REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PRO9VINCIAL DIVISION)

REPORTABLE

EQUALITY COURT CASE No: 12478/08

In the matter between:

MANONG & ASSOCIATES (PTY) LTD	**Complainant**
and	
CITY MANAGER, CITY OF CAPE TOWN	**First Respondent**
FUTUREGROWTH PROPERTY DEVELOPMENT COMPANY (PTY) LTD	**Second Respondent**

SECOND LEG OF THE ENQUIRY
JUDGMENT DELIVERED : 12 NOVEMBER 2008

On behalf of Complainant	***:***	***In Person***
Attorney(s)	***:***	
On behalf of First Respondent	***:***	***Adv I Jamie SC et Adv R Paschke***
Attorney(s)	***:***	***Webber Wentzel***
On behalf of Second Respondent	***:***	***Adv N Arendse SC et Adv M Janisch***
Attorney(s)	***:***	***Cliffe Decker Hofmeyr***

Heard on : 2007: November: 5, 6, 7, 8, 9, 12, 13, 14, 22
2008: March: 10, 11, 12, 14, 17
July: 28, 29, 30, 31
Aug: 6, 7, 8
CAV on 8 August 2008

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

EQUALITY COURT CASE No: 9934/2005

In the matter between:

MANONG & ASSOCIATES (PTY) LTD	**Complainant**
and	
CITY MANAGER, CITY OF CAPE TOWN	**First Respondent**
FUTUREGROWTH PROPERTY DEVELOPMENT COMPANY (PTY) LTD	**Second Respondent**

SECOND LEG OF THE ENQUIRY
JUDGMENT DELIVERED : 12 NOVEMBER 2008

MOOSA, J:

Introduction

[1]This is the second leg of the enquiry. The court delivered judgment in respect of the first leg of the enquiry which related to the determination of certain preliminary issues of law. The judgment was reported as **Manong & Associates (Pty) Ltd v City of Cape**

Town and Others [2007] 4 All SA 1452 (C). Pursuant to the court's findings, the court issued two further directions with regard to the issues to be adjudicated upon in this leg of the enquiry. They are:

(i) Whether complainant has unfairly been discriminated against by respondents on the basis of race in not being allocated the civil engineering contract for the KBD (Twenty Fifth Direction);

(ii) Whether first and third respondents unfairly discriminated against complainant on the basis of race in the allocation of any other civil engineering contracts for the area of Khayelitsha as a whole (Twenty Sixth Direction)

The nature of the complaints

The complaints are set out in paragraph 7 of complainant's founding affidavit as follows:

> *"…to review the policy of first and second respondents in appointing civil engineering consultants to do work in Khayelitsha in general and for the proposed KBD in particular which policy or practice is construed as deliberately and unfairly limiting access to the contractual opportunities for the provision of professional services to the complainant."*

The specific prohibited grounds of unfair discrimination that complainant relies on is its exclusion under respondents' practice that appears to be legitimate, but which is aimed at maintaining exclusive control by a particular race group. The effect whereof is to deny complainant access to contractual opportunities for rendering professional services at a fee or to mask respondents' failure to take steps to reasonably accommodate complainant in accessing such opportunities.

Response to the complaints

[2]First respondent denied that complainant made out a case against it in that complainant has been excluded from procurement opportunities in Khayeltisha on the grounds of race. First respondent states that it did not appoint consultants for the KBD project but, in any case, complainant is not seeking any relief against first respondent arising from the proposed KBD project.

[3]Second respondent averred that complainant had failed to set out a factual basis that it has been guilty of the act of discrimination against complainant on the basis of race. Similarly, the averment that the appointment of Axis Consulting ("Axis") was *"aimed at maintaining exclusive control by a particular group"* is without any factual foundation. There is no causal link between the appointment of Axis and second respondent as the contractor, WHBO, appointed Axis to the KBD project.

[4]Third respondent, which is wholly owned by the Khayelitsha Community Trust ("KCT"), has not opposed the proceedings and is not legally represented in these proceedings. In any case, complainant is not seeking any relief against third respondent. The court has already found that third respondent is a municipal entity and as such an organ of state.

The parties

[5]It is common cause that, prior to the democratic elections of 27 April 1994, Khayelitsha was controlled and administered by Lingelethu West Transitional Council ("Lingelethu"). After such elections, Lingelethu was incorporated into the City of Tygerberg ("CoT") and Khayelitsha was controlled and administered by such municipal

authority. Following the local government elections of 2000, CoT was incorporated into the Unicity of Cape Town and became part of the structure of first respondent. Since then Khayelitsha was controlled and administered by first respondent.

[6]The civil engineering practice of complainant was founded by Stanley Manong in 1995 under the name and style of Manong & Associates. It initially operated from Cape Town and concentrated on developmental projects particularly in the black townships. With the passage of time, it became involved in more challenging projects in the broader Cape Town area. As the demand for its professional services extended to other centres of the country, it expanded its presence to such areas. It presently has offices in most of the major centres of the country. The practice at the same time expanded exponentially from a one person practice to a partnership and then to a close corporation and finally to a private company. With the passage of time, the professional component of the staff also increased exponentially as the demand for its services increased. It presently has a professional staff complement comprising four full time directors who are qualified engineers, five professionals heading the five offices in the various centres, three professional associates and eleven professional technical staff. The firm boasts of appointments as consulting civil, structural and developmental engineers in large projects by the public, private and para-statal sectors.

