Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A 250/2018

Before: The Hon. Mr Justice Binns-Ward
The Hon. Ms Justice Salie-Hlophe
The Hon. Mr Justice Parker

Hearing: 29 January 2019
Judgment: 6 February 2019

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LTD Appellant

and

THE CITY OF CAPE TOWN First Respondent

SECHABA PROTECTION SERVICES
(WESTERN CAPE) (PTY) LTD Second Respondent

ALL 4 SECURITY SERVICES CC Fourth Respondent

JUDGMENT

BINNS-WARD J (SALIE-HLOPHE and PARKER JJ concurring):

[1] This an appeal against an order by the court a quo determining liability for costs in a judicial review application. The appeal has come before the Full Court pursuant to leave granted by the learned judge at first instance.

[2] The City of Cape Town, which is the first respondent in the appeal, put out to tender certain requirements that it had in respect of the procurement of guarding and security services. The tender invitation attracted a large number of responses and several of the tenderers were subsequently awarded contracts. The second and third respondents in the appeal, Sechaba Protection Services Western Cape (Pty) Ltd and All 4 Security Services CC, were amongst the successful tenderers, but they were dissatisfied with what they termed '*the limited extent of* [their] *success*'. That resulted in them instituting proceedings for the judicial review and setting aside of the tender awards. In their notice of motion, they sought orders (i) reviewing and setting aside the City's decision to make an award in the tender (ii) suspending the effect of any order granted in terms of the primary relief sought pending the completion of a new tender process and (iii) directing the City to initiate a new tender process within 30 days of the grant of the primary relief. As to the costs of the review, the second and third respondents sought an order that the City, as well as any other respondent who opposed their application, should pay their costs of suit.[1] The salient ground for the review was that the scoring of the tenders had misdirectedly treated some tenders that were non-compliant with the statutorily regulated pricing provisions as acceptable tenders.

[3] The City and the appellant, which, as one of the other successful tenderers, was the eighth respondent in the review, delivered notices of intention to oppose the review application. It bears mention in this regard that the founding affidavit in the review application expressly stated that the second and third respondents sought relief in the review application only against the City, and that the remaining respondents had been cited '*merely as potentially interested parties*'. Indeed, as apparent from the nature of the relief sought - as described above - success by the second and third respondents in their application would not have had an immediate effect on the contracts awarded to the successful tenderers pursuant to the impugned tender. Those contracts would remain in effect until the completion of a new process in which the appellant and any other interested party would obviously be free to participate.

[4] The City compiled and made available, in terms of Uniform Rule 53, the administrative record in the tender. The record was voluminous, running to approximately 17 000 pages. Subsequently, and after being on the receiving end of an order obtained

[1] A number of other ancillary orders were sought in the notice of motion, but they are not material for the purpose of this judgment.

through the chamber book putting it and the appellant to terms in regard to the delivery of their answering papers, which had not been produced within the time limit provided in the rules of court, the City bethought its opposition to the review application. It consequently delivered an affidavit explaining why it would concede the review. The City did not, however, accompany its withdrawal of opposition with a tender to pay the second and third respondents' costs. The deponent to the City's affidavit explained the absence of a tender of costs by stating that '*mulcting a public body or a public official in costs when their action or attitude, though mistaken, was bona fide and not grossly irregular, would normally be inequitable and would be detrimental to the proper functioning of the public administration which it is essential in the public interest to maintain. Public bodies and public officials should not be hampered in making decisions they are required to make for fear of costs orders being made against them in subsequent litigation*'.

[5] Very shortly, after the delivery of the City's explanatory affidavit, the appellant delivered its answering affidavit. The appellant's answering affidavit, which we accept would have been prepared under pressure of the aforementioned chamber book order, and without knowledge of the change of position by the City, challenged the merits of the second and third respondents' grounds of review. However, the City's concession of the merits of the review challenge, which included the identification of other fatal flaws in the tender process, cut the ground from under the appellant's feet so to speak. The appellant would have been well advised in the circumstances to have promptly withdrawn its own opposition to the review and to have tendered the costs occasioned to the second and third respondents in respect of the perusal of its answering affidavit.

[6] The City's failure to concede any liability for the costs of the review and the appellant's failure to withdraw its opposition in the light of the City's concession resulted in the delivery of replying papers by the second and third respondents. The reply, which was delivered about one month after the aforementioned affidavits by the City and the appellant, also sought to effect certain amendments to the notice of motion in the review. The contemplated amendments, which were objected to, are not material for present purposes. The replying papers, which were predominantly argumentative in character and did not advance the case in any factually relevant sense, elicited a so-called 'further affidavit' by the appellant's general manager. The appellant's 'further affidavit' was delivered about eight months after the delivery of the replying papers in the review. Its content was mainly argumentative, directed at putting up the appellant's contention that it should not be liable to

pay any of the costs of the second and third respondents and why, on the contrary, *the appellant's* costs in the review should instead be paid by either the City or the second and third respondents.

