

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

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

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

BETWEEN:

WILHELMIE 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**

**COMPLAINANTS' LIST OF AUTHORITIES, STATUTES AND
REGULATIONS**

A. History of the Suit

1. The suit was filed in the Equality Court (WLD High Court) on January 20 2005.
2. On the 16 August 2005 the matter came on for hearing before the Presiding Officer, Jajbhay J. After hearing argument from the Complainants for approximately one hour (in respect of the issue of res judicata raised by the Respondents), a consent order was negotiated in the Judge's chambers which provided, inter alia, that the Respondents would abandon their plea of res judicata and their objection to the claim against the third Respondent, and the matter be referred to the Labour Court for hearing on the merits. The Court order was subsequently amended to make it clear that Jajbhay J was sitting in the Equality Court when he made the consent order. A copy of the amended order dated 6 September 2005 is included in the record.
3. On 7 September 2005 the Equality Court file and order was lodged with the Registrar of the Labour Court.
4. On 9 November 2005 a Pre-Trial Conference took place in the chambers of Kennedy AJ resulting in a Minute signed by all the parties of even date. A copy of the Minute is part of the record.

5. On 28 February 2006 the matter came before Sibeko AJ for hearing on the preliminary points raised by the Respondents in paragraphs 3.1 and 3.2 of the Pre-Trial Minute:
 - Have the Second and Third Complainants *locus standi* in a case referred by the Equality Court to the Labour Court?
 - Is the Third Complainant entitled to represent the First and Second Complainants in the Labour Court in a matter referred by the Equality Court?
6. On 5 July 2006, Sibeko AJ handed down the judgement which is the subject of this appeal.
7. On 29 September 2006, Sibeko AJ gave leave to appeal against his judgement to this Honourable Court.
8. On October 2006 the Complainants filed their Notice of Appeal to this Honourable Court.

B. Future Conduct of the Suit

B.1 The learned acting judge's judgement left the case in limbo. At paragraph 40 ff, he invited the first Complainant to go back to square one and approach the CCMA under section 10 of the EEA. But he made no order as to the current suit. It is effectively 'frozen'.

B.2 The learned acting judge gave no consideration to the Complainants' application (raised in their Heads of Argument and orally at the Bar) to exercise their right to have the case referred back

to the Equality Court under section 20(8)(b) of PEPUDA. The proceedings were filed in the Equality Court in January 2005, and the rules of that court provide for a mandatory time frame of three months from filing to judgement. The delays in this matter constitute a serious breach of the provisions of PEPUDA and the Regulations made there under, and a breach of the Complainants' constitutional rights under sections 33 and 34 of the Constitution.

B.3 The Labour Court has failed to comply with the mandatory obligation placed upon it by Regulation 6(10) of the PEPUDA regulations which requires the 'alternative forum' (in this instance the Labour Court) to submit a report on the progress of the case to the Equality Court within 60 days of referral. That period of 60 days expired in November 2005.

B.4 The Complainants will ask this Court (i) to set aside the whole of the judgement of Sibeko AJ, (ii) to answer the preliminary points raised in the Pre-Trial Minute in paragraphs 3.1 and 3.2 in the affirmative, and (iii) make one of the following orders:

1. An order that the suit be heard on its merits in the Labour Court as a matter of expedition and urgency and that the Respondents comply with their agreement to make discovery and exchange of documents as recorded in paragraphs 8 & 9 of the Pre-Trial minute within 30 days.

2. An order that the suit be forthwith transferred back to the Equality Court under section 20(8)b of PEPUDA.

The Complainants also ask for costs of this appeal and in the court below.

C. Breach of Constitutional Rights of the Complainants

C.1 Constitutional Rights of the First Complainant

(a) At the heart of the First Complainant's case is her allegation that she suffered impairment of her *dignity*. She is a previously disadvantaged coloured person who at the time of the events complained of was working under black management and under white nursing staff. (See paras 8,9,14 and her first claim for relief in the Particulars of Claim).

There is no redress for impairment of *dignity* in the Employment Equity Act, 1998 (Act 55 of 1998).

It follows that the finding that the Labour Court had exclusive jurisdiction in this matter and therefore that the Equality Court had no jurisdiction to deal with the case violates the First Complainant's constitutional rights under section 10 of the Bill of Rights.

