

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

Case No: AR514/2008

In the matter between:

ANIL B. MAHARAJ

Appellant

and

GOLD CIRCLE (PTY) LTD

Respondent

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] This is an appeal against a judgment of the Equality Court which found that the appellant had not been unfairly discriminated against by the respondent. The appellant was directed to pay the respondent's costs on the attorney and client scale.

[2] The appeal is pursued in terms of section 23 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 ('the Act').

GROUND OF APPEAL:

[3] The appellant's notice of appeal sets out eight grounds of appeal. The respondent's categorisation of these grounds is appropriate and will, for convenience, be adopted in this judgment. The broad categories are:

- (a) Alleged discrimination arising from the respondent's:
 - (i) refusal to lease stables to the appellant;
 - (ii) failure to extend benefits to the appellant from the respondent's transformation fund (which also ties up with the fifth ground of appeal);¹
 - (iii) refusal to allow the appellant to use the respondent's track facilities from the off-limit stables available to the appellant at Mr Page's yard;
- (b) The respondent is not justified in relying upon the infractions which the appellant has been guilty of, when compared to that of other trainers, which the appellant contends was no different and who were dealt with less severely;
- (c) The respondent is, in essence, depriving the appellant of the right to earn a livelihood and practice his chosen occupation;
- (d) The issue of the appellant's character had been taken into account by the National Horse Racing Authority ("NHA") in reissuing the appellant with a trainer's license; accordingly the respondent was imposing an additional punishment on the appellant by having regard to his conduct;
- (e) The court *a quo* erred in accepting the evidence of Ms Mnganga in concluding that there was no discrimination in the allocation of benefits under the transformation fund;
- (f) The respondent discriminated against the appellant in the past when it deprived the appellant of stables at Drier's yard by giving A D Gordon,

¹The grounds in sub-paragraphs (i) and (ii) were described in the appellant's heads of argument as '(t)he genesis of the application giving rise to this appeal ...'

a white trainer, preference when he already had stables to further enrich him;²

- (g) The court *a quo* erred in accepting that there are currently four African licensed horse trainers as Cyril Naidoo has been warned off for life, Bennet Bulana's transformation fund allocation has been taken away and he is no longer training, thus leaving two active trainers which since the advent of democracy 'does not say much about transformation';
- (h) The court *a quo* erred in granting costs against the appellant on an attorney and client scale.

Save for the issue of costs in sub-paragraph (h), the grounds of appeal in sub-paragraphs (b) to (g) are all really alleged manifestations of alleged discrimination against the appellant in the three circumstances identified in sub-paragraph (a)(i), (ii) and (iii) above.

RELEVANT BACKGROUND:

[4] The appellant, a South African citizen by birth and a race horse trainer, is what the former race classification legislation described as 'Indian'. In 1989 he applied unsuccessfully to the Jockey Club of South Africa, the predecessor of the NHA to be admitted as a horse trainer. The reason for that refusal, namely that it would 'be setting a precedent because of the appellant's skin colour' was clearly discriminatory and hurtful.

[5] After the advent of democracy, the appellant who had in the interim continued working in the horse racing industry abroad, returned to South Africa, and, after an initial set back, was issued with a trainer's license by the NHA. Once again, it appears that the path to him being issued with his licence, was not a smooth one with inter alia KZN stewards voting against it, his license and letter of

² This is really another ground of discrimination under the first ground of appeal.

acknowledgement initially becoming allegedly 'misaid', and him being required to sit for an examination. After at first being refused boxes to lease, the appellant subsequently leased 14 boxes at Summerveld stables from the respondent, which is the body in control of and managing the stables at Summerveld.

[6] During 2002 the appellant was found guilty on two counts of assault. His trainer's license was suspended for a period of five years by the NHA. Upon expiry of the suspension period he wished to resume his occupation as a trainer. He once again sought to lease stables at Summerveld from the respondent. In addition he also contends that he applied for financial assistance from the respondent's transformation fund.

[7] The respondent refused to lease stables to the appellant and, further, did not grant any financial assistance to him from the transformation fund.

[8] Based on his experiences, the appellant formed the view that racism was still rife in the horse racing industry. He accordingly became a vociferous advocate of transformation of that industry. His complaints included that the industry favours whites only, perpetuates racism, is controlled by whites and that white miscreants are treated with kid gloves when compared to the appellant. In support of his contentions, he asserted that whites continue to occupy all the positions of power which is inconsistent with the industry having transformed, as whites should then be minority stakeholders with Africans and Indians progressing and acquiring a majority stake in the control of the industry. He maintains that his pursuit of the afore-stated objectives did not endear him to many, particularly whites in the industry.

[9] The respondent is a racing operator as contemplated by Rules 1.1.66 and 44 of the Rules and Constitution of the National Horse Racing Authority³ and section 1 of the Regulation and Betting Ordinance.⁴ Whilst the Ordinance essentially governs

³ Hereinafter referred to as 'the Rules.'

