THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 457/09

MANONG AND ASSOCIATES (PTY) LTD Appellant

and

CITY OF CAPE TOWN First Respondent

FUTUREGROWTH PROPERTY DEVELOPMENT COMPANY (PTY) LTD Second Respondent

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Neutral citation: *Manong v City of Cape Town* (457/09) [2010] ZASCA 169 1 December 2010)

CORAM: Navsa, Cloete, Van Heerden and Mhlantla JJA and Ebrahim AJA

HEARD: 15 November 2010

DELIVERED: 1 December 2010

SUMMARY: Unfounded complaints in Equality Court – formulation of complaints not in accordance with the manner envisaged by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – costs in matters concerning the assertion of constitutional rights – manner in which litigation conducted justifying costs order against complainant – concerns expressed about irrelevant and outrageous statements by complainant during course of enquiry.

ORDER

On appeal from: Western Cape Equality Court (Cape Town) (Moosa J sitting as court of first instance).

1. The appellant's appeals in respect of its exclusion from the CBD project and the upholding by the court below of the second respondent's plea of misjoinder in relation to the Setsing project are dismissed with costs, including the costs of two counsel.

2. The cross-appeal by the first respondent in respect of the broader Khayelitsha enquiry is upheld with costs, including the costs of two counsel.

3. The cross-appeals by the first and second respondents, in relation to the costs order in both cases, are upheld with costs, including the costs of two counsel.

4. The finding of the court below set out in para 36 and the costs order contained in para 64 of the judgment dated 12 November 2008 are set aside and substituted as follows:

'1. The applicant's complaint that it was discriminated against in general by the first respondent and its predecessor in the allocation of contracts in Khayelitsha is dismissed with costs, including the costs of two counsel and such costs are to include the costs reserved on 18 August 2007.

2. The applicant is ordered to pay the first and second respondents' costs in relation to the complaint concerning its exclusion from the CBD project, including the costs of two counsel and such costs are to include the costs reserved on 18 August 2007, which also encompass the second respondent's costs in relation to the Setsing project.'

5. The appellant is ordered to pay the respondents' wasted costs occasioned by the postponement of the appeal on 20 August 2010.

JUDGMENT

NAVSA and MHLANTLA JJA (CLOETE, VAN HEERDEN JJA and EBRAHIM AJA concurring)

[1] This case implicates the right to equality in the procurement of State related (municipal) contracts. The Constitution guarantees equality before the

law and prohibits unfair discrimination by the State and/or individuals directly or indirectly 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. Section 9(3) of the Constitution obliges the State to enact national legislation to prevent or prohibit unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act), which came into operation on 16 June 2003, is an important statute to that effect. Its purpose is to prevent or prohibit unfair discrimination and to promote equality.

[2] The promotion of equality is a noble goal and as we transform our society and meet the myriad challenges associated with change we should always act on a principled basis. Where there are legitimate grievances based on racial exclusion, we should deal with them promptly and firmly. Racism was the scourge of our nation and we should, where it is shown to exist, resist it strenuously and take all the necessary steps to eliminate it from our midst. Courts, when faced with legitimate complaints of racial exclusion should not hesitate to show their disapproval by means of appropriate orders. On the other hand, given South Africa's peculiar history, racism is such a serious charge that care should be taken to ensure that such a complaint is well-founded. A contrived charge is equally deserving of censure. In this case we have to decide on which side of the dividing line the appellant's complaint in the Equality Court falls. The evidence and issues in this case demonstrate the complex challenges facing the State in its management and promotion of fundamental change in society.

[3] The procurement of State-related contracts for the acquisition of professional or other services, whether by way of tender or otherwise, has become a hotly contested field with courts frequently being the battleground. Litigation has included a range of legal issues, including but not limited to charges by unsuccessful service-providers of being victims of racial discrimination or bias. The question in the present appeal is whether the complaint of racism brought by the appellant in the Equality Court (Cape Town) in relation to the procurement of municipal contracts was warranted.

The appeal is before us with the leave of that court. The two judgments of the court below which are the subject of the present appeal and cross-appeal are reported as *Manong and Associates (Pty) Ltd v City of Cape Town & others* 2008 (2) SA 601 (C) and *Manong and Associates (Pty) Ltd v City Manager, City of Cape Town, & others* 2009 (1) SA 644 (EqC). The first judgment deals with practice directions and preliminary points.

[4] The appellant, Manong and Associates (Pty) Ltd, describes itself as a national company specialising in civil, structural and development engineering. The engineering practice progressed from initially operating only in Cape Town as a one person practice, to operating as a close corporation, and ultimately expanding its presence as a national company to Port Elizabeth, Johannesburg, East London and Mthatha. Notwithstanding its national footprint the company has a fairly limited professional staff complement comprising four full time directors who are qualified engineers, four professional associates and eleven professional technical staff.

[5] The driving force behind the appellant is Mr Mongezi Stanley Manong (Manong), who is its managing director and a professional engineer. The complaint in the court below leading up to the present appeals is the culmination of a deep sense of injustice on the part of Manong, which appears to have developed over many years based on his perception of treatment meted out to him by officialdom. Unless the context otherwise requires, we shall refer to the engineering practice headed by Manong in its various forms over the years as ‘the company’.

[6] The company’s complaint as initially formulated in its founding affidavit was that it was discriminated against by the first respondent, the City of Cape Town (CCT), and its predecessor, the City of Tygerberg (COT), by being generally excluded from municipal contracts in relation to Khayelitsha and specifically in relation to a proposed retail development in the Central Business District (CBD) in that township. The company alleged that the CCT and the COT implemented policies and practices designed to exclude and limit its access to municipal projects. Interestingly, even though the COT and

the CCT were implicated in relation to the CBD complaint no relief was claimed against the CCT. As regards the CBD, the company alleged that the second respondent, Futuregrowth Property Development Company (Pty) Ltd (FG) discriminated against it by excluding it from that development. The company also complained that FG had excluded it from the 'Setsing project' in the Free State and had again discriminated against it by doing so. Manong's founding affidavit comprised 92 paragraphs extending to 30 pages. The characterisation of the complaint, outlined earlier in this paragraph, is our best attempt at encapsulating what is set out by Manong in rather convoluted form. Manong's method of formulating a complaint is criticised later in this judgment.

[7] In the replying affidavit, after being invited by the respondents to state the basis of the company's complaint more precisely, Manong relied on the provisions of ss 7(c) and (e) of the Act, which read as follows:

'Prohibition of unfair discrimination on ground of race

Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

(a) . . .

(b) . . .

(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;

(d) . . .

(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.'

[8] The factual basis for the complaint was set out by Manong.[1] He blamed the company's exclusion from opportunities in Khayelitsha on Mr Hendrik Barnard, employed by CCT as a civil engineering technologist. For the greater part of his career with the COT and CCT, Barnard was involved with the allocation and administration of municipal contracts in Khayelitsha. According to Manong, the antagonism between Barnard and the company arose as a result of Barnard's contrived complaint concerning the quality of services provided by the company to COT in relation to a contract involving the installation of a boardwalk leading to a platform with a sea view at a site on Lookout Hill in Khayelitsha. Barnard was accused of being racist and of conspiring with others to ensure that only white-controlled institutions received municipal work.

