THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1313/17

In the matter between:

GOLD CIRCLE (PTY) LTD **APPLICANT**

and

ANIL B MAHARAJ **RESPONDENT**

Neutral citation: *Gold Circle (Pty) Ltd v Maharaj* (1313/17) [2019] ZASCA 93 (3 June 2019)

Coram: Majiedt, Wallis, Saldulker and Molemela JJA and Weiner AJA

Heard: 6 May 2019

Delivered: 3 June 2019

Summary: Complaint of unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 – earlier application dismissed by Equality Court – whether second referral precluded by the operation of doctrine of *res judicata* or issue estoppel – remittal to Equality Court for *de novo* hearing.

ORDER

On appeal from KwaZulu-Natal Division of the High Court, Pietermaritzburg (Seegobin and Balton JJ sitting as court of appeal):

1 The application for leave to appeal is granted.

2 Save to the extent as set out in paragraph 3 below, the appeal is dismissed with costs.

3 Paragraph 2 of the order of the court a quo is set aside and substituted with the following:

'The matter is remitted to the Equality Court for a hearing *de novo* before any presiding officer.'

JUDGMENT

Molemela JA (Majiedt, Wallis, Saldulker JJA and Weiner AJA concurring**)**

Introduction

[1] The respondent, Mr Anil Bhagwan Maharaj, a professional racehorse trainer, instituted proceedings in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) alleging that the applicant, Gold Circle (Pty) Ltd (Gold Circle), a racing operator, had unfairly discriminated against him on racial grounds. His claim was instituted in the Durban Magistrate's Court sitting as the Equality Court. At the directions hearing held at the Equality Court (presided over by Magistrate van Rooyen), Gold Circle raised a special plea of *res judicata* in the form of issue estoppel. The Equality Court upheld the special plea and dismissed Mr Maharaj's claim with costs.

[2] Mr Maharaj appealed against the finding of the Equality Court to the KwaZulu-Natal Division of the High Court (Seegobin and Balton JJ) (the court a quo). It upheld

that appeal with costs and remitted the matter to the Equality Court for a hearing *de novo* before another magistrate. Gold Circle unsuccessfully sought leave to appeal that decision. On petition to this court, the matter was referred for oral argument as contemplated in s 16(1)*(c)* read with s 17(2)*(d)* and *(e)* of the Superior Courts Act 10 of 2013. The parties were also directed to be prepared to argue the merits of the appeal at the hearing.

Issues

[3] Accordingly, the first issue to be determined is whether or not Gold Circle should be granted leave to appeal. The second issue is whether the court a quo was correct in not upholding the special plea of *res judicata*. The final issue is whether, if the matter is remitted, Magistrate van Rooyen is disqualified from hearing it and whether the issues should be circumscribed.

Factual Background

[4] In order to determine whether the special plea was properly upheld, it is necessary to examine the factual background of this litigation, which has a rather long and troubled history. Mr Maharaj leased stables from Gold Circle for a number of years. In 2002 the National Horse Racing Authority (NHA) found Mr Maharaj guilty of two counts of assault, one in relation to a jockey and the other in respect of a steward. The sanction imposed on him was an order suspending his training licence for 5 years. As a sequel to the NHA's finding, Gold Circle ordered Mr Maharaj to remove his horses from the stables it had leased to him. It took Mr Maharaj three months to transfer the horses he was training to other trainers. This rendered him liable to Gold Circle for the rent in respect of the stables for that period. It is common cause that Mr Maharaj did not settle the arrear rent at that stage.

[5] Following the expiry of his period of suspension, Mr Maharaj decided to resume his racehorse-training activities. He accordingly approached Gold Circle seeking stabling facilities as well as funding from the transformation fund Gold Circle was statutorily required to ring-fence for previously disadvantaged persons operating in the horseracing industry. Both requests were denied by Gold Circle and no reasons were furnished. Having formed the view that the refusal to grant him facilities and funding was prompted by unfair racial discrimination on account of his being

Indian, Mr Maharaj lodged a complaint of unfair discrimination with the Magistrate's Court, Durban, sitting as the Equality Court (the 2008 claim). Gold Circle defended the claim.