⁴ No. 28 of 1957

betting, the Rules govern the horse racing industry which is largely self-regulated. Horse racing in KwaZulu-Natal and the Western Cape falls under the control of the respondent. The respondent does not dispute that the horse racing industry, like other industries, also in the light of its historical past, requires transformation.

[10] Every trainer needs stable facilities for race horses, such as those at Summerveld, to carry out his/her occupation. Apart from the respondent, there are some privately owned stable facilities that may be rented. The rental payable in respect of these private facilities is significantly more than that payable for the respondent's stables. The stable rent, for similar periods, of boxes with the respondent is R200 per box, whereas so called off limit ones cost R650 per box. Respondent's box rent will include grooms' accommodation, use of track facilities, floating of horses/race tracks and security. With off limits boxes, a trainer often has to pay for these services and benefits over and above the box rental.

[11] The respondent created a transformation fund, the purpose of which was to financially assist emerging black trainers, in pursuit of its transformation objectives.

[12] Following a request by the appellant to the respondent to lease boxes at the premises of the respondent, and for financial assistance from its transformation fund, the appellant received a letter from the respondent dated 24 October 2007 refusing both requests. No reasons were given for such refusal.

[13] Thereafter the appellant lodged a complaint with the Equality Court claiming:

- (a) Damages in the sum of R1 800 000 for loss of income and a further amount of R50 000 per month calculated from 1 December 2010 to date of payment;
- (b) Damages in the sum of R6 000 000 for loss of stake money and a further amount calculated at the rate of R2 000 000 per annum from 1 December 2010 to date of payment;

- (c) Damages in the sum of R10 000 000 for impairment to dignity, psychological and emotional trauma, humiliation and embarrassment;
- (d) Payment of the sum of R3 000 000 from the transformation fund and further amounts at the rate of R1 000 000 per annum from December 2010 to date of payment;
- (e) An order that the Respondent enter into negotiations with the Appellant for the purposes of concluding a contract for the lease of stables at Summerveld on terms not less favourable than those offered to other trainers; and
- (f) Costs of suit on an attorney and client scale.

THE GROUND OF DISCRIMINATION RELIED UPON BY THE APPELLANT:

[14] The basis of the appellant's complaint to the Equality Court was that the respondent's conduct in refusing to lease boxes and afford him financial assistance amounted to unfair discrimination as envisaged in section 6 of the Act. That section inter alia prohibits any person from unfairly discriminating against any person.

[15] The appellant did not however in his founding papers state on what ground he was allegedly discriminated against.⁵ According to his heads of argument, he specifically relies, although not wanting to abandon the generality of the provisions of Section 6, on [section](#) 7(c) and (e) of the Act. These subsections provide that '(s)ubject to section 6, no person may unfairly discriminate against any person on the ground of race, including:'

- '(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;'

and

⁵ A request for particulars by the respondent to establish the ground relied upon had simply elicited simply a reference to the nature of the relief that would be sought in terms of section 21 of the Act.

- (e) the denial of access to opportunities, including access to service or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.’

[16] As appears from a perusal of these two subsections and the application papers, the appellant’s case clearly is that the prohibited ground, upon which alleges he was discriminated against, was his race. This is consistent also with the content of an affidavit filed by the appellant dated the 1 October 2008 in which he had alleged unfair discrimination on the grounds of race because ‘...I am an Indian’.⁶

THE LEGISLATIVE FRAMEWORK:

[17] Section 6 of the Act provides that:

‘Neither the State nor any person may unfairly discriminate against any person’.

[18] ‘Discrimination’ is defined⁷ as meaning ‘any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds’.

[19] ‘Prohibited grounds’ are defined⁸ as being:

- ‘(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

⁶ In a reply to a request for further particulars dated 12 November 2008, it was contended that the appellant was discriminated against on not only the ground of ‘race’ but also on the grounds of ‘conscience and belief’. No details of the ‘conscience and belief’ were provided, nor amplified further in evidence. A request for further particulars also produced a reply that the appellant relied on an analogous ground subparagraph (b) of the definition of prohibited ground under s 1 of the Act. The appellant however failed to state what this analogous ground was. Paragraph (b) of the definition does not state any analogous ground.

⁷ s 1 of the Act.

⁸ s 1(1)(xxii) of the Act.

- (b) any other ground where discrimination based on that other ground –
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity;
 - (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)'.

[20] Section 7 deals specifically with 'unfair discrimination on the grounds of race' in the following terms:

'Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including –

- (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;
- (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;
- (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but is actually aimed at maintaining exclusive control by a particular race group;
- (d) the provision or continued provision of inferior services to any racial group, compared to that of another racial group;
- (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons'.

[21] Section 13, dealing with the burden of proof, provides:

- '(1) If the complainant makes out a *prima facie* case of discrimination –
 - (a) the respondent must prove, on the facts before the Court, that the discrimination did not take place as alleged; or
 - (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.
- (2) If the discrimination did take place –

- (a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;
- (b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair –
 - (i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established ;
 - (ii) unless the respondent proves that the discrimination is fair'.

