

IN THE EQUALITY COURT  
HIGH COURT OF SOUTH AFRICA  
(TRANSCAAL PROVINCIAL DIVISION)

Date: 25/08/2008  
Case number: 20978/2008

UNREPORTABLE

In the matter between:

MANONG & ASSOCIATES (PTY) LTD	Complainant
And	
THE MINISTER OF PUBLIC WORKS	First Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF PUBLIC WORKS	Second Respondent

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JUDGMENT

BOTHA J:

In this matter the complainant launched an application against the respondents to review and set aside the decision of the second respondent to replace a roster system for procurement with a register system. That is the relief claimed in part B of the notice of motion.

At this stage, in terms of part A of the notice of motion, the complainant asks for an interim interdict restraining the respondents from implementing the Professional Services Supplies Registrar (the register) pending the adjudication of part B of the notice of motion.

There was also a prayer for the production of certain information, but at the directions hearing the respondents tendered the required information.

The complainant is a private company that conducts the business of civil engineers. According to the composition of its directors and shareholders it can be described as belonging to the category of historically disadvantaged persons, disadvantaged by unfair discrimination. Within that category it can also be described as African, in the sense of belonging to a population group excluded from the 1984 tri-cameral parliament.

The first respondent is the Minister of Public Works.

The second respondent is the Director-General of the Department of Public Works (DPW).

The case must be considering against the background of the Constitution of the Republic of South Africa, 1996 (the Constitution).

Section 217 of the Constitution under the heading "Procurement", reads as follows:

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) may be implemented."

The national legislation envisaged in section 217(3) is the Preferential Procurement Policy Framework Act 2000 (Act 5 of 2000) (the PPPFA).

In section 2(1) it provides that a preferential procurement policy must follow a preference point system. Over a prescribed maximum amount price must count 90 and specified goals may count 10. Under that prescribed maximum price must count 80 and specified goals may count 20. Specified goals may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability.

Section 9(2) of the Constitution is also relevant. It reads as follows:

- "(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 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 established that the discrimination is fair."

Mr Manong, who is the deponent on behalf of the complainant, sketched the origin and development of the roster system. The aim of the

system was to target historically disadvantaged firms and to give them preferential treatment. Such firms were described as APSP's (Affirmable Professional Service Providers). There were three categories of APSP's: general, priority population and women. Priority population, to which the complainant belonged, comprised persons excluded from the 1984 tri-cameral parliament.

Appointments for work where fees do not exceed R2 million (exclusive of VAT) were awarded on a rotation basis. After an appointment, a firm would fall back to the bottom of the roster. He explained how the effect of the roster was that a firm with priority population status would move down 91 places on the roster after an appointment whilst a firm with ordinary APSP status would move down 121 places.

He gave the history of complaints the complainant had with manipulation of the roster and litigation in which it became engaged.

He gave the names of professional bodies that were involved in discussions with the second respondent in the evolution of the roster: ADP (Alliance for Development Professionals) and SABATCO (South African Black Technical and Allied Careers Organisation). He also referred to SAACE (South African Association of Consulting Engineers) who, according to him, waged a campaign against the roster.

On 2 March 2008 the second respondent, by way of advertisements in

the press invited professional service providers in the built environment to apply for registration with it.

Mnr Manong described the steps he took to prevent the implementation of the register and to obtain the reasons for it.

With regard to the register policy he said the following:

80. "Without being exhaustive, I wish to point out that my perception that the register policy/key principles are construed to be perpetuating the unfair discriminatory policies of the past, is informed by the following:

80.1. Under paragraph 1.3 of the document the following is stated:

80.1.1. 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.

80.1.2. The register does not explain how preference will be achieved through the quotation system. What complicates issues here is that quotations can only be used where the professional fee does not exceed R200 000.00 (two hundred thousand rands). What happens when the fees are in excess of R200 000.00. Quotations are a source of corruption whereby Public Sector officials would try to amend the quote of a favoured tenderer without the knowledge of others with the sole aim of benefiting the "preferred" tenderer. Quotations are in direct conflict with the principles of s.217. The quotation system is utilized where the monetary sums are small and was definitely not meant for DPW projects which are sometimes huge and complex in nature.

80.2 How does the register address the question of transparency of which the current computerized system is compared to a "Black Box" because of its consistency with the principles of s.217 of the Constitution.

80.3 How does the register address the lack of procurement opportunities to APSP (PP) firms when it had done away with any preference in the appointment of consultants in contravention of the constitution.

80.4 The first sentence of the advertisement ("STAN 33") states: "In compliance with the Public Finance Management Act, 1999 (Act 1 of 1999) and the Preferential Procurement Policy Framework Act (Act 5 of 2000), the DPW has ...". This is nothing but a smokescreen aimed at the exclusion of priority population firms under a rule of practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group."

It is also alleged that the register policy was hurried through in a procedurally unfair way.



To support his allegation that the complainant had a prima facie right, he said the following:

"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 it's 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."

In the answering affidavit mr T.S Motsoeneng, a Chief Director in the DPW in limine raised the issue of the non-joinder of bodies like SAACE, ADP and SBTACO.

He denied that the complainant had made out a prima facie case of discrimination under section 7(c) or 7(e) of Act 4 of 2000.

He explained that the roster had to be replaced with the register in order to comply with the PPPFA and the Public Finance Management Act, (PFMA). The register provides for tenders in the open market where the estimated fee value exceeds R500 000.00. If it is lower, quotations are invited from the top most three service providers that can provide the service in the

town concerned.

