

IN THE HIGH COURT OF SOUTH AFRICA

(Sitting as an Equality Court, BHISHO)

Case No. 2/2008

Reportable

In the matter between

MANONG ASSOCIATES (PTY) LTD

Complainant

and

**EASTERN CAPE DEPT OF ROADS AND
TRANSPORT**

First Respondent

THE NATIONAL TREASURY

Second Respondent

HAWKINS HAWKINS OSBORN

Third Respondent

KWEZI V3 ENGINEERS

Fourth Respondent

ILISO NINHAM SHAND JOINT VENTURE

Fifth Respondent

JUDGMENT

When a matter is determined in the High Court under the provisions of the Equality Act 4 of 2000 the High Court is exercising an extended jurisdiction as a High Court, not as a separately constituted ‘equality court’. It retains its inherent and constitutional power of review. The review of administrative action may thus take place in the High Court hearing a matter, both under the provisions of the Equality Act and other Constitutional provisions. Procurement policy that requires experience and expertise in road building is not unreasonable where disadvantaged groups have had the opportunity to gain that experience and expertise.

Froneman J.

Introduction to the issues

[1] This judgment concerns matters brought before court under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act ('the Equality Act').¹ A person who institutes proceedings in terms of the Equality Act based on an allegation that a provision of the Act has been contravened is referred to in the Act as a 'complainant'.² The complainant in this matter is a commercial company whose complaints relate to the allocation of tenders by the first respondent for the construction of a number of road works in the province. It contends that the tender process is unfair under the Equality Act because it amounts to indirect discrimination against previously disadvantaged persons. The unfair discrimination in the process is said to lie in the requirements that successful bidders must have a history of at least seven years involvement in similar projects, must have completed at least five similar projects, and that technical members of its staff must have a minimally prescribed level of engineering experience. These requirements, although non-discriminatory on their face, are said to effectively exclude previously disadvantaged persons or groups, who did not have the opportunity to gain such experience earlier, from entrance to the public roads works construction industry and thus amounts to indirect, but still unfair, discrimination. In addition to these grounds the complainant also alleges that the procurement process is flawed in that it is insufficiently transparent in a number of respects; not cost effective; contrary in some aspects to its enabling legislation; and that the complainant's disqualification at an early stage of the process was actuated by improper motives on the part of officials of the first respondent resulting from the respondent's earlier refusal to involve itself in corrupt practices involving those officials.

¹ No 4 of 2000.

² Section 1, definition of 'complainant'.

[2] The complainant brought the application as a matter of urgency, initially seeking relief in two parts. The first part sought temporary relief pending determination of the relief sought in the main application. I gave judgment on the application for temporary relief earlier and apart from the question of costs relating to those proceedings nothing further needs to be said about that part of the application. What remains for determination is the final relief sought by the complainant.

[3] The complainant delivered a formal notice of motion seeking (1) the review, correction and setting aside of the decision to disqualify from further consideration its tender for the relevant road works; (2) the review, correction and setting aside of the award of the tenders to the successful bidders;³ (3) an order declaring the contracts resulting from the allocation of tenders to be null and void; (4) orders declaring the procedure followed in awarding the tenders to be inconsistent with section 217 of the Constitution and unfairly discriminatory under the Equality Act; and (5) a direction that the first and second respondents' procurement procedures and practices should undergo an 'audit' in a manner that the court must prescribe.

[4] The first and second respondents oppose the relief sought on the basis, firstly, that this court does not have the power or competence to grant relief in the form of administrative review; secondly, that the correct procedures under the Equality Act have not been followed; and, thirdly, that there is no substance in the alleged complaints of unfair discrimination and unlawfulness in the procurement process. I

³ They have since been joined as parties to the proceedings.

will deal with the first two together before turning to a more detailed examination of the facts and the substantive merit of the application. For the moment I will simply draw attention to the fact that the complainant's grounds for the review relief it seeks are not simply restricted to the provisions of the Equality Act, but includes reliance on general constitutional provisions which do not relate solely to equality.

