IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: AR616/16

In the matter between:

MR ANIL B MAHARAJ Appellant

and

GOLD CIRCLE (PTY) LTD Respondent

Coram : Seegobin J and Balton J

ORDER

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1. The appeal is upheld and the ruling of the court *a quo* is set aside.

2. The matter is remitted back to the Equality Court, Durban, to commence *de novo* before a different presiding officer.

3. The respondent is ordered to pay the appellant's costs of appeal, such costs to include the costs of counsel.

JUDGMENT

SEEGOBIN J (Balton J concurring)

INTRODUCTION

[1] "Justice', according to Aristotle, 'belongs not only to the general virtue of Moral Justice, but also to the principle of Equality: that is to say, to that kind of Justice which is displayed in the form of Equitable Fairness." [1] Justice is also the legal or philosophical theory by which fairness is administered. There can, however, be no justice if the structures set up to administer it behave in a manner which is manifestly unfair. As the facts in this matter will show, the proceedings in the court *a quo* were anything but fair.

[2] This is an appeal against a ruling in the Magistrates Court, Durban, sitting as an Equality Court, in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act'). In terms of the ruling, the learned magistrate, Mr G H van Rooyen, effectively dismissed a complaint of unfair discrimination based on race brought by the appellant, Mr A B Maharaj, against the respondent, Gold Circle (Pty) Ltd. The ruling was made pursuant to a plea of *res judicata* raised by the first respondent at a directions

1 Anton-Hermann Chroust and David L. Osborn, Aristotle's Conception of Justice, (1942) 17 Notre Dame L. Rev.129, 134.

hearing convened by the court in terms of the regulations promulgated regulating the procedures to be followed in connection with an enquiry in terms of the Equality Act. At the heart of this appeal and the ruling made by the learned magistrate lies the issue of fairness.

LEGISLATIVE CONTENT

[3] There are various pieces of legislation to which reference will be made in this judgment. The first of course is the Equality Act referred to above and the applicable regulations promulgated thereunder. The second is the Constitution of the Republic of South Africa, 1996 ('the Constitution') and the third is the KwaZulu-Natal Gaming and Betting Act, 8 of 2010 ('The KwaZulu-Natal Act').

BACKGROUND

[4] The appellant, Mr Maharaj, is a South African citizen by birth. Although a member of the Indian population he is also part of a broader classification of citizens in this country who are commonly referred to as 'Black' (African, Indian and Coloured). As a member of this category of persons Mr Maharaj is also considered to be a historically disadvantaged individual or HDI as the term is referred to in various pieces of legislation including the KwaZulu-Natal Gaming and Betting Act referred to above.

[5] It would not be wrong to describe Mr Maharaj as a racehorse trainer by profession, after all it is in this industry that he spent the better part of his life trying to earn a living. By all accounts his foray into this industry has not been an easy one:[2] It began in 1989 when he first applied to the Jockey Club of South Africa to be admitted as a horse trainer. The Jockey Club turned down his application – it reasoned that it would 'be setting a precedent because of the appellant's skin colour'. In the apartheid era and given how people of colour were discriminated against by the authorities, the Jockey Club may have felt justified by its decision. That decision undoubtedly was not only discriminatory it was also hurtful. It was this decision that prompted Mr Maharaj to leave the country for Australia where he was allowed to work in the horse racing industry.

[6] After the advent of democracy in this country in 1994 Mr Maharaj returned to South Africa in about 1997. He once again applied for a licence to the National Horseracing Authority of Southern Africa (NHA), the authority in charge of horseracing in the country. Once again his path into the industry was not a smooth one with *inter alia* the KwaZulu-Natal stewards voting against the grant of a licence. It also transpired that his licence and letter of acknowledgment was initially mysteriously 'mislaid'. His licence was granted

[2] These background facts appear from two other judgments of this court involving Mr Maharaj, namely (a) *Maharaj v National Horseracing Authority of Southern Africa* 2008 (4) SA 59 (NPD), and (b) *Maharaj v Gold Circle (Pty) Ltd* [2012] ZAKZDHC 82.
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only after intervention by the head executive steward of the NHA at the time. That intervention however, entailed that Mr Maharaj was obliged to sit for an examination.

[7] Despite being issued with a licence, Mr Maharaj experienced undue hardship in the horseracing establishment. Initially his training establishment was outside the Summerveld Training Centre. The respondent who managed the training centre at first refused to lease him boxes to house his horses. He was subsequently able to lease 14 boxes at Summerveld from the respondent. The respondent is in control of and manages the stables at Summerveld.

[8] In 2002 Mr Maharaj's trainer's licence was suspended for five (5) years by the NHA arising out of two incidents of assault which he committed at work against a person of the White race. The altercations in question involved the issue of race. Mr Maharaj was escorted off the premises and was forced to make arrangements for the transfer of the horses he was training to other trainers. This arrangement went on for about three (3) months in which time he was charged a rental of R11 000-00 for the leasing of the stabling boxes from the respondent.

