THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 461/2023

In the matter between:

ROADMAC SURFACING (PTY) LTD **APPELLANT**

and

MEC FOR DEPARTMENT OF POLICE, ROADS AND TRANSPORT, FREE STATE PROVINCE **FIRST RESPONDENT**

TAU PELE CONSTRUCTIONS (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Roadmac Surfacing (Pty) Ltd v MEC for the Department of Police, Roads and Transport, Free State Province and Another* (461/2023) [2024] ZASCA 157 (14 November 2024)

Coram: HUGHES, MABINDLA-BOQWANA, MOLEFE and KEIGHTLEY JJA and MJALI AJA

Heard: 13 September 2024

Delivered: 14 November 2024

Summary: Appeal – s 16(2) of the Superior Courts Act 10 of 2013 – whether the appeal will have practical effect or result – high court failed to deal with issue of reserved costs – determination of costs as a consideration in terms of s 16(2)*(a)*(ii) – existence of exceptional circumstances.

ORDER

On appeal from: Free State Division the High Court, Bloemfontein (Pohl AJ and Molitsoane J, sitting as court of first instance):

1 The appeal succeeds in part to the extent indicated below.

2 The order of the Free State Division of the High Court, Bloemfontein, is varied by adding paragraph 2 to the order as follows:

'(2) The first respondent is ordered to pay the wasted costs occasioned on 28 January 2022, 10 February 2022, and 24 March 2022, which costs shall include the costs of two counsel, where so employed.'

3 The first respondent is ordered to pay the costs of the appeal and wasted costs occasioned by the adjournment of the appeal on 7 May 2024, which costs shall include the costs of two counsel, where so employed.

JUDGMENT

Hughes JA (Mabindla-Boqwana, Molefe and Keightley JJA and Mjali AJA concurring):

[1] The appellant is Roadmac Surfacing (Pty) Ltd (Roadmac), a company that appeals against the dismissal of a review application, with costs, heard in the Free State Division of the High Court, Bloemfontein before Pohl AJ and Molitsoane J (the high court). The appeal is with the leave of that court.

[2] On invitation by the first respondent, the MEC for the Department of Police, Roads and Transport, Free State Province, Roadmac together with the second respondent, Tau Pele Construction (Pty) Ltd, as well as other bidders, submitted bids regarding a tender (Tender No:PR&T18/2021/22) for the Special Maintenance on Route P44/1&2 between Deneysville and Jim Fouche (the works) in the Free State Province. Roadmac was unsuccessful as the second respondent was awarded the bid. Not happy with the outcome, Roadmac sought reasons from the first respondent. After receipt thereof, Roadmac launched review proceedings premised on the fact that the award of the tender to the second respondent was not fair, transparent, competitive,

or cost effective. Pending the review proceedings, Roadmac applied for interim relief, seeking an interdict, which was granted on 28 March 2022. With immediate effect, the first respondent was interdicted from giving instructions to the second respondent to continue under the tender in question, and the second respondent was interdicted from commencing with any further work.

[3] The order granting the interim interdict directed that the costs leading up to the hearing of the application for an interdict (being the 28 January 2022, 10 February 2022 and 24 March 2022), stand over for determination at a later stage (the Daffue J order). The review application was heard on 7 November 2022, and an order dismissing this application was delivered on 14 November 2022. On 28 April 2023 leave to appeal this order was granted by the high court. Conspicuously, the costs aspect of the Daffue J order remains unresolved, as the high court failed to deal with it. This failure is the subject matter of one of the grounds of appeal raised by Roadmac.

[4] The appeal was scheduled to be heard in this Court on 7 May 2024. However, on the day in question, counsel for the first respondent handed up a Certificate of Completion of Works (completion certificate), which indicated that the works were completed on 28 September 2023. This completion certificate affirmed that, on 14 September 2023, the works carried out had been inspected and had been found to have met all the required conditions for its issuance, in line with the project specification. The question that then arose was whether the appeal will have practical effect or result.

[5] At the request of counsel for Roadmac, the hearing of the appeal was adjourned, as Roadmac had been taken by surprise. The matter was accordingly postponed with costs reserved and was subsequently set down for 13 September 2024.

[6] Section 16(2)*(a)*(i) and (ii) of the Superior Courts Act 10 of 2013 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.’