THE ISSUES AND THE ONUS:

[22] The issues therefore are:

- (a) Did the appellant make out a case of discrimination as alleged based on the prohibited ground of race?;
- (b) If such discrimination did take place on the ground of race, a ground in paragraph (a) of the 'prohibited grounds', did the respondent prove that the discrimination was fair?⁹

[23] The burden of proving the issue in paragraph 22(a) was on the appellant and that in paragraph 22(b) on the respondent.

THE SCHEME ADOPTED IN THIS JUDGMENT:

[24] The appellant's contention that he was discriminated against on the ground of race, is alleged by him to have arisen and to be evident in the context of certain specific circumstances and in respect of particular conduct (whether action or

⁹ s 13(2)(a) of the Act

inaction) of the respondent. These instances are considered under the following headings:

- (a) the respondent's track facilities;
- (b) the transformation fund;
- (c) the refusal to lease stables to the appellant at Summerveld.

The above instances are considered and discussed *seriatim* below. They do not follow in any particular order of significance.

THE RESPONDENT'S TRACK FACILITIES:

[25] The issue here is not that the respondent refuses to allow the appellant to use the track facilities,¹⁰ but is rather directed at 'the respondent's position regarding allowing the complainant to use its track facilities.'

[26] The appellant's attorney's letter of 3 April 2008 contained the first request for track facilities. It reads:

'In the interim we are instructed to enquire whether your client will allow our client the use of its track in the event that our client obtains stables elsewhere'.

[27] On 7 July 2008 the respondent's attorneys replied:

'Our client may from time to time provide track time to trainers who stable their own horses, but always subject to formal application being made to our client (and considered by the relevant chapter board) and subject to our client's rules and regulations from time to time relating to that use'.

¹⁰ The respondent points out that it has not refused the use of its track facilities but that it has not received a proper application for it to consider such a request.

[28] On 18 July 2008 the appellant's attorneys inquired whether there was a particular form the formal application should follow, and if so, requesting a copy as well a copy of the respondent's rules and regulations. On 2 September 2008 the appellant's attorneys again wrote complaining that they had not received a response, and threatening court proceedings.

[29] On 19 September 2008 the respondent's attorneys replied as follows:

- '1. The application for use of track facilities should be made in writing and addressed to our client's racing manager. The writing should include pertinent matter, including, without limitation, the number of horses which your client would like to train and an indication of proposed training schedules. The writing will be tabled before an appropriate Chapter Board meeting where it will be considered in light of criteria which the Chapter Board considers appropriate. These criteria might include, without limitation, the number of horses currently being trained at the facility, the infrastructural capacity of the facility, the number of horses and training regime which your client proposes to be added to the facility.
2. Any permission which might be given to your client would be subject to your client's compliance with such rules and regulations as the Chapter Board of our client may reasonably impose in relation to the ad hoc use of the training facilities'.

[30] The motivation for these requirements was explained by the respondent. The details required are necessary to enable the respondent to run the Summerveld training facility properly and to avoid an overuse of the track facilities. Overuse might pose a danger to riders, be detrimental to the welfare and soundness of horses, and otherwise prejudicial to owners and trainers or the industry as a whole. It was furthermore consistent with the policy in practice of the respondent regulating the use of its training facilities. The requirements accordingly appear rational, necessary, *bona fide* and reasonable. Certainly, the contrary was not proved. They do not differentiate between the appellant and other trainers. No question of discrimination accordingly arises. The information requested was reasonably and

bona fide required by the appellant and there is a rational connection between information required and the respondent's legitimate purpose to enable the operation of the Summerveld Training Centre and tracks in the interest of all concerned.

[31] Although the appellant had initially indicated that he was prepared to make whatever application was required, he failed to make the necessary application for the use of the facilities and in a reply dated 26 September 2008 his attorneys recorded the following:

'Ad paragraph 1

In this paragraph you indicate that application must be made in writing to the racing manager. Our client is not aware of any such requirement in respect of other trainers. Moreover in previous dealings with your client our client was not requested to make such an application. You are required to furnish copies of similar applications lodged with your client by all other trainers.

At paragraph 2

In this paragraph you refer to rules and regulations which your client may impose. Please let us have a copy of such rules and regulations. Our client is not aware of any rules and regulations that apply to any other trainers.'

[32] No such application was ever made by the appellant.¹¹ The respondent accordingly has never refused the use of its track facilities to the appellant in response to a proper application from the appellant dealing with the respondent's requirements. The appellant's true complaint rather is that other off limit trainers are not required to make application and therefore he is not prepared to make an application. There was no evidence to support his contention that other trainers are not required to make application. Indeed the contrary is the case. Other off limit trainers are required to make application for use of the respondent's training facilities and they provide the respondent with precisely the same information sought by the respondent from the appellant, as for example happened in the case of trainer G van

¹¹ A fact also eventually conceded by the appellant during his evidence. The appellant also was unable to prove the absence or non existence of the rules. Although he tried to denigrate them to 'rules of thumb' there are rules which are indeed expressly referred to in the formal lease agreement concluded by the appellant. These rules were also testified to by John Wingfield, a previous general manager of KZN Racing Services and by Colin Aiken, a previous racing executive of the respondent.