Review jurisdiction

[5] The judicial authority of the Republic is vested in the courts established in terms of the Constitution.⁴ These courts are the Constitutional Court,⁵ the Supreme Court of Appeal,⁶ the High Courts,⁷ the Magistrates' Courts⁸ and any court established or recognized by an Act of Parliament, including any court of a "status similar to either the High Courts or the Magistrates' Courts".⁹ Under the common law only the then Supreme Court had the inherent power to review and set aside the exercise of public power of other branches of government under certain circumstances. But they had "to claim space and push boundaries"¹⁰ in order to do so. That is no longer the case. The Constitution has defined the role of the courts in relation to the other arms of government.¹¹ By virtue of the separation of powers and the judicial authority vested in the courts by the Constitution they now have an extended power of review to control the exercise of public power¹² in accordance with constitutional principles. More specifically in relation to public administrative action, the courts exercise that power of review in accordance with a person's fundamental right to just administrative action under section 33 of the Constitution, as given expression to in the Promotion of Administrative Justice Act ("PAJA").¹³ The High Courts, the Magistrates Courts (in certain respects)¹⁴ and any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of PAJA,¹⁵ may judicially review administrative action in terms of the provisions of section 6 of PAJA.

⁴ Sections 165 and 166 of the Constitution.

⁵ Section 166(a).

⁶ Section 166(b).

⁷ Section 166(c).

⁸ Section 166(d).

⁹ Section 166(e).

¹⁰ *Pharmaceutical Manufacturers Association of SA and another: In Re Ex Parte President of Republic of South Africa and others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC), para. [45].

¹¹ *Id.*

¹² And private power too, but the limits of those powers of review are not in issue in this case.

¹³ Act 3 of 2000.

¹⁴ Section 9A of PAJA.

¹⁵ Definition of "tribunal" in section 1 of PAJA.

[6] Where does a High Court or Magistrates' Court functioning as an equality court for the area of its jurisdiction fit into the judicial system under the Constitution?

Section 16 of the Equality Act provides for every High Court and certain Magistrates' Courts to be "equality courts for the area of their jurisdiction" and for judicial officials to be allowed to act in them only after undergoing training courses under section 31 (4).

[7] There appears to be three possibilities which would place these courts within the judicial system with judicial authority under the Constitution. The first is that they remain High Courts or Magistrates' Courts constituted under section 166(c) and (d) of the Constitution, but with extended jurisdiction and powers in terms of the provision of the Equality Act. The second is that they may be courts of a status similar to a High Court or Magistrates' Court, established under section 166(e) of the Constitution. The third possibility is that they may be other courts recognised or established in terms of an Act of Parliament under section 166(e) of the Constitution, but which do not have a status similar to the High Courts or the Magistrates' Courts.¹⁶

[8] Another, fourth, possibility exists, but not as a court falling within the judicial system with judicial authority under the Constitution. Parliament may provide for an independent and impartial tribunal to deal with equality issues, which may also possibly be clothed with authority under sections 1 and 6 of PAJA to have the power to review administrative action under PAJA. The Constitution does not prohibit the

¹⁶ Section 166(e) provides for "any other court established or recognised in terms of an Act of Parliament, *including any court of a status similar to either the High Courts or the Magistrates' Courts*". The implication appears to be that Parliament may create courts that do not have the status of either High Courts or Magistrates' Courts.

establishment of these kinds of institutions and they may in appropriate instances be used to afford people the fundamental right of access to justice to have legal disputes resolved by the application of law under section 34 of the Constitution. Generally speaking, however, they would not have judicial authority under the Constitution to determine constitutional matters.¹⁷

[9] Examples of each of these possibilities can be found in parliamentary legislation.

The High Court exercises admiralty jurisdiction as a High Court in terms of the provisions of the Admiralty Jurisdiction Regulation Act.¹⁸ That appears to fit the first category mentioned above. The Labour Court and Competition Appeal Court are courts established as courts with a status similar to that of a High Court in terms of their founding legislation.¹⁹ The Land Claims Court is a court which has powers to the exclusion of any court “contemplated in section 166(c),(d) or (e) of the Constitution”.²⁰ They are thus courts that fit in with the second category and, in the case of the Land Claims Court, its structure also seems to encompass the third category. The Tax Courts,²¹ Commissioners of Patents²² and the Competition Tribunal²³ may fall within either the third or fourth category - it is not necessary here to decide which one.²⁴ The Commission for Conciliation, Mediation and

¹⁷ Sections 169 and 170 of the Constitution.

¹⁸ No. 105 of 1983, section 2.

¹⁹ Section 151(2) of the Labour Relations Act 66 of 1995; section 36(1)(a) of the Competition Act 89 of 1998.

²⁰ Section 22(1) of the Restitution of Land Rights Act 22 of 1994.

²¹ Section 83(3) of the Income Tax Act 58 of 1962.

²² Section 8 of the Patents Act 57 of 1978.

²³ Section 26 of the Competition Act, note 19 above.

