IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: A541/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

In the matter between:

TSWELOKGOTSO TRADING ENTERPRISE **Appellant**

V

AIRPORTS COMPANY OF SOUTH AFRICA (SOC) LIMITED **Respondent**

JUDGMENT

THE COURT,

[1] This is an application for leave to appeal brought by Tswelokgotso Trading Enterprise CC ("the appellant") against a ruling handed down by Acting Judge Grenfell on 8 September 2018 ("the order"). In terms of this order: (i) The application for a

declaratory order launched on 28 February 2016 (as amended) is dismissed. (ii) The application for committal of board members of the respondent (Airports Company of South Africa (SOC) Ltd) for contempt of the orders of Jansen, J and de Vos, J is dismissed. (iii) The applicant is ordered to pay the respondent's costs of both applications, such costs to include the costs of two counsel.

[2] The application launched on 28 February 2016 had two parts. In terms of Part A of the application, an order was sought on an urgent basis that an interdict be granted against the respondent in favour of the appellant (the applicant in the court *a quo*) restraining the respondent from preventing and/or prohibiting the appellant in any manner whatsoever from carrying out its obligations in terms of the contract between the parties for the maintenance of runways, taxiways, aprons and road services at OR Tambo International Airport ("the contract"). Notably the order sought would operate as an interim interdict pending the hearing of Part B of the application.

[3] In Part B of the Notice of Motion, the following order was sought: (i) A declaratory order that the contract came into effect on a date when the applicant received a fully completed original copy of the contract, to wit 17 June 2013. (ii) That the 3-year duration of the contract was until 16 June 2016. (iii) Costs on an attorney and client scale.

[4] On 12 May 2016 the applicant filed a Notice of Amendment effectively introducing a completely new cause of action to the effect that it now sought a declaratory order that the contract only came into effect when the appellant had received a fully completed original copy of the contract together will all its annexures and deviations. In effect the applicant sought a declaratory order that the 3-year duration of the contract has not yet commenced and will only come into effect on some unspecified further date.

[5] There was some debate about whether or not the amendment was perfected. However, upon a reading of the judgment of the court *a quo*, the court *a quo* approached the matter on the basis that the amendment had been effected and proceeded to consider the amended claims made in the Notice of Motion dated 12 May 2016. Accordingly, I will likewise proceed on that basis.

[6] I should, however, point out at the outset, that counsel on behalf of the appellant conceded that the amended cause of action had no merit and that he was unable to advance any submissions in respect of the claim advanced in the amended Notice of Motion to the effect that the contract would only come into operation on some unspecified future date. To a question posed by this court, counsel on behalf of the appellant conceded that this meant that the claim for relief in Part B in fact fell by the wayside.

The issues before the court *a quo*

[7] Two issues were before the court *a quo*: The first was Part B of the application launched on 28 February 2016 (as amended to provide for a new cause of action) and the second an application launched in June 2017 for the committal of various board members of the respondent for contempt of the orders handed down by Jansen, J and De Vos, J. On 1 March 2016 Jansen, J granted the interim interdict pending the hearing of Part B. The Notice of Intention to amend Part B was filed after Jansen, J granted the interim interdict. On 28 June 2016, De Vos, J found the respondent to be in contempt of the order dated 1 March 2016 but reserved the sanction. Both these orders were thus made pursuant to the original Notice of Motion and not the amended version.

Postponement application

[8] At the commencement of the proceedings the appellant sought an order for the postponement of both Part B of the application and the contempt application. The basis for the application was to afford the appellant an opportunity to join a "necessary party" Mabothema Trading Enterprises (Pty) Ltd) ("Mabothema") to the declaratory application. After the contract in issue lapsed, the respondent issued a tender invitation for a new contract. The appellant submitted a bid but was unsuccessful. It was common cause that the appellant never challenged the award of the tender to Mabothema yet sought (unsuccessfully) to join it as a so-called "necessary party". Mabothema had no interest in the committal for contempt application.

[9] The application for the postponement was dismissed whereafter counsel on behalf of the appellant withdrew. Mr Makola (the legal advisor of the appellant) then

sought a postponement to obtain legal representation. That application was likewise dismissed.

[10] As far as the postponement applications are concerned, counsel on behalf of the appellant conceded that these orders are now academic and made no further submission in respect of the orders regarding the postponement applications. The concessions are well made.