[9] Upon expiry of his suspension in 2007, Mr Maharaj once again applied for stabling facilities from the respondent. The respondent denied him the use of such facilities. It provided no reasons for its decision. Mr Maharaj was

convinced that he was being punished twice for the offences he committed and that he was being racially discriminated against by the respondent. He held this view because other trainers of the White group, who were also involved in acts of assault or other unlawful conduct, continued to be accorded the privilege of holding stabling facilities with the respondent. These facilities, according to Mr Maharaj, were never withdrawn or denied to such members, even after they were found guilty of unlawful behaviour.

[10] In light of the above Mr Maharaj lodged a complaint with the Equality Court under case number 42/2008 (the 2008 case). That complaint was dismissed with costs. Mr Maharaj's appeal against that finding to the High Court under case number AR514/2008 (the appeal judgment) was dismissed. An application for leave to appeal further was refused.

[11] In 2013 Mr Maharaj lodged a further complaint of unfair discrimination based on race with the Equality Court. The KwaZulu-Natal Gambling Board was cited as the first respondent, the Premier of KwaZulu-Natal as the second respondent and the respondent herein as the third respondent. The matter was heard by the learned magistrate, Mr M S Motala who, without hearing any evidence in the matter, ruled that the court had no jurisdiction in terms of section 20(3) of the Equality Act to deal with the matter.

[12] On 13 January 2016 Mr Maharaj again applied in writing to the respondent for stabling facilities at its Summerveld facility. On 22 January 2016 the respondent's attorneys, Barkers, wrote to Mr Maharaj informing him that the respondent was unable to accede to his request for the reasons set out in their letter.

[13] On receipt of the above letter Mr Maharaj lodged a complaint of unfair discrimination based on race in the Equality Court, Durban, under case number 09/2016 (the 2016 case). At a directions hearing the learned magistrate Mr van Rooyen directed that the parties provide facts on affidavit that will be relied upon to establish their respective cases.

[14] On the adjourned date, Mr Maharaj duly filed his affidavit in which he confined his case to five (5) specific grounds which he intended to raise at the hearing. The respondent did not file an affidavit as directed by the court. Instead it filed a statement in which it raised a plea of *res judicata*. The Equality Court thereafter proceeded to deal with the matter solely on the plea of *res judicata* in the form of *issue estoppel*. Without hearing any evidence on the grounds raised by Mr Maharaj in his affidavit the court ruled that the matter was indeed *res judicata*.

[15] This appeal is against that decision. The order sought is one setting aside the decision of the Equality Court with costs and remitting the matter to that court for the leading of evidence before a different presiding officer.

[16] Before dealing with the proceedings as they unfolded before the learned magistrate Mr van Rooyen, it is necessary to consider the broad framework and objectives of the Equality Act[3] as well as the KwaZulu-Natal Gaming and Betting Act, *supra*.

THE EQUALITY ACT

[17] The Equality Act was enacted pursuant to the provisions of section 9 of the Constitution which deals with the issue of equality, being one of the fundamental rights enshrined in the Bill of Rights (Chapter Two). Section 9 of the Constitution provides as follows:

> '9. Equality –
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status,

[3] The broad purpose and scheme of the Equality Act have been dealt with extensively by Navsa JA in *Manong v Department of Road* (No. 2) 2009 (6) SA 589 (SCA). I can do no better than to borrow therefrom.

ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against any one on one or more grounds in terms of subsection (3) National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[18] Section 2 sets out the objects of the Equality Act as follows:

'(a) to enact legislation required by section 9 of the Constitution;

(b) to give effect to the letter and spirit of the Constitution, in particular—

(i) the equal enjoyment of all rights and freedoms by every person

(ii) the promotion of equality;

(iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

(v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)*(c)* of the Constitution and section 12 of this Act;

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;

(g) to set out measures to advance persons disadvantaged by unfair discrimination;

(h) to facilitate further compliance with international law obligations…'

[19] The Equality Court is aimed at these objectives and in particular in determining whether discrimination has occurred and if so, whether it is unfair.

[20] Section 16, under the heading 'Equality courts and presiding officers', establishes equality courts. The relevant parts of s 16 previously read as follows:[4]

> '(1) For the purposes of this Act, but subject to section 31 ─
>
> …
>
> (2) Only a judge, magistrate or additional magistrate who has completed a training course as a presiding officer of an equality court─
>
> before the date of commencement of section 31; or
>
> (b) as contemplated in section 31(4), and whose name has been included on the list contemplated in subsection (4)*(a)*, may be designated as such in terms of subsection (1).
>
> (3) …
>
> (4) The Director-General of the Department must compile and keep a list of every judge, magistrate and additional magistrate who has─
>
> (a) completed a training course as contemplated in section 31(4) and (5); or
>
> (b) been designated as a presiding officer of an equality court in terms of subsection (1).
>
> (c)
>
> (5) A presiding officer *must perform the functions and duties and exercise the powers assigned to or conferred on him or her* under this Act or any other law.' (my emphasis).

