

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

IN THE EQUALITY COURT

PARTIES: **MANONG & ASSOCIATES**

APPLICANT

AND

DEPARTMENT OF TRANSPORT

1ST

RESPONDENT

IN THE EASTERN CAPE PROVINCE

THE NATIONAL TREASURY

2ND RESPONDENT

- Case Number: **928/06**
- High Court: **BHISHO HIGH COURT**

DATE OF HEARING: **13/06/2007**

DATE DELIVERED: **18/10/2007**

JUDGE(S): **PILLAY, J**

LEGAL REPRESENTATIVES -

Appearances:

- for the Applicant(s): **ADV MASUKU**
- for the Respondent(s): **ADV NTSALUBA**
-

Instructing attorneys:

- Applicant(s): **Messrs Mlonyeni & Lesele Inco.**
- Respondent(s): **State Attorney**
C/O Shared Legal Services
Office of the Premier

CASE INFORMATION -

- *Nature of proceedings* : **Equality Court Case**

**IN THE EQUALITY COURT
(BHISHO HIGH COURT)**

Reportable

CASE NUMBER: **928/06**

DATE DELIVERED:

18/10/07

In the matter between:

MANONG & ASSOCIATES (PTY) LTD

APPLICANT

AND

DEPARTMENT OF TRANSPORT IN THE
EASTERN CAPE PROVINCE

1ST RESPONDENT

THE NATIONAL TREASURY

2ND RESPONDENT

JUDGMENT

PILLAY, J:

This is an application launched by the Applicant in this court during August 2006. I am called upon to deal with what has been referred to as Part 'B' of the Notice of Motion. Part 'A' was interim relief sought on an urgent basis pending the outcome of the application as constituted in Part 'B'. Only the relief sought in Part 'B' will therefore be dealt with herein.

The relief sought in Part 'B' of the application reads as follows:

“1. Reviewing, correcting and setting aside the decision taken by the delegated authority of the First Respondent, at some time before 16 August 2006, to disqualify from consideration the Applicant's tender for the upgrading of the provincial roads referred to in paragraph 2 of Part A relief of the Notice of

Motion;

2. Reviewing, correcting and setting aside the decision of the delegated authority of the Respondent to award of the tender (sic) any other tenderer (to the extent that such an award has been made);
3. Declaring that any purported contract entered into with any other tenderer in relation to the tendered services (pursuant to the award of the tender) be declared to be null and void, and of no force and effect (to the extent that such a contract has been made);
4. Declaring that the procedure followed by the First Respondent or its delegated authority outlined in clause 24 of the Bid Rules issued by the First Respondent, to disqualify the Applicant is inconsistent with the requirement of section 217 of the Constitution of the Republic of South Africa, alternatively that clause 9.4 of the Practice Note issued by the National Treasury in terms of which the Bid Rules are made is inconsistent with section 217;
5. Declaring the procedure followed by the delegated authority to disqualify the Applicant's tender bid unfairly (sic) discriminatory in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and therefore unlawful;
6. Directing the Respondents to undergo an audit of its procurement procedures and practices as the Court may direct;
7. Granting Applicant further and or alternative relief;
8. That the costs of this application be borne by the Applicant."

The matter has a long and checkered history. The urgent application for interim relief was refused as was the subsequent application for leave to appeal and petition to the Supreme Court of Appeals for leave to appeal. Another related application was also refused.

Paragraphs 1, 2 and 3 of the relief are of a practical nature and refer to the decisions of a state institution which is sought to be, *inter alia*, reviewed and set aside. Paragraph 4 seeks a declarator in terms of which the procedure followed by the relevant tender committee and outlined in clause 24 of the Bid Rules be declared inconsistent with section 217 of the Constitution of the Republic of South Africa of 1996 ('the Constitution').

Paragraph 5 similarly seeks a declarator that the procedure, in terms of which the delegated authority disqualified the Applicant's tender is declared unfair and unlawful as envisaged in the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 ('the Act').

Paragraph 6 seeks an order directing the Respondents to undergo an audit of their procurement procedures and practices as this court may deem appropriate.

Paragraphs 7 and 8 do not touch on the nature of the rationale of this application.

The application with all the papers was filed and served on 22 August 2006. It gave notice that the application would be brought before the Equality Court on 25 August 2006. By the nature of the relief sought and as set out in the Notice of Motion, it could only

have been brought before the court on an urgent basis to deal with Part 'A' of the relief.

