



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 115/2010

In the matter between:

**ETHEKWINI MUNICIPALITY
MINISTER OF TRANSPORT
MEMBER OF THE EXECUTIVE COUNCIL
FOR THE PORTFOLIO OF TRANSPORT IN
THE PROVINCE OF KWAZULU-NATAL**

**First Appellant
Second Appellant**

Third Appellant

and

**COMBINED TRANSPORT SERVICES (PTY)
LTD
KZT BUS SERVICES (PTY) LTD
KZT COUNTRY CRUISER (PTY) LTD
SOUTH COAST BUS SERVICE (PTY) LTD
NGOTSHANA BUS SERVICES CC
MASIJABULE TRANSPORT CC
IKHWEZI BUS SERVICE (PTY) LTD
TANSNAT BUS SERVICE (PTY) LTD
TANSNAT COACHLINES (PTY) LTD**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent**

Neutral citation: *Ethekwini Municipality v Combined Transport Services*
(115/10) [2010] ZASCA 158 (1 December 2010)

Coram: MPATI P, HEHER, MAYA and SNYDERS JJA and R PILLAY
AJA

Heard: 15 November 2010

Delivered: 1 December 2010

Summary: Appeal — Power of Court of Appeal — Power in terms of s 21A of Supreme Court Act 59 of 1959 to dismiss appeal where judgment or order sought would have no practical effect or result.

ORDER

On appeal from: KwaZulu-Natal High Court, (Pietermaritzburg) (Rall AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

R PILLAY AJA (MPATI P and HEHER and MAYA and SNYDERS JJA concurring)

[1] With the leave of the trial court, the appellants appeal against the judgment of the Pietermaritzburg High Court (Rall AJ) reviewing and setting aside the decision of the Department of Transport, KwaZulu-Natal,¹ to award to Tansnat Bus Service (Pty) Ltd, the eighth respondent the remainder (fifteen months) of a seven-year contract relating to the operation of bus services in the Durban and surrounding areas. The issue in the court below was the validity or otherwise of the decision to award the remainder of the contract to Tansnet Bus Service (Pty) Ltd.

[2] Prior to October 2003, first and third appellants provided a bus service to the public of the greater Durban and surrounding areas, as they were obliged to do, the third appellant having been responsible, in terms of s 9 of the National Land Transport Transition Act 22 of 2000 ('Transport Transition Act'), for overseeing land public transport within the province of KwaZulu-Natal. However, earlier in the same year, the

¹ Third appellant is the member of the executive council for the portfolio of Transport in the Province of KwaZulu-Natal and consequently the political head of the department.

first and third appellants decided to outsource public land transport in the greater Durban and surrounding areas. Tenders for the provision of the service were invited in terms of s 47(2) of the Transport Transition Act.

[3] Consequent upon the tender process and on or about 30 September 2003, the first and third appellants concluded a contract with Remant/Alton Land Transport (Pty) Limited ('Remant') for the provision of public passenger bus transport services in the greater area of Durban as from 1 October 2003 to 30 September 2010. The service was intended to provide transport for about ten thousand commuters daily.

[4] During March 2009, the Metro Group of companies (which incorporates the first, second and third respondents as well as KZT Bus Services (Pty) Ltd) represented by their general manager, Mr Vikesh Maharaj ('Maharaj'), reacted to newspaper reports and rumours of Remant's impending termination of the contract. Maharaj then addressed various letters to the first and third appellants in which he explained the capabilities of the companies he represented to provide the necessary bus services, which were being provided by Remant.

[5] On 17 March 2009, representatives of the first and third appellants convened a meeting with the bus operators of the greater area of Durban, to discuss how one or more of them could assist in providing bus services in areas where Remant was unable to do so. The meeting ended with the bus operators being invited to submit proposals to the offices of the third appellant indicating their capacity to accommodate Remant's commuters on short notice, in areas where Remant was unable to provide the service.

[6] On 1 June 2009 Remant gave written notice to the first appellant of

its intention to terminate the contract on 30 June 2009. The termination was accepted and Remant was requested to source an alternate operator as provided for in terms of the contract. On 17 June 2009 Remant informed the first appellant that it was unable to find an alternate operator and that the agreement would still be terminated with effect from 30 June 2009.

[7] It is common cause that by 6 July 2009 the third appellant had decided to appoint the eighth respondent as an alternate operator until 30 September 2010, being the remainder of the period that the contract with Remant was scheduled to run. It is also common cause that no tenders were invited for the appointment of a bus operator to provide the bus services for the remainder of the period of the contract.

