THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 331/08

MANONG & ASSOCIATES (PTY) LTD Appellant

and

DEPARTMENT OF ROADS & TRANSPORT,

EASTERN CAPE PROVINCE 1st Respondent

NATIONAL TREASURY 2nd Respondent

Neutral citation: *Manong v Department of Roads & Transport, Eastern Cape Province* (331/08) [2009] ZASCA 59 (29 May 2009)

Coram: FARLAM, NUGENT, VAN HEERDEN, MLAMBO JJA and KROON AJA
Heard: 4 MAY 2009
Delivered: 29 MAY 2009
Updated:
Summary: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – jurisdiction – High Court sitting as an equality court not a High Court ─ extent of jurisdiction of equality court to grant relief in respect of administrative action allegedly invalid on the grounds that it amounted to unfair discrimination.

ORDER

On appeal from: High Court, Bhisho (Pillay J sitting as an equality court):

1. The appeal is upheld with costs, subject to 2.

2. The costs of the record on appeal will be restricted to the costs of two volumes.
3. The order of the court a quo dismissing the application with costs is set aside.
4. The matter is remitted to the court a quo for adjudication in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and the making of an appropriate costs order.

JUDGMENT

KROON AJA (FARLAM, NUGENT, VAN HEERDEN and MLAMBO JJA concurring):

INTRODUCTION

[1] This is an appeal from a judgment of the Bhisho High Court, sitting as an equality court,[1] in which Pillay J upheld a contention by the respondents that the court had no jurisdiction to review administrative action or to adjudicate constitutional issues, and accordingly non-suited the appellant. The appeal is with the leave of Pillay J.

[2] The learned judge addressed the questions referred to in the preceding paragraph because those were the issues that were canvassed in argument before him. As will appear later in this judgment, however, whether the equality court has jurisdiction 'to review administrative action' or 'to adjudicate

[1] The wording 'High Court sitting as an equality court' is used for convenience: as will be shown later the High Court and the equality court are separate and discrete institutions.

constitutional issues' (meaning, presumably, to rule upon constitutional rights) were not the questions to be resolved: the correct question was whether the equality court had jurisdiction in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), the statute that established the equality court, to grant the relief sought by the appellant.

BACKGROUND

[3] The appellant, an engineering company, instituted application proceedings in the court a quo in which it cited the Department of Roads and Transport, Eastern Cape Province as the first respondent (the Department) and the National Treasury as the second respondent (the Treasury).

[4] In essence, the appellant's complaints related to the allocation of tenders by the Department for the upgrading of a number of roads in the province. It contended that the tender process (the Bid Rules prescribed by the Department, in particular clause 24 of these rules) was unfair as envisaged in the Equality Act, read with the Constitution, because it amounted to indirect discrimination against previously disadvantaged persons.

[5] The appellant instituted the application as a matter of urgency, initially seeking relief in two parts. (The proceedings were instituted by way of notice of motion, accompanied by a supporting affidavit in the form usually employed in High Court applications.) Part A sought interim relief (in particular, an order interdicting the Department from processing the tenders received by it for the upgrading of the roads in question) pending the determination of the relief sought in Part B of the notice of motion.

[6] That relief was the following:

(a) the review, correction and setting aside of the decision to disqualify from further consideration the appellant's tenders for the upgrading of the roads in question;

(b) the review, correction and setting aside of any award of tenders to successful bidders;

(c) a declarator that any contract concluded pursuant to the award of tenders to any other tenderer was null and void;

(d) a declarator that the procedure followed pursuant to the Bid Rules by the Department to disqualify the appellant was inconsistent with the provisions of s 217 of the Constitution,[2] alternatively that clause 9.4 of the Practice Note issued by the Treasury, in terms of which the Bid Rules were made, is inconsistent with the provisions of the said section;

(e) a declarator that the procedure followed to disqualify the appellant's tenders was unfairly discriminatory as envisaged in the Equality Act;

(f) an order directing that the respondents undergo such audit of their procurement procedures and practices as the court may direct.

