IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MAKANDA

CASE NO: C.A.&R: 94/2021

DATE HEARD: 31 JANUARY 2022

DATE HANDED DOWN: 10 FEBRUARY 2022

In the matter between:

BAYETHE PROJECTS CC	**APPELLANT**
and	
THE NELSON MANDELA BAY MUNICIPALITY	**1ST RESPONDENT**
BRONSCOR CC	**2ND RESPONDENT**

FULL COURT APPEAL JUDGMENT

D VAN ZYL DJP:

[1] This appeal has raised for consideration the costs of an appeal that has no practical effect or result as envisaged in section 16(2)(a)(i) of the Superior Courts Act[1] (the Act). In the court a quo (the Court), the appellant (Bayethe), as applicant, sought the judicial review and setting aside of the decisions made by the first respondent (the Municipality) pursuant to its invitation for tenders from interested parties to undertake "Mechanical Infrastructure Services" consisting primarily of the maintenance of, and repairs to its waste and water treatment works in three separate areas.

[2] Bayethe submitted tenders in respect of all three areas. Bayethe's tender bids were found not to comply with the tender specifications and was declared to be non-responsive. The second respondent (Bronscor) tendered in respect of Area 1. It was

[1] Act 10 of 2013.

successful and was awarded the tender. A contract was subsequently concluded between it and the Municipality. No awards were made in respect of Areas 2 and 3.

[3] In its amended notice of motion Bayethe sought the review and setting aside of the decisions of the Municipality: (a) to cancel the tender in respect of Area 2; (b) to declare the tender offer of Bayethe non-responsive in respect of Areas 1 and 2; (c) to award the tender to Bronscor in respect of Area 1, and further, the substitution of those decisions by the award of the tenders in respect of Areas 1 and 2 to Bayethe; alternatively, that the award of the tenders be remitted to the Municipality for its reconsideration.

[4] At the hearing of the matter before the Court Bayethe limited the relief sought in respect of Area 1 to a review and setting aside of the decision to award the tender to Bronscor, and an order remitting the matter to the Municipality for reconsideration. The reason for it no longer asking that the tender for Area 1 be

awarded to it, was Bayethe's acknowledgement in its replying affidavit that its own bid was non-responsive for Area 1. In respect of its tender for Area 2, Bayethe asked the Court to set aside the decision of the Municipality to cancel the tender and to award the tender for Area 2 to it; alternatively, that the matter be remitted to the Municipality for its reconsideration. The Municipality in turn asked the Court to set aside its own decision to award the tender for Area 1 to Bronscor, the submission being that Bronscor's bid, like that of Bayethe, did not comply with the tender specifications, and that it should similarly have been found to be non-responsive. With regard to the tender for Area 2, the Municipality defended its decisions not to award it to Bayethe, and to subsequently cancel the tender for Area 2.

[5] The Court dismissed the application and ordered Bayethe and the Municipality, jointly and severally, to pay Bronscor's costs of the application. Bayethe was granted leave to appeal the judgment. Its grounds of appeal, which are relevant for present purposes, are that the Court erred (a) by failing to deal with the relief sought by it in respect of the tender for Area 2, and (b), by ordering Bayethe

to pay Bronscor's costs of the application. The appeal was accordingly essentially limited to the costs order, and what was said to be the failure of the Court to determine the issue raised in respect of Area 2.

[6] The Municipality subsequently lodged a cross appeal against the order of the Court. It asked that the order of the Court be set aside, and that it be substituted with an order:

> **"1.1 That the decision of the First Respondent to accept the offer of the Second Respondent to provide the tendered services for Area 1 under Tender Number SCM/18-46/S be reviewed and set aside;**
>
> **1.2 That the Second Respondent is to pay the First respondent's costs.**

2. That the Second Respondent is to pay the costs of the cross appeal."

[7] Shortly before the hearing of the appeal, the Municipality withdrew its cross-appeal and tendered, **"the Applicant's taxed or agreed party and party costs in relation thereto."** The reference to the **"Applicant"** is obviously a typographical error. The cross appeal was limited to relief which only affected the interests of Bronscor in the tender for Area 1, and the tender of costs was clearly intended to be in respect of Bronscor's costs of the cross appeal.

