THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 518 / 2008

MANONG & ASSOCIATES (PTY) LTD **Appellant**

and

THE MINISTER OF PUBLIC WORKS **First Respondent**
THE DIRECTOR GENERAL,
DEPARTMENT OF PUBLIC WORKS **Second Respondent**

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

CORAM: **HARMS DP, BRAND, PONNAN, SNYDERS JJA and BOSIELO AJA**

HEARD: **4 SEPTEMBER 2009**

DELIVERED: **23 SEPTEMBER 2009**

SUMMARY: Practice – companies – litigation – whether obliged to act through a legal representative. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 - application for interim interdict to Equality Court – failure to establish a prima facie case.

ORDER

On appeal from: The Equality Court, High Court, Transvaal Provincial Division (Botha J sitting as a court of first instance).

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

PONNAN JA (HARMS DP, BRAND, PONNAN, SNYDERS JJA and BOSIELO AJA concurring):

Introduction

[1] State tenders have become fertile ground for litigation. The present is one such matter. It commenced as what can only be described as a somewhat ambitious application in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 (the Equality Act) to the Equality Court (Transvaal Provincial Division). In it, the appellant Manong and Associates Pty Ltd (the company), which describes itself as 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 (the first and second respondents respectively), in addition to condonation and the usual order for costs, the following relief,

'2. Pending the determination of Part B of the relief sought by the complainant, an interim interdict be granted preventing the first and second Respondents ("the respondents') from implementing the Professional Services Supplier Register ("The Register") including its key Principles.

3. Ordering the respondents to furnish the complainant with the following information:

3.1 A record of the decision that was taken to abolish the current roster and its replacement by the register.

3.2 A list of Civil engineering Consultants who are on the current roster of the Department of Public Works ("the DPW") from the year 2005 to date;

3.3. A schedule of fees showing appointments made to Consultants and the fees received per project from the year 2005 to date.'

In Part B of the order prayed, the company sought the following relief:

'1. Reviewing, correcting and setting aside the decision taken by the respondent to abolish the current roster and its replacement by the register;

2. Reviewing and setting aside the implementation of the register and declaring its key principles to be inconsistent with sections 9 and 217 of the Constitution of the Republic of South Africa, No. 108 of 1996 read with S.7 (c) and 7 (e) of the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 ("the Equality Act");

3. Reviewing the conduct of the respondents in appointing Consultants as it is inconsistent with S. 217 of the Constitution;

4. Directing the respondents to undergo an audit of their procurement policies . . ..'

[2] Botha J was called upon in the court below to adjudicate only Part A of the relief sought. The learned judge dismissed the application for an interim interdict with costs, but granted leave to the appellant to appeal to this court.

Right of Appearance

[3] Before turning to consider the merits of the appeal it is necessary to first consider whether Mr Mongezi Stanley Manong (Mr Manong), the managing director of the company, who signed the heads of argument on behalf of the company and purported to represent it before us, has what can be described as a right of audience on behalf of the company before this court.

[4] The rule that a company cannot conduct a case in this court except by the appearance of counsel on its behalf was laid down in *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue.*[1] The rule may well have originated in early seventeenth century metaphysical reasoning that a corporation has 'no soul, is invisible and cannot do homage'.[2] It, according to Viscount Simon LC, secures that a court like this will be served by persons who observe the rules of their profession,

[1] 1956 (1) SA 364 (A).
[2] *Re G J Mannix Ltd* [1984] 1 NZLR 309 at 311; *Northern Homes Ltd v Steel-Space Industries Ltd* (1976) 57 DLR (3d) 309 at 313.

are subject to a disciplinary code and are familiar with the methods and scope of advocacy to be employed in presenting argument.[3]

[5] There is nothing to suggest that Mr Manong's decision to secure the benefits of incorporation was not a genuine one. He did after all have the option of establishing and conducting the business as an unincorporated sole proprietorship. There is thus a persuasive argument that having chosen the benefits of incorporation, he must bear the corresponding burdens and not be allowed to escape them lightly.[4]