[9] As the enquiry progressed in the court below, the company's case crystallised as follows: Barnard, driven by racism, fabricated and/or exaggerated the complaint referred to in the preceding paragraph, and then, using it as a reason, vowed never again to allocate any municipal work in Khayelitsha to the company. Barnard conspired with other like-minded officials of the COT and CCT to achieve that end. Accordingly, in respect of the CBD project, Barnard conspired with other CCT officials and with employees of FG to exclude the company. This was achieved through privatising the CBD project so as to have it developed on a turnkey 'design, develop and deliver' basis.[2] This enabled the CCT to shift the blame for the company's exclusion to

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[1] In his replying affidavit under the heading 'CAUSE OF ACTION', inter alia, the following appears:

'40. Advocate Jamie SC representing the first and third respondents during the directions hearing of 06 March 2007 issued a practice note directing the complainant to explain some issues that would clarify its cause of action against the first respondent. The complainant sets out its reply to the queries raised by the first respondent.

40.1 The complainant in its complaint of unfair discrimination against the first respondent relies on its exclusion from the procurement process in Khayelitsha on direct discrimination against the complainant as witnessed by the behaviour of Barnard in the Lookout Hill project;

40.2 On the Khayelitsha CBD project the complainant relies on both on an act and omission on the part of the first respondent as fully described under the preliminary issues of this affidavit;

40.3 The policy of the first respondent of appointing consultants "HCB1" found on page 166 of the record is deemed to be imposing conditions which are unfairly discriminating to the complainant.'

[2] A turnkey development is one where for an agreed sum the contractor appointed undertakes to provide a fully operational facility on an agreed date. The contractor is accordingly at risk should the deadline not be met or should there be any defects in the design or construction.

FG. In short, the company's case was that the CCT, in order to exclude him from the CBD contract, decided to develop the CBD project on a turnkey basis enabling the principal contractor to appoint the consulting engineers and others without having to comply with State procurement requirements and that this was done solely to exclude the company.

[10] In the court below the company sought an order against the CCT in terms of which the latter would be prohibited from excluding the company from procurement opportunities in Khayelitsha and would be obliged to make such opportunities available to it. The company also sought an order in terms of which the CCT would be required to compensate it for financial losses sustained as a result of being 'deliberately marginalised . . . in Khayelitsha'. Against FG, the company sought compensation in the sum of R1.74 m which it alleged was the financial loss it suffered as a result of being unfairly excluded from the CBD project. Additionally, it sought compensation from FG in the sum of R240 000 which it claimed represented the loss it suffered as a result of cancellation by FG of a contract to be a consultant on the 'Setsing Project' in the Free State. It is difficult to discern the basis on which this latter claim falls within the jurisdiction of the Equality Court. Later, when we set out the background in greater detail and evaluate the evidence, its lack of relevance will become clear.

[11] Although stating early on in the judgment that a complainant bears the onus to establish discrimination on the basis of race, the court below (Moosa J sitting with two assessors), in evaluating the evidence presented during the enquiry, at the outset, adopted the wrong approach. It held that the CCT was 'burdened with the onus of showing on a balance of probabilities that the discrimination did not take place or that the impugned conduct was not based on race or that the discrimination was fair'. The court below considered that the thrust of the CCT's case was that the discrimination did not take place. It was on that basis that the evidence was evaluated. As we will show later, this inverts the approach that should be followed when a case of discrimination is adjudicated.

[12] In assessing the evidence the court below took the view that the CCT's complaint in relation to the quality of work on the first phase of the Lookout Hill project had never been formally communicated to the company and that it had in any event been shown that such issues that had arisen had been resolved at a meeting in February 2002. The court below stated that Barnard gave no reason for not appointing the company to the second phase of the Lookout Hill project. Compounding the erroneous approach referred to in the preceding paragraph the court below held it against the CCT that it had failed to conduct a formal performance evaluation on the work done by the company on the first phase of the Lookout Hill project. A formal performance evaluation is required by the procurement policy adopted by the CCT pursuant to the Preferential Procurement Policy Framework Act 5 of 2000 ─ but that only applied from September 2003, which was after the first phase of the Lookout Hill project had been completed.[3] The court below took into account that the company received no further work in Khayelitsha and concluded as follows:

'From the objective facts the only reasonable inference we can draw is that the complainant was excluded from the second phase of the Lookout Hill project on the basis of race and such exclusion continued on subsequent appointments.'

[13] Having arrived at the conclusion referred to in the preceding paragraph, the court below nevertheless proceeded to consider affirmative action measures adopted by the CCT and its predecessor, the COT, in relation to Cape Town in general and to Khayelitsha in particular. It had regard to targets that were set and the database of consultants which it is common cause had shortcomings. The court below took into account the reappointments of consultants other than the company on Khayelitsha projects within particular timeframes and the CCT justification, namely, that they had been reappointed because they had the exposure to the first phase of particular developments or that they had special expertise and skills that were required on the second phase. This, according to the CCT, was done to retain expertise and to ensure continuity.

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[3]The Preferential Procurement Policy Framework Act 5 of 2000 is legislation contemplated by s 217(3) of the Constitution which provides that national legislation must prescribe a procurement policy that allows for categories of preference in the allocation of contracts and the protection or advancement of persons previously disadvantaged.

[14] The court below concluded that such policies and practices as were resorted to by the CCT in the allocation of municipal contracts, although appearing to be legitimate on the face of it, perpetuated unfair discrimination on the basis of race and had the effect of maintaining exclusive control of such professional work in the hands of white professional consultants (see para 30 of the judgment of the court below). In effect, the court below held that the company's complaint of being racially discriminated against generally, in respect of the allocation of work in Khayelitsha, was justified in respect of ss 7(c) and (e) of the Act.

[15] In respect of the company's exclusion in relation to the CBD development, the court below had regard to its progression from inception to completion. It concluded that although the processes followed by the CCT in initiating and promoting the development were suspect, from an administrative law point of view, the conspiracy relied on by Manong referred to in paras 8 and 9 above was not proved and consequently held that the complaint in terms of either of the sections of the Act referred to above could not be upheld.

[16] The effect of the court's findings was that the quantum of the compensation the company sought against the CCT in relation to its exclusion generally from municipal projects in Khayelitsha based on the CCT's racism stood over for later adjudication.

[17] In the first judgment referred to in para 3 above, the court below held that FG had no connection to or involvement in the Setsing project and that there had been a misjoinder. The court had found that the company had made no attempt to join the entities to which the Setsing project was related, namely Futuregrowth Asset Management (Pty) Ltd and Community Property Company (Pty) Ltd. The costs relating to that dispute was held over for 'later determination'.

[18] After disposing of the issues set out above, the court below dealt with the question of costs. It took the view that an equality court should be careful

to avoid deterring bona fide litigants from asserting constitutional rights to equality by making costs orders against unsuccessful parties and consequently made no order as to costs. That costs order appears to have encompassed the costs referred to at the end of the preceding paragraph.

