



EQUALITY COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

29/7/2014-

CASE NO: 61600/2012

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

ESSOP MOOSA

Complainant

and

PHUMELELA GAMING AND LEISURE LIMITED

Respondent

J U D G M E N T

MAKGOKA, J

[1] The complainant seeks to be reinstated or employed by the respondent as a race caller. He contends that the respondent's refusal reinstate or employ him as such, contravenes the provisions of the Employment Equality Act 55 of 1998 (EEA). He further alleges that the respondent's conduct constitutes discrimination in contravention of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

[2] That discrimination is said to be based on race, as the complainant alleges that the respondent's reason for its refusal to reinstate or employ him, is that he is not white. According to the complainant, the respondent only employs white race callers. Flowing from that, the complainant seeks a two-fold relief. First, compensation for alleged loss of earnings and second, reinstatement to his previous position as a race caller with the respondent.

[3] In answer, the respondent has raised two preliminary points. First, that this court lacks jurisdiction to grant the relief sought by the complainant. The contention is that the applicant seeks a labour law remedy, which only the Labour Court has the exclusive jurisdiction to determine in terms of s 49 of the EEA, read with s 157(1) of the Labour Relations Act 95 of 1995 (LRA).

[4] Secondly, the respondent pleads *exceptio res judicata*. It contends that the Conciliation Commission for Mediation and Arbitration (CCMA) and the Labour Court have finally determined the dispute between the parties. With regard to the substantive merits of the application, the respondent opposes the relief sought by the complainant on the basis that the relationship of trust between the parties has broken down due to the complainant's unlawful conduct.

[5] The factual background is fairly straight-forward. The respondent is involved in the gaming and horse racing industry. During 1990, the complainant was employed by respondent's predecessor, the Highveld Racing Authority, as a full-time horse-racing commentator. In May 2001, the complainant was medically boarded due to ill health. During the complainant's absence, the respondent reviewed and restructured some of its operations. Among others, it was decided that its race schedule and business no longer justified the employment of full-time commentators. Therefore, it was decided that these positions should be made redundant and that the commentating function would

function would be contracted to individuals on an *ad hoc* basis, as and when required. Some race callers were indeed retrenched, and some were retained on an *ad hoc* basis, while some accepted alternate positions with the respondent.

[6] The complainant was declared fit to return to work in March 2003. On his return, it was explained to him that as a result of the restructuring referred to in the preceding paragraph, the respondent could no longer employ him as a full-time race commentator. He was offered an alternative position, without loss of salary or benefits, with effect from 1 May 2003, with occasional calling of race meetings. The complainant says that the new position was never properly discussed with him as to what it entailed. He alleges that a senior representative of the respondent failed to attend a meeting scheduled to discuss the alternative position. However, nothing really turns on this, for the present purposes. However, it is safe to accept that given the complainant's insistence on being employed as a race caller, the complainant most probably would have declined that position. The complainant was eventually retrenched on 31 August 2003. That, briefly, is the background.

[7] I turn now to the respondent's points *in limine*. Ordinarily, I would consider the defence of jurisdiction first, as a finding in that regard is potentially dispositive of the matter. However, given the circumstances of the case, I shall first consider the defence of *res judicata*. For this defence, the respondent relies on the facts set out in the in the next paragraphs.

[8] After the complainant was retrenched, he referred the matter to the CCMA, alleging unfair retrenchment. The referral was delivered outside of the prescribed time period, and the condonation application for its late delivery was dismissed by the CCMA on 24 January 2004. The complainant applied to the Labour Court for the review of the CCMA's dismissal of his condonation

application. On the 4 February 2005, the Labour Court dismissed the complainant's review application.

[9] On 1 December 2006, the complainant lodged an application against the respondent in terms of section 20 of PEPUDA, in which the complainant alleged that he was discriminated against during his term of employment with the respondent. The respondent opposed the application, and after delivering its answering affidavit, the complainant withdrew the application on 26 February 2007.

[10] On 25 May 2007 the respondent was informed by the South African Human Rights Commission (SAHRC) in writing that the complainant had complained to it regarding his retrenchment. On 30 May 2007 the respondent wrote to the SAHRC, refuting the complainant's allegations. There was nothing further subsequent to the respondent's letter.