Zyl from whom similar information was sought in a letter dated 22 November 2006 from Colin Aiken, the then Racing Operations Manager of the respondent.

[33] In the absence of even *prima facie* evidence that the respondent had imposed burdens, obligations or disadvantages or withheld benefits or opportunities from the appellant in relation to the use of the track facilities, no *prima facie* case of discrimination in relation to the use of the track facilities arises. But even if I was wrong in that regard, and such an act or omission by the respondent, as per the definition of discrimination, can be said to have occurred, there is no proof that this occurred on the ground of race, conscience or belief or any other prohibited ground under the Act. Accordingly, no discrimination, and certainly no unfair discrimination has been proved in respect of this incident.

THE TRANSFORMATION FUND:

[34] Ms Mnganga of the respondent testified how the respondent developed and implemented a strategy to identify and advance the most vulnerable, being those who had no access to education or the opportunity to progress their careers, within the racing industry. This was carried forward in the allocation of the transformation fund, with the respondent identifying the least represented areas to prioritise. To this end the respondent had resolved, in the exercise of its discretion, to establish a black African trainer as a role model. Patently, the respondent's resources are not unlimited. It identified Mr Bhekinkosi Bulana, a clearly previously disadvantaged individual with potential. The resume of his career describes how, through hard work and dedication, he progressed from a farm worker to a groom, to a foreman, to a farrier, and later, an instructor at the KZN Training Centre and Head of the Grooms School. There was no reason for the court *a quo* not to accept the evidence of Ms Mnganga in this regard. The appellant's contention that the court *a quo* had erred in doing so is without merit.

[35] It was against this background that the appellant's attorney's letter of 4 October 2007 must be viewed. It recorded:

'We have been requested to obtain from yourselves the following:

- a) ...
- b) As a disadvantaged Mr Maharaj a highly experienced and qualified trainer requires assistance from the Gold Circle Transformation Fund for himself and his assistant. Mr Maharaj would appreciate receiving similar assistance that has been given to current trainer B Bulana.'

[36] No factual or other basis for the demand for 'similar assistance' was provided.

[37] The appellant did not qualify for assistance from the Transformation fund as he was not a member of the priority group identified by the respondent, namely black Africans. In addition it also emerged that within the racing industry he was, on his own version, a highly experienced and qualified trainer who was going to enjoy financial backing to the tune of approximately R15 000 000 from the resumption of his training career. He accordingly did not qualify as a vulnerable or excluded person. As early as 2002 when he had expressed ambitions to serve on the respondent's main board and the KZN Trainers Association he had indicated that he had considerable experience. In evidence he also stated that he was 'better than the average white trainer', that is he was better than the privileged comparative group. During cross-examination he also declined the opportunity to disagree that in his opinion he was one of the best trainers in the country. Accordingly, he did not qualify for assistance from the Transformation Fund.

[38] As a matter of law he cannot, as a member of a previously disadvantaged race, insist that he must be given assistance simply if another previously disadvantaged individual was given assistance. In *Minister of Finance and Another v Van Heerden*¹² the proper interpretation of section 9(2) of the Constitution was considered and it was held:

¹² 2004 (11) BCLR 1125 (CC) para 37.

'When a measure is challenged as violating the equality provision, its offender may meet the claim by showing that the measure is contemplated in section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality'.

[39] The second criterion requires no more than that the remedial measure 'must be reasonably capable of attaining the desired outcome'. It is not necessary for the respondent to establish that the measure sought to be achieved will be achieved, or has been achieved or that there may be less onerous ways to achieve it.¹³ In regard to the third criterion the measure must 'promote the achievement of equality'. Obviously in applying any measure bringing about transformation it 'will inevitably affect some members of the society adversely, particularly those coming from the previously disadvantaged communities'.¹⁴

[40] Having regard to the long term objective of a non racial, non sexist society that recognises the diversity of citizens in our country, I am unable to conclude that in conferring benefits on Mr Bulana, and not the appellant under the transformation fund, the respondent abused any power or imposed substantial or undue harm on the appellant as one excluded from its benefits, or that any of South Africa's constitutional goals and long term objectives would be threatened.

[41] The appellant's case had also been that had he been allocated stables at Summerveld he would immediately have commenced to earn a net profit from his training fees alone of R50 000 per month. From this it follows that from the off limit

¹³ Van Heerden's case above para 43.

¹⁴ Per Ngcobo J in *Bato Star (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 CC para 76 referred to in *Van Heerden* above para 44..

stables available at Mr Page's facility he could have earned a net profit from his training fees in the region of R48 000. This would have enabled him to derive winning stakes allegedly of R10 000 000. In those circumstances it is difficult to see how the appellant could have had any *bona fide* or legitimate claim to financial assistance under the transformation fund.

[42] Ultimately, it was not proved that the decision by the respondent to promote a black African trainer was not *bona fide* and reasonable. In promoting certain disadvantaged individuals, it is permissible to prefer one previously disadvantaged group over another previously disadvantaged group.¹⁵

[43] Section 14 of the Act recognises that 'it is not unfair discrimination to take measures designed or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.'