[8] The reason for the Municipality's withdrawal of the cross appeal is its concession that the issue raised therein with regard to the decision to award the tender in respect of Areas 1 to Bronscor, will have no practical effect or result as contemplated in section 16(2) (a) (i) of the Act. In terms of this section of the Act, when at the hearing of an appeal the issues raised are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed

on that ground alone. This section gives effect to the fundamental feature of our judicial process that the courts decide disputes between the parties before them, and will not pronounce on abstract questions of law or hypothetical statements of fact where there is no live dispute to be resolved.[2] At the hearing of the appeal all the parties were *ad idem* that a decision on the issue raised in Bayethe's appeal with regard to the tender for Area 2, will similarly have no practical effect. The concessions were correctly made. The reason for this is that the contracts that were to be entered into by the Municipality with the successful tenders, were limited to a period of three years. The contract period expired in August 2021, approximately five months before the hearing of the appeal.

[9] Section 16(2)(a)(ii) provides that the question as to whether a decision would have practical effect or result is, save under exceptional circumstances, to be determined without reference to any consideration of costs. The costs referred to in

[2] See the authorities referred to in Legal Aid South Africa v Magidiwana and Others (1055/2013) [2014] ZASCA 141 (26 September 2014) at para [26].

this provision are the costs incurred in the Court against whose decision an appellant is seeking to appeal, not the costs in the appellate Court. **"The section is concerned with the decision of the Court a quo and the circumstances in which the appeal against the decision of that Court can be dismissed without an enquiry into the merits. If the costs incurred in the Court a quo were very substantial, this might constitute an exceptional circumstance leading to the conclusion that a reversal of that Court's decision would have practical effect."**[3]

[10] In the present matter there are no exceptional circumstances which will justify a reassessment of the costs order made by the Court. Bayethe chose not to appeal the findings of the Court in relation to its unsuccessful tender for Area 1 on which the Court premised its finding that Bayethe and the Municipality should not be liable for Bronscor's costs incurred by it in having to defend the validity of the tender awarded to it. The finding of the Court was that in light of the fact that Bronscor materially complied with the tender specifications, and that it had been rendering the

[3] John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another **(John Walker Pools)** 2018 (4) SA 433 (SCA) at para [8].

required services in terms of the contract concluded with the Municipality pursuant to the award of the tender to it, it would not be just and equitable in the circumstances to set aside the award in respect of Area 1. With regard to the Municipality's request that the award of the tender to Bronscor for Area 1 be set aside, the Court found that without a substantive application having been made by the Municipality, it was not open to it to ask for such relief.

[11] There is no merit in the submission on which Bayethe premised its appeal against the costs order. The submission was in essence that because the Municipality had conceded that the award in respect of Area 1 ought to be reviewed and set aside, there was no reason why Bayethe should have been ordered to pay Bronscor's costs of the application jointly with the Municipality. Subject to the principle that the court has a judicial discretion in awarding costs, the general rule is that the successful party in litigation is entitled to his or her costs.[4] Bayethe brought Bronscor to Court in a bid to have the decision to award the tender for Area 1 to it set aside. To this

[4] Griffiths v Mutual and federal Insurance Co Ltd 1994 (1) SA 535 (A).

extent, the Municipality made common cause with Bayethe in its answering papers by contending that the contract entered into with Bronscor was invalid, in that its tender, like that of Bayethe, should similarly have been found to be non-responsive. Bronscor successfully defended the matter. Bayethe elected not to appeal the findings of the Court in dismissing its application in respect of Area 1, and the Municipality in turn withdrew its appeal in relation to the tender for Area 1.