It is alleged that the register is compliant with the Constitution, the PFMA and the PPPFA and the Treasury regulations.

It is explained that the roster system is computer generated. It works without human intervention. A letter of the nominations is sent to the designated firm who then accepts the nomination or not.

It is alleged that the DPW did have consultations with all relevant parties before the register system was adopted. Minutes of various liaison meetings were annexed as DPW5-DPW10. In addition there was a conference in November 2007 where the issue was discussed.

The allegation is made that the roster system had to be abandoned because it did not comply with the PFMA and the PPPFA. For instance it did not make provision for disabled persons.

It is specifically stated that the register system is compliant with the PPPFA, including the preference point system.

Reference is made to a document titled "Built Environment Professional Services Acquisition Directive" to explain how preference will be achieved through the quotation system. Where fee value exceeds R500 000.00 tenders will apply. Below R500 000.00 quotations will be invited.

Ms Tolmay SC, who with Ms Dukhi, appeared for the respondents, argued in limine that bodies like SAACE, ADP and SABATCO, who, on the complainant's own showing had been involved in the evolution of the roster system, should have been joined. The question is whether they have a direct legal interest in the case. As mnr Manong, who represented the complainant, correctly argued, appointments were not awarded to these bodies. Although they may be bodies that have to be consulted when consultation is required, they themselves have no direct legal interest in the appointments made by the DPW. See *SA Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985(3) SA 1000 at 103i-J, *Bohlokeng Black Taxi Association v Interstate Bus Lines (Edms) Bpk* 1997(4) SA 6350 at 641H-642E and *Transvaal Agriculture Union v Minister of Agriculture and land Affairs and Others* 2005(4) SA 212 SCA at 226F-227H.

I am therefore of the view that it was not necessary to join the said bodies.

The complainant complained about unfair administrative procedure without elaborating too much on the issue. I take it that the complaint is directed at a lack of prior consultation before the adoption of the register policy. That per se is not a complaint that falls within the jurisdiction of the Equality Court. It is a matter that should be pursued in the High Court.

The real complaint of the complainant is that the register policy will

cause it to be treated unequally in the sense that its constitutional right to preferential treatment will be curtailed. Mr Manong in argument also made it clear that that is the gist of the complainant's complaint.

The respondents disavowed any intention to curtail the rights to preferential treatment enshrined in the Constitution and the PPPFA. The complainant's contention is that these protestations are a smokescreen. Ms Tolmay argued that the register policy complied with the PPPFA and that the complainant should take instances of non-compliance on review as it has done when it was of the view that the roster system was applied unfairly.

Where the complainant asks for an interim interdict the court should apply the test laid down in *Reckitt & Coleman SA (Pty) Ltd v SC Johnson & Son (SA) (Pty) Ltd* 1995(1) SA 725 T at 730 B-D. The court must have regard to the facts set out by the complainant together with such facts set out by the respondents that the complainant cannot dispute. If the facts set out in the respondents' affidavits cast serious doubt on the complainant's case, an interim interdict cannot be granted.

The register system provides for tenders where fees exceed R500 000.00 and quotations where fees do not exceed R500 000.00. There is no reason to suppose that where tenders are invited that there will be unfair discrimination against the complainant. Similarly there is no reason to suppose that the system of inviting quotations will be applied in a manner that will amount to unfair discrimination against the complainant.

In spite of the complainants suspicions, I am of the view that the complainant could not effectively deny the asseverations of the respondents that the register system, was designed to comply and does comply with the PPPFA.

There is another problem that I have with the application. It is a jurisdictional problem concerning the issue of whether unfair discrimination was proved.

The complainant relied on section 7(c) or 7(e) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 40 of 2000).

These sub paragraphs reads as follows:

"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.

It would seem to me that sub paragraph (e) is more apposite to the complainant's case.

The word "discrimination" is defined in section 1 as follows:

"Discrimination means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly

- (a) imposes burdens, obligations or disadvantages from,
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."

Section 14 provides that it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.

Section 29 provides that the schedule to the act is intended to illustrate practices that are unfair, without detracting from the generality of the provisions of the Act.

In the Schedule examples of unfair practices are given under 10 headings. Item 9, under the heading "Provision of goods, services and facilities" has the following sub-paragraph:

"(c) Unfairly limiting access to contractual opportunities for supplying goods and services"

Section 9 of the Constitution is the source of the right to equality. More precisely, the right is enshrined in section 9(1). Section 9(2) authorizes, by way of exception, measures to redress past unfair discrimination.

On the same basis section 217(2) of the Constitution authorizes what may be termed preferential procurement, as a deviation from what is prescribed in section 217(1).

In my view the right to preferential treatment is not the same as the right to equal treatment. In a sense it is the antithesis of it, however justified it may be. The complainant is not relying on the right to equality, but on an exception to the right to equality. It is not its case that in the category of persons entitled to preferential treatment, it is being treated unequally.

I find nothing in Act 4 of 2000 that justifies the conclusion that a rearrangement or even a curtailment of preferential procurement constitutes unfair discrimination.

Therefore the complainant cannot address its complaints against the register system to the Equality Court. If in any respect the register system does not comply with the PPPFA, it must raise its complaints in the High Court.

For all these reasons I have come to the conclusion that the application for an interim interdict must be dismissed.

It was never suggested that should the application fail, an order for costs would be inappropriate. In my view the costs of two counsel are justified.

The following order is made:

The application for an interim interdict is dismissed with costs which costs shall include the costs of two counsel.

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C BOTHA  
PRESIDING OFFICER IN THE EQUALITY COURT,  
HIGH COURT, PRETORIA