THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 62/2019

KP Case Nos: 4536/2017P

10475/2017P

In the matter between:

RESULTANT FINANCE (PTY) LTD **APPELLANT**

and

HEAD OF DEPARTMENT FOR THE DEPARTMENT OF HEALTH, KWAZULU-NATAL **FIRST RESPONDENT**

MEC FOR HEALTH, KWAZULU-NATAL **SECOND RESPONDENT**

KP Case No. 10475/2017P

And in the matter between:

RESULTANT FINANCE (PTY) LTD **APPELLANT**

and

MEC FOR FINANCE IN THE PROVINCE OF KWAZULU-NATAL **THIRD RESPONDENT**

ARKEIN CAPITAL PARTNERS (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Resultant Finance (Pty) Ltd v Head of Department for the Department of Health, KwaZulu-Natal and Another* (62/2019) [2020] ZASCA 87 (16 July 2020)

Coram: PETSE DP and CACHALIA, WALLIS, MBHA and MOLEMELA JJA

Heard: No oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 16 July 2020.

Summary: Review of tender award – contract period of tender lapsed prior to hearing of appeal – no substantial points of law or matters of substance raised – appeal dismissed by reason of mootness under s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Mngadi J, sitting as court of first instance):

The appeals are dismissed with costs, including the costs occasioned by the employment of two counsel.

JUDGMENT

Molemela JA (Petse DP and Cachalia, Wallis and Mbha JJA concurring)

Introduction

[1] These appeals concern a dispute emanating from the cancellation of a public procurement contract concluded pursuant to a tender that was awarded to Resultant Finance (Pty) Ltd (the appellant) by the KwaZulu-Natal Provincial Department of Health (the Health Department).

Background facts

[2] On 2 March 2015, the appellant submitted a bid[1] in response to a Request for Proposal (RFP) issued by the Health Department for the provision of services to manage the leasing of medical and non-medical equipment. By letter dated 8 April 2015 addressed to the appellant, the Health Department informed the

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[1] One of the requirements of the tender was set out as follows in clause 2.34 of the Request for Proposal:

'The bidder must be a Registered Financial Services Provider registered with the Financial Services Board (FSB). *The relevant certificates must be submitted with bid, failure to comply with this clause will invalidate your bid*. If the bidder is a Joint Venture or Consortium or Partnership at least member thereof must be registered with FSB *and proof to that effect must be attached*. *Failure to submit will invalidate the proposal submitted* and the bid will not be considered for evaluation.' (Own emphasis.)

appellant that its bid had been successful. On 13 April 2015, the appellant accepted the terms and conditions of the contract. On 22 April 2015, the Health Department signed a five-year contract (the contract) in terms of which the appellant was formally appointed as the solution provider responsible for sourcing medical and non-medical equipment through lease agreements. The contract was signed on behalf of the Health Department by its former Head of Department (the HOD). It is common cause that upon the conclusion of the contract, no value was placed on it; instead, the percentage of the value was agreed upon as a basis for the determination of a contract price. On the appellant's estimation, it was envisaged that the total value of the contract over the full contract term of 5 years would amount to hundreds of millions of rand, if not in excess of a billion rand.

[3] The appellant contended that on 31 August 2015, the first respondent approved an initial order for equipment and requested the respondent to commence with the acquisition process. The value of the scanners was estimated to be in excess of R400 million. During October 2015, the PIC granted a facility of R1.7 billion to be advanced to the appellant under certain conditions, amongst which was the appellant's compliance with all procurement legislation.

[4] On 26 January 2016, the Health Department addressed a letter to the appellant asking it to show cause as to why the contract should not be cancelled on account of the appellant's failure to perform in accordance therewith. On 3 February 2016, the appellant responded to the Health Department's letter, disputing that there was any reason for cancellation of the contract. In August 2016, a forensic investigation into the bid process was commenced at the instance of the Health Department. The appellant was duly informed of that investigation. The interim investigation report was issued on 30 March 2017. On 21 April 2017 the appellant launched an application in the KwaZulu-Natal Division of the High Court, Pietermaritzburg on the basis that the Health Department had breached the contract (the first application). The HOD and the Member of the Executive Council for the Department of Health, KwaZulu-Natal (MEC for Health)

were cited as the first and second respondent, respectively. The appellant sought a declaratory order confirming the existence of the contract and an order compelling the Health Department to comply with its obligations thereunder.