[6] It has been thought,[5] somewhat cynically I dare say, that the rule is based on some misguided attempt to preserve an unjustified monopoly for legal practitioners. This is not the case. Litigation is based on the adversary system. In determining a dispute, a court is dependent on the way in which the case is presented. Factual admissions or denials are made from time to time and a course of conduct has to be chosen by the litigants. When a corporation instructs an attorney who in turn instructs an advocate the law recognises their authority to bind the corporation for the purpose of litigation. In those circumstances a court need not concern itself about authority. Litigation will become very difficult indeed if a court had to be concerned at every step of the proceedings as to the authority of the person conducting the litigation to make binding decisions. The litigant in person can of course make those decisions without any question of authority, but a corporation cannot act except through its agent and an agent cannot have more authority than the corporation legally gives to it.[6] Yet a further consideration is that corporate officers could cause impecunious companies to litigate hopeless causes without any fear of personal risk. Thus, apart from the fact that there are usually rules of court that preclude a company from being represented by anyone other than a qualified practitioner, a review of the cases in England, Ireland, Australia, New Zealand and Canada shows that the courts, for pragmatic and policy reasons, have set their face against

---

[3] *Tritonia Ltd and others v Equity and Law Life Assurance Society* [1943] 2 All ER 401 (HL).
[4] *R v Rockwood* (2008) 164 CRR (2d) 345 at para 10-11.
[5] LCB Gower, JB Cronin, AJ Easson and Lord Wedderburn of Charlton *Gower's Principles of Modern Company Law* (4ed (1979) p 212.
[6] *Harrison v Guardian Assurance Company Ltd* [1989] 1 NZLR 59 at 60.

unqualified persons presenting and conducting cases unless they are doing so on their own behalf.[7] So too, in Zimbabwe[8] and South Africa.

[7] That a person in the position of Mr Manong has no right, such as counsel and in certain circumstances attorneys have, to address this court on behalf of the appellant is thus well settled. But to observe that he does not have a right of audience is not as Scott J put it [9] ' ... to answer the question whether the court does not have, and whether the court should not on the facts of the case exercise, a power to permit him to address the court on behalf of the corporate litigant.'

[8] *Yates* did not consider the question of a judicial discretion to allow non-professional representation in a particular case. For, as Gardiner JP put it:

'The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice ....' [10]

Likewise, Denning MR stated

'It is well settled that every court of justice has the power of regulating its own proceedings; and, in doing so, to say whom it will hear as an advocate or representative of a party before it. As Parke J said in *Collier v Hicks* ((1831) 2 B & Ad 663 at 672, 109 ER 1290 at 1293): "No person has a right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases when they are not already regulated by ancient usage".' [11]

[9] The main reasons for relaxing the rule are, I suppose, obvious enough: a person in the position of the controlling mind of a small corporate entity can be expected to have as much knowledge of the company's business and financial affairs as an individual would have of his own. It thus seems somewhat unrealistic and illogical to allow a private person a right of audience in a superior court as a party to proceedings, but deny it to him when he is the governing mind of a small company which is in reality no more than his business *alter ego*. In those

---

[7] The cases are usefully collected in *California Spice and Marinade (Pty) Ltd and others in re: Bankorp v California Spice and Marinade (Pty) Ltd and others; Fair O' Rama Property Investments CC and others; Tsaperas; andTtsaperas* [1997] 4 All SA 317 (W).
[8] *Lees Import and Export (PVT) Ltd v Zimbabwe Banking Corporation Ltd* 1999 (4) SA 1119 (ZSC).
[9] *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd and others* [1991] 1 All ER 591 (Ch) at 595.
[10] *Ncoweni v Bezuidenhout* 1927 CPD 130.
[11] *Engineers' and Managers' Association v Advisory, Conciliation and Arbitration Service and another* (No 1) [1979] 3 All ER 223 (CA) at 225.