[12] The only question is consequently whether there was any reason to depart from the usual order. Having been unsuccessful in what was effectively a joint attempt by Bayethe and the Municipality to have the award of the tender to Bronscor set aside, there is no good reason why they should not be jointly liable for the costs of the application.[5] It cannot in my view be said that in the circumstances the Court

[5] Minister of Labour and Others v Port Elizabeth Municipality 1952 (2) SA 522 at 537 G; Maclean v Haasbroek NO and Others 1957 (1) SA 464 (A) at 417 A and Davies v Gordonia Liquor Licensing Board and Others 1958 (3) SA 449 (A) at 457 B - C.

failed to exercise a proper and judicial discretion,[6] and Bayethe's appeal against the costs order must be dismissed, with the costs of the appeal to follow the result.

[13] There accordingly exists no reason to continue the appeal for the sole purpose of resolving the issue of the costs of the application. The issues raised by the appeal are generally factual in nature. There being no question of law or other issue of importance that is raised, there exists no reason for this Court, in the exercise of its discretion, to allow the appeal to proceed on the merits.[7] The appeal therefore falls to be dismissed as envisaged in section 16(2)(a)(i) of the Act. That leaves the costs of the appeal against the decision of the Municipality not to award the tender for Area 2 to Bayethe, which had become moot. The principles applicable to costs in original proceedings apply equally to the costs of an appeal.[8] This falls within the discretion of the appellate court, to be exercised judicially on a consideration of all

[6] See Merber v Merber 1948 (1) SA 446 (A); Cronje v Pelser 1967 (2) SA 589 (A) and Beinash v Wixley 1997 (3) SA 721 (SCA) at 739 G – H.
[7] The Merak S: Sea Melody Enterprises SA v Bulktrans 2002 (4) SA 273 (SCA) at para (4) and ABSA Bank Limited v Van Rensburg and Another; In Re: ABSA Bank Limited and Another 2014 (4) SA 626 (SCA) at para [8].
[8] Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court Appeal of South Africa 5th ed at page 1010.

the facts.[9] In considering how to exercise its discretion the starting point for the court is that the appeal has been unsuccessful, and the successful party is entitled to an order for costs. The question that is raised is therefore whether there exists any reason to depart from the general rule that Bayethe, as the unsuccessful party, must be ordered also to pay the costs of the Municipality.

[14] The question is essentially whether, having regard to all the circumstances and how it would affect the parties, an order that Bayethe should pay the costs of the appeal would be unjust. Each case will turn on its own circumstances and there should be no limit to the types of circumstances which may, in a particular case, make it unjust that the usual order should follow. Some of the considerations which may be relevant are the reasons for, and the stage at which the appeal had lost its utility; when the parties became aware, or could reasonably have been expected to become aware of that fact; the steps taken by primarily the appellant who is *dominus litis*, to avoid the unnecessary expenditure of costs and court time; the need not to

[9] Blou v Lampert and Chipkin NNO and Others 1973 (1) SA 1 (A) at 15 E – F.

discourage parties from settling proceedings at an early stage by the making of adverse costs orders; and the impact of the order of costs on the appellant that may be disproportionate when weighed against his or her prospects of success, had the appeal been decided on the merits. The extent to which the latter consideration may ask of the Court to look into the merits of the appeal, will depend on the circumstances of the case, not least the amount of costs at stake, the conduct of the parties, and the fact that the issues are moot. The prospects of success of the appellant on the merits of the appeal may be of little significance when weighed against other relevant considerations. The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs. As stated, ultimately each case will turn on its own circumstances.

[15] In John Walker Pools the court explained these aspects as follows:[10]

[10] Supra fn 2.

"Where an appeal or proposed appeal has become moot by the time leave to appeal is first sought, it will generally be appropriate to order the appellant or would-be appellant to pay costs, since the proposed appeal was stillborn form the outset. Different considerations apply where the appeal or proposed appeal becomes moot at a later time. The appellant or would-be appellant may consider that the appeal had good merits and that it should not be mulcted in costs for the period up to date on which the appeal became moot. The other party may hold a different view. As a general rule, litigants and their legal representatives are under a duty, where an appeal or proposed appeal becomes moot during the dependency of appellate proceedings, to contribute to the efficient use of judicial resources by making sensible proposals so that an appellate Court's intervention is not needed. If a reasonable proposal by one of the litigants is rejected by the other, this would play an important part in the appropriate costs order. Apart from taking a realistic view on prospects of success, litigants should take into account, among other factors, the extent of the costs