[5] On 13 June 2017 the Health Department cancelled the contract on the basis that the appellant: had not met the bid requirements, had failed to secure funding to execute the contract, and was unable to execute the works. On 23 June 2017, the final forensic investigation report was submitted to the Health Department. On 12 July 2017, the HOD and the Health Department (together referred to as the respondents) filed an affidavit opposing the first application. The respondents simultaneously filed a counter-application seeking an order declaring that the contract had been validly cancelled in June 2017.

[6] On 14 September 2017, the Member of the Executive Council for Finance, KwaZulu-Natal (MEC for Finance) launched review proceedings in the High Court against the appellant (the second application), asserting that the award of the tender was unlawful and invalid. The basis of that application was that the tender awarded by the Health Department to the appellant had not complied with the tender requirements set out in the RFP. The Health Department was not cited as a party in the second application. The MEC for Finance also sought an order consolidating the first and second applications.

[7] Both applications came before the High Court and were simultaneously adjudicated upon by Mngadi J (the court a quo). The court a quo dismissed the first application. It found that the contract concluded by the parties lacked specifics and reasoned that various issues needed to be resolved by the parties prior to the performance of each party's contractual obligations. The court a quo also dismissed the Health Department's counter-application, inter alia, on the basis that even if it were to be accepted that the award of the tender to the appellant was irregular, it was not up to the Health Department to decide that the tender was of no force or effect, without bringing an application for review of that award.

[8] With regard to the second application, the appellant raised several preliminary points in relation to the launching thereof. The appellant contended that the MEC for Finance had launched that application after an unreasonable delay of two years and six months and, in any event, had no standing to review the administrative action of another provincial department. It was also submitted that the failure by the MEC for Finance to join the Health Department in the second application had rendered it irredeemably flawed.

[9] It was submitted on behalf of the MEC for Finance that in bringing the second application, she was acting in accordance with an agreement she had concluded with the Premier of KwaZulu-Natal and the MEC for Health, in terms of which it was agreed that she would launch that application as a representative of the provincial government as a whole.[2] Reasons were also advanced to explain why the MEC for Finance had not launched the second application earlier.

[10] The court a quo dismissed all the preliminary points. As regards the issue of standing, it accepted the MEC for Finance's assertion that the provincial treasury was concerned with matters of expenditure in the province and thus played a transversal role within the provincial government framework.[3] On that basis, it found that the MEC for Finance had a direct and substantial interest in the subject matter and therefore had locus standi to bring the application for review. With regard to the issue of non-joinder, it found that, since the MEC for Health had deposed to an affidavit supporting the MEC for Finance, the MEC for Health did not wish to be joined in that litigation, with the result that the non-joinder of the MEC for Health in the second application was of no consequence. It accepted the reasons proffered by the MEC for Finance and condoned the delay in launching the second application.

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[2] The MEC for Finance averred that this was done in accordance with the executive powers and functions imposed under s 125(2)*(b)*, *(c)*and *(g)* of the Constitution.

[3] Reliance was placed on secs 17 and 18 of the Public Finance Management Act 1 of 1999, which bestows on the MEC for Finance the authority to head the provincial treasury and also empowers the incumbent to intervene and take appropriate steps to address breaches of the Act by a provincial department or provincial public entity.

[11] Concerning the merits, the court a quo found that the central issue related to the requirements stipulated in clause 2.34 of the RFP, which stipulated that a bidder's failure to submit proof of registration with the Financial Services Board (FSB) would invalidate the bid.[4] It considered non-compliance with that provision as an irregularity that tainted the bid process.

[12] In upholding the review sought in the second application, the court a quo expressed itself as follows:

'The real issue, in my view, relates to the requirement stipulated in clause 2.34 of the [RFP]. . . . There was no ambiguity in the requirement and it needed no interpretation. It stated that the bidder was required to be a registered financial services provider with FSB. If it was a Joint Venture or Consortium or Partnership it would suffice if one of its members was so registered. It [is] common cause that [the appellant] made a bid alone. It was not a Joint Venture, Consortium or Partnership. Clearly the award of the tender to [the appellant] was irregular. [The] Health [Department] had no authority to award the bid to [the appellant] in contravention of the Bid Specifications. The awarding of the tender to [the appellant] was unfair in that it favoured [the appellant] over other entities not registered as required and it deprived entities so registered of being awarded the tender. It rendered the process uncompetitive and unfair in that a bidder who was supposed to be disqualified was awarded a tender. . . . It was illegal in that it contravened section 217 of the Constitution, Treasury Regulations and the SCM policy of the Department of Health. The award of the tender to [the appellant] allowed corrupt practices in that set published requirements were not applied. It resulted in an unfair process. See *AllPay Consolidated v Chief Executive Officer SASSA* 2014 (1) SA 604 (CC).