[7]Second respondent is described as a property development and management company which specialises, *inter alia*, in managing retail development projects. Second respondent was drawn into the KBD project by Rand Merchant Bank ("RMB") which was appointed by first respondent to source and secure necessary private sector funding for the project. Third respondent appointed second respondent as the developer of the project on a turn-key *"design, develop and deliver"* basis.

[8]Third respondent is the wholly owned company of the Khayelitsha Community Trust ("KCT") which was formed by first respondent for the benefit of the community of Khayelitsha. The court found that, like KCT, third respondent is a municipal entity and as such an organ of state as defined in the Municipal Systems Amendment Act of 2004. KCT assigned the leasehold and development rights of the KBD site to third respondent.

The Rule of Law

[9]The foundational values of our democracy are underpinned by human dignity, the achievement of equality and the advancement of human rights and freedoms within the context of the rule of law. Section 9 of our present Constitution in broad outline sets out the various components making up the right of equality. They include the nature of the right, the positive measures to achieve such right and the prevention and prohibition of unfair discrimination. The section provided for National legislation to be enacted within three years of the coming into effect of the new Constitution, to promote equality and to prevent and prohibit unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000 ("PEPUDA") was enacted in pursuance to such Constitutional injunction. The equality jurisprudence developed by the constitutional court up to that stage influenced the drafting of PEPUDA. Such jurisprudence, the equality provisions of the Constitution and the provisions of PEPUDA are not mutually exclusive. They in fact complement each other. In my view the enquiry postulated by the 25th and 26th Directions falls to be determined under PEPUDA, but in consonance with S 9 of the Constitution, as the facts with regard to the two enquiries straddle the periods both pre and post the coming into operation of PEPUDA. I will return to this issue later.

[10]Section 217 of the Constitution provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective and nothing prevents such organ of state from implementing a procurement policy providing for the protection or advancement of person or categories of persons, disadvantaged by unfair discrimination.

[11]The Constitutional Court identified dignity as a core value and purpose of the right to equality and in **President of the RSA and Another v Hugo** 1997 (4) SA 1 (CC) at Para 41, **Goldstone J** said the following:

> *…At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be afforded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked."*

Burden of proof

[12]In terms of S 9 of the Constitution the onus is on the complainant to establish discrimination on the basis of race. Once the complainant has discharged such onus, S 9(5) creates a rebuttable presumption of unfair discrimination. In such event the burden of proof shifts to the respondents who must show, on a balance of probabilities, that the discrimination is fair. In terms of S 13 of PEPUDA all complainant is required to do in order to discharge its onus, is to make out a *prima facie* case of discrimination

based on race. In that event the burden of proof shifts to the respondents who must show either that discrimination did not take place or that the impugned conduct is not based on race. If respondents succeed, the matter ends there. If respondents fail, the rebuttable presumption of unfair discrimination kicks in. In that event, respondents must prove that the discrimination is fair. The overall onus, as we know it, at all times, rests with the complainant who must prove on a balance of probabilities that he has been discriminated against by the respondents. The rebuttable presumption which is an evidential burden assists complainant to cross the hurdle from *prima facie* proof to proof on a balance of probabilities. (See:**Tregea v Godart** 1939 AD 16 at 28; **Pillay v Krishna 1946 AD 946 at 952**; and a comprehensive discussion on the question of onus in the persuasive minority judgment of **Grosskopf JA in the case During NO v Boesak and Another 1990 (3) SA 661 at 666 et al)** .

Retrospectivity of the Equality Act and issue of prescription

[13]During the course of the hearing counsel for first respondent brought the attention of the court to a recent authority dealing with the retrospectivity of the Equality Act. In **Maharaj v National Horseracing Authority of Southern Africa** 2008 (4) SA 59 (N), the court held that the Equality Act was not retrospective in effect as there was no indication in the Equality Act that the legislature intended the provisions of the Act to operate retrospectively. This issue was not raised in the papers. However, there might be strong argument to be made out for a case of retrospectivity of the Equality Act. Firstly, the right to equality and the obligation to prevent and prohibit unfair discrimination are Constitutional imperatives; secondly, the Constitution enjoins the legislature to enact legislation to promote equality and to prevent and prohibit unfair discrimination within three years from the coming into operation of the final Constitution;

thirdly, the Equality legislation was designed to give flesh to the Constitutional right and obligation pertaining to equality and lastly, the Equality Act is essentially procedural in nature.

[14]Adv **Jamie** submitted that the decision was persuasive as it has been handed down by a bench comprising two judges and we should accordingly follow such authority. The doctrine of *stare decisis* obliges a court of lower jurisdiction to follow the decision of a higher court. It is, however, not obliged to follow the decision of a court of equal standing. A decision of a fuller court in the same division is binding on a lesser court of the same division. However, the decision of a fuller court of another division is not binding, but is persuasive. (See: **Lawsa**: Second Edition, Volume 5 part 2 at para 163). We will accept the correctness of the *ratio decidendi* of the **Maharaj** case *(supra)* for reasons that follow: Firstly, the issue of retrospectivity was not fully ventilated before us; secondly**,** the **Maharaj** case was an appeal from a lower court and was heard by a bench comprising two judges; thirdly, in our law, there is a presumption against retrospectivity; and fourthly, we cannot say with any degree of certainty that the decision is wrong.

[15]The relevant section of the Equality Act came into operation on 16 June 2003. Complainant instituted proceedings in this matter in March 2005. We will accordingly adjudicate on cause of action pertaining to conduct, events, practices and policies that arose after 16 June 2003. Although the issue of prescription was likewise not raised in the papers, Adv **Jamie**, on behalf of first respondent, *ex abundante cautela*, invoked the defence of prescription in respect of all events that occurred before March 2002, should the court hold that the Equality Act had retrospective effect. Adv **Jamie**

conceded that the court is entitled to have regard to facts and circumstances prior to 16 June 2003, provided they do not in themselves constitute the cause of action.