[11] On 28 May 2008 the complainant again referred an alleged unfair dismissal claim to the CCMA, challenging his retrenchment by the respondent in 2003. The respondent opposed the application and argued *in limine* that the matter was *res judicata*. On 15 July 2008 the CCMA upheld the respondent's point *in limine*. On 28 August 2008, the complainant again referred his 2003 retrenchment in the Labour Court. The respondent has opposed this application in which it also seeks an order barring the complainant from instituting any further litigation against it arising from the 2003 retrenchment. It is not clear from the papers whether that application has been finalized, and if so, the outcome thereof.

[12] On 11 November 2009, the complainant launched an application in the High Court (North Gauteng), seeking an order in terms of section 82 Promotion of Access to Information Act 2 of 2000 (PAIA), compelling the respondent to disclose certain documents and information, including its employment equity

plans and reports. The order was sought on the basis that the respondent had refused to employ him on discriminatory grounds, and the documents sought in terms of PAIA may ultimately show that he had a protectable right. The respondent opposed the application, and on 5 November 2010 the application was dismissed with costs.

[13] The respondent argues that on the above facts, the matter is *res judicata*. The requirements for a successful reliance on the *exceptio res judicata* were restated in *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SCA) para 3 of the majority judgment as follows:

‘The fundamental question ... is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the Court been finally disposed of in the first action?’

[14] From the above, I have no hesitation in coming to the conclusion that the respondent’s defence of *res judicata* was well-taken. The complainant’s complaint has been finally determined, not once, but twice, respectively, by both the CCMA and the Labour Court. This should be the end of the matter. However, because of the complainant’s past history of reinventing issues that have been ventilated before, I consider it necessary to also consider the issue of jurisdiction.

[15] In that regard, the respondent contends that the complainant’s complaint is a labour dispute, and as such, has been excluded from the jurisdiction of this court by virtue of s 5(3) of PEPUDA. That section provides that PEPUDA does not apply to any person to whom and to the extent to which the EEA applies. Section 49 of the EEA clothes the Labour Court with exclusive jurisdiction to determine such disputes. The power to decide whether an employee has been unfairly discriminated against is also reserved exclusively for the Labour Court. In terms of s 50(1) (d) and (e) of the EEA, the Labour Court is entitled to award

compensation. This, it should be borne in mind, is part of the relief sought by the complainant. It would therefore appear that the proper forum to deal more appropriately with the matter is the CCMA or the Labour Court.

[16] On behalf of the complainant, Ms *Mboweni*, argued that this court has the discretion whether or not to refer the matter to an alternative forum. I agree in principle with this submission. Section 20 of PEPUDA provides, among others, for a decision to be made by the presiding officer whether the matter is to be heard in the equality court or whether it should be referred to an alternative forum which, in the presiding officer's opinion, can deal more appropriately with the matter in terms of that alternative forum's powers and functions. Section 20(4) provides a broad guiding framework when a decision has to be taken whether to refer the matter to an alternate forum. It reads:

'The presiding officer, before making a decision to refer a matter as contemplated in subsection (3), must take all relevant circumstances into account, including the following:

- (a) The personal circumstances of the parties and particularly the complainant;
- (b) The physical accessibility of any contemplated alternative forum;
- (c) The nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law;
- (d) The views of the appropriate functionary at any contemplated alternative forum.'

[17] It seems to me that in addition to the factors specified in (a) – (d), the presiding officer is enjoined to consider other 'relevant factors' before deciding to refer the matter to an alternate forum. As to what 'relevant factors' might be in a particular case, would depend obviously on the facts of each case. One example that immediately comes to mind is where multiple rights are implicated, some simultaneously justiciable in this court and in the alternative forum. In such instance the rights might be so closely intertwined and

overlapping, such that a referral to an alternative forum cannot be made without watering down the essence of the complainant's claim.

[18] In the present case, I have decided not to refer the matter to either the CCMA or the Labour Court, despite my inclination that those could deal more appropriately with the matter. In reaching that decision, I considered as 'relevant factors' the following: First, that both the CCMA and the Labour Court have, twice, respectively, been seized of the dispute between the parties and have both dismissed the complainant's case. It would therefore be an exercise in futility to refer the matter to either of those *fora*, where the outcome is a foregone conclusion. Second, policy dictates that there should be finality to legal disputes. It is certainly not in the public interest that courts are seized of the same disputes concerning the same parties. Third, the interests of the respondent should also be taken into consideration. It has already defended the complainant's claims, at a significant cost, and it would be most unfair to expect it to go back to the either the CCMA or the Labour Court.

