THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 918/10

DESMOND WHITE — Appellant

and

CITY OF CAPE TOWN — Respondent

Neutral citation: ***White v City of Cape Town*** **(918/10) [2011] ZASCA 212 (29 November 2011)**

BENCH: **PONNAN, SNYDERS, LEACH, MAJIEDT JJA and PETSE AJA**

HEARD: **10 NOVEMBER 2011**

DELIVERED: **29 NOVEMBER 2011**

SUMMARY: **Appeal - s 21A of the Supreme Court Act – power of court to dismiss appeal where judgment or order sought will have no practical effect or result.**

ORDER

On appeal from: Western Cape High Court (Cape Town)
(Thring J sitting as court of first instance).

The appeal is struck off the roll with costs.

JUDGMENT

PONNAN JA (SNYDERS, LEACH, MAJIEDT JJA and PETSE AJA concurring):

[1] This case is about water, or more accurately, about a water tariff policy adopted by the respondent, the City of Cape Town (the City), which the appellant, Mr Desmond White, a resident of a block of flats in Seapoint, Cape Town, alleges unfairly discriminates against flat dwellers such as himself. By the time the matter served before this court though, one suspected, to borrow loosely from an idiom, that the water may already have passed under the bridge. And so, after heads of argument on the merits of the appeal had been filed, this court addressed a directive to the parties calling for further heads and informing them that at the outset of the hearing of the appeal they would be required to address argument on the preliminary question of whether the appeal and any order made thereon would within the meaning of s 21A have any practical effect or result.

[2] Section 21(A)(1) of the Supreme Court Act 59 of 1959 provides:

'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

The primary question therefore, one to which I now turn, was whether the judgment sought in this appeal would have any practical effect or result. It arises against the backdrop of the following facts.

[3] During June 2009 Mr White applied to the Western Cape High Court for the following declaratory orders:

(a) that the City has contravened ss 74(3), 74(1)(a) and 74(1)(b) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') in that it allegedly charges residents of flats and domestic cluster complexes 'considerably more' for water than residents of single dwellings (paragraph 1 of the notice of motion);

(b) that the City has imposed on residents in flats and domestic cluster complexes 'an unfair and discriminatory' tariff for solid waste removals since there is a minimum charge based on one third of the residential units, irrespective of whether the City's services for removal of the bins is used and irrespective of the number of bins that are used (paragraph 5 of the notice of motion); and

(c) that those sections of the City's Tariff Policy relating to water and sanitation costs and solid waste removal costs be declared 'null and void and of no force and effect' (paragraph 7 of the notice of motion).

[4] The thrust of the appellant's case in the high court was that the City charged flat dwellers, such as himself, more than home dwellers for water, which, so he suggested, was unlawful. The appellant accordingly contended that by having different water tariffs for flat dwellers to that of house dwellers, the City's 2009/2010 tariff policy which was approved by the City on 27 May 2009 contravened the prohibition against unfair discrimination contained in s 74 of the Local Government: Municipal Systems Act 32 of 2000. In the court below the appellant also challenged the City's differential tariff for refuse removal. But that is not on appeal before us.

[5] Thring J, who heard the application in the high court, dismissed it on 31 May 2010 with costs, but granted leave to the appellant to appeal to this court.

[6] The policy sought to be impugned in this matter was to have been operative only until 30 June 2010. In an answering affidavit filed on behalf of the City it is stated:

'The impugned policy will be in operation only until 30 June 2010. Accordingly, by the time this matter is likely to be heard, the relief sought by the plaintiff will be moot.'

The point was reiterated somewhat more forcefully on behalf of the City in the court below in opposition to the application for leave to appeal in these terms: .... 'by the time the appeal is determined, the issue would be academic. The application relates only to the 2009/2010 budget and the tariff policy will be in operation only until 30 June 2010. An appeal which will have no practical effect may be dismissed for that reason alone in terms of s 21A(1) of the Supreme Court Act.'

Having been forewarned by the City it could thus hardly have come as a surprise to the appellant when this court invited additional heads of argument and oral argument at the outset of the hearing of the appeal on the preliminary question of whether the appeal and any order made thereon would, within the meaning of s 21A, have any practical effect or result.

[7] Of s 21A this court stated in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 7:

'The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing.'

Courts should and ought not to decide issues of academic interest only. That much is trite. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA), this court expressed its concern about the proliferation of appeals that had no prospect of being heard on the merits as the order sought would have no practical effect. It referred to *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) at para 26 where the following was said:

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle . . . that Courts will not make determinations that will have no practical effect.'

[8] This principle is common also to other systems. As Plewman JA observed in

Coin Security (para 7):

'It has particular application in Courts of appeal. The attitude of the House of Lords is illustrative of this. What that Court has held is that it is an essential quality of an appeal (such as may be disposed of by it) that there should exist between the parties to the appeal a matter "in actual controversy which (the Court) undertakes to decide as a living issue". See *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 (HL) at 471A-B. This phrase accurately states the standpoint of our Courts. It is a principle consistently adopted by this Court and the other Courts in the Republic.'