[19] The company appeals against the finding of the court below in respect of its exclusion from the CBD project. It also appeals against the finding of misjoinder as set out in para 17 above. The CCT cross-appeals against the conclusion by the court below that it had discriminated against the company on the basis of race in the allocation of civil engineering contracts for the area of Khayelitsha generally. Furthermore, it appeals against the finding that its practices and policies had been designed to maintain exclusive control by white professional consultants. The CCT and FG appeal against the costs order in the court below, submitting that although courts should be careful not to mulct parties who bona fide seek to assert constitutional rights, this case was an abuse and was brought solely to promote the company's commercial interests. A further issue that we will deal with in due course is the costs of the postponement of the appeal on 20 August 2010, when senior counsel representing the company suddenly took ill and had to be hospitalised.

[20] Thankfully, the following questions are no longer in issue:

(a) whether entities such as the company can be discriminated against on the ground of race;

(b) whether a Trust established by the CCT and the company which it controlled are municipal entities and as such are organs of state;

(c) whether the Act has retrospective effect.

In relation to the last question the parties were agreed that the historical enquiry into racism was relevant only to the extent that it could be shown to have existed in the first place and to have continued to periods after the commencement of the Act.

[21] The assessment by the court below of the evidence adduced was terse and it made no credibility findings. The proceedings in the court below endured over a period of more than three years. The record extended over 34

volumes comprising more than 3000 pages. A considerable part of the record contained irrelevant material, an aspect to which we will revert later in this judgment. The court below ought to have conducted a more thorough, comprehensive and accurate evaluation of the evidence. That exercise is one we now embark on. We will also determine whether the reasoning and the conclusions reached by the court below are correct.

[22] At the outset it is necessary to record that when Manong testified, a persistent theme was that both the CCT and the COT were reluctant to appoint him over a period spanning almost ten years. Throughout his testimony he sought to emphasise that officials partial to the apartheid regime and presently in the employ of the CCT were intent on preserving the privilege of white persons and institutions, consequently denying him the opportunity of procuring municipal contracts. We interpose to state that Manong produced irrelevant documentation and often made speeches about the injustices of the past and on occasion made outrageous statements, thereby detracting from a proper enquiry and protracting the proceedings. When it was put to Manong under cross-examination that his allegations about racial discrimination were unsustainable because the parties who were appointed to a particular project instead of the company were black persons or entities controlled by black persons, he invariably responded by stating that he was principally concerned to promote the company's interests.

[23] Another feature of Manong's testimony is that he often relied on allegations made by himself in letters sent to various individuals including the Presidency and commercial and other entities as 'proof' of his complaint. He also made references to newspaper articles. Furthermore, he repeatedly resorted to other hearsay evidence which was never substantiated and was plainly shown to be unreliable.

[24] Manong initially operated an engineering practice under the style of a close corporation. It started business operations in 1995. The appellant was formed in 2002 and took over the business formerly run by the close corporation. When the close corporation started its operations, Manong was

the only professional employed by it. Almost immediately after the close corporation started conducting business, it was appointed to a municipal project by the CCT. The close corporation added to its staff as it procured more projects. It is undisputed that from 1996 to 2002 the close corporation and thereafter the company procured municipal work from the CCT in at least 15 projects, the total value of which is approximately R137 m. From 2003 until the complaint in the court below the company procured ten more contracts to do municipal work for the CCT. The total fees paid to it in respect of the latter contracts amounted to R1 523 221.27. To sum up, between 1996 until the beginning of 2005 the CCT awarded the company a total of 25 projects outside of Khayelitsha. That equates to approximately 2.8 projects per annum.

[25] Before the COT was incorporated as part of the CCT in 2000 it alone was responsible for awarding municipal contracts in Khayelitsha, which at that time fell under its jurisdiction. It is common cause that Manong formally introduced himself and the company to the COT for the first time in 1997, by way of a letter in which he extolled the company's skills, experience and virtues. Between 1998 and 2000 the company was awarded two municipal contracts to do work in Khayelitsha. Those projects are all relevant to Manong's perception of being unfairly discriminated against and they deserve closer attention. They are as follows:

(a) The Mew Way Sports project ─ the fee was R25 000.

(b) The Lookout Hill project phase 1 ─ the total value of the project was R1.5 m.

[26] In 1998, shortly after Manong had introduced himself to the COT, Barnard himself thought it might be worthwhile to award a small project in Khayelitsha to the company to see what it was capable of. That was how the company became involved in the Mew Way project, which is described hereafter. The COT appointed the company to this project jointly with Wouter Engelbrecht, an established white-controlled engineering firm, which had vast experience in sport facility development. Their brief was to prepare a master-plan for the development of sport facilities in Khayelitsha. When he was cross-examined about being given this opportunity Manong was dismissive,

suggesting that the Mew Way project was awarded to set him up for failure, since the company had no prior experience in the development of sporting facilities. He was especially disparaging concerning the total amount of fees which had to be shared equally with Wouter Engelbrecht, namely R50 000. He was adamant that there was no empowerment potential of any kind in this project. We pause to state that counsel for the company rightly found themselves unable to contend that the awarding of the project was designed to ensure the company's failure.

[27] Manong himself was contradictory when he contended that on other projects where the company did not have the necessary experience, the CCT or its predecessor ought to have considered pairing it with established entities which had specialised skills and experience.

[28] From 2000 to 2005 only 12 new projects were awarded to consultants in Khayelitsha by Barnard, acting with a colleague, Mr Tertius de Jager. Barnard's evidence that the clamour for work in Khayelitsha by a host of consultants is far in excess of available projects was not contradicted. Of the 12 new projects, one was awarded in 2000 to the company, namely, the first phase of the Lookout Hill project.

[29] As stated above, the first phase of the Lookout Hill project contemplated a boardwalk leading to a platform with a sea view. According to Manong, a key black employee of the COT, acting on his behalf, to his knowledge falsely represented to Barnard that the company had done work on the project on risk. Impressed by this, Barnard appointed the company as an engineering consultant on the first phase of the Lookout Hill project. Barnard was thus instrumental in awarding the Mew Way Project and the first phase of Lookout Hill to the company.

[30] It is now necessary to look at the problems that arose in relation to the first phase of the Lookout Hill project. It is common cause that the company was responsible for the technical information to be provided to prospective tenderers on the project. It had to ensure that the information was such that a

person or entity wishing to tender for the construction of the boardwalk could draw up a bill of quantities so as to put a price to a tender. It is common cause that the thickness of the slurry on which the boardwalk had to rest had not been provided in the documents on which tenders had to be based. Furthermore, it is common cause that no provision had been made for handrail specifications which also would have caused a difficulty in drawing up a bill of quantities. It is uncontested that the timber for the boardwalk that was delivered to the site and accepted was not in accordance with specification. What is instructive in this regard is the initial testimony of an important figure in the company, namely, Mr Lyndon Davids, who at the outset accepted that the company bore the overall and ultimate responsibility for ensuring that the documents that went out to tender were complete. He initially accepted responsibility on behalf of the company for the failures referred to above. Later he retracted that evidence and both he and Manong attempted to shift the blame to the landscape architect who had been employed on the project, namely, Mr Eamonn O'Rourke. That exercise proved unconvincing, particularly if one has regard to the written recommendation made by Barnard to the COT, which reads as follows:

'7.1 That Manong and Associates be appointed for the design-,tender- and construction supervision stages of the first phase of the civil engineering works associated with the Look-out Hill Tourism Facility in Khayelitsha.'

