THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 369/08

MANONG AND ASSOCIATES (PTY) LTD	Appellant
and	
EASTERN CAPE DEPARTMENT OF ROADS AND TRANSPORT	1st Respondent
THE NATIONAL TREASURY	2nd Respondent
HAWKINS HAWKINS OSBORNE	3rd Respondent
KWEZI V3 ENGINEERS	4th Respondent
ILISO NINHAM SHAND JOINT VENTURE	5th Respondent

Neutral citation: *Manong v Eastern Cape Department of Roads and Transport & others* (369/08) [2009] ZASCA 50 (25 May 2009)

CORAM: Navsa, Brand, Jafta, Ponnan JJA and Bosielo AJA

HEARD: **5 May 2009**

DELIVERED: **25 May 2009**

CORRECTED:

SUMMARY: Principle of legality – powers of Equality Court – consideration of provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – Equality Court not a High Court – powers exercised in terms of the Act – restricted to dealing with specified complaints – procedures in terms of Equality Act not followed – matter remitted.

ORDER

On appeal from: High Court, Bhisho (Froneman J sitting as court of first instance).

1. The appeal is upheld.
2. The order of the court below is set aside in its entirety and the matter is remitted to the Equality Court for it to be dealt with in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
3. No order is made as to costs of appeal at this stage. The parties are invited, if so advised, to apply to this court upon the final resolution of their dispute for an order in this regard.

JUDGMENT

NAVSA JA (Brand, Jafta, Ponnan JJA and Bosielo AJA concurring):

Introduction

[1] At the heart of this appeal is the principle of legality, an incident of the rule of law.[1] This appeal concerns the jurisdiction and powers of the Equality Court established in terms of s 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

Background

[2] During July 2007 the first respondent, the Eastern Cape Department of Roads and Transport (the ECDRT), invited tenders for the design and

[1] In *Fedsure Life Assurance Ltd v Greater Johannesburg TMC* 1999 (1) SA 374 (CC) at para 56 the following appears:
'[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law ─ to the extent at least that it expresses this principle of legality ─ is generally understood to be a fundamental principle of constitutional law.'

construction of three provincial roads in an area under its jurisdiction. In August 2007, the appellant, Manong and Associates (Pty) Ltd (Manong), a company that conducts business nationally as consulting civil, structural and developmental engineers responded to the invitation. In December 2007 Manong was disqualified during the first part of a two-phase tender evaluation process due to not scoring the minimum required points for functionality.

[3] Manong considered that it was unlawfully disqualified and in February 2008, as a matter of urgency, instituted proceedings, purportedly in the Equality Court in Bhisho, seeking relief in two parts.[2] In the first part, Manong sought a temporary interdict preventing the ECDRT from: (a) taking further steps to evaluate any of the other tenders and; (b) awarding the tenders to any one of the other tenderers. Manong also sought an order compelling the ECDRT to furnish certain documentation.

[4] At the time that the proceedings were instituted, Manong was unaware that the tenders had already been awarded to three of the tenderers.

[5] Manong sought the orders set out in para 3 pending determination of an application for final relief in the following terms:

(i) to set aside a decision of the ECDRT to disqualify from further consideration Manong's tender for the relevant works;

(ii) to review, correct and set aside the award of the tenders to successful bidders;

(iii) declaring the contracts resulting from the allocation of tenders to be null and void;

(iv) declaring the procedure followed in awarding the tenders to be inconsistent with s 217 of the Constitution and unfairly discriminatory under the Equality Act;

[2] Proceedings were instituted by way of notice of motion, accompanied by supporting affidavits in the form usually employed in high court applications.

(v) A direction that the first and second respondent's procurement procedures and practices should undergo an audit in a manner to be prescribed.

[6] The matter came before Froneman J, who, in a judgment in relation to the interim relief sought, said the following:

'Because of the expedited time limits contained in the order below the application should be determined finally at the next hearing. I therefore do not consider that any temporary interdict is called for, because if the application is successful it will still be possible to undo the effects of any wrongful award of the tenders. The respondents are in any event now aware that the award of the tenders are under attack and they will not be able to rely on any steps taken with that knowledge to prevent the final relief if such relief is in the end merited.'

[7] Froneman J made the following interim orders:

'1. The application is postponed to 20 March 2008.

2. [Manong] must ensure that the full application papers, including this judgment, be served by the sheriff on (1) Hawkins Hawkins Osborne Africa; (2) Kwezi V3 Engineers; and (3) Iliso Ninham Shand Joint Venture[3] ("the other respondents") in terms of rule 4 of the High Court rules by 6 March 2008, and proof of such service must be delivered to the Registrar of the High Court, Bhisho, by 12 noon on 7 March 2008.

3. The first respondent is ordered to deliver the full records of the proceedings in respect of the tenders for the Dimbaza Road Project, the Maluti to Qachas Nek Road project; and the St. Barnabas Hospital to Hluleka Nature Reserve Road project,[4] including the documentation referred to in paragraph 6.1 and 6.2 of the Notice of Motion, to the Registrar of the High Court, Bhisho, by 12 noon on 7 March 2008.

