ORIGINAL

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 3942/2021

In the matter between:

BA-MAMOHLALA AND BIG MASH JV Applicant

and

MAFUBE LOCAL MUNICIPALITY 1st Respondent
ANY OTHER PERSON OR
ORGANISATION ACTING IN THE ASSOCIATION
WITH OR ON THE INSTRUCTION
OF THE FIRST RESPONDENT 2nd Respondent

Coram:	Opperman, J
Date of hearing:	25 February 2022
Order Delivered:	7 March 2022
Reasons for Judgment:	The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 7 March 2022. The date and time for hand-down is deemed to be 7 March 2022 at 15h00.
Summary:	Application for leave to appeal – "Rule 6(12) urgency – finding" – factors to be considered on interlocutory orders – the test is to accord with the equitable and the more context-sensitive standard of the interests of justice favored by our Constitution.

JUDGMENT

[1] This is an application for leave to appeal on a finding of the Court *a quo* that the matter is not urgent. It was struck from the roll on this basis and with a costs order against the applicant. The applicant wants to appeal the entire order.

[2] The test and major factors to consider in an application for leave to appeal on an interlocutory order have finally been established. The interest of justice and thus potential for irreparable harm are vital factors. Guidance of future cases, incorrect statements of law in the judgment *a quo* and the milieu and perception in which the law must be interpreted may cause a need for the adjudication of an interlocutory order on appeal.

[3] Each case must be adjudicated on its own peculiar facts. A fixed maximum of factors will not suffice and must be read with the test as pronounced in

sections 16[1] and 17[2] of the Superior Courts Act 10 of 2013 ("SC Act") and the law that evolved around it. As was eloquently put in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (1032/2019) [2021] ZASCA 4 (13 January 2021) at paragraph [9] the assessment is now: "to accord with the equitable and the more context-sensitive standard of the interests of justice favored by our Constitution."

[4] The facts of the case are imperative to understand the mootness of the application for leave to appeal on the urgency. Mootness can have vast

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1 Section 16. Appeals generally. —
(1) Subject to section 15 (1), the Constitution and any other law—
(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted—
(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6); or
(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and

(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.

(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

(b) If, at any time prior to the hearing of an appeal, the President of the Supreme Court of Appeal or the Judge President or the judge presiding, as the case may be, is prima facie of the view that it would be appropriate to dismiss the appeal on the ground set out in paragraph (a), he or she must call for written representations from the respective parties as to why the appeal should not be so dismissed.

2 See Proclamation R. 36 of 2013 dated 22 August 2013 (Government Gazette 36774). Section 17(1) to read:
(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -
(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

consequences for a court case.[3] Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact. In other words, a court cannot take on a purely hypothetical debate in which it would be called on to decide what might happen if something were to arise between two parties. "If the court determines that the conflict has died and the parties no longer have any actual, vested interest in what the outcome might be, then the court will find that the issue is moot and dismiss the case…"[4]

[5] The tragedy of this case does not only lie in the facts but it begins with the strange and erroneous citation of the parties. The applicant is Ba - Mamohlala Projects & Big Mash Construction and Projects (JV), a joint venture between two building contract companies. The first respondent is the Mafube Local Municipality. The second respondent has been cited as "ANY OTHER PERSON OR ORGANISATION ACTING IN ASSOCIATION WITH OR ON THE INSTRUCTIONS OF FIRST RESPONDENT". No relief was claimed against the second respondent and the reasoning behind citing a further (and vague) respondent in this manner was never explained. Considering the statements of the applicant the Municipal Manager should have been cited as the second respondent; he is clearly not only an interested party but also the main official complained against. This presents as a serious and confusing defect in the case for the applicant. The point was not argued and I will leave it there.

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3 Where the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone [S 16(2)(a)(i)]. Save under exceptional circumstances the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs [S 16(2)(a)(ii)]. *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* (245/2017) [2018] ZASCA 012 (8 March 2018).

4 https://study.com/academy/lesson/mootness-legal-definition-doctrine.html on 27 February 2022.

[6] The transcribed record also does not make for good reading.

[7] The law that is applicable on the appealability of the issue of interlocutory orders has been declared upon in numerous cases since the Zweni – judgment (*Zweni v Minister of Law and Order* 1993 (1) SA 523 (A))[5] The Cipla – dictum evolved (*Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and others* 2018 (6) SA 440 (SCA)).