²⁴ It is not clear to me what the position or status in the constitutional judicial system is of “any other court” established under section 166(e) which does not have a status similar to either the High Courts or the Magistrates’ Courts.

Arbitration²⁵ is a tribunal which falls into the fourth category of an independent, impartial tribunal without judicial authority under the Constitution.²⁶

[10] It is apparent from the provisions of sections 16 and 31 of the Equality Act that equality courts are not separate courts of “a status similar to either the High Courts or the Magistrates’ Courts” in terms of section 166 (e) of the Constitution. Unlike the explicit provisions establishing the Labour Court, Competition Appeal Court and Land Claims Court there is no explicit attempt in the Equality Act to establish a separate court in terms of the provisions of section 166 (e) of the Constitution, nor is there provision for the separate appointment of judges and judicial officers in accordance with the Constitution as there are in those Acts. Judges of the High Courts and courts of a similar status are appointed by the President on the advice of the Judicial Service Commission,²⁷ and other judicial officials are appointed in terms of national legislation which must ensure that their appointment, promotion, transfer, dismissal or disciplinary action against them must take place without favour or prejudice.²⁸ Judges are appointed to serve in equality courts by the Judge President of the particular High Court²⁹ and magistrates by designation in the Gazette by the Minister.³⁰ Judges are not appointed to serve in the equality courts by the President on the advice of the Judicial Service Commission nor are magistrates appointed to serve there in terms of any specific provisions ensuring their judicial independence

²⁵ Section 112 of the Labour Relations Act, note 19 above.

²⁶ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC), paras. [82] to [88]

²⁷ Section 174 (6) of the Constitution.

²⁸ Section 174 (7) of the Constitution.

²⁹ Section 16 (1) (b).

³⁰ Section 16 (1) (c).

under the Constitution.

[11] The first and second respondents' contention that a High Court sitting as an equality court for the area of its jurisdiction in terms of section 16 (1) of the Equality Act does not have administrative review powers is based on two grounds, said to be mutually supportive of each other. The first is that the manner of appointment or designation of judges³¹ who may hear matters under the Equality Act is an indication that they determine matters under the Equality Act not as judges of a court with judicial authority under the Constitution, but as officials presiding over tribunals without judicial authority under the Constitution - that is, that they fall into the fourth category referred to above. The second ground is that this conclusion is strengthened by the fact that review powers are not explicitly included in the powers and functions granted to an equality court under section 21 of the Equality Act.

[12] Section 16 (2) of the Equality Act provides that only a judge or magistrate who has completed a training course in terms of the provisions of section 31 (4) may be designated to hear matters under the Act. Given the fact that the Equality Act does not purport to establish a separate court in terms of the provisions of section 166 (e) of the Constitution and that section 31(4) envisages training courses "with a view to building a dedicated and experienced pool of trained and specialised presiding officers, for purposes of presiding in court proceedings as contemplated by this Act", there may be some superficial attraction to the argument that what the legislature had in mind was not a court with judicial authority and independence under the Constitution, but

³¹ The argument was restricted to judges, but an analogous argument about the competence of magistrates may also be made.

something else, a tribunal with specialised skills to deal expeditiously with issues under the Equality Act and in accordance with “uniform norms, standards and procedures”.³² In my view, however, this argument cannot hold.

[13] The judicial function exercised by judges and magistrates under the Equality Act cannot be equated to some specialised legal skill such as that required of someone determining, for example, a tax, patent, competition or labour dispute. The achievement of equality, together with the other values mentioned in section 1 of the Constitution, including dignity and freedom, is a fundamental value of our Constitution. Achievement of equality as a fundamental value of the society we aspire to, and the interpretation and application of the right to equality in terms of section 9 of the Bill of Rights under the Constitution, are integral features of any adjudication on any given day in the courts established under the Constitution. Judges and magistrates are bound by their judicial oath in terms of section 174 (8) of the Constitution to uphold and protect the Constitution. They must give expression to the constitutional demand of equality in the application of the law in the High Courts and Magistrates’ Courts every day. Equality underlies all adjudication under the Constitution, not only that in terms of the Equality Act.