The Broader Enquiry

Introduction

[16]The court decided to hear evidence in respect of the enquiry arising from the Twenty-sixth direction ("the broader enquiry"). As such enquiry affected first and third respondents only and second respondent had no interest in the outcome thereof, the parties agreed and it was so directed (Twenty-Seventh Direction), that the presence of second respondent and its legal representatives be excused from such enquiry. This was done to save costs. The broader enquiry did not involve third respondent. For the purpose of the broader enquiry, complainant tendered the oral evidence of Stanley Manong ("Manong"), Lyndon Davids ("Davids") and Dr Mlamli Magqwaka ("Magqwaka") while first respondent tendered the evidence of Hendrik Barnard ("Barnard").

[17]The complainant, in its further particulars, amplified its cause of action against first respondent in respect of the broader enquiry as follows:

> *"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 it as witnessed by the behaviour of Barnard in the Lookout Hill project;*
>
> *40.2 …*
>
> *40.3. The policy of 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;*

40.4 …

40.5. The prohibited grounds of unfair discrimination on which the Complainant relies are sections 7(c) and 7(e) of the Act. The rules and practices are contained in HCB1…"

The first respondent's policy contained in HCB1 is the Preferential Procurement Policy Initiative which came into operation in September 2003.

The facts

[18]According to Manong, complainant, in or about 1998, started to actively market itself and its professional services, both in writing and orally, to Lingelethu and CoT which controlled and administered the area of Khayelitsha. However, it found resistance to its appointment from certain officials. Through the intervention of certain politicians and officials, complainant received two appointments in Khayelitsha. The one was a joint appointment with Wouter Engelbrecht for the planning of a sport facility in which the fees were limited to R50 000 and which had to be shared between the joint appointees. This work fell essentially within the expertise and scope of townplanners and not civil engineers. The other was a joint appointment with Eamon O'Rourke Landscape Architects ("O'Rourke") for the first phase of the Lookout Hill which was made in February 2000. In February 2002, appointments were made in respect of Phase 2 of the Lookout Hill project, but the complainant was not re-appointed.

[19]Manong testified that both the Khayelitsha projects were not profitable and were financially disempowering. He maintained that complainant was set up for failure which was racially motivated. Besides the financial aspects, the project which impacted negatively on complainant was the first phase of the Lookout Hill project. Because there was no formal letter of appointment from CoT clearly delineating the functions

and responsibilities of the professionals, there was some confusion as to who was the principal agent. According to Barnard, they were equal consultants and there was no principal and sub-consultant relationship. However, it appears that complainant claimed for "oversight" fees in that his fees were calculated on the total value of work done on the project including work designed by O'Rourke.

[20]According to the Minutes of the site meetings which were discovered, certain issues were raised, as is customary, at the site meetings but they were never in the form of formal complaints. The Minutes indicate that, depending on the nature of the issues, the matter was passed on to either complainant, O'Rourke or to the Contractor for further attention. The Minutes also indicate that a special meeting was held on 13 December 2000 to discuss outstanding issues. The meeting was attended by Barnard and Mr Buhr representing CoT, Mr D van Nieuwenhuizen representing O'Rourke and Davids representing complainant. Certain issues were of a structural nature and were passed on to the complainant to sort out and others were of an environmental nature and passed on to O'Rourke to sort out.

[21]Complainant was not appointed to the second phase of the Lookout Hill projects despite the fact that Magqwaka & Associates, as the principal agent, recommended complainant. This project went out on a proposal call and various disciplines grouped together and submitted their proposals to obtain the work. Magqwaka headed one of the groups. Magqwaka testified that he dropped complainant because of the objection raised by Anton Groenewald ("Groenewald") and Barnard. The reason for the objection given, was because of underperformance in phase one of the project. Magqwaka was somewhat ambivalent why complainant was not appointed to the second phase of the Lookout Hill project. Both Manong and Davids testified that at no stage was such

underperformance ever communicated to complainant. According to the objective evidence, the question of underperformance, if any, was satisfactorily resolved at a meeting called by complainant with Barnard and held on 11 February 2002.

[22]First respondent 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 thrust of first respondent's case was that the discrimination did not take place. Barnard was somewhat ambivalent about the objection to the appointment of complainant to the second phase of the Lookout Hill project. He confirmed that his reservation with complainant in respect of the first phase of the project was of a technical nature and he had no difficulty with complainant's appointment for the second phase of the project.

[23]It is common cause that complainant was not re-appointed to the second phase of the project nor for any other projects in Khayelitsha. There was a duty on first respondent to have undertaken a formal performance evaluation of complainant on completion of the first phase of the project. This may have resulted in the implementation of remedial measures, if any, to ensure better performance on the part of complainant in the second phase of the Lookout Hill project if it was appointed. In any case Barnard indicated that he had no problem with its re-appointment. It was a policy of first respondent to re-appoint consultants who had been appointed to earlier phases of projects. Barnard could give no reason why complainant was not re-appointed for the second phase of the Lookout Hill project.

[24]The failure of first respondent to do a formal performance evaluation of phase one, negatively impacted on complainant and prejudiced it from being appointed to the

second phase of the Lookout Hill projects and to any other subsequent civil engineering contracts in Khayelitsha. From the objective facts the only reasonable inference we can draw is that complainant was excluded from the second phase of the Lookout Hill project on the basis of race and such exclusion continued on subsequent appointments.

