THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 437/2005
REPORTABLE

In the appeal between:

MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM Appellant

and

KENNETH GEORGE First respondent
TRUSTEES OF THE MASIFUNDISE DEVELOPMENT TRUST Second respondent
JOHN SPAMI NKUNZANA Third respondent
JAPIE BRITS Fourth respondent
NORTON DOWRIES Fifth respondent
PETER CORAIZIN Sixth respondent
ARTISANAL FISHERS ASSOCIATION OF SOUTH AFRICA Seventh respondent

Before:	Harms, Zulman, Cameron, Lewis and Jafta JJA
Heard:	Tuesday 2 May 2006
Judgment:	Thursday 18 May 2006

Equality Court – power under Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 to refer case to 'appropriate forum' – court has discretion – when not exercised, no 'judgment or order' capable of being appealed – leave to appeal against orders of equality court in any event required

Neutral citation: Minister of Environmental Affairs and Tourism v George [2006] SCA 57 (RSA)

JUDGMENT

CAMERON JA:

[1] The Minister of Environmental Affairs and Tourism (the Minister) appeals against a refusal by a judge sitting in the equality court in Cape Town to refer this case to the high court as a more appropriate forum to hear it. In December 2004, the respondents, individuals and organisations claiming to represent about 5000 artisanal fishers (the fishers), lodged simultaneous applications in the high court and in the equality court at Cape Town. (Artisanal fishers are small-scale fishers who use traditional low-technology methods to catch fish, not on a large commercial scale, but to make a living through local sale or barter and to feed themselves and their families.) The fishers lodged a single set of papers in both courts, claiming that the Minister had failed to provide them with just access to fishing rights, and seeking an order giving them equitable access to marine resources. But they asked that, before their high court claims be considered, the equality court hold an inquiry into their causes of action under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

(the Equality Act). The Minister sought to block this. He asked the equality court to refer the entire matter to the high court, but NC Erasmus J refused;[1] hence this appeal, for which the Minister neither sought nor obtained leave.

[2] Before the appeal can be enrolled, the Minister requires condonation for various procedural lapses, most signally the late filing of his notice of appeal. The respondent fishers dispute the explanation the Minister proffers; and it is common cause that the fate of the condonation application turns on whether the merits of the appeal are sound. But two factors render these deeply flawed: (a) the equality court's refusal to refer the matter to the high court, which entailed a discretionary decision entrusted to it, did not embody a judgment or order capable of being appealed, and the order the Minister sought was incompetent; and (b) leave is in any event required for an appeal to lie from orders of the equality court.

(a) No appealable order; order Minister sought in any event incompetent

[1] *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC).

[3] The equality court is established by s 16 of the Equality Act, which was enacted in fulfilment of the Constitution's central equality clause.[2] The statute's objects are to give effect to the letter and spirit of the Constitution's equality promise and to provide practical measures to facilitate the eradication of unfair discrimination, hate speech and gender and other forms of harassment (s 2). The Act proscribes unfair discrimination on 'prohibited grounds', which are broadly defined (sections 6-12, read with s 1), and vests equality courts with extensive procedural and remedial powers in complaints of unfair discrimination (s 21).

[4] The purpose of these innovations is to create enhanced institutional mechanisms through which victims of unfair discrimination and inequality can obtain redress for the wrongs against them. The equality court is not a wholly novel structure, but is a high court or a designated magistrate's court. Apart from

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[2] **Equality** 9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is

the specific powers the statute confers, the only distinction is that the presiding judges or magistrates must have undergone 'social context training' (s 31(4)(a), read with s 16(2)). Subject to the availability of a presiding officer and one or more clerks, every high court is for the area of its jurisdiction an equality court, and the Judge President may designate any judge who has completed a training course a presiding officer of the equality court (s 16(1)(a), (b) and (2)). The Minister for Justice and Constitutional Development must also designate magistrates' courts as equality courts (s 16(1)(c)).

[5] The statute obliges an equality court before which proceedings are instituted to hold an inquiry in the manner prescribed in the regulations[3] and to 'determine whether unfair discrimination has taken place as alleged' (s 21(1)). But when a complainant lodges an equality complaint, the statute first obliges the equality court to determine where the matter should best be heard. It requires the court to –

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established that the discrimination is fair.'

[3] GN R764, Government Gazette 25065 of 13 June 2003. Reg 10 deals with the powers and functions of an equality court. Reg 10(1) provides that the inquiry 'must be conducted in an expeditious and informal manner which facilitates and promotes participation by the parties'. Reg 10 (3) provides the proceedings 'should, where possible and appropriate, be conducted in an environment conducive to participation by the parties'.

