Republic of South Africa

THE EQUALITY COURT
HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: EC 2 / 2005

In the matter between:

MANONG & ASSOCIATES (PTY) LTD	Complainant
and	
1. CITY OF CAPE TOWN	First Respondent
2. FUTUREGROWTH PROPERTY DEVELOPMENT COMPANY (PTY) LTD	Second Respondent
3. KBD MANAGEMENT (PTY) LTD	Third Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL
DELIVERED ON: 6 AUGUST 2009

MOOSA, J:

Introduction

[1] In this matter the parties applied to this court, sitting as an Equality Court of the High Court, for leave to appeal and counter-appeal to the Supreme Court of Appeal against

its principal judgment handed down on 12 November 2008. In addition thereto, first respondent also sought leave to counter appeal against the interlocutory order of this court handed down on 28 August 2007 relating to the legal status of third respondent. Such leave to counter-appeal was conditional on the court granting complainant leave to appeal against its decision in respect of the CBD enquiry ("the narrower enquiry"). Should the court refuse such leave, first respondent abandons the application for leave to counter-appeal in respect thereof.

[2] The parties applied for leave to appeal and counter-appeal against the principal judgment and interlocutory order in the following respects:

2.1. Complainant applied for leave to appeal against part of that judgment and order dealing with the allocation of civil engineering contracts for the area of Khayelitsha ("the broader enquiry") and against the whole of the judgment and order dealing with the narrower enquiry, except the order regarding costs.

2.2. First respondent applied for leave to counter-appeal against: the whole of the judgment of the broader enquiry; the order to the effect that

there was to be no order as to costs in respect of the narrower enquiry and the order of this court handed down on 28 August 2007 to the effect that third respondent is a municipal entity and as such an organ of state.

2.3. Second respondent applied for leave to counter-appeal against the order of this court to the effect that there was to be no order as to costs in respect of the narrower enquiry.

The Proceedings

[3] By agreement between the parties the merits and the relief and/or the quantum were separated (Seventeenth Direction). In respect of the broader enquiry, the court in its judgment has disposed of the first leg of such enquiry, namely, the merits. The court is now required to deal with the second leg of the enquiry, namely, the relief and/or quantum. Before the court could enquire into the second leg, both complainant and first respondent brought the present applications. This court has to decide whether the judgment is appealable at this stage. Insofar as the narrower enquiry is concerned, it is common cause that this court has given final judgment in that regard and the judgment is accordingly appealable.

Directions

[4] In pursuance to the applications for leave to appeal and counter-appeal, this court on 27 May 2009, issued directions concerning the further conduct of the matter. The court, *inter alia*, directed the parties to address it on the question of the appealability of the judgment and/or rulings in respect of the merits on the broader enquiry in the absence of an order in respect of the relief and/or the quantum; whether the appeals should be heard by the full bench of this division or whether the appeal should be heard by the Supreme Court of Appeal; and what are the prospects of success on appeal.

Case Law

[5] During the course of argument before us, Adv **Rosenberg** SC, appearing for complainant, referred to and quoted from two recently unreported judgments of the Supreme Court of Appeal in which complainant was involved. The one was **Manong and Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport and Others,** Case No. 369/08, ("**Manong (1)**") which was handed down on 25 May 2009. The other was **Manong and Associates (Pty) Ltd v Department of Roads & Transport, Eastern**

Cape Province and Another, Case No. 331/08 ("**Manong (2)**"). In both these matters, the appeal came directly from the Equality Court to the Supreme Court of Appeal with the leave of that court. In the matter of **Minister of Environmental Affairs and Tourism v George** 2007 (3) SA 62 (SCA) ("**George**"), which was referred to in both **Manong (1)** and **Manong (2)**, the appeal went directly from the Equality Court to the Supreme Court of Appeal without the leave of such court.

[6] In **George** (*supra*), **Cameron, JA** writing for the court found that leave to appeal from the Equality Court sitting as a High Court was necessary. In para 16 he went on to say: *"that no appeal lies against a judgment or order of the High Court sitting as an equality court in any civil proceedings unless leave to appeal is granted".* This might account for the fact that in **Manong (1)** (*supra*) **and Manong (2)** (*supra*), the appellant sought and obtained leave to appeal from the Equality Court directly to the Supreme Court of Appeal. **Cameron, JA** in **George** (*supra*) dismissed the appeal, not on the ground that the appellant had failed to obtain leave to appeal from the court below, but on the ground that the order not to refer the matter to an alternative forum in terms of section 20(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("Pepuda")

was not appealable. I will return to this issue shortly.