[7] The resultant deadlock about liability for costs resulted in the matter being set down for argument before the judge a quo. It is evident from his judgment that the judge was persuaded by the City's argument that in principle it should not be mulcted in costs for having mistakenly made an unlawful administrative decision because it had acted in good faith and without gross negligence. The judge absolved the City from any responsibility for the second and third respondents' costs of suit, but held that the appellant should be liable for those costs for having unsuccessfully entered into the fray in the face of the notice that costs would be sought against the City and any other respondent who chose to oppose the review.

[8] The scope for interference on appeal with a costs order is very limited. This is because it is well established that the making of such orders involves the exercise by the judicial officer concerned of a true or strict discretion, and intervention on appeal is permissible only if there has been a demonstrable failure at first instance to exercise the discretion judicially or that its exercise has been affected by material misdirection.

[9] There is, in addition, a reluctance by the courts as a matter of policy to entertain appeals in situations in which the substantive issues between the parties have already been resolved or become moot and all that remains in dispute is liability for costs. This policy, which previously found statutory expression in s 21A of the Supreme Court Act 59 of 1959, has been reiterated in s 16(2) of the Superior Courts Act 10 of 2013. Mindful of this consideration, the parties were called upon in terms of s 16(2)(b) to persuade us why the appeal should not be dismissed on the ground that the decision sought would have no practical effect or result aside from a possible revisitation of the determination of costs.

[10] The parties were unanimous in their submission that the circumstances were sufficiently exceptional to merit our entertaining the appeal notwithstanding the generally applicable policy against doing so when only costs are concerned. In this regard the parties emphasised that the perusal of the administrative record of 17 000 pages had resulted in the issue in dispute involving a very substantial sum in money. They pointed to decisions in which the high amount of the costs in issue had been a consideration identified as sufficient to constitute exceptional circumstances in the relevant sense. An *en passant* remark supporting their argument is to be found in *John Walker Pools v Consolidated Aone Trade &*

Invest 6 (Pty) Ltd (In Liquidation) and Another 2018 (4) SA 433 (SCA) at para 8. The passing remark was inspired by the approach in *Oudebaaskraal (Edms) Bpk en Andere v Jansen van Vuuren en Andere* 2001 (2) SA 806 (SCA) at 812D – E, where regard was had to the peculiar circumstances of a case in which substantial costs had been run up in the litigation before the substantive issues had become moot as being sufficient to warrant an appeal exclusively against a costs order to be entertained. It seemed to us that the circumstances in the current were quite closely comparable. A further factor that weighed with us was that we had a strong prima facie view that there had been a fairly obvious misdirection by the court a quo in the exercise of its discretion and that an injustice would be visited if we declined to entertain the appeal on its merits.

[11] The approach of the court a quo overlooked the constitutional character of the litigation and the established principles applicable in respect of the determination of costs in such cases. A judicial review challenge of the nature mounted by the second and third respondents was essentially in defence of their fundamental rights to lawful administrative action. The Constitutional Court spelled out important guideline principles for the determination of liability for costs in such matters in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC). In relevant part that judgment (at para. 23) firmly established that *'…it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door*'.[2]

[12] Had the court a quo, as it was bound to, applied the principles enunciated by the apex court, it would have held the City liable for the second and third respondents' costs incurred the review application up to and including attendances associated with the delivery of the City's affidavit explaining its withdrawal of its opposition to the review on its merits. Those costs should have included the costs reserved for later determination in the abovementioned chamber book application. It was materially misdirected of the court a quo to have burdened the appellant with the costs that in constitutional principle should have been awarded against the City. The costs incurred by the second and third respondents in taking issue in their

[2] Footnote omitted.

replying papers with the City's position on costs could properly be left out of account, however, because the reply was effectively superfluous by reason of its argumentative character.

[13] The appellant's exposure to an adverse costs order in the review should have been limited to joint and several liability with the City in respect of the costs in the chamber book application, and to a liability to pay the costs occasioned by its answering affidavit and the 'further affidavit' in which it very misdirectedly sought to argue for a costs order in its favour against either the second and third respondents or the City.

[14] The circumstances were such that it was most unfortunate that the parties were unable to settle the question of costs without the necessity for a hearing before the court a quo. The effect of the proper application of the principles enunciated in the *Biowatch* judgment should have been plainly evident to them. In my judgment it would have been appropriate in the circumstances for the court a quo to have ordered the City and the appellant to bear joint and several liability for the costs incurred by the second and third respondents in respect of the hearing before it in respect of the costs dispute.