[14] It is clear from the provisions of the Equality Act that a court exercising its function under the Equality Act does not do so under any exclusive jurisdiction to deal with the particular subject matter, nor does it do so under any form of concurrent

³² Section 31 (4) (b) of the Equality Act.

jurisdiction with the High Court.³³ The fact that section 21 of the Equality Act does not specifically provide for review powers is consistent with the view that adjudication of equality disputes under the Equality Act falls under the first category referred to in paragraph [8] above, namely that it is an instance of the High Court itself exercising equality jurisdiction in terms of the Equality Act. When the High Court exercises jurisdiction as a High Court under the Constitution it does not need statutory review powers, it is already possessed of them in terms of the common law and by virtue of being a superior court with judicial authority under the Constitution. The provisions of the Equality Act are not directed only against inequality in the private sphere. Its provisions also bind the State³⁴ and neither the State nor any person may unfairly discriminate against any person.³⁵ The Equality Act also places specific obligations on the State to promote equality.³⁶ Much, if not most, of the conduct of State organs under these provisions will amount to reviewable administrative action under the provisions of section 33 of the Constitution and that of PAJA. If the intention was that an 'equality court' would merely be an independent and impartial tribunal with effective power to enforce the breach of its provisions by administrative review under PAJA, it would have been necessary to include administrative review as part of its powers and functions under section 21. The fact that this was not done is in my judgment a clear indication that it was never intended to be such a tribunal, but that the equality jurisdiction in terms of the Act would be exercised under High Court judicial authority, which includes judicial review.

³³ In this regard the Equality Act's provisions differ from those of, for example, section 157 (1) and (2) of the Labour Relations Act, note 19 above, and section 22 (1) of the Restitution of Land Rights Act, note 20 above, where exclusive and concurrent jurisdiction in respect of constitutional matters are conferred on the Labour Court and the Land Claims Court respectively.

³⁴ Section 5 (1) of the Equality Act.

³⁵ Section 6.

³⁶ Sections 24, 25 and 26.

[15] In *Minister of Environmental Affairs and Tourism v George and others* ('the *George case*')³⁷ the Supreme Court of Appeal held that a matter heard under the provisions of the Equality Act cannot be transferred to the High Court as "another ... court" under section 20 (3) (a) of the Equality Act:

"It is true that s 20 (3) (a) refers to 'another ... court'. But 'court' clearly cannot include a High Court when the equality court is itself a High Court sitting as an equality court. It may include a small claims court or a magistrates' court but it is not necessary for us to decide that now. What is clear is that, in these circumstances, a High Court is not intended."

[16] The outcome of the *George case* in the Supreme Court of Appeal lends support to the approach that when the High Court sits as an 'equality court for the area of its jurisdiction' in terms of section 16 (1) (a) of the Equality Act it does so as a High Court with judicial authority under the Constitution.³⁸ The jurisdiction it exercises when doing so is its own, as a High Court. There is, in my respectful view, no separate 'equality court' (either in the form of a court established under section 166(e) of the Constitution or as a tribunal without judicial authority under the Constitution) with any separate jurisdiction of its own. The High Court sitting as an 'equality court' sits as a High Court, retaining its original jurisdiction as such, together with any expanded jurisdiction that may be conferred upon it in terms of the provisions of the Equality Act.

[17] I am aware that in *George and others v Minister of Environmental Affairs and*

³⁷ 2007 (3) SA 62 (SCA).

³⁸ Magistrates' Courts sitting as equality courts for administrative regions in terms of section 16 (1) (c) of the Equality Act do so, similarly, as Magistrates' Courts with judicial authority under the Constitution. Whether they would also have review powers would depend on the designation process in terms of section 9A of PAJA.

Tourism,³⁹ reference was made to ‘parallel proceedings’ in the High Court and Equality Court, and that in the Supreme Court of Appeal in the *George* case it was stated that at least some of the relief sought by the fishers lay “solely within the jurisdiction of the equality court”⁴⁰ and that “some of the relief the fishers seek can be adjudicated only by the High Court”.⁴¹ But in my respectful view these comments should be read in the context of the issue raised in that matter, namely whether an ‘equality court’ may refer a matter to the High Court under section 20 (3) (a) of the Equality Act, and especially against the background of the outcome in relation to that issue, namely that such a referral cannot be done because, essentially, an ‘equality court’ *is* a High Court.⁴² If read with that in mind these remarks simply emphasize that a High Court sitting as an equality court within its area of jurisdiction may have an extended jurisdiction conferred upon it by the provisions of the Equality Act.

[18] Perhaps it would be conducive to clarity to talk of the High Court exercising ‘equality court jurisdiction’ under the Equality Act rather than the ‘equality court’ having that jurisdiction.⁴³ Use of the term ‘jurisdiction’ in that sense would denote that the High Court has jurisdiction to determine a cause of action brought before it which is based on the provisions of the Equality Act. If used in that sense it would mean that there should be no obstacle to single proceedings being brought in the High

³⁹ 2005 (6) SA 297 (EqC), para. [27].