[4] It is to be noted that section 16 has undergone significant amendments from when the Act first came into effect, for instance, subsections (2) and (4) referred to above have since been deleted. These sections were referred to above to illustrate the training requirement of the presiding officers in such courts.

[21] In s 4(1) of the Equality Act, under the heading 'Guiding principles', the following is stated:

> 'In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:
>
> (a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings;
>
> (b) access to justice to all persons in relevant judicial and other dispute resolution forums;
>
> (c) the use of rules of procedure in terms of section 19 and criteria to facilitate participation;
>
> (d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature;
>
> (e) the development of *special skills and capacity* for persons applying this Act in order to ensure effective implementation and administration thereof.' (my emphasis).

[22] Section 17 provides for the appointment of clerks of equality courts to assist the court to which they are attached to perform prescribed functions. Section 20 provides for the institution of proceedings in terms of or under the Equality Act. Section 20(1) provides that any person may act in his/her own interest or on behalf of persons who are unable to do so themselves or as a member of or in the interest of a group or class of persons. Furthermore, a person may act in the public interest. Section 20(1) also entitles associations to act in the interest of their members and provides that the Human Rights Commission or the Commission for Gender Equality may institute proceedings in the Equality Court.

[23] Section19(1) of the Equality Act provides that the Magistrates' and High Court rules apply, with the necessary changes required by the context, to equality courts in so far as these provisions relate to ─

> '(a) the appointment and functions of officers;
> (b) the issue and service of process;
> (c) the execution of judgments or orders;
> (d) the imposition of penalties for non-compliance with orders of court, for obstruction of execution of judgments or orders, and for contempt of court;
> (f) jurisdiction, subject to subsection (3), and in so far as no other provision has been made in the regulations under section 30 of this Act.'

[24] In terms of s 20(2), a person wishing to institute proceedings in the Equality Court is obliged to notify the clerk of the court, in the prescribed manner, of its intention to do so. The clerk, in turn, is obliged to refer the matter to a presiding officer of the Equality Court in question who must decide whether the matter should be dealt with by the Equality Court or whether it should be referred to 'another appropriate institution, body, court, tribunal or other forum', which, in the view of the presiding officer, can deal more appropriately with the matter in terms of that alternative forum's powers and functions.

[25] If the decision is that the Equality Court should hear the matter, the clerk of the Equality Court must assign a date for the hearing of the matter. In making a decision as to the appropriate forum the presiding officer 'must' take all

relevant factors into account, including those listed in s 20(4), which includes the needs and wishes of the parties, particularly of the complainant.

[26] Regulations have been promulgated regulating the procedures to be followed in connection with an enquiry in terms of the Equality Act. The relevant regulations are the following:

26.1 The regulations provide that if the matter needs to be heard in the Equality Court the presiding officer 'must refer the matter to the clerk who must, within three days after such referral assign a date for the directions hearing' and inform the complainant of that date. Regulation 8 provides for witnesses to be subpoenaed and for compelling documentary evidence. Regulation 10 (1) states that the enquiry must be conducted <u>in an expeditious and informal manner, which facilitates and promotes participation by the parties</u>. Regulation 10 (3) provides that the proceedings should, where possible and appropriate, be conducted in an environment conducive to participation by the parties. (my emphasis)

26.2 At a directions hearing the presiding officer 'must give directions in respect of the conduct of the proceedings as he or she deems fit. After hearing the parties the presiding officer may make an order in respect of a range of issues, including discovery, interrogatories, admissions, the limiting of disputes, the joinder of parties, *amicus*

curiae interventions, the filing of affidavits, the giving of further particulars, the time and place of future hearings, procedures to be followed in respect of urgent matters and the giving of evidence at the hearing, including whether evidence of witnesses is to be given orally or by affidavit or both.

26.3 Regulation 10(5) (d) is noteworthy. It provides that in order to give effect to the guiding principles contemplated in s 4 of the Equality Act, and in dealing with how the enquiry is to be conducted, the presiding officer

> 'must, as far as possible, follow the legislation governing the procedures in the court in which the proceedings were instituted, with appropriate changes *for the purpose of supplementing this regulation* where necessary, but may in the interest of justice and if no-one is prejudiced deviate from these procedures after hearing the views of the parties to the proceedings.' (my emphasis).