[19] For the same reason mentioned in para [14] above, I proceed to consider the respondent's refusal to employ the complainant as an *ad hoc* race caller. It is common cause that between 2003 and 2009 the complainant engaged in threatening and abusive behaviour towards the respondent's employees and contractors. He threatened them with physical harm and death, conveyed in the most distasteful and profane language. Examples abound in the papers of this. For that reason the respondent's stance is that it does not wish to have a further relationship with the complainant, apart from the fact that it has no vacancies for race callers.

[20] The complainant states that the letters and emails contained the threats and profanities were written in anger and his judgment was clouded. The complainant therefore says that the issue is water under the bridge, and he

should be given another opportunity to work for the respondent as a race caller. That might so as far as the complainant is concerned. But it requires the consent of both parties to conclude an agreement. The respondent has not consented to further contract with the complainant.

[21] The complainant seems to suggest that by agreeing to meet him during 2009, the respondent is now estopped from refusing to employ him. The meeting in question took place on 6 August 2009 between the complainant and representatives of the respondent. The purpose of that meeting, and the outcome, is contained in a letter by the chief executive officer of the respondent to the complainant, dated 17 August 2009. The following is recorded in the letter:

- (a) The complainant made a request at the meeting that he be employed as an *ad hoc* race commentator by the respondent;
- (b) The respondent considered the request and refused it, on the grounds that the complainant had made several serious threats of violence against its employees and contractors.
- (c) The complainant's inability to control his emotions and to conduct himself in a professional manner 'is of great concern to management, and is incompatible with the company's work environment and would be a risk to the respondent's business'.
- (d) The respondent accordingly decided that it was not in the company's interests to employ the complainant.
- (e) In any event, Phumelela has no vacancies for a race commentator.

Subsequent to that, the complainant responded by way of a letter dated 27 August 2009, in which he maintained his contention that the respondent had treated him unfairly and that there was no valid reason why he could not be placed on the respondent's roster as an *ad hoc* race caller.

[22] The respondent contends that its refusal to employ the applicant as a race-caller is not based on any discrimination, but on the break-down in trust between the parties, given the applicant's own conduct as set out above. It is further submitted that a finding of no discriminatory conduct on the part of the respondent, takes the proceedings out of the purview of PEPUDA. I agree. What was required of the complainant was to produce evidence, on a *prima facie* basis, that he was discriminated against on. This required more than a mere allegation. This, the complainant has failed to establish.

[23] On the contrary, the respondent has placed facts before this court that its refusal to employ the complainant is based on his past conduct towards it and its employees and contractors - the threatening, abusive, and unlawful behaviour referred to above. The respondent has therefore proved that no discrimination took place as alleged by the complainant. The mere fact there are no black race callers employed by the respondent, is not in itself, sufficient to establish discrimination on race. As correctly argued by Mr *Ferreira*, counsel for the complainant, the complainant has no right to a contract with the respondent, in any capacity, and that the respondent is entitled to refuse to enter into a contract, provided that it does not do so for impermissible, discriminatory reasons.

[24] Counsel for the complainant, Ms *Mboweni*, urged me to consider the fact that the respondent has a monopoly of the racing industry. Therefore, so was the argument, the respondent's refusal to employ the complainant as a race caller, effectively means the complainant is prohibited from exercising his chosen trade as a race caller. There is no merit in this argument. As explained in the preceding paragraph, the complainant does not have a right to be contracted to the respondent, and the respondent has no obligation to employ the complainant, as long as it does not refuse to employ him on the prohibited grounds. I have already found this not to be the case.

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

1. The complainant's claim is dismissed;
2. There is no order as to costs.



T.M. MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD : 11 APRIL 2014

JUDGMENT DELIVERED : 29 JULY 2014

FOR THE COMPLAINANT : ADV L. J. MBOWENI

INSTRUCTED BY : PRETORIA JUSTICE CENTRE

FOR THE RESPONDENT : ADV. N. FERREIRA

INSTRUCTED BY : BOWMAN GILFILLAN ATTORNEYS