REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
Case number: **401/05**

In the matter between:

DEPARTMENT OF PUBLIC WORKS Appellant

and

MS MOOS CONSTRUCTION CC Respondent

CORAM: **MPATI DP, FARLAM, MTHIYANE, BRAND JJA and MAYA AJA**

HEARD: **3 MAY 2006**

REASONS HANDED DOWN: **25 MAY 2006**

Summary: Appeal – s 21A of Supreme Court Act 59 of 1959 – Power of court of appeal to dismiss appeal where judgment or order sought will have no practical effect or result.

Neutral citation: This judgment may be cited as *Department of Public Works v M S Moos Construction CC* [2006] SCA 63 (RSA)

REASONS

MPATI DP:

[1] This appeal was dismissed with costs on 3 May 2006. The reasons for that order now follow.

[2] On 23 January 2004, and following a tender process, a contract was concluded between the Government of the Republic of South Africa and the respondent, in terms of which the respondent was to carry out restoration and upgrading work on the official residence of the Minister of Justice and Constitutional Development, situated at Rondebosch, Cape Town. In concluding the contract the Government was represented by the Director-General: Department of Public Works.

[3] On 29 November 2004 and after it had purportedly cancelled the contract and the respondent had refused to vacate the property, the appellant applied, on an urgent basis, to the Cape High Court for an order of eviction against the respondent. The respondent opposed the order sought. One of the grounds of opposition was that the appellant is not a *legal persona* and thus does not have the necessary *locus standi* to institute legal proceedings. The court *a quo* (Yekiso J) agreed and, finding it unnecessary to consider the merits, dismissed the application with costs. This appeal is with its leave.

[4] On 24 November 2005 the Government of the Republic of South Africa and the Minister of Public Works applied to the Cape High Court, also on an urgent basis, for the same order that was sought before Yekiso J. An eviction order, together with other ancillary relief, was granted by Traverso DJP on 10 February 2006. Leave to appeal against that order was refused and an application to the President of this court for such leave is pending.

[5] In their heads of argument counsel for the appellant submitted that in the event of the appeal succeeding, the matter should be remitted to the court *a quo* for that court to consider the merits of the case. But the merits have now already been considered by Traverso DJP, who made the order referred to above on 10 February 2006. For this

reason the parties were given notice, in terms of s 21A(2) of the Supreme Court Act 59 of 1959 (the Act), that they would be required, at the hearing of the appeal, to make submissions as to why the appeal should not be dismissed for the reason that the judgment or order sought will have no practical effect or result.

[6] Section 21A(1) of the Act reads:

'When at the hearing of any civil appeal . . . 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 question whether the judgment or order will have no practical effect or result is determined without reference to a consideration of costs, save under exceptional circumstances (s 21A(3)).

[7] Remitting the matter to the court *a quo* for consideration of the merits, were the appeal to succeed, will clearly have no practical effect or result. The order sought from the court *a quo* has already been obtained and the fact that it might be appealed does not change the position. Counsel for the appellant, however, submitted that the issue between the parties concerns the appellant's *locus standi*; that this is a live issue, the adjudication of which would clearly have a practical effect in that the appellant, if successful, would be authorised to continue to litigate in its own name; that a consideration of the issue will have a wider effect in that it will also decide the *locus standi* of all government departments, both national and provincial; that departments frequently litigate in their own names, particularly in the magistrates' courts, and that all such litigation presently pending will be affected by a decision of the 'merits' of the present appeal, 'which is to a large extent a test case'. Moreover, counsel contended, a further issue between the parties concerns the recovery of damages suffered pursuant to the respondent's failure to complete the building work in accordance with the contract. Counsel therefore argued that it is in the public interest that the issue concerning the appellant's *locus standi* – and by the same token the *locus standi* of other departments – 'should be authoritatively decided by this court' as it will frequently arise in further litigation in the future. For these contentions counsel relied particularly on three decisions of this court, namely *Land en Landbouontwikkelingsbank van SA v*

Conradie 2005 (4) SA 506 (SCA); *Radio Pretoria v Chairman, ICASA* 2005 (1) SA 47 (SCA) and *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA).

