IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: AR691/2017

In the matter between:

KWAFEL CC	**APPELLANT**
and	
KWADUKUZA MUNICIPALITY	**FIRST RESPONDENT**
LAMULA BENJAMIN TRADING CC	**SECOND RESPONDENT**
CIYAJABULA UMHLABA TRADING CC	**THIRD RESPONDENT**
SBUSAHLE TRADING ENTERPRISES CC	**FOURTH RESPONDENT**
TDJK TRADING CC	**FIFTH RESPONDENT**
KISSOONLAL INVESTMENT CC	**SIXTH RESPONDENT**

JUDGMENT

Date Delivered: 16 October 2020

Masipa J

[1] This is an appeal against a judgment of D Pillay J.

[2] In the court *a quo* the appellant had brought an application for an interim interdict, pending the institution of review proceedings. In terms of the interdict an

order was sought to prevent the conclusion of contracts pursuant to a tender process, and to interdict the first respondent from taking any steps to implement the tender or awards.[1]

[3] The court *a quo* dismissed the interdict with costs on the attorney and client scale.

[4] The issues on appeal are:

(a) Whether this court can entertain the merits of the case despite agreement between the parties that the matter is moot.

(b) In the event of this court finding that the matter is moot, can this court make a determination on the punitive costs order made by the court *a quo*.

The facts

[5] The appellant, a close corporation, was previously awarded a tender with the first respondent, a municipality duly constituted in accordance with the Local Government: Municipal Systems Act 32 of 2000 for the cutting of grass and trees and sweeping services. Despite the tender expiring, the services continued until 2016 on a monthly contract. During or about July 2015, the first respondent advertised four different tenders for various wards in respect of services which included those rendered by the appellant. The appellant responded to all four tenders by the closing date on 24 July 2015. According to the appellant, the tender validity period was ninety days in accordance with the first respondent's usual policy failing which the tender would lapse unless extended. This is denied by the first respondent who contends that each tender process is different and that in this instance, there was no mention of the ninety-day period. Accordingly, there was no obligation on the first respondent to finalise the tender process within ninety days. For purposes of determining the identified issues, this is irrelevant.

[6] It was common cause that there was no tender award made before the expiry of the ninety-day period. The appellant contends therefore that the tender bids lapsed. On 22 July 2016, the appellant received notices by email from the first

[1] Appellant's heads of argument

respondent dated 12 July 2016 informing the appellant of the successful bidders being the second to the sixth respondents. It appeared from the correspondence that the tender awards were made on 4 July 2016, a period well over the ninety-day validity period for the bids.

[7] The appellant contends that after the ninety-day period, the first respondent was not authorised to award the tenders and had in doing so, transgressed its own policy. The appellant contends that the impugned tender could only be extended by agreement. The appellant averred that the awarding of the tender bids to the second to sixth respondents transgressed the principles of legality and breached its legitimate expectation. The appellant raised other factors in support of the granting of the relief it was seeking. I will not deal with them as this is not necessary for the determination of the appeal.

[8] The appellant lodged an objection to the refusal of its tender on 1 August 2016. According to the first respondent, the appellant's tender submission was found to be non-responsive by the bids evaluation committee and the bids adjudication committee of the first respondent since the bidders were required to provide a Waste Management Plan, a compulsory requirement to the bid. The first respondent contended that the appellant failed to provide this plan and that accordingly, the appellant lacked *locus standi* to challenge the awarding of the bid. Further, the first respondent contends that there could be no legitimate expectation since the appellant participated in the tender process and knew that the outcome would be the appointment of a successful bidder.