A notice of opposition dated 24 August 2006 was filed by the Respondents. The matter was postponed on 25 August 2006 to 31 August 2006. Furthermore, the Respondents filed a Notice in terms of the Rules of the High Court, *viz* Rule 6 (5) (d) (iii) which reads as follows:

- “(d) any person opposing the grant of an order sought in the notice of motion shall –
- i) -----;
 - ii) -----;
 - iii) If he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceeding sub-paragraph, setting forth such question.”

The period referred to therein is fifteen (15) days.

The notice of the Respondents dated 30 August 2006 in terms of Rule 6(5)(d)(iii) sets out the following:-

- “1. The Applicant has failed to satisfy the requirements for the relief (interim interdict) it seeks;
- 2. Consequently, the application ought to be dismissed with costs.”

It is unclear what the Respondents were attempting to convey in the notice. It certainly does not comply with Rule 6(5)(d)(iii) in that it

does not set forth any question of law.

In any event the urgent application was proceeded with on 31 August 2006 and was refused. The application was postponed for the purposes of dealing with Part B of the relief sought.

The application proper was heard by me on 13 June 2007 after a hearing as contemplated in section 20(3)(a) of the Act was convened and completed. The purpose of a hearing in terms of subsection 20(3)(a) is to investigate, *inter alia*, whether the substance of the proposed proceedings are such that it should be entertained by the Equality Court or some other court or forum. However by the time that hearing was held, the urgent application had already been entertained by the Equality Court and the decision in respect of Part 'B' of the relief was postponed accordingly.

The order did not contain a directive that a hearing in terms of section 20(3)(a) should be held. Consequently the order in question must be construed to have meant that the application (proper) was postponed to the Equality Court. It is therefore understandable that the presiding officer in the section 20(3)(a) hearing, felt constrained to deal with the issue placed before him on the basis that consideration as to whether the matter should be dealt with outside of the Equality Court was excluded because he could not have set that order aside or amended it in any way. That being the case, the

Equality Court was seized with the matter.

The Respondents did not plead to the allegations made by the Applicant at all.

Heads of Argument on behalf of the Applicant were properly and timeously filed. Surprisingly, there were no Heads of Argument filed on behalf of the Respondents as is generally required in matters such as this. The provision of Heads of Argument in opposed applications is so trite that the failure to do so could hardly be excused and is unacceptable in the extreme.

More significantly, on the morning of the hearing, I was provided with a Notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court. It carries the Registrar's stamp dated 12 June 2007.

This notice reads as follows:-

“Please take notice that First and Second Respondents intend to raise questions of law only which is set forth hereunder:-

1. The (sic) Honourable Court does not have jurisdiction to entertain the application for review as sought by the Applicant;
2. The Applicant, on its papers, does not make out a case for the Respondents to answer; and
3. Consequently, the application ought to be dismissed with costs.”

Counsel for both parties came to see me prior to the commencement of the hearing and Mr Masuku (who appeared for the Applicant) indicated that though he was taken by surprise, he

wanted to proceed with the hearing.

When Mr Ntsaluba (who appeared for the Respondents) started to argue first, as per agreement between the parties, he strung a second string to his bow by adding the further point that this court did not have the jurisdiction to deal with issues of constitutionality.

Again Mr Masuku, who was visibly surprised by this new aspect, informed me that he preferred to continue with the hearing nonetheless.

In the light of the Respondent's approach, it is clear that if they succeed in their contention that this court lacked jurisdiction to entertain what is essentially an application to review the administrative decision of the Respondents and/or that this court lacked the jurisdiction to decide on issues of constitutionality, then the matter will end at that point in this court. If they do not succeed, then the merits, which stand uncontested, will have to be dealt with. In the circumstances, it would be convenient to deal with the jurisdictional issue(s) first.

The Applicant is a company registered in accordance with the laws of the Republic of South Africa with its principle place of business (it seems) in East London.

The First Respondent is the Department of Roads and Transport of the Eastern Cape with its principle officer in King William's Town.

The Second Respondent is the National Treasury established in terms of the Public Finance Management Act 1 of 1999 and in terms

of which the National Treasury is empowered to prescribe tender regulations and practice notices. The Second Respondent operates its Head Office in Pretoria.