26.4 Regulation 10 (7) states that, 'save as is otherwise provided for in these regulations, the law of evidence, including the law relating to competency and compellability, as applicable in civil proceedings, applies in respect of an enquiry: Provided that in the application of the law of evidence, fairness, the right to equality and the interest

of justice should, as far as possible, prevail over mere technicalities. (my emphasis)

[27] Returning to the provisions of the Equality Act, Section 21 sets out the powers and functions of the equality court. Section 21(1) reads as follows:

> 'The equality court before which proceedings are instituted in terms of or under this Act must hold an enquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.'

[28] After holding an enquiry the court may make any of the orders set out in s 21(2). For present purposes the following are important:

'(a) an interim order;
(b) a declaratory order;
(c) …
(d) an order for the payment of any damages …
(e) …
(f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, …;
(g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant …;
(h) an order for the implementation of special measures to address the unfair discrimination …;
(i) an order directing the reasonable accommodation of a group or class of persons…;
(j) …
(k) an order requiring … an audit of specific policies or practices …;
(l) …
(m) a directive requiring … regular progress reports …;

(n) …

(o) an appropriate order of costs …;

(p) an order to comply with any provisions of the Act.'

[29] In terms of s 21(4), during or after an enquiry a court may refer any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.

[30] In terms of s 21(5), the court 'has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.'

[31] Section 13 deals with the burden of proof when the Equality Court determines a complaint. It provides that if a complainant has made out a *prima facie* case of discrimination, the respondent must prove that it did not take place, or that it was not based on one or more of the prohibited grounds, which includes race. Furthermore, if discrimination has taken place on a prohibited ground, then it is deemed unfair, unless the respondent proves that it is fair.

[32] A complaint may, of course, be premised on any of the grounds set out in ss 6 to 12. These sections prohibit unfair discrimination in general and then specifically on grounds of race, gender and disability. Section 10 prohibits hate

speech. Section 11 prohibits harassment and s 12 prohibits the dissemination and publication of information that unfairly discriminates.

[33] Section 14 sets out the many factors that must be taken into account in determining whether the discrimination is fair. These include the context, whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned. Some of the other factors are whether the discrimination is systematic, has a legitimate purpose and to what extent it achieves its purpose. (my emphasis)

[34] As pointed out by Navsa JA in *Manong, supra* (para 52), if one reads the preamble to the Equality Act and considers the provisions set out above, it is clear that

> 'the legislature intended to promote the restructuring and transformation of our society and institutions, away from the deeply imbedded systematic inequalities and unfair discrimination that still prevail, and to affect practices and attitudes that undermine the best aspirations of our constitutional democracy'. (my emphasis)

[35] He further points out that (para 53)

> '[i]t is abundantly clear that the Equality Court was established in order to provide easy access to justice and to enable even the most disadvantaged individuals or

communities to walk off the street, as it were, into the portals of the Equality Court to seek speedy redress against unfair discrimination, through less formal procedures.'

[36] From the above, it is clear that the proceedings in the Equality Court are less formal and provide for convenient and easy access in order to correct an act of discrimination and to seek redress in respect thereof.

[37] Before leaving this broad framework and objectives of the Equality Act, it is important to have regard to certain specific definitions as well as certain other provision which apply to the complainant herein and the complaint lodged by him in the Equality Court.

37.1 The relevant definitions in section 1 of Chapter 1 are the following:

> "discrimination" means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –
> (a) imposes burdens, obligations or disadvantages on; or
> (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;
>
> "equality" includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes;
>
> "prohibited grounds" are –
> (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).

37.2 Section 3 deals with the interpretation of the Act and provides as follows:

"3. Interpretation of Act –

(1) Any person applying this Act must interpret its provisions to give effect to –

(a) The Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination;

(b) the Preample, the objects and guiding principles of this Act, thereby fulfilling the spirit, purport and objects of this Act.

(2). Any person interpreting this Act may be mindful of –

(a) any relevant law or code of practice in terms of a law;

(b) international law, particularly the international agreements referred to in section 2 and customary international law;

(c) comparable foreign law;

(3) Any person applying or interpreting this Act must take into account the context of the dispute and the purpose of this Act." (my emphasis)

37.3 Section 7 deals with the prohibition of unfair discrimination on ground of race and provides as follows:

"7. Prohibition of unfair discrimination on ground of race –

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 which 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 those 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."

