IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS746/06

In the matter between:

TITUS SELLO DITSAMAI APPLICANT

AND

GAUTENG SHARED SERVICES CENTRE RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This matter concerns the determination of a *point in limine* raised by the Respondent against the alleged automatically unfair dismissal claim lodged by the Applicant. The point in limine raised by the Respondent is based on *res judicata*.

Background

[2] The background facts are fairly common cause. The applicant was after responding to a newspaper advert called for an interview on the 30th April 2004 for the post of the Forensic Auditor, Level 8 by the respondent. The Applicant was pursuant to the interview offered a limited duration contract of employment as "temporary Junior Forensic Audit". The contract of employment was on the month to month basis for a maximum of six months.

[3] The two other people who responded to the advertisement were, Mrs Mirash Suklal (Suklal) and Andries Dippenaar (Dippenaar). They were respectively appointed, Senior Forensic Audit: Internal Audit Level 11 and Senior Forensic Supervisor Level 12.

[4] Subsequent to commencement of his employment, the applicant discovered that Dippenaar and Suklal were appointed as permanent employees. And when he came to know that the two other employees who applied at the same time with him were appointed on a permanent basis, the applicant lodged a grievance on the 22nd July 2004. In his grievance the applicant demanded that he be appointed on a permanent basis. The applicant was dismissed on the same day that he lodged his grievance, the 22nd July 2004. He thereafter referred an alleged unfair dismissal dispute to the CCMA. The CCMA found the dismissal to have been unfair and ordered the respondent to pay compensation.

[5] After accepting the payment and on the 22nd September 2006 the applicant referred another dispute to the CCMA alleging that it arose on the 22nd of July 2004 the date when he was dismissed. Conciliation having failed the CCMA issued a certificate on the 31st October 2006. And subsequent to the issuance of the certificate of outcome by the CCMA the applicant lodged the claim with this Court on the 14th November 2006. The applicant's claim is based on section 10 of the Employment Equity Act 55 of 1998 (EEA).

Legal principles

[6] It is trite that a matter is *res judicata* when a decision was given involving:

(a) the same subject matter; (b) based on the same grounds; and (c) involving the same parties. See *Herbstein and Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 249.*

[7] This Court in *Dial Tech CC v Hudson and Another (2007) 28 ILJ 1237 (LC),* was faced with having to resolve the question whether the employee who successfully obtained compensation for constructive dismissal based on the allegations of sexual harassment was entitled to later claim compensation for sexual harassment. The Court held that:

> *"[63] Whilst the cause of action in both the constructive dismissal and the sexual harassment cases may arise in the same facts and circumstances, the remedies are located in different statutes. The remedies for constructive dismissal and unfair discrimination are found in the LRA and the EEA respectively.*
>
> *[64] In terms of the constructive dismissal, the matter is firstly, before reaching arbitration or adjudication, processed through conciliation in terms of section 135 of the LRA. If conciliation failed the employee is entitled to refer the matter to arbitration under the auspices of the CCMA or a bargaining council whichever is applicable. However, dismissal disputes, referred to conciliation in terms of section 187 of the LRA, are adjudicated by the Labour Court if conciliation fails.*

[65] Claims for constructive dismissal are governed by the provisions of 186 of the LRA, the relevant part of which reads as follows:

> *"(1) dismissal means that-*
>
> *... an employee terminated a contract of employment with or without notice because the employer made continued employment intolerably for the employee."*

[66] Section 194(1) deals with compensation to be awarded in cases concerning dismissal, including constructive dismissal. The maximum that a commissioner may award may not be more than the equivalent of 12 months' remuneration calculated at the rate of the employees' salary on the date of the dismissal.

[67] On the other hand unfair discrimination is prohibited by the provisions of the EEA. Section 10(1) of the EEA reads as follows:

> *1. In the section the word "dispute" 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 VIII of the Labour Relations Act.*
>
> *2. Any party to a dispute concerning this Chapter may refer a dispute in writing to the CCMA within six (6) months*

after the act or omissions that allegedly constitute unfair discrimination."

[8] The Court went further, in drawing the distinction between the LRA and EEA and in demonstrating that same facts could give rise to different causes of action to say:

"[68] The Labour Court is empowered by s50 of the EEA to order payment of compensation by the employer to the employee if it finds that the employee was discriminated against by the employer.

[69] Similarly, discrimination disputes are processed in the first instance, through the conciliation process in the CCMA or bargaining councils and upon failure of conciliation an employee is entitled to refer the matter to the Labour Court which has exclusive jurisdiction to adjudicate discrimination cases. The CCMA or bargaining councils do not have jurisdiction to adjudicate discrimination disputes unless both parties consent to arbitration under their auspices.