On or about June 2006, the First Respondent published an advertisement calling for tenders in respect of the provision of professional engineering services for the construction of five (5) different projects each related to roadworks.

The Applicant responded to the advertisement on 20 July 2006. It alleges that it was then disqualified on the grounds of a perceived lack of functionality requirements and/or that the tenders did not comply with the relevant tender procedure.

The Applicant denied that it failed to meet the functionality requirements. Significantly it alleged and was indeed strongly argued by Mr Masuku, that the prescribed procedure followed by the Respondents in disqualifying the Applicant was itself unlawful for want of constitutionality. He explained that the Applicant had no quarrel with the way the tender committee handled the said tender in following the prescribed procedure but it was the effect of this very procedure which was offensive.

The Applicant alleged that the procurement procedure followed by the Respondents is not fair, transparent, cost effective and does not

promote equality and consequently, is contrary to and inconsistent with section 217 of the Constitution (which broadly provides for what procurement procedure and policies should be adopted). It follows therefore that, in essence, the Applicant contends that the procurement procedure dealing with the Applicant's tender is unconstitutional.

The rules and procedures which were to be adopted in dealing with these tenders are clearly set out in the Invitation to Tender and the Bid Notice.

Clause 23 of the Bid Rules sets out that the procurement procedures were subject (and therefore based) on the following:-

- a) The Preferential Procurement Policy Framework Act No. 5 of 2000;
- b) The Public Finance Management Acts No's 1 and 19 of 1999;
- c) The Broad Based Black Economic Empowerment Act No. 53 of 2003;
- d) The Department of Roads and Transport Manual on supply Chain Management.

Clause 24 of the Bid Rules details the method of evaluation of each bid and/or tender. It is the procedure referred to therein that is the subject of the Applicant's complaint.

Clearly the foundation of these rules is the aforementioned legislation and regulations which in turn are based on empowering legislation. An argument that the rules upon which the Applicant's

bid was disqualified do not give rise to the question of constitutionality but rather a situation which requires the decision to be reviewed (as has effectively been sought by the Applicant) would meet with difficulty. The problem with such an argument would be two-fold.

Firstly, it ignores the fact that the very rules are founded on empowering legislation. In my view, it places them in a special category in which the issue of constitutionality could be raised. Furthermore, the rules themselves could be rendered invalid because they were incorrectly promulgated or if they have the effect of straining the constitution (as is alleged by the Applicant).

Secondly, the question is whether the adoption of the rules is reviewable or not. The argument presupposes the court's jurisdiction to do that. This aspect will be dealt with more fully in due course.

The Equality Court is a special court born out of very crucial constitutional notions like equality, equity, social progress, justice, dignity, fairness and democratic values. It is created in terms of the constitution by an Act of Parliament which creates and sets out the powers of Equality Courts.

Section 169 of the Constitution empowers the High Court to decide:

- “(a) any constitutional matter except a matter that –
- i) only the Constitutional Court may decide or;
 - ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
- b) any other matter not assigned to another court by an Act of Parliament.”

Section 21(1) of the Act empowers the Equality Court to determine whether unfair discrimination, hate speech or harassment has taken place. It is clearly restricted to dealing with these aspects. Section 21(2) makes provision for various remedies or orders the court may make in relation to issues it has considered in terms of section 21(1).

Section 169 of the Constitution clearly empowers the High Court to deal with certain matters involving constitutional matters including any such matters not assigned to another court by an Act of Parliament. The Act does not directly make provision for the Equality Court to decide on constitutional matters.

However, it is precisely this set of rules aforementioned which form the substance of the complaint. It is alleged that the application of those rules gives rise to discrimination. It is, in my view, not necessary to decide whether that is indeed so when dealing with the issue of jurisdiction.

What is quite apparent is that in order to determine whether the effect of the proper application of the rules in question amounts to discrimination or not, it is necessary to delve into the essence of the rules. This would entail the unavoidable exercise of determining whether these rules strain the constitution or not because inevitably, if it is unconstitutional they are likely to be discriminatory (and perhaps *vice-versa*). Consequently, on the face of it, this issue would then fall within the powers of the Equality Court. Strictly speaking however, the Equality Court does not seem to be empowered with the jurisdiction to review, correct or set the bid rules aside.