THE KWAZULU-NATAL GAMING AND BETTING ACT

[38] The KwaZulu-Natal Gaming and Betting Act is a progressive piece of legislation which came into operation in December 2010. Apart from providing for the regulation of gaming, horse racing and betting in the Province, it also provides for the establishment of a Gaming and Betting Board in Chapter 2, the objects of which are set out in section 6, the relevant parts of which read as follows:

'6. Objects of Board.—
(1) The objects of the Board are to—
(a)…
(b)…
(c) promote opportunities for historically disadvantaged persons to participate in the horse racing and betting industries in the capacity of

any of the persons required to be licensed or registered in terms of section 89, 94, 103, 110 or 111;

(d) increase the ownership stakes of historically disadvantaged persons in the horse racing and betting industries;

(e) develop appreciation for and knowledge of horse racing amongst all communities, particularly those comprised of historically disadvantaged persons; and

(f)…

(2) For purposes of this section, a person is historically disadvantaged if that person is—

(a) a natural person, who before the Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993), came into operation, was disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion; or

(b) …

(3) The responsible Member of the Executive Council may issue directives to the Board relating to the objects of the Board contemplated in subsection (1) (c), (d), (e) and (f).'

GOLD CIRCLE'S LICENCE CONDITIONS

[39] As far as Gold Circle is concerned it holds a licence to conduct horseracing, a sporting event or other event or contingency in terms of the KwaZulu-Natal Gaming and Betting Act. The terms and conditions of its licence are set out in various schedules. Clause (a) of Schedule C provides that the licenced racecourse must be established and operated in accordance with all applicable laws, including the National Gambling Act 7 of 2004 and the regulations promulgated thereunder, the KwaZulu-Natal Gaming and Betting Act 8 of 2010 and the regulations promulgated and the rules made thereunder,

and the terms and conditions of the licence and directions given by the KwaZulu-Natal Gaming and Betting Board from time to time.

[40] Gold Circle is also obliged in terms of its licence conditions to adhere to the transformation goals contained therein. For instance, by 30 June 2013 Gold Circle was to have at least 24% effective Black membership/ownership/ shareholding, by 31 December 2013 it was required to increase this figure to 26% and within a period of the next five (5) years (as from date of its licence), at least 40% of senior and middle managers were required to be Black. Most importantly, in terms of Schedule 5 of its licence conditions, Gold Circle was obliged to comply fully with the transformation minimum standards and/or guidelines adopted by the Board in respect of the horseracing and betting industry. Additionally, in terms of its licence conditions, Gold Circle was obliged, from time to time, to submit to the Board proof of progress relating to these matters. I mention all of this purely to illustrate that quite apart from the other business which the Board is required to conduct in terms of the Act, transformation of the horseracing and betting industry in this Province is an important objective which it seeks to achieve.

PROCEEDINGS BEFORE THE EQUALITY COURT (2016 case)

[41] As mentioned already, Mr Maharaj appeared before the Equality Court presided over by Mr G H van Rooyen, on 25 May 2016. At that stage Mr

Maharaj was unrepresented while Gold Circle was represented by counsel, Mr Boulle, both in the court *a quo* and at the appeal hearing before us on 30 August 2016.

[42] At the commencement of this judgment I alluded to the fact that the proceedings in the court *a quo* were anything but fair. This was largely due to the manner in which the learned magistrate conducted himself at the time. The record shows that the learned magistrate was simply not prepared to allow Mr Maharaj to place his case before the court. From the outset the learned magistrate adopted a bombastic and belligerent attitude; he was extremely impatient and off-handish to the point of being rude. He displayed his impatience by badgering Mr Maharaj and continuously interrupted him as he attempted to present his case. Inasmuch as Mr Maharaj sought to persuade him that he was required to listen to the evidence which he intended adducing, the learned magistrate flatly refused to allow him to do so. A most disturbing feature of the learned magistrate's utterances is that he made it obvious, perhaps unintentionally, that he had no time to read through all the papers thus indicating, quite explicitly and unashamedly, that he was not adequately prepared to hear the matter.

[43] The result of all this was that Mr Maharaj was left in quite a helpless situation. His attempts to convince the learned magistrate that the nature of the

evidence he intended calling was not only new but was also directly related to the issue of race and the objections raised by the respondent, were futile. This attitude by the learned magistrate meant that Mr Maharaj was not even allowed to establish a *prima facie* case. The record indicates that in the course of the exchange between the learned magistrate and Mr Maharaj, Mr Boulle informed the court that the matter was *res judicata* (as far as the respondent was concerned) and that the matter could only be adjudicated upon on any new evidence presented by Mr Maharaj.