⁴⁰ The *George* case, note 24 above, para. [12].

⁴¹ *Id.*, para. [13].

⁴² It is not clear to what extent the question of jurisdiction and remedies under the equality and other provisions of the Constitution, compared to those under the Equality Act itself, were raised and debated in the *George* matter, and the issue does not appear to have been central to the ultimate issue at stake. There appears to me to be room for an argument that a High Court may be able, in an equality matter, to achieve all that can be achieved under the Equality Act, solely in reliance on the Constitution, by virtue of the provisions of, in particular, sections 38, 172 and 173 of the Constitution.

⁴³ In a similar manner to the High Courts exercising ‘admiralty jurisdiction’ under section of the Admiralty Jurisdiction Regulation Act, note 18 above.

Court, based on a cause of action under the provisions of the Equality Act, as well as on any other cause of action over which the High Court would normally have jurisdiction. There would then be no need for the use of ‘parallel proceedings’. If I am correct in this view the problem that arose in the *George* matter might have been avoided altogether.

[19] Two possible difficulties may be raised to this approach. The first is procedural, namely that “[a]n integral part of the Equality Act ...is the focus on the creation of a user-friendly Court environment where proceedings are conducted along inquisitorial lines, with an emphasis on informality, participation and the speedy processing of matters”,⁴⁴ and that by allowing other causes of action to be brought in the same proceedings the advantages of this process will be lost. It is a valid point, but not one that cannot be overcome in a practical manner. If litigants choose to bring single proceedings in the High Court by relying on both a cause of action founded in the Equality Act as well as another not founded on the Equality Act, they may have to accept that by doing so they will have to forego the advantages of the more informal and speedy proceedings under the provisions of the Equality Act. If they do want to proceed under speedier and more informal procedures they would need to apply for relaxation of the normal High Court rules, or for condonation for not complying with them. The question of prejudice to their opponents may then be an important consideration, apart from other requirements, but in principle such an obstacle may be accommodated within existing High Court rules.

⁴⁴ Per N C Erasmus J in the High Court *George* case, note 39 above, para. [12].

[20] The present case is an example of the converse situation. The first and second respondents object to the fact that the complainant has used all the trappings of a normal, albeit urgent, application for review instead of the informal procedure provided for under the Equality Act. They argue that I should decline to hear the matter because there has been no proper inquiry held in terms of the provisions of section 21 (1) of the Equality Act. I do not consider there to be any material substance in the argument. An inquiry under the Equality Act may take many forms, some informal, others less so. The directions I gave for the further conduct of the matter at the earlier hearing were formal in the sense that they allowed for the delivery of sets of affidavits, but also less formal in the sense that these papers had to be filed speedily within expedited limits. The hearing before me proceeded in the formal manner used in ordinary High Court applications. I do not consider the form of the hearing or the filing of papers preceding it as not being in compliance with the provisions of the Equality Act, nor am I able to conceive in what manner the first and second respondents may have been prejudiced by the form the proceedings took.

[21] The second difficulty relates to the earlier argument concerning the appointment of judges⁴⁵ to preside in Equality Act matters, but now in a different form. If the High Court exercises its own jurisdiction when it determines matters under the Equality Act then, so the argument might run, there is no constitutional or other justification for restricting the exercise of High Court equality jurisdiction only to those judges who have completed a training course in terms of section 31 of the Equality Act. I have considerable sympathy for such a view. It would be ironic,

⁴⁵ The appointment of magistrates will fall under the same argument.

regrettable and in my view unconstitutional if the provisions of the Equality Act indeed seek to make some judges ‘more equal than others’.⁴⁶ It is also an impractical, inconvenient and illogical requirement.⁴⁷ But for present purposes I need not decide whether the provisions of section 16 (2) of the Equality Act is unconstitutional or not, because whatever the outcome of such a challenge may be, it would not affect the outcome in the present case. I am qualified under the present provisions of the Equality Act to preside in a matter arising from the Equality Act. If it is found that the provision is constitutional nothing will change from the present situation. If the particular provision in section 16 (2) is found to be unconstitutional it would not result in the whole of the Equality Act becoming unconstitutional for that reason. The section may be declared unconstitutional or it may be read down to make it constitutionally inoffensive so that all judges can sit in the High Court exercising equality jurisdiction. But none of that will render the conclusion reached here, that the High Court exercises its own jurisdiction as a court with judicial authority under the Constitution when it hears matters under the Equality Act, invalid.⁴⁸

⁴⁶ “All animals are equal but some animals are more equal than others”, in ch. 10 of *Animal Farm*, by George Orwell.