'decide whether the matter is to be heard in the equality court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum (hereafter referred to as an alternative forum) which, in the presiding officer's opinion, can deal more appropriately with the matter in terms of that alternative forum's powers and functions' (s 20(3)(a)).[4]

Before making a decision to refer a matter to another forum, the statute obliges the presiding officer to 'take all relevant circumstances into account', including the following:

'(a) The personal circumstances of the parties and particularly the complainant;

(b) the physical accessibility of any contemplated alternative forum;

(c) the needs and wishes of the parties and particularly the complainant;

(d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law;

(e) the views of the appropriate functionary at any contemplated alternative forum.' (s 20(4))

[6] Section 20(5)(a) provides that if the presiding officer decides to refer the matter to an alternative forum, he or she must 'make an order' directing the clerk of the equality court to refer the matter.

[4] Reg 6(4) of the regulations promulgated in terms of s 30 of the Equality Act (GN R 764, GG 25065 of 13 June 2003) requires the presiding officer in the equality court, within seven days after receiving the documentation relating to the matter, to decide 'whether the matter is to be heard in the court or whether it should be referred to an alternative forum'.

What emerges signally from this statutory wording – and is fatal to the Minister's appeal – is that the court makes an order when re-directing a matter: but does not do so otherwise. And this is logical. For once a complaint of unfair discrimination is properly before an equality court, the statute vests it with jurisdiction to hear the matter, and no further order is required to render the court competent, nor is any order required for it to retain its competence.

[7] By providing that the court may refer a matter to 'another appropriate institution', the statute acknowledges not only the potential intricacy of unfair discrimination claims, but the range of other institutions that could afford appropriate assistance in resolving them. But the avenue so created, far from being intended to deprive the equality court of its jurisdiction, is premised on its continuing jurisdiction, with the result that in cases of non-referral no express order need be given.

[8] If the alternative forum does not resolve the matter to the satisfaction of either party, and either party so requests, the alternative forum must refer the matter back to the equality court (s 20(8)). The equality court's jurisdiction thus persists: the

redirection entails only a conditional exploration of appropriate institutional alternatives. Where there is no redirection, the unavailing application has no executive impact on the process, for the presiding officer has declined to exercise the discretion to redirect, and the proceedings continue as before. Since in that event no 'judgment' or 'order' is either necessary or appropriate, the Minister's application stumbles on the first criterion of appealability.[5]

[9] I would in any event add that the equality court's decision whether to redirect a matter entails a discretion with which this court will interfere only when the equality court fails to exercise it judicially.[6] Counsel for the Minister was invited, with reference to the judgment in court below, to indicate what considerations NC Erasmus J had misapplied, and what factors he had erroneously taken into account, but was unable to suggest any basis for a case of misdirection.

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[5] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 531B-C.

[6] *Ex parte Neethling* 1951 (4) SA 331 (A) 335D-F, per Greenberg JA: 'Can it be said in the present case that the Court a quo exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons?'; LTC Harms *Civil Procedure in the Superior Courts* (1990, with updates) para C1.39.

[10] There is a further consideration. The Minister contended both before us and in the equality court that the high court was a more appropriate institution to hear the matter. But in my view such a redirection would have been incapable, since the high court did not fall within the category of alternative fora to which the equality court was in this case empowered to refer the matter. 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 magistrate's 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.

[11] This appears most obviously from the 'relevant circumstances' the presiding officer must take into account in terms of s 20(4). These include 'the views of the appropriate functionary at any contemplated alternative forum' (s 20(4)(e)): it is neither apparent who the 'appropriate functionary' in the case of a high court would be nor, if it is a high court judge, how his or her views would be obtained. The entire process of conditional exploratory referral is alien to the functioning of a high court. It must therefore be

concluded that the legislation does not contemplate that a high court sitting as an equality court can refer a matter to itself in another capacity.

[12] The jurisdiction and powers that the statute confers on equality courts is wide, and counsel for the Minister was obliged to concede that at least some of the relief the fishers seek lies solely within the jurisdiction of the equality court. The fishers conceded that all their claims arise from substantially the same facts, and that they are all directed at substantially the same relief: but they pointed out that the claims are based on a range of different causes of action. Some of the relief they seek the high court has no jurisdiction to consider or grant – most notably, their prayer for an inquiry in terms of s 21(1) of the Equality Act. The fact that much of the other relief they seek could also be granted by the high court does not detract from the equality court's jurisdiction, nor is it a reason to deprive the fishers of the procedural benefits they hope will accrue from proceeding in the equality court.