[44] The following exchange between the learned magistrate and Mr Maharaj at page 23 of the record provides some insight into the learned magistrate's attitude and his reluctance to deal with the matter:

> "COURT I don't want to deal with matters that has already been dealt with. I can't.
>
> MR MAHARAJ These matters has never been heard by any Court.
>
> COURT No, there is only one matter, there is no other matters, there is only one matter and this is the application.
>
> MR MAHARAJ I understand that, but whatever is put herein these papers has never been dealt with by any other Court, Appeal Court of High Court, so the Equality Act, Your Worship … [intervention]
>
> COURT I haven't had time to look at this.
>
> MR MAHARAJ … gives me the right to talk about anything from 2003, 16 June 2003 … [intervention]
>
> COURT No, no, no, no.
>
> MR MAHARAJ …the advent of the Equality Act.
>
> COURT No, no, no, unfortunately that doesn't happen, no, that is not how it works, maybe you – that's why I said you are welcome to go and see a

> legal representative, because that is no how it works, I have now repeated myself and will repeat myself until you get tired of me, we are dealing with the specific matter where this complaint was made on the 13th of – or this request was made on 13 January and it was refused on 22 January, it is this application … [intervention]
>
> MR MAHARAJ Mm.
>
> COURT … that has been refused on the basis of unfair discrimination based on race.
>
> MR MAHARAJ So … [intervention]
>
> COURT It has nothing to do with what happened in 2003."

[45] The record is replete with similar exchanges right from the commencement of the proceedings. At some stage Mr Boulle informed the learned magistrate (page 28) that 'obviously if there is new evidence then obviously the complainant is perfectly entitled to raise it …' While Mr Maharaj insisted that the five (5) points he raised and on which he intended calling evidence were in fact new, the court *a quo* eventually directed, at the instance of Mr Boulle, that both parties should deliver affidavits in the matter. The hearing was adjourned for this purpose. As I pointed out already, while Mr Maharaj complied with the directive made by the court *a quo* and delivered his affidavit, the respondent did not. Instead it filed a statement in which it raised its plea of *res judicata*.

[46] On the adjourned date of 15 June 2016 Mr Maharaj, who was still unrepresented, took issue with the respondent's failure to deliver its affidavit as

previously directed by the court. On this occasion and contrary to his earlier view regarding the filing of affidavits, Mr Boulle was now of the opinion that there was no need for the respondent to file an affidavit but that if Mr Maharaj insisted on an affidavit they were prepared to hand up an affidavit from the respondent confirming that a special plea was raised. Faced with this legal issue as well as the respondent's heads of argument and bundle of authorities Mr Maharaj considered that he is required time to prepare. The matter was thereafter postponed to 19 July 2016. On this date Mr Maharaj informed the court that in view of the legal issue raised and his inability to deal with same, he sought the assistance of an attorney, Mr Lalbahadur, who was prepared to assist him but was not available at that stage. For this reason the matter was once again postponed to 26 August 2016.

[47] When the mater resumed on 26 August 2016 Mr Lalbahadur placed himself on record for Mr Maharaj and without more Mr Boulle commenced his argument on the plea of *res judicata* in the form of *issue estoppel*. In his argument Mr Boulle dealt with each of the five (5) grounds relied upon by Mr Maharaj, contending that none of them constituted new evidence which required consideration by the court. Mr Boulle contended that the same issue had been raised and determined in previous proceedings and that there was no need for the court to embark on a further enquiry.

[48] In response Mr Lalbahadur submitted that the 2016 complaint was based entirely on new evidence which was relevant and material to the issue before the court. He emphasised that there was a need for the court to hear the evidence before making a determination on the issue of *res judicata*. He further emphasised that the 'moral' issue raised by the respondent no longer applied as Mr Maharaj had rehabilitated himself by undergoing psychological counselling over a prolonged period. This was new evidence which was never tendered before. As for the 'commercial' reason (*viz* that Mr Maharaj was a bad debtor) advanced by the respondent, it was pointed out that this no longer applied as Mr Maharaj was in the process of liquidating the debt owing to Gold Circle. Mr Lalbahadur went on to contend that while there may be some issues that were already determined there were also new issues which required determination and that Mr Maharaj should at least be afforded the opportunity of calling such evidence. Needless to say that request was not acceded to with the learned magistrate proceeding to dismiss the complaint on the plea of *res judicata*.

MR MAHARAJ'S FIVE (5) POINTS OF COMPLAINT

[49] It is perhaps convenient at this stage to set out in summary form the five (5) grounds relied on Mr Maharaj insofar as the 2016 complaint was based. They are the following:

49.1 That the respondent failed to consider that he had undergone psychological counselling in order to deal with his anger issues.

49.2 That a fellow trainer of the white population group, Charles Laird, had also committed an assault in March 2012 against a 60 year old Black employee of Gold Circle in the course of his duties. Despite this Charles Laird continues to enjoy stabling facilities with the respondent.

49.3 That other White trainers from other provinces are also accommodated by the respondent with stabling facilities while Mr Maharaj is excluded.

49.4 That White employees of the respondent holding managerial positions such as M Nairac, D Furness and Gardiner were at some stage dismissed by the respondent but later re-employed.

49.5 That the respondent continues to transgress the conditions of its licence requirements by failing to effect transformation in terms of the KwaZulu-Natal Gaming and Betting Act.