[70] In the present case the constructive dismissal arose out of the failure by the applicant to correct the intolerable environment that was created by its manager. Having found the employee to have been unfairly dismissed, the Commissioner, in exercising the discretion given to him by section 194(1) awarded the maximum compensation of 12 (twelve) months to the employee.

[71] On the other hand, the dispute concerning unfair discrimination arose out of the failure by the applicant to take reasonable steps to prevent sexual harassment in the form of pornography appearing on the employee's computer. It was on the basis of the conclusion that the employee was discriminated upon that the court ordered the applicant to pay compensation in the amount of R58 080-00 to the employee."

[9] Mr Boda for the respondent accepted as correct the distinction between the unfair dismissal disputes and those related to unfair discrimination. However, he argued that the approach adopted in the *Hudson's* case will encourage duplication of claims which in principle was discourage in *Chirwa v Transnet Limited and Others 2008 (4) SA 367 (CC),* and for that reason this Court needed to reconsider its view and conclude that that decision *(Hudson)* was made in error.

[10] The respondent further argued in the replying heads of argument that the reliance by the applicant that the first case of dismissal was based on the LRA whereas the present is based on the EEA, was simplistic and ignored the development of the doctrine of issue estoppel and the equitable nature of the defence which allows for flexibility in its application. The true nature of the dispute should according to the respondent be taken into account in considering whether or not the cause of action is based on the same set of facts.

[11] The respondent relied in support of the above argument on the case of *Kommissaris Van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653(A),* where the Court held that the success or failure of the *res judicata* defence ultimately depends on principles and considerations of equity and that it is flexible in its application. The Court in that case further held that the plea of *res judicata* is available not only when the cause of action is the same but also where, even if it appears that the cause of action is different, the earlier proceedings involved a judicial determination on the same facts or issues or for that matter the same relief.

[12] The same approach was according to the respondent followed in *Fidelity Guards Holdings (Pty) Ltd v PPWU and Others (1998) 10 BLLR 995 (LAC),* where it was held that the applicant for an interdict against the strike cannot launch a new application based on different facts that existed at the time of the initial application. The Court therefore held that the plea of *res judicata* should succeed and applied it in a flexible manner.

[13] The other argument of the respondent which seems to be based on the "once and for all principle" is that litigators should not be allowed to utilise different pieces of legislation. Allowing litigants to forum shop through the use of different litigation would according to the respondent be contrary to the principle in *Chirwa* which was that the courts should be vigilant and guard against forum shopping.

[14] On the facts of this matter, the respondent argued that the true and substantial cause of action of the applicant is a dismissal dispute. The applicant's grievance and dismissal happened on the same day being the 22nd July 2004. The remedy available to him was to challenge his dismissal at either this Court or at the CCMA. He chose the CCMA and exhausted his remedies. The EEA finds no application if one examined the true nature of the dispute, Mr Boda argued. The applicant had an election to make and elected in this regard to go to the CCMA and therefore the applicant can not now be permitted to formulate another claim on the same facts when he has made an election. In the CCMA the applicant demanded compensation which he received. The CCMA dealt with the re-instatement, re-employment and compensation claims as they were all available at the time to pursue. The arbitrator rejected the re-instatement claim and by implication the claim for re-employment. His award is final and binding.

[15] I am not persuaded by the above argument of the respondent and in my view the facts and the circumstances the respondent sought to rely on are distinguishable from the present case. I maintain that the view expressed in the *Hudson's case* was the correct one. This view is reinforced by the approach adopted by other overseas jurisdictions whose legislative framework and structure is similar to ours.

[16] Whilst the Australian decisions are not binding on this Court, they are valuable and of great assistance in the consideration of the correct approach to adopt in matters of this nature. I find the Australian approach, which was adopted by the Court of Appeal in that jurisdiction to be very instructive. The Court of Appeal

in the Supreme Court of the New South Wales dealt with this issue in the case of *Pradeep Deva v University of the Western Sydney (2008) NSWCA 137*.