In a similar vein in *Radio Pretoria* (para 41), Navsa JA said:

'Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise (see the *Coin Security* case (*supra*) at paragraph [7] (875A-D)).

[9] Reverting to the facts. In reply to the assertion in the City's answering affidavit that the relief sought would be moot, Mr White stated:

'The City has the option to amend the water and sanitation tariffs for flats with effect from 1 July 2009. Having only challenged this tariff in April 2008 Applicant feels it has been more than reasonable in only asking for relief in the current financial year. It would have been possible to ask a Court to declare the water and sanitation tariffs for the last three years to be unfair and invalid.'

As that makes plain Mr White was content to restrict himself to relief in respect of what he described as the 'current financial year'. Moreover, he had restricted himself solely to declaratory relief posited on the notion that the City's tariff policy for that particular financial year was discriminatory. But even were it to be found that the policy was indeed discriminatory as was urged upon us in argument that would hardly assist any other potential litigant intent upon embarking upon a similar future challenge. For, as the City pointed out:

'The City is committed to further analysis of its tariff structures to decide what adjustments need to be made in subsequent years. This process of investigation and adjustment is in any event part of the normal annual budget process. The fact that the City is considering making adjustments to its Tariff Policy does not amount to a concession that its current Tariff Policy is unfairly discriminatory. The City is entitled to select a Tariff Policy from a range of options which do not discriminate unfairly.'

[10] Recently in *Clear Enterprises (Pty) Ltd v SARS* (757/10) [2011] ZASCA 164 (29 September 2011) para 19 this court stated:

'But as Innes CJ observed in *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441:

"After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21 footnote 18, the Constitutional Court echoed what the learned Chief Justice had stated over eight decades earlier when it said:

"A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law." '

[11] Nothing that has been said by or on behalf of the appellant[1] in his additional heads of argument or on his behalf by counsel from the bar before us has caused us to think that the determination of the appeal will have a 'practical effect or result' within the meaning of s 21A.

[12] That leaves costs. Thring J gave anxious consideration to the nature of the litigation and the relative positions of the parties before ordering Mr White to pay the City's costs in the high court. It has not been suggested that he misdirected himself in any way. Accordingly, no warrant exists for this court to interfere with the exercise of the learned judge's discretion in that regard. Counsel sought to persuade us that Mr White should not be mulcted with the costs of the appeal, essentially because as he put it: first, Mr White, who is retired, was litigating in the public interest; and, second, the City has deep pockets.

[13] As to the first: the City contended that it had adopted a policy that was rationally related to the purpose sought to be achieved by it, namely the supply of piped water to the largest number of its citizens at the lowest aggregate price. Accordingly, were flat dwellers in the position of Mr White to have been charged less than the rate fixed in its tariff then, so it was contended by the City, funds would have to be diverted from the City's poorer residents resulting in them having to subsidise their richer compatriots. Furthermore, so the contention went, any under-recovery would impact negatively on the service delivery targets that the City has set for itself. Thus that others similarly

1 The appellant conducted the litigation in person in the high court and initially before this court as well. It was only approximately one week prior to the hearing of the appeal and after his main and supplementary heads had been filed that a firm of attorneys and counsel were instructed by the appellant.

placed to Mr White may possibly benefit financially - which was in any event strenuously disputed by the City - does not, without more, mean that the litigation was indeed in the public interest. From the City's perspective it patently was not. It is so that Mr White litigated for the greater part in person. But he had been forewarned by the City, not just once but twice, that it was of the view that the appeal was moot. Nor did the directive from this court give him pause for reflection. Undeterred he persisted in the appeal. Whilst that is his right it is not without its consequence.

[14] As to the second: Mr White has involved the City in long drawn out and costly litigation. Our administrative arms of State are saddled with a difficult enough task. They usually have comparatively meagre resources at their disposal as against huge demands on the public purse that they are called upon to administer. It is inexcusable that the City should have been forced to fritter away its scarce resources in defending a claim such as this (see *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* (518/09) [2010] ZASCA 128 (30 September 2010) para 32). Moreover, it bears noting that the principle involved cannot be viewed solely *inter partes*. Cases such as this serve to unnecessarily clog the roll of this court with matter that does not require its attention. The domino effect is that cases of greater complexity that are truly deserving of the attention of this court are left having to compete for a place on the court roll with a case which is not. It follows that there is no reason why costs should not follow the result in the appeal.

[15] For the aforegoing reasons, after hearing argument on the issue the matter was struck off the roll with costs, it being intimated then that these reasons would follow.

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V M PONNAN
JUDGE OF APPEAL

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