THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not-Reportable

Case no: 835/2018

In the matter between:

THE LASER TRANSPORT GROUP (PTY) LTD	**FIRST APPELLANT**
GIN HOLDINGS (PTY) LTD	**SECOND APPELLANT**

and

ELLIOT MOBILITY (PTY) LTD	**FIRST RESPONDENT**
NEO THANDO / ELLIOT MOBILITY (PTY) LTD JOINT VENTURE	**SECOND RESPONDENT**

Neutral citation: *The Laser Transport Group (Pty) Ltd & another v Elliot Mobility (Pty) Ltd & another* (835/2018) [2019] ZASCA 140 (01 October 2019)

Coram: Ponnan, Wallis, Dambuza and Mocumie JJA and Dolamo AJA

Heard: 30 August 2019

Delivered: 01 October 2019

Summary: Administrative law – review of a tender award – four-year contract concluded pursuant to a tender award challenged for non-adherence to provisions of the Preferential Procurement Policy Framework Act 5 of 2000.

Mootness – with about three months before expiry of the contract period a decision on appeal would have no practical effect - no discrete point of public importance that would affect matters in the future – appeal dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Pretorius J, with Molopa-Sethosa and Mngqibisa-Thusi JJ concurring, sitting as court of appeal):

The appeal is dismissed with costs, which costs shall include those consequent upon the employment of two counsel.

JUDGMENT

Dambuza JA (Ponnan, Wallis and Mocumie JJA and Dolamo AJA concurring):

[1] On 30 August 2019 we dismissed this appeal in terms of s 16(2)*(a)*(i) and undertook to furnish the reasons at a later stage together with our order for costs. These are our reasons. The appeal is against the judgment of the Full Court of the Gauteng Division of the High Court, Pretoria (Pretorius, Molopa-Sethosa and Mngqibisa-Thusi JJ) (full court), sitting as a court of appeal from a decision by a single judge in the high court. The high court had set aside on review the award of a tender and the appeal against that order succeeded. In the result an application by the appellants to have a decision to award a tender in favour of the respondents set aside, was dismissed with costs. The appeal is with the special leave of this court.

[2] In March 2015 the first appellant, The Laser Transport Group (Pty) Ltd t/a Stuttaford Van Lines (The Laser Group) together with the second appellant, Gin Holdings Proprietary Limited (Gin Holdings), both conducting business as furniture removers, submitted a bid removals under the name ‘Laser Transport Group (Pty) Ltd t/a Stuttaford Van Lines and Gin Holdings Business Unit Venture (the appellants), in response to a tender invitation issued

by the Department of International Relations and Co-operation (DIRCO). The tender was issued on 11 March 2015 under the reference DIRCO 13/2014/15 (the first tender). It invited bids for removal and insurance services for household goods and vehicles belonging to DIRCO officials transferred to and from diplomatic missions within South Africa and abroad. From 2011, these services had been rendered by Stuttaford Van Lines (Pty) Ltd, a division of the Laser Transport Group, together with Gin Holdings. The four-year contract in terms of which they performed those services expired by effluxion of time on 31 March 2015

[3] The first and second respondents, Elliot Mobility (Pty) Ltd and Neo Thando/Elliot Mobility (Pty) Ltd also submitted a bid. A third 'bid', submitted by Crown Relocation Worldwide Move, turned out to be only an objection to certain clauses in the tender.

[4] On 26 March 2015, the day on which the tender closed, the appellants' tender price was announced as R117 673 286.00. The respondents' was R215 882 882.00. Having heard nothing from DIRCO about the results of the tender, on 30 June 2015 the appellants wrote to the department expressing their discomfort and suspicions regarding the delay in the awarding of the tender. They suspected that it would be cancelled and warned that its cancellation would be unlawful because there were no valid or lawful reasons for such cancellation.

[5] It appears that there was no response to the appellants' letter. Instead, on 6 August 2015 the Director-General in DIRCO wrote to the appellants advising that the tender had been cancelled and would be re-advertised. Apart from stating that the Terms of Reference of the tender would be revised, no reasons were given for the cancellation. Indeed, a second invitation to tender was advertised on 11 August 2015 (the second tender) under reference no DIRCO 05/2015/16. The Terms of Reference, as they had appeared in the first tender, had been revised. Both the appellants and the respondents were, again, amongst those who responded to the invitation by submitting bids.

[6] As with most government tenders the consideration of the second tender consisted of four 'phases'. The first phase entailed an assessment of compliance by the bidders with mandatory submission requirements. Based on such compliance the bid would be

considered either ‘responsive’ or ‘non-responsive’. The second and third phases entailed assessment of stipulated ‘functionality criteria’. The bidders would be scored out of 100 points, split into 70 points for capacity, systems, skills and international membership and accreditation, and 30 points for facilities and vehicles. In phase four, bids were allocated price and performance points in terms of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA). Ninety points were allocated for price and ten points for the bidder’s Broad Based Black Empowerment status.