4. [Manong] may, if it chooses to do so, deliver further supplementary affidavits, but only in response to new material arising from the delivery of the said records, by 12 noon on 12 March 2008.

5. The first and second respondents may, if they choose to do so, deliver their opposing affidavits on the main application by 12 noon on 17 March 2008.

6. The other respondents referred to in paragraph 2 above, must file an intention to oppose by 12 noon on 11 March 2008 and may, if they choose to do so, deliver their opposing affidavits on the main application by 12 noon on 17 March 2008.

7. [Manong] may file final replying affidavits by 12 noon on 19 March 2008.

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[3] These three entities were the successful tenderers.

[4] These three projects were the subject of the tender process.

8. The costs of the application thus far are reserved for decision on final determination of the application.'

[8] The matter proceeded to a hearing on the main relief sought, referred to in para 5 above.

[9] The second respondent, the National Treasury, was cited as a second respondent by Manong because, in terms of the Public Management Finance Act 1 of 1999, it is empowered to prescribe tender regulations and practices. It is, however, common cause that the ECDRT conducted the tender process in question in terms of regulations prescribed by the Provincial rather than the National Treasury.

[10] The three successful tenderers did not participate in the proceedings and chose to abide the court's decision. The Managing Director of Manong, Mr Mongezi Stanley Manong, appeared in person on behalf of his company both before the court below as also at the hearing of this appeal.

[11] Manong's principal complaint is that the ECDRT tender process is unfair under the Equality Act because it amounted to indirect discrimination against previously disadvantaged individuals. The discrimination is said to arise from the requirement that a bidder must have a history of at least seven years' involvement in similar projects and that the technical members of its staff must have a minimum prescribed level of specialist engineering experience. Manong contended that these requirements effectively excluded previously disadvantaged persons or groups, who historically did not have an opportunity to develop that experience. In the present circumstances it meant that black engineers, either individually, or as a group, were excluded from commercial participation in public works initiated by the ECDRT.[5] Manong is wholly Black-owned. It appears that many of its key personnel are also Black persons.

[5] The complaint is premised on s 7*(c)* which prohibits unfair racial discrimination including:

[12] In addition, Manong contended that the procurement process was flawed because it lacked transparency, was not cost-effective,[6] was contrary to legislation and the Constitution, and that its early disqualification was actuated by improper motives on the part of officials flowing from its refusal to provide 'kick-backs'.

[13] The ECDRT and the treasury opposed the main relief sought on the basis first, that the Equality Court did not have the power to grant relief in the form of administrative review. Second, that the correct procedures under the Equality Act had not been followed and third, that there was no substance in the complaints of unfair discrimination and the unlawfulness of the procurement process.

[14] Froneman J, presumably because of the basis of opposition of the first and second respondents, because the notice of motion was couched in terms conventionally used in review applications in the High Court and because the relief sought was based on grounds that included some of the grounds for judicial review of administrative action set out in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), immediately proceeded to consider whether the Equality Court had 'review jurisdiction'.[7] The learned judge had regard to ss 16 and 31 of

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'The exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group.'
It may also be covered by s 7*(e)* which prohibits unfair racial discrimination including:
'The denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.'
In its founding affidavit, Manong refers to s 29 of the Equality Act which incorporates a schedule which contains an Illustrative list of unfair practices in certain sectors which are unfair and are widespread and which need to be addressed. That list encompasses the sector in which Manong operates and its complaint.

[6] The factual underpinning in respect of Manong's complaint concerning cost-effectiveness is that the two-phase tender process, in terms of which a technical envelope is first opened and its contents scrutinised and evaluated, before a financial envelope is proceeded to, lacks transparency and increases costs. In terms of the process one has to qualify by attaining a minimum of 75 points for functionality in terms of the technical aspect of the bid before the financial aspects are considered.

[7] The judgment of the court below is reported as *Manong & Associates (Pty) Ltd v Department of Roads & Transport, Eastern Cape, and others* (No 2) 2008 (6) SA 434 EqC.

the Equality Act[8] and concluded that equality courts are not 'separate courts of "a status similar to either the High Courts or the Magistrates' Courts" in terms of s 166*(e)* of the Constitution.'[9] He went on to state:

'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 s 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.'[10]

[15] The court below reasoned that 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.'[11] It held that the achievement of equality, together with the other values mentioned in s 1 of the Constitution, including dignity and freedom, was a fundamental value and that the interpretation and application of the right to equality in terms of the Constitution are integral features of any adjudication on any given day in the courts established under the Constitution.[12]

[16] Froneman J considered that although s 21 of the Equality Act did not provide for review powers, an equality court located at the High Court, dealing with an adjudication dispute under the Equality Act, could exercise its High Court powers of review. This review power of the High Court, he reasoned, was in

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[8] The relevant provisions of s 16 are set out in para 30 below. Section 31 is dealt with in paras 48 to 50 below.

[9] Section 166*(e)* of the Constitution under the heading 'Judicial system', provides:
'The courts are –
(a) …
(b) …
(c) …
(d) …
(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court or the Magistrates' Courts.'

[10] Para 10 at 439E-G.

[11] Para 13 at 441A-B.