[6] The essence of Gold Circle's defence was that the reasons for denying Mr Maharaj's request had nothing to do with unfair discrimination. It was alleged that its refusal was based on his previous misconduct, coupled with his failure to settle his indebtedness to Gold Circle in respect of arrear rent. In a judgment handed down in May 2011, the Equality Court found that the reasons advanced by Gold Circle were sound. It dismissed Mr Maharaj's claim with costs on the basis that he had not shown that Gold Circle had unfairly discriminated against him. Mr Maharaj appealed against that judgment.

[7] In its appeal judgment delivered in November 2012, the KwaZulu-Natal High Court endorsed the Equality Court's findings and held that Gold Circle had shown what it termed 'moral' and 'commercial' reasons for its refusal to accede to the requests. It considered the moral reason to be Mr Maharaj's previous misconduct which had culminated in his suspension by the NHA and the commercial reason to be Mr Maharaj's failure to liquidate his indebtedness in respect of arrear rent and the cost orders previously granted against him in favour of Gold Circle. Mr Maharaj was refused leave to appeal that judgment by both the high court and this court.

[8] In 2013, Mr Maharaj again approached the Equality Court (Magistrate Motala), this time citing the KwaZulu-Natal Gambling Board as the first respondent, the Premier of KwaZulu-Natal as the second respondent and Gold Circle as the third respondent. That court ruled that it had no jurisdiction to entertain the complaint as it amounted to a review of administrative action. Mr Maharaj's attempts to appeal against that ruling were unsuccessful.

[9] On 13 January 2016 Mr Maharaj once again approached Gold Circle for the renting of stables and for financial assistance from its empowerment fund. His application was couched as follows:

'**Application for training / stabling facilities at Summerveld**

Dear Sir

I am a horse trainer since 1993. My career started off in Australia, then I moved to South Africa in 1997 until 2002, when I was suspended.

Racing has been my passion and that is what I dedicated my life to.

During my suspension and more recently, despite efforts, I have found it extremely difficult to focus on other alternative careers. My focus remains with horse racing.

I have decided to approach you humbly again with a request to be allocated boxes and training facilities at your facility in Summerveld in order that I may resume working.

A lengthy period of time has passed. I am aware that I had experienced some anger management problems in the past. To this end, over a period of 7 years, I have enrolled in various programmes and counselling to learn strategies and techniques to manage anger. I am now confident in my ability to control my emotions.

I am acutely conscious of the fact that I owe you money and the only way I can repay you is if I go back to work and start earning money so [that] I can make some arrangements with you.

In the conditions stipulated by the KZN Betting and Gaming Board there is a clause stating that the historically previously disadvantaged persons should be assisted financially and if my request for boxes and facilities is accepted I would apply for such funds in the hope that you [will] look kindly at my request.'

[10] On 22 January 2016 Gold Circle advised Mr Maharaj of its refusal to accede to his request, advancing a number of factors, the sum total of which amounted to the 'moral reason' and 'commercial reason' as referred to in the High Court judgment relating to the 2008 complaint. Mr Maharaj then referred an unfair discrimination complaint to the Equality Court (the 2016 claim), again claiming to have been unfairly discriminated against on the basis of his Indian descent. His claim for unfair discrimination rested on five grounds. First, he averred that he had received counselling for his anger-management issues. The second ground was that there was disparity of treatment because stabling facilities were denied to him on account of being found guilty on the assault charges, while a white horserace trainer, namely Mr Laird, was still being afforded stabling facilities despite having been found guilty of assault in 2008 and 2012. In the third ground relied upon, Mr Maharaj alleged that

Gold Circle had exhibited unfairly discriminated against him insofar as white trainers who had committed other transgressions were still being afforded stabling facilities. The example he cited was that of Mr Lafferty, who had allegedly administered prohibited drugs to racehorses, was dismissed but was later re-employed by Gold Circle. As his fifth ground Mr Maharaj averred that Gold Circle was transgressing its licensing conditions by failing to meet the statutory transformation requirements. Gold Circle contended that with the exception of the first ground, the rest of the grounds had already been considered in previous proceedings and had already been found to be *res judicata* in the 2013 judgment of Magistrate Motala. It contended that the first ground was irrelevant to a claim of unfair racial discrimination.