[8] On 16 July 2009, the first to sixth respondents launched an urgent application in the Pietermaritzburg High Court seeking an order, firstly, interdicting the appellants and the eighth and ninth respondents from implementing the award of the contract and secondly, reviewing and setting aside the decision of the first and third appellants to award the contract to the eighth respondent on the basis of non-compliance with the provisions of subsections 47(1) and (2) of the Transport Transition Act,² which read as follows:

‘47 Subsidised service contracts

- (1) After the expiry of any interim contract or current tendered contract or any extension thereof, whether provided for in such contract or negotiated, if the public transport service that had been operated in terms thereof will continue to be subsidised, that service must be operated in terms of a subsidised service contract.
- (2) Only a provincial department, a transport authority and a metropolitan

²The National Land Transport Transition Act 22 of 2000 was repealed and replaced by the National Land Transport Act 5 of 2009.

municipality may enter into a subsidised service contract with a public transport operator, and subject to subsection (3), only if —

(a) the service to be operated in terms thereof, has been put out to public tendering in accordance with a procedure prescribed by or in terms of a law of the province;

(b) the tender has been awarded by the tender authority, in accordance with that procedure, and

(c) the contract is entered into with the successful tenderer.

(3) ...'

To justify their failure to put the service out tender, the respondents relied on certain provisions in the contract which allowed for the appointment of an alternate operator, by either party. The application was successful and the decision to award the remainder of the contract to the eighth respondent was set aside.

[9] By the time the appeal was heard on 15 November 2010, the contract in question had run its full course — to 30 September 2010. In his heads of argument, counsel for the respondents submitted that the issue of the validity of the agreement had become moot, that a decision on the merits of the appeal will have no practical effect and the appeal should therefore be dismissed on that ground alone, in terms of s 21A of Act 59 of 1959) ('the Act'). Counsel were accordingly invited to first address us on the question of mootness.

[10] Section 21A(1) of the Act reads:

'(1) When at the hearing of any civil appeal to the Appellate Division [Supreme Court of Appeal] or any Provincial or Local Division of the Supreme Court [High 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.'

[11] Where the relief sought on appeal is moot and would be of

academic interest only, the merits of the appeal will not be entertained and the appeal will be dismissed on that ground alone. (See *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA); *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA)).

[12] Counsel for the third appellant contended on behalf of all the appellants that the appeal was not moot because the question of the validity of the contract is a live issue and could have the following consequences viz (a) the appellants may be sued for damages by the respondents; (b) there may be outstanding amounts due to the eighth respondent for services rendered in terms of the contract, and (c) the matter of subsidies might have to be assessed.

[13] Section 21A however confers a discretion on this court to deal with the merits of the appeal. This would be done where an appeal involves a question of law and which is likely to arise again. (See *Land & Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA)).

[14] It is clear that the contract in question no longer exists and its validity or otherwise is therefore no longer a live issue. Consequently, deciding that issue will have no practical effect or result.

[15] The factors raised on behalf of the appellants are all speculative. There is no evidence that similar matters, based on similar facts, will arise in future. As was said in *Radio Pretoria* para 41:

‘. . . Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise . . .’.

[16] In any event the Transport Transition Act has since been repealed and the wording of the equivalent section in the National Land Transport Act 5 of 2009 is different. Consequently there is no likelihood of the circumstances in this case being repeated.

[17] In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC), Ackermann J in referring to *JT Publishing (Pty) Ltd & another v Minister of Safety and Security & others* 1997 (3) SA 514 (CC) said at para 21 (footnote 18):

‘A case is moot and therefore not justiciable 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.’

[18] Clearly the matter is moot and there is no factual basis for the exercise of the discretion to entertain the appeal. The appeal therefore falls to be dismissed.

[19] The appeal is dismissed with costs.

R Pillay
Acting Judge of Appeal

APPEARANCES

- FIRST APPELLANT: ABG Choudree
Instructed by Linda Mazibuko and Ass,
Durban
Matsepes Inc, Bloemfontein
- THIRD APPELLANT: DJ Shaw SC (with him R Padayachee)
Instructed by Ngcobo Poyo Diedricks
Inc, Pietermaritzburg
Bezuidenhouts Inc, Bloemfontein
- 1ST to 6TH RESPONDENTS: RAK Vahed SC
Instructed by Livingston Leandy Inc,
Durban
McIntyre & van der Post, Bloemfontein