[12] Para 13 at 441B-D.

terms of the common law and by virtue of it being a superior court with judicial authority under the Constitution. He held as follows:

'[T]he equality jurisdiction in terms of the Act would be exercised under High Court judicial authority, which includes judicial review.'[13]

[17] For this conclusion the learned judge relied on the decision of this court in *Minister of Environmental Affairs and Tourism v George & others*.[14] In the passage relied upon, this court considered whether a High Court was one of the *fora* to which a matter could be referred by a presiding officer of the Equality Court in terms of s 20(3) of the Equality Act. The following was said:

'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 is not necessary for us to decide that now. What is clear is that, in these circumstances, the High Court is not intended.'

[18] After considering the aforesaid passage, the learned judge said the following:

'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 s 16(1)*(a)* of the Equality Act, it does so as a High Court with judicial authority under the Constitution. 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 s 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.'[15]

[19] Re-emphasising that viewpoint Froneman J stated:

'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. Use of

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[13] Para 14 at 442A-B.
[14] 2007 (3) SA 62 (SCA) para 10 at 69B.
[15] Para 16 at 442D-F.

the term "jurisdiction" in that sense would denote that the High Court has jurisdiction to determine the cause of action brought before it which is based on the provisions of the Equality Act.'[16]

[20] The learned judge went further:

'If used in that sense it would mean that there should be no obstacle to single proceedings being brought in the High 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.'[17]

He did not consider that the less formal procedures of the Equality Court militated against a combination of issues being brought in the Equality Court.[18]

[21] Dealing with the view of the first and second respondents that the proper procedures envisaged by the Equality Act had not been followed, Froneman J held that there was no substance to it. In his view, an enquiry in terms of s 21(1) of the Equality Act could take many forms, some formal, others less so.[19] His attitude was that the directions he had given for the further conduct of the matter, namely, those set out in the interim order referred to earlier in this judgment, were sufficient. He recorded that the hearing before him on the main application had proceeded in a formal manner employed in ordinary High Court applications.

[22] Froneman J then turned to consider the merits of the main application and took into account the first respondent's defences. At para 32 of the judgment, he records that Manong did not ask for the matter to be referred to oral evidence on any specific aspect. He considered the ECDRT's answering affidavits to be the complete response to Manong's complaints. He held that the two-phase tender process was practical, cost-effective and transparent. The learned judge held that corruption and an improper motive to exclude Manong had not been proved.

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[16] Para 18 at 443B-C.
[17] Para 18 at 443C-D.
[18] Para 19 at 443E-444D.
[19] Section 21(1) is dealt with later. See paras 41-44 and 63. As will become apparent the problem arises not only in relation to the enquiry itself but to the process leading up to it.

[23] In respect of the complaint of indirect discrimination flowing from the requirements of experience and functional expertise, the learned judge took the view that a prior roster system of preferential allocation to previously disadvantaged persons provided for the possibility of obtaining practical experience. He held that the requirements of practical experience and functional experience 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.[20]

[24] The following part of the judgment is important:[21]

'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.'

[25] In the result, Froneman J dismissed the application with costs, such costs to include the costs of two counsel. The present appeal against that order and Froneman J's judgment is with the leave of the court below. The National Treasury was not a party to the appeal.

The law

[26] The first issue to be dealt with is whether the court below was correct in its characterisation of the Equality Court. Allied to this is the question of its jurisdiction and powers *vis à vis* the High Court. In order to answer this question it is necessary to understand the purpose and scheme of the Equality Act.

[27] Section 9(2) of the Constitution, after recording that equality includes the full and equal enjoyment of all rights and freedoms, provides that to promote the

[20] Para 34 at 449F-H.
[21] Para 34 at 449G-I.

achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be adopted. The Equality Act is legislation to that effect.

[28] Section 2 sets out the objects of the Equality Act as follows:

'*(a)* to enact legislation required by section 9 of the Constitution;

(b) to give effect to the letter and spirit of the Constitution, in particular—

(i) the equal enjoyment of all rights and freedoms by every person

(ii) the promotion of equality;

(iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

(v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)*(c)* of the Constitution and section 12 of this Act;

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;

(g) to set out measures to advance persons disadvantaged by unfair discrimination;

(h) to facilitate further compliance with international law obligations…'

[29] As will become apparent, in due course, the Equality Court is important in meeting these objectives and in particular to determine whether discrimination has occurred and if so, whether it is unfair.

[30] Section 16, under the heading 'Equality courts and presiding officers', establishes equality courts. The relevant parts[22] of s 16 read as follows:

'(1) For the purposes of this Act, but subject to section 31 ─

(a) every High Court is an equality court for the area of its jurisdiction;

(b) any judge may, subject to subsection (2), be designated in writing by the Judge President as a presiding officer of the equality court of the area in respect of which he or she is a judge;

(c) …

(d) …

(2) Only a judge … who has completed a training course as a presiding officer of an equality court─

(a) before the date of commencement of section 31; or

(b) as contemplated in section 31(4),

and whose name has been included on the list contemplated in subsection (4)*(a)*, may be designated as such in terms of subsection (1).

