



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 251/2024

In the matter between:

APTITUDE TRADING ENTERPRISE (PTY) LTD

APPELLANT

and

THE CITY OF TSHWANE METROPOLITAN

MUNICIPALITY

FIRST RESPONDENT

THE MUNICIPAL MANAGER OF THE CITY OF

TSHWANE METROPOLITAN MUNICIPALITY

SECOND RESPONDENT

Neutral citation: *Aptitude Trading Enterprise (Pty) Ltd v The City of Tshwane Metropolitan Municipality and Another* (251/2024) [2025] ZASCA 72 (30 May 2025)

Coram: MOCUMIE, MOKGOHLOA and COPPIN JJA and TOLMAY and MOLITSOANE AJJA

Heard: 12 May 2025

Delivered: 30 May 2025

Summary: Civil procedure – legality of court order extending suspension of order of invalidity of tender pending new award of tender – new tender awarded – no live extant issue – any decision or order sought on appeal having no practical effect or result – whether there is a discrete legal issue of public importance which nevertheless justifies this Court to decide the matter on its merits – powers of an appeal court in terms of s

16(2)(a)(i) of the Superior Courts Act 10 of 2013 – mootness of the appeal – public importance of the matter.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hassim AJ, sitting as a court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Mocumie and Coppin JJA (Mokgohloa JA and Tolmay and Molitsoane AJJA concurring):

[1] This is an appeal against the judgment and order of Hassim AJ, with leave having been granted by the Gauteng Division of the High Court, Pretoria (the high court). On 31 August 2023, Hassim AJ, conditionally extended an order first made by Ferreira AJ (the extension order) in the same high court on 26 November 2022, suspending the declaration of invalidity of the award of a tender (the declaration of invalidity of the award order) by the first respondent (the municipality). The second respondent is referred to as 'the municipal manager'. The municipality and the municipal manager are jointly referred to as 'the respondents'.

[2] The appellant, Aptitude Trading Enterprise Pty Ltd (Aptitude) and other entities were unsuccessful bidders in a tender of the municipality (tender HHS01 2021/2022) for the supply of 10 000 litres of mobile water tankers to refill stationary water tanks of varying sizes in various informal settlements within the municipal area. The successful bidders were appointed on 12 May 2022. On 20 June 2022, the appellant and certain others brought an urgent application in the high court to review, declare invalid, and set aside the award of tender HHS01 2021/2022, and also to set aside all agreements concluded pursuant to the grant of that tender.

[3] On 26 November 2022, Ferreira AJ granted an order reviewing and setting aside the award of that tender as well as the agreements concluded under such grant. Of significance, in paragraph 46.3 of the suspension order, Ferreira AJ suspended the declaration of invalidity and setting aside of the tender grant and agreements until 28 February 2023 (the suspension order). Ferreira AJ further ordered the municipality to commence with the new tender process for the procurement of the same services contemplated in the tender within seven days after 28 February 2023.

[4] On 23 February 2023, the municipality brought an urgent application in the high court to extend Ferreira AJ's suspension order until 31 May 2023. On 27 February 2023, Khumalo J granted the extension sought until 31 May 2023 to give the municipality more time to complete a lawful procurement of the water tankers. Despite the extension, the municipality did not achieve that objective and on 31 May 2023, approached the high court again on an urgent basis for a further extension of the suspension order for three months.

[5] On 2 June 2023, Van Niekerk AJ made an order, inter alia, 'that the date of suspension contained in paragraph 46.3 of Justice Ferreira AJ's order dated 26 November 2022 read together with the [o]rder of Justice Khumalo dated 2 March 2023 is hereby extended from 28 February 2023 to 31 August 2023 [and] [t]hat all agreements concluded between [the municipality] and the tenders according to the tender HHS01 2021/2022 are hereby extended until 31 August 2023'. In addition, Van Niekerk AJ ordered that if the municipality and municipal manager 'intend to seek a further extension of the suspension order, notice must be given to the respondents at least 21 days in advance, failing which [they] will not be entitled to a further extension'. Van Niekerk AJ also requested the Registrar of the high court to refer the matter urgently to the Auditor-General and the Public Protector.

[6] The three months' extension also turned out not to have been enough for the municipality, because it yet again approached the high court (Hassim AJ) on an urgent basis at the end of August 2023, purportedly in terms of rule 27(1) read with rule 6(12) of the Uniform Rules to further extend the suspension order 'to 30 November 2023 or until [the municipality] awards new contracts in terms of Tender HHS05-2022/23, whichever may come first'. On the night of 31 August 2023, Hassim AJ further

extended the order of suspension to 30 November 2023, alternatively to the date when a decision is made by the municipality in respect of the tender. This extension was made subject to the municipality reporting to the court in detail on progress made in respect of the award of the tender. That part of the order is elaborate, but in light of the approach adopted by this Court in this matter, the detail thereof need not be stated here. It is not disputed that on 30 November 2023, the city manager made a final decision on the tender, which led to the conclusion of new agreements with successful bidders on 30 August 2023.