[8] The final word was now spoken in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (1032/2019) [2021] ZASCA 4 (13 January 2021)

The majority Judgment: Sutherland AJA (Cachalia and Mbha JJA concurring):

[7] What is required to render an order appealable is well trodden judicial turf. It is to the law on appealability in this regard we now turn.

[9] … More recently, in Philani-Ma-Afrika v Mailula, the Supreme Court of Appeal had to decide whether an order of the high court which puts an eviction order into operation pending an appeal was appealable. In a unanimous judgment by Farlam JA, the Court held that the execution order was susceptible to appeal. It reasoned that it is clear from cases such as S v Western Areas that "what is of paramount importance in deciding whether a judgment is appealable is the interests of justice." As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice favored by our Constitution. In any event, the Zweni requirements on when a decision may be appealed against were never without qualification. For instance, it has been correctly held that in determining whether an interim order may

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5 *Mannatt and Another v De Kock and Others* (18799/2018) [2020] ZAWCHC 54 (22 June 2020).

be appealed against regard must be had to the effect of the order rather than its mere appellation or form. In Metlika Trading Ltd and Others v Commissioner, South African Revenue Service the Court held, correctly so, that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings it will generally be final in effect. Lastly, when we decide what is in the interests of justice, we will have to keep in mind what this Court said in Machele and Others v Mailula and Others. In that case, the Court had to decide whether to grant leave to appeal against an order of the High Court authorising execution of an eviction order pending an appeal. In granting leave to appeal, Skweyiya J, relying on what this Court held in TAC (1), reaffirmed the importance of "irreparable harm" as a factor in assessing whether to hear an appeal against an interim order, albeit an order of execution: *"The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted".'* (Emphasis added)

[9] Whether irreparable harm will eventuate will depend on the merits of each case. This brings the other hurdle to be jumped by the applicant and that is the leave to appeal itself on the facts of the case.

[10] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Access to justice is access to justice.

[11] Historically the rule was: "In that reasonable prospect exists that another Court, sitting as the Court of Appeal, would come to different findings and conclusions on the facts and the law."[6]

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6 *S v Smith* 2012 (1) SACR 567 (SCA) at [7].

[12] The words "would" and "only" in the current legislation caused some to opinion that the bar for granting leave to appeal has been raised.[7] All it in reality articulates is that the matter must be pondered in depth and with careful judicial introspection. It did not raise the bar because as said, access to justice is access to justice. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal and another court would come to another conclusion.

[13] The final word was spoken recently in the Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021:

> [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. *If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion*

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7 *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021), *Hans Seuntjie Matoto v Free State Gambling and Liquor Authority* 4629/2017[ZAFSHC] 8 June 2017, *K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency (SOC) Ltd* 2021 JDR 0273 (FB).

different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist. (Accentuation added)

[14] The fact remains that *the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court.*[8]

[15] In the instance the words of Binns-Ward, J in the Mannat - case *supra* is eerily applicable to this case:

[9] The decision to strike the principal application in the current matter from the roll for lack of urgency was of a purely procedural character. It did not have any of the three attributes of a 'judgment or order' identified in Zweni. On the basis of the authorities just referred to that counts strongly against it being regarded as appealable. In addition, there are no considerations that would make it susceptible to appeal 'in the interests of justice'. On the contrary, it would be inimical to the interests of justice to permit or encourage the applicants to continue on their misguided path in the current litigation. It is purposeless, and nothing more than an abusive imposition on the court's resources and an unwarranted derogation from the prima facie rights of those of the respondents who are applicant's judgment creditors.

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8 *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC).

[16] The matter served before G.J.M. Wright, AJ. Her term as acting judge lapsed and the matter is thus entertained in terms of section 17(2)(a) of the SC Act read with Rule 49(1)(e) of the High Court Rules in that leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

[17] The hearing happened on 7 September 2021 as an urgent application. On 14 September 2021 it was ordered that:

1. The application is struck off the roll for want of urgency;
2. The Applicant is to pay the First Respondent's costs attendant upon argument of the matter on 7 September 2021, as well as the costs attendant upon the drafting of Heads of Argument and Supplementary Heads of Argument by counsel for the First Respondent.