⁴⁷ Only one such training course has been offered for Eastern Cape judges. One of the presenters of the course I attended was Professor Plasket, then an academic at Rhodes University. He is now a judicial colleague, but has not yet attended the training course which he earlier taught us in. He may thus not sit in matters of first instance under the Equality Act. By some accident another colleague, one of the most senior judges in the Eastern Cape, could not attend the training course. He, too, may not sit in a matter of first instance under the Equality Act. But both of them may sit as judges of appeal in appeals under the provisions of the Equality Act, and all judges must interpret and apply the constitutional demands to achieve equality in other cases that come before them in the High Court. We have all also attended ‘social context’ judicial education as judges of the High Court that differed little from the ‘equality training’.

⁴⁸ It will be apparent from the reasoning in this judgment that I disagree with the finding of Pillay J in an earlier matter of *Manong & Associates v Dept of Transport, EC and another*, case no. 928/06 (Bhisho), that the High Court sitting as an equality court does not have review jurisdiction. The fundamental disagreement between us appears to me to lie, with respect, in whether the ‘equality court’ does have a separate existence from the High Court or not. I consider that difference of opinion of a sufficient degree to allow me not to follow his judgment. I do not think my views are inconsistent with those expressed by Moosa J in *Manong & Associates v City of Cape Town and others*, case no. 2/2005 (CPD), except that this judgment goes beyond the narrower point raised in that matter.

Background facts

[22] The complainant is a national company specialising in civil, structural and developmental engineering with offices in Cape Town, Johannesburg, Port Elizabeth, East London and Mthatha. It has three black directors, all with civil engineering qualifications and experience in various parts of the construction industry.

[23] As background to its present complaint Mr. Manong, one of its directors, sketched the history of its dealings with the first respondent and the tender authorities in this province since 2002, in the founding affidavit. Mr. Manong alleged that in 2002 and early in 2003 the complainant was approached on more than one occasion by a Mr. Xoko, an official of the first respondent, with suggestions that the complainant should pay certain amounts to him, Mr. Xoko, in order to facilitate the award of road construction tenders to the complainant. The complainant refused these invitations to enter into a corrupt relationship with Mr. Xoko..

[24] In May 2003 the first respondent launched a roster system of appointing consultants to construction projects. The aim of the roster system was to ensure a fair and equitable distribution of work with specific emphasis on affording historically disadvantaged firms and individuals preferential treatment through accelerated appointments in order to assist them to develop. Under the terms of the roster system firms owned and controlled by previously disadvantaged individuals would qualify for more appointments under the roster system than firms not so owned and controlled, a result in keeping with the aim of preferential treatment for previously

disadvantaged people.

[25] Since the implementation of the roster system in 2003 the complainant alleges it has not received a single appointment from the first respondent. As a result of this failure the complainant requested and held a meeting with the Member of the Executive Council ('the MEC') of the first respondent in December 2004. The complainant alleges that this intervention led to the Auditor-General launching an investigation which led to the uncovering of serious irregularities. Soon after this the then MEC was transferred and the matter was not pursued by the incumbent MEC. In February 2005 the complainant became aware that certain consultants were appointed for road maintenance works and it wrote a letter to the office of the MEC complaining about the manner in which consultants were being appointed.

[26] In June 2006 the first respondent advertised tenders for five road construction projects in the province. On 26 July 2006 the complainant brought an urgent application for, in the first part, an order compelling the first respondent to open the financial proposals in public, and, in the second part, seeking a direction for an inquiry under the provisions of the Equality Act. The urgent application was dismissed and the complainant never proceeded with the relief sought in the second part. When the complainant's technical proposal for those contracts was disqualified on the basis that it did not obtain the minimum number of points to be considered further, it brought another urgent application to interdict the award of the tenders pending review of the process that led to the complainant's disqualification from further participation in the process. This urgent application was once again dismissed,

but the second part of the application (for review) was postponed indefinitely. Complainant sought leave to appeal against the refusal of the urgent application, which was refused, but an order for a directions hearing for the review part of the application was nevertheless made. A further petition to the Supreme Court of Appeal for leave to appeal was also refused, allegedly because there was no application for condonation for its late filing. On 13 June 2007 the review part of this second application by the complainant was heard. Judgment was handed down on 18 October 2007, after the complainant had complained to the Judicial Service Commission about lack of progress in the matter. The application was dismissed on the ground that the equality court did not have review jurisdiction. Leave to appeal has been sought by the complainant against that judgment, but the application for leave has apparently not yet been heard.