(3) The Judges President … must─

(a) take all reasonable steps within available resources to designate at least one presiding officer for each equality court within his or her area of jurisdiction; and

(b) without delay, inform the Director-General of the Department of any judge … who has completed a training course as contemplated in section 31(4) and (5) or who has been designated in terms of subsection (1).

(4) The Director-General of the Department must compile and keep a list of every judge … who has─

(a) completed a training course as contemplated in section 31(4) and (5); or

(b) been designated as a presiding officer of an equality court in terms of subsection (1).

(5) A presiding officer *must perform the functions and duties and exercise the powers assigned to or conferred on him or her* under this Act or any other law.' (My emphasis).

[31] In s 4(1) of the Equality Act, under the heading 'Guiding principles', the following is stated:

'In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:

(a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings;

(b) access to justice to all persons in relevant judicial and other dispute resolution forums;

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[22] References to Magistrates' Courts have been omitted.

(c) the use of rules of procedure in terms of section 19 and criteria to facilitate participation;

(d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature;

(e) the development of *special skills and capacity* for persons applying this Act in order to ensure effective implementation and administration thereof.' (My emphasis).

[32] Section 17 provides for the appointment of clerks of equality courts to assist the court to which they are attached to perform prescribed functions. Section 20 provides for the institution of proceedings in terms of or under the Equality Act. Section 20(1) provides that any person may act in his/her own interest or on behalf of persons who are unable to do so themselves or as a member of or in the interest of a group or class of persons. Furthermore, a person may act in the public interest. Section 20(1) also entitles associations to act in the interest of their members and provides that the Human Rights Commission or the Commission for Gender Equality may institute proceedings in the Equality Court.

[33] It is important to have regard to s 19(1) of the Equality Act, which provides that Magistrates' and High Court rules apply, with the necessary changes required by the context, to equality courts in so far as these provisions relate to ─

'*(a)* the appointment and functions of officers;

(b) the issue and service of process;

(c) the execution of judgments or orders;

(d) the imposition of penalties for non-compliance with orders of court, for obstruction of execution of judgments or orders, and for contempt of court;

(e) jurisdiction, subject to subsection (3),[23]

and in so far as no other provision has been made in the regulations under section 30 of this Act.'[24]

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[23] Section 19(3) provides that a magistrates' court sitting as an equality court is not precluded from making orders contemplated in the Act which exceed its monetary jurisdiction. When it does so, its order will be subject to confirmation by a judge of the High Court having jurisdiction. That in itself serves to distinguish a magistrates' court sitting in its capacity as such from an equality court sitting at the seat of a magistrates' court ─ in this regard see the discussion later in this judgment from para 52 to 71.

[24] Section 30(1) allows for the Minister to make regulations relating to, amongst other things, the procedures to be followed at or in connection with an enquiry in terms of the Act, including the

[34] In terms of s 20(2), a person wishing to institute proceedings in the Equality Court is obliged to notify the clerk of the court, in the prescribed manner, of its intention to do so. The clerk, in turn, is obliged to refer the matter to a presiding officer of the Equality Court in question who must decide whether the matter should be dealt with by the Equality Court or whether it should be referred to 'another appropriate institution, body, court, tribunal or other forum', which, in the view of the presiding officer can deal more appropriately with the matter in terms of that alternative forum's powers and functions.[25]

[35] If the decision is that the Equality Court should hear the matter,[26] the clerk of the Equality Court must assign a date for the hearing of the matter. In making a decision as to the appropriate forum the presiding officer 'must' take all relevant factors into account, including those listed in s 20(4), which includes the needs and wishes of the parties, particularly of the complainant.

[36] I interpose to record that regulations have been promulgated regulating the procedures to be followed in connection with an enquiry in terms of the Equality Act. The relevant regulations will be dealt with in the next four paragraphs.

[37] Insofar as the regulations deal with the institution of proceedings they largely echo the provisions of the Equality Act. Importantly, the regulations provide that if the matter needs to be heard in the Equality Court the presiding officer 'must refer the matter to the clerk who must, within three days after such referral assign a date for the directions hearing' and inform the complainant of

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manner in which proceedings must be instituted, the referral of matters contemplated in s 20 and the hearing of urgent matters. The Minister is also empowered to make regulations concerning the right of appearance in court and the attendance of witnesses. The regulations are dealt with later in this judgment.

[25] Section 20(3)*(a)*.

[26] Section 20(3)*(b)*.

that date.[27] Regulation 8 provides for witnesses to be subpoenaed and for compelling documentary evidence. Regulation 10 (1) states that the enquiry must be conducted in an expeditious and informal manner, which facilitates and promotes participation by the parties. Regulation 10 (3) provides that the proceedings should, where possible and appropriate, be conducted in an environment conducive to participation by the parties.