[11] The 2016 claim was allocated to Magistrate van Rooyen. At the directions hearing, he requested the parties to file affidavits setting out the facts on which they would rely to prove their respective cases. In due course, Mr Maharaj filed his affidavit, but Gold Circle instead raised a plea of *res judicata* and filed written submissions in that regard. Mr Maharaj's response was that he had, in the 2016 complaint, raised a number of issues that had previously not been raised in his complaints to the Equality Court. The Equality Court found that Mr Maharaj had not raised any new issues and accordingly upheld the plea of *res judicata* in the form of issue estoppel.

[12] Dissatisfied with that finding, Mr Maharaj appealed to the court a quo. The crisp issue before that court was whether the Equality Court's ruling in respect of the *res judicata* plea was correct or not. The court a quo upheld the appeal. It held that the 2016 complaint was based on a new cause of action. It also held that the facts pertaining to the anger management therapy allegedly received by Mr Maharaj constituted new evidence that was relevant to the claim of unfair discrimination. It further found that the second incident of assault pertaining to Mr Laird and the alleged infractions of Mr Lafferty were new facts that had not been considered by the Equality Court.

[13] Gold Circle's attack on the court a quo's judgment is principally on the following grounds. It contended that the first ground was irrelevant for purposes of determining whether or not Mr Maharaj had been discriminated against on the basis

of his race. With regards to the other grounds raised by Mr Maharaj, it maintained that they were previously considered by the Equality Court and were merely being rehashed in the 2016 complaint. With specific reference to the second assault committed by Mr Laird, it held that this had been raised in the 2013 complaint that served before the Equality Court (Magistrate Motala), in which he not only ruled that the Equality Court had no jurisdiction, but also expressly stated that the assault claims had previously been entertained and were thus *res judicata*.

[14] Before this court, Mr Maharaj contended that, whereas Mr Laird and Mr Lafferty had committed transgressions similar to his, Gold Circle continued to afford them stabling facilities but refused to grant him the same facilities. It further denied his request for a grant from the empowerment fund. He considered Gold Circle to have exhibited a disparity of treatment which was prompted by racial discrimination and considered the reasons it had proffered to be a farce. He asserted that its refusal to accede to his requests denied him an opportunity of participating in the horseracing industry and thus amounted to discrimination as contemplated in s 1 of PEPUDA.

[15] Gold Circle, on the other hand, maintained that its refusal to accede to Mr Maharaj's requests was motivated by the same commercial and moral reasons which another court had already found to be valid. It argued that the misdemeanours of Mr Laird and Mr Lafferty were not comparable. It denied having unfairly discriminated against Mr Maharaj. Its alternative defence was that in the event that it is found that there was differential treatment amounting to discrimination, then such discrimination is not unfair. Gold Circle contended that the finding of the Equality Court in respect of the 2016 claim was correct, as all the legal requirements of issue estoppel have been met. Mr Maharaj on the other hand, maintained that none of the five grounds he had raised were previously pronounced upon by another court.

Discussion

a) Res Judicata

[16] It is appropriate at this stage to first dispose of the issue raised in respect of the remarks made by Magistrate Motala in relation to the issue of *res judicata*. It is well established that a court's finding of its lack of jurisdiction prevents any binding

decision by that court on the merits of the matter.[1] It follows that the only finding that is binding in relation to the 2013 Equality Court case before Magistrate Motala is the one in terms of which he found that the Equality Court had no jurisdiction to hear the case as he considered it to be an application for review. His views on *res judicata* were obiter and not binding.

[17] As stated before, Mr Maharaj's complaint is premised on the provisions of PEPUDA. The objects of PEPUDA are, inter alia, to enact legislation required by s 9 of the Constitution; to give effect to the letter and spirit of the Constitution, in particular the equal enjoyment of all rights and freedoms by every person; the promotion of equality; the prevention of unfair discrimination and protection of human dignity as contemplated in ss 9 and 10 of the Constitution; to provide for procedures for the determination of circumstances under which discrimination is unfair; and to provide remedies for victims of unfair discrimination.

[18] The relevant definitions in terms of terms of s 1 of the Act are as follows:

'"**discrimination"** means 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;

"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 . . . .'