[7] Before giving consideration, if necessary, to the Directions issued by this court on 27 May 2009, it is appropriate, in the light of the case law referred to above and the provisions of Pepuda, to determine whether this court is competent to grant the parties leave to appeal and counter-appeal directly to the Supreme Court of Appeal. As this issue was not ventilated at the hearing of this application, the court requested counsel for the parties to make written submissions whether this court is competent to grant leave to appeal and if so, whether such appeal should lie to the full bench of the High Court or to the Supreme Court of Appeal. We are grateful for the input made by the parties. They were *ad idem* that this court was competent to grant such leave and the appeal should in fact lie to the Supreme Court of Appeal. Other than the decision in **George** (*supra*), which, according to **Navsa, JA** in **Manong (1),** was *obiter dictum* and echoed in that respect by **Kroon, AJA** in **Manong (2),** neither **Manong (1)** or **Manong (2)** dealt specifically with the issue in question. It therefore appears that the remarks of both **Navsa, JA** and **Kroon, AJA** are also *obiter dictum.*

Appeals from the Equality Court

[8] Appeals from the Equality Court are governed by section 23 of Pepuda as amplified by Regulation 9. Section 23 (1) provides:

> *"Any person aggrieved by any order made by an Equality Court in terms of or under this Act may, within such period and in such manner as may be prescribed, appeal against such order to the High Court having jurisdiction or the Supreme Court of Appeal, as the case may be."*

According to the canons of construction, words in the statute must be given its ordinary grammatical meaning unless the context suggests otherwise. In my view the meaning of the words is clear and unambiguous and effect accordingly should be given to such meaning.

[9] Section 16 of Pepuda designates every High Court as an Equality Court for the area of its jurisdiction and designates one or more Magistrate's Court as an Equality Court for the administrative region of such court. It therefore follows that an appeal from the decision of a designated Magistrate's Court, sitting as an Equality Court, will lie to the High Court having jurisdiction and of a High Court sitting as an Equality Court will lie to the

Supreme Court of Appeal as opposed to the High Court. Whether the separate appellate jurisdiction which is conferred on the Equality Court is consonant with the spirit and ethos of Pepuda is a matter in which I am constrained not to express an opinion. **Navsa, JA** in **Manong (1)** at para [57] names the Equality Court as a *"special animal"* which could be described as a *"special purpose vehicle"*. He concludes that the Equality Court sitting as a High Court is separate from and independent of the High Court.

[10] However, the provisions of Regulation 19(7) of Pepuda create an anomaly and appear to be inconsistent with the clear and unambiguous language of section 23(1) insofar as appeals from the Equality Court sitting as a High Court are concerned. Regulation 19(7) reads:

> *"(a) After an appeal has been noted in terms of sub-regulation (1) the appeal must be prosecuted as if it was an appeal against the decision of a magistrate in a civil matter, and the rules regulating the conduct of the proceedings of the several provincial and the local divisions of the High Court in so far as they relate to civil appeals from the magistrate's courts apply, with the necessary changes, to any appeal.*

(b) The provisions of the relevant Uniform Rules of Court with regard to an appeal from a High Court to the Supreme Court of Appeal apply with the necessary changes."

Sub-regulation 19(1) provides:

"*Any person wishing to appeal against any order made by the court as contemplated in section 23(1) of the Act must within 14 days of such order being made, deliver a notice of appeal to the clerk and the complainant or the respondent as the case may be."*

[11] Regulation 9 does not draw a distinction, as in the case of section 23 between the Equality Court sitting as a Magistrate's Court and that of it sitting as a High Court. To the extent that Regulation 9 suggests that appeals from the decision of an Equality Court sitting as a High Court lie to the High Court having jurisdiction, it is *ultra vires*. The same consideration does not necessarily apply in the case of an appeal from the Equality Court sitting as a Magistrate's Court. In order to eliminate the anomaly the legislature will have to amend the law either to bring Regulation 9 in line with section 23 or *vice versa*.

[12] According to the scheme of things as presently constituted, it appears that a litigant, who wishes to appeal against the decision of an Equality Court sitting as a Magistrate's Court, has an automatic right of appeal to the High Court having jurisdiction. (See **Lawsa** Vol 3 Part 2 at page 260). Further appeal from the decision of the High Court to the Supreme Court of Appeal will require the leave of such High Court in terms of section 20(4)(b) of the Supreme Court Act, No 59 of 1959, or in the absence of such leave, the leave of the Supreme Court of Appeal in terms of section 21(2) of the said Act. In the case of a litigant, who wishes to appeal against the decision of an Equality Court sitting as a High Court, it appears that such litigant can appeal directly to the Supreme Court of Appeal with the leave of such Equality Court. This issue is dealt with more fully later.