[38] At a directions hearing the presiding officer 'must give directions in respect of the conduct of the proceedings as he or she deems fit.'[28] After hearing the parties the presiding officer may make an order in respect of a range of issues, including discovery, interrogatories, admissions, the limiting of disputes, the joinder of parties, *amicus curiae* interventions, the filing of affidavits, the giving of further particulars, the time and place of future hearings, procedures to be followed in respect of urgent matters and the giving of evidence at the hearing, including whether evidence of witnesses is to be given orally or by affidavit or both.[29]

[39] Regulation 10 (5)(d) is noteworthy. It provides that in order to give effect to the guiding principles contemplated in s 4 of the Equality Act, and in dealing with how the enquiry is to be conducted, the presiding officer 'must, as far as possible, follow the legislation governing the procedures in the court in which the proceedings were instituted, with appropriate changes *for the purpose of supplementing this regulation* where necessary, but may in the interest of justice and if no-one is prejudiced deviate from these procedures after hearing the views of the parties to the proceedings.' (My emphasis).

[40] Regulation 10 (7) states that, 'save as is otherwise provided for in these regulations, the law of evidence, including the law relating to competency and compellability, as applicable in civil proceedings, applies in respect of an enquiry:

[27] Regulation 6 (5).
[28] Regulation 10 (5)(b).
[29] Regulation 10 (5)(c).

Provided that in the application of the law of evidence, fairness, the right to equality and the interest of justice should, as far as possible, prevail over mere technicalities.'

[41] I return to deal with further provisions of the Equality Act. Section 21 sets out the powers and functions of the equality court. Section 21(1) reads as follows:

'The equality court before which proceedings are instituted in terms of or under this Act must hold an enquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.'

[42] After holding an enquiry the court may make any of the orders set out in s 21(2). For present purposes the following are important:

'*(a)* an interim order;

(b) a declaratory order;

(c) …

(d) an order for the payment of any damages …

(e) …

(f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, …;

(g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant …;

(h) an order for the implementation of special measures to address the unfair discrimination …;

(i) an order directing the reasonable accommodation of a group or class of persons…;

(j) …

(k) an order requiring … an audit of specific policies or practices …;

(l) …

(m) a directive requiring … regular progress reports …;

(n) …

(o) an appropriate order of costs …;

(p) an order to comply with any provisions of the Act.'

[43] Interestingly, the Equality Court may, in terms of s 21(4), during or after an enquiry refer any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.

[44] In terms of s 21(5), the court 'has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.'

[45] Section 13 deals with the burden of proof when the Equality Court determines a complaint. It provides that if a complainant has made out a prima facie case of discrimination, the respondent must prove that it did not take place, or that it was not based on one or more of the prohibited grounds, which includes race.[30] Furthermore, if discrimination has taken place on a prohibited ground, then it is deemed unfair, unless the respondent proves that it is fair.[31]

[46] A complaint may, of course, be premised on any of the grounds set out in ss 6 to 12. These sections prohibit unfair discrimination in general and then specifically on grounds of race, gender and disability. Section 10 prohibits hate speech. Section 11 prohibits harassment and s 12 prohibits the dissemination and publication of information that unfairly discriminates.

[47] Section 14 sets out the many factors that must be taken into account in determining whether the discrimination is fair. These include the context, whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned. Some of the other factors are; whether the discrimination is systematic, has a legitimate purpose and to what extent it achieves its purpose.

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[30] Sections 13(1)*(a)* and *(b)*.
[31] Section 13(2)*(b)*.

[48] Section 31 of the Equality Act, on which the court below relied for its conclusion that the Equality Court was not a separate court, deserves attention. Section 31(2) makes further provision for the designation and appointment of presiding officers and clerks of the Equality Court. Section 31(4) obliges the Chief Justice, in consultation with the Judicial Service Commission and the Magistrates Commission, to develop the content of training courses with the view to building 'a dedicated and experienced pool of trained and *specialised presiding officers*, for purposes of presiding in court proceedings as contemplated in this Act, …'. (My emphasis).

[49] Section 31(6) obliges the Director-General of the Department of Justice and Constitutional Development to develop and implement a training course for clerks of equality courts with the view to building 'a dedicated and experienced pool of trained and *specialised clerks*, for purposes of performing their functions and duties as contemplated in this Act, …'. (My emphasis).

[50] If anything, these provisions point in the opposite direction to the conclusions reached by the court below ─ the establishment of a dedicated and specialised court.

[51] Before concluding this examination of the provisions of the Equality Act, it is necessary to note the provisions of s 5(2) of the Act, which provides as follows:
'If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.'

[52] If one reads the preamble to the Equality Act and considers the provisions set out above, it is clear that the legislature intended to promote the restructuring and transformation of our society and institutions, away from the deeply imbedded systematic inequalities and unfair discrimination that still prevail, and to affect practices and attitudes that undermine the best aspirations of our constitutional democracy.

[53] It is abundantly clear that the Equality Court was established in order to provide easy access to justice and to enable even the most disadvantaged individuals or communities to walk off the street, as it were, into the portals of the Equality Court to seek speedy redress against unfair discrimination, through less formal procedures.

[54] In my view, Froneman J erred in stating that when the High Court sits as an Equality Court it does so as a High Court with all the powers and trappings of that court, including having jurisdiction in respect of causes beyond those stipulated in the Equality Act.[32]

[55] As stated above, the reasoning of the court below is as follows: Equality is a fundamental constitutional value that underlies all adjudication under the Constitution. Equality is an integral feature of any adjudication in the High Court on any given day. When judges adjudicate disputes under the Equality Act, it is the High Court itself with all its attendant powers that is exercising equality jurisdiction.