[7] The respondents submit that when a final decision was made on the tender on 30 November 2023, the suspension order of Hassim AJ lapsed; that the appeal, which is directed at the order of Hassim AJ, has become moot and that any order sought on appeal in respect of it would have ‘no practical effect or result’ as envisaged in s 16(2)(a)(i) of the Superior Courts Act 10 of 2013 (the Act), and should be dismissed on that ground alone.

[8] Aptitude submits that even though the order of Hassim AJ has lapsed, this Court should nevertheless exercise its discretion to hear the matter on its merits because it would be in the interest of justice to do so and that the order sought on appeal will still have some practical effect, either on the parties or on others. Aptitude submits, in particular, the following in that regard: The order sought will deal with a legal issue of public importance and this Court must pronounce on the issue. Relying on decisions such as *Ex Parte Minister of Home Affairs and Another*¹ Aptitude argues that once the suspension order lapsed after it was not renewed before 31 May 2023, no court, including the high court presided over by Van Niekerk AJ, had the authority to resuscitate the lapsed order. Accordingly, there was no basis for Hassim AJ to grant an extension of a lapsed order and it was thus granted wrongly.

[9] In elaboration of this point – Aptitude contends as follows: For as long as the extension order of Hassim AJ stands ‘it serves as authority for the proposition that, at least in principle, organs of state can approach the same [h]igh [c]ourt for an extension

¹ *Ex Parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2023] ZACC 34; 2024 (1) BCLR 70; 2024 (2) SA 58 (CC) (*Ex Parte Minister of Home Affairs*) para 59.

of the declaration of invalidity' on an urgent basis at the eleventh hour when the order is due to lapse. Given the time it takes for a matter to be heard on appeal in this Court, it will always be close to impossible to have an appeal heard within the period of the declaration of invalidity. The relief obtained by Aptitude before Ferreira AJ, at a significant cost, was effectively rendered meaningless by the further extensions of the suspension order granted by Ferreira AJ. The municipality has paid 'hundreds of millions of rands to the panel of contractors during the period after 28 February 2023', and the lawfulness of these payments depends on the outcome of this appeal.

[10] In terms of the extension order, Hassim AJ extended the suspension order to 30 November 2023, alternatively, to a date on which the second respondent (the city manager) had made a new decision on the award of the tender (whichever was the earliest). It is common cause that the extension order of Hassim AJ would then have lapsed.

[11] The main issue in this appeal is therefore mootness; if we are of the view that even if Hassim AJ was not empowered to extend the order of Ferreira AJ when she did as of 30 November, it had lapsed.

[12] Section 16(2)(a) of the Superior Courts Act 10 of 2023 (the Superior Courts Act), 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.'

[13] A matter is moot when the order sought will have no practical effect on the parties – because there is no longer an existing or live controversy between them.² Courts are required to refrain from making a ruling in such matters, because the ruling

² *A B and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) (*Pridwin*) para 50.

will amount to a mere advisory opinion, which is abstract or academic and of no practical effect.³

[14] In *Narius Moloto v The Pan Africanist Congress of Azania*⁴ it is aptly stated:

‘This Court, in *The President of the Republic of South Africa v DA and Others*,⁵ had this to say on the issue:

“The question of mootness of an appeal has featured repeatedly in this and other courts. These cases demonstrate that a court hearing an appeal would not readily accept an invitation to adjudicate on issues that are of “such a nature that the decision sought will have no practical effect or result”. The Constitutional Court in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21 footnote 18 remarked:

“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 opinions on abstract propositions of law. Such was the case in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599), where Didcott J said the following at para [17]:

“(T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become.”

There are instances where there have been exceptions to the provision, initially of s 21A of Act 59 of 1959 and presently s 16(2)(a)(i) of the Superior Courts Act 10 of 2013. The courts have exercised discretion to hear a matter even where it was moot. This discretion has been applied in a limited number of cases, where the appeal, though moot, raised a discrete legal point that required no merits or factual matrix to resolve. In this regard, the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC), in paragraph 11 held:

“... A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others.”

³ *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 (CC) (*National Coalition for Gay and Lesbian Equality*) para 21; *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; [2018] 11 BLLR 1035; 2018 (11) BCLR 1411; (2018) 39 ILJ 2646; 2019 (1) SA 73 (CC) (*Police and Prisons Civil Rights Union*) para 43; *President of the Republic of South Africa v Democratic Alliance and Others* [2019] ZACC 35; 2019 (11) BCLR 1403; 2020 (1) SA 428 (CC) (*Democratic Alliance*) para 35.

