



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: **4568/2022**

In the matter between:

DS CONSORTIUM
(A Joint Venture between Dots Design Group (Pty) Ltd
and Sonaqua Events and Promotions CC)

Applicant

and

**THE MEC: FREE STATE PROVINCIAL DEPARTMENT
OF SPORTS, ARTS, CULTURE AND RECREATION**

First Respondent

C-SQUARED GROUP (PTY) LTD

Second Respondent

HEARD ON: 10 OCTOBER 2022

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 27 OCTOBER 2022

- [1] This is an application for leave to appeal against the orders made by this Court on 3 October 2022 in an urgent application, and against the Reasons for the said Orders handed down on 6 October 2022. The applicants for leave are the two respondents. For the sake of convenience, and for ease of reference, the parties are referred to herein as they were in the main application.

- [2] The main application concerned the award of a tender by the First Respondent to the Second Respondent to provide event management services for the Macufe Festival in Bloemfontein, which festival was held during the period 25 September 2022 until 9 October 2022. The urgent application launched by the applicant was heard on 26 September 2022, that is one day after the festival had commenced.
- [3] After hearing the application, the Court made the following orders:
1. The Applicant's non-compliance with the rules of court in relation to time periods is condoned, and the application is heard as an urgent application in terms of Rule 6(12).
 2. The decision of the First Respondent to award tender SCM/MACUFE 01/22 to the Second Respondent, is hereby reviewed, declared unlawful and set aside.
 3. Any service level agreement concluded between the First and Second Respondents relating to the impugned decision is struck down in accordance with Section 8 of the Promotion of Administrative Justice Act 3 of 2000.
 4. The First and Second Respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.
- [4] It is mentioned in the Reasons handed down for these Orders that the consequential relief sought by the applicant, for instance that a new tender must be awarded, would not be in the public interest because such an order could bring an immediate end to the festival, which was already in full swing at that point in time. It is mentioned that it was best to leave the way forward in the hands of the parties without interference by the Court. The Court refrained from making any further orders by virtue of Section 172(1)(b) of the Constitution, which provides that a Court may make any order that is just and equitable in circumstances like the present.
- [5] In their application for leave to appeal, the Respondents raised a number of grounds of appeal. Having regard to the fact, however, that the Macufe Festival has ended some two weeks ago, the first question that now arises is whether

an appeal by the Respondents would have any practical effect, should such an appeal eventually be upheld. This question is relevant because Sections 16 and 17 of the Superior Courts Act¹ provide, *inter alia* as follows:

“16(2) (a) (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.

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a)

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a)”.

- [6] The result hereof is that leave to appeal may only be granted if the issues are of such a nature that the decision sought will have a practical effect or result. If not, leave to appeal may not be given. At the hearing of the application for leave, counsel for the Applicant submitted that a successful appeal will have no practical effect or result, simply because the Macufe festival has already run its course. He submitted that for this reason, the issues sought to be raised on appeal have become moot.
- [7] Counsel appearing for the two Respondents submitted that the matter is not moot. Mr. Merabe, appearing for the Second Respondent, referred this Court to the judgement of **Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others**² and the judgement of the Constitutional Court in **AB and Another v Pridwin Preparatory School and Others**³, submitting that the matter represents a live controversy for the Second Respondent. By reason of the fact that the judgement of this Court saddled the Second Respondent with an albatross around its neck as far as its future operations are concerned, the matter has not become moot, the argument went.
- [8] In my view, the **Minister of Justice** case is clearly distinguishable from the present case. In that case, the South African Government failed to arrest a visiting head of state for whom the International Criminal Court had issued

¹ Act 10 of 2013

² 2016(3) SA 317 (SCA)

³ (2020) ZACC 12

warrants for his arrest. In an urgent application launched in the Pretoria High Court, an order was made declaring that the failure to arrest was inconsistent with the Constitution and invalid, and a further order was made for the arrest and detention of the head of state concerned. Subsequently the High Court refused leave to appeal on the basis that the litigation has become moot, since the person concerned had already left the country. On petition the Supreme Court of Appeal held that the High Court had erred in refusing leave to appeal on the basis that there was no live dispute between the parties. It held that the High Court order had a continuing effect because the SALC would seek to enforce it if the head of state ever returned to South Africa, something the government had to take cognisance of in the conduct of its diplomatic relations.

- [9] In the present case the order of this Court had no such continuing effect. On the fact of the present case, the litigation has become moot because a court's ruling on appeal will have no direct practical effect.

- [10] The judgement in the **AB and Another** case is also distinguishable. In that case, the headmaster of a private school terminated the parent contract with the parents of two boys who attended the school. The parents sought an order in the Constitutional Court declaring the headmaster's decision to terminate the Parent Contract unlawful, and declaring a clause in the contract contrary to public policy to the extent that it purports to allow the school to cancel the parent contract without following a fair procedure. By the time the matter came before the Constitutional Court for leave to appeal, the two boys have already left the school in question, and the parents indicated that they did not pursue any relief seeking the children's reinstatement at their old school. The question then arose whether the matter is therefore moot, since the Court's ruling would have no direct practical effect.

- [11] In deciding this question, the Constitutional Court pointed out that mootness is not an absolute bar to deciding an issue ... the question is whether the interests of justice require that it be decided. The Court found that it was in the broader public interest for the Court to make a decision on the constitutionality of the abovementioned clause only, and to thus grant leave to appeal notwithstanding

mootness. It was in the broader public interest because similar clauses in parent contracts are used in many independent schools across the country.

[12] In the present case there are no issues pertaining to the interests of justice or the broader public interest that require the attention of a court of appeal. The issues therefore remain moot, because a successful appeal will have no direct practical effect. I need to mention here that there is nothing on record to indicate that there are pending or expected disputes between the parties that may benefit from any findings by a court of appeal. In any event, it was found by the Constitutional Court in **Steenkamp NO v Provincial Tender Board, Eastern Cape**⁴ that there were no public policy considerations and no constitutional values which justified adapting or extending the common law of delict to recognise a right of action by an initially successful tenderer who had incurred financial loss on the strength of the award which was subsequently set aside on review. The initially successful tenderer has other remedies, for instance to negotiate the recovery of its out-of-pocket expenses from the tender board.

[13] In the premises, I find that the decision sought on appeal will have no practical effect or result. The following order is made:

1. The application for leave to appeal is dismissed with costs, including the costs of two counsel.



P. J. LOUBSER, J

For the First Respondent (Applicant for leave):

Instructed by:

Adv. L.R. Bomela

The State Attorney

Bloemfontein

⁴ 2007 (3) SA 121 (CC)

For the Second Respondent (Applicant for leave):

Instructed by:

Adv. M.J. Merabe

Mohobo Attorneys Inc

Bloemfontein

For the Applicant:

With him:

Instructed by:

Adv. P.J.J. Zietsman SC

Adv. W. A. van Aswegen

Muller Gonsior Inc

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/roosthuizen