[8] The section confers a discretion on this court or any High Court sitting as a court of appeal (*President, Ordinary Court Martial v Freedom of Expression Institute* 1999 (4) SA 682 (CC) at 687 para 13). In *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) this court (at para 7) raised as an argument (which it said found support in *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 (HL) at 114) the proposition that s 21A only affords a court of appeal a discretion not to entertain an appeal when there is still a subsisting *issue* or *lis* between the parties, the resolution of which, for some or other reason, has become academic or hypothetical. Counsel's submission that the question of the appellant's *locus standi* is a 'live issue' is correct. It is still a subsisting issue. What needs to be considered, therefore, is whether this court should exercise its discretion in favour of the appellant and adjudicate on that issue.

[9] In the *Conradie* case, supra, this court decided to exercise its discretion in favour of the appellant and considered the issue at hand, which concerned the interpretation and application of the Extension of Security of Tenure Act 62 of 1997, and thus a point of law. It held that the issue was likely to arise frequently since it involved eviction proceedings brought under that Act by lessors against lessees. What was of particular importance was the fact that judgments of the Land Claims Court are binding on magistrates and it had, in that case, followed its own judgment which this court held to have been wrongly decided.

[10] In *Rand Water Board*, supra, Navsa JA pointed out (at 62 para 20 – the passage relied upon by counsel for the appellant) that in a debate about the application of s 21A of the Act, when a public law issue presents itself, sight should not be lost of the following passage in *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 2 WLR 483 (HL) at 488B; ([1999] 2 All ER 42 at 47d):

'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the

public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'

And in *Radio Pretoria*, supra, this court (per Navsa JA) said the following (at 55 para 40): 'Assuming without deciding . . . that the practical effect or result referred to in s 21A(1) of [the Act] is not restricted to the parties *inter se* and that the expression is wide enough to include a practical effect or result in some other respect, there is no clear indication that another case on identical facts will surface in the future.'

[11] As I have mentioned above, the 'existing' or 'live issue' in the present matter is the appellant's *locus standi*, ie whether the appellant may, in the future (and so also other government departments), litigate in its own name as the Department of Public Works. I am not at all persuaded that any good reason in the public interest exists for this court to exercise its discretion in favour of hearing the dispute between the parties. This is not a case where a refusal to determine the dispute in the exercise of its discretion by this court will result in hardship or prejudice for the appellant, or any other government department for that matter. Section 2(1) of the State Liability Act 20 of 1957 makes provision for the Minister of the department concerned to be cited as nominal defendant in claims against the State. A corollary is that the Minister of the department concerned may sue as a nominal plaintiff on behalf of the State. And this has been the case for decades now. The State may also be cited as the Government of the Republic of South Africa. (See *Marais v Government of the Union of South Africa* 1911 TPD 127 at 132; *Die Spoorbond v South African Railways; Van Heerden v South African Railways* 1946 AD 999 at 1004-5; *Die Regering van die Republiek van Suid-Afrika v SANTAM Versekeringsmaatskappy Bpk* 1964 (1) 546 (W).) More recently, this court, in *Distcor Export Partners v The Director-General of the Department of Trade and Industry* (as yet unreported judgment in case no 521/03 delivered on 23 March 2005), held that not only the Minister as political head of department is empowered to sue on behalf of the State, but also the Director-General, provided, of course, there is ministerial authorization.

[12] The State thus has more than one option when it wishes to litigate and in my view the appellant now merely wishes this court to advise it on a fourth option, ie whether it can

litigate in its own name. The purpose and effect of s 21A have been explained in *Premier, Provinsie Mpumalanga v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA) at 1143 A-C and require no further elaboration. And as was said in *Geldenhuys and 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.' With regard to the information, given from the bar, that pending litigation in the magistrates' courts 'would be affected by a decision of the merits of the present appeal', it has not been suggested that an amendment of the pleadings in terms of rule 55A of the Rules of the Magistrates' Courts is not practicable (for example, for fear of a special plea of prescription) in any one of those matters.

[13] For these reasons the appeal was dismissed with costs.

L MPATI DP

CONCUR:

FARLAM JA)
MTHIYANE JA)
BRAND JA)
MAYA AJA)