[7] The proceedings in respect of Part A came before Van Zyl J. He refused the application for interim relief and postponed the application for the relief in Part B of the notice of motion sine die. An application for leave to appeal against the refusal of the interim relief was dismissed and the matter was referred to the clerk of the equality court with the direction that a date be assigned for the holding of a directions hearing as envisaged in regulations 6 and 10 of the regulations issued in terms of s 30 of the Equality Act. Leave to appeal against the dismissal of the interim relief sought was similarly refused by this Court.

[8] The directions hearing was presided over by Ebrahim J. It was agreed that the Department would file the record of the proceedings in respect of the adjudication of the bids, in terms of Uniform Rule 53(1)(b). This was duly done.

---

[2] S 217 provides 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) must be implemented.'

[9] Prior to the hearing before Pillay J for the determination of the relief set out in Part B of the notice of motion the respondents (which had filed no opposing affidavits) filed a notice in terms of Uniform Rule 6(5)(d)(iii) which read as follows:

'PLEASE TAKE NOTICE THAT the First and Second Respondents intend to raise questions of law only which [are] set forth hereunder: -

1. The Honourable Court does not have jurisdiction to entertain the application for review as sought by the Applicant;

2 The Applicant, on its papers, does not make out a case for the Respondents to answer; and

3. Consequently, the application ought to be dismissed with costs.'

THE COURSE OF THE PROCEEDINGS BEFORE THE EQUALITY COURT

[10] The judgment of Pillay J[3] recorded that when Mr Ntsaluba (who appeared for the respondents) started to argue first, as per an agreement between the parties, he 'strung a second string to his bow by adding the further point that the court did not have jurisdiction to deal with issues of constitutionality'.

The learned judge thereupon noted that it was clear that if the respondents succeeded in their contention that the court lacked jurisdiction to review the administrative decisions of the respondents and/or to decide issues of constitutionality, the matter would end there. If they were not successful in that contention then the merits (which Pillay J said stood uncontested) would have to be addressed. In the circumstances, it was convenient to deal first with the jurisdictional issue(s).

[11] It appears from the above comments that the parties agreed that the argument would initially canvass the contentions raised by the respondents on the issues relating to the jurisdiction of the court, to be followed by judgment on those issues. If judgment were given in favour of the respondents, the dismissal of the appellant's application would follow. If judgment were given in favour of the appellant, the parties would then present argument on the

[3] Reported at 2008 (6) SA 423 (EqC).

merits, to be followed by judgment on the issues that arose on the merits. Mr Masuku, who appeared for the appellant in the court a quo as well as in this Court, confirmed that that was the course agreed upon between the parties.

RELEVANT STATUTORY PROVISIONS

[12] Further relevant sections of the Constitution are the following:

(a) '9 **Equality**

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

(b) '33 **Just administrative action**

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and promote an efficient administration.'

(c) '166 **Judicial System**

The courts are —

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;

(d) the Magistrates' Courts; and

(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 Courts or the Magistrates' Courts.'

(d) '169 **High Courts**

A High Court may decide –

(a) any Constitutional matter except a matter that –

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament.'

[13] The Equality Act

(a) The objectives of the Equality Act were set out in *Minister of Environmental Affairs and Tourism v George and Others*[4] as follows:

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

[4] The purpose of these innovations is to create enhanced institutional mechanisms through which victims of unfair discrimination and inequality can obtain redress for the wrongs against them. The equality court is not a wholly novel structure, but is a High Court or a designated magistrates' court. Apart from the specific powers the statute confers, the only distinction is that the presiding Judges or magistrates must have undergone "social context training" (s 31(4)(a), read with s 16(2)). Subject to the availability of a presiding officer and one or more clerks, every High Court is, for the area of its jurisdiction, an equality court, and the Judge President may designate any Judge who has completed a training course a presiding officer of the equality court (s 16(1)(a), (b) and 16(2)). The Minister for Justice and

[4] 2007 (3) SA 62 (SCA) at 66.