. . .

In my view, in this application factors that carry more weight are the following: there has been no delivery in terms of the contract; the ground of review is of substance; [the appellant] is the author of the established ground of review; the contract was a high value contract; there were issues around the delivery in terms of the contract that had not been resolved by the parties which delayed delivery in terms of the contract. In conclusion, the delay in lodging the review application is condoned.

. . .

[4] See footnote 1 above.

Once it is found that the award of the tender to [the appellant] was unlawful, it is required that it be considered what would be the just and equitable remedy in the circumstances. There has been no delivery in terms of the contract. The affected parties are [the appellant] and the [Health] Department. There are no consequences of the award that are irreversible. The non-compliance must be placed at the door of [the appellant] and in my view it was a substantial non-compliance. I find that it is a just and equitable remedy to set aside the award of the tender to [the appellant].'

[13] The court a quo granted the appellant leave to appeal against its judgment on a limited basis. The appeal against the whole judgment of the court a quo is with the leave of this Court.

Issues raised in the parties' heads of argument

[14] The parties' heads of argument raised the following issues for determination. Whether the contract that arose out of the procurement award was extant and should be enforced; whether the court a quo correctly granted condonation in review proceedings launched more than two years after the impugned decision; whether the award made in favour of the appellant, was irregular, unlawful, ultra vires; whether the court a quo correctly granted a review of that award on the basis of the principle of legality;[5] and if so, whether the irregularities contended for were material to warrant the setting aside of the award.

Submissions made on behalf of the parties in this Court

[15] It was submitted on behalf of the appellant that the court a quo's finding that the appellant had not delivered its performance as contemplated in the contract was incongruent with its finding that the Health Department had failed to issue any purchase orders despite its contractual obligation to do so. The appellant argued that the dismissal of its application flew in the face of the principle that where a

[5] The reliance of the MEC for Finance on the principle of legality was averred in her replying affidavit, filed on 1 December 2017. This clarification was made pursuant to the handing down of judgment on 14 November 2017 in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).

party has proven a right and the breach thereof, a court has no discretion to refuse to grant relief to vindicate the breach of the said right.[6]

[16] It was further submitted on behalf of the appellant that the court a quo ought to have upheld the preliminary point on the basis that it is not the MEC for Finance's personal knowledge that triggers the duty to act, instead, the knowledge of those who were involved in the procurement process was imputed to the organ of state itself, namely, the Department of Finance.

[17] Concerning the merits, it was submitted on behalf of the appellant that there was no justification for the cancellation of the contract by the Health. The appellant further contended that the Health Department had deliberately made it impossible for it to perform its obligations under the contract in order to justify its subsequent repudiation thereof.

[18] In relation to the second application, it was submitted on behalf of the appellant that the MEC for Finance had delayed unreasonably in bringing the review application. The court a quo was also criticised for having found that the MEC for Finance was entitled to seek the review of the administrative acts of the Health Department.

[19] It was contended on behalf of the appellant that, in finding that the tender to the appellant was irregular, the court a quo had ignored objective evidence, namely, the content of the co-operation agreement concluded between the appellant, Standard Bank and STANLIB.

[20] It was submitted on behalf of the respondents and the MEC for Finance that the appellant had not submitted proof of registration with the FSB and had therefore failed to comply with clause 2.34 of the bid.

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[6] *Chunguete v Minister of Home Affairs and Others* 1990 (2) SA 836 (W) at 848I-849A.

[21] Given the view I take on this matter, it is not necessary for this Court to analyse the parties' submissions relating to the merits in any detail. Suffice it to emphasise that s 217 of the Constitution lays down the threshold requirements for a valid procurement process in accordance with a system that is 'fair, equitable, transparent, competitive and cost-effective'.[7] Statutes, such as the PFMA and subordinate legislation made under that Act, such as the Treasury Regulations, as well as the supply chain management policies that have to be applied by organs of state, all give effect to the constitutional injunction enunciated s 217 of the Constitution.[8] Section 172(1)*(a)* of the Constitution[9] obliges every competent court to declare invalid law or conduct that is inconsistent with the Constitution.[10] Following thereon, a court must, in terms of s 172(1)*(b)* make an order that is just and equitable.