⁴ *Narius Moloto v The Pan Africanist Congress of Azania* [2023] ZASCA 140 para 14.

⁵ *The President of the Republic of South Africa v DA and Others* [2018] ZASCA 79 paras 11-12.

[15] Most recently, this Court in, *Solidariteit Helpende Hand NPC v Minister of Co-operative Governance and Traditional Affairs*⁶ stated:

‘The general principle is that a matter is moot when a court’s judgment will have no practical effect on the parties.⁷ This usually occurs where there is no longer an existing or live controversy between the parties.⁸ A court should refrain from making rulings on such matters, as the court’s decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect;⁹ one of the reasons for that rule being that a court’s purpose is to adjudicate existing legal disputes and its scarce resources should not be wasted away on abstract questions of law.¹⁰ In *President of the Republic of South Africa v Democratic Alliance*,¹¹ the Constitutional Court cautioned that “courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now”.’

[16] In *Centre for Child Law v The Governing Body of Hoërskool Fochville*,¹² concerning its discretion in cases of mootness, reviewed previous cases and found that in the class of case where this Court considered the merits of the appeal, despite mootness, was where ‘a discrete legal issue of public importance arose that would affect matters in future and on which the adjudication of this Court was required’.

[17] That the matter has become moot leaves no doubt. The only remaining question is whether ‘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’. Aptitude concedes mootness but tries to convince this Court to exercise its discretion and nevertheless deal with the merits of the matter. The ‘discrete legal issue’ it identifies relates to the fact that when Van Niekerk AJ extended or purported to extend the order of suspension further on 2 June 2023, that order had already lapsed on 31 May 2023. The contention is that Van Niekerk AJ’s extension of that order was invalid considering

⁶ *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* [2023] ZASCA 35.

⁷ Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013; *Pridwin*.

⁸ *Pridwin* para 50.

⁹ *National Coalition for Gay and Lesbian Equality* para 21 fn 18.

¹⁰ *Police and Prisons Civil Rights Union* para 43.

¹¹ *Democratic Alliance* para 35.

¹² *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 11.

what the Constitutional Court has held in several cases, namely, that the high court does not have the power to make an order, even pending further litigation, that a lapsed suspension order 'remains operative'.¹³

[18] The papers indicate that the extension of the suspension order that was to expire on 31 May 2023, may have lapsed before it was extended by Van Niekerk AJ. However, the fact that a legal issue might have arisen there in that regard does not require this Court's attention. The order of Van Niekerk AJ was not appealed against, and is not before us. We cannot pronounce on its correctness and the circumstances in which it was made. The order that is before us is that of Hassim AJ. At the time she made her order, the order made by Van Niekerk AJ had not lapsed. Thus, the legal question advanced by Aptitude does not arise for decision in respect of Hassim AJ's order. But over and above that, Hassim AJ's order in which the provision of the water tankers was effectively extended was made on an urgent basis for a temporary period so as not to deprive affected persons of a water supply and so infringe their constitutional rights. The consideration of Hassim AJ's order will not be of any practical effect and is academic. The scarce resources of this Court should not be wasted on such questions. It is also not the function of this Court to provide legal advice or opinion to disgruntled litigants or to the public. Taking all the facts into account, entering the merits of the appeal against Hassim AJ's order, despite its mootness, is not in the interests of justice.

[19] Having said that it is nevertheless apparent that the municipality dragged its feet in implementing the order of Ferreira AJ and always sought an extension of the suspension order at a very late stage just before its expiry. Such conduct should not be countenanced. It is an abuse of the court processes. Aptitude was justified in pursuing the appeal but for its mootness. Therefore, even though the appeal is to be dismissed for that reason, Aptitude should not be mulcted with the costs of the municipality.

¹³ *Ex Parte Minister of Home Affairs* para 59; *Ex Parte Minister of Social Development* [2006] ZACC 3; 2006 (5) BCLR 604; 2006 (4) SA 309 (CC) para 38.

[20] In the result:

The appeal is dismissed with no order as to costs.

B C MOCUMIE
JUDGE OF APPEAL

P COPPIN
JUDGE OF APPEAL

Appearances

For the appellant:

A P J Els SC and N G Louw

Instructed by:

Albert Hibbert Inc., Pretoria

Webbers Attorneys, Bloemfontein

For the respondents:

L Nkosi-Thomas SC and T M Makola

Instructed by:

Kutumela Sithole Inc., Pretoria

Honey Attorneys., Bloemfontein.