[18] The claims were as follows:

PART A

1. Directing that the matter be heard as one of Urgency and to dispense with forms and services provided for the Uniform Rules of Court and allowing the matter to proceed as the Urgent Applicant, as is provided for in Rule 6(12) of the Uniform Rules of Court, as per the directions of this Honorable Court;

2. The First Respondent be ordered to remove Advert (Re-Advert), on a Tender of the Construction of a New 12ML Water Concrete Reservoir in Namahadi/Frankfort (Free State), from media sources it advertised, within **3 Hours** of granting the Court order, and copies of confirmation of that removal be filed with Registrar of this Court within **24 Hours**, and be served to the attorneys of the Applicant within that latter period, and same be transmitted by an email.

3. Alternatively, to prayer 2 above, the First Respondent issue a formal Notice to all media sources it advertised the "Re-Advert' on, to immediately suspend all the bidding processes, pending the outcome of Part B of this Application, and copies of confirmation of that suspension Notice be filed with Registrar of this Court within 24 Hours, and be served to the attorneys of the Applicant within the latter period, and same be transmitted by an email.

4. In the event the process of bidding would be at an advance stage at the time of the hearing of Part A of this application, the Court makes an order halting any other subsequent processes, and the First Respondent makes formal contact, at its own costs, to the bidders informing them about this Court order.

5. Order that the First Respondent has the legal and moral obligation to comply with the provisions of Section 217 of the Constitution of the Republic of South Africa, 1996, towards every bidder and/or the Applicant on the Bid No. MAF089/2020/21, in order for the principles of fairness, equitability and transparency to be realized, as it deliberately failed to deal with Applicant' letters sent to it, dated 21st day of July 2021, and the 16th day of August 2021.

6. The First Respondent be ordered to pay the costs of Part A, on a punitive scale.

7. Further and/or alternative relief, as in the circumstances of this Application.

[19] Part B of the Notice of Motion contains prayers which may suitably be referred to as a review application. In essence it wanted to halt the readvertising of the tender pending a review of the first decision of the first respondent.

[20] Apparently the first respondent reviewed themselves and re-advertised the tender. **17 September 2021** was now the closing date for the submission of the bid in issue.

[21] If there were to be any untoward conduct in the first decision process it must be dealt with in the appropriate manner such as an inquiry by the powers that be and disciplinary action and if necessary, criminal proceedings against individuals. The review of the allocation of the re-advertised tender and the original decision could have been concluded by now in our courts. In the stead we are confronted by an application for leave to appeal on the finding on urgency of the Court *a quo.* There were and are alternative remedies available to the applicant and the issue of urgency is no more.

[22] On the **17th of September 2021** the applicant filed a request for reasons in terms of Rule 49(1)(c). The reasons for the order were handed down on 14 October 2021.

[23] On 9 November 2021 an application for condonation for the late filing of the application for leave to appeal was filed; of course, accompanied by the application for leave to appeal. The Registrar of this Court took immediate steps to arrange a date for the hearing of the application. Three dates were supplied to the applicant; 12 February 2022, 19 February 2022 and 25 February 2022. The latest date, 25 February 2022, found their favour. This confirms that urgency is non-existent.

[24] The applicant also graced the Court with a transcribed record of the proceedings of the 7th of September 2021 consisting of 207 pages on the 9th of November 2021.

[25] The application for condonation of the late filing of the application for leave to appeal as decreed in Rule 49 of the High Court Rules explained the reasons for the late filing of the application.[9] The notice had to be filed within fifteen days but was served on 9 November 2021. The reasons for judgment were only handed down almost a month after the order and on 14 October 2021. 9 November 2021 is nineteen court days and 26 calendar days later; this is condonable if the reasons are regarded.