[9] On 20 September 2016, the first respondent advised the appellants that it intended proceeding with the tender awards to successful bidders. On 29 September 2016, the appellant's attorneys sought an undertaking from the first respondent that it would hold the conclusion of contracts with successful bidders in abeyance. The first respondent's response of 30 September 2016 was that the matter was closed. Having established from some of the successful bidders that the first respondent intended concluding contracts with them during the first or second week of October 2016, the appellants approached the court *a quo* as a matter of urgency to be heard on 4 October 2016 for an order that:

‘1.1 The first respondent be and is hereby interdicted and forthwith prevented from concluding any contract with the second to the sixth respondents in terms of contract numbers MN 113/2015, MN 114/2015, MN 122/2015 and MN 126/2015 (“the tenders”) and from taking any steps for the implementation of such tender awards or in furtherance of such tenders;

1.2 The first respondent is hereby directed to forthwith provide the applicant with a copy of the record of the tender adjudication and bid process as well as a copy of the record of the proceedings in respect of the applicant’s objection;

1.3 Any party opposing this application is directed to pay costs;

1.4 Further and/or alternative relief.’

[10] The first respondent contended that there was no prejudice suffered by the appellant and that the appellant failed to demonstrate a prima facie right with the result that its application should be dismissed with costs alternatively that it be struck off from the roll with a punitive costs order. The order granted by the court *a quo* is set out earlier in this judgment.

[11] It was apparent from the relief sought by the appellant that the order sought was one interdicting the first respondent from finalising the agreements regarding the awarding of the tender. This was what the court *a quo* was called upon to determine at the time. It appears, however, that when the matter was argued, that mention was made of a review process and the court *a quo* engaged counsel for the appellants on the issue and the appropriate prescripts to follow in respect of the review. There were of course no review proceedings initiated at that stage and none were initiated at a later stage.

[12] The issue of the review continued to appear and to be dealt with in the judgment by the court *a quo*, with the court mentioning that the appellant and its junior counsel followed an incorrect procedure in respect of the review. The court *a quo* found that the appellant’s tender was rejected due to non-compliance with tender specifications. The result of such failure was that the appellant lacked *locus standi* to challenge the awards. The court further found that the appellants had to take responsibility for its grounds for challenging the award. Further, that according to the appellants, the flaws occurred from the outset. That being so, the court *a quo*

found that the appellants should have stopped the tender process immediately instead of allowing the process to run to finality and then objecting thereafter. While the court *a quo* considered making a *de bonis propriis* cost order against the appellant's junior counsel, it did not, and simply dismissed the application with costs on an attorney and client scale.

[13] In its written heads of argument the appellants addressed the issue of *locus standi* and argued that the court *a quo* was wrong to determine the matter as it did. According to Mr *Pillemer* SC, for the appellant, the court *a quo* ought to have considered the issue of own interest standing as set out in s 38(a) of the Constitution. Reliance was also made to *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 BCLR 251 (CC) and *Premier KwaZulu-Natal & others v KwaZulu-Natal Gaming and Betting Board & others and a related matter* [2019] 3 All SA 916 (KZP). In reply, Mr *Troskie* SC argued that the issue of own interest standing was not considered by the court *a quo* as it had not been raised. He relied on *Giant Concerts* and *Tupac Business Enterprises CC v The Chairperson KwaZulu-Natal Gaming and Betting Board* 2018 JDR 2052 (KZP) to support the contention that a non-responsive party has no interest in the outcome of the tender since it would not be entitled to an award.

[14] It became common cause between the parties that the tender contracts were awarded for a period of two years with an option to be renewed for another year. The contracts commenced in July 2016. The appeal was being argued approximately four years after the contracts were concluded between the parties and the services rendered in accordance with those contracts. Consequently, it was submitted by Mr *Troskie* that the relief sought by the appellant was academic.

[15] When the appeal was argued, the issue of mootness of the matter was raised with counsel. Mr *Pillemer* argued that there were still live issues since the court *a quo* had misdirected itself in that it did not consider the issue of own interest. He argued that if this court were to find that the court *a quo* was wrong, then it should set aside the judgment of the court *a quo* which is binding on the lower courts. The judgment deals with a live issue which arises frequently. He argued that the decision by the court *a quo* was on a legal issue of own interest standing which is now the

law. Regard must be had to the nature and extent of the practical effect and the importance of the case.