[7] In phase 1 both the appellants’ and the respondents’ bids were assessed as responsive and therefore progressed to the next stages. In the final result, the overall score for the appellants’ bid was 95 points, whilst that of the respondents was 73 points. On 3 November 2015 the tender was awarded to the respondents. On 5 November 2015 DIRCO concluded a contract with the respondents based on their tender. On 6 November 2015 DIRCO informed the appellants that their bid for the second tender had been unsuccessful. On 10 November 2015 DIRCO advised them that the month to month contract which had been concluded on expiry of the 2011 contract, had come to an end and that a new contractor had been appointed.

[8] The duration of the contract concluded with the respondents in November 2015 was four years, with DIRCO reserving the right to ‘request an extension’ of the period up to a maximum period of 12 years. The agreement would therefore expire during November 2019. Although couched as a single contract, the scope of work consisted of packing, storage, shipment and unpacking of each transferred official’s household goods and personal effects or departmental equipment. As such there would be individual contracts in relation to each transferred official.

[9] Aggrieved by losing the tender, the appellants approached the Gauteng Division, Pretoria (high court), seeking a review of the decisions taken by DIRCO in relation to both the first and the second tenders. They also sought interim relief that DIRCO be restrained from implementing the agreement concluded with the respondents.

[10] The essence of the appellants' complaint was that DIRCO had been obliged to award the tender in their favour as the highest scoring bidders with the lowest bid price. They contended that there were no objective criteria justifying the award to the respondents.[1] They also asserted that the first tender was cancelled unlawfully in that the cancellation was for reasons other than those stipulated in Regulation 10(4) of the Regulations issued under the PPPFA.[2] Also, their price schedule for that tender had been made public to their competitors, giving them an unfair advantage and an opportunity to adjust their prices in the second tender, and thus robbing the appellants of any competitive advantage they would have had going into the second tender. The appellants also contended that the respondents had failed to furnish a bank guarantee as required in the Terms of Reference of the first tender.

[11] DIRCO's response was that the first tender was cancelled in response to complaints received from other contractors in the industry about DIRCO's indirect exclusion of Previously Disadvantaged Movers (PDM's) from DIRCO tenders. The complaint, as expressed by Crown Relocation Worldwide Move[3] and Baxter International Movers, related to requirements, in the tender Terms of Reference, that bidding companies should be in possession of international membership certificates. The requirement was criticised as exclusionary of PDI's because they were unlikely to be in possession of the required certificates, as they would not previously have participated in the international movers' market.

[12] As to the appellant's higher score, DIRCO contended that there was no reason why the respondents, having met the minimum threshold for functionality, could not be awarded

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[1] Section 2(1)*(f)* of the PPPFA reads as follows:
'An organ of state must determine its preferential procurement policy and implement it within the following policy:

…

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraph *(d)* and *(e)* justify the award to another tenderer….'

[2] Regulation 10 (4) provides that:
'(4) An organ of state may, prior to the award of a tender, cancel the tender if-

(a) due to changed circumstances, there is no longer a need for the goods or services tendered for; or

(b) funds are no longer available to cover the total envisioned expenditure; or

(c) no acceptable tenders are received.'

[3] See para 3 above.

the tender. DIRCO insisted that a tender could be properly awarded to a tenderer other than the one with the lowest price if objective criteria justified that decision; for example, if DIRCO 'objectively viewed that, notwithstanding the lowest price, realistically speaking the respondent's price was still reasonable in the circumstances.' In this instance DIRCO had concluded that the appellants' price was unsustainable as the lowest item in its price schedule was below an average price as determined by DIRCO by calculating the average prices of the five bidders who had responded to the invitation to tender, including those whose bids were unresponsive.

[13] In the high court the application was heard in two sittings. On 12 December 2015 Pretorius J ordered that the application for interim relief be struck off the roll for lack of urgency. A year later, on 11 December 2016 Van der Westhuizen AJ granted an order setting aside the tender award to the respondents and awarding it to the appellants based on the reasons for which they had challenged the award. In terms of that court order, the individual contracts concluded with the respondents would be honoured, but new contracts would be concluded with the appellants.

[14] On appeal, the Full Court set aside the order granted by Van der Westhuizen J and ordered that it be replaced with a dismissal of the appellants' application, together with a concomitant costs order. On appeal in this court, the dispute had crystalized to the lawfulness of awarding the tender to the respondents despite the appellants' bid price having been the lowest. DIRCO did not participate in this appeal.

[15] In anticipation of the appeal hearing, the parties were invited to make submissions in relation to whether any decision in the appeal would have any practical effect as contemplated in s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 (the Act). This was because the four-year contract concluded with the respondents in 2015 would be expiring in approximately three month from the date of the hearing of the appeal. In that regard s 16 (2*)(a*) provides:

'(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.'

[16] The appellants' submission was that the appeal was not necessarily moot. The question whether the decision of this court would have a practical effect depended on the judgment of this court on the merits of the appeal. 'If it is found that the tender should have been awarded to the appellants they would be entitled to a four year appointment by DIRCO from the date of the final decision to that effect', so it was submitted.