circumstances the principle that a company is a separate entity would suffer no erosion if he were to be granted that right. There may also be the cost of litigation which the director of a small company, as well acquainted with the facts as would be the case if a party to the dispute personally, might wish to avoid. Such companies are far removed from the images of gigantic industrial corporations which references to company law may conjure up.[12]

[10] It follows that cases will arise where the administration of justice may require some relaxation of the general rule. Their occurrence, in my view, is likely to be rare and their circumstances exceptional or at least unusual. I thus consider that our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings. After all it seems to me that the power of a court to give leave to a corporation to carry on a proceeding otherwise than by a legal representative is of necessity an integral part of the rule itself.

[11] That our courts were endowed with such power even in our pre-constitutional era is evident from the following dictum of Corbett JA:

'There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice ....'[13]

Courts now derive their power from the Constitution itself,[14] which in section 173 of provides:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

As it was put by the Constitutional Court in *SABC Ltd v National Director of Public Prosecutions and others*:[15]

'This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common law. . . . The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that Courts in exercising this power *must take into account* the interests of justice.'

---

[12] *Re G J Mannix Ltd* at 315.
[13] *Universal City Studios Inc and others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G.
[14] *Phillips and others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 47.
[15] 2007 (1) SA 523 (CC) para 35 and 36.

[12] According to the Constitutional Court:[16]

'The task of an appeal Court in determining its own proceedings is an important one. Its primary constitutional responsibility is to ensure that the proceedings before it are fair and it must give content to that obligation. This obligation has always been part of our law and is now constitutionally enshrined as a fundamental right in s 35(3) of the Constitution. The task of ensuring that the proceedings are fair will often require consideration of a range of principled and practical factors, some of which may pull in different directions.'

But it did remind us that 'it is a power which has to be exercised with caution'[17] and sparingly having taken into account the interests of justice in a manner consistent with the Constitution.[18]

[13] It is important to emphasize that the power vested in the court in this regard is a purely discretionary power. In general, and without attempting to lay down any hard and fast rules, discretionary audience should be regarded as a reserve or occasional expedient. For, whilst we must be free to review the *Yates* rule in the light of currently prevailing conditions and requirements, we perhaps need to remind ourselves that given the increasing complexity of litigation, the rule may well be required as strongly today as it ever was. In those circumstances an unqualified and inexperienced person may do more harm than good to the corporate litigant that he purports to assist.

[14] I have expressly refrained from formulating a test for the exercise of the court's inherent power as I believe that such cases can confidently be left to the good sense of the judges concerned. Lest this be misconstrued as a tacit or general licence to unqualified agents, it needs be emphasised that in each such instance leave must 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. Individual cases can thus be met by the exercise of the discretion in the circumstances of that case. It would thus be impermissible for a non-professional representative to take any step in the proceedings, including the signing of pleadings, notices or heads of argument (as

[16] *SABC Ltd* para 21.
[17] *S v Pennington and another* 1997 (4) SA 1076 (CC).
[18] *Parbhoo and others v Getz NO and another* 1997 (4) SA 1095 (CC).

occurred here), without the requisite leave of the court concerned first having been sought and obtained.

[15] This approach, in my view, is consistent with the right enshrined in s 34 of the Constitution, which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Emphasising that the courts have a duty to protect *bona fide* litigants and the importance of untrammelled access to the courts, the right enshrined in s 34 has variously been described by the Constitutional Court as 'fundamental to a democratic society that cherishes the rule of law', 'of cardinal importance that requires active protection', foundational for 'the stability of an orderly society', and a right that 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help' and serves as 'a bulwark against vigilantism, and the chaos and anarchy which it causes'.[19]