[44] It is incumbent 'on courts to scrutinise each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in a real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation sensitive" approach which is indispensable because of shifting patterns of hurtful discrimination and stereo typical response in our evolving democratic society.'¹⁶

[45] The respondent's conduct, in not providing benefits to the appellant from the transformation fund, was in the circumstances not shown to be unfair discrimination against the appellant.

THE REFUSAL TO LEASE STABLE TO THE APPELLANT AT SUMMERVELD:

¹⁵ *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D).

¹⁶ *Van Heerden* above para 27.

[46] During 2002 the appellant was found guilty by the NHA of various charges levelled against him. These charges included the appellant having punched the jockey academy master, Gadsby in the stomach, and breaking the nose of the stipendiary steward Arendse in public in the parade ring on a July racing day. A sentence of a five year suspension from November 2002 to November 2007 was imposed. The decision was not taken on review. Subsequently during or about April 2006 the appellant requested the NHA to reinstate him, which request was declined.¹⁷ This resulted in the appellant thereafter launching proceedings against the NHA in the Equality Court during May 2006. The same complaints which served before the Equality Court then, are advanced in the present matter as 'background facts'. That court (per Ms Moolman) concluded that the appellant had failed to make out a *prima facie* case.¹⁸ These 'back ground facts' were accordingly already adjudicated upon and disposed of by that judgment. In his evidence in chief and in cross-examination the appellant disavowed any reliance on the 'background' he had put up before the court *a quo* in support of his claim of discrimination. The respondent accordingly complains, with good reason, that the appellant's approach is anomalous as the only allegations before the court *a quo* to try and justify the inference that the refusal to lease stables was discriminatory on the grounds of race, is the 'back ground evidence' that pertained to the pre 2003 era, but which the appellant expressly disavows placing any reliance on.

[47] The only other interaction between the parties during the appellant's period of suspension, was the respondent taking judgment against the appellant for arrear rental which the appellant failed to pay to it in the sum of R11 187.05, together with interest at the rate of 15,5% per annum on:

- (a) R3 704.25 from 30 September 2002 to date of payment;
- (b) R 3568,50 from 31 October 2002 to date of payment; and
- (c) R3 863,00 from 30 November 2002 to date of payment.

¹⁷ See *Maharaj v National Horse Racing Authority of Southern Africa* 2008 (4) SA 59 (N).

¹⁸ This finding was left undisturbed in the decision in *Maharaj v National Horse Racing Authority of Southern Africa* above, which court found it unnecessary to deal with the matter.

A writ of execution was issued which produced a *nulla bona* return. Section 65 debt collecting proceedings resulted in the appellant being ordered to pay an amount of R100 per month in settlement of the judgment debt. Payments at R100 per month do not cover the interest which accrues on the judgment debt. During the period from 14 June 2006 to 4 April 2009, R3 700 was paid under the judgment debt, but R8 407,20 accrued in respect of interest at the prescribed *morae* rate on the judgment debt.

[48] The only other potential new evidence before the court *a quo*, arose from the correspondence exchanged between the party's respective attorneys, commencing from October 2007. This correspondence contains no evidence of any *prima facie* discrimination on the basis of race, or for that matter, conscience or belief.

[49] Apart from the appellant, not a single witness testified before the court *a quo* as to racism by or opposition to transformation by the respondent.

[50] The respondent has attacked the evidence of the appellant for various contradictions, inconsistencies and what it has termed "downright untruths". These are summarised in Schedule 2 to the respondent's heads of argument.

[51] The respondent has various members of other race groups on its board, or within its management including Mr T N (Moga) Pillay a director on the main board of the respondent and also the chairperson of the KZN Chapter Board that manages racing in KwaZulu-Natal, a Mr Ron Moodley whom the appellant himself thought was previously a director of the respondent and to whom reference was made during the appellants cross-examination, Praveen Naidoo, Naresh Chagan and Veronica Jack (assistant to Ms Mnganga) who are all on the respondent's senior board of management. At least four other Indian trainers have been granted stabling by the respondent, namely Cyril Naidoo, K Naidoo, Yarief Singh and Chetty. Stabling facilities were also previously given by the respondent to trainers Selwyn Moodley and Mr Mohadien (also Indian trainers). Five of the twelve directors on the

respondent's main board of directors were, at the relevant time, black persons. Furthermore, the respondent's black membership increased from 15% in July 2006 to 24% in 2008. 41% of its middle management are black and 76% of its junior management are black.

[52] The appellant called Mr J Harielall, the respondent's racing manager, as a witness. His evidence was adduced to substantiate claims that the respondent was inconsistent in treating another trainer, Mr de Kock, considerably more leniently than the appellant. Mr de Kock had assaulted a steward. He received a R30 000 fine. That occurred in 2000 before Mr Harielall joined the respondent. Mr Harielall testified that from his vantage point he could not see exactly what happened, but that he recollected Mr de Kock shoving stipendiary steward Anderson on the chest. Mr Harielall did not testify about any racial discrimination or anti-transformation practices within the respondent. On the contrary, he testified about other Indian trainers training at KZN, and all of these trainers as well as Mr Bulana leasing stables from the respondent. He also confirmed that substantial progress had been made in the promotion of racing in the rural black communities with initiatives being undertaken to promote such racing, such as a contribution of R75 000 in 2008 to stakes in a rural riding festival in Dundee, and the respondent's programme to subsidise wages to promote stable employees to assistant trainers.