The present application

[27] The present application arises from an invitation for tenders made by the first respondent in July 2007 for the design and construction of three different road construction works. The complainant submitted a tender for all three projects in August 2007, but was disqualified from further participation in the tender process for failing to score the minimum number of points in its technical proposal. This happened on 20 December 2007 but complainant alleges it only became aware of this on 23 January 2008. In its founding papers the complainant attacked the disqualification of the complainant's technical proposals as unlawful in general terms on the basis that the procurement process was unfair, inequitable, not transparent, uncompetitive and not cost-effective; also that it was unfairly discriminatory under

the Equality Act: and, lastly, that it was unreasonable and irrational and thus contrary to the provisions of section 33 of the Constitution.

[28] The factual basis for this attack on the alleged unlawfulness of the procurement policy in the founding papers is the following:

- the requirements that a bidder should have undertaken a minimum number of similar projects in the previous seven years and that it should have key personnel with sufficient technical expertise and experience unfairly discriminates against new entrants, who will predominantly be previously disadvantaged groups or persons;
- there is insufficient transparency in the process in that the opening of the technical proposals of bidders is not immediately followed by the opening of their financial proposals;
- the process is not cost effective because of the separate consideration of the technical and financial proposals;
- that the process contravenes legislation which states that 90 points should be allocated for price whilst the process only allocates 27 points for price; and
- that the complainant is being deliberately targeted because of his previous encounters with officials of the first respondent, especially Mr. Xoko.

[29] The first respondent, in an affidavit deposed to by the chief engineer (materials) in the roads, planning and design section of the first respondent, dealt extensively with the factual allegations underlying the complainant's attack on the lawfulness of the tender process. In reply the complainant did not directly attempt to refute these, but in argument a number of issues arising from the record of the process (which only became available after the initial hearing before me) were used in an attempt to justify the complainant's case in this regard. I must also add that extensive argument on this aspect was addressed to me at the earlier hearing.

[30] In summary, the defence to the attack on the alleged unlawfulness of the procurement policy and its application is the following. The first respondent denies that the complainant was ever approached by its officials in order to involve it in corrupt activities, or that it has been unfairly excluded from the allocation of tenders in the past. It points to the fact that the complainant has done work to the value of millions of rands for the respondent as proof of this. There has been no exclusion of the complainant for improper motives or purposes. The procurement procedure changed from the roster system to the present system because of a change to the enabling legislation applicable to public procurement. The roster system was designed to, and did, give previously disadvantaged groups or persons the opportunity to gain practical experience in the road construction industry. The requirements relating to experience and technical expertise under the present system have been built into the bid rules in order to ensure that successful bidders have the capacity to carry out the functions set out in any specific tender. The projects at stake are multi-million rand projects. If the successful bidder does not have the functional capacity to perform the work public money would be squandered. The roads that need to be built must be safe to use and should have maximum durability. The intention is not to exclude new entrants, but rather to employ experienced firms from historically disadvantaged groups. The complainant is one of those historically disadvantaged firms who could fulfil the requirements of practical experience and technical expertise under the provisions of the policy. In the particular projects relating to this application, however, a fair and objective analysis of the complainant's functional proposals led to an assessment that the complainant did not reach the required 75 points to be

considered further. The details of the manner of assessment and scoring in relation to the complainant's bids were provided in the first respondent's papers. The initial assessment of the functional proposals, and making those results known, before proceeding with the process in relation to the financial proposals of those who passed the functional threshold was practical, cost effective and transparent. The procurement procedure of the first respondent does not allocate 27 points for price as the complainant alleged. Mr. Xoko was not involved in either the bid evaluation or bid award committees. The recommendations of the bid evaluation committee were duly and properly considered by the bid award committee. After consideration the tenders were then properly awarded and the awards made public.

[31] I may interpose here that when the complainant launched the application on an urgent basis it was not yet aware who had been awarded the tenders. On obtaining this information and the record of the process the complainant added another string to its bow, namely that the new information showed that a massive fraud had been committed. The basis for this new ground was that in respect of at least one of the projects, the successful bidder's initial bid document was for about half the amount at which the final award was granted to it and that the changes to reflect the increased bid amount could only have been made on the document after it had been initially submitted. On the face of it this did indeed look odd, but, at the second hearing before me, Mr. Bloem, who appeared with Mr. Sandi for the first and second respondents, explained that there was a simple and innocuous explanation for this. The total value of the particular contract was increased substantially after the initial tender documentation was made available. At a meeting, the minutes of which was recorded

and formed part of the record of the tender proceedings,⁴⁹ the increase in value was made known to all the bidders, a representative of the complainant included. An opportunity was given to all for an adjustment of their bids, and automatic adjustments were also made for those who did not do so on their own and had passed the functional part of the process. The documents in the record bear this out. Consequently, in my view, there is no, or insufficient, evidence to sustain this additional and alternative complaint against the process.