[31] It is clear from the relevant documentation, including the fees charged by the company and the manner of calculating those fees, the testimony of Barnard and the initial concessions by Davids that, as the consulting engineers, the company bore the responsibility to ensure that the document that went out to prospective tenderers was accurate and complete. It also bore responsibility for ensuring that the timber and other materials received on site were as specified in the relevant plans. It is difficult to make sense of Manong's grievance that he had not received a letter of appointment from Barnard in respect of the first phase of Lookout Hill. It appears that he was suggesting that this failure is somehow connected to the conspiracy to undermine the company and to exclude it from further work in Khayelitsha. Barnard testified that he could not recall whether a letter of appointment was

sent to the company but stated that if that had not been done it was purely an oversight and that there was no sinister motive behind it. There is no other evidence from which it can be inferred or concluded that Barnard was untruthful on this aspect.

[32] From the minutes of site meetings and the evidence referred to in paras 30 and 31 it is palpably clear that the concerns expressed by Barnard, about the quality of the work done by the company in respect of the first phase, were genuine and justified. They certainly were not contrived. The conclusion of the court below that these concerns were never communicated to the company is therefore incorrect.

[33] Manong complained that the company was excluded from the second phase of the Lookout Hill project because of Barnard's racism. It is necessary to consider the facts. The boardwalk referred to above was to form part of a tourist centre with a parking area. The work beyond the boardwalk comprised the second phase of the project. Before decisions were finally made by the architect, Dr Mlamli Magqwaka, about the composition of his project team on the second phase of the Lookout Hill project, including the consulting engineer, he happened to have an informal discussion with Barnard. The latter mentioned the problems he had encountered with the company on the first phase. Magqwaka said that he knew Manong, had worked with him in the past and was comfortable with him. Barnard replied that it was up to Magqwaka to make the final decision about whether to persevere with Manong. Magqwaka's recollection of that conversation was hazy. He did not contradict Barnard, save that he stated that the nature of the opposition was such that he thought it best not to endanger his own reputation and appointed in the company's stead an entity called Iliso Consulting, which was 67 per cent black-owned. Barnard was not responsible for appointing the consulting engineer on the second phase of the project.

[34] Given that the engineering consultant appointed to the second phase of the Lookout Hill project was black-controlled, the suggestion that the motive for excluding Manong was racist is ill-conceived. In any event, the final

decision to exclude the company appears to have been made by Magqwaka. That the first phase was completed within budget was fortuitous and occurred despite the company's shortcomings. In a project with a greater value and with greater dimensions the failures referred to above could have had disastrous financial consequences.

[35] A further complaint by the company was that a number of consultants had been reappointed to projects in Khayelitsha, thus denying other consultants an opportunity of doing work in Khayelitsha. It will be recalled that the court below thought that this was a significant factor indicating racial bias.

[36] In dealing with the multifarious and rambling nature of the company's complaint of discrimination extending over a number of years, including a time when the COT was still in existence and later after it had been absorbed into the CCT, Barnard was compelled to reconstruct records of allocations of contracts in Khayelitsha because many officials had left the department and relevant documents could no longer be located. When Barnard was cross-examined on the reasons for the reappointment of certain consultants he stated that generally the reasons were to ensure continuity, to capitalise and build on the consultant's exposure to first phases of particular projects and to use the specialised skills of particular consultants. He could not provide specific motivations for each project on which there had been a reappointment of contractors because contemporaneous notes were not always available. It is clear that a number of firms with a majority black shareholding were also reappointed during particular cycles.

[37] We turn to deal with the affirmative action policies and practices of the COT and the CCT over the relevant period. It is common cause that one of the measures adopted by the COT and CCT to promote transformation, was that a minimum quota of 30 per cent of municipal work was reserved for allocation to historically disadvantaged individuals or entities. Another measure was that the companies to whom such work had to be allocated were required to have a minimum 30 per cent shareholding by previously

disadvantaged individuals. These measures were resorted to in order to promote transformation. Section 217(1) and (2) of the Constitution provide:

'(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.'

[38] The Broad Based Black Economic Empowerment Act 53 of 2003, which came into operation on 21 April 2004, established a legislative framework for the promotion of Black Economic Empowerment. It uses the expression 'Black people' as 'a generic term which means Africans, Coloureds and Indians'.[4] Manong laid great store by the fact that the company is a hundred per cent African-owned. He repeatedly emphasised that the company was the only engineering practice in the Western Cape which was a hundred per cent African-owned. Manong and Magqwaka testified about the difficulties faced by black Africans to overcome obstacles and prejudices in the Western Cape which historically was 'a Coloured preference area'. In this latter contention they cannot be faulted.

[39] Some government departments have in the recent past adopted measures to prefer black Africans to other segments of the black population of South Africa in the allocation of contracts. The parties were agreed that during the timeframe relevant to the present appeal that preference did not apply.

[40] Following the issue by the CCT of a Procurement Policy Initiative dated September 2003, a database was used in an attempt to ensure a fair spread of contractual opportunities. It is unchallenged that the database was ineffective. This was due to it being technically deficient. There is no sustainable evidence that it was designed to favour anyone or discriminate

[4]See s 1 of the Act.

against any person or entity. It is abundantly clear that whilst the targets initially set by the COT and CCT might be susceptible to the criticism that they were not sufficiently ambitious, the transformation thrust nevertheless gained momentum over the years leading up to the time when the complaint was lodged. A greater percentage of the total value of the municipal work was allocated to previously disadvantaged individuals. The graph was decidedly moving upwards and at an accelerated pace.

[41] Barnard testified with reference to a schedule compiled in conjunction with counsel representing the CCT that in 2002/2003 seventy-one per cent of projects in Khayelitsha was awarded to firms comprising a black shareholding of more than 50 per cent. For the year 2003/2004 eighty-nine per cent went to black-controlled firms. In 2004/2005 seventy per cent was allocated in this way. In 2005/2006 seventy-five per cent was awarded to black-controlled firms. Significantly, most of these appointments were made by Barnard.

[42] More importantly, the evidence of Barnard, which did not enjoy sufficient attention in the court below, was that the CCT did not deal with Khayelitsha in isolation. In attempting to ensure the fairest spread of work and employing the measures referred to earlier, the frequency and value of work allocated to consultants were measured across the entire metropole. As can be seen from the allocation of work to the company from 1996 to the beginning of 2005 a total of 27 projects, including Khayelitsha, was awarded to the company. This approximates to 3 contracts per annum. The total value is considerably more than R140 m. Not only is this a hugely significant number of valuable contracts but it also reflects that the company must have been reappointed in any given annual cycle.

[43] We now turn to deal with the background to the CBD project. In 1999 the COT called for expressions of interest in the development of a CBD in Khayelitsha. A series of consultations and interaction with interested parties and community organisations followed. This culminated in the conclusion of a framework agreement, to which attendees subscribed. A provision in this framework agreement, whilst committing to fair and transparent procurement

procedures, nevertheless purported to grant the signatories preference in the procurement process. The company was one such signatory.

[44] Having absorbed the COT in 2000, the CCT accepted the broad principles contained in the framework agreement but not all the details. The land owned by the CCT and earmarked for the CBD was sold to a Trust which the CCT had established and controlled. The Trust held 100 per cent of the shares in KBD Management (Pty) Ltd which was the vehicle that would receive the financing for the project by way of a loan from a bank. KBD Management (Pty) Ltd established KBD Retail (Pty) Ltd for the sole purpose of developing and constructing the CBD. KBD Retail in turn appointed FG as project managers for the development and construction of the CBD.

