

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA  
HELD AT JOHANNESBURG** **Case No JS735/05**

(On appeal from the judgement of Sibeko AJ delivered 5<sup>th</sup> day of July 2006  
and with leave of Sibeko AJ granted 29<sup>th</sup> day of September 2006)

**ON REFERRAL FROM  
THE HIGH COURT OF SOUTH AFRICA** **Case No 1/2005**  
**WITWATERSRAND LOCAL DIVISION**  
**EQUALITY COURT**

**BETWEEN:**

**WILHELMEN MAGDALENA CHARLES** **FIRST COMPLAINANT**

**and**

**DOCTORS FOR LIFE INTERNATIONAL** **SECOND COMPLAINANT**

**and**

**JOHN JACKSON SMYTH** **THIRD COMPLAINANT**

**and**

**GAUTENG DEPARTMENT OF** **FIRST RESPONDENT**  
**HEALTH (KOPANONG HOSPITAL)**

**and**

**MEMBER OF EXECUTIVE COUNCIL**  
**FOR HEALTH (GAUTENG)** **SECOND RESPONDENT**

**and**

**THE NATIONAL MINISTER OF**  
**HEALTH** **THIRD RESPONDENT**

**and**

**WOMEN'S LEGAL CENTRE** **AMICUS CURIAE**

---

**NOTICE OF APPEAL**

---

THE GROUNDS OF APPEAL TO BE PRESENTED TO THIS  
HONOURABLE COURT ARE:

1. The pivotal finding in the learned judge's judgement is paragraph 31.2 which means that the Labour Court has exclusive jurisdiction in this matter, and that the WLD Equality Court lacked jurisdiction to entertain the complaint.

1.1 The learned judge erred in making such a finding for the following reasons:

(a) It was not required of him in the Pre-Trial Minute agreed by the parties and endorsed by Kennedy AJ.

(b) He made the finding without hearing any argument on the point from the Complainants thereby contravening their constitutional rights and the time-honoured principle of audi alteram partem.

(c) All the parties had consented to the jurisdiction of the Equality Court when they consented to the order of Jajbhay J. referring the case to the Labour Court from the Equality Court for hearing on the merits.

(d) A court without appellate powers has no jurisdiction to act as an appeal court from another court of equal status.

(e) The consequences of the judge's finding in paragraph 31.2 are that the Labour Court has no jurisdiction to entertain this matter and both Kennedy AJ and Sibeko AJ should have ordered that it be struck from the roll. If Jajbhay J lacked jurisdiction he had no power to refer the case to the Labour Court.

1.2 In any event the learned judge's finding that the Equality Court had no jurisdiction is wrong on a proper interpretation of section 5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000), (hereinafter called PEPUDA) because, inter alia,

(a) The Complainants seek certain relief in this suit which is available in the Equality Court but not available in the Labour Court.

(b) The Second and Third Complainants are not employees.

(c) The Third Respondent could not be cited under the Employment Equity Act, 1998.

(The Complainants will elaborate on these arguments in their written submissions.)

2. The learned judge erred in finding (paragraphs 14 and 15) that there was no 'objective proof' that the case had been referred to the Labour Court by Jajbhay J. under section 20 of PEPUDA. The Pre-

Trial Minute signed by all the parties and ratified by Kennedy AJ provided such proof, as did three letters on the Court file which were drawn to the learned judge's attention. In any event there was no other way that the suit could have arrived in the Labour Court except by statutory referral.

3. The decision of the learned judge at paragraph 32 and following, that the Second and Third Complainants have no standing in the suit in the Labour Court violates section 38 of the Constitution expressly, and section 157(2) of the Labour Relations Act, by implication.

4. The learned judge erred in finding (paragraph 38) that the Third Complainant is not a designated person in terms of section 161(b) of the LRA.

5. The learned judge's interpretation of the decision of the Presiding Officer of the Vereeniging Equality Court in paragraph 8 was in no way common ground and not argued at all before him. In fact the learned Presiding Officer's judgement was so equivocal and confused that the Complainants were able successfully to resist the Respondent's plea of res judicata on the basis of the SCA decision in Tradex Ocean Transportation SA v MV "Silvergate" (1999) 3 All SA 175 (A). As the Consent Order referring this suit to the Labour Court

shows, the Respondents abandoned their plea of res judicata after hearing the Complainants' arguments.

6. The learned judge was in error in paragraph 11 of his judgement where he says the Complainants sought the same relief in this suit as they sought in the Vereeniging Equality Court.

7. The learned judge failed to consider the Complainants' application to exercise their right to have this case referred back to the Equality Court under section 20(8)(b) of PEPUDA.

The Complainants reserve the right to renew this application to the Labour Appeal Court.

KINDLY PLACE THIS MATTER ON THE ROLL FOR HEARING

Dated day of October 2006

John J Smyth QC

Third Complainant in person, and on behalf of the 1st and 2nd Complainants

PO Box 200 Umdloti KZN 4350

Tel/Fax 031 568 2521

Janse van Rensburg, Strydom & Botha Inc

Attorneys for the Complainants

27 Lothbury Road, Auckland Park, 2006

Tel 011 726 6171 Fax 011 726 6119