

IN THE NORTH GAUTENG HIGH COURT
[REPUBLIC OF SOUTH AFRICA]

23/01/2013

Appeal Case No.: A555/2011

Case No.: 47220/2009

(1) IF NEITHER IS APPLICABLE	
(2) CONTESTABLE: YES/NO.	
(3) OF INTEREST TO OTHER JUDGES: YES/NO.	
(4) REVISED.	
23 JAN 2013	
DATE	SIGNATURE

In the matter between:

THE EXECUTOR OF THE LATE
NTOMBIZODWA CONSTANCE
MADLALA

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

1st Respondent

TOKISO DISPUTE RESOLUTION

2nd Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

3rd Respondent

JUDGMENT

MNGQIBISA-THUSI J:

- [1] This appeal was heard on 5 November 2012. After hearing argument and considering the matter a ruling dismissing the appeal was made. It was indicated to counsel that reasons for the decision would be made available later.

- [2] The appellant, in his capacity as executor of Ntombizodwa Constance Madlala who died before this appeal could be heard, is appealing against the judgment of Judge Zondo handed down on 16 May 2011 dismissing her application for the review of first respondent's decision refusing her application for accreditation as a panellist on the second respondent's panel.
- [3] During May 2009 the second respondent had applied to the first respondent for the accreditation of the appellant. The first respondent refused to accredit the appellant which led the deceased launching the review proceedings.
- [4] The grounds upon which the appellant relied upon for seeking the first respondent's decision reviewed are the following:
- 4.1 that the first respondent does not have the power to accredit panellist to bargaining councils or private agencies in terms of section 127 of the Labour Relations Act, and therefore acted *ultra vires* its powers;
- 4.2 that the decision refusing appellant's accreditation was irrational and therefore liable susceptible to be reviewed in terms of the **Promotion of Administrative Justice Act 3 of 2000(PAJA)**.
- [5] The appellant has since died and the executor of her deceased estate is pursuing this appeal.

- [6] The first respondent has raised a point *in limine*, that in terms of section 21A of the **Supreme Court Act** 59 of 1959 ("the Act"), this appeal should be dismissed on the ground that it has become moot.
- [7] Counsel for the first respondent argued that in view of the appellant's death, there would be no practical benefit for the deceased estate even if the appeal was to succeed. Further that although the appellant in its heads of argument had alluded to the fact that the executor of the deceased estate intended pursuing a potential damages claim should the appeal succeed, there was no affidavit filed by the executor indicating its intention to do so. Further, it was argued that, in view of the provisions of section 126 (2) of the **Labour Relations Act** 66 of 1995, there were no prospects of success in a damages claim against the first respondent in view of the fact that the appellant had not alluded to any mala fides on the part of the first respondent when it took the decision to refuse to accredit the deceased.
- [8] Section 126(2) of the Labour Relations Act provides that the first respondent would not be held liable for any loss suffered by any person as a result of any act performed or omitted in good faith in the course of exercising the functions of the first respondent.
- [9] In response counsel for the appellant submitted that the appeal was not moot. Relying on the recent yet unreported SCA judgment in *Buthelezi and another v Minister of Home Affairs* [2012] ZASCA 174 OF 29 November 2012 counsel submitted that there was a potential claim for damages should the appeal be upheld. It was further argued

that even if the appeal was moot the court could still exercise its discretion and hear the appeal in the interest of justice or public interest in that the order may have practical effect on others. However, counsel had no explanation as to how the executor intended quantifying its damages with regard to the potential action against the first respondent.

[10] Section 21A of the Act reads as follows:

“(1) When at the hearing of any civil appeal to the Appellate Division or any provincial Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

...

(3) save under exceptional circumstances, the question of whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.”

[11] The import of section 21A is that courts should be concerned only with matter where there are practical disputes. The test to be applied is whether ‘the judgment or order on appeal will have a practical effect or result, not whether it might be of importance in a hypothetical future case. *Dornell Properties 282 CC v Renasa Insurance Co Ltd and others NNO 2011 (1) SA 70 (SCA)* at 91E-93C. Counsel for the appellant was at pains to impress on us that there were other potential litigants who were seeking the same relief sought by the appellant but could not point us to actual instances where this was contemplated.

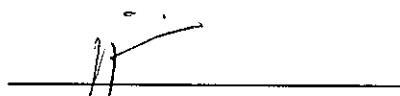
[12] We are of the view, as correctly pointed out by counsel for the first respondent that the determination of this appeal would serve no practical purpose. The applicant in the court *a quo* has passed on and the executor would have difficulties proving with certainty that even if the appeal succeeds, the deceased would have proven the number of cases that would have been allocated to her including the commensurate fees. Secondly, there are no facts before us laying a basis that it is the intention of the executor to pursue a damages claim should the appeal succeed. Nowhere in the founding affidavit is the issue of damages canvassed. Furthermore, even if the executor had such an intention, he or she would not be acting in the public interest but for the benefit of the deceased estate.

[13] Furthermore, even if the appeal was heard and the appellant was successful, the deceased estate would not be able to sue the first respondent for damages, as pointed out by counsel for the first respondent, the appellant has not alluded to any facts which might indicate that when the first respondent took the decision to refuse accreditation to the deceased, it was motivated by mala fides.

[14] In the premises we are of the view that the point in limine should be upheld and the appeal dismissed.

[15] Accordingly the following order is made:

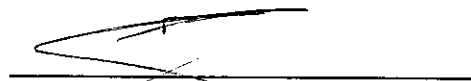
1. The appeal is dismissed.
2. There is no order as to costs.



N. P. MNGQIBISA-THUSI

Judge of the North Gauteng High Court

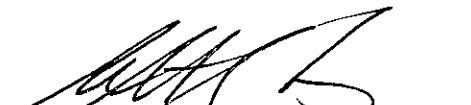
I agree



S POTTERILL

Judge of the North Gauteng High Court

I agree



W HUGHES

Judge of the North Gauteng High Court