[26] The record was transcribed because it was deemed crucial to decide their way forward by the legal team of the applicants. The transcribers caused a delay. The case for the applicant is one of procedural injustice and inequity and the record is thus important in the perspective of the applicant. The delay could not be attributed to the applicant only. The record is indeed vital for the adjudication of the process the matter followed. The delay was comparatively

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9 Rule 49(1)
(a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.
[Heading of r. 49 substituted by r. 2 of GNR.518 of 8 May 2009.]
(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within 15 days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of 15 days.
(c) When in giving an order, the court declares that the reason for the order will be furnished to any of the parties on application, such application shall be delivered within 10 days after the date of the order.
(d) The application mentioned in paragraph (b) above shall be set down on a date arranged by the registrar who shall give written notice thereof to the parties.
(e) Such application shall be heard by the judge who presided at the trial or, if he is not available, by another judge of the division of which the said judge, when he so presided, was a member.

short in the circumstances. The prospects of success are vital and I entertained the two issues simultaneously before I would make a final ruling.

[27] It is imperative to pinpoint the issues in the case. I will work with the word of the applicant for this. The peripheral white noise that eventuated in the case might cause the administration of justice to fall into disrepute. I will not give any status to it. In paragraph 2.3 of their Heads of Argument served on 17 February 2022 the applicant states as follows:

2.3 In light of the above, the Applicant' main contention is that there has been a serious misapprehension of the material facts of the case; there was further a problem on appreciating the questions of law the Court was called to deal with; procedural unfairness on the part of the Applicant; proper interpretation of the prevailing laws on the matter and the underlying principles read in the Constitution of the Republic of South Africa, 1996. That is the premise of the Application.

[28] Counsel for the applicants conceded in no uncertain terms that his summary of the nature of the dispute and orders sought by the applicant as emphasized in the Practice Note should not be entertained by the Court:

3.1 The Applicant instituted an Application based on the provisions of section 17(1) and 18(1) of the Superior Court Act 10 of 2013, Applicant have further filed an Application for condonation for relative shorter delay in launching its application, and is it clear, that all the requirements, are met.

3.2 Insofar as the Application for leave to appeal is concerned, I am of the considered view that the Applicant' Application have met the legal muster.

3.3 *No proper and/or clear opposition is established by the Respondent in its so-called Notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules, that then offends the provisions contained in Rule 18(4) of the Uniform Rules.* (Accentuation added)

3.4 *In absence of proper opposition*, as required by the Rules, the Respondent' spirited, yet misguided opposition, falls like a deck of cards. (Accentuation added)

3.5 The Applicant have successfully made out a proper case for a relief sought.

[29] The opposition of the application for leave to appeal by the first respondent is the lack of any practical effect any outcome will have. If the facts are considered the case becomes bizarre and one wonders at the purpose of the litigation by the applicant. During the hearing I explained the practical reality of the case to counsel. He agreed with it. I explained that to appeal the finding *a quo* as to the urgency is moot and will have no effect on the real plight of his clients. It will not promote the success of their main application and quandary even if a Court of Appeal finds in their favor. Counsel for the applicant agreed with this.

[30] If the applicants had re-submitted their tender on the extended date, they would have stood a chance to be allocated the tender; if they had enrolled the review to the decision of the Municipality even on the decision of the re-advertised tender in the normal course, the outcome would have been known by now. The applicants now literally spend their money on the urgency issue because they feel that they have been unfairly treated.

[31] Slotting in with this craving for justice is the judgment in the Constitutional Court in *President of the Republic of South Africa v Democratic Alliance and Others* (CCT159/18) [2019] ZACC 35; 2019 (11) BCLR 1403 (CC); 2020 (1) SA 428 (CC) (18 September 2019) wherein a minority judgment penned by Jafta, J agrees with the majority judgment that the matter is moot, but finds

that it is in the interests of justice to interpret rule 53 for guidance of future cases. In finding that it is in the interests of justice to hear this matter, the second judgment holds that a judgment of this Court would have a practical effect on the President and any other party who wishes to review an executive decision. The second judgment further holds that incorrect statements of law in the High Court judgment also favors the adjudication of this matter. It further holds that this matter is of great importance to the public not only because it involves a challenge to the appointment or dismissal from Cabinet that governs the country, but also for the need to clarify procedural rights of a party who wishes to impugn these types of decisions. On the merits, the second judgment holds, that the interpretation of rule 53 requires a look at the language of the rule; the context in which the rule appears; its purpose; and material known to the Chief Justice in 1965 when the rules were made. The second judgment would grant leave to appeal and uphold the appeal.