[45] Manong repeatedly stated, without substantiation, that there had been keen interest shown by a number of banks to finance the project. The truth is that only one bank was prepared to do so, namely Rand Merchant Bank (RMB). That bank insisted that the building contractor commissioned to construct the CBD be one of the big four building contractors in South Africa and that the project be completed on a turnkey basis. This led to WBHO (Pty) Ltd (WBHO) being appointed as the contractor. WBHO, because it bore the risk and the cost of development up until delivery of the project, insisted, as is usual in turnkey projects, that it have a free hand in appointing consultants, including the engineers. This was of course subject to transformation targets being met, namely, that at least 30 per cent of consultants be made up of previously disadvantaged persons.

[46] Because of the conditions set by RMB and WBHO, referred to in the preceding paragraph, FG and the CCT effectively played no further part in the development of the CBD. However, the Trust that the CCT initially controlled[5] would ensure, after construction and after the loan was repaid, that the community of Khayelitsha would reap the financial benefits of the project.

[5]City councillors, because of later regulatory legislation, were forced to resign as trustees.

[47] The engineering entity that was appointed by WBHO to the CBD project, namely, Axis Consulting, was black-owned, albeit by a person who is coloured. It is preposterous to suggest, as Manong does, that the arrangement involving RMB and WBHO was designed specifically to exclude him. It is a proposition that merely has to be stated to be rejected. Regrettably, it took almost five years for this proposition to be finally rejected.

[48] Manong contended further that the company had been appointed to the CBD project as the engineering consultant by Mr Van Der Vent, a director of FG, and that it had subsequently been excluded by some form of racist conspiracy between Barnard and Van der Vent. According to Manong he had a legitimate expectation that he would be part of the CBD project team. This, however, was not borne out by the evidence. When Van der Vent and Barnard testified, they both denied that Van der Vent had in fact appointed the company to the CBD project and also that Van der Vent had made a public announcement to that effect. The overwhelming weight of evidence is that RMB insisted on the turnkey arrangement and that Van der Vent had no authority to appoint consultants. Furthermore, the main consultants that were appointed to the CBD project were black. Magqwaka was the architect, Axis Consulting, which was black-owned, was the engineering consultant and the electrical consultants were Johaardien and Associates, also a black-controlled entity. There is not a tittle of evidence to support Manong's allegations of a conspiracy of any sort to exclude the company.

[49] The legal advice received by the COT and CCT on how to deal with the disposal of the land on which the CBD was to be developed, and the privatisation of the project without tender or other prescribed procedures being followed, does appear to be suspect from an administrative law point of view. However, it does not follow that there was a racist motive for the development proceeding as it did. Put differently, the charge of racism appears unfounded in relation to the manner in which the development proceeded. In order for the company to succeed in the court below that charge had to be proved.

[50] Without condoning the CCT's apparent failure to follow proper tender or other prescribed procedures for the disposal of the land on which the CBD was to be developed, the reality is that the development would probably never have seen the light of day had the measures referred to above not been employed. The principle of legality in relation to the establishment of the Trust and the company that it controlled and the manner in which the COT and the CCT were involved in the CBD project prior to the final agreement for its construction is not what the court below was constrained to adjudicate upon. It was called upon to decide whether a charge of racial discrimination was properly brought.

[51] We now turn our attention briefly to the Setsing project. In the first judgment of the court below dealing with practice directions and preliminary points, it held that FG's plea of misjoinder was well-founded. It accepted FG's assertion that it had no connection to the Setsing project and pointed out that the entities responsible for that project were Futuregrowth Asset Management (Pty) Ltd and Community Property Company (Pty) Ltd. Before us the company adopted the view that, since Van der Vent was a director of all three companies, the court below ought to have held that at material times he was representing FG. That submission is somewhat confusingly tied to a further contention on behalf of the company, namely, that the court below ought to have directed that the two companies responsible for the Setsing project be joined in the proceedings.

[52] A careful examination of the complaint and the evidence adduced by Manong reveal that his baseless perception was that Van der Vent had offered him an opportunity to be a consultant on the Setsing project in the Free State as a trade-off for ending his crusade in relation to the CBD project. The total value of the Setsing project was R12 m, two per cent of which would have accrued to the company as fees. According to Manong, this offer was made to the company when he confronted Van der Vent, after he had been informed by Magqwaka that the company was not going to be part of the CBD project team. After an acrimonious exchange of correspondence concerning the Setsing project, the relationship between Manong and Van der Vent broke

down and that put paid to any further involvement by the company in the Setsing project.

[53] In his testimony Van der Vent was adamant that the Setsing project was unconnected to the CBD venture. He was emphatic that he had offered the project to the company in line with his commitment to transformation and to making opportunities available to black consultants. He referred to his track record in this regard. Even Manong conceded that Van der Vent had an admirable transformation record, but stated that he had become disillusioned with Van der Vent after the company was excluded from the CBD project. Manong was unable to substantiate his allegations in relation to the Setsing project. They amounted to nothing more than (at best for him) unfounded supposition.

[54] As stated early in this judgment, the court below approached the evidence on the basis that it was for the CCT to prove that it had not discriminated against the company. The burden of proof in cases of discrimination brought in the Equality Court is dealt with in s 13 of the Act. The relevant part of s 13(1) provides:

'(1) If the complainant makes out a *prima facie* case of discrimination—

(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; . . .'

'Discrimination' is defined in s 1 of the Act as follows:

'[It] means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.'

The prohibited ground of unfair discrimination relied on by the company is race and as pointed out above it relied specifically on ss 7(c) and (e).

[55] In *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) para 23, the Constitutional Court, in dealing with the equality clause in the interim Constitution (s 8), said the following:

'The idea of differentiation (to employ a neutral descriptive term) seems to lie at the heart of equality jurisprudence in general and of the s 8 right or rights in particular.'

In *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) para 42 the following appears:

'Where s 8 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people.'

[56] Thus, to even begin to get off the ground the company must at the very least show that it was treated differently to other engineering consultants in relation to COT or CCT projects. The company had to show that in the totality of City projects, it received disproportionately fewer contracts so in relation to other consultants. Since the very premise of the company's case was race it had to establish a prima facie case that the differentiation was race-based.

[57] The litigation in the court below was preceded by litigation in the Cape High Court in terms of which the company sought an interdict against CCT and FG in terms of which they would be prohibited from continuing to construct the CBD in Khayelitsha pending the furnishing of information by them. Although that litigation was withdrawn with the company tendering costs it is clear that Manong considered it a worthwhile exercise. According to him he received 'crucial information' to assist him in lodging the complaint in the court below. It is clear from that statement by Manong and the manner in which the enquiry was conducted by him, including the paucity of substantiating evidence, that he and the company were on a fishing expedition, hoping somehow that the complaint would ultimately be proved. The following part of his evidence shows that the complaint was contrived:

'I just went in there with eyes closed, literally. But the papers that came from the interdict gave me more hope that I've got a case here, that's why I did not even continue to argue the case, I said okay, let us pay the costs and start a new fresh ─ a fresh case, based on the answering affidavit of the interdict. In fact, in the beginning of my founding papers I said based on the information that we received from the interdict papers, then we are doing this, instituting this litigation.