[53] The appellant's retort to this is simply that these programmes amount to 'pulling the wool over the government's eyes' The beneficiaries of the respondent's social initiatives are dismissed by him as 'Uncle Thom's' and 'yes baas blacks'.

[54] The appellant's allegations are contradicted by the BEE rating awarded to the respondent by the accredited BEE rating agency, Empowerdex. The respondent's former AA rating was subsequently changed to an A rating.

[55] Based on the aforesaid brief summary of the relevant facts, I am unable to find that there was any misdirection in the findings of the court *a quo* in concluding

that the appellant had failed to make out a *prima facie* case of discrimination whether on any of the prohibited grounds or any other ground.

[56] However, even if I was wrong in that regard, the respondent has in my view clearly demonstrated that its conduct is not based on one or more of the prohibited grounds, or that it has acted unfairly. I have no basis to conclude that the respondent's decision not to lease stables at Summerveld to the appellant, even if discriminatory, is not based on *bona fide* good reasons that bear a rational connection to a legitimate purpose. In reaching that conclusion I have considered *inter alia* the following:

- (a) the respondent's stated commitment to transformation, which although criticized by the appellant, remains a stated policy objective of the respondent;
- (b) the issue of contractual autonomy and whether the appellant can insist that the respondent contract with it, if for whatever reason it does not want to do so; and
- (c) even if the respondent does not have such contractual autonomy, and regardless of such autonomy, whether the respondent had rational and sound reasons for not contracting with the appellant.

These are considered briefly *seriatim*.

RE TRANSFORMATION:

[57] The evidence of the Ms Mnganga, which is on record and will not be repeated in this judgment, demonstrates a clear commitment by the respondent to transformation, non racism and non sexism as a policy objective. There is nothing to gainsay the evidence adduced by the respondent on this score.¹⁹

¹⁹ At best for the appellant, he is critical and scathing of the pace of transformation.

RE CONTRACTUAL AUTONOMY:

[58] The respondent has made various submissions in support of the contention that contractual autonomy remains part of freedom, and that this is still the case in the constitutional era post 1994,²⁰ which it no doubt is.

[59] The appellant on the other hand submitted that the freedom of contract is over written by the respondent's 'positive obligation to take steps to redress imbalances of the past.' For this proposition, the appellant relied on the decision in *Mozart Ice-cream Franchises Pty Ltd v Davidoff and Another*,²¹ the principle of Ubuntu,²² and section 29 of the Act read with item 9(a) of the Schedule to the Act.

[60] The judgment in *Mozart* does not do away with the common law of contract and contractual freedom, but merely draws attention to the imperative in section 39 (2) of the Constitution that when interpreting any legislation and when developing the common law or customary law, a court must promote the spirit, purport and objects of the bill of rights. That presents no problem and is not controversial. But that is as far as it goes. Parties are otherwise free to contract on whatever basis they choose, provided it is not immoral or illegal. In *Bredenkamp v Standard Bank of SA Ltd*,²³ the SCA held that fairness is not a free standing requirement for the exercise of a contractual right, a statement subsequently confirmed in *Mphango v Aengus Lifestyle Properties Pty Ltd*²⁴ and *Potgieter and Another v Potgieter NO and Others*.²⁵

²⁰ Reliance was placed on *inter alia* *Brisley v Drotske* 2002 (12) BCLR 1229 SCA para 94 and *Napier v Barkhuizen* 2006 (9) BCLR 1011 (SCA) paras 12 – 13 and *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) paras 57 and 87.

²¹ 2009 (3) SA 78 (C).

²² The reference to Ubuntu in the judgment of Yacoob J in *Everfresh Market Virginia Pty Ltd v Shoprite Checkers Pty Ltd* 2012 (1) SA 256 (CC).

²³ 2010 (4) All SA 113 (SCA) paras 52 and 53.

²⁴ 2011 (5) SA 19 (SCA) paras 22 and 25.

²⁵ 2012 (1) SA 6 37 (SCA) paras 31 – 36.

[61] The reference to Ubuntu in the *Everfresh* judgment is furthermore obiter as the court had found that it was not an appropriate instance to deal with this issue authoritatively. The judgment is in any event also distinguishable as it dealt with the position of two parties to a previously freely entered into agreement, and not with claims between two independent parties, one of whom refuses to enter into a contract with the other. Significantly however, the majority judgment by Moseneke DCJ endorsed the principle of *pacta sunt servanda*.