[17] This court has, on numerous occasions, pronounced on the guiding principles for determining whether an appeal should be entertained where a decision thereon will have no practical effect or result. The main principle is that courts of law ought not to decide issues purely for academic interests. They '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'.[4] The purpose of s 16(2*)(a)* of the Act*,* which is in identical terms to its predecessor, s 21A(1) to (3) of the Supreme Court Act 59 of 1959,[5] is to entrench this principle and thus to alleviate the heavy workload of courts of appeal.[6]

[18] This court has a discretion to refuse to consider merits where an appeal is moot, or to entertain an appeal even though it is moot, where there is a discrete legal issue of public importance which would affect matters in the future.[7] In *Minister of Justice and others v Estate Stransham-Ford*[8] this court explained the principle as follows:

'It is a prerequisite for the exercise of the discretion that any order that the court may ultimately make will have some practical effect either on one of the parties or others. Other factors that may be

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[4] *Geldenhuys and Neethling v Beuthin* 1918 (AD) 426 at 441. See also Van Loggerenberg et al *Erasmus Superior Court Practice* (2 ed, looseleaf) Vol 1, A2-49 (Original Service, 2015); *Coin Security Group (Pty) Ltd v SA National Union of Security Officers and others* 2001 (2) SA 872 (SCA) para 7; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & Another* 2005 (1) SA 47 (SCA).

[5] Which provided that:

'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 must be dismissed on this ground alone'.

[6] *Erasmus Superior Court Practice* at A2-49.

[7] See *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA166; 2013 (3) SA 315 (SCA) para 5.

[8] In *Minister of Justice and others v Estate Stransham-Ford* [2016] ZASCA 197; 2017 (3) SA 152 (SCA).

relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument.
The common feature of the cases where the Constitutional Court has heard matters notwithstanding the fact that the case no longer presented a live issue, is whether the order had a practical impact on the future of one or both of the parties to the litigation…'.[9]

[19] In *Qoboshiyane,* whilst accepting that the cases raised issues under the Constitution in the context of the Promotion of Access to Information Act 2 of 2000 (PAIA), this court found that the court decision on the interests of the public in disclosure of the information concerned was fact specific.

[20] Turning to this appeal, the appellants' first submission was fundamentally flawed because it rested on an incorrect application of s 16(2)*(a)*(i). It advocated an approach that would make nought of the purpose of the section, which is to avoid fruitless usage of the court's resources where the decision sought will have no practical effect or result and is of no significant importance to the public. On this argument the test would be whether on the merits the appeal should succeed. An additional difficulty with the appellants' submission is that if the appeal was entertained and the decision sought was determined in favour of the appellants, the only way the decision sought would have a practical result or effect would be by extension of the contract (based on the August 2015 tender) beyond the November 2019 expiry date. As submitted on behalf of the respondents, the result would be contrary to the terms of the August 2015 award and there could be no basis, on the facts of this case, for the commencement date of the contract to be on a date beyond the period of the contract. The tender was intended for commencement in 2015 on terms and conditions (especially pricing conditions) that existed then. One hardly needs evidence to show that, four years later such conditions have changed. This court would therefore have to create a contract for DIRCO and the appellants.

[21] As shown above, this court has exercised its discretion to determine appeals which are moot where issues arising involve a discrete legal point of public importance that would affect matters in the future. In their alternative submission, the appellants argued that this

[9] Ibid paras 22-23.

court should exercise its discretion to entertain this appeal because the issues that arise 'could or should' affect similar matters in the future. They contended that the interpretation of s 2(1)*(a)* of the PPPFA involved Constitutional issues[10] that impacted on public procurement, just administrative action, and access to courts. *Qoboshiyane* provides no support for the appellants' submissions. If anything, that case illustrates that even where Constitutional issues are implicated, if the decision is case specific, there are no grounds for the court to exercise its discretion in favour of entertaining an appeal that is moot. Even if the assessment of objective factors under s 2(1)*(b)*(i) of the PPPFA was incorrectly applied, or the tender process was tainted by illegality or the Full Court's substitution of tender award was wrong, no basis was laid for a conclusion that the matter raised issues of public importance.

[22] Further, as to whether exceptional circumstances existed for exercise of the court's jurisdiction under s 16(2)*(a)*(ii) the assertions by the respondents that they had raised the question of mootness when the application for leave to appeal was heard, cannot be ignored. And thereafter the appellants did not seek a preferential date for the appeal to be heard. It was in consideration of these factors that we dismissed the appeal with costs.

[23] No warrant exists for departing from the rule that costs follow the result. Consequently, the costs in this appeal, including the costs of two counsel, are awareded in favour of the respondents.

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N Dambuza

Judge of Appeal

[10] Under ss 217, 33 and 34 of the Constitution of the Republic of South Africa, 1996.

APPEARANCES

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