BEFORE THIS COURT

[50] Mr Moodley who appeared on behalf of Mr Maharaj at the appeal hearing contended strongly that the court *a quo* simply erred in not affording Mr Maharaj the opportunity of establishing his case on the new evidence relating to the complaints referred to above. He submitted that the new evidence sought to be led was not subject to the plea of *res judicata* as raised by the respondent, that the causes of action giving rise to the 2016 case are different from those canvassed in the 2008 case and that therefore the plea of *res judicata* finds no

application in the 2016 case. It was further contended that the application of *issue estoppel* in circumstances where the court failed to examine the factual basis of the complaint based on new evidence, would create severe hardship and result in unfairness and inequity. I will in due course have regard to the nature of the evidence which formed the basis of Mr Maharaj's complaint before the court *a quo*.

[51] Mr Boulle, while initially trying to defend the ruling of the court *a quo* and the respondent's position, was eventually constrained to concede that some of the grounds relied on by Mr Maharaj were in fact not previously adjudicated upon. On this basis he accepted, correctly in my view that such issues would have to be fully ventilated and for that purpose the matter would have to be remitted back to the court *a quo* for a proper hearing.

FINDINGS

[52] I have already dealt with the learned magistrate's attitude towards Mr Maharaj when proceedings commenced before him on 25 May 2016. I have traversed this in some detail above. There is no point in saying anything more on this aspect other than to say that it fills one with a sense of disquiet. What the learned magistrate appeared to have forgotten completely is the fact that he was sitting as an Equality Court in which he was ordinarily required to approach the complaint before him with some sensitivity and with a measure of dignity. He

failed to appreciate that complaints that generally serve before the Equality Courts have all to do with unfair discrimination, hurt feelings, lost opportunities and a loss of dignity and respect arising out of one or more of the prohibited grounds referred to in Chapter 2 of the Equality Act. He failed to appreciate that the proceedings in such courts are less formalistic allowing for hearings to take place expeditiously and to facilitate the full participation of all parties concerned. Ultimately he failed to allow Mr Maharaj the opportunity to present his case before him. It is not clear why the learned magistrate adopted this attitude. Perhaps he was really not fully prepared to hear the matter as he so often alluded to on record. Perhaps he was not really prepared to listen to a matter involving a sensitive topic such as race. Or perhaps he did not receive the requisite training to deal with matters of this nature. Whatever the position, I hold that his attitude rendered the proceedings unfair from the start and on this basis alone the matter should be remitted to start afresh before a different judicial officer.

[53] Turning to the nature of the evidence that Mr Maharaj sought to lead, Mr Boulle quite fairly and correctly, in my view, accepted that the evidence concerning Mr Maharaj's psychological counselling and his efforts to deal with his anger issues, is relevant insofar as it goes to establishing that he has redeemed himself and is a changed person. The expert evidence he intends calling is that of Professor A E Gangat, a Specialist Psychiatrist, and Dr Meriam

Motala, a Clinical Psychologist. In my view, Mr Maharaj should not be restricted to these experts only and should be allowed to call any other evidence on this issue should it be necessary. This evidence is also relevant to overcome one of the objections raised by the respondent regarding his application for membership, namely, the objection based on the so-called 'moral issue' which the respondent continues to throw into his face.

[54] The nature of the second piece of evidence that Mr Maharaj intends leading relates to the so-called 'second Laird assault' incident which occurred in 2012, well after the 2008 case and the appeal that followed. This evidence is not only new but it is also relevant to the issue before the Equality Court. It must be borne in mind that the appellant was suspended for a period of five (5) years for his assaults in 2002 while *prima facie* it appears that Laird on the other hand was merely given a slap on the wrist. This evidence would also establish whether the respondent has differentiated between Laird and Mr Maharaj on racial grounds by continuing to provide stabling facilities to Laird while denying such opportunity to Mr Maharaj.

[55] The third category of evidence relates to other white trainers from outside the province who enjoy stabling facilities with the respondent while Mr Maharaj continues to be denied same. Once again, this evidence may be relevant to show that the respondent denies such facilities to Mr Maharaj on racial grounds.

[56] The fourth category of evidence relates to the re-employment of certain white officials of the respondent. This evidence, while strictly not relevant to the issue before the Equality Court is nonetheless relevant insofar as the transformation goals set by the Board in terms of the KwaZulu-Natal Gaming and Betting Act are concerned. According to Mr Maharaj the issue of re-employment of these officials was never raised or addressed in any of his previous complaints which served before the Equality Court.

[57] The fifth category of evidence also relates to the transformation goals which are required to be met by the respondent in terms of the conditions set by the Board and which attach to the respondent's licence.