[19] It is trite that the expression *res judicata* means that the dispute raised for adjudication has already been finally decided. In terms of the common-law, the three requisites of *res judicata* are: that the dispute to be adjudicated relates to the same parties, for the same relief and in relation to the same cause. With time, the common law requirements were relaxed, giving rise to the expression *issue estoppel*, which describes instances where a party can successfully plead that the matter at issue has

[1] See *Lewis & Marks v Middel* 1904 TS 291 at 303 and *The Master of the High Court, North Gauteng High Court, Pretoria v Motala NO & others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) paras 12-14.

already been finally decided even though the common law requirements of *res judicata* have not all been met.[2] The crux of the matter is whether the plea of *res judicata* in the form of issue estoppel was correctly upheld in relation to the 2016 claim. This requires a brief consideration of the applicable principles. In *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another*,[3] Brand JA gave a detailed exposition of the development of our law pertaining to *res judicata*. Any attempt to do more than that in this judgment would be supererogatory.

[20] Brand JA acknowledged issue estoppel as part of our law. He aligned himself with the following dictum enunciated in *Smith v Porritt & others*:[4]

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Bnnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, "unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals".'

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[2] See *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 670I-671B.
[3] *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 10.
[4] *Smith v Porritt & others* 2008 (6) SA 303 (SCA) para 10.

[21] Furthermore, Brand JA pointed out that the relaxation of the requirements of *res judicata* in this way creates the potential of causing inequity and unfairness that would ordinarily not arise upon application of the three Roman Dutch law requirements of *res judicata*. He warned that the application of issue estoppel be considered on a case by case basis in order to guard against the potential prejudice of impinging on the constitutional right of access to justice. The doctrine of *res judicata* must be carefully delineated and demarcated in order to prevent hardship and actual injustice to the parties.[5]

[22] The question that must be answered is whether there was any new evidence placed before the Equality Court in the 2016 claim, which was not previously adduced in the adjudication of the 2008 claim. For the reasons that follow, I am of the view that the answer to this question must be answered in the affirmative. First, the new evidence regarding Mr Maharaj having undergone extensive anger management counselling, is directly relevant to his previous infractions which resulted in his five year suspension. It was admitted in the answering affidavit on behalf of Gold Circle that this evidence is new. The reports of Professor Gangat, a specialist psychiatrist, and Dr Motala, a clinical psychologist, indicate that Mr Maharaj has successfully undergone anger management counselling and that he has responded positively to treatment. Mr Maharaj wishes to use this evidence to show that the reasons advanced by Gold Circle for its decision are a sham. Whether it does so is not for this court to decide, but Mr Maharaj is entitled to seek to use it for that purpose.

[23] The grounds of his complaint may be the same as in 2008, but Mr Maharaj contends that facts that have arisen since then may undermine the reasons given by Gold Circle. We do not say that they will, but he is entitled to advance them in support of his contentions.

[24] It follows that the finding of issue estoppel was an error on the part of the Equality Court. Given that finding, there is no reason why Mr Maharaj should be

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[5] *Molaudzi v S* [2015] ZACC 20 (CC); 2015 (2) SACR 341 (CC); *Royal Sechaba Holdings (Pty) Ltd v Coote & another* [2-14] ZASCA 85 (SCA); 2014 (5) SA 562 (SCA); *Prinsloo NO* supra fn2; *Holtzhausen & another v Gore NO & others* 2002 (2) SA 141 (C); *Man Truck and Bus (SA) (Pty) Ltd v Dusbus Leasing CC & others* 2004 (1) SA 454 (N).

precluded from placing evidence before the Equality Court. As no evidence was led in respect of the merits of the 2016 claim, the court a quo correctly remitted the matter to the Equality Court for a hearing *de novo*. This, however, is not the end of the matter.

b) Judicial Restraint

[25] I consider next the issue whether the court a quo's remarks constituted a lack of judicial restraint. It is indeed so that judicial officers wield great power.[6] While judges may have occasion to express critical views about litigants or witnesses, such criticism requires circumspection and must be supported by all the facts. Given its unfortunate history of structured racism, South Africa is still a racially charged society. That this is so, is evident from a number of cases recently brought before the courts in which accusations of racism are made. These cases attest to the far-reaching consequences that a mere accusation of racism may bring. Courts must therefore be alive to the sensitivity of disputes involving racial connotations. Circumspection is required not only in relation to the order that is ultimately made but also in relation to remarks made *en passant*. As aptly stated by a US Court of Appeal dealing with the materiality of racism, 'some toxins can be deadly in small doses.'[7]