Evaluation

[25]With that background, we turn to discuss the measures introduced by CoT to affirm the appointment of black professional firms. First respondent admitted in its papers that black individuals and entities have historically been discriminated against on the basis of race more particularly in the Western Cape. But since 1994, there have been clear and concerted strategies put in place to halt and reverse such discrimination. Barnard testified that prior to September 2003 and while Khayelitsha was part of CoT, it implemented an affirmative action policy in terms of which 30% of the value of the projects were reserved for persons who, or entities that were historically disadvantaged. He testified that entities with 1% black ownership qualified for such status. This threshold in respect of entities diluted corrective and restorative measures designed to protect and advance persons and categories of persons disadvantaged by unfair discrimination and cannot, by any stretch of one's imagination, amount to a genuine attempt on the part CoT to have affirmed black professional firms.

[26]Professional firms previously advantaged could have obtained disadvantaged status and benefited from such measure or practice by getting on board black professionals with 1% interest. Such move would have defeated the very object of these measures and undermined genuine attempts to promote the achievement of equality. In our view, such policy and practice while it appears to be legitimate, is

actually aimed at maintaining exclusive control by members of the white group.

[27]Barnard in his evidence alluded to the fact that for certain periods the target of 30% was not achieved. Surely there would have been sufficient takers in the black professional fraternity to meet the target if a concerted effort was made to bring such opportunities to their attention. We know for a fact that complainant was *"begging"* for civil and structural engineering opportunities and was not considered for such projects.

[28]Barnard testified that the new Procurement Policy Initiative ("PPI") came into operation in September 2003. The application of such policy was dependent on the Tradeworld Database which had to provide information as to the value of work obtained by any particular consultant during a pre-determined period. At the time the database was defective and was unable to generate information concerning the value of contracts awarded to consultants and could not provide the shortlist of candidates that had to be scored. The particular information was accordingly based on the official's own assessment of which consultants should be short listed for the purpose of the scoring exercise and the information was obtained from the parties short listed. This entailed a degree of subjectivity. It is common cause that complainant was not short listed for such appointments. We are satisfied that there was resistance from certain white officials of first respondent to appoint complainant for projects in Khayelitsha. In our view the question of underperformance was a red herring. The only reasonable inference the court can draw is that complainant was excluded because of race.

[29]Barnard testified further that he and his colleague, Tertius De Jager ("De Jager") who was responsible for recommending civil and structural engineers to a council committee, altogether recommended 25 such appointments since 2000. Of these, half

of them were reappointments and the rest were new appointments. Complainant was not one of the 25. The re-appointments were justified on the basis that the consultants worked previously on the project or had special expertise and skills. Barnard stated that such re-appointment of consultants is specifically catered for in first respondent's procurement policy. In terms of such policy, special circumstances could warrant deviation from the selection process. This, however, does not detract from the constitutional obligation of first respondent to empower and affirm consultants which have been disadvantaged in the past because of race. Barnard conceded that nothing prevented them from making joint appointments but such possibility to affirm previously disadvantaged consultants was not given consideration.

[30]Historically, all major civil and structural engineering contracts were awarded to white firms. It effectively meant that, in terms of this policy, any subsequent work to be performed on those sites had to be awarded to the same firm. This flies in the face of the Constitutional measures *"to protect or advance persons or categories of persons disadvantaged by unfair discrimination"*. Generally, it makes good sense to make re-appointments, but where it exclusively benefits those firms which have been advantaged historically, such re-appointments would, in my view, not be legitimate. It could, however, be legitimate if such re-appointments were paired with black firms, in terms of which, the expertise of the white firms, especially those with specialized skills, were transferred to such black firms to ensure that the playing field becomes level with the passage of time. Such strategy would not only have been beneficial to the client, but would also have benefited the white firms and at the same time have affirmed the black firms. We therefore conclude that such policy, although it appears to be legitimate on the face of it, perpetuates unfair discrimination on the basis of race and has the effect of maintaining exclusive control of such professional work in the hands of

white professional consultants.

Can a juristic person be the victim of racial discrimination?

[31]The final issue the court has to decide is whether complainant as a company can be a victim of discrimination on the basis of race. The first defendant contended that an entity such as a complainant being a juristic person, cannot suffer racial discrimination. It submitted that only natural persons can be victims of racial discrimination. Consequently, it was argued that the complainant's complaint is misguided. We will examine that proposition. In **Dadoo Ltd and Others v Krugerdorp Municipality Council** 1920 AD 530, the Appellate Division has recognised the separate legal personality of a company as distinct from that of its shareholders. Our company law has also entrusted corporations with such status. In amplifying such status, **Joubert AJA in Ngcwase v Terblanche** 1977 (3) SA 796 (A) at 803H said that a corporation is *"a statutory juristic person (persona juris) ...in law considered to be an abstract legal entity which exists as a juristic reality in the contemplation of law despite the fact that it lacks physical existence*". Our courts have also recognised that a juristic person or universitas has the right to a reputation, good name and fame. (**Dhlomono v Natal Newspapers (Pty) Ltd** 1989 (1) SA 945 (A)), the right to privacy (**Financial Mail (Pty) Ltd v Sage Holdings Ltd** 1993 (2) SA 451 (A)) and the right to identity (**Universiteit van Pretoria v Tommie Meyer Films** 1979 (1) SA 441 (A)). It is therefore axiomatic that a juristic person, like a natural person, could also enjoy the right to equality. These rights, in my view, are distinct from and independent of the right to dignity. A juristic person is likewise bound to the duties and obligations flowing from such rights.