[15] It will be apparent from what I have said thus far that the appellant's appeal will be upheld and the order made by the court a quo will be set aside. There were no conditional cross-appeals by either the City or the second and third respondents, but counsel were agreed, rightly so in my view, that any setting aside by this court of the costs order made in the court a quo would require us to make a substitutive costs order on the basis of a decision completely afresh of the issue that was before the court a quo. Such an order in the form set out at the conclusion of this judgment will duly follow.

[16] It remains only to consider the costs of the appeal. The appellant has been successful. But the nature and extent of its success make this a peculiar case in which the general approach that costs follow the result would not be in accordance with justice. The costs order that will be made in place of that made at first instance will, in its essential respects, be that for which the second and third respondents always contended, and which, having regard to the *Biowatch* principle, the appellant and the City should long ago have conceded. There is therefore no proper basis upon which the second and third respondents should be liable for the appellant's costs on appeal. The fact that the second and third respondents were obliged to incur any costs in the appeal was essentially due to the failure by both the City and the appellant to have made appropriate tenders in their favour before the matter even came up for

hearing before the court a quo. It seems to me in the circumstances that the City and the appellant should in justice be held jointly and severally liable for the second and third respondents' costs in the appeal, and that the City should be held liable for part of the appellant's costs in the appeal.

[17] Regrettably, there are other features about the appeal that merit reflection in the formulation of the costs order to be made in respect of the appeal. The record on appeal ran to eight and a half volumes. It included the entire record of the review application. Objectively, it was necessary for the court to have regard only to a very limited part of that record for the purposes of deciding the issues in the appeal. There is an obligation on the parties in terms of the practice directives in force in this Division to identify the passages of the record which, reasonably considered, it should not be necessary for the appeal panel to read. The information is required to be included in the practice notes that must accompany the parties' respective heads of argument. The parties are expressly reminded of this obligation in the notices of set down that are sent out by the registrar, which also inform them of the dates by which their heads of argument must be delivered. None of the parties complied with these obligations. In the result it was left to us to either unnecessarily read the entire record, or to rely on our instinct and experience to ferret out what appeared to be germane to our task and skip over the rest. Furthermore only one of the three legal teams involved in the appeal filed a list of authorities with their heads of argument, as also required in terms of the practice directives.

[18] Non-compliance with these practice directives has become all too common. The practice directives set out measures and procedures considered useful and desirable to assist in the more effective and efficient discharge of the judicial workload. They have been compiled on the basis of the collective experiences of the judges in this Division in the course of discharging their functions in a wide variety of matters. Compliance with the practice directives should conduce not only towards assisting judges to do their work efficiently, but also, and, in consequence of that, to the benefit of the community who bring matters before the courts of this Division for adjudication. Enjoinders from the bench for more punctilious compliance with the practice directives do not seem to be particularly effective. We have therefore considered it necessary to mark our displeasure at the non-compliance in this case by depriving the parties in whose favour costs are to be awarded on appeal of part of those costs. The City ends up as the incidental beneficiary of this approach in that the extent of its costs exposure to the appellant and the second and third respondents is

consequently reduced. The comfort we take from this otherwise eccentric incidence of the order to be made is that at least it is not the rates paying public that will get punished in the process.

[19] The court a quo made no provision in its order in respect of the costs of the application to it for leave to appeal. I think it may be implied that the intention must have been that those costs should be costs in the appeal, as is ordinarily the case.

[20] The following order is made:

1. The appeal is upheld.
2. The costs order made by the court of first instance is set aside and substituted with an order in the following terms:
    a. The first respondent (the City of Cape Town) shall be liable for the costs of suit incurred by the applicants in the review application up to and including any attendances associated with the delivery of the affidavit *jurat* 30 June 2015 explaining the first respondent's withdrawal of its opposition to the review on its merits.
    b. The eighth respondent (Fidelity Security Services (Pty) Ltd) shall be liable for the costs of suit incurred by the applicants in the review application in respect of the perusal and consideration of the answering papers delivered by the eighth respondent.
    c. The first and eighth respondents shall be liable jointly and severally, the one paying the other being absolved, for the costs incurred by the applicants in respect of the latter's application through the chamber book for an order putting the said respondents to terms in regard to the delivery of their respective answering papers.
    d. The first and eighth respondents shall be liable jointly and severally, the one paying the other being absolved, for the costs incurred by the applicants in respect of the hearing on the issue of liability for costs in the review application.
    e. Save as provided in paragraphs a. to d. above, the parties shall bear their own costs in the review application.

3. The first respondent is ordered to pay one half of the appellant's costs of suit in the appeal, such costs to include the costs of the application for leave to appeal.

4. The appellant and the first respondent shall be liable jointly and severally, the one paying the other being absolved, to pay three quarters of the second and third respondents' costs of suit in the appeal.

A.G. BINNS-WARD
Judge of the High Court

G. SALIE-HLOPHE
Judge of the High Court

M.K. PARKER
Judge of the High Court