[16] Reverting to Mr Manong's entitlement to represent the company before us. The company, which was founded in 1995, has three directors with offices in four of our major cities. It is described in the founding affidavit as having 'evolved over the years from a firm that initially specialised in development projects, … to one 'which now specialises in more complex engineering projects such as the design of runways and taxiways'. The company's size (some 20 professionals), sophisticated hierarchy and management structure, the scale of its operations and what it describes as the many prestigious projects it has been involved in, are all testament to the fact that, by no stretch of the imagination, can it be regarded as the alter ego of Mr Stanley Manong. In those circumstances, one may well have hesitated to permit him a right of audience on behalf of the company. What weighs against that conclusion however is that only last term he appeared, without demur, before this court on behalf of the company.[20] Moreover, by the time that his entitlement to

[19] *Beinash and another v Ernst & Young and others* 1999 (2) SA 116 (CC) para 17; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* (*Women's Legal Centre as Amicus Curiae*) 2001 (4) SA 491 (CC) para 23; *Chief Lesapo v North West Agricultural Bank and another* 2000 (1) SA 409 (CC) para 22; *First National Bank of South Arica Ltd v Land and Agricultural Bank of South Africa and others; Sheard v Land and Agricultural Bank of South Africa and another* 2000 (3) SA 626 (CC) para 6.
[20] *Manong v Department of Roads & Transport, Eastern Cape Province* [2009] ZASCA 59.

represent the company was queried by this court, he had already prepared and signed the heads of argument on behalf of the company. In those circumstances were he to have been debarred from representing the company, the matter would of necessity have had to be postponed – occasioning delay and the incurring of additional costs to both parties (all of which may not have been recoverable from the losing litigant). We therefore allowed Mr Manong to represent the company before us.

The Merits

[17] Section 217 of the Constitution reads:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[18] To achieve that objective, the National Department of Public Works (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. Thus firms and individuals with such preferred status, through the operation of a prescribed formula, enjoyed a favourable weighting on the roster. The net effect was that such firms and individuals came up for allocation of fresh assignments quicker than those who did not enjoy such status. They thus qualified for accelerated access to work opportunities by the DPW.

[19] The preamble to that policy recorded that the DPW

' ... will at intervals of approximately one year and in consultation with relevant professional bodies ... assess the operation of the roster in order to determine whether it is achieving its objectives in a satisfactory manner.'

And, if not

'... consideration will be given to modifying the system to remedy [its] shortcomings'.

[20] To that end and in contemplation of the introduction of a new policy to replace the roster system, on 2 March 2008, the DPW through advertisements in national newspapers invited consultants in the built environment to apply to be listed as service providers on the DPW's proposed new professional services supplier register.

[21] Disgruntled at the DPW's decision to discard the roster system in favour of the new register, Mr Manong dispatched a letter on 7 April 2008 in which he called upon the Minister not to implement the new policy until in his words:

'1. adequate legal reasons are given why the current roster policy should be discarded;
2. adequate legal reasons are given why the proposed new policy is more suitable to the present needs of the DPW than the current one;
3. adequate reasons both factual and legal that Black Consultants especially Affirmable Priority Population Service Providers (APSP) will benefit more under the proposed new policy as compared to the existing one;
4. the widespread advertisement in national newspapers calling on all stakeholders to be given sufficient time in order to make significant and meaningful input into the new draft policy.'

Mr Manong sought an assurance that the proposed new policy would not be implemented, failing which an urgent application to the Equality Court would be lodged. No assurance was forthcoming and a fortnight later the threatened proceedings in the guise of the present application was launched on 7 April 2008.

[22] The requirements for the grant of an interim interdict are well settled.[21] I will limit myself solely to a consideration of the first - a prima facie right - as in my view the application had to fail at that preliminary hurdle. It is thus unnecessary to range beyond that to a consideration of the other requirements.