[32]The next question to be answered is whether a company as a juristic person can be

discriminated against on the basis of race. Although a company has a separate legal personality from that of its shareholders, it is controlled by such shareholders. The company, as a juristic person, is a commercial mechanism used by its shareholders to conduct a commercial enterprise for their benefit. In a dictum **Innes CJ** in **Dadoo Ltd and Others v Krugerdorp Municipal Council** (*supra*) at 550/1 said the following:

"…This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; … cases may arise concerning the existence or attributes which in the nature of things cannot be associated with a purely legal persona. And then it may be necessary to look behind the company and pay regard to the personality of the shareholders, who compose it."

[33]In **Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd** 1916-1917 All ER Rep 191 (HL) the plaintiff company was controlled by German shareholders and directors and the company was accordingly held by the House of Lords to be enemy alien. **Lord Parker,** in commenting on the question of control, said that as the shareholders character would imbue the company's character, it was necessary: *"for certain purposes a Court must look behind the artificial persona – the corporation – and take account of and be guided by the personalities of the natural persons, the corporators".* In that case, reliance was placed on the judgment of **Lord Lindley** in **Janson v Driefontein Consolidated Mines Ltd** 1902 AC 484, in which the House of Lords, on the question of corporate nationality, held that during the British/Boer war a company registered in the Transvaal Republic did not cease to be an *"enemy company"* simply because the majority of its shareholders were English.

[34]The constitution vests a juristic person with the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person. In this matter we are seized with the right to equality. The nature of such right is predicated on the premise that everyone is equal before the law and has the right to equal protection and benefit of the law. There is nothing to gainsay that a company which has a separate legal personality cannot enjoy equality before the law and protection and benefit of the law. The difficulty, however, arises when it comes to the prohibition of unfair discrimination on certain specified grounds, which essentially embraces human attributes. One of those grounds that we are called upon to consider in this matter is discrimination on the grounds of race. During the apartheid era, companies, in terms of the Group Areas Act, were imbued with racial characteristics. The racial profile of the company was determined by the racial profile of the shareholders controlling the company and the company, despite its separate corporate personality, suffered the same fate and racial discrimination as its controlling shareholders. I therefore see no reason why in principle on the basis of public policy, such companies cannot benefit from the constitutional measures designed to protect or advance persons (including juristic persons) or categories of persons (including juristic persons) disadvantaged by unfair discrimination I am of the view that the racial profile of the company can be determined by the racial profile of its controlling shareholders. The racial profile of each company will depend on its own facts and circumstances. I can see no reason why a company in which women, the disabled, ethnic and religious minorities and other disadvantaged class of persons who hold the controlling interest, cannot be discriminated against. I therefore conclude that, as a matter of principle and public policy, a juristic person, like that of a natural person, can be discriminated against on the grounds of race.

[35]Complainant is a professional company of civil and structural engineers and is wholly owned by professional black shareholders. It is accordingly, in my view, a disadvantaged juristic person. It is entitled to enjoy the equality rights and benefits as contained in Article 9 of the constitution and bound to the duties imposed by such rights insofar as they may apply to it and as more fully amplified in Article 8 of the Constitution as well as in PEPUDA. In the circumstances we find that the complainant can be a victim of discrimination based on race.

Finding in Respect of the Broader Enquiry (Twenty -Sixth Direction)

[36]In the premises, we are satisfied that first respondent has unfairly discriminated against complainant on the basis of race by firstly, denying it (complainant) contractual opportunities for rendering services for gain in the broader Khayelitsha area since June 2003 and failing to take steps to reasonably accommodate the needs of complainant and secondly, excluding complainant indirectly under its policy, rule, strategy or practice that appears to be legitimate, but which is aimed at maintaining exclusive control by white professional firms.

[37]Second and third respondents were not involved in the professional appointments made in the broader Khayelitsha area and, in the circumstances, no adverse findings can be made against them. As the cause of action to the non-appointment of complainant to the second phase of the Lookout Hill project arose prior to the relevant sections of the Equality Act coming into operation, this court has no jurisdiction to make an order or grant relief in respect of such a claim.

The KBD or CBD Enquiry

Introduction

[38]We now turn to discuss the narrower issue of the non-appointment of complainant as civil and engineering consultants to the Khayelitsha Business District, also known as the Central Business District (KBD) project. It is set out in the twenty-fifth direction and reads as follows: *"Whether complainant has unfairly been discriminated against on the basis of race by respondents in not being allocated the civil engineering contract for the KBD".* As we had mentioned earlier, the relief sought by complainant is against second respondent only. The gravamen of the complaint is that *"the appointment of Axis on the CBD project under rules or practices that appear to be legitimate but which are actually aimed at maintaining exclusive control by a particular race group"*, is unlawful and contrary to the Constitution and the *"framework agreement"*. The complaint is brought in terms of Section 7(c) of the Equality Act. The group alluded to in such complaint is the coloured group. In amplification of such complaint Manong alleged that there was a conspiracy by second respondent to use the turnkey mechanism to exclude the complainant which is wholly African owned and appoint Axis which was in majority Coloured owned. He also alleged that second respondents in appointing civil engineering consultants *"is construed as deliberately and unfairly limiting access to contractual opportunities for the provision of professional services to the Complainant".* This complaint would bring it also within the ambit of Section 7(e) of the Equality Act.