[7] The issue to be determined in this appeal is whether the judgment or order sought by Roadmac will have any practical effect or result. I need to mention that, in the appeal proceeding, the second respondent filed a notice to abide this Court's decision.

[8] However, Roadmac persisted in its argument that this Court is still obliged 'to declare the administrative acts complained of. . .to be constitutionally invalid' by invoking s 172(1) of the Constitution, which states:

'When deciding a constitutional matter within its powers, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable. . .'

Further, a separate ground raised was that there were pending costs occasioned prior to the hearing of the review application, which the high court failed to deal with.

[9] The high court had the following to say when it granted Roadmac leave to appeal to this Court:

'However, I do accept that another court may come to a different finding that we ought to have pertinently dealt with. . .Constitutionality as raised in these proceedings. Our failure to deal with [the] issue[s] is. . .enough to grant leave to appeal. It is unnecessary for me to deal with other grounds raised in the application for leave to appeal.'

What is glaringly obvious is that the high court did not appreciate that they had not exercised their discretion to deal with the costs, which was argued in the review, that had been held over for determination in the Daffue J order. Hence, the matter had not reached finality when the review was determined.

[10] In this Court, Roadmac, argued that it was entitled to these costs. In addition, it stated that the high court's failure constituted a misdirection, the high court having failed to direct itself to all the pertinent and relevant issues. As such, Roadmac placed reliance on *Naylor and Another v Jansen* (*Naylor*),[1] that the failure of the high court to

[1] *Naylor and Another v Jansen* [2006] ZASCA 94; 2007 (1) SA 16 (SCA) (*Naylor*) para 10; see also *Logistic Technologies (Pty) Ltd v Coetzee and Others* 1998 (3) SA 1071 (W) at 1075J-1076A.

exercise its discretion, 'at least, usually' constituted exceptional circumstances as envisaged in s 16(2)*(a)*(ii).

[11] Counsel for the first respondent argued that both the merits and the costs held over were moot. However, in the course of his argument before this Court, he was constrained to concede that finality had not been attained in the matter because of the outstanding determination of costs. Further, that the first respondent was liable for the costs of 7 May 2024 when the completion certificate was handed up from the bar, which necessitated a postponement.

[12] It is obvious that despite the completion certificate having already been issued, the first respondent drafted the heads of argument for this appeal on 26 October 2023 with no mention of this fact. By then, on 28 September 2023, the first respondent was or ought to have been well aware that the matter was moot, as the completion certificate was already on hand. However, the first respondent failed to take this Court into its confidence and waited for the date of the appeal to spring the existence of the completion certificate on both the Court and Roadmac. The second respondent is not an innocent party in this conduct either, as they were signatories to the completion certificate and were participants in this appeal before they decided to abide by the decision of this Court.

[13] On the merits of the appeal, counsel for Roadmac argued that, even though the relief it sought in relation to the award of the tender was moot and the appeal would have no practical result or effect, it was entitled to a declaration by this Court in terms of s 172 of the Constitution that the administrative act of the first respondent was invalid. When asked to what end such a declaration should be made, the response advanced was that it might open an avenue for a civil suit against the first respondent.

[14] This, to my mind, is akin to Roadmac seeking advice from this Court to bolster a further civil suit. It is trite that courts will not decide matters which are purely academic and will have no practical effect. This Court and the Constitutional Court have said this much in a plethora of judgments, as far back as *Geldenhuys & Neethling v Beuthin,*[2]

[2] *Geldenhuys &Neethling v Beuthin* 1918 AD at 441:

and in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*:[3]

'A case is moot and therefore not justifiable 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.'

[15] It follows that the merits in this matter ought not to detain this Court. The appeal on the merits is academic, moot and of no practical effect, as the works had been completed as far back as 2023.

[16] As to the issue of the outstanding costs determination, the following relevant passage from *Naylor*[4] is apposite referring to s21A of the Supreme Court Act, 59 of 1959 now replaced by s16(2)*(a)*(i) and (ii) of the Superior Courts Act 10 of 2013:

'It would be convenient, at this stage, to dispose of the defendants' argument that the appeal should be dismissed because of the provisions of s 21A of the Supreme Court Act 59 of 1959. That section provides, to the extent relevant for present purposes:

"(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local 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 whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs."