[32] The facts of this case do not cause any reason to infer irreparable harm, injustice, erroneous factual findings or clarifying of any law. In fact, it will have no practical effect to entertain the decision on appeal. These are the facts that were correctly captured by the court *a quo*:

> [7] As urgency is always the first hurdle which any applicant in an urgent application is to overcome in order to be allowed to proceed to the merits of the application, I indicated to the Applicant's counsel that I am of the opinion that the issue of urgency should be adjudicated, or at least argued, first. He insisted however on arguing the two points in limine before finally addressing me on urgency. This kept us in court for the better part of five hours. It was submitted that, should the points in limine succeed, there would be no opposition left by the First Respondent and that, should the application then fail on urgency, the Applicant cannot (or should not) be ordered to pay the costs of opposition.

[8] In fact, the Applicant and its legal team appeared intent on diverting attention from what should actually be adjudicated by creating and/or venturing into side-issues. Counsel began his argument by complaining about the answering affidavit which was not filed within the shortened time period unilaterally decided on by the Applicant. He highlighted the inconvenience this caused him and the so-called lack of courtesy from the First Respondent's legal team. Regardless, however, a replying affidavit was prepared and filed. In the replying affidavit itself time was spend on complaining about the First Respondent's approach to the proceedings. The personal attacks were unnecessary and wasted time.

[9] Despite the insistence by counsel that he wished to present comprehensive arguments on the points in limine first, he was unable to provide citations (or even the names) of the authorities he was supposedly relying on. It was specifically his submissions relating to the Municipal Manager's lack of authority to depose to an affidavit which present this difficulty. Instead, counsel referred to cases that he "had read" and presented his version of the principles allegedly enunciated therein. Despite a break in proceedings at some stage, counsel still did not provide me with any of the authorities. I requested him to provide my secretary with the citations as soon as possible after I reserved my decision. It took several days before emails arrived with attachments. The plethora of documents so attached were not organized in any way and dealt with all kinds of issues. No attempt was made to indicate which paragraphs counsel wanted to draw my attention to and it appeared to have no relevance to the submissions made by counsel on the alleged lack of authority. This was decidedly unhelpful. As I had an initial inclination to strike the matter of the roll due to lack of urgency and as I was not persuaded otherwise, I proceeded to hand down the order.

[10] Unfortunately, counsel failed to appreciate that a so-called urgent application may be struck off the roll for lack of urgency regardless of the prospects of success on any other issue. The Applicant's counsel may also not have appreciated at the time that I would have raised the issue of urgency even in the absence of opposition. In

fact, the First Respondent would have been entitled to oppose the matter on urgency alone, should they have so decided, and would have been entitled to present arguments on that point even if they did not file any affidavit. Regardless of the merits or demerits of the points in limine, the Applicant needed to convince me that the matter is sufficiently urgent for condonation to be granted and that any urgency there may be has not been self-created.

[11] I concluded that the Applicant failed to convince me that the matter should be heard as one of urgency and that the matter should not be allowed to proceed as an urgent application. Thus, there was no need to adjudicate the points in limine relating to the affidavits filed on behalf of the First Respondent. My decision on urgency was made solely on the Applicant's own founding affidavit and I did not consider any of the facts alleged in the answering affidavit. No decision on either one of the points in limine would have had any effect on the urgency issue.

[12] Due to the approach followed by the Applicant during oral arguments, the parties did not present arguments on the merits of the application, except in as far as it was deemed necessary to amplify submissions relating to urgency.

[13] I proceed to provide my reasons as to why I had ruled that the matter should be struck of the roll for want of urgency.

URGENCY

[14] The Applicant intended with the relief claimed in Part A of the Notice of Motion to seek recourse "against the conduct of the First Respondent, in relation to Construction of a New 12ML Water Concrete Reservoir in Namahadi/Frankfort, Free state, which the Applicant have duly bid for based on all specific requirements of that Bid No. MAF089/2020/21". The bid was advertised on 21 March 2021. The closing date for submitting bids was 30 April 2021. The Applicant submitted a bid but was not informed of the success or failure thereof. On 21 July 2021 the

Applicant's attorney directed a letter to the First Respondent expressing dissatisfaction with the fact that the tender had not been awarded to the Applicant. **The time lapse between 30 April 2021 and 21 July 2021 is not explained in the Founding Affidavit.** (Accentuation added)