The Broader Enquiry

[13] With the technical issues out of the way, I now turn to deal with the applications for leave to appeal and counter-appeal. In this respect, I will firstly deal with the broader enquiry and thereafter with the narrower enquiry. The applications in respect of the broader enquiry will be approached on the basis of the directions issued by me on 27 May 2009. The first issue is the appealability of the judgment in respect of the merits. Both

counsel for complainant and first respondent submitted that the judgment on the merits is appealable in the absence of an order having been made thus far with regard to the relief. Pepuda expressly states that an *"order"* is appealable.

[14] **Harms, AJA** , as he then was, in **Zweni v Minister of Law and Order** 1993 (1) SA 523 (A) at 532J-533A, says that the distinction between judgment and order is formalistic and describes *"judgment or order"* as a decision which, as a general principle has three attributes; first, the decision must be final in effect and not susceptible to alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[15] Section 20 (1) of the Supreme Court Act also does not distinguish between a *"judgment or order"*. In order to determine the appealability of the judgment on the merits of the broader enquiry, we need to apply the test as set out in **Zweni** (*supra*). Applying such test, it is my considered view that the judgment in question is firstly, final in effect and cannot be altered by us; secondly, it is definitive of the rights of complainant and first

respondent and thirdly, it disposes of the merits of the broader enquiry, which is at least a substantial portion of the relief claimed in the main proceedings.

[16] Although piecemeal adjudication of a case is frowned upon by our courts, if an appeal can lead to a more expeditious and cost effective determination of the main dispute between the parties, then the trial court may exercise its discretion to grant leave to appeal despite the fact proceedings have not been finalised. (**Priday t/a Pride Paving v Rubin** 1992 (3) SA 542 (C) at 548H-J.)

[17] In the broader enquiry, the court not only made findings of fact on the merits, but the court also made findings on matters of law. On the latter, this court, amongst other, found that a juristic person such as complainant can be discriminated against on the ground of race. The highest court in our land has not yet pronounced on this matter. Should the Supreme Court of Appeal find to the contrary, then it can put paid to the entire proceedings not only in this court but also in other jurisdictions in which complainant is litigating. This can lead to the final determination of the main dispute between the parties in a more expeditious and cost effective manner. I am therefore of the view that, at this

stage of the proceedings, there are reasonable prospects of success on appeal and counter-appeal in respect of the broader enquiry.

The Narrower Enquiry

[18] With regard to the appeal and counter-appeal in respect of the narrower enquiry, this court has given a final judgment in the matter by dismissing complainant's claim against second respondent and making no order as to costs. Complainant has appealed against the whole of that judgment other than the order regarding costs. Both first and second respondent have counter-appealed against the costs order. First respondent has conditionally appealed against the decision of this court handed down on 28 August 2007 to the effect that third respondent is a municipal entity and as such an organ of state.

[19] In the narrower enquiry, like that of the broader enquiry, this court made findings on matters of fact and matters of law. The court, amongst other, found that a private company can be a municipal entity and as such an organ of state. The highest court in this country has not yet pronounced on the matter. This court also made no order as to costs despite the fact that complainant's case against second respondent was dismissed. Both

such parties were commercial entities. It is not improbable that another court may come to a different finding to that of this court not only on the factual findings, but also on matters of law. I accordingly conclude that there are reasonable prospects of success on appeal and counter-appeal in respect of the narrower enquiry.

The Forum to Hear the Appeal and Counter-Appeal

[20] The final issue this court has to resolve is the forum which ought to hear the appeal and counter-appeals. All the parties were *ad idem* that leave should be granted to appeal and counter-appeal to the Supreme Court of Appeal. Counsel for the parties submitted that this court is bound by the decision of **Cameron, JA** in **George** (*supra*) on this issue. In both **Manong (1)** and **Manong (2)** the appeal came directly from the Equality Court, sitting as a High Court, to the Supreme Court of Appeal with the leave of such court. In determining such appeal, the Supreme Court of Appeal did not question its own power to hear the appeals. In the light of my findings concerning the construction of section 23 (1) and sub-regulation 19 (7) of Pepuda and the authorities quoted, I conclude that the appeal and counter-appeal should lie directly from this court to the Supreme Court of Appeal. There are important matters of law involved in this matter and it would be desirable that the

highest court of the country pronounce on such matters to get certainty on the state of law in respect of those issues. The parties were not to be found for the referral of the appeal and counter-appeals to the Constitutional Court in terms of section 23 (3) of Pepuda.

The Order

[21] It therefore follows that the parties are given leave to appeal and counter-appeal to the Supreme Court of Appeal. The question of costs in the applications for appeal and counter-appeal stands over for later determination.

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