



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable
Case no: 971/2023

In the matter between:

**WESTERN CAPE PROVINCIAL
GOVERNMENT**

FIRST APPELLANT

**ACTING DIRECTOR: SUPPLY
CHAIN MANAGEMENT**

SECOND APPELLANT

**ACCOUNTING OFFICER OF THE
DEPARTMENT OF FINANCE,
WESTERN CAPE PROVINCIAL
GOVERNMENT**

THIRD APPELLANT

**HEAD OF DEPARTMENT OF
COMMUNITY SAFETY,
WESTERN CAPE PROVINCIAL
GOVERNMENT**

FOURTH APPELLANT

and

D C SECURITY (PTY) LTD t/a D C SECURITY

FIRST RESPONDENT

**SECHABA PROTECTION SERVICES
WESTERN CAPE (PTY) LTD**

SECOND RESPONDENT

**DELTA CORPORATE SECURITY
SERVICES (PTY) LTD**

THIRD RESPONDENT

Neutral citation: *Western Cape Provincial Government and Others v D C Security (Pty) Ltd t/a D C Security and Others* (971/2023) [2025] ZASCA 35 (01 April 2025)

Coram: MBATHA and BAARTMAN JJA and WINDELL, MODIBA and NORMAN AJJA

Heard: 4 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 01 April 2025

Summary: Administrative law – review and setting aside – tender – Promotion of Administrative Justice Act 3 of 2000 – whether appeal has been rendered moot in circumstances where contracts concluded at the heart of review applications have come to an end – whether court should exercise a discretion to hear appeal despite mootness – no discrete legal question of law found to exist.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Martin AJ, sitting as court of first instance):

The appeal is dismissed with costs, including costs of two counsel where applicable.

JUDGMENT

Mbatha JA (Baartman JA and Windell, Modiba and Norman AJJA concurring):

[1] The central issue in this appeal is whether the appeal is moot. If it is, the question then arises whether the court should exercise a discretion in the interest of justice to determine the appeal.

[2] In November 2017, the Western Cape Provincial Government (the provincial government) issued a call for bids for the framework agreement for transversal provision of security services for the 13 departments of the Western Cape (the tender). The process comprised of two main stages. First, the establishment of a panel of services providers who meet the qualification criteria set in the bid document. This process included the ranking of service providers according to the type of services, risk rating and geography. Second, the conclusion of various transversal agreements between the departments and the services providers on the panel. It was a material term of the bid that the contracts would come into existence as and when the services of the service provider would be required. This was initiated through a procedure referred to as the ‘call-off’ system.

[3] The provincial government adopted the direct selection process in implementing the call-off system. The process involved the selection of a service provider from the list of shortlisted service providers based on their ranking. The first available contract was assigned to the highest ranked and eligible provider. Once the initial allocation had been exhausted, it was envisaged that the ranking will align with the contract value of the work completed in the initial round of the call-offs. Consequently, the service provider ranked lowest in contract value would be awarded the highest contract value. This procedure initiated the establishment of a security contract with the various provincial departments.

[4] Dissatisfied with the outcome of the process and the allocations in terms of the call-off process, three service providers brought the application for review before the high court. The review applications were brought by Distinctive Choice Security (Pty) Ltd t/a DC Security (DC), Sechaba Protection Services Western Cape (Pty) Ltd t/a Sechaba Protection Services (Sechaba) and Delta Corporate Security Services (Pty) Ltd (Delta). The applications were consolidated and heard together.

[5] The Western Cape Division of the High Court, Cape Town, on 1 July 2022 (per Martin AJ) (the high court), granted the following orders against the provincial government:

- ‘1. Bid No WCPT- TR 01/2017/2018 and all decisions made in terms of it are hereby declared invalid;
2. All contracts awarded in terms of Bid No WCPT-TR 01/2017/2018, are hereby declared invalid, subject to part 3 of this order;
3. All contracts concluded by the Western Cape Provincial Department of Community Safety pursuant to Bid No WCPT-TR 01/2017/2018 shall remain in full force and effect until their termination dates as if the court had not made parts 1 and 2 of this order;

4. The Provincial Government shall constitute, a fresh bid for the procurement of security services and, subject to part 3 of this order, commence the bid process *de novo*;
5. The Provincial Government shall pay the costs of all three Applicants, including the costs of two counsel where applicable, but excluding any costs Distinctive Choice may have incurred in obtaining expert opinion.’