[17] The facts in the *Pradeep Deva's* matter are very similar to those of the current case. In that case the employee who was dismissed during February 2005, referred his dispute to the Australian Industrial Relations Commission (the AIRC) in terms of section 170 CE (1)(a) of the Workplace Relations Act of 1996 (the WRA). The employee sought the relief on the ground that the dismissal was *"harsh, unjust or unreasonable."* This claim was dismissed on 22 June 2005 by the Commissioner of the AIRC. During August 2005, the employee lodged a complaint with the Anti-Discrimination Board (the ADB) in terms of section 8(2)(c) of the Anti-Discrimination Act of 1977 (ADA). The complaint was based on the ground that the employer had discriminated against the employee in dismissing him for reasons related to his race.

[18] The President of the ADB declined the complaint in terms of section 92(1)(a)(v) of the ADA. The employee then requested the President to refer the complaint to the Administrative Decision Tribunal (the Tribunal). However, Deputy President refused to have the matter referred to the Tribunal on the ground that the subject matter of the complaint had been dealt with by the AIRC and that public policy considerations militated against the employee being given another opportunity to seek relief for his dismissal.

[19] The employee, then took the matter on review. The Court dismissed the review. The Court found that the review of the decision of the Deputy President was untenable in that there was no real question in law to be determined.

[20] Before dealing with the decision of the Court of Appeal, I need to briefly indicate that section 170CE of the WRA entitles an employee to challenge his or her dismissal on amongst other grounds, that it was harsh, unjust or unreasonable. And section 170CK (2) prohibits discrimination against another person on various grounds including that of race.

[21] Turning to the decision of the Appeal Court, the employee's appeal was upheld and the matter was remitted back to the Court aquo. The Court in arriving at its decision drew a distinction between unfair and unlawful dismissal. On the facts the Court found that the employee's application to the AIRC was that he had been unfairly dismissed in that the dismissal was *"harsh, unjust and unreasonable."* The subject matter in that instance related to the unfair dismissal as opposed to unlawful dismissal, applicable in the case of discrimination. In this respect when dealing with the decision of the Commissioner the Appeal Court, per Tobias JJA had this to say:

> *"[24] It is apparent from the Commissioner's decision ... that the hearing before the AIRC was deliberately confined to the ground that the respondent's termination of the appellant's employment on the ground of his unsatisfactory work performance was harsh, unjust or unreasonable and that no reliance was place upon any*

alleged contravention of s170 CK(2)(f) to the effect that the termination was carried out by reason of the appellant's race."

[22] In its conclusion the Court found that although the complaint was with respect to the termination of the employee's employment by the respondent, that was not its *"subject matter"*. The subject matter of the complaint according to the Court was that the respondent had unlawfully dismissed the employee on the ground of race.

[23] Tobias JJA went further to say:

"[64] ...

*(d) The appellant's application to the AIRC was that he had been **unfairly**, as distinct from unlawfully, dismissed in that the termination of his employment by the respondent was harsh, unjust or unreasonable;*

*(e) The relevant provisions of the WR Act draw a clear distinction between **unfair** dismissal and unlawful dismissal;*

*(f) As the subject matter of the appellant's complaint to the ADB was one of unlawful dismissal and as the subject matter of his application to the AIRC was **unfair** dismissal, they were not the same;*

(g) Accordingly, in terms of s 92(1)(a)(v) of the AD Act, the subject matter of the appellant's complaint to the ADB had

not been dealt with by the AIRC (it was not suggested by the respondent that it should be so dealt with noting that the subsection does not refer to a complaint that "could have been" or "should have been" so dealt with:…"

[24] In South Africa, the authorities support the views expressed in the *Hudson's case*, and have followed the same approach as that in *Pradeep Deva's* matter, that of drawing the distinction between unfair labour practice and unlawful discrimination. In *Ntsabo v Real Security CC (2003) 4 ILJ 2341 (LC),* the Court awarded the employee compensation for constructive dismissal in terms of the provisions of the LRA and damages arising from the sexual harassment in terms of the provisions of the EEA.

[25] It is clear from the facts in the present instance that the arbitration award granted in favour of the applicant related to the unfair dismissal in terms of the LRA. The subject matter of the case before the Court relates to unfair discrimination in terms of Section 10 of the EEA.

[26] It is therefore my opinion that the claim lodged by the applicant in terms of Section 10 of the EEA is not *res judicata* and the point *in limine* raised by the respondent stand to be dismissed. I see no reason in law and fairness why the costs should not follow the results.

[27] In the premises the point *in limine* raised by the respondent, that the matter is *res judicata* is dismissed with costs.

Molahlehi J

Date of Hearing : 23rd October 2008

Date of Judgment : 29th January 2009

Appearances

For the Applicant : Riki Anderson of Riki Anderson Attorneys

For the Respondent: Adv FA Boda

Instructed by : The State Attorney