I had occasion in *Logistic Technologies (Pty) Ltd v Coetzee* to express the view that a failure to exercise a judicial discretion would (at least, usually) constitute an exceptional circumstance. I still adhere to that view ─ for if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order, simply because an appeal would be concerned only with costs; and that, obviously, cannot be the effect of the section.'

'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'

[3] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 para 21 at footnote 18; *Tecmed Africa (Pty) Ltd v Minister of Health* [2012] ZASCA 64; 2012 (4) All SA 149 (SCA) para 19.

[4] *Naylor* para 10.

[17] The costs referred to in this provision are the costs incurred in the court against whose decision the appellant or would-be appellant is seeking to appeal, not the costs in the appellate court.[5] Such an appeal will only be entertained if there are exceptional circumstances or an important issue of principle between the parties that requires a resolution in the interest of justice. Taking into account the fact that the high court failed to deal with the Daffue J order in relation to the costs which stood over, this is an instance where an important issue between the parties affecting their interest requires resolution for justice to prevail. Furthermore, the high court's failure to exercise its judicial discretion in dealing with the costs issue, as stated above, could amount to an exceptional circumstance. Consequently, the circumstances of this case culminate into an ideal situation where an appeal court may interfere in the interests of justice.

[18] I propose to deal with the issue of costs in this order: the Daffue J costs order, the amended cost order in the review as a result of the success obtained by Roadmac, costs of the postponement on 7 May 2024 and costs of the appeal.

[19] It would be well to remind ourselves that the Daffue J costs order made provision for the costs leading up to the hearing of the application for an interdict, being 28 January 2022, 10 February 2022 and 24 March 2022, which were to stand over for determination at a later stage. Regarding the costs of 28 January 2022, these costs relate to an urgent application for the first respondent to provide reasons for its decision to award the tender to the second respondent and interdictory relief. The parties agreed to postpone the application to 10 February 2022 to enable the first respondent to provide the reasons, which it did on 7 February 2022. On 10 February 2022, the application was yet again postponed to 24 March 2022 when the matter was heard by Daffue J, where interdictory relief was granted on 28 March 2022 in favour of Roadmac. Since Roadmac successfully obtained the interim interdict, it was entitled to obtain the costs for the dates preceding the interdict order. It is not clear why Daffue J did not deal with those costs when he heard the application for the interdict. As stated, the high court overlooked the costs. In these circumstances, it is in the interests of justice that the cost order of the review proceedings be amended.

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[5] *John Walker Pools v Consolidated Aone Trade and Investment 6 (Pty) Ltd (in Liquidation) and Another* [2018] ZASCA 12; 2018 (4) SA 433 (SCA) para 8.

[20] As to the costs in this Court, it was rightly conceded by the first respondent's counsel, that the postponement of the appeal on 7 May 2024 was occasioned by the first respondent handing up the completion certificate dated September 2023 on that date. As stated, this completion certificate was issued before the first respondent filed its heads of argument in October 2023 and all the while, the first respondent did not notify Roadmac and this Court of it prior to the hearing of the appeal. The first respondent is therefore liable for the wasted costs occasioned by the postponement.

[21] Roadmac argued that the failure of the high court amounts to partial success on appeal in these exceptional circumstances, warranting a costs order in their favour. This argument has merit. This is more so because it was notified on the steps of this Court about the completion certificate. It had already incurred the costs. Roadmac is successful to this extent. There are also no reasons why costs in this appeal should not follow the result. Roadmac having attained partial success in the appeal, is entitled to these costs.

[22] In the result, the following order is granted:

1 The appeal succeeds in part to the extent indicated below.

2 The order of the Free State Division of the High Court, Bloemfontein, is varied by adding paragraph 2 to the order as follows:

> '(2) The first respondent is ordered to pay the wasted costs occasioned on 28 January 2022, 10 February 2022, and 24 March 2022, which costs shall include the costs of two counsel, where so employed.'

3 The first respondent is ordered to pay the costs of the appeal and wasted costs occasioned by the adjournment of the appeal on 7 May 2024, which costs to include the costs of two counsel, where so employed.

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W HUGHES

JUDGE OF APPEAL

Appearances

For the appellant:	N Snellenburg SC with J J Buys
Instructed by:	York Attorneys, Bloemfontein
For the first respondent:	L R Bomela with M B Mojaki
Instructed by:	The State Attorney, Bloemfontein.