The Equality Court has furthermore not been empowered to review decisions of the kind in question. Section 23(5) of the Act directs that a decision of the Equality Court constituted at a Magistrate's Court level and related to a defined prohibited ground of discrimination, must be submitted to a High Court having jurisdiction for review. That is the only aspect to which the Act speaks to the notion of review.

It was argued by Mr Masuku that this Equality Court, sitting at the level of a High Court did in fact have jurisdiction to review the decision in question and determine the constitutionality of the Rules because it was constituted at the level of the High Court which is empowered to deal with such issues. He referred me to *Minister of*

Environment Affairs and Tourism v George and Others 2007 (3) SCA 62 page 12-14 in a valiant attempt to persuade me that this Equality Court had concurrent jurisdiction with the High Court to deal with a constitutional matter as it was convened at that level.

In the *George* matter, a number of fishermen had launched an application in the High Court and the Equality Court (sitting at the level of High Court) at the same time. They urged the Equality Court to hold an enquiry before the matter was dealt with in the High Court. The Appellants (as Respondents) requested that the court *a quo* refer the matter to the High Court in terms of section 20 of the Act. This was refused and the Appellant appealed against the refusal.

The refusal was based on the rationale that there is no reason why those who have interrelated remedies under the Act and other legislation should not be entitled to pursue parallel claims in the Equality Court, constituted at the level of the High Court, and in the High Court. Coupled with this was the finding that the Respondent's request to refer the matter to a High Court was incapable of being granted because that Equality Court was itself a High Court.

It followed, so it was argued, that the High Court, sitting as an Equality Court had double jurisdiction and therefore had the required jurisdiction to deal with the Applicant's application. This

case is clearly distinguishable.

Firstly it is not a matter which involved a quest for a referral of the matter. Secondly this is not a matter in which the question of double jurisdiction arises. It is precisely the power of this court to review which is in issue.

As will be seen from the form of the relief sought, the Applicant essentially seeks to have the decisions which affect it reviewed, corrected and set aside. For the purposes of this judgment I will confine myself to the question of review especially in the light of the Respondent taking the specific point.

Prior to the present Constitutional dispensation the word 'review' is capable of three (3) meanings within the legal framework. These were comprehensively set out in the often quoted decision of Innes CJ in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111.

It is explained that:

“In the first and most usual signification it denotes the process by which, apart from appeal, the proceeding of inferior courts of justice, both civil and criminal are brought before this court in respect of grave irregularities occurring during the course of such proceedings ...”

“But there is a second species of review to the one with which I have dealt, but differing from it in certain well defined respects. Whenever a public body has a duty imposed upon it by statute and disregards important provisions of the statute or is guilty of gross irregularity or clear illegality in the performance of the duty this court may be asked to review the proceedings complained of and set aside or correct them. Then as to the third significance of the word. The legislature has from time to time conferred upon this court or a judge a power to review which in my opinion, is meant to be far wider than the power which it possesses under either of the review procedures to which I have alluded”

Review proceedings are governed by Rule 53 of the Uniform Rules of Court which rules regulate the conduct of proceedings of several Provincial and Local Divisions of the High Court of South Africa. In the light of the nature of the Applicant’s case that it is only the impact of the bid rules which it finds offensive, it is difficult to place its case in any of the three (3) categories referred to in the aforementioned quote.

However, if it did fall into one of these, then it was likely to fall within the second category as the decision complained of is one which flows from the conduct of a public body involved in a public function.

But the issue goes further.

In the case of *Pharmaceutical Manufacturers Association of SA and*

Another: In Re Ex Parte President of the Republic of South Africa and Others 2000(2) SA 674 cc @ 692 E-G. Chaskalson P, expressed himself as follows:

“The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts”.

In my view therefore, even if the complaint was one which could be dealt with by review, it should be dealt with in terms of Rule 53 aforementioned. Consequently this is an application with which the Equality Court cannot deal with for lack of jurisdiction.

If regard is had to section 21 of the Act and section 169 of the Constitution, then it is clear that only the High Court has the power to deal with constitutional matters and the Equality Court has not been empowered to do so either by the Constitution or the Act itself.