Constitutional Development must also designate magistrates' courts as equality courts (s 16(1)(c)).' (Footnotes omitted).

(b) The Act binds the State and all persons (s 5).

(c) Section 16 reads inter alia 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'.

(Paragraph (c) deals with the designation of magistrates' courts as equality courts by the Minister of Justice and Constitutional Development.)

'(2) Only a judge, magistrate or additional magistrate 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).

. . . .

(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.'

(d) Section 21 of the Act provides inter alia as follows:

'(1) 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.

(2) After holding an inquiry, the court may make an appropriate order in the circumstances, including –

. . . .

(b) a declaratory order;

. . . .

(f) an order restraining unfair discriminatory practices or 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 in question;

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

. . . .

(k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;

. . . .

(o) an appropriate order of costs against any party to the proceedings;

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

. . . .

(3) An order made by an equality court in terms of or under this Act has the effect of an order of the said court made in a civil action, where appropriate.

. . . .

(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.'

[14] The Promotion of Administrative Justice Act 3 of 2000 (PAJA) constitutes the national legislation envisaged in s 33 of the Constitution[5] and its objectives are the achievement of the purposes identified in that section.

THE JUDGMENT OF THE EQUALITY COURT

[15] Pillay J held that it was unnecessary to decide whether the application of the prescribed Bid Rules gave rise to discrimination. He adopted that attitude in the light of the conclusion reached by him on the issue of whether the equality court had jurisdiction to issue the orders sought by the appellant, a question he answered in the negative. He did so on a two-fold basis: the equality court did not have jurisdiction to decide constitutional matters nor to review, correct and set aside administrative action.

[5] Para [12](b) above.

[16] It was noted that, in order to determine whether the application of the Bid Rules resulted in discrimination, it would be necessary to determine whether the rules passed constitutional muster. A distinction was, however, drawn on this score between the High Court and the equality court. While s 169 of the Constitution[6] empowers the High Court to decide constitutional matters (with certain exceptions) neither the Constitution nor the provisions of s 21 of the Equality Act[7] give the equality court that jurisdiction.

[17] The learned Judge further held that the Equality Act did not accord jurisdiction to the equality court to review the administrative action in question. Section 21(1) of the Act empowers the court to determine whether unfair discrimination (or hate speech or harassment) has taken place. Its powers were clearly restricted to these aspects. The remedies provided for in s 21(2) do not include the review of administrative action.

[18] In reaching his conclusion the learned judge rejected the argument that because the High Court was sitting as an equality court it was clothed with the High Court's jurisdiction. The argument, so it was held, overlooked essential differences between the two courts. The objectives of the Equality Act, as set out in s 2 thereof, read with s 9 of the Constitution, defined the parameters within which the equality court operates.

OTHER DECISIONS

[19] In *Manong & Associates (Pty) Ltd v City of Cape Town*[8] it was held (per Moosa J)[9] that the equality court does not have jurisdiction per se to review matters covered by PAJA. It can only enquire into the matter if the cause of action is founded on unfair discrimination. In that event the court or tribunal which has jurisdiction to review matters of administrative action will have concurrent jurisdiction with the equality court. Thus, where a public tender has not been allocated to a particular service provider on the grounds of unfair discrimination, either or both courts could be approached for relief. The relief sought in either court would differ. Section 8 of PAJA sets out the remedies a court or tribunal, in proceedings for judicial review of administrative action, is

[6] Para [12](c) above.
[7] Para [13](d) above.
[8] 2008 (2) SA 601 (C).
[9] Para [4].

competent to grant. Section 21(2)[10] of the Equality Act sets out the remedies that the equality court is competent to grant.