[32] The complainant did not ask for the matter to be referred to oral evidence on any specific aspect, nor does my reading of the record indicate any reason, readily apparent from the review record, that throws any material doubt on the version put up by the first respondent about the procurement process in respect of the works under consideration in this application. That version appears to refute the complainant's allegation of an unlawful and unfair process completely.

[33] On the version put before me by the first respondent (which is the version I have to accept for the determination of this matter) there is no factual basis to sustain interference by review because of improper motive or purpose. So too in respect of the complaints relating to transparency, cost effectiveness and the correct points allocation under the policy. What remains is the alleged indirect discrimination flowing from the requirements of experience and functional expertise. The test here is whether these requirements could be said to be reasonable given the stated aim of the first respondent, in terms of the empowering legislation, to advance the empowerment

⁴⁹ Not part of the court record, though, because a substantial part of the very voluminous record of the entire tender process was physically available at court on the day of the second hearing before me but, by agreement between the parties, was not included in the court record.

of previously disadvantaged groups and persons.

[34] “[T]he broad goals of transformation can be achieved in a myriad of ways”, remarked O’Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*,⁵⁰ and on the particular facts of that case held that a policy that favoured ‘internal’ transformation rather providing for new entrants to the particular part of the fishing industry passed the test of reasonableness. On the facts before me the initial roster policy appears to have provided for the possibility of obtaining practical experience in the field. The requirements of practical experience and functional expertise in the present procurement policy are rationally connected to the unobjectionable goals of providing safe and durable roads to the public without wasting public money. There is no indication before me that there are no previously disadvantaged groups or persons sufficiently experienced and qualified to satisfy the functional requirements in the procurement policy. Indeed, the complainant itself appears to fit this profile in general terms. I cannot hold that a reasonable decision-maker could not have reached the conclusion that the policy is fair and reasonable.⁵¹

[35] In the result I find that the complainant has failed to advance sufficient grounds to justify the relief sought in the notice of motion.

Ancillary matters

[36] In its founding papers the complainant saw fit to include correspondence between it, the Chief Justice and the Judicial Service Commission in relation to complaints

⁵⁰ 2004 (4) SA 490 (CC); 2004 (70 BCLR 687 (CC), at para. [35].

⁵¹ *Id.*, at para. [44].

made by it about the conduct of the judges involved in the earlier litigation referred to in this judgment, as well as that of another judge in a different division. When taxed about the relevance of this Mr. Manong, a director of the complainant who was allowed to represent the complainant in the hearings before me, eventually apologised for its inclusion in the papers, saying that there was no ulterior purpose in including the correspondence in the papers. I accepted his explanation and apology and hope that it does not happen again. What other judges did or did not do in matters the complainant had previously been involved in, and whether the complainant reported their conduct to the JSC, are matters that are irrelevant to the issues that I had to decide in this application.

[37] As mentioned in the previous paragraph I allowed Mr. Manong to represent the complainant in this application. The regulations issued under the Equality Act appear to make provision for individuals to represent complainants who are not able to do so adequately for themselves. In the context of informal and speedy proceedings where the aim is to make those proceedings accessible and understandable to litigants who may not be attuned to legal proceedings there should not be a problem in allowing that kind of representation. But on reflection I do not think that it is appropriate where the litigation involves a commercial company such as the complainant, and in proceedings where purely commercial advantages are being sought in formal proceedings such as the present. The fact that I allowed Mr. Manong to represent the complainant in the particular circumstances of this case should not be regarded as a precedent for allowing him to do so in further proceedings of a similar nature.

[38] The matter is of sufficient complexity and importance to justify the costs of two counsel. Because of the history and urgency of the matter I do not think the complainant should be ordered to pay the costs of the two previous hearings. The complainant did not know initially when the tenders would be awarded and who the successful bidders were.

[39] In the result the application is dismissed with costs, such costs to include the costs of two counsel, but to exclude the costs relating to appearances on the two previous days when the matter came before court.

J.C.Froneman
Judge of the High Court.