[62] The appellant's reliance on section 29 read with item 9(a) of the Schedule to the Act also does not assist his cause. Section 29 contains an 'illustrative list of unfair practices in certain sectors', as its heading indicates, and provides that '(w)ithout detracting from the generality of the provisions of this Act, the Schedule to this Act is intended to illustrate and emphasise some practices which are or may be unfair, that are wide spread and that need to be addressed.' The section is therefore illustrative and a guideline as a reading of section 29(5) confirms by providing that the practices in the schedule are not conclusive, but that they must be considered and revised by the Equality Review Committee on a continuous basis. Item 9(a) of the Schedule to the Act also begs the issue in stating:

'Unfairly refusing or failing to provide the goods or services or make the facilities available to any person or group of persons on one or more of the prohibited grounds.'

The issue remaining still is whether there is a prohibited ground present, and if so whether the discrimination is unfair.

[63] At best for the appellant, if contractual autonomy came into conflict with the right to equality, the question arises how these competing rights are to be balanced. This entails a balancing exercise to be carried out as in *Midi Television Pty Ltd v DPP Western Cape*.²⁶ *In casu*, there is no conflict of rights. The right relied upon by the appellant is not to be discriminated against and that has not been infringed by

²⁶ [2007] 3 ALL SA 318 (SCA) para 7 – 11.

the respondent. But once again, even if infringed the reasons advanced by the respondent for such infringement are rational and justified.

[64] In the final analysis, the appellant could always have secured stables off limits. In order to use the facilities at Summerveld, he needed to make application.

RE: RATIONAL CONNECTION FOR THE RESPONDENT'S REFUSAL TO MAKE STABLES AVAILABLE TO THE APPELLANT:

[65] I have perused the evidence carefully and am unable to conclude that the reasons advanced by the respondent are anything other than *bona fide*, reasonable and grounded in a legitimate purpose, thereby being rational for the differentiation that results between trainers because bear a rational collection to a legitimate purpose or purposes of the respondent, namely to protect the interest of horse racing, its own business and the legitimate interest of stakeholders in the industry – See *Prinsloo v Van der Linde and Another*²⁷ and *Harksen v Lane NO and Others*²⁸

[66] The reasons why the respondent declined to make stables available to the appellant are:

- (a) The appellant is a judgment debtor of the respondent, whose judgment debt simply accumulates, with no prospects seemingly of it being discharged ('the commercial reason');
- (b) The appellant's behaviour to the respondent and the NHA has been problematic resulting in the respondent not wanting to have an association with the appellant ('the moral reason');
- (c) The KwaZulu-Natal Trainers Association has informed the respondent that its association is not prepared to accept the appellant as a lessee at the stable yard at Summerveld ('the stakeholders reason');

²⁷ 1997 (6) BCLR 758 (CC).

²⁸ 1997 (11) BCLR 1489 (CC) para 38.

- (d) Summerveld's facilities are fully subscribed and there are no available stables to lease to the appellant ('the practical reason').

All these reasons emerge from the evidence of the chief executive officer and director of the respondent, Mr Nairac²⁹ and the evidence of the chairperson of the KwaZulu-Natal Trainers Association and a member of the respondent's Chapter Board responsible for racing in KwaZulu-Natal tasked with responsibility of the training centres, including Summerveld, Mr Rivalland.³⁰

[67] As regards the commercial reason, the appellant's failure to satisfy the judgment against him when contrasted to statements of financial backing available to him and his ability to earn a substantial income, smacks of bad faith and a strategy of avoiding or delaying the discharge of his admitted legal obligations. Instead of paying off his indebtedness, he has paid paltry amounts (which admittedly he was ordered to pay), which do not even cover the interest accumulating on the outstanding debt; an absolute no win situation to the respondent. On that score alone, he has the record of a bad debtor, which no commercial enterprise would want to have on its debtor's book or have commercial dealings with.

[68] The moral reason advanced by the respondent is also well justified based on the appellant's violent and abusive nature resulting in him even challenging the respondent's attorney during cross-examination before the court *a quo*, to a physical challenge. This is totally unheard of. But it is also not an isolated occurrence. He unfortunately has a history of abusive conduct, such as the attack on Mr Boojhawn (at the time a gentleman already in his sixties) and Mr Smout for which he was sentenced to a fine of R6 000, the incident where he made obscene and grossly insulting remarks to a security officer, Welcome Khambule, the Swift incident as it has been referred to on 1 July 2002, the events in the stipendiary steward's boardroom on July day (6 July 2002) and the assaults on Gadsby and Arendse also referred to earlier in this judgment, the incident in the Summerveld Club House on

²⁹ In the case of the commercial, moral and stakeholders reasons.

³⁰ In the case of the practical reason.