[56] This view loses sight of the fact that when they are fulfilling their obligations and exercising the powers of their office as judges in their everyday adjudication, they do so within the powers that they have as set out in the Constitution, the common law and the statutes that specifically apply to them. They also do so in terms of the requirements of the substantive law which they apply under the umbrella of the Constitution. It is clear that any person who is the victim of racial or other discrimination is not precluded from asserting his or her right to equality as provided for in s 9 of the Constitution by the institution of proceedings in the ordinary course in a High Court. The matter will then be dealt with by the High Court, following the terms of its empowering statute and its processes and rules.

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[32] Sections 6 to 12.

[57] The Equality Court is a special animal. In modern language one could describe it as 'a special purpose vehicle.' As stated above, it was clearly designed and structured to ensure speedy access to judicial redress by persons complaining of unfair discrimination. The infrastructure of magistrates' and high courts are to be utilised. Selected and 'specially trained' magistrates and judges are appointed[33] to preside at the seats of their existing respective courts and in relation to a geographical area encompassing the territorial areas of jurisdiction of those courts. In my view, the difference sought to be drawn by Froneman J, between the legislative structure of the equality court and other specialist courts is fallacious.

[58] The legislation establishing some of those courts is instructive. It is dealt with in the paragraphs that follow.

[59] In terms of s 8 of the Patents Act 57 of 1978, the Judge President of the North Gauteng High Court designates one or more judges of that division as commissioner of patents to exercise the powers and perform the duties conferred or imposed by the Act. The general powers of the commissioner are set out in s 17 which states that the commissioner shall have 'such powers and jurisdiction as a single judge has in a civil action before a provincial division of the High Court having jurisdiction at the place where the proceedings before the commissioner are held, including the appellate power referred to in s 75.' 'Jurisdiction' under the Patents Act is clearly limited to hearing matters properly brought in terms of the Patents Act. The seat of the court is in Pretoria but hearings may be held at another place. There can hardly be talk of other causes of action or alternative relief in proceedings before the commissioner.

[33] This is an aspect which Froneman J considered constitutionally questionable and criticised. It is an aspect which is dealt with later in this judgment.

[60] Section 36 of the Competition Act 89 of 1998 established the Competition Appeal Court (CAC). It is a court contemplated in s 166*(e)* of the Constitution, with a status similar to that of a high court. In terms of s 36(1)*(b)* it has jurisdiction throughout the Republic. It consists of at least three judges appointed by the President on the advice of the Judicial Services Commission, each of whom must be a judge of the High Court. The jurisdiction of the CAC is limited to reviewing decisions of the Competition Tribunal or considering appeals from it. The CAC can only deal with such matters as are provided for by that Act. The Competition Act provides, amongst others, for the control and evaluation of restrictive practises and to prevent the abuse of dominant positions. It thus implicates to a degree, the notion of equality within the commercial world.

[61] Section 83 of the Income Tax Act 58 of 1962 established the Tax Court, which consists of a judge of the High Court, an accountant and a representative of the commercial community. The Judge President of the provincial division of the High Court having jurisdiction in the area in which the Tax Court is to hear an appeal is situated, may, where the subject of the dispute exceeds a particular amount or where the parties have agreed thereto, direct that the appeal shall consist of three judges of the High Court. The powers of the Tax Court are set out in s 83(13) of the Income Tax Act. In the Income Tax Act the fact that judges preside does not give them jurisdiction beyond that conferred by the Act. There is no prospect of other causes of action. Tax courts are located within High Court precincts and this is because of infrastructure and geography.

[62] Outside of the provisions of the Equality Act, high courts and magistrates' courts continue, on a daily basis, to uphold the fundamental values of our Constitution within the parameters of their powers. The Equality Court is an added tool to promote the transformation of our society in realisation of our best aspirations. It is a separate and distinct court with powers specified in its empowering statute.

[63] As can be seen from the scheme of the Equality Act, dealt with extensively above, the Equality Court has its own rules and procedures, both in terms of the Equality Act and the regulations framed thereunder. The provisions of the Magistrates' Courts Act 32 of 1944 and the Supreme Court Act 59 of 1959 and the rules of the Magistrates' Court and the High Court play a limited part as provided for in s 19(1) of the Equality Act and regulation 10 (5)(d), the provisions of which are set out in paras 33 and 39 above. The statutory provisions and regulations apply in respect of the aspects set out in s 19(1)*(a)* to *(e)* and only insofar as no other provision has been made in the regulations under the Equality Act and for the purpose of supplementing them.