[11] Regarding the application for a declarator, the court *a quo* – again correctly in my view - dismissed the order sought in Part B (as amended) for a declarator that the three-year duration of the contract has not yet commenced despite the fact that the appellant earlier relied on the fact that the contract came to an end on 16 June 2016. The court *a quo*, *inter alia,* rejected the relief on the basis that the new version put forward by the appellant did not take into account the fact that both parties conducted their affairs as from 17 June 2013 (at best for the appellant) until 16 June 2016 as if a three-year contract was in place. The court further noted that the appellant rendered invoices to the respondent in terms of the contract, all of which were paid.

[12] Before us, counsel on behalf of the appellant, as already pointed out, conceded that he was unable to advance any submissions in support of the relief sought in Part B of the notice of motion thus effectively abandoned any reliance on the relief sought in terms of the amended notice of motion. More in particular, counsel conceded that he was unable to argue for a fresh commencement of the contract (as contended by the appellant in the amended notice of motion). Any appeal against this part of the order of the *court a quo* has thus become academic.

[13] As far as the contempt application is concerned, the court *a quo*, correctly in my view, found that, because the contract between the parties came to an end on 16 June 2016, the interim interdict came to an end with it on 16 June 2016 when the (three-year) contract came to an end. At best for the appellants, and having regard to the wording of prayer 3 of the notice of motion (which reads that the order operated as an interim interdict pending the hearing of Part B of this application) the orders by De Vos, J and Jansen, J came to an end on 8 September 2017 when the court *a quo*

handed down its order. The orders therefore were academic then and they remain so now.

[14] In the circumstances, no live issue or controversy remain between the parties: The order sought in Part B is academic in light of the fact that the contract came to an end on 16 June 2016. Both the postponement applications and the contempt application have likewise become academic. Consequently, the issues on appeal before us have become academic. This much has also been conceded on behalf of the appellant.

[15] In terms of section 16(2)(a)(i) of the Superior Courts Act[1] a court may dismiss an appeal 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. A court on appeal, however, retains a discretion to decide an issue or issues that have become moot or academic. The appeal before us is not, in my view, one of those cases that requires this court to pronounce thereon. In all fairness to the parties, it has also not been suggested by any of the parties that this court should pronounce on any of the issues that have since become moot.

[16] In any event, no legal issue of public importance arose in this matter that would require this court to pronounce thereon nor is it in the interests of justice to do so.[2]

[17] Where a judgment or order will have no practical effect, a court may therefore dismiss such an appeal. See in this regard *Independent Electoral Commission v Langeberg Municipality*[3] where the court found that there was no live controversy

[1] Act 10 of 2013.

[2] *Centre for Child Law v Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA): "[11] This 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 enter into the merits of the appeal.[2] 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..." See also *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) where the Constitutional Court noted that: "[32] (M)ootness is not an absolute bar to deciding an issue. That is axiomatic: the question is whether the interests of justice require that it be decided. One consideration is whether the court's order will have any practical effect on either the parties or others."

[3]

between the parties because the elections were already over and in light of the fact that there was no suggestion that any order the court would make might have an impact on the parties. The disputes between the parties were therefore moot:

> "[11] This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. 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. Other factors that may be 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 advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.
> [12] There is no live controversy between the parties. The elections are over and there is no suggestion that any order we make could have any impact on them…."

[18] For these reasons the appeal is dismissed. Costs should follow the result. There was some debate about whether this appeal warranted the costs occasioned by two counsel particularly because only one counsel appeared on behalf of the appellant. I have been persuaded by Mr Mnyandu, who appeared on behalf of the respondent that the preparation of this matter required the employment of two counsel.

[19] In the event the following order is made:

1. The appeal is dismissed
2. The appellant to pay the costs, such costs to include the costs of two counsel.

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A. C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

I agree

_____

P.M. MABUSE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

I agree

_____

E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 March 2021.

Case number : A541/2017

Matter heard on : 24 February 2021

Appearances

On behalf of the appellant

Adv Ascar

Instructed by Beder-Friedland Inc Attorneys

c/o Friedland Hart Solomon Nicolson

On behalf of the respondent

Adv Mnyandu

Instructed by Raname Mokalane Inc

c/o Mashego Ramaga Attorneys