[20] The argument that s 21(5) of the Equality Act[11] accords the equality court the power of judicial review under PAJA was rejected. The additional powers provided for in the subsection must be read in the context of s 21(1) and (2) of the Act which empower the equality court to hold 'an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged,' and make an appropriate order, including the remedies set out in the subparagraphs of s 21(2). The additional powers are accordingly not to be extended beyond what is necessary or reasonably incidental to the powers and functions of the equality court.[12]

[21] The learned judge accordingly concluded as follows:

'[T]he equality court has jurisdiction to enquire into and review matters pertaining to complaints of unfair discrimination under [the Equality Act], but is precluded from doing so under PAJA. Nothing, however, prevents the equality court from enquiring into whether any administrative action constitutes unfair discrimination or not and granting the necessary relief in terms of [the Equality Act].' [13]

[22] The issue of the equality court's jurisdiction to review administrative action again arose in *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Others* (No 2).[14] The relevant issues in that case were similar to those that arise in the present matter.

[23] Froneman J was persuaded that the conclusion reached by Pillay J was wrong and he dissented therefrom. He held inter alia as follows:

'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 s 166(e) of the Constitution, nor is there

---

[10] Para [13](d) above.
[11] *Ibid*.
[12] Paras [7] and [8] of the judgment of Moosa J (note 8 above).
[13] Para [9].
[14] 2008 (6) SA 434 (EqC).

provision for the separate appointment of judges and judicial officers in accordance with the Constitution as there are in these acts.' [15]

[24] He went on to state:

'If the intention was that an "equality court" would merely be an independent and impartial tribunal to have effective power to enforce the breach of its provisions by administrative review under PAJA, it would have been necessary to include administrative review as part of its powers and functions under s 21. The fact that this was not done is in my judgment a clear indication that it was never intended to be such a tribunal, but that the equality jurisdiction in terms of the Act would be exercised under High Court judicial authority, which includes judicial review.'[16]

[25] Paragraph 16 of the judgment reads as follows:

'[16] The outcome of the *George* case in the Supreme Court of Appeal[17] 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.' (Footnotes omitted).

[26] In the view of the learned judge the fact that the Equality Act provided for less formal procedures to be followed in the equality court did not militate against a combination of issues being adjudicated in the equality court.[18]

---

[15] Para [10].
[16] Para [14].
[17] *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA) in which the issue was whether a High Court was one of the *fora* to which a matter could be referred by a presiding officer in a 'High Court sitting as an equality court' in terms of s 20(3) of the Equality Act. In para [10] 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.'
[18] Para [18].

[27] The learned judge further recorded[19] that he had not lost sight of the reference in *George* to 'parallel proceedings' in the High Court and the equality court or the comments in that case that certain of the relief sought by the complainants lay 'solely within the jurisdiction of the equality court' and that 'some of the relief can be adjudicated only by the High Court'.[20] In the view of the learned judge, however, these comments should be read in the context of the issue raised in that case, namely whether an equality court may refer a matter to the High Court under s 20(3)(a) of the Equality Act. So read, the comments emphasised that a High Court sitting as en equality court may have extended jurisdiction conferred upon it by the Equality Act.

ASSESSMENT

[28] In my judgment, the equality court does have jurisdiction to entertain the relief sought by the appellant in the instant matter: as will be shown below such jurisdiction is accorded to the equality court by the provisions of the Equality Act.

[29] The first aspect requiring consideration is the position of the equality court (when the High Court sits as such) vis-a-vis the High Court.

[30] I am unable to align myself with the approach of Froneman J in *Manong (2)*[21] that there is no separate equality court and that the High Court sitting as an equality court is one court sitting in two capacities: both as a High Court (with the jurisdiction of that Court) and as an equality court (with the extended jurisdiction conferred by the Equality Act). In this regard I refer to the comprehensive discussion of this issue by Navsa JA in *Manong v Eastern Cape Department of Roads and Transport and others*,[22] paras [26]-[71].