[39]In the past, as a matter as policy, there were degrees of discrimination and deprivation of social and economic opportunities amongst the various racial groups. In the Western Cape preferential treatment by law was afforded to the coloured people over African people. The Western Cape was declared a Coloured labour preferential area. Certain restricted trades were reserved for the Coloured people only. Africans *"lawfully"* resident in the Western Cape were precluded from entering such trades. They were restricted to perform menial tasks. Africans from outside the Western Cape

were barred from seeking employment or for that matter living in the Western Cape. Such discriminatory policy was enforced through the notorious pass law system and the movement of Africans into the Western Cape was controlled by such system. At the time, thousands of work-seekers from the homelands were arrested, charged and convicted of being illegally in the Western Cape and repatriated to their homelands.

[40]Substantive equality recognises that inequality is sometimes present in deeply rooted social and economic cleavages between groups in society. The effects and consequences of the past patterns of disparity within the disadvantaged racial groups are succinctly illustrated in the case of **Motala v University of Natal** 1995 (3) BCLR 374 (D), where an Indian student was refused admission to the medical faculty of the University of Natal on the basis that, as a matter of policy, preference was given to African students. The court held at 383B-F that, although Indian students were disadvantaged by apartheid, African students had experienced greater disadvantage because of the poor quality of African education. As a result the measure which preferred one black group over another was lawful.

The Facts

[41]It is common cause that third respondent appointed second respondent as the developer of the KBD site on a turnkey *"design, develop and deliver"* basis. Second respondent in turn appointed WBHO Construction (Pty) LTD (WBHO") as the Contractors on the same turnkey basis. WBHO appointed the professional consultants. It is common cause that complainant was not appointed by WBHO as the civil and structural engineers despite its involvement at risk on the project at the conceptual and design stage and which stretched over many years. Axis was appointed by WBHO as

the civil and structural engineers. It is the non-appointment of complainant to the project as the civil and structural engineers that triggered the present enquiry.

The Framework Agreement

[42]It is not in dispute that in 1999 and prior to the appointment of second respondent as the developer, CoT set in motion an extensive consultation process, which included the community and other stakeholders. Complainant was part of that process. The consultation process culminated in the acceptance of the framework agreement. It provided for a tendering protocol which shall be fair and equitable and provide for preferential arrangements in favour of the signatories to the agreement. On 25 January 2000, first respondent accepted the principles contained therein as mandate and directive in order to proceed with the establishment of the necessary institutional entities to facilitate the development.

The Collaborative Agreement

[43]First respondent entered into a collaborative agreement with RMB ("collaborative agreement") in terms of which the latter was to assist with sourcing and securing the necessary private sector funding for the project. Second respondent, as a property developer, became involved through RMB. The land earmarked for the KBD was sold by first respondent to KCT which established third respondent. KCT holds 100% of the shares in third respondent. We found that both KCT and third respondent are municipal entities and as such organs of state. KCT granted third respondent leasehold and development rights in respect of the land.

The Development Agreement

[44]Third respondent and second respondent entered into a retail development

agreement in respect of KBD ("development agreement"). In terms of such agreement second respondent had to deliver to third respondent a fully designed, built and tenanted shopping centre. The development agreement provided for black economic empowerment. It provided that second respondent shall firstly, use reasonable endeavours whenever possible to appoint or procure the appointment of professional consultants, contractors and sub-contractors (other than the main building contractor) who are majority black owned or who have a substantial black shareholding in connection with the works and the retail development; and secondly undertake its best endeavours to ensure that either it or the main building contractor procures in total not less than 30% of the total monetary value of the works and all professional and other services required in connection with the retail development from black persons and small and medium black owned enterprises. In the agreement between second respondent and WBHO ("turnkey agreement") provision is made for the contractor to comply with the BEE obligations contained in the development agreement.

The Evidence

[45]The complainant called two witnesses, namely Manong and Magqwaka. At the conclusion of the complainant's case in the KBD enquiry, first and second respondents moved an application for absolution of the instance. The court assumed in favour of the respondents that the Equality Court was competent to entertain such an application and found on the facts and the inferences to be drawn from such facts, that complainant had made out a *prima facie* case of discrimination against the defendants. The onus accordingly shifted to the defendants to show that the discrimination based on race as alleged by complainant either did not take place or that the exclusion of complainant is not based on race or that the discrimination is fair. First respondent then called Andre Human ("Human") as a witness and second respondent called

Wayne Clifford Van der Vent ("Van der Vent") and Geoffrey Parker ("Parker") of WBHO as witnesses.

[46]The court has found that third respondent is a municipal entity and as such obliged to follow tender procedures applicable to municipalities. It is common cause that it had failed to follow such procedure when it appointed second respondent as the developer. First respondent, which had set up the various entities connected to the KBD development, had obtained legal advice with regard to the legal status of third respondent. In terms of such advice, third respondent was not regarded as a municipal entity. First and third respondent acted on such advice and accordingly did not follow the tendering procedure applicable to municipalities at the time when third respondent appointed second respondent. The complainant submitted that had the tendering process been followed, second respondent would have been compelled to utilise the framework agreement and more particularly the annexure "A" list attached thereto in the appointment of consultants. Complainant accordingly had the legitimate expectation to be appointed as the civil and structural engineers on the project.

[47]The evidence of Human is that first respondent acted on legal advice that third respondent was not a municipal entity. It acted on such advice and did not follow the tender procedures. He said in hindsight such advice was wrong. A written legal opinion was handed in as evidence in support of such evidence. There is no evidence that the tender process was not followed in order to exclude complainant from being appointed as a consultant on the project. The court accordingly finds that first and third respondents did not follow the tender procedure, not because they wanted to discriminate against complainant, but because they acted on wrong legal advice.