28 September 1999 which led to an NHA inquiry presided over by two former judges of the KZN High Court which found him guilty of the conduct complained of, the events of 3 July 1999 involving the incitement of crowd violence during an objection to the outcome of a race (for which he likewise was found guilty and had his license suspended for a period of three months in turn suspended for two years, altered on appeal to one year), the incidence of violence and abuse described by Rivalland etc. I do not agree that the appellant's infractions were no different to that of other trainers. Unfortunately his past conduct shows a persistence in and pattern of antisocial aggressive behaviour. I also do not agree that he has been dealt with more severely than others who have been guilty of physical assaults. Every case must be treated on its own facts. Ultimately the sanction imposed is a matter of discretion. It has not been demonstrated, having regard to the particular facts of each infraction he was convicted of that such discretion was not exercised properly, or that the sanction he received was motivated by his race. It is furthermore also not a case that the appellant was receiving an additional punishment as his character had already been taken into account by the NHA when re-issuing the appellant with a trainer's license. The NHA dealt with the re-issue of a licence. The respondent's refusal deals with not wanting to have him as a lessee of stables because of his conduct, which persists to this day.

[69] In Schedule 2 to the respondent's heads of argument, the respondent summarised the untruthful nature and character of the appellant. I do not intend detailing all these various instances in this judgment. They emerge from a perusal of the record itself. Suffice it to say that the NHA tribunal consisting of two former Judges of the KZN High Court, referred to earlier, commented on the appellant's mendacity and concluded that what he had said and testified to was not the truth.

[70] The stakeholder's reason is also a rational and legitimate one. Summerveld is a training facility utilized by trainers who have entered into lease agreements with the respondent subject to its rules and regulations. This body of trainers organised

itself into the KwaZulu-Natal Trainer's Association. They have an interest in the operation of the training centre at Summerveld. The respondent has a duty to ensure that the environment created for training is conducive to that purpose and accordingly, to take into account legitimate concerns of trainers insofar as they may affect the operation of the Summerveld Training Centre.³¹

[71] As regards the practical reason, Mr Rivalland testified that there was no capacity at Summerveld to accommodate further trainers and horses at the stables. The trainer's association had also resolved that it did not want the appellant renting stables because of its previous experience with him. Mr Rivalland's explanation for that stance was corroborated in material respects by Mr Nairac. No evidence was adduced to disturb the basis for the views expressed by Mr Rivalland. Other trainers, including Dominic Zackie had been turned down 'satellite yards' in Summerveld because there was simply no space to accommodate them. Indeed it was due to this lack of space, that the appellant initially had to use off limit stabling in 1997, before he was later granted stables when they became available in September 1997.

[72] The appellant's claims have no merit. The conclusion of the court *a quo* to dismiss his application cannot in my view be faulted. Absent any actionable discrimination, it follows that the accusation that the respondent is, in essence, depriving him of the right to earn a livelihood and practice his chosen occupation, is also without merit.

³¹ The respondent demonstrably recognizes that interest of trainers by the KZN Trainer's Association being allocated an *ex officio* seat on the KZN Chapter Board, occupied by Mr Rivalland, the chairperson of the KZN Trainers Association.

COSTS:

[73] As regards costs, the respondent has asked that the appellant pay the respondent's costs of this appeal as on the scale as between attorney and own client based on:

- (a) the appellant's claim in the court *a quo* being frivolous and vexatious and its character not having changed in appeal;
- (b) the appellant's case in the court *a quo*, being characterised by untruthfulness;
- (c) the appellant's case in the court *a quo* being grossly exaggerated insofar as quantum was concerned;
- (d) the tenor and content of the appellant's initial approaches to the respondent when he wished to resume training, being suggestive of confrontation and a desire to harass the respondent rather than engage in *bona fide* negotiations with the respondent.³²
- (e) the appellant has breached various rules of this court relating to the appeal, by the record being filed approximately two months late, the application for the assignment of a date for the hearing of the appeal being made out of time, and the appellant's heads of argument being filed late.

[74] A court should be slow to find that a *bona fide* attempt by an individual to have his rights vindicated, when it subsequently becomes clear that he had a poor case was necessary frivolous or vexatious. In this matter however the appellant's case in the court *a quo* was in many respects characterized by untruthfulness which in some respects certainly suggested an element of vexatiousness. His approach has also been one suggestive of confrontation and a desire to harass rather than to negotiate. Some aspects of his conduct may be explained on the basis that the appellant is a strong advocate for transformation and that his perception of any

³² See *MEC for Education v Pillay* 2008 (2) BCLR 99 (CC) paras 108 – 110 referring to *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC).

progress made in that regard has left him frustrated, resorting to abuse, and with his temperament, when not getting his way, finding expression in physical encounters. As much as one would like to feel some sympathy for the bitterness finding expression in his conduct, his conduct³³ remains unsavoury and unacceptable. The incidents of untruthfulness in seeking to falsely explain or deny events which have occurred, are also to be deplored in the strongest terms.

[75] Overall, and on under conspectus of all these considerations, it seems to me proper that this court exercise its discretion on costs in favour of directing that the appellant pays the costs of the appeal on the attorney and client scale.

THE ORDER:

[76] The appeal is dismissed with costs on the attorney and client scale.

MOKGOHLOA J

I agree

³³ Some of which has also been referred to briefly in this judgment.

DATE OF HEARING: April 2012.

DATE OF JUDGMENT: 13 November 2012

Counsel for the appellant : Adv Reddy (instructed by Raj Ramsaran & Co)

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