[64] Section 19(1)*(e)*, in stating that those provisions and rules apply in respect of jurisdiction must, in the scheme of things, mean territorial jurisdiction. Earlier in this judgment the provisions of s 19(3) of the Equality Act were referred to. That subsection, it will be recalled, states that a magistrates' court sitting as an equality court is not precluded from making orders contemplated in the Act which exceed its monetary jurisdiction subject to confirmation by a judge of the High Court having jurisdiction. This provision is understandable. The legislature, it appears, was intent on ensuring that when an equality court matter was being heard at the seat of a magistrates' court a party against whom a complaint was lodged was precluded from raising the monetary limit as a jurisdictional point. As pointed out earlier in the judgment, this in itself distinguishes magistrates' courts from equality courts. The substantive jurisdictional bases for the institution of proceedings are set out in ss 6 to 12 of the Act. These sections prohibit specified unfair discrimination and other conduct. Section 21 provides extensive remedies and sets out the powers of the Equality Court.

[65] High courts have inherent power to protect and regulate their own process.[34] Equality courts do not. The provisions of the Supreme Court Act and the Uniform rules do not provide for this inherent power and can therefore not be

[34] See s 173 of the Constitution.

sourced through the Equality Act. The Equality Court has only those powers and functions set out in the Equality Act.

[66] Froneman J criticised the exclusive use in the Equality Court of select judges who had completed a training course. He questioned the constitutionality of that exclusivity without deciding it. He did not, however, see that as a bar to the conclusions reached by him.

[67] As can be seen from what appears above, judges in the equality court are appointed to preside in that court by the Judge President, and only after such judge has completed a training course. If the Equality Court is truly the High Court under a different name, as concluded by the learned judge, then there can be no justification for limiting the judicial officers entitled to hear equality court matters. It is to be noted that judges who preside in the High Court and who hear matters in that court implicating s 9 of the Constitution are not required to have completed a specific training course. It is, of course, ironic that Equality Court matters cannot be heard by all High Court judges.

[68] Legislation could have been constructed or amended to provide for indigent communities or persons or associations or institutions representing the public interest to bring unfair discrimination complaints in the High Court under a simplified procedure that would have been informal, cheap and speedy. If it was felt that High Court judges required sensitivity or diversity training to enable a better understanding of the variety of complaints that would be presented, that could have been done. That, however, was not the structure resorted to by the legislature. We are constrained to interpret and apply the Equality Act.

[69] The passage in *George*, a decision of this court, on which the court below relied was *obiter*. In that case, this court was dealing with facts clearly distinguishable from those in the present case and was not required to confront

the issue resolved in this appeal. In any event, for the reasons set out above, the conclusions on which Froneman J relied cannot be supported.

[70] For all these reasons I conclude that Froneman J erred in his characterisation of the Equality Court. In my view, the error in his reasoning was prompted because he was asked to consider, at the outset, whether the Equality Court had 'review' jurisdiction. It was the wrong question, which inevitably led to the wrong conclusion.

[71] The correct question was to ask whether Manong's complaint fell within the purview of the Equality Act. Clearly it did. The next step was to look at the powers and functions of the Equality Court referred to above. In the event of the complaint being sustained, any one of the orders set out in s 21*(f)* to *(i)* was competent. That an order by the Equality Court might have the same effect as an order made by a high court on review, is merely coincidental.

[72] The attempts to typify or categorise the proceedings brought by Manong is what led to the confusion. Labels are less important than substance. In respect of Manong's principal complaint, the Equality Court clearly had jurisdiction. In the event of the success of that complaint there would have been nothing further to adjudicate. However, in the light of the conclusions reached as set out above, it needs to be stated that only complaints or 'causes of action' provided for by the Equality Act are susceptible to adjudication by the Equality Court. That court was set up for a particular purpose. Other causes of action are accommodated in other appropriate *fora*. The Equality Court was especially set up to deal with unfair discrimination and the other issues provided for by ss 10 to 12 of the Equality Act, as described above.

[73] It is now necessary to consider whether the court below, in determining that the ECDRT's policy was not unfair, acted appropriately in terms of the Equality Act.

[74] It is common cause that the prescribed procedure for the institution of proceedings in the Equality Court was not followed. Mr Manong submitted that given the urgency of the matter, he was entitled to resort to an urgent application in conventional form. Counsel for the ECDRT did not contend that there was any prejudice. It is an aspect that we need not address any further.

[75] It is apparent from Froneman J's judgment that he completed a training course as required by the Equality Act. It also appears that he came to preside in the matter coincidentally.

[76] It is common cause that, prior to the hearing on the merits of the complaint, no consideration was given to whether the matter could be best dealt with elsewhere. Furthermore, there was no directions hearing as required by regulation 10 and therefore none of the issues set out in regulation 10 (5)(c) (referred to in para 38 above) were considered.

[77] The guiding principles set out in s 4 of the Equality Act, particularly that concerning the facilitation of participation by the parties to the proceedings, were ignored. In terms of regulation 10 (5)(c), a presiding officer may make an order in respect of further conduct of proceedings 'after hearing the views of the parties'. This was not done in the present case. Froneman J, as referred to in para 21 above, thought that his *mero motu* direction concerning the filing of further affidavits was sufficient. It was not.

[78] This approach meant that the burden of proof provision set out in s 13 of the Equality Act (referred to in para 45 above) was not considered, nor, in consequence, were the provisions of s 14 of the Equality Act.[35] The complaint was finally adjudicated on the basis of the *Plascon-Evans* rule.[36]

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[35] See para 47 above.
[36] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[79] As will be demonstrated below, by reference to the available information, there were issues related to the complaint concerning systematic discrimination by the ECDRT that required further exploration.

