THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1284/2017

In the matter between:

MADIBENG LOCAL MUNICIPALITY **APPLICANT**

and

DDP VALUERS (PTY) LTD **FIRST RESPONDENT**

ACTIVA VALUATION SERVICES (PTY) LIMITED **SECOND RESPONDENT**

Neutral citation: *Madibeng