[58] It bears mentioning that apart from the so-called moral issue which the respondent continues to rely on for denying Mr Maharaj stabling facilities, the other reason is what it refers to as a 'commercial reason'. The respondent continues to raise this as a reason to show that Mr Maharaj is a bad debtor in that he still owes the respondent moneys in respect of stabling facilities previously held by him. The evidence on record, however, suggests that by arrangement with the respondent Mr Maharaj continues to pay them R100,00 per month and is in fact slightly ahead with his payments in this regard. Perhaps it would be necessary for him to satisfy the Equality Court that the commercial

reason advanced by the respondent in its letter of 22 January 2016 is not the real reason why he continues being denied stabling facilities. In any event, I consider that the respondent is obliged to assist Black trainers such as Mr Maharaj through its 'transformation fund' established in terms of the KwaZulu-Natal Gaming and Betting Act. Should the evidence establish that Mr Maharaj as a previously disadvantaged individual does in fact qualify for such financial assistance, the commercial reasons raised by the respondent could fall by the wayside.

[59] All in all, I consider that the 2016 complaint lodged by Mr Maharaj is based largely on a new cause of action which requires adjudication by the Equality Court. In my view, the Court is thus obliged to hear the evidence before hastily concluding whether a plea of *res judicata* based on *issue estoppel* really finds application.

[60] It must be borne in mind that Mr Maharaj's complaint is grounded in section 7 of the Equality Act which deals exclusively with unfair discrimination on grounds of race. Sections 7(c) and (e) make it clear that racial discrimination based on exclusivity and the denial of access to opportunities is unlawful. Of particular importance in this regard is the denial of contractual opportunities specified in s7(e).

[61] Sections 4(i)(a) and 4(i)(b) specifically provide that cases brought before the Equality Court must be determined expeditiously and informally. Paramount to these provisions is the issue of access to justice in the form of access to a court. In this respect as well the court *a quo* erred in finding that the issues raised by Mr Maharaj were traversed in previous litigation, without first hearing the evidence. Section 3(3) of the Act requires a presiding officer to take into account the context of the dispute for purposes of the Act. In the present matter the context of the dispute raised by Mr Maharaj can only be determined in light of the evidence that is called.

CONCLUDING REMARKS

[62] By all accounts this is a rather sad case. Inasmuch as it is a case of one man's pursuit of justice and the right to engage in economic activity of his choice in a country that guarantees such a right, it is also symptomatic of the plight of thousands of other people in this country, mainly Black, who struggle on a daily basis for justice, equality and more importantly, the right to earn a living.

[63] As I pointed out earlier, Mr Maharaj's battle to enter the horseracing industry in this country started in 1989. Having been denied that opportunity by the Jockey Club because of the colour of his skin, he was forced to leave the country to pursue his passion in Australia. Returning to the country in 1997

after the dismantling of apartheid he could have been forgiven for believing that his struggle to enter the local industry would now be a smooth one. It was clearly not. Fifteen (15) years on and after seeing out his five (5) year suspension in 2007, his battle to re-enter the industry continues unabated. This is mainly due to the position adopted by the respondent which is in charge of horseracing in this Province. While the respondent may seek to maintain that it is a private company and is entitled to act as it pleases, it should be reminded that it operates under the auspices of the KwaZulu-Natal Gaming and Betting Act and the terms and conditions which are attached to its licence by the Board. This being the case, it is required by law, to give effect to the transformation goals entrenched in the KwaZulu-Natal Gaming and Betting Act and the rights enshrined in the Constitution. By continuously raising the so-called 'moral' and 'commercial' reasons for excluding Mr Maharaj from the industry the respondent shows that it is simply not prepared to change.

[64] I accordingly conclude that justice will be served if this matter is remitted back to the Equality Court to commence *de novo* before a different presiding officer. Mr Maharaj should be entitled to lead whatever relevant evidence he wishes to relating to the 2016 complaint. It goes without saying that the respondent will be entitled to lead such evidence at it considers necessary to prove, on the facts before the court, that the discrimination that Mr Maharaj alleges did not take place. As far as the issue of costs is concerned I hold that

Mr Maharaj has been substantially successful in this appeal and there is accordingly no reason why he should not be entitled to his costs.

ORDER

[65] The order I make is the following:

65.1 The appeal is upheld and the ruling of the court *a quo* is set aside.

65.2 The matter is remitted back to the Equality court, Durban, to commence *de novo* before a different presiding officer.

65.3 The respondent is ordered to pay the appellant's costs of appeal, such costs to include the costs of Counsel.

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SEEGOBIN J

I agree.

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BALTON J

COUNSEL FOR THE APPELLANT:	Mr S Moodley (Instructed by Narain Naidoo & Associates)
COUNSEL FOR THE RESPONDENT:	Mr Boulle (Instructed by Barkers Attorneys)
DATE OF HEARING:	23 September 2017
DATE OF JUDGMENT:	17 September 2017