[15] The crux of the Applicant's complaints may be gleaned from the letter of 21 July 2021 addressed to the First Respondent by the Applicant's attorneys. The salient paragraphs thereof read as follows:

> 5. . . . our client is aggrieved by the processes and procedures adopted by the Municipality, which led to its exclusion and not being awarded that tender. Our client have (sic) a right in law to be afforded a fair treatment on processes and procedures of awarding a municipal tender or contract.
>
> 6. We are aware that our client had the most favorable bid price on the tender, from all the companies, and we are also aware that our client have (sic) provided all the documentations. Unless proper reasons and basis exists on why our client was not considered as a preferred bidder, then conclusion can be made that the municipal processes on this tender or contract were flawed.
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> 7. It is therefore on the premise of what is stated above that our client affords you 7 calendar days to prove it with written reasons and/or explanation on why it was not considered as a preferred bidder, even when it complies, and in your explanation and/or reasons, provide the entire process that led to it not being considered as preferred bidder, even with its enormous credence.
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> 8. We further hold instructions to report our client' grievance and/or complaint to relevant authorities in the country for a forensic investigation on the tender, and subsequently institute legal proceedings on the matter.

Therefore, your response on all this will dictate our next step without notice to you." [own emphasis]

[16] The letter of 21 July 2021 thus afforded the First Respondent seven calendar days to respond to the Applicant's complaints, failing which the institution of legal proceedings was already contemplated.

[17] On 28 July 2021 the Municipal Manager of the First Respondent responded in quite some detail to the complaints, indicating inter alia the following:

"1. Your letter is premature as no award has been made with regard to the aforementioned tender; hence I am confused how your client reached the conclusion that they were unfairly overlooked for the tender."

[18] **More than two weeks after the response of 28 July 2021** the Applicant's attorney reacted. In the follow-up letter of 16 August 2021, it was averred that – (Accentuation added)

"3. We record that our client and/or us as its legal representatives have not received any further correspondence from the municipality on the outcome of the tender and/or its progress, as advertised and our client accordingly bid. We further record that you have not made any update to our client.

4 . . .. our client expected written reasons and/or explanation, including the entire processes which might have led to it not being considered for the tender. . ..

6. In light of the above, we therefore seek to inform you that our client have undertaken to exercise its rights based on the relevant provisions of the Constitution of the Republic of South Africa, 1996: Promotion of Access to

Information Act No. 2 of 2000; Promotion of Administrative Justice Act No. 3 of 2000, the Uniform Rules of Court; and the Common Law. . ..

7. You are therefore provided 48 Hours, after the receipt of this letter, to properly deal with the concerns raised by our client letter dated the 21st day of July 2021 and your incongruous letter dated the 26th day of July 2021. . .."

[19] Considering the wording of the initial letter of complaint, one cannot resist pondering why a further letter was addressed to the First Respondent if the Applicant was not satisfied with the response. The initial seven days afforded to the First Respondent to provide written reasons and/ or an explanation for why the bid had not been awarded to the Applicant have long since gone and the Applicant, who clearly felt strongly about the matter, should have issued some form of legal proceedings (which they had warned the First Respondent about).

[20] On 19 August 2021 the Municipal Manager addressed another letter to the Applicant's attorneys, indicating that –

"Kindly take note that the Bid Adjudication Committee recommended to the Accounting Officer for the tender for the construction of 12ML concrete water reservoir to be re-advertised . . ."

[21] It is the Applicant's case that this last letter of 19 August 2021 prompted them to have a "series of consultations with the hope of approaching Court on urgent basis". One may have expected some consultation to have been held prior to the first letter from the attorneys or at the latest after the so-called unsatisfactory response was received at the end of July. The Applicant has previously warned of legal action and should have been ready to see the threat through. At all times they indicated to the First Respondent that they intended to approach court should they not receive a satisfactory response.

[22] According to the Applicant they encountered obstacles as they were "not at a sound financial space to can instruct attorneys to brief counsel and launch this Application. As a regard, few counsel were approached, but even if they believed in the case of the Applicant, money was decisive factor for them to accept the instructions." Surely, an applicant who warns another party of possible court proceedings should make the necessary arrangements timeously. In any event, the explanation as to the attempts to obtain the services of counsel is vague.