Evaluation

[48]It is common cause that complainant was a signatory to the agreement. First respondent ratified the principles of the framework agreement subject to the rules and regulations it was bound to follow. Complainant submitted that first respondent, by ratifying the agreement, brought about a binding agreement between the signatories and first respondent. The complainant argued that in terms of the law, the framework agreement constituted an offer on behalf of the signatories and the ratification of the principles constituted an acceptance of the offer. First respondent was accordingly bound to the principles of such agreement. The court, without making a formal finding on the validity of such legal argument, will assume in complainant's favour that a valid and binding agreement came into existence. In such event, a breach of such agreement as alleged by complainant will not in itself constitute a cause of action within the ambit of the Equality Act. It can only constitute such cause of action if it can be shown that such breach was as a result of discrimination based on race.

[49]There are a number of factors that militate against complainant's argument. Firstly, such ground was never raised in the papers. It was raised for the first time in argument before us. Secondly, there was a range of signatories consisting of various entities and individuals and comprising of various racial groups and many of whom were not BEE compliant. Thirdly, the way we understand complainant's case in this regard, is not that it was excluded because of race, but had first respondent followed the tendering process as required in terms of the framework agreement, complainant would have been appointed as the preferred civil and structural engineering consultants. We have already made a finding in respect thereof above. In any case the failure to adhere to the terms of the framework agreement could never *per se* amount to racial discrimination. We will return to the question of conspiracy later. Fourthly, second

respondent was not a party to the framework agreement and the relief sought by complainant in respect of the KBD project is essentially against second respondent. In the circumstances, we find that there is no merit in this leg of complainant's argument. Even if there were to be merit in this argument, the Equality court is not the correct forum to bring a case of breach of contract or legitimate expectation.

[50]Complainant's main ground of attack for its non- appointment as the consultant in the KBD project was because of the turnkey mechanism. Manong submitted that the turnkey method of appointing consultants on the project unfairly discriminated against the complainant on the basis of race in that the criteria used by WBO in appointing Axis constituted an absolute barrier. Manong maintained that there was a conspiracy against complainant to use the turnkey mechanism to exclude it and appoint Axis. Human testified that he was put in charge of the KBD project from its conception stage. Despite an extensive marketing campaign in which he was involved, the only financial institution that showed an interest was RMB. Other financial entities were not interested for various reasons including the fact that black areas like Khayelitsha were *"redlined"* by the banks.

[51]It is common cause that RMB agreed to finance the KBD project subject to the following conditions:

(a) that a *"turnkey design and build"* method of construction be employed,

(b) that one of the big four construction companies be contracted to construct on such basis and

(c) that payment of the contract price to be made in a single lump-sum amount upon completion of the shopping centre and delivery

of the keys.

Second respondent concluded such a contract with WBHO. In terms of such contract because WBHO was at risk, it retained the right to appoint the professional consultants. WBHO accordingly appointed Magqwaka & Associates as architects, Axis Consulting as civil and structural engineers and Johaardien & Associates as mechanical engineers. Complainant and Letchmia Daya Verachia, who were involved on the project at risk, were not appointed.

[52]It is not disputed that Van der Vent expressly told Parker of WBHO that he *"would like to run with black professionals".* He put the name of complainant forward as one of the professionals who was involved in the project at risk and requested that complainant be included in the project. On 30 January 2004, he raised the matter once more with Parker in the context of the letter from complainant ("MS10") and had asked WHBO to reconsider the appointment of complainant. Parker said he had worked with Henry Herring ("Herring") previously on the International Convention Centre and was comfortable to work with him. Complainant's cause of action in respect of the KBD project arises from its non-appointment as the civil and structural engineers for the project.

[53]Second respondent was not a party to the framework agreement and whatever rights and obligations that might have flowed from such agreement, if any, were not binding on second respondent. If such agreement were binding on the first and third respondents, no relief was sought against them and in the circumstances it is unnecessary for this court to make a finding on the validity, scope and implication of such agreement. Manong contended that there was an agreement between second respondent and the complainant that it would be appointed as the civil and structural

engineers and pursuant such agreement complainant was asked to assist Magqwaka in the production of structural engineering drawings. Complainant produced such drawings which were tendered in evidence as appendix “A”. Van der Vent denied that such an agreement existed, but stated that if second respondent had the power to make the appointments, it would have appointed the complainant to the project. But matters were taken out its hands when the financiers insisted that the turnkey mechanism be used to develop the shopping centre. The court is satisfied that second respondent, through the intervention of Van der Vent, used reasonable endeavours to procure the appointment of complainant on the project but was unsuccessful.

[54]We now turn to discuss the complaint that the turnkey mechanism was used to discriminate against complainant and appoint Axis, the principal of which is a close friend of Van der Vent and like him is a member of the coloured group. The thrust of such complaint is that there was a conspiracy between first, second, third respondents and WBHO to exclude the complainant from the project and appoint Axis. The discrimination is based on the exclusion of an African entity in favour of a Coloured entity. It is common cause that complainant is a wholly owned African company whereas Axis is majority Coloured owned.

[55]It is not disputed that WBHO appointed the professional consultants, including the civil and structural engineers in terms of the turnkey agreement as it carried the risk. Human testified that first respondent had no say in the appointment of such consultants. Parker testified that he appointed Axis on behalf of WBHO and he was not influenced by any official of first respondent, including Human or Barnard, to appoint Axis in place of complainant. He confirmed in his evidence that he was approached by Van der Vent to appoint complainant as the consultant, but because he had worked

with Herring on another project he felt comfortable to appoint Axis as the consultants. He said WBHO appointed consultants that they knew and had worked with before and this was the principal reason why Axis was appointed to the project. Van der Vent testified that second respondent played no role in the appointment of Axis on the project. He refuted most emphatically Manong's allegation that complainant was excluded in favour of Van der Vent's coloured friends. Van der Vent in fact testified that he did not know Herring, the managing director of Axis. Magqwaka did not confirm in his evidence the allegations attributed to him by Manong that there were *"sinister forces at play to remove complainant from the project in favour of Van der Vent's coloured friends"*.