[26] A proper determination of the matter warranted that the facts constituting new evidence be presented in the Equality Court be tested. The court a quo thus correctly remitted the matter to the Equality Court for evidence to be presented on the merits. However, given that the allegations of racism had not been tested by cross-examination and that Gold Circle had countered the allegations of its lack of transformation by presenting names of black people who had allegedly benefitted from transformation policies of Gold Circle, there was simply no basis for the court a quo to have made remarks from which it could be implied that Gold Circle is racist. The court a quo seems to have made findings pertaining to the very nub of the case based on unproved facts. This is contrary to established legal principles which dictate that inferences be drawn only if they are justified by proven facts. Moreover, since

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[6] See *S v Mamabolo [2001] ZACC 17;* 2001 (3) SA 409 (CC) para 15; *Cathay Pacific Airways Ltd and another v Lin and another* [2017] 2 All SA 722 (SCA) para 1.
[7] *Buck v Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division* 580 U.S (2017) at 19-20.

there were disputes of facts on that very aspect, it was impermissible for the court a quo to make the remarks it made on the basis of averments made by just one party.[8]

[27] Equally unjustified were the court a quo's conclusions regarding Magistrate Van Rooyen's state of readiness to proceed with the matter. The statement that Magistrate Van Rooyen had confessed to not having read the papers was taken out of context as he had referred to documents that had been handed up during the hearing. He later adjourned before giving his judgment and would obviously have had the time to peruse all the documents before giving judgment. On the conspectus of the record, there was also no justification for concluding that he had been rude to Mr Maharaj. In the absence of any suggestion as to how any party would potentially be prejudiced if the matter were to be remitted to Magistrate van Rooyen, there is therefore no cogent reason why he should be precluded from presiding over the matter in a *de novo* hearing.[9]

(c) Should the remittal to the Equality Court be circumscribed?

[28] Gold Circle contended that in the event that this court decided to remit the matter to the Equality Court for a *de novo* hearing, it should circumscribe the remittal by limiting Mr Maharaj to the five points raised in his complaint. The legal principles applicable to the remittal of a matter for a *de novo* hearing are well-established. The pleadings already filed in the matter continue to stand. In relation to this matter, the pleadings are Mr Maharaj's referral, Gold Circle's response thereto and all the affidavits filed in compliance with the directions made by Magistrate van Rooyen. Having said that, sight must not be lost of the clear provisions of PEPUDA and its regulations[10] in relation to the conduct of proceedings before the Equality Court. In terms of Regulation 10(1), the hearing must be conducted in an expeditious and informal manner which facilitates and promotes participation by the parties. Regulation 10(5)*(b)* provides that the presiding officer must give such directions in respect of the conduct of the hearing as he or she deems fit. Section 3(3) of PEPUDA also enjoins a presiding officer applying or interpreting PEPUDA to take

[8] See *Fischer & another v Ramahlele & others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 17 and 24.
[9] *S v Teek* (SA 44/2008) [2009] NASC 5 (28 April 2009) at para 31.
[10] Regulations made in terms of s 30 of the Promotion of Equality and Prevention of Unfair Discrimination, 2000 (Act 4 of 2000) published in Government Notice No. R. 764 of 13 June 2003 (Government Gazette No. 25065.

into account the context of the dispute lodged by the party referring the complaint and the purpose of the Act. It is therefore not for this court to prescribe how the adjudication of the matter at the Equality Court should unfold. Both parties will have to comply with any further directions that may be given by the magistrate who will preside over the matter pertaining to the giving of evidence at that hearing.[11]

Order

[29] In the result, the following order is made:

1 The application for leave to appeal is granted.

2 Save to the extent as set out in paragraph 3 below, the appeal is dismissed with costs.

3 Paragraph 2 of the order of the court a quo is set aside and substituted with the following:

'The matter is remitted to the Equality Court for a hearing *de novo* before any presiding officer.'

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M B Molemela
Judge of Appeal

[11] See Regulation 10(5)*(c)(xiii)*.

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