[16] In respect of costs, he argued that awarding a punitive costs order meant a litigant had done something wrong. There was nothing on the papers to suggest that junior counsel did anything wrong save to draft papers, yet the court *a quo* considered making a punitive cost order against him. He submitted that there was nothing on the papers to suggest that the case was not arguable. He argued that the issue relating to costs was also a live issue which needed to be set aside. He relied on *Giant Concerts*. He argued that there were good reasons for this court to deal with the matter in its totality even if the main issue has become moot. In support of his argument that we can interfere with the exercise of the court *a quo*'s discretion on costs even if we find that the matter is moot. Mr *Pillemer* relied on a costs order issued by the Supreme Court of Appeal in *South African Clothing and Textile Workers Union (SACTWU) v ABSA Bank Limited* Appeal Case no: 20281/2014 (17 September 2014) where, having dismissed the appeal on the basis that the order sought to be appealed against was not appealable, the court granted leave to appeal against a punitive cost order.

[17] Mr *Troskie* submitted that the case was indeed moot. He relied on *Resultant Finance (Pty) Ltd v Head of Department for the Department of Health, KwaZulu-Natal* 2020 JDR 1396 (SCA) para 29 where the court stated as follows:

'I consider next whether this appeal should be decided despite the issues on the merits being moot. The judgment of the Constitutional Court in *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Ltd and Others* is instructive. The Constitutional Court re-affirmed that mootness is not an absolute bar to the justiciability of an issue. Following a careful analysis of the principles applicable to mootness and the attendant discretion to deal with matters despite their mootness, it enumerated factors that should form part of that enquiry. These include:

'(a) whether any order which it may make will have some practical effect either on the parties or on others;

(b) the nature and extent of the practical effect that any possible order might have;

(c) the importance of the issue;

(d) the complexity of the issue;

(e) the fullness or otherwise of the arguments advanced; and

(f) resolving the disputes between different courts.'

[18] He argued that there was no precedent set by the court *a quo* since there were many cases which state that if the tender is non-responsive, then the award may not be challenged. It was submitted that when leave to appeal was granted in 2017, the issue was still live since the contract was still in operation.

[19] As regards costs, he submitted that this was a live issue as an ancillary matter. He argued however that the issue of costs could not be separated from the merits. Further, that the appellants raised a new issue during the appeal which was not placed before the court *a quo*. It was argued that when a cost order is the subject of an appeal, it must be noted that a cost order is discretionary. The question is whether the costs order was capriciously granted. Disagreeing with how the court *a quo* dealt with the matter did not justify interfering with the cost order imposed. If however the court found the issue of costs to be separable from the merits, he submitted that an appropriate cost order would be to award costs on a party and party scale.

Mootness

[20] The issue of mootness was aptly dealt with by Mogoeng CJ in *President of the Republic of South Africa v Democratic Alliance & others* 2020 (1) SA 428 (CC), *('the Democratic Alliance*'). Having considered the provision of s 16(2)(*a*)(i) of the Superior Courts Act, 10 of 2003, Mogoeng CJ stated the following:

'[17] This would ordinarily put an end to this application. But, this court has the discretionary power to entertain even admittedly moot issues. In *Langeberg* we said that we have —

"a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require." [*Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC)]

[18] And in *Shuttleworth* we said —

"to the extent that it may be argued that this dispute is moot . . . this court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this court from hearing this dispute. Instead, it is the interests of justice that dictate whether we should hear the matter." [*South African Reserve Bank and Another v Suttleworth and Another* 2015 (5) SA 146 (CC)].

[19] It is only when the constitutional threshold requirement for entertaining moot applications is met, that the President's application would be allowed. And that is the interests of justice standard. The question then arises whether it is in the interests of justice for this court, in the exercise of its discretion, to entertain the appeal against the admittedly moot interlocutory order.'

[21] In order to prove the interest of justice in *Democratic Alliance*, the appellant argued as follows:

'The President still contends that —

(a) extending the scope of rule 53 to executive functions is an impermissible encroachment into the executive domain, more specifically the exclusive terrain of the Rules Board;

(b) it is a ground-breaking development or a novelty; and

(c) there is a need for certainty in relation to the obligation to disclose reasons for future cabinet reshuffles and the relevant part of the record that formed the basis upon which such decisions were taken.'

[22] While *Democratic Alliance* may be construed as dealing specifically with cases before the Constitutional Court, Similar sentiments were shared in *Women in Capital Growth (Pty) Ltd and Another v Scott and Others* (1193/2019) [2020] ZASCA 95 (20 August 2020) *where the following was stated:*

'[15] I proceed to consider the issue of mootness. If there are no longer live issues between the parties, then the appeal has no practical effect and the matter is moot. Section 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013 provides that where the issues in an appeal 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. The point of principle has been formulated as follows: 'This principle is based on the notion that judicial resources should be efficiently employed and not be used for advisory opinion or abstract propositions of law.' (Footnotes omitted.)