[22] It is clear from the bid documents that only the name of the appellant was reflected as the bidder. Furthermore, the appellant was, by its own admission, not registered with the FSB. The appellant asserted that an employee of Standard Bank had mentioned at the tender briefing meeting that Standard Bank would be in a joint venture with the appellant for purposes of the bid. The appellant contended that the requirements in clause 2.34 of the RFP had been met, insofar as it had, on 27 February 2015, entered into a 'co-operation agreement' with Standard Bank and STANLIB, which entities were registered with the FSB. It is undisputed that no proof of FSB registration, in relation to Standard Bank and STANLIB, was attached to the appellant's bid documents.

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[7] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 89.
[8] *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62 para 40.
[9] Section 172(1)*(a)* provides:
'(1) When deciding a constitutional matter within its power, a court –
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'
[10] *Notyawa v Makana Municipality and Others* [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] BLLR 337 (CC); (2020) 41 ILJ 1069 (CC) para 49.

[23] Significantly, clause 2.19.2 of the RFP, stipulated that in the case of a joint venture, the names and particulars of each company participating therein had to be provided. In addition thereto, a certified copy of the joint venture agreement had to be attached to the bid, specifying the percentage of the contract to be undertaken by each company participating therein. It is apparent from the bid documents submitted by the appellant, that a line has been drawn diagonally through the text appearing on the page reserved for the names and other details of the members of a joint venture; in other words, the required information pertaining to members of the joint venture was not furnished. It is difficult to conceive of a clearer indication that the appellant was not acting on behalf of a joint venture.

[24] In terms of clause 2.34 of the RFP, failure to submit proof of registration with the FSB would invalidate the bid.[11] The appellant's non-compliance with clause 2.34 of the RFP, which required the bidder (including a Joint Venture, Consortium or Partnership) to not only be registered with the FSB but also to submit proof of such registration with its bid documents, is self-evident. As stated before, s 172(1)*(a)* of the Constitution obliges every competent court to declare invalid law or conduct that is inconsistent with the Constitution.

[25] I interpose to refer to a directive issued by this Court and sent to the parties prior to the date allocated for the hearing of the appeal. Having noted that the relief sought by the appellant was specific performance of obligations in terms of the contract,[12] and having noted that the date of termination of the contract by effluxion of time predated the date allocated for the hearing of the appeal, the parties were

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[11] See footnote 1 above.

[12] The relief sought was couched as follows:

'1. Declaring as valid and extant the written contract between the applicant and the Department of Health KwaZulu-Natal on 22 April 2015 for the appointment of the applicant as a solution provider to manage the leasing of medical and non-medical assets for the KwaZulu-Natal Department of Health.

2. Directing immediate specific performance by the respondents in terms of the contract for the entire duration of the contract period commencing on 22 April 2015 for a period of 5 years expiring on 30 April 2020. . . .' There was other relief prayed for, which was for various forms of specific performance.'

directed to file supplementary heads of argument on the question of whether the decision sought on appeal would have a practical effect or result.

Mootness

[26] 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. It is trite that if there is no longer a live controversy between the parties, then there is no longer an appeal that would have any practical effect.[13] Where the existing or live controversy is absent, the matter is moot. This principle is based on the notion that judicial resources should be efficiently employed and not be used for advisory opinions or abstract propositions of law.[14] In this matter, the relief sought by the appellant in its Notice of Motion was for specific performance. The clear constraint is that the contractual term of the agreement has expired.

[27] In their supplementary heads, the respondents and the MEC for Finance submitted that the issues in dispute had been overtaken by events and that the resolution of that dispute would not afford the appellant any practical relief.[15] The appellant contended that the mere fact that the contract forming the basis of its claim had been terminated by effluxion of time was not, in and of itself, sufficient to render the case moot. It pointed out that dismissing the appeal on the grounds of mootness would encroach on its rights of access to the courts, as the respondents would raise the defence of *res judicata* if it tried to sue for damages. The appellant submitted that it was important for this Court to hear the appeal, as an order in its favour would entitle it to proceed with a damages claim against the Health Department.

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[13] *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC).
[14] *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) para 15; *Normandien Farms (Pty) Ltd v South African Agency for the Promotion of Petroleum Exportation and Exploitation (SCO) Ltd and Others* [2020] ZACC 5 para 47.
[15] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) paras 5-6.