[6] Dissatisfied with the outcome of the review application, the appellants, Western Cape Provincial Government, Acting Director: Supply Chain Management, Accounting Officer of the Department of Finance, Western Cape Provincial Government and the Head of the Department of Community Safety, Western Cape Provincial Government sought leave to appeal the judgment and orders of the high court (the appellants will be referred to individually by their names or collectively as the provincial government). The matter serves before us with leave of this Court.

[7] On the eve of the hearing of this appeal, the appellant filed a supplementary record. This became the 12th volume of the record. The applications for condonation for the late filing of the supplementary record, the record of appeal and the reinstatement of the appeal by the provincial government and the late filling of the heads of argument by Delta were granted, with costs.

[8] The first point of enquiry is whether the appeal is moot. Section 16(2)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) governs such issues. It provides that:

- ‘(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.’

[9] The issue of mootness loomed large at an early stage. This occurred during the application for leave to appeal before the high court. At all times, the provincial government was firm in its view that the appeal would not be moot by the time it is heard. At that stage and later on before this Court, it lamented the unfortunate delays by the high court in delivering the main judgment and the judgment in the application for leave to appeal. However, I have noted that there were also delays in filing of the appeal record, which is understandable given its voluminous nature.

[10] It is therefore imperative to begin by examining the chronological sequence of events in this matter. The bid provided that the contracts would endure for a period of three years commencing from 1 November 2018, with an option for a one-year extension. The period envisaged for the completion of the contracts meant that the contracts were to end during 2022. The contract concluded with Delta commenced in 2019 and ended in March 2022. The Delta contract was extended for a period of one year to 31 March 2023. It was further extended to 30 June 2023.

[11] It is common cause that, by the time the provincial government's application for leave to appeal was lodged with the high court, the Department of Health (DOH) had already exited the framework agreement. By then, the DOH, a major contractor for security services within the province, had issued a new bid for security services. This occurred five months after the delivery of the high court judgment. By the time the application for leave to appeal was heard by the high court, it had already cancelled the previously advertised bid and re-advertised a new one, calling for bids by 9 June 2023.

[12] The application for leave to appeal filed with the high court on 15 May 2023 was still pursued. It was, however, unsuccessful. This Court granted the application

for leave to appeal on 30 August 2023. The notice of appeal was filed by the provincial government on 28 September 2023 and the record of appeal on 12 April 2024. The provincial government maintained its stance, even at this juncture, that only the DOH, had exited the framework agreement. As a result, 13 departments, remained bound by the framework agreement and in that regard had to proceed with the appeal.

[13] On 20 December 2024, after the appeal had been set down for hearing, Delta's attorneys of record addressed a letter to the registrar of this Court, which categorically stated that it believed that the appeal should not be heard because it was moot. On the other hand, the provincial government persisted in prosecuting the appeal. It even proposed that the issue of mootness be determined separately from the merits of the appeal. This Court was disinclined to proceed with the appeal on a piecemeal basis. It was not surprising that, upfront, the heads of argument filed by the parties dealt with the issue of mootness of the appeal. On the date of the hearing, counsel for the provincial government informed the Court that the rest of the departments had exited the framework agreement and conceded that the appeal is moot.

[14] This did not come as a surprise as the provincial government's heads of argument had stated that the provincial treasury, at the time of filing thereof, was in the process of initiating a new procurement process which would replace the current framework arrangements, the subject of this appeal. Irrespective of these developments, though conceding the mootness of the appeal, it maintained that the transversal agreements remained of considerable interest to the provincial government for use in the future. Against this backdrop, counsel for the provincial government persisted with the argument that issues raised in the appeal remained

relevant and important to the provincial government. It persisted in pursuing the appeal on the purported public interest grounds. Despite the concession made by counsel for the provincial government, I have decided to explore the issue of mootness.

[15] The most trenchant criticism from which there is no escape for the provincial government, is that the order of the high court, which is the subject of the appeal, on its own rendered the appeal moot. The effect of the order was that the contracts remained extant until their termination dates, irrespective of the finding of invalidity. The effect was that it did not adversely affect the material rights of the contractors and those of the provincial government. The contractual period to Delta ended on 30 June 2023. This was the case with other contractors. In blunt terms, no further purpose was served by the filing of the appeal. This made the appeal academic. The provincial government went on a frolic of its own in pursuing the appeal.

[16] On the provincial government's version, the largest contractor for security services, the DOH, had long exited the framework agreement. In addition, the heads of argument filed by the provincial government on 28 June 2024, succinctly indicated that the provincial government was in a process of initiating a new procurement process, but it consciously persisted with the appeal on the abandoned procurement process. These developments should have sent the red signal to the provincial government that the nature of the relief sought by the provincial government on this appeal is purely academic, as no live issue existed. It was also no surprise, on the day of the hearing, to learn that the other 13 departments had exited the framework agreement.