Okay, so let's just take it one step at a time then. On your own evidence you took a shot in the dark with the interdict application? --- Absolutely.'

[58] As stated earlier, the court below made no credibility findings. In our view, Barnard and Van der Vent were credible and reliable witnesses as were other material witnesses who testified on behalf of the respondents. Manong was an unsatisfactory witness. He clearly made up his case as he went along. He made scandalous allegations that he could not justify, he drew conclusions that were unwarranted and he was unable to provide any concrete evidence supporting the company's case. Insofar as Davids' evidence was in conflict with Barnard's, particularly in relation to the latter's concerns about the quality of the company's work on the first phase of Lookout Hill, Barnard's evidence is to be preferred. The detailed analysis of the evidence set out above shows that the company's case did not get out of the starting stalls.

[59] It is clear that at the end of the company's case on the merits in the court below, it had failed to establish a prima facie case, either in respect of its complaint of being discriminated against in general in relation to work in Khayelitsha, or in regard to its exclusion from the CBD project. Its case consisted mostly of self-serving and unsubstantiated statements by Manong. The evidence he had indicated that would be forthcoming in substantiation of his case did not materialise. For example, he had indicated that Magqwaka would testify that Barnard had excluded him from the second phase of the Lookout Hill project on the basis of race. According to Manong, Magqwaka had telephoned him and told him that Barnard had said that for as long as he (Barnard) was responsible for awarding work in Khayelitsha the company 'will never be appointed for any project full stop'. Magqwaka did not testify to that effect.

[60] Furthermore, in respect of its complaint that it was discriminated against in general by the CCT in respect of Khayelitsha, the company failed to bring into account all the projects that had been awarded to it across the metropole. Manong was dismissive, without justification, of the CCT's claims that projects in Khayelitsha were not considered in isolation and that the fair distribution of work to consultants was weighed citywide. In deciding that the

company suffered racial discrimination in respect of the allocation of work in Khayelitsha generally, the court below was clearly wrong.

[61] At the end of the company's case of general discrimination in respect of projects in Khayelitsha, the CCT unsuccessfully applied for absolution from the instance. It ought to have succeeded.

[62] In our view, the court below was correct in its conclusion on the company's exclusion from the CBD project. As demonstrated above the exigencies of a successfully funded development in Khayelitsha drove the turnkey arrangement. The main consultants appointed by WBHO in accordance with set Black Economic Empowerment targets were all black. It is preposterous to suggest, as Manong did, that the final agreement which gave WBHO the right to appoint consultants was a ploy to exclude him and was racially motivated.

[63] Section 7(c) of the Act provides that the impugned rule or practice, although appearing legitimate, must be 'aimed' at maintaining exclusive control by a particular race group. The targets set by the COT and the CCT were intended to have the opposite effect. They were not proved to have been applied in a manner calculated to maintain exclusive control by a particular race group. Section 7(e) of the Act prohibits the denial of access to opportunities to particular categories of persons. Under this section unfair discrimination may include the failure to take steps to reasonably accommodate the needs of particular categories of persons. The company's case, based on this section, was also not established.

[64] In our view the court below was undoubtedly correct in upholding the plea of misjoinder of FG in relation to the Setsing project. The court below made that decision after being informed that FG had no connection to the Setsing project. Counsel on behalf of FG disclosed the identities of the entities responsible for that project. It was contended before us that because the litigation occurred in the Equality Court there was a duty on the court below to have had those entities joined in the proceedings. We have difficulty in

understanding this proposition. First, Manong made no complaint of racist conduct on the part of those entities. Second, his misconception that the Setsing project was a trade-off, which was central to his complaint ─ such as it is ─ against FG, can hardly hold sway against these other entities. Third, Manong is no ordinary lay litigant. He is correctly described by counsel for the respondents as a serial litigant.[6] He has been quick to resort to litigation when the company has a grievance against any person or entity. When he was informed of the identities of the entities connected to the Setsing project, he had to choose whether he could make a sustainable case against them in the Equality Court. It does not behove the company to lay the blame at the door of the court below for not joining them. Fourth, the relevant evidence in relation to Setsing shows that it has no bearing on his complaint of racism. This means that the joinder he contends should have occurred would have been pointless.

[65] Before turning our attention finally to the question of costs, we briefly address related issues of concern. As this court observed in *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, & others* (No 2) 2009 (6) SA 589 (SCA) paras 53 and 57, the Equality Court was established in order to provide easy access to justice 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.[7]

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[6] In *Manong & Associates v Minister of Public Works* 2010 (2) SA 167 (SCA) this court dismissed an appeal against a judgment of the Equality Court (TPD) in terms of which an application by the company for an interim interdict preventing the Director-General and the Minister of Public Works from implementing a Professional Services Supplier Register was rejected. The company had submitted in the Equality Court that the abandonment by the Department of Public Works of a roster in favour of the register referred to above would prejudice particularly African professional consultants. The Department justified the departure on the basis that its policy to promote transformation had to be in line with the Public Finance Management Act 1 of 1999 and the Preferential Procurement Policy Framework Act 5 of 2000. The Department sought by way of the register to expand the categories of formerly disadvantaged persons who would benefit from its transformation policy. In dismissing the appeal this court stated (at para 1) that the application in the Equality Court was 'somewhat ambitious'.
In the two other judgments of this court involving the company referred to elsewhere in this judgment the company succeeded on procedural aspects and the matter was referred back to the Equality Court for adjudication. In one of the judgments, this court commented unfavourably on the extent of the record filed on behalf of the company.

[7] In that case the company's complaint was that it was unsuccessful in a tender process on the basis of experience requirements which Manong contended discriminated against black

[66] Section 20(2) of the Act provides that a person wishing to institute proceedings in terms of or under the Act must, in the prescribed manner, notify the clerk of the Equality Court of their intention to do so. Regulation 6 of the Regulations governing proceedings in the Equality Court provides for a prescribed form to be completed in which the complaint is to be formulated. It is clear that a succinct statement of complaint is required. In response, the person or entity against whom or which the complaint is lodged similarly has to complete a prescribed form in which information in limited form is required. It also requires any documentation on which reliance is to be placed to be attached. This is clearly intended to focus the minds of the parties and the court leading to expedition.

[67] As stated earlier, Manong, instead of using the prescribed form, resorted to a rambling 30 page exposition. If his annexures are included his complaint took up a total of almost 100 pages. It is therefore unsurprising that the enquiry in the court below extended over more than three years.

[68] Included in the documentation presented to the court below was documentation relating to alleged racism in the judiciary and the church. Allegations implicating the media and copies of court judgments were included. Before the hearing of this appeal, this court directed the parties to consider more carefully which parts of the record it was necessary to read. A note by the respondents indicated that approximately 750 pages of record that had been filed were unnecessary to read. These parts of the record were filed despite an agreement between the parties that they were unnecessary. Before us counsel representing the company apologised for this and disavowed any involvement in how this had occurred. By the time the record was filed the company was represented by attorneys. In *Manong &*

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engineers who historically did not have an opportunity to develop experience. In the absence of directions by the court below, the enquiry did not sufficiently explore whether a scoring and roster system provided sufficient opportunity for developing the required experience. In that case this court referred the matter back to the Equality Court for further exploration. This court was sympathetic to the company in that case on the basis that Manong who drove the litigation was a lay litigant and on the information before it took the view that the Equality Court ought to have been of greater assistance.

Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape & another (No 1) 2009 (6) SA 574 (SCA) para 44, this court commented unfavourably on the unnecessary parts of the record filed by the company in that case. It is unacceptable that the same litigant conducts litigation in this court repeatedly in this unsatisfactory manner.

[69] If litigation is to be conducted in the Equality Court on this basis rather than in the intended manner, the envisaged expedition and easy access to justice will be undone. A factor that may require legislative attention is whether entities that are financially able to litigate on a grand scale should be able to use the machinery of the Equality Court to clog up a system intended to benefit particularly lay litigants and the public at large.

[70] Of course, government must be held to account and where the principle of legality or other fundamental constitutional principles have been breached by the State, appropriate relief should be afforded to a complainant. However, it does not follow that procedures intended to benefit lay litigants and to have legitimate complaints speedily adjudicated should be allowed to be abused to the extent that government is unnecessarily tied up in extended litigation.

[71] During his testimony in the court below and whilst he was conducting the company's case, Manong made a number of outrageous and irrelevant statements deserving of censure. At one stage, whilst being cross-examined by counsel for FG, Manong testified that black Africans will not deal with other Africans 'unless they get kickbacks'. He went on to say 'they'll prefer Whites'. He stated that that was a reason he had 'cases' in the Eastern Cape.

[72] At one stage in his cross-examination of Barnard, Manong stated that in all the problems he encountered concerning procurement, the common denominator was Afrikaans speakers. When Barnard testified about interacting with certain individuals and offered up names including those against whom no charge of racism was levelled by Manong, the latter asked whether that person was an Afrikaner, suggesting collusion in the racist

conspiracy. This, not surprisingly, resulted in an objection by counsel for the CCT that Manong was resorting to racial stereotypes.

[73] Manong was not short on threats either. When he was cross-examined by counsel for FG and was reminded that the company had received work from the COT on Lookout Hill and was asked to confirm that fact, Manong's response was:

'Don't involve yourself, otherwise I will join you and ask damages. . . '

[74] Manong accused Van der Vent of deliberately defacing an FG letterhead in a telefacsimile in which Van der Vent informed him that his services were no longer required on the Setsing project. Manong surmised that this was calculated to prevent the company from ascertaining Futuregrowth Asset Management (Pty) Ltd's particulars and designed to enable FG to raise the plea of non-joinder. Manong labelled the 'deliberate' distortion a criminal offence in terms of the Companies Act. This accusation is ridiculous. That company appears to be well-known and is registered in accordance with company legislation. Van der Vent testified that the distortion that obfuscates the names of directors at the bottom of the letterhead was probably due to a problem encountered in the transmission of the telefacsimile. Since it had no such distortions on the dispatching end it might even be due to problems at the receiving end. This unwarranted allegation of criminal conduct against Van der Vent is not atypical.

[75] At one stage of his evidence, Manong, consistent with his stance of making up his case as he went along and in line with being a conspiracy theorist, said, without any prior warning, that he had information from State agencies, including the office of the Presidency, the National Intelligence Agency and the Scorpions, a police investigative unit, that the company was being specifically targeted by government officials, including those within the CCT and the Western Cape Provincial Government. When counsel for the CCT asked about the basis for this general conspiracy, Manong's response was that it was based on correspondence that he had written to these

agencies. Questioned further he stated that he had reports from the National Intelligence Agency. The following is a part of his evidence in this regard:

'These reports, we got them from the National Intelligence Agency. Somebody from the National Intelligence Agency said: "Look, be careful. Your company is specifically targeted by these individuals and State organisations." '

[76] On top of all of this is a bizarre moment when Manong, interrupting his cross-examination of Barnard, asked for a minute to pay tribute to Dr Piet Koornhof, a former Minister in the apartheid government. He had just heard of Dr Koornhof's death. The following are extracts from the record on this aspect:

'[L]ast night I heard the sad news that Dr Piet Koornhof passed away I want just for one minute to pay tribute to him how it also affected my life, just one minute I won't take much of the Court's time. In 1971 Dr Piet Koornhof was the Minister of Bantu Affairs and Development. Now his Department was in charge of forced removals and so on, now why I am mentioning this because at that stage in fact Africans were staying in the Karoo because I'm from Victoria West, they started with Beaufort West and Middelburg in the Cape, they moved them to Thembaza. Now the Daily Despatch that was under the editorship of Donald Woods at that time . . .'

At that stage the court below questioned the relevance of these statements. Unflustered, Manong went on to say the following:

'No it's not relevant but about him, the good part of him, only to say the good heart of Dr Koornhof in that process but if the Court feels I'm going to clutter the record . . .'

The court then put it to Manong that he was saying that Dr Koornhof was a good man to which he replied:

'Yes because when he was sent there to Thembaza and saw the situation he literally cried and said this policy is inhuman.

. . .

After a week when he went to Pretoria he was removed from the position. I am just saying that was the type of person he was, although he was serving that Government but he had the human heart in him.'

[77] These statements and this kind of conduct should not be tolerated in any court, least of all the Equality Court. Even accepting that the Act envisages a less formal manner of conducting enquiries, this manner of leading evidence and conducting a case is beyond the pale.

[78] It is not lost on us that Manong himself was not averse to being expedient. As pointed out above, whilst ostensibly championing fair and transparent procurement procedures, Manong nevertheless sought to assert a dubious claim by the company to preferential treatment in terms of the framework agreement relating to the CBD project. The same applies to Manong's assertion that he was awarded the Elsies River depot project by virtue of the 'intervention' of a black COT councillor. In the same vein he saw nothing wrong with engaging a key employee of the COT fraudulently to misrepresent that he had done work on risk on the first phase of Lookout Hill in order to facilitate an appointment to that project. Despite his assertion that he was championing social justice he was dismissive of socially meritorious projects such as Mew Way because the financial rewards were small. Whilst asserting emphatically that the company is the only wholly-African owned engineering practice in the Western Cape, Manong conveniently chose to ignore or downplay the prominent role in the company played by Davids, a coloured person. It is common cause that on one of the biggest projects that the company undertook, namely, the Stanhope Bridge Project in Claremont, Davids was the principal actor on behalf of the company. From Davids' own evidence he was so busy seeing to the company's affairs that it took him several more years than usual to obtain his professional accreditation. This is yet another example of double standards by Manong.

[79] Manong, having had the experience of that case and the others listed earlier in this judgment, continues unabatedly to litigate in shotgun fashion. He can no longer elicit any sympathy or goodwill on the basis of being a lay litigant.

[80] Our comments in respect of the merits in this case are not intended to minimise the problems facing government in the Western Cape. Deeply embedded prejudice is difficult to overcome. It is clear that black Africans suffered severe prejudice in the Western Cape in the past. Much effort, time and resources are required to overcome that disadvantage. We express the hope that all role players will do their utmost to undo the ravages of the past

and that everyone concerned will understand that it is in the national interest to be inclusive.

[81] It is now necessary to deal with costs. Section 21(2)*(o)* of the Act provides:

'After holding an inquiry, the court may make an appropriate order in the circumstances, including an appropriate order of costs against any party to the proceedings.'