[13] Conversely, some of the relief the fishers seek can be adjudicated only by the high court – for instance their claims based on constitutional provisions other than equality, such as

those conferring a right to choose a trade or occupation (Bill of Rights s 22) and access to socio-economic rights (Bill of Rights s 27). But this again does not entail that the equality court cannot first (or concurrently) adjudicate upon the claims that are properly before it.

[14] I conclude that the scheme of the Equality Act does not envisage an appealable order when a presiding officer decides against referring a matter to another forum, and that the referral to the high court the Minister sought was in any event incompetent because the high court sitting as an equality court cannot refer a matter to itself in the former capacity. The appeal therefore founders at the first hurdle.

Leave to appeal in any event required for appeal to lie from equality court decision

[15] The Minister seeks to appeal directly to this court, without having sought or obtained leave. He says that s 23(1) of the Equality Act grants him an untrammelled right of appeal. This provides that 'Any person aggrieved by any order made by an equality court in terms of or under this Act may … appeal against

such order to the High Court having jurisdiction or the Supreme Court of Appeal, as the case may be.' In conjunction with this, counsel for the Minister pointed out, the regulations indicate merely that any person wishing to apply for leave to appeal against any order of the equality court must, within fourteen days of the order, deliver a notice of appeal (reg 19).

[16] But the Equality Act makes the provisions of the Supreme Court Act 59 of 1959, and the rules under it, applicable 'with the necessary changes required by the context' to (amongst other matters) questions of 'jurisdiction' (s 19(1)(e)). And the Supreme Court Act provides in general terms that no appeal shall lie against a judgment or order of the court of a provincial or local division of the high court in any civil proceedings (or against any judgment or order of that court given on appeal to it) unless leave to appeal is granted (s 20(4)). This court's jurisdiction to hear appeals from the high court (and, with the necessary changes, the high court sitting as an equality court) is conditioned by the provisions of the Supreme Court Act.[7] The effect of these provisions is therefore that no appeal lies against a judgment or

[7] *New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) para 22.

order of the high court sitting as an equality court in any civil proceedings unless leave to appeal is granted. The appeal is for this additional reason incompetent.

'Expeditious and informal processing of cases'

[17] It is finally apposite to make some observations on the course these proceedings have taken. As NC Erasmus J pointed out, the question of double jurisdiction this case raises is not unique, and is likely to arise in every case brought under the Equality Act: and there is no reason why those who have interrelated remedies under the equality statute and other legislation should not be entitled to pursue their remedies in parallel proceedings before the high court in its capacity as an equality court, and the high court in its ordinary capacity.[8]

[18] One of the Equality Act's 'guiding principles', which is to be applied in the adjudication of any proceedings instituted under the Act, is the 'expeditious and informal processing of cases' (s 4(1)(a)). In addition, the statute requires that the regulations under it relating to procedure must, as far as possible, ensure that

[8] 2005 (6) SA 297 (EqC) para 27.

the application of the Act is ‘simple, fair and affordable’ (s 30(5)). It is ironical, to say the least, that the fishers’ attempt to invoke the benefits they conceive will flow to them from the establishment of the equality courts has produced a procedural mire which has cost both sides considerable expenditure of time and money and effort. The Minister based his argument that the matter should be referred to the high court on the fact that the equality court does not have jurisdiction over the bulk of the relief the fishers seek, and on the contention that their claims are both premature (given the pending re-allocation of fishing rights) and a ‘disguised and belated review’ (regarding allocations that have run their course). As counsel for the fishers pointed out, if the Minister is correct in these submissions, the equality court will in due course non-suit the fishers. But what the Minister cannot do is to deny them their day in that court. They are entitled to claim the assistance and protection the legislature afforded litigants who wish to press equality claims when it enacted the Equality Act.

[19] The fishers, for their part, say that they instituted parallel proceedings in the high court and the equality court with the express intention of ‘achieving cost efficiency and through

synchronicity between the two procedures'. Given that the problem of concurrency will inevitably recur, the most productive and expeditious way of achieving efficiency would seem to lie in the matter being referred to the same high court judge who, in his capacity as an equality court judge, is presiding in that court.

ORDER

1. The application for condonation is refused with costs.
2. The appeal is struck from the roll with costs.

E CAMERON
JUDGE OF APPEAL

CONCUR:
HARMS JA
ZULMAN JA
LEWIS JA
JAFTA JA