[31] I would add the following. While it is so that s 16(1) of the Equality Act[23] provides that each High Court is an equality court for its area of jurisdiction, that provision does not, however, mean that the equality court is a High Court — in any sense and specifically in the sense that it enjoys the original

[19] Para [17].
[20] *George* paras [12] and [13].
[21] Note 14 and paras [22] to [24] above.
[22] [2009] ZASCA 50, on appeal from the decision of Froneman J, handed down on 25 May 2009.
[23] Para [13](c) above.

jurisdiction that a High Court has. The High Courts are the courts referred to in s 166(c) of the Constitution.[24] The equality court is a court as envisaged in s 166(e),[25] ie a court established or recognized in terms of an Act of Parliament, including any court of a status similar to that of either the High Courts or the Magistrates' Courts. It is therefore a statutorily created court (much as the court of the Commissioner of Patents or the Special Income Tax Court). It follows that its powers are to be found in, and are confined to those conferred by, the statute creating it. It may be added that s 166(e) does not empower Parliament to create another forum which can sit and function *as a High Court* and a statute which purported to do so would be constitutionally offensive against what the Constitution has, in s 166(c), declared are High Courts.

[32] The jurisdiction to review administrative action in terms of the provisions of PAJA reposes in the High Courts, which exercise their original jurisdiction in that regard. In that the equality court is not a High Court, and therefore does not enjoy such original jurisdiction, and in that the Equality Act does not otherwise provide that the court has jurisdiction to review administrative action under PAJA, it does not have jurisdiction under that Act.

[33] As already stated, however, that is not the question to be asked in the present matter and the negative answer to that question is neither here nor there. The correct question is whether in terms of the Equality Act the equality court has jurisdiction to entertain the relief sought by the appellant. As shown below, that question falls to be answered affirmatively. That the grant of portions of that relief might, on analysis, from a practical point of view, have the same effect as an order made by the High Court on review is purely co-incidental.

[34] Equality courts are vested with extensive procedural and remedial powers in complaints of unfair discrimination and the jurisdiction and powers that the Equality Act confers on equality courts are wide (subject thereto that, insofar as is relevant for present purposes, the equality court is confined to adjudicating alleged discrimination). The specific powers conferred on an equality court by s 21(2) of the Act[26] (which are to be read with the ancillary

[24] Para [12](c) above.
[25] *Ibid*.
[26] Para [13](d) above.

powers provided for in s 21(5)[27]) are wide enough to embrace adjudication of the relief in question.

[35] As regards constitutional matters, the question again is not whether the equality court has jurisdiction 'to adjudicate constitutional matters' (again, presumably meaning to rule upon constitutional rights), but what is the extent of the jurisdiction given to the equality court by the Equality Act and whether that jurisdiction would embrace the grant of the relief sought by the appellant. That question I have already answered in the affirmative. To the extent that any order granted by the equality court has, from a practical point of view, the same effect as an order by the High Court on a constitutional matter, that again would be merely co-incidental.

[36] The above conclusions accord with the purpose and objectives of the Equality Act which is aimed at giving equality courts wide powers to redress inequality and discrimination.

IS THE APPEAL MOOT?

[37] Mr Buchanan (who appeared with Mr Ntsaluba for the respondents) submitted that the appeal had become moot and that accordingly in terms of s 21A(1) of the Supreme Court Act 59 of 1959[28] this Court should dismiss the appeal in that an order upholding the appeal would have no practical effect or result. In essence, the submission was based on the fact, as it was stated to be, that performance in terms of the contracts awarded to the successful tenderers for the upgrade of the roads in question has already been completed. In addition, however, counsel sought to suggest that the matter was moot because there was a further appeal on this Court's roll for this term (ie the appeal is against Froneman J's judgment in *Manong (2)*[29]) in which the parties are the same (further parties joined in the proceedings at the instance of the court a quo in *Manong (2)* did not enter the lists and abided the court's

---

[27] *Ibid*.

[28] The section provides as follows:
'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[29] Para [30] and note 22 above.

decision) and the issues on the merits are on all fours with those in the present matter.