(b) The issue of jurisdiction (which the Judge decided without hearing argument from Mr Smyth) was NOT one of the issues referred to the Court by Kennedy AJ in the Pre-Trial Minute.

The judgement violates the First Complainant's constitutional right under section 34 of the Constitution. It is not a 'fair public hearing' for a party to have issues decided against him/her without the time-honoured principles of *natural justice* and *audi alteram partem* being complied with.

(c) By reason of the inordinate delays in the Labour Court the Complainants' constitutional rights are being violated more and more. PEPUDA provides for a three month period from filing proceedings to judgement. This case was filed in January 2005, and was referred to the Labour Court in September 2005. There was a delay of over 4 months in delivering the current judgement. (See para B.2 above).

C.2 The Constitutional Rights of the Second and Third Complainants

Section 38 of the Bill of Rights applies to any 'competent court'. It follows that the second and third complainants have as much constitutional 'standing' in the Labour Court as in any other court. The acting judge's finding to the contrary violates this right. Section 20(1) of PEPUDA echoes section 38 of the Constitution. The second Complainant has locus standi

pursuant to subparagraph (d) and (e). The third Complainant has locus standi pursuant to sub-paragraph (d).

D. Heads of Argument in support of paragraph 1.1 of the Notice of Appeal

The Complainants do not wish to amplify this paragraph.

E. Heads of Argument in support of paragraph 1.2 of the Notice of Appeal

E.1 The Complainants submit that for the reasons set out in paragraph 1.1 of their Notice of Appeal, the issue of whether the Equality Court has jurisdiction in this matter is NOT a matter for consideration of this court. In the event of the Court deciding otherwise, the Complainants submissions in support of their contention that the suit was properly filed in the Equality Court are contained in **Annexure A** to this document.

E.2 The Complainants add just one point. We submit that in view of their consent to the jurisdiction of the Equality Court by consenting to an order of that Honourable Court (a matter which was explained to their legal representatives by Jajbhay J in his chambers on 16 August 2005) the Complainants are **estopped** from taking this point in this Court.

F. Heads of argument in support of Paragraph 2 of the Notice of Appeal

F.1 We add only one point to the facts set out in paragraph 2 of the Notice of Appeal. Again, an *issue estoppel* arises in respect of the section 20 referral to the Labour Court, by virtue of the Pre-Trial Minute and the three letters.

G. Heads of Argument in respect of Paragraph 3 of the Notice of Appeal.

We cannot add to paragraph 3 and paragraph C.2 of this document (above).

H. Heads of Argument in respect of Paragraph 4 of the Notice of Appeal

H.1 The learned acting judge's finding that there was no evidence that the Third Complainant is a designated person within section 161(b) of the LRA, cannot stand in the light of the definition of "employee" in section 213 of the LRA. At the hearing before Sibeko AJ a letter from the CEO of Doctors for Life concerning the third Complainant's terms of employment was shown to the legal representatives of the Respondents and the Amicus Curiae, and thereafter this point was not pursued in their arguments.

H.2 The presence of the Third Complainant in Court conducting the case on behalf of the Second Complainant is enough to satisfy the definition of employee, paragraph (b), in section 213 of the LRA.

H.3 The Third Complainant is also entitled to represent the First and Second Complainants by reason of the provisions of section 30(1)(d) of PEPUDA and Regulation 10(9)(a) which reads:

Any party to the proceedings may, during the proceedings in court, be represented by an attorney or advocate or any person of his or her choice

We submit that the words of the both section 30(1)(d) of PEPUDA and of the regulation thereunder clearly cover any alternative forum to which the Equality Court has referred the case, as well as the Equality Court itself. Furthermore the words of section 20(8) of PEPUDA make it clear that it is the Equality Court which continues to control the proceedings; there has been a “referral” to the alternative forum, and there may be a “referral” back (subsections 3(a), 5(a), 8(b)). It is not a “transferral” save in the sense that there has to be an administrative transfer of the papers (subsections 5(a) and 6). In these circumstances the provisions of PEPUDA must prevail in any alternative forum.

**J. Heads of Argument in support of paragraphs 5,6,7 of the
Notice of Appeal**

These are factual matters.

Dated day of 2007

John J Smyth QC

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

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