[17] The circumstances of this appeal are such that, it was inappropriate for the provincial government to proceed with the appeal. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,¹ the Constitutional court had this to say:

‘A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinion on abstract propositions of law.’

The Constitutional Court, in *Minister of Tourism and Others v Afriforum NPC and Another*,² held that:

‘A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court’s decision or which would be resolved by a court’s decision. A case is also moot when a court’s decision would be of academic interest only.’

I, therefore, conclusively find that there was no live issue for the determination of appeal.

[18] Nevertheless, I proceed to the next stage of the enquiry. It is trite that a court may exercise a discretion, if it is in the interest of justice to do so and determine the issues in terms of s 16(2)(a) of the Superior Courts Act. In *Pheko and Others v Ekurhuleni Metropolitan Municipality*,³ the Constitutional Court held that for the court to exercise its discretion there must be a discrete legal issue of public importance which is likely to affect matters in the future. This Court, in *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others*,⁴ stated that:

¹ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 para 21 at footnote 18.

² *Minister of Tourism and Others v Afriforum NPC and Another* [2023] ZACC 7; 2023 (6) BCLR 752 (CC) para 23.

³ *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) para 29-30 and footnote 23.

⁴ *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5. Also see *Centre for Child Law v The Governing Body of Hoerskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 11.

‘The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose.’

[19] I have some difficulty accepting the submissions made on behalf of the provincial government regarding the purported discrete legal issues, namely, non-compliance with the mandatory bid requirements, adequacy of reason, the methodology of awarding call-offs and the 180-day period to launch a review in terms of the Promotion of Administrative Justice Act 3 of 2000. The question that remains to be considered, is whether the said issues raise discrete legal issues of importance that they warrant this Court’s adjudication for the benefit of future matters. I am not persuaded that they do.

[20] The premise from which the provincial government’s submissions operate are factually flawed. The facts show that, by and large, these are not legal questions of law. It is so because, the main argument relied upon by the provincial government, was that the court found the transversal agreements unsuitable and flawed. Adverse findings made by a court are not discrete legal points of law. Besides that, the appeal rests only on the order of the court and not the reasons for judgment. In addition, the high court merely applied the trite principles applicable to public procurement cases in the adjudication of the issues before it.

[21] Logically, none of the purported legal issues will affect the provincial government in the future. The said issues are fact based and determinable through the trite principles of law. Consequently, there are no factors that are relevant to the

exercise of the Court’s discretion. In *Agribee Beef Fund (Pty) Ltd and Another v Eastern Cape Development Agency and Another*,⁵ the Constitutional Court listed the factors that bear consideration when determining whether it is in the interests of justice to hear a moot matter. They 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 disputes between different courts.”.’

None of the aforementioned issues have been raised by the provincial government.

[22] I do not intend to delve into the merits of the appeal, despite the provincial government’s attempt to draw us into them. I can only emphasise that the lifespan of the tender is over, no acquired rights were lost when the tender was reviewed and set aside, all the issues raised are academic and will have no practical effect, there are no conflicting judgments raised in the provincial government papers, and no discrete legal issues were raised.

[23] The appeal was purely brought for advice and clarification of the erstwhile framework transversal agreement. As this Court pertinently pointed out, in *Radio Pretoria v Chairperson of Independent Authority of South Africa*,⁶ that ‘[c]ourts 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 . . .’. For the

⁵ *Agribee Beef Fund (Pty) Ltd and Another v Eastern Cape Development Agency and Another* [2023] ZACC 6; 2023 (5) BCLR 489 (CC); 2023 (6) SA 639 (CC) para 24.

⁶ *Radio Pretoria v Chairperson of Independent Authority of South Africa and Another* [2004] ZASCA 69; [2004] 4 All SA 16 (SCA); 2005 (1) SA 47 (SCA) para 41.

aforementioned reasons, I find that there is no basis for this Court to exercise the discretion to hear the appeal despite its mootness.

[24] For the reasons set out in this judgment, the appeal cannot succeed. Accordingly, I make the following order:

The appeal is dismissed with costs, including costs of two counsel where applicable.

Y T MBATHA
JUDGE OF APPEAL

Appearances

For the appellant: H De Waal SC with A Christians and A Toefy

Instructed by: State Attorney, Cape Town
State Attorney, Bloemfontein

For the third respondent: R Stelzner SC

Instructed by: Bossr Inc, Durbanville
Lovius Block Attorneys, Bloemfontein.