Thus, it is clear that in respect of costs an equality court exercises its discretion in the light of all the circumstances.

[82] It was submitted on behalf of the company that an order by this court reversing the costs order by Moosa J in respect of both appeals would have a chilling effect on future complaints that could legitimately be brought in the Equality Court. It was submitted that particularly where constitutional rights were being asserted a court should be slow to order a litigant to pay costs.

[83] In *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC), the Constitutional Court said the following (para 16):

'Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or, as in the case of many NGO's, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.'

[84] At para 22 of *Biowatch* the Constitutional Court referred to its earlier judgment in *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) which established the principle that ordinarily, if the State loses, it should pay the costs of the other side and if the government wins, each party should bear its own costs.

[85] At para 23 of *Biowatch* the court stated:

'If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs

consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door.'

[86] However, in the paragraph that follows the Constitutional Court qualified that statement and said the following:

'If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it.' (Footnotes omitted.)

[87] In *Biowatch*, the Constitutional Court warned that the mere labelling of litigation as constitutional and the dragging in of specious references to sections of the Constitution would of course not be enough, in itself, to invoke the general principle that ordinarily, if government wins in a constitutional case, each party should bear its own costs. It stated that the issues must be genuine and substantive and truly raise constitutional considerations relevant to the adjudication.[8]

[88] In *Affordable Medicines* the Constitutional Court said the following at para 138:

'There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.'

[89] In *Weare v Ndebele NO* 2009 (1) SA 600 (CC) para 78, the Constitutional Court stated the following:

'The ordinary rule in the court is that where litigants unsuccessfully raise important constitutional issues against the State, costs will not be awarded against them. There is an exception to this rule; this is when the litigation is pursued for private commercial gain.' (Footnote omitted.)

[8]See para 25.

There appears to be a tension between that conclusion and what is set out in the first sentence of the dictum referred to in para 83 above. In *Weare*, notwithstanding the exception referred to in the dictum set out above, the Constitutional Court did not order costs against the losing litigant, a business-man who had embarked on a commercial venture and where, no doubt, the litigation was pursued for commercial gain. In *Weare*, the Premier of KwaZulu-Natal had no objection to each party paying its own costs.

[90] Moosa J, in making the costs order in the court below, considered the general principle referred to in the judgments of the Constitutional Court, cited in the preceding paragraphs. The learned judge stated that the principle could only be departed from in 'exceptional circumstances'. He took into account in the company's favour that it had done some work on the CBD project on risk and thought that it had a legitimate expectation to be appointed. Against that, he reasoned that because of matters beyond the control of the CCT, the company had lost out on that opportunity. In conclusion the court below said the following:

'In the light of these circumstances, the court is of the opinion that equity and fairness demand that the court applies the spirit and ethos of the Equality legislation by making no order as to costs.'

[91] In the case dealing with practice directives and preliminary points where FG's plea of misjoinder was upheld, the question of costs was held over for 'later determination'. As we have said, it appears that the order referred to at the end of the preceding paragraph encompassed those costs. We shall assume in the company's favour that it did. If it did not, this court is entitled to make an appropriate costs order itself.

[92] The discretion exercised by a court in making a costs order is not a 'broad' discretion or a 'discretion in the wide sense' or a 'discretion loosely so called', where a court of appeal is at liberty to substitute its decision for the decision of the court below simply because it considers its conclusion more appropriate. The discretion in relation to costs is a discretion in the strict or narrow sense, which is also described as a 'strong' or a 'true' discretion. In

such a case, the power to interfere is limited to cases in which it is found that the court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons. See *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) para 14.

[93] In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11, the Constitutional Court, in dealing with a similar kind of discretion in relation to a postponement, said the following about the powers of a court of appeal:

'[I]t may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.' (Footnote omitted.)

[94] In the present case the court below did not, as stated above, conduct an exhaustive analysis of the evidence. It did not take into account, as it was obliged to, that the complaint was contrived and that Manong representing the company made up its case as he went along. The court below did not consider the reprehensible manner in which the litigation was conducted. Despite the pretention that the complaint in the court below was constitutionally founded, it was in fact purely mercenary. The sympathy of the court below expressed in respect of the CBD project is in our view misplaced. It is thus clear that the court misdirected itself in this regard. Notwithstanding that the court found in the company's favour in respect of the complaint of general discrimination in respect of the allocation of work in Khayelitsha, the court below did not follow the general rule that the State should pay the winning litigant's costs. It is clear that the court misdirected itself in all the respects listed above and that this court is entitled to interfere with the order it made in respect of costs. In our view, it would indeed be appropriate to set aside the costs order made by the court below and to hold the company liable for the respondents' costs, including the costs of two counsel. The same result should ensue in respect of the costs in this court.

[95] We now address the costs of the postponement occasioned by the ill-health of the company's senior counsel hours before the scheduled hearing of the appeal on 20 August 2010. The heads of argument had been drawn by junior counsel. It is necessary to record that on that day junior counsel representing the company informed the court that the company insisted that it be represented by the senior counsel it had retained and his instructions were that he should not present the company's case on his own. In *Cape Law Society v Feldman* 1979 (1) SA 930 (E), the respondent was confined to hospital and too ill to attend the hearing necessitating a postponement. In that case, there was a dispute concerning liability for the wasted costs. The court, in dealing with the contention that the award of costs should depend on the outcome of the case on the merits, stated the following (at 934A-C):

'Because of the enforced absence of the respondent this case has had to be postponed *sine die*. To that substantial extent the respondent's rights have been safeguarded and to that extent he has benefited but to that same extent the applicant has been prejudiced. It would be manifestly inequitable to prejudice the applicant further by placing it in a potentially vulnerable position of having to pay the costs of postponement if it should lose the main case.'

[96] That approach should be followed. The present is an *a fortiori* case, because a postponement of the appeal was not inevitable. The company sought an indulgence, which was granted. Its rights were thereby safeguarded. In light of the view we take in regard to costs generally in this matter, as set out above, the company should also pay the costs occasioned by the postponement.

[97] The following order is made:

1. The appellant's appeals in respect of its exclusion from the CBD project and the upholding by the court below of the second respondent's plea of misjoinder in relation to the Setsing project are dismissed with costs, including the costs of two counsel.

2. The cross-appeal by the first respondent in respect of the broader Khayelitsha enquiry is upheld with costs, including the costs of two counsel.

3. The cross-appeals by the first and second respondents, in relation to the costs order in both cases, are upheld with costs, including the costs of two counsel.

4. The finding of the court below set out in para 36 and the costs order contained in para 64 of the judgment dated 12 November 2008 are set aside and substituted as follows:

'1. The applicant's complaint that it was discriminated against in general by the first respondent and its predecessor in the allocation of contracts in Khayelitsha is dismissed with costs, including the costs of two counsel and such costs are to include the costs reserved on 18 August 2007.

2. The applicant is ordered to pay the first and second respondents' costs in relation to the complaint concerning its exclusion from the CBD project, including the costs of two counsel and such costs are to include the costs reserved on 18 August 2007, which also encompass the second respondent's costs in relation to the Setsing project.'

5. The appellant is ordered to pay the respondents' wasted costs occasioned by the postponement of the appeal on 20 August 2010.

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M S NAVSA
JUDGE OF APPEAL

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N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

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