[28] I am mindful of the fact that the appellant had sought, in the alternative, an order declaring the contract cancelled on the basis of the Health Department's breach thereof. That relief was misconceived, as it is for the parties to the contract to elect to cancel it and not for the court to declare it cancelled. Equally misconceived is the appellant's contention that it needs to be successful on appeal in order for it to proceed with a damages claim. This is premised on the fact that it was always open to the appellant to seek damages as a remedy for the alleged breach of contract.

[29] 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*[16] 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.'

[30] In relation to (a) and (b), the appellant, relying on this Court's judgment in *MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works and Another* (*Terra Graphics*),[17] submitted that dismissing the appeal on the grounds of mootness would have an undesirable result as the respondents would not account for: (a)

[16] [2020] ZACC 5; 2020 (6) BCLR 748 (CC) para 50.
[17] [2015] ZASCA 116; [2015] 4 All SA 255 (SCA); 2016 (3) SA 130 (SCA).

their unconstitutional conduct of undermining a valid contract based on a lawfully awarded tender; and (b) resorting to 'tactical manoeuvring'. It is evident from the averments made in the appellant's affidavits that the conduct it considered to be a manifestation of the 'tactical manoeuvring' included a delay in processing the purchase orders, the Health Department launching a forensic audit under 'dubious circumstances' in which the forensic investigator asked 'nefarious questions', a delay in filing the answering affidavits and the counter-application, culminating in the MEC for Finance's launching an application for review after what the appellant termed 'an inordinate delay'.

[31] In *Terra Graphics*, the provincial government had awarded a tender in relation to a road infrastructure programme and concluded an agreement with the second respondent as the main contractor for the supply of engineering services. The provincial government also sanctioned the appointment of the first respondent as the subcontractor. After both respondents had completed the work and received some payment, the provincial government refused to pay the balance owing, on the basis that the work had not been budgeted for. Notwithstanding that the provincial government had received the benefits of the labour of the two contractors, the provincial government contended that the failure to budget for the contemplated project in the year in which the agreement with the main contractor was concluded, amounted to a contravention of the applicable regulatory statutory provisions. It therefore considered itself entitled to refuse to be held to its obligations in terms of the concluded agreements. This Court found that the provincial government had behaved unconscionably and conducted itself without integrity. It dismissed the provincial government's appeal.

[32] In this matter, the respondents inter alia relied on the findings of the forensic investigation for its decision to cancel the contract. In explaining its conduct in relation to the performance of its obligations under the agreement, the respondents asserted that the irregular award of the bid to the appellant was as a result of collusive conduct between the former HOD and a small group of people, who had

concealed the irregularities. According to the respondents, the irregularities only surfaced when the new HOD was appointed. The new HOD had raised concerns about a number of contracts, which culminated in a forensic investigation being initiated in August 2016. The interim report arising from the forensic investigation had found that the award of the bid to the appellant was irregular and recommended that disciplinary action be taken against some officials. The MEC for Finance asserted that the final forensic investigation report only came to her personal knowledge on 13 August 2017, which prompted her to launch the second application.

[33] The conduct of the officials in this matter bears similarities with that of the officials in *Valor IT v Premier, North West Province and Others (Valor IT)*,[18] which was captured as follows:

'It is clear that officials in the Department played a pivotal role in the scheme, from the initial award of the SDA to VIT to its progressive extensions thereafter. This ongoing involvement explains why the legality of the scheme was not challenged prior to the first cancellation. It was only after the provincial government had been placed under administration, with new officials looking afresh at the relationship between the Department and VIT, that that was done.' (Footnotes omitted.)

[34] This Court in *Valor IT* reaffirmed that the determination whether condonation of an unreasonable delay should be granted was a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors are all considered and weighed before a discretion is exercised one way or the other.[19] Relying on the approach laid down in various authorities, this Court found that the court below was justified in overlooking the unreasonable delay.

[35] Reverting to the facts of this matter, the reasoning of the court a quo in relation to its decision to condone the delay in launching the second application is

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[18] *Valor IT*, supra paras 33-34.
[19] *Valor IT* para 29-30; *Gqwetha v Transkei Development Corporation Ltd and Others* [2006] 3 All SA 245 (SCA); 2006 (2) SA 603 (SCA) para 33.

not out of sync with the applicable legal principles. Moreover, its finding that the appellant had not yet procured any equipment on behalf of the Health Department is borne out by the record.[20] I am of the view that there is no clear evidence of unconscionable conduct on the part of the respondents. The facts of this case are therefore distinguishable from those in *Terra Graphics*.

