

SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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***Manong v The Minister of Public Works
(518/2008) [2009] ZASCA 110 (23 September 2009)***

Media Statement

Today the Supreme Court of Appeal (SCA) dismissed an appeal by Manong and Associates (Pty) Ltd (the Company). The matter had commenced in the words of the SCA 'as a somewhat ambitious application in terms of The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) to the Equality Court (Transvaal Provincial Division)'. In it, the Company, a national company specialising in civil, structural and development engineering, sought against the Minister of Public Works and the Director General, Department of Public Works an interim interdict preventing them from implementing their Professional Services Supplier Register (the register) including its key principles. The application was dismissed with costs in the court below by Botha J.

The National Department of Public Works (the DPW), which has been described as the largest employer of consultants in the built environment, operated a roster system for the procurement of professional service providers for its projects. The aim of that policy, which was introduced in May 2001, was to ensure a fairer distribution of work by targeting historically disadvantaged firms and individuals and affording them preferential treatment through accelerated appointments to departmental tenders. During March 2008, the DPW sought to replace that policy with a new Professional Services Supplier Register (the register). Disgruntled at the DPW's decision to discard the roster system in favour of the new register, the Company launched an application for an interdict in the Equality Court.

In the view of the SCA, the Company had to fail at the first hurdle for the grant of an interdict – namely a *prima facie* right. According to the SCA, in order to succeed the Company had to establish *prima facie* that the mere implementation of the new policy by the DPW would in and of itself have resulted in a discriminatory practice to the Company and other similarly placed historically disadvantaged firms and individuals. That proposition, according to the SCA, was wholly untenable, because the DPW's explanation that the roster system had to be discarded in favour of the new register to ensure compliance with the relevant statutory framework was not and could not have been gainsaid by the Company. It followed therefore that the appeal had to fail and it was dismissed with costs.

In the course of doing so, the SCA was also called upon to first consider whether Mr Mongezi Stanley Manong (Mr Manong), the managing director of the company, who had signed the heads of argument on behalf of the company and who had purported to represent it before the SCA, had what is described as a right of audience on behalf of the Company before it. After considering the historical rationale for the rule that a company cannot conduct a case before it except by the appearance of counsel on its behalf, the SCA concluded that cases will

arise where the administration of justice may require some relaxation of that general rule. It accordingly held that superior courts have a residual discretion in a matter such as that, arising from their inherent power to regulate their own proceedings. Such a discretionary power was in the opinion of the SCA consistent with the Constitution. The SCA emphasised that discretionary audience should be regarded as a reserve or occasional expedient, for, given the increasing complexity of litigation, the rule may well be required as strongly today as it ever was and furthermore there may well be circumstances when an unqualified and inexperienced person may do more harm than good to the corporate litigant that he purports to assist. The SCA refrained from formulating a test for the exercise of the Court's inherent power as it believed that such cases could confidently be left to the good sense of the judges concerned. It did however hold that it would be necessary in each such instance that leave first be sought by way of a properly motivated, timeously lodged formal application showing good cause why in that particular case the rule prohibiting non-professional representation should be relaxed.

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