[21] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[23] In the founding affidavit deposed to by Mr Manong in support of the application, he sets out the background to the application as follows:

> 'After examining the proposed key principles of the register found under paragraph 1.3 of the said document ("STAN 34"), I came to the conclusion that the DPW was abrogating its constitutional obligation of promoting the achievement of equality as enshrined under section 9 of the constitution.
>
> …
>
> The register will be used on a rotational basis for the invitation of quotations from at least the top most three service providers. The register does not state the different categories of the service providers that are enlisted on the register as mandated by section 9 read with section 217 of the constitution. This is not just an oversight from the register, but a deliberate attempt at maintaining and perpetuating the policies of the past within the civil engineering industry through the denial of procurement opportunities to previously disadvantaged individuals.
>
> …

He goes on to assert:

> 'Furthermore the quotation system suggested in the register is aimed at cementing this racially exclusive practice by the denial of access to opportunities, including access to services or contractual opportunities for rendering services to DPW by previously disadvantaged individuals. Should the register principles be implemented, quotations from African firms will be perpetually rejected on the basis that they are too high. The implementation of the register principles will sound a death-knell to all African firms – few as they are at the present moment.'

Mr Manong then suggests:

> 'It is the complainant's reasonable perception that the roster system was being manipulated to benefit firms other than priority population firms. This perception is borne out by the fact the DPW has flatly refused to make available the information requested under annexure "STAN 23".
>
> This perception is further reinforced by the inexplicable conduct of the DPW of hurriedly and unprocedurally discarding the current roster system and replacing it with a more corrupt-prone quotation register. It is the perception of the complainant that the abolishment of the current roster was aimed at appeasing the SAACE and other groups who are fiercely opposed to Black Economic Empowerment.
>
> The current roster is not abolished because of policy consideration it is abolished to enable other groups and mainly white established firms to continue with their dominance of the civil engineering industry. The roster policy was devised and implemented to assist historically disadvantaged firms and to ensure a fair and equitable distribution of work to private sector consultants.'

[24] That, in sum, constitutes the gist of the appellant's complaint about the implementation of the DPW's register. Against that backdrop Mr Manong alleges:

'I believe that the Complainant has made out a case for the prima facie right for the reviewing of the decision taken by the respondents in abolishing the current roster and its replacement by the register. I also believe that the Complainant has made out an irrefutable prima facie case that the Key principles of the Register are inconsistent with sections 9 and 217 of the constitution read with s.7(c) and 7(e) of the Equality Act.'[22]

[25] Explaining what motivated the change in policy, Thapelo Samuel Motsoeng, a chief director in the DPW, states:

> The reason why the Roster had to be discarded was that the Roster did not comply with the Public Finance Management Act 1 of 1999 (PFMA) and the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA). In fact the Roster Policy was formulated before the PPPFA Act was enacted and its regulations promulgated. The Roster therefore was not conforming to the PPPFA in more than one sense, for example, the Roster did not encompass provision for disabled persons, being one of the defined groups within the PPPFA's definition of a Historically Disadvantaged Individual (HDI).
>
> National Treasury together with the World Bank, launched the Country Procurement Assessment review in 2001. The findings of this review resulted in the decision by Cabinet in November 2003 to align South Africa's procurement with best international standards, which includes the appointment of consultants, by means of a systematic competitive selection procedure. Thus, the Department of Public works could no longer continue with the Roster in the form it was structured as the principle on which it functioned allows for non-competitive awards to be made up to the value of R2 million. It also did not afford preference to disabled persons. Therefore the Roster system had to be discarded in order to have a system in line with the PPPFA and more so one which approaches the procurement of professional services on the basis of competitive bidding.'

[26] Mr Manong's further allegations elicited the following response from Motsoeng:

> 'The Applicant fails to set out the basis for his conclusion that the DPW was abrogating its constitutional obligation of promoting the achievement of equality under section 9 of the Constitution. In fact such a conclusion as reached by the Applicant is denied. …

---

[22] Those subsections read: Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

(c) 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;

(e) 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.

