



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Case no: JS 950/11

In the matter between:

SOLIDARITY obo M P N DE SAMPAIO

Applicant

**(Respondent in *in limine*
application)**

and

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

First Respondent

**(Applicant in *in limine*
application)**

J NGOBENI N.O.

Second Respondent

MS MKHATSHWA

Third Respondent

Heard: 22 April 2013

Delivered: 22 April 2013

Summary: (special plea– *res judicata*).

RULING ON SPECIAL PLEA

LAGRANGE, J

Background

[1] The applicant in this matter had acted in the post of Deputy Director (Systems Development) for some three years, but when the post was advertised he was not successful in obtaining appointment. In November 2008 and June 2009 when the post was advertised he was not shortlisted for an interview. In February 2011, when the post was advertised again he was shortlisted, but was then apparently removed from the shortlist because he would not improve the Department's 'equity profile' since he was a white male. He lodged a grievance over his exclusion on this last occasion on 30 May 2011 which could not be resolved internally. In the meantime, no appointment was made and he continued to act in the position.

[2] The post was re-advertised in September 2011 and was eventually filled in March 2012. On 11 November 2011, the applicant referred a case of unfair discrimination on the grounds of race to this court. Apart from the special plea of *res judicata* raised by the respondent, the parties agreed that the court would have to decide the following issues if the special plea failed:

a) *Whether the respondent unfairly discriminated against the employee on the ground of race by persistently failing to appoint him to the post in which he had been acting between February 2008 and August 2011*

b) *In particular:*

(i) *whether by ignoring the employees application and insisting on appointing a designated candidate, if one could be found, the respondent failed to take into consideration the pool of suitably qualified*

employees and the factors listed in section 42 of the Employment Equity Act;

- (ii) Whether an employee who wishes to implement affirmative action measures must do so in terms of an approved employment equity plan;*
- (iii) Whether the employee was a victim of unfair discrimination, and whether the respondent can justify such discrimination on any basis recognised in law;*
- (iv) Whether by refusing to shortlist qualified white males on "equity" grounds, the respondent raised an absolute barrier before white male employees, including the applicant employee."*

- [3] The relief sought by the applicant in this referral is either some form of protected promotion or compensation.
- [4] Around the same time that this referral was made, the applicant brought an urgent application for interim relief, which sought to stop the respondent from making an appointment in the post until proper selection procedures had been followed and a suitable candidate appointed, pending the outcome of the referral above. That application led to a settlement concluded on 17 November 2011 which was made an order of court. In terms of that order the respondent agreed to place him on its shortlist for the post in question and to interview him during the last week of November. It was further part of the order that the interview process would take place in a fair and consistent manner taking into account the shortlisted candidates qualifications, experience and suitability, but not equity considerations. Lastly, it was also agreed that the post would not be left vacant after finalising the interview process, and that if the applicant was not appointed he would be provided with written reasons for the decision.

The special plea

- [5] The respondent argues that the case referred to trial essentially concerns the same issues that were the subject matter of the urgent application which was settled, namely the fact that the applicant was not shortlisted nor interviewed, and that the order agreed to meant that those issues were *res judicata* in relation to the pending trial in this matter.
- [6] If I have regard to the interdict, it was brought to ensure that the current recruitment process in progress in November 2011 was conducted in accordance with the correct principles. The agreement reached was effectively prospective in effect and not declaratory of the legal status of previous recruitment initiatives. It did not entail any finding on whether the applicant's alleged exclusion from previous shortlisting and interviewing processes was unfairly discriminatory or not. Still less, did it concern whether the failure to appoint him to the post he was acting in amounted to unfair discrimination.
- [7] I accept that the factual background set out in the urgent application also traversed allegations made in the statement of case and consequently there is a degree of overlap in the factual context in both matters. Nevertheless, I am satisfied that the referral to trial concerns an examination of the respondent's past conduct when it advertised the post up to and including August 2011, to determine whether or not it conducted the recruitment process in a way that unfairly discriminated against the applicant and, or alternatively, whether he was unfairly discriminated against because he was not appointed. The point was made in argument that no appointment was made on those previous occasions and that might present an obstacle to the applicant advancing a claim that he should have been appointed, but that is not something that needs to be decided in these proceedings. It is sufficient simply to note that the dispute over the applicant's non-appointment and consequential relief that might flow from that are not the same as in the relief afforded by the order obtained in the urgent interdict proceedings.
- [8] Similarly, an award of compensation for alleged unfairly discriminatory treatment in the recruitment process up to and including August 2011, is

not something traversed by the settlement agreement in the urgent application, nor was it an issue foreshadowed in the relief sought on that occasion.

Order

[9] In the circumstances, the respondent's special plea is dismissed with costs.

[10] The matter must be placed on the opposed trial roll.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: L Halgryn, SC instructed by Serfonteing, Viljoen & Swart

FIRST RESPONDENT: W Bekker instructed by Gildenhuys, Lessing & Malatji