[36] In condoning the delay in launching the second application, the court a quo exercised a discretion that can be justified on appeal only on narrow grounds.[21] Its decision can only be set aside on appeal if it is found that it did not exercise its discretion judicially,[22] in other words, if its decision was based on incorrect facts or wrong legal principles.[23] This does not appear to be the case. In my view, the objective facts of this case, viewed against the backdrop of the statutory provisions and case-law canvassed earlier in this judgment, lead to an ineluctable conclusion that a decision in this appeal will serve no practical effect.

[37] I am also satisfied that this matter does not implicate a public interest element that would otherwise impel this Court to hear the appeal despite mootness. As the appellant is merely advancing its own commercial interest in this matter, the issues raised for determination are only of importance to the parties hereto. Furthermore, the matter considered by the court a quo was not unduly complex. The court a quo dismissed the appellant's application and granted the second application on clear and simple grounds. The appeal is fact-specific, relying on established principles. There is a plethora of judgments pertaining to a review based on the principle of legality.[24] The law is thus settled in this regard. Although argument in this matter was full and comprehensive, there is no important point or

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[20] This is a relevant factor in relation to any just and equitable remedy that could conceivably require consideration. See *Buffalo City Metropolitan Municipality*, supra paras 54 and 148; *Notyawa* para 50.
[21] Ibid para 40.
[22] Ibid para 41.
[23] Ibid.
[24] *AllPay Consolidated v Chief Executive Officer South African Social Agency and Others* 2014 (1) SA 604 (CC); *Member of the Executive Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* 2014 (3) SA 481 (CC); *State Information Technology Agency*; *Buffalo City Metropolitan Municipality*; *Notyawa*; *Valor IT*.

issue that needs to be decided for future guidance.[25] This Court's decision will therefore have no precedential importance.

[38] I turn now to the appellant's contention that the failure of the court a quo to grant it a costs order remained a live issue that ought to be decided on appeal. The appellant submitted that there was incongruity between the dicta making up the reasoning of the court a quo and its dismissal of the application. It contended that the court a quo had unjustifiably denied it a costs order. The judgment of this Court in *RMR Commodity Enterprises CC t/a Krass Blankets v The Chairman of the Bid Adjudication Committee and Others* (*RMR Commodity Enterprises*) is apposite.[26] In that matter, the term of the contract had expired by the time the appeal was heard. The appeal was dismissed on the basis that it would have no practical effect as contemplated in s 21A(1) and (3) of the Supreme Court Act 59 of 1959, which Act has since been repealed.

[39] The appellant in that matter had, as an alternative argument, urged this Court to hear the appeal so as to determine the question of costs, notwithstanding its finding that the issues on the merits were moot. This Court found that it was inappropriate to decide academic disputes where the issue of costs was the only remaining issue. It found that the considerations relied upon by the appellant (that the respondents conduct was clearly calculated to cause delay) were insufficient to constitute 'exceptional circumstances' contemplated in s 21A(3) of the Supreme Court Act.

[40] Notably, s 16(2)*(a)* of the Superior Courts Act[27] mirrors the provisions of secs 21A(1) and (3) of the Supreme Court Act. In this instance, too, there are no

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[25] *Notyawa*, paras 49-50.
[26] [2009] ZASCA 2; [2009] 3 All SA 41 (SCA).
[27] Section 16(2)*(a)* of the Superior Courts Act provides as follows:
'(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.'

‘exceptional circumstances’ warranting that the appeal be decided purely for purposes of ventilating the issue of costs. This is more so because first and second applications were intertwined. A discernible overlap was that in their counter-application, the respondents averred that the appellant did not meet the tender requirements. It was on the same basis that the MEC for Finance sought the review of the award, which was duly granted. It is against that background that the court a quo did not make an order of costs in any of the applications. That being the case, I am not persuaded that this is an appropriate case to decide an academic dispute purely on the basis of the issue of costs.

[41] For all the reasons canvassed in the foregoing paragraphs, it follows that the appeals must be dismissed on the grounds of mootness.

Order

[42] The appeals are dismissed with costs, including the costs occasioned by the employment of two counsel.

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M B MOLEMELA

JUDGE OF APPEAL

Appearances:

For appellant:	P L Mokoena SC (with him L Sigogo)
Instructed by:	DM5 Incorporated, Sandton
	McIntyre Van der Post, Bloemfontein
For respondents:	A J Dickson SC (with him R Athmaram)
Instructed by:	PKX Attorneys, Pietermaritzburg
	Lovius Block, Bloemfontein