[23] The financial obstacles may account for the delay since 19 August 2021, but the initial delay remains unexplained. In as far as the Applicant's attorneys were writing letter upon letter without seeing through the threat of court action, this undoubtedly contributed to any urgency which was created. The Applicant could and should have acted earlier. If not as soon as they became aggrieved, then at least as soon as possible after they formed the opinion that the First Respondent is not giving them a satisfactory response.

[24] The Applicant's main complaint is the failure by the First Respondent to award them the tender. It is not explained when they became of this fact. In as far as the Applicant complained of the First Respondent's failure to properly address the letter of 21 July, the application could, and should, have been launched as soon as possible after the expiry of the seven days which had been afforded to the First Respondent (thus shortly after 28 July). Instead, the application was only issued on 26 August.

[25] The Applicant attempted to make out a case that the need to approach court only arose once the letter of 19 August was received (wherein the First Respondent revealed its intention to readvertise the bid). This simply cannot be correct. The Applicant was dissatisfied with the First Respondent and/or its Municipal Manager already prior to that and legal action was already threatened and/or considered at least a month earlier.

[26] A copy of the readvertisement was attached to the founding affidavit. It indicates 17 September 2021 as the new closing date for the bid. The Applicant did not argue that the looming deadline made the matter urgent. In any event, the Applicant could easily have tendered again and waited to see whether they were not lucky the second time around. After the application was struck off the roll there was sufficient time left for the Applicant to tender or to proceed with the review application as contained in Part B of the Notice of Motion.

[27] The Applicant did not act expeditiously and expected the Court to overlook their own delay. To have an application adjudicated on an urgent basis is not as simple as merely asking for the matter to be heard on an urgent basis. An applicant is duty bound to act as soon as possible and to at least explain every portion of any delay, apart from expressly stating why it will not be afforded substantial redress in due course. For example, in regard to the relief claimed in prayer 4 of the Notice of Motion, the Applicant failed to explain how they would have been prejudiced should the bidding process (following the readvertisement) proceed whilst they review the initial failure to award them the tender. Although the Applicant stated in the founding affidavit that "there exist no practical and a realistic substantive redress in due course", they failed to convince me of such.

[28] To reiterate: The Applicant was already dissatisfied with the fact that the initial bid was not awarded to them. That is essentially what they are complaining about. The readvertisement at most added another twist to the situation.

[29] On the Applicant's own version the readvertisement was actually not the kickstart to the court proceedings. Upon receiving the letter of 19 August steps were taken to approach the court, although court action had been considered for some time. On 22 August the services of counsel were obtained. Coincidentally 22 August was also the date on which the bid was readvertised. Thus, the readvertisement was done after the Applicant had already decided to approach the court for relief.

[30] The Applicant would always have been entitled to approach the court with a review application, whether they were successful with the urgent portion of the application or not.

[31] I considered dismissing the application altogether due to the Applicant's problems with urgency. But in deference to the Applicant, I did not go that far. After the application was struck off the roll, the Applicant could always have proceeded in terms of the regular provisions of Rule 6.

[33] The rule is that costs must follow the cause. The Court *a quo* has the discretion in the matter. She considered the situation carefully and her ruling cannot be faulted. She made specific orders to prevent any unnecessary burden be placed on the applicant.

[34] In conclusion, the case of the applicant is a moot one without any practical effect and may not be allowed to go on appeal.

ORDER

The application for leave to appeal is dismissed with costs.

M OPPERMAN, J

APPEARANCES

For the applicant

ADVOCATE P.A. MABILO

Adv.pa.mabilo@gmail.com

NAKEDI BANDA ATTORNEYS

54 MARONE STREET

BURGERSFORT

TEL: 073 227 2726/076 590 5454

Email: info@bandaattorneys.co.za/riringobenie@gmail.com

c/o MADUBA ATTORNEYS

67 PRESIDENT REITZ AVENUE

WESTDENE

BLOEMFONTEIN

Tel: 051 430 7961

EMAIL: nadinem@maduba-attorneys.co.za

For the first respondent

ADVOCATE L.A. ROUX

PEYPER ATTORNEYS

101 Olympus Road

Helicon Heights

BLOEMFONTEIN

Tel: 087 073 9737

Fax: 086 560 2463

everlona@peyperattorneys.co.za

REF: LRadley/ep/