[56]The evidence is quite clear that second respondent had no say in the appointment of professional consultants on the project. It is common cause that WBHO made such appointments. Van der Vent put the names of complainant and Magqwaka forward to WBHO as professional consultants, but WBHO elected to appoint Magqwaka and not complainant. Both were regarded as African entities. If we have to assume that the turnkey agreement was designed to exclude complainant as an African in favour of Coloureds, then in pursuance to such design, there was no reason why Magqwaka was also not excluded in favour of coloured architects. Such argument is therefore, in our view, misplaced. Such conclusion also flies in the face of Van der Vent's credentials that he was prepared to promote black including African professionals. This is evidenced by the fact that he introduced Magqwaka to WBHO and tried his best endeavours to get complainant appointed.

[57]Manong's contention is that the criteria used by WBHO in the appointment of Axis to the project, was an absolute barrier and accordingly discriminatory. WBHO who is

not a party to these proceedings and no finding can accordingly be made against it. In any case we have already found that second respondent was not a party to the appointments of consultants to the project and such complaint cannot be levelled against it.

The Conspiracy

[58]We now turn to the final issue, namely the question of conspiracy. There is no evidence other than the *ipse dixit* of Manong that there was a conspiracy on the part of the respondents to exclude complainant as consultant from the project nor are there facts from which such conclusion can be inferred. The facts are egregiously to the contrary. Van der Vent in fact went out of his way to promote and plead for the inclusion of complainant to the project. Manong's allegation that Barnard was the mastermind behind the conspiracy is not substantiated by the evidence or facts from which such inference can be drawn. In our opinion there is no substance to the allegation of conspiracy.

Finding in Respect of the KBD or CBD Enquiry (Twenty- Fifth Direction)

[59]In the light of the totality of the evidence, the objective facts and the probabilities, we are satisfied that the respondents have discharged the onus of showing that the respondents were not responsible for the non-appointment of complainant to the project and could therefore not have discriminated against it on the basis of race. In our view the complainant has failed to discharge the overall onus of proving, on a balance of probabilities, as against second respondent firstly, that the appointment of Axis on the CBD project under rules or practices that appear to be legitimate, but which are aimed at maintaining exclusive control by the Coloured group is in violation of S 7(c) of the Equality Act and secondly, it has the effect of unfairly limiting access of

contractual opportunities for the provision of professional services from the complainant in violation of S 7(e) of the Equality Act.

The costs

[60]The Equality Court is empowered in terms of S 21(2)(o) of the Act to make an appropriate order of costs against any party to the proceedings. The Regulations promulgated under the Act provides, in terms of S 12(2) that each party bears its own costs unless the presiding officer directs otherwise. The general rule is therefore that each party pays its own costs unless there are exceptional circumstances entitling the presiding officer to direct otherwise. This differs from the general rule in the Magistrate's Court, High Court and the Supreme Court of Appeal that costs follow the result unless the court directs otherwise. **Ackerman J** in **Ferreira v Levin NO and Others**; **Vryenhoek and Others v Powell NO and Others** 1996 (2) SA 621 (CC) at 624B-F, referring to the general rule in such courts, makes the following observation in the context of constitutional litigation:

> *"… that the principles which have been developed in relation to the award of costs are by their very nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should, however, be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation."*

[61]The spirit and ethos of that principle has found favour not only in constitutional litigation but also in other public interest litigation such as labour litigation, land claim

litigation etc. The same spirit and ethos are entrenched in the Equality legislation which provides that each party shall pay its own costs unless the Equality Court directs otherwise. The Equality Court has a discretion to make a cost order against one or other of the parties in the interest of equity and fairness. The Equality legislation is an extension of the right to equality embodied in S 9 of the Constitution and *"endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom"*. The Equality Court must guard against deterring *bona fide* litigants from exercising and asserting their constitutional rights to equality, which is underpinned by the foundational values of human dignity and freedom, by making adverse cost orders against them.

[62]Adv **Arendse** SC submitted that complainant is not a disadvantaged person seeking to remedy an inequality but is a commercial entity litigating for commercial gain and embarked on frivolous and vexatious litigation. In such circumstances there should be no diffidence about making a costs order against complainant. Adv **Jamie** SC expressed similar sentiments. Manong, on the other hand, submitted that respondents abused the court process by bringing various abortive applications for the sole purpose to frustrate complainant from asserting its constitutional rights to equality.

[63]In this matter the complainant has been involved with the project on risk since its inception. It invested its intellectual capital and time in the project in the hope of getting appointed as the structural and civil engineers should the project get off the ground. In that event it would have been able to recoup its losses it made while working on the project on risk. It also contributed its intellectual capital and time after second defendant was appointed by third defendant to act as the developer. This is evidenced

by exhibit referred to as “Appendix “A”. The complainant, therefore, had the legitimate expectation to be appointed as a professional consultant but due to circumstances beyond the control of second defendant Axis was appointed. The court has found that the complainant was not excluded on the ground of race and it was therefore not entitled to any relief in terms of the Equality Act.

[64]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.

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A S S E S S O R S : We agree

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