Mr Masuku also relied on section 172 of the constitution to advance his argument that this court is a court envisaged in section 172 and empowered to hear this matter. Suffice to say that this section refers, *inter alia*, to the constitutional validity of an Act of Parliament and a Provincial Act. The substance of what is sought to be attacked by the Applicant is neither an Act of Parliament nor a Provincial Act. It is clear therefore that this is not a matter in which double jurisdiction is apparent. Nor is it a matter in which the High Court sitting as a Equality Court could equally deal with the issue(s) at hand.

Mr Masuku further argued that because the High Court is sitting as an Equality Court, it had the ordinary jurisdiction of the High Court. It follows, from his argument, that the High Court, when sitting as an Equality Court, can then assume the jurisdiction of the High Court merely because it is a High Court which is sitting as an Equality Court. The argument is flawed because to adopt that approach would overlook to essential differences between these two courts. It is important to always be mindful of the fact that the Equality Court is different from a High Court even if the latter is constituted as an Equality Court.

The objects of the Act are set out in section 2 thereof and clearly demonstrates the boundaries within which the Equality Court

operates. It operates within the parameters of section 9 of the Constitution and is intended to deal with the protection of all the values set out therein. Section 2 of the Act and the Code of Practice as purported to have been promulgated by the Minister of Justice and Constitutional Development in terms of section 30 of the Act broadly confirm this contention.

The differences and separateness of these two courts is also borne out by section 16(2) of the Act. It clearly provides that only an officer who has completed a training course as a presiding officer and whose name has been included on a list of presiding officers designated to preside in an Equality Court, may so preside.

It is clear therefore that in the case of a High Court sitting as an Equality Court, a judge might technically be capable of dealing with matters which he or she could have dealt with as an ordinary High Court judge. However, it does not follow that any judge of the High Court is empowered to deal with issues designated for the Equality Court.

Consequently while there will be cases in which double jurisdiction would be apparent and capable of being dealt with in either of the courts (as referred to in *George*), it is necessary to generally be mindful of the fundamental difference(s) between the two courts lest it be clouded by convenience.

This case is not a matter such as that with which *George* was concerned and there are clear issues which involve the questions of constitutionality of the Bid Rules and the review of the decision. In my view, the Equality Court is not empowered to pronounce on either.

Consequently even if this court did have the power to pronounce on the constitutionality of the rules and their effect, it does not have the power to review and correct the decision complained of which is, in any event, integral to the basis of the quest to have the tender committee's decision reviewed, set aside and corrected.

Furthermore, even if this court did have the power to review as envisaged in this application, the application would, in my view, still fail both in terms of common-law and constitutionally. This is because even if I thought that the conclusion was one which I would not have arrived at, I would not be permitted to interfere therewith absent any irregularity or illegality by the Respondent and in particular by the tender committee in the exercise of its duties.

I respectfully agree with the summary of the legal position in this regard as enunciated in the *Pharmaceutical Manufacturers* case by Magid J, in *Durbsinvest (Pty) LTD v Town and Regional Planning Commission, Kwa-Zulu Natal and Others* 2001 (4) 103 (N) at 107 G – H as follows -

“(1) The review of an administrative decision of an organ of the Executive gives rise to a constitutional enquiry.

- (2) In any such enquiry the first question to be asked is whether the decision complained of is, objectively speaking, rationally related to the purpose for which the power was given.
- (3) If it was, and the decision was arrived at *bona fide* and within the authority and jurisdiction of the body whose decision is being enquired into, the Court cannot interfere with the decision merely because it disagrees with it."

See : *Mkhatshwa v Mkhatshwa and Another* 2002 (3) SA 441 (T)

Mindful of the fact that the conduct of the tender committee in applying the rules is not the source of complaint in this application, it would seem to me, in so far as it is necessary to comment thereon, that the application must fail in this respect also.

In the circumstances, the point of law taken by the Respondents is a good one and the application must therefore fail for lack of jurisdiction of this court.

It seems to me that the costs should follow the result and I will make such an order accordingly.

In the result, the application is dismissed with costs.

R PILLAY
JUDGE OF THE HIGH COURT

APPEARANCES

<u>FOR THE APPLICANT</u>	:	ADVOCATE MASUKU
INSTRUCTED BY	:	MESSRS MLONYENI &
LESELE INCO.		APPLICANT'S ATTORNEYS
 <u>FOR THE RESPONDENT</u>	 :	 ADVOCATE NTSALUBA
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 <u>DATE OF HEARING</u>	 :	 13 JUNE 2007