader). Not only was Geleba's sense of self (his quality face) affected by what Herselman said, but the groups to which Geleba belong (and therefore his social identity face) – in this case his professional, racial and cultural groups – are also implicated and affected by what is associated with the word 'baboon'.

Conclusion

In concurring with the court *a quo*, judge Dawood found Herselman guilty of hate speech on the grounds that his words had a hurtful and harmful effect on Geleba. The presiding officer based his judgement partially on the understanding that the hearer's perception must prevail in order for the Equality Act to succeed. By doing so the court assumes that a hearer is always a reasonable audience. This approach is quite problematic, to say the least, as the hearer's perception will almost always be subjective and difficult to trust. How can a court establish with certainty if the hearer is not being malicious or lying? Since a court has to determine whether an utterance qualifies as hate speech, it would be advisable to interpret the Equality Act by studying the utterance in terms of speech acts and Grice's conversational implicature and related maxims. This could help a court assess whether a listener's reactions and perception are realistic and justified. A court should also be able to tell whether an utterance is ambiguous or not. Speech acts and Gricean implicature and maxims might even reveal something about both the speaker and listener's intentions.

Hate speech and the issue of verbal hurtfulness and harmfulness fall within the discipline of pragmatics and concern phenomena such as face and politeness (alongside speech acts). As a result it would make more sense for a court to consider the hearer's face and the ways in which it was threatened during the verbal exchange. Interpreting the Equality Act alongside Brown and Levinson's criteria (or those of Lakoff and others) could be a better approach to establishing whether someone like Herselman is being hurtful or harmful and to what extent the speaker was polite or impolite.

A court's interpretation of the Equality Act can be complemented by employing linguistic, especially pragmatic, tools when dealing with hate speech cases. Using linguistics to find and analyse 'predictable order' (as Cunningham would have it), is a much more trustworthy approach in comparison to relying solely on the subjective perception of the hearer and his or her community. An analysis of a disputed utterance will help determine its true semantic meaning. In addition, a court should have better regard for tone of voice and body language by allowing witness reports and by taking these aspects into consideration when deciding if someone is guilty of hate speech. The same goes for the cultural context to which an expression belongs; if it ignores the cultural and context-bound meaning of an expression, a court goes against the South African judicial tradition of adhering to the ordinary meaning of words.

By citing other law reports without paying attention to nuanced semantic differences, judge Dawood further implies that the use of the word 'baboon' in *Herselman* is almost identical to other cases heard in South African courtrooms. It might be similar, but it is not identical. Even though the word 'baboon' is racially sensitive in a South African context, its use in *Herselman* definitely has a cultural connotation in the sense that it might refer to being silly or doing something stupid. Nonetheless, it should be clear from the analysis that Herselman was being impolite and hurtful by not being mindful of Geleba's face. Herselman's use of the word 'baboon' is ultimately a contravention of the Equality Act, as can be seen in the prohibited grounds relevant to hate speech. Indeed, by studying the topic of hate speech from a linguistic perspective, it is apparent that Herselman is guilty of being hurtful and harmful, because he was tactless and careless in his communication with Geleba. Though the court's approach to addressing language matters might have been questionable, the judgement was correct.

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End notes

¹ The following cases (amongst many others) make it clear that dictionaries should be used purely as a guide within the greater context of the word under scrutiny: *Association of Amusement and Novelty Machine Operators v Minister of Justice*; *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA*; *De Beers Industrial Diamond Division (PTY) Ltd v Ishizuka*; *Fundstrust (PTY) Ltd (In Liquidation) v Van Deventer*; *Warren Marine (PTY) Ltd v Secretary for Customs and Excise*.

² To what extent the word ‘baboon’ is used both as a racial and conventional Afrikaans term, as I have suggested here and elsewhere, can be determined by studying available corpora. Corpus linguistics can be valuable when the different meanings and uses of a given word are questioned. Afrikaans and South African English corpora should provide the necessary insight into the way ‘baboon’ (or more precisely, ‘bobbejaan’) is used within the South African context. However,

accessibility and the size of available corpora may be of some concern. See also Cunningham and Fillmore (1995), Langford (2000) and Mouritsen (2010) who have demonstrated the added value of corpus linguistics in court cases.

³ See *Strydom v Chiloane* (2008, 251) as well as *Mangope v Asmal* (1997, 286-287) where the court refers to the same issue, namely the word ‘baboon’ associating a person with low or even subhuman intelligence.