> The Applicant's perception that the Register is construed to be perpetuating unfair discriminatory policies of the past is unfounded.
> The acquisition of Professional Services in the built environment to perform services on behalf of the National Director of Public Works had to be in line with the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA"), the Public Finance Management Act 1 of 1999 (PFMA), the Supply Chain Management Regulations and the Construction Industry Development Board Act 38 of 2000.
> The Professional Services Supplier Register is compliant with the above statues as opposed to the Roster which was not.
> The Register does not state the different categories of the service providers since in terms of the PPPFA all service providers are allowed to tender but preference will be given to certain categories. These categories are listed in section 2(1)(d)(i) of the PPPFA.
> . . .
> The Register also had to be compliant with the Treasury Regulations published under GN R225 in GG 27388 of 15 March 2005 in promoting competitive bidding. Reference should be had to Section 16A3.2 of the Treasury Regulations which provide that:
> *16A3.2 A supply chain management system referred to in paragraph 16A.3.1 must –*
> *(a) be fair, equitable, transparent, competitive and cost effective;*
> *(b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000);*
> *(c) be consistent with the Broad Based Black Empowerment Act 2003 (Act 53 of 2003);*
> *(d) . . ..*'

[27] 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, of necessity, have resulted in a discriminatory practice to the company and other similarly placed historically disadvantaged firms and individuals. But that proposition in my view is wholly untenable. Plainly, at this stage of the enquiry, the respondents' 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 appellant.

[28] Expatiating on his assertion that the company's allegations 'are contradictory and confusing', Motsoeng states:

> 'The Applicant makes out a case that the Roster system is a better system but at the same time states that the Roster system was being manipulated to benefit firms other than priority population firms. He then continues by stating that the Roster system was replaced by a more corrupt-prone quotation register.

> . . .
>
> It is submitted that the Applicant fails to make out any case that his constitutional right to equality under section 9 of the Constitution is being infringed in any way. He has further not shown that the Register is inconsistent with section 9 and section 217 of the Constitution read with section 7(c) and 7(e) of the Equality Act. His application is without any merit.'

With that, one can hardly disagree.

[29] Before us and although only raised somewhat obliquely on the papers, an additional ground of review was sought to be advanced by Mr Manong, namely that there had not been a proper consultative process prior to the introduction of the new policy. That too, as emerges from the following excerpt from Motsoeng's affidavit, is devoid of any merit.

> Furthermore, the DPW did have consultations with all relevant stakeholders. Such consultations took place on 25 January 2006, 28 June 2006, 13 September 2006, 08 November 2006, 25 April 2007, 06 February 2008. I attach hereto a copy of the minutes of such consultations attached hereto as Annexure "DPW 5 – DPW 10". Furthermore, a conference was held in November 2007, to discuss the intended procurement route of the Department as well as the fact that the Roster will be discarded in lieu of a new Register. The following organizations were represented at the conference – South African Council for the Architectural Profession, the South African council for the Quantity Surveying Profession, the engineering Council of South Africa, the council for the Built Environment, SAIA, ASAQS, SAACE and SABTACO. Present at all these consultations was Chief Director of Professional Services, Mr Gerhard Damstra whose confirmatory affidavit is attached hereto as Annexure "DPW13".

[30] I have quoted *in extenso* from the affidavits, because they illustrate, I do believe, that if this were a horse race, the appellant has not yet made its way out of the starting stalls. At best for the appellant, the hypothesis advanced by it is a rather tentative and speculative one. The relief sought is not grounded in any factual foundation but rather on conjecture, perception and supposition. It followed that the application had to fail and that the court below cannot be faulted in holding that the appellant had failed to make out a prima facie case because the respondents' answer cast serious doubt upon it (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son (Pty) Ltd* 1995 (1) SA 725 (T) at 730B-D).

[31] In the result the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M S Manong (Appearing in person)
	Instructed by: Manong & Associates c/o MacRobert Inc Pretoria E G Cooper & Majiedt Inc Bloemfontein
For Respondent:	R Tolmay SC T Khatri
	Instructed by: The State Attorney Pretoria The State Attorney Bloemfontein