[38] There are a number of answers to the argument. First, the issue whether the court a quo erred in dismissing the appellant's application remains for decision in the present appeal. Second, as counsel in fact conceded during argument, at least prayer 4 of the appellant's notice of motion (paraphrased above[30]) refers to relief which is not moot. Third, this Court has a discretion whether or not to dismiss an appeal on the grounds that an order upholding the appeal would have no practical effect or result. It would be in the public interest for the judgment in the present matter to pronounce on the extent of the jurisdiction of the equality court (notwithstanding that the conclusion reached in this judgment is the same as that reached in the other appeal). It is accordingly proper for this Court to entertain the appeal. In the event of the appeal being successful and a further order being made remitting the matter to the court a quo for adjudication of the relief sought by the appellant, it would be open to the respondents to pursue whatever defences they may be advised to raise. The fact that the other appeal was on this Court's roll did not render the present appeal moot.

FINDING

[39] It follows from the conclusions recorded in this judgment that the appeal must be upheld and the order of the court a quo dismissing the appellant's application be set aside.

[40] In his heads of argument counsel for the appellant, Mr Masuku, urged upon us that if the conclusion set out above were to be reached, it would be proper for this Court to dispose of the whole matter by coming to the appellant's aid and granting the orders sought by it, instead of remitting the matter to the court a quo. It was pointed out that the respondent had not placed in dispute any of the factual averments set out in the appellant's founding papers, and it was submitted that a proper case for the grant of the orders had been made out.

[30] Para [6](d) above.

[41] The course proposed cannot, however, be followed. The appellant was non-suited in the court a quo on the grounds that the court lacked jurisdiction in the matter (which was the only issue addressed in that court), leave was sought to appeal against *that* decision, such leave was granted and the appellant's notice of appeal was restricted to an attack on that decision (and in fact further sought an order that the matter be remitted to the court a quo for adjudication of the merits of the application). In any event, it would not be appropriate for this court to sit, as it were, as a court of first instance. In the result counsel abandoned the submission and accepted that the proper course would be for the matter to be remitted to the equality court for adjudication of the relief sought by the appellant.

COSTS OF APPLICATION FOR LEAVE TO APPEAL

[42] In granting the application for leave to appeal Pillay J ordered the respondents to pay the costs of that application. The proper order would have been that the costs of the application be costs in the appeal. However, in view of the conclusion reached by this Court and the order set out below, there is no need to alter the costs order made by Pillay J.

COSTS OF APPEAL

[43] Having achieved success in the appeal the appellant is entitled to the costs of the appeal, subject to what follows.

[44] The record on appeal comprises eight volumes. Much of the record was unnecessary for the purposes of the appeal. I refer, firstly, to the copies of the documentation, which was substantial, which had a bearing on the process followed in the adjudication of the tenders for the upgrade of the roads in question. Counsel advised us from the Bar that this documentation was included in the record for the purposes of counsel's argument that this Court should grant it the substantive relief it sought in the court a quo. As already recorded above, that argument was misconceived. I refer, secondly, to various other documents such as, for example, copies of the judgments of Van Zyl J on Part A of the notion of motion and on the application for leave to appeal (which were in fact duplicated), the papers filed in respect of that application, returns of service, and various notices filed.

[45] I consider that the exigencies of the matter may be met by an order that the appellant's costs of the record on appeal be restricted to the costs of two volumes.

ORDER

[46] The following order will accordingly issue:

1. The appeal is upheld with costs, subject to 2.
2. The appellant's costs of the record on appeal are restricted to the costs of two volumes.
3. The order of the court a quo dismissing the application with costs is set aside.
4. The matter is remitted to the court a quo for adjudication in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and the making of an appropriate costs order.

F KROON
ACTING JUDGE OF APPEAL

For Appellant: T MASUKU

Instructed by:

NONGOGO, NUKU INC
CAPE TOWN

EG COOPER & MAJIEDT INC
BLOEMFONTEIN

For Respondent: R G BUCHANAN SC
T M NTSALUBA

Instructed by:

THE STATE ATTORNEY
KING WILLIAM'S TOWN

THE STATE ATTORNEY
BLOEMFONTEIN