[80] Ironically, in the court below, it was the ECDRT which complained that the proper procedures of the Equality Act were not complied with. Before us, Mr Manong raised this complaint and submitted that he had not had a proper enquiry. It is this turn of events that underlies the order in relation to costs that will follow.

[81] Mr Manong, although an engineer, is a lay person as far as the law is concerned. It was for the court below to ensure compliance with and adherence to the provisions of the Equality Act and the related regulations. As stated above, Froneman J stated that Mr Manong had not applied for a referral to oral evidence. This approach is at odds with the scheme and purpose of the Equality Act.

[82] In order to demonstrate some of the issues that were unexplored because of the ordinary motion court procedure that was followed, and also to show that Froneman J's conclusions, without all the facts, were premature, it is regrettably, necessary to deal, in some detail, with what emerged from the affidavits, including the bid requirements. I proceed to do so.

[83] Bidders had to provide details of similar projects carried out in South Africa in the past seven years. Similar projects relate to the design or rehabilitation of bitumen roads with a minimum project length of ten kilometers. A maximum of ten points is awarded under this category. Furthermore, it is essential that the bidder provides suitably qualified personnel to carry out the work.

[84] A maximum of 31 points is awarded for key personnel, dependent on the experience and professional qualifications of key staff members. Four points are available for what appears to be a professional registration (NQF registration). A maximum of five points is also awarded to firms who hold specified management certificates.

[85] Thus, for prior work and professional experience a maximum of 50 points can be scored.

[86] The following are regarded as key personnel:
(a) Project Manager;
(b) Road Design Engineer;
(c) Pavement/Materials Engineer;
(d) Bridge Design Engineer.

[87] According to the ECDRT, Manong was allocated two points for each of three similar projects currently in progress or carried out in the past seven years. Although Manong's project manager Mr Raath has extensive experience it relates to projects outside of South Africa and Manong therefore received no points for his experience. In this regard it received zero out of ten points. In respect of the remaining key personnel it received maximum points. It did not receive any points for quality management certificates as they did not exist. It received full points for NQF certificates that had been applied for but not obtained.

[88] Under functionality a total of 100 points can be scored, comprising the 50 points referred to above and 50 points for Methodology, an aspect we need not be concerned with.

[89] Manong received 66 points under functionality, thus failing to score the minimum of 75 points out of 100. What is clear is that Manong's limited number

of prior similar projects and Mr Raath's non-qualification made a substantial difference in the allocation of points. It materially affected the decision to disqualify Manong. So too did the lack of the specified management certificates.

[90] Froneman J, with respect, concluded rather too easily, that the prior roster system provided sufficient opportunity for developing the minimum required experience. This was an aspect that was not fully explored. Furthermore, his conclusion that there are no indications that Manong and other similar players in the field are not sufficiently experienced and qualified to satisfy the functional requirements of the bid, is problematical. First, he did not consider whether other previously disadvantaged individuals or engineering firms should be joined. There is no evidence about how many previously disadvantaged individuals or firms are interested or actively involved in bidding for ECDRT contracts. No evidence was presented concerning the profile of previously disadvantaged engineers or firms that operate in South Africa or who are actively interested in public contracts. No evidence was presented about why seven years was chosen as the appropriate minimum requirement as opposed, to say, any other number of years. Manong asserts without challenge, that it had successfully completed other engineering projects for the ECDRT.

[91] In dealing with the issues referred to above the evidential onus provision may be implicated. As stated above, it was not even considered. In the light of the aforesaid background, it is clear that Froneman J's conclusions in relation to the complaint ought to have been more guarded.

[92] Every reasonable person would share the court below's concerns that our roads should be safe and durable and constructed by persons who are technically proficient. This, however, does not obviate the need to properly establish whether the systematic exclusion alleged is unfair. A proper enquiry should reach a decision that will ensure that these concerns are addressed.

[93] Counsel for the ECDRT and Mr Manong agreed that, in the light of Froneman J's non-consideration of imperative provisions of the Equality Act and regulations, the order made by the court below is liable to be set aside and that we should remit the matter for it to be dealt with in accordance with the provisions of the Equality Act.

[94] There is one further aspect that requires attention. In its heads of argument, the ECDRT submitted that the court below did not have territorial jurisdiction, because neither it nor the National Treasury were within the area of jurisdiction of that court and furthermore, that 'the cause of action' did not arise within the court's area of jurisdiction. Although counsel for the ECDRT did not have instructions to abandon the jurisdiction point he quite correctly did not address us on this aspect. The impugned policy applies throughout the province and the jurisdiction point raised by the ECDRT is entirely without merit.

[95] In light of the above, the following order is made:

1. The appeal is upheld.
2. The order of the court below is set aside in its entirety and the matter is remitted to the Equality Court for it to be dealt with in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
3. No order is made as to costs of appeal at this stage. The parties are invited, if so advised, to apply to this court upon the final resolution of their dispute for an order in this regard.

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M S NAVSA
JUDGE OF APPEAL

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