> **already incurred; the additional costs that will be incurred if the appellate proceedings are not promptly terminated; the size of the appeal record; and the likely time it would take an appellate Court to form a view on the merits of the moot appeal. There must be a proper sense of proportion when incurring costs and calling upon judicial resources."**[11]

[16] In the present matter, there exists in my view no reason to find that the usual order as to costs would be unjust in the circumstances. Bayethe, being the appellant, could have avoided the costs of the appeal. It must have been evident to Bayethe at an early stage that the prospects were slim that the appeal process would be finalised before the expiry of the relevant contract period. It manifestly took no steps to prevent the continuation of the appeal before and after it had become moot. In a matter such as the present one, where judicial review is a discretionary remedy, and the utility of the relief sought is determined by, and limited to a specific time period, it is advisable for the appellant to consider carefully whether or not it is sensible in

[11] At para [10].

the light of intervening events and the passage of time, to continue to pursue the appeal. If it is not, then whatever may have been the merits at the time of the application for leave to appeal, an attempt should be made to come to terms with the respondent(s) and to discontinue the proceedings.

[17] A further consideration which is relevant in the present circumstances is that Bayethe's appeal against the dismissal of the relief claimed in respect of Area 2, has no reasonable prospects of success. Bayethe's grounds of appeal in relation to Area 2 were limited to the Court having erred in failing **"to deal with the distinct relief sought by the Appellant in respect of Area 2,"** and **"to deliver judgment in respect of the relief sought by Appellant in respect of Area 2."** The Court dismissed the application as a whole. That would include the relief sought by Bayethe in relation to both Areas 1 and 2. On a reading of the judgment of the Court, it would appear that it dealt with the portion of the relief sought by Bayethe in respect of Area 2 on the basis that the Municipality was found to have cancelled the tender following its decision that none of the tenderers submitted a responsive tender, and consequently that the issue raised

in relation to Area 2 was no longer a live issue. The Court, by implication, found no reason to set aside the decision to cancel the tender for Area 2.

[18] On a reading of the papers filed in support of Bayethe's application, such a finding appears to be justified. The focus of the application was the decision by the Municipality to rule its tender non-responsive. One is hard pressed to find that any case was made out for the setting aside of what was a separate and distinct decision to cancel the tender. This is so despite Bayethe's obvious realisation that the decision to cancel the tender would stand in the way of it being awarded the tender. That the decision presented an obstacle that first needed to be cleared, is apparent, not only from the relief claimed in the amended notice of motion, but from Bayethe's reliance, in an internal appeal process in terms of section 62 of the Local Government Municipal Systems Act,[12] on the cancellation of the tender as signifying that the

[12] Act 32 of 2000.

tender process had come to an end, and that the Municipality was prevented from awarding any further tenders to any of the other tenderers.

[19] It is accordingly incorrect that the Court had failed to deal with, and to deliver judgment in respect of Bayethe's application for relief pertaining to the tender for Area 2 as raised in the grounds of appeal. Where the Court's finding with regard to the cancellation of the tender was not pertinently raised as a ground of appeal, there exists no reason, in the context of a consideration of the costs of the appeal, to also have regard to the merits of the decision of the Court in relation to whether or not the decision not to award the tender for Area 2 to Bayethe, must be set aside.

[20] In the result:

> "**(a) The appeal is dismissed;**
>
> **(b) the appellant is ordered to pay the first and the second respondents' costs of the appeal.**

(c) In view of the withdrawal of the cross appeal with the tender to pay the second respondent's costs, it is not necessary to make any specific order in respect of the costs of the cross appeal, save to order that the costs be limited to those incurred up to the date of the withdrawal of the cross appeal."

SIGNED

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D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

SIGNED

_____

M J LOWE
JUDGE OF THE HIGH COURT

I agree:

SIGNED

_____

R BROOKS
JUDGE OF THE HIGH COURT

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