[23] In the current matter, the issue which Mr *Pillemer* seeks this court to deal with for purposes of ensuring precedent and to set aside bad precedent is an issue which arises frequently in the tender processes. The court in *Tupac Business Enterprises CC* pronounced on the issue on non-responsive tenders. Accordingly, the need to set aside that which is termed bad law is an insufficient reason to justify this court exercising its discretion to hear the matter. I agree with Mr *Troskie* that the interests of justice do not necessitate this similar to *Women in Capital Growth*, I am of the

view that this matter is of no precedential significance. The matter is moot and does not call for this court to make any determination on the merits of the matter.

Costs

[24] The court *a quo* granted costs against the appellant on the attorney and client scale. The reasons for the costs order appear to be linked to the court *a quo*'s opinion that the appellant should be punished for its failure to first request reasons in terms of s 5 of the Promotion of Administrative Justice Act 3 of 2000 and for following the wrong procedure. It was argued by Mr *Pillemer* that the reasons by the first respondent that were relevant to the interim order sought had already been given and thus it would not have made sense to ask for further reasons.

[25] In order for this court on appeal to interfere with the court *a quo*'s finding, it must be satisfied that it was influenced by wrong principles or a misdirection on the facts. In this regard, the court in *Limpopo Legal Solutions & another v Eskom Holdings Soc Ltd* 2017 (12) BCLR 1497 (CC) para 20 stated the following:

'A costs award, of course, falls within a court's discretion. An appellate tribunal cannot willy-nilly intervene. The grounds for interfering are limited. Khampepe J aptly summarised the applicable standard:

"When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—

'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'"

[26] As to the circumstances in which an award of costs on an attorney and client scale should be granted, the court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 8 stated:

'Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. As correctly stated by the Labour Appeal Court —

"(t)he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."'[2]

[27] While the appellant's argument appears to be convincing, as to the punitive costs order by the court *a quo,* the test on appeal as stated in *Public Protector* para 144 is that:

'Ordinarily, it would be inappropriate for an appeal court to interfere in the exercise of a true discretion, unless it is satisfied that the discretion was not exercised judicially, the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. There must have been a material misdirection on the part of the lower court in order for an appeal court to interfere. It is not sufficient, on appeal against a costs order, simply to show that the lower court's order was wrong.'

[28] In *Women in Capital Growth* dealing with the issue of costs, the court stated the following

> '[27] ….. The costs that were referenced are those ordinarily incurred by parties who engage upon litigation of commercial importance in urgent circumstances. No exceptional circumstances were disclosed. Hence this court, in terms of s 16(2)(a)(ii), cannot attach any weight to the costs incurred as a basis to hold that our decision on appeal would have a practical effect or result.'

[29] In order for this court to interfere, it would be necessary that we consider the merits of the application and to arrive at the conclusion that the order was influenced by wrong principles or that there was a clear misdirection by the court a quo. Since we are of the view that this is not justifiable and required in this instance, we will not venture on the issue and interfere with the discretion by the court *a quo*. There are also no exceptional circumstances for this court to interfere with the discretion of the court *a quo.*

[30] In the circumstances, I make the following order:

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[2] The Labour Appeal Court judgment cited was *Plastic Converters Association of South Africa (PCASA) v National Union of Mineworkers Union of South Africa & others* (JA112/14) [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) (6 July 2016).

The appeal is dismissed with costs.

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MASIPA J

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BALTON J

I agree

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HADEBE J

I agree

APPEARANCE DETAILS:

For the Appellant:	Mr M Pillemer SC
Instructed by:	Nirvan Kawulesar & Company 20 Gizanga Street KwaDukuza
For the First Respondent:	Mr AJ Trotskie SC
Instructed by:	Livingstone Leandy Inc. 309 Umhlanga Rocks Drive La Lucia Ridge
Matter heard on:	31 July 2020
Judgment delivered on:	16 October 2020