



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case No: JA 44/09

GAUTENG SHARED SERVICES CENTRE

Appellant

and

TITUS SELLO DITSAMAI

Respondent

Heard: 21 September 2011

Delivered: 7 December 2011

**Summary:** The principle of *res judicata* does not arise when the respondent alleges unfair dismissal in terms of the LRA and unfair discrimination in terms of the Employment Equity Act.

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JUDGMENT

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DAVIS JA

## Introduction

[1] This appeal concerns the question of whether respondent, who was a former employee of appellant, was entitled to pursue claims against appellant under both the Labour Relations Act ('LRA')<sup>1</sup> and the Employment Equity Act ('EEA').<sup>2</sup>

[2] Before the court *a quo*, appellant contended that respondent was not so entitled. Once respondent had obtained relief in the General Public Service Sectorial Bargaining Council ('GPSSBC') in terms of the LRA, he was not entitled to institute a further claim by relying on the EEA to claim additional relief. In short, appellant pleaded *res judicata*, which plea was rejected by the court *a quo* and which decision has given rise to this appeal.

## The facts

[3] On 4 April 2004, appellant advertised certain posts, including one for a forensic auditor. On 3 May 2004, respondent was interviewed for post of forensic auditor at a level 8. Respondent appeared to be unsuccessful in his attempt to gain a permanent contract as, on 13 May 2004, appellant concluded a contract of limited duration with respondent for the post of temporary junior forensic auditor

[4] The latter commenced employment on 1 June 2004. The relevant contract provided *inter alia*, as follows:

'(a) *The contract of employment shall be on a month to month basis for a maximum period of six (6) months from Tuesday 1<sup>st</sup> June 2004.*

(b) *On the completion of the contract as detailed in (a) above, this contract shall automatically terminate. Such termination shall not be construed as being retrenchment but shall be completion of the contract. No enquiry is required when this contract terminates through effluxion of time. The employee shall nonetheless still be given two weeks of expiry of the contract period.*

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<sup>1</sup> 66 of 1995.

<sup>2</sup> 55 of 1998.

*Nothing in this limited duration contract shall give rise to any expectations by either your employer or employees that it shall, upon termination, be renewed, or re-negotiated. Any subsequent agreement that may follow this agreement shall be entirely at the discretion of both parties to enter into, on whatever terms and shall have no bearing on the termination of this agreement.*

*(c) The remaining conditions of employment, not expressly detailed above, shall be the existing employer policy, rules and regulations and the general conditions of employment as contained in the policies and procedures of Corporate Vision Personal and Gauteng Shared Service Centre subject to limitation set out in (b) above.*

*(d) Subject to amendment of the general conditions of employment as set out in (c) above, the engagement conditions shall be: Occupation: Temp Junior Forensic Auditor.'*

[5] On 16 January 2004, an employee, Andries Dippenaar, was interviewed for the posts of Forensic Supervisor Level 12. On 14 May 2004, a Mr N Suklak was interviewed for the post of Senior Forensic Auditor Level 2. Both were offered permanent positions.

[6] Respondent was particularly aggrieved with these appointments. On 22 July 2004, he lodged a grievance, complaining of unsatisfactory treatment, victimization and bias. On the same day he was dismissed; that is the day on which he lodged his grievance.

#### The Arbitration Proceedings

[7] On 7 September 2005, an arbitration was conducted under the auspices of the GPSSBC to deal with the respondent's contention that his dismissal on 22 July 2004 had been substantively and procedurally unfair.

[8] The arbitrator noted that the contract which had been entered into between the parties had been for a period of six months. In his view, there was no evidence

to suggest that the respondent was not competent or that there was any other justifiable reason for dismissing the respondent within the period of six months. The arbitrator found that, 'the indication is the applicant was dismissed for lodging a grievance. In such circumstances the compensation awarded was regarded as just and equitable.' Although the arbitrator held that reinstatement was not competent, he ordered appellant to pay respondent an amount of R 43 200.00, being 18 weeks salary as a result of the unfair dismissal, in terms of section 186 of the LRA.

#### The dispute in terms of the EEA

[9] After accepting payment of the compensation which had been so ordered, on 22 September 2006, applicant referred another dispute to the CCMA, alleging unfair discrimination, in that both Mr Suklak and Mr Dippenaar had been permanently appointed while he had only been offered a contract of limited duration.

[10] The essence of respondent's complaint under the EEA is reflected in the founding affidavit deposed to by him when this dispute was referred to the court *a quo*:

*'6. On the 4<sup>th</sup> April 2004, the Respondent advertised post in the national newspaper, The Sunday Times. According to the advertisement, Corporate Vision was commissioned by the respondent to handle the responses...*

*7. I responded to the advertisement as directed by the advertisement. On the 30<sup>th</sup> April 2004, I received a notice of invitation for interview from Corporate Vision to attend the interviews at GSSC 75 Fox Street, Imbumba House, Johannesburg.*

*8. I attended the interview on the 3<sup>rd</sup> June 2004 for the position of forensic auditors Level 8. During the interview, Mr Marthinus Koen, the Manager for the Respondent, indicated that I will be on a temporary/permanent position for the period of six months, and based on the satisfactory performance, I will be appointed permanently. I therefore accepted the offer...*

*9. I commenced duty on the 2<sup>nd</sup> June 2004 with the prospect of being appointed permanently at the end of December.*

10. *Whilst working at GSSBC, I realized that some employees, who responded to the same advertisement, were appointed on a permanent basis while I was employed on a so-called temp-permanent basis despite the fact that the advertisement did not indicate whether positions were temporary or permanent at any level of the post.*

11. *Mr Andries Dippenaar is a White appointee and Mr Narish Suklak of Indian origin who before being appointed by GSSC working in the private sector whilst I was within the public services.*

12. *On noticing and contemplating on the contract of employment of Andries Dippenaar I realized that he was out-rightly employed by GSSC, and further that he is permanently employed. During my discussion with Narish Suklak, he confirms the same preferential treatment.*

13. *As an applicant to the post of forensic auditor, I lodged a grievance with my manager, inter alia, the unfair discrimination based on colour and race, in as far as my appointment of my position was made...'*

#### The decision of the court a quo

[11] Mohlahleli J rejected appellant's argument which was based on the principle of *res judicata*, namely the dispute concerning the EEA as set out in the finding affidavit was about the same subject matter and based on the same grounds as that which had been determined by the arbitration, pursuant to, the proceedings before the GPSSBC. Mohlahleli J held that the 'dismissal dispute' concerned respondent being dismissed before the end of the period of his contract of limited duration. The subject matter of the second dispute, which was based upon the EEA, related to unfair discrimination, on the basis that other candidates had been preferred to respondent when he had applied for a permanent position of forensic auditor.

#### The Appeal

[12] Mr Boda, who appeared together with Mr Lecoge on behalf of appellant, submitted that the EEA was not designed to deal with dismissal disputes but rather

with discrimination which amounted to unfair labour practices short of dismissal. In his view, in terms of section 10 (1) of the EEA, 'the word dismissal excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of chapter VII of the Labour Relations Act'. Accordingly, Mr Boda submitted that what the respondent had done was to split the same set of facts to create two causes of action. However, the entire dispute had turned on a question of unfair dismissal which had then been resolved by way of arbitration. Thus, the evidence which was necessary to justify the finding of the arbitrator with regard to the unfair dismissal complaint was, in substance, the same evidence which was necessary to support the complaint which had been referred to the court *a quo* pursuant to the EEA.

[13] The principles of *res judicata* are captured in the judgment in *National Sorghum Breweries v International Liquor Distributors*<sup>3</sup> where Olivier JA said:

*'The requirements for a successful reliance on the exceptio were, and still are: idem actor, idem reus, eadem res and eadem causa petendi. This means that the exceptio can be raised by a defendant in a later suit against a plaintiff who is "demanding the same thing on the same ground"(per Steyn CJ in *African Farms and Township Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562 A); or which comes to the same thing, "on the same cause for the same relief" (per Van Winsen AJA in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (a) at 472 A - B; see also the discussion in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 664 C – E); or which also comes to the same thing, whether the "same issue" had been adjudicated upon (see *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 179 A – H).'*[My underlining]

[14] In *Yellow Star Properties v MEC Department of Development Planning and Local Government*,<sup>4</sup> Leach AJA amplified on this *dictum* when he emphasised that.

<sup>3</sup> 2001 (2) SA 232 (SCA) at paras 2-3.

*'When dealing with issues [of] estoppel, it is necessary to stress not only that the parties must be the same but the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment.'*

[15] The decision upon which appellant relies in the present dispute was based on the following factual *matrix*: a contract of limited duration, that is for six months, had been concluded between the parties, respondent had a reasonable expectation that he would have been employed for the defined period and that, without justification, appellant terminated the contract prior to the completion of the specified term. On the basis of these facts, the arbitrator found the dismissal to be substantively and procedurally unfair and thus awarded compensation.

[16] By contrast, the case brought before the court *a quo* on the basis of a breach of the EEA was predicated upon respondent's contention that a white and Indian person had been preferred to him, when appointments were made pursuant to the advertisements placed by appellant on 04 April 2004. Accordingly, appellant had unfairly discriminated against him when it had preferred Mr Dippenaar and Mr Suklak in the making of permanent appointments; that is Mr Dippenaar for the post of Forensic Supervisor Level 12 and Mr Suklak for the post of Senior Forensic Auditor Level 2.

[17] When the relevant facts are set out thus, it is clear that the second case brought by respondent was predicated on an allegation of unfair discrimination as set in section 6 of the EEA. This dispute requires a completely different determination to that which confronted the arbitrator, which turned on the fairness of an early termination of the contract. In the case based on the EEA, the court was required to make a determination as to whether there had been unfair discrimination in the refusal to appoint the respondent to a permanent position and the concomitant preferences given to other applicants who were of a different racial group.

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<sup>4</sup> [2009] (3) All SA 475 (SCA) at para 22.

[18] For this reason, it cannot be said that either the same issue of fact or law, which was an essential element in the determination by the arbitrator, applies in respect of the dispute brought under the EEA.

[19] For these reasons, the appeal is dismissed with costs.

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DAVIS JA

I Agree

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WAGLAY DJP

I Agree

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MURPHY AJA



APPEARANCES:

FOR THE APPELLANT: Advocate F A Boda and Advocate BM Lecoge

Instructed by the State Attorney

FOR THE RESPONDENT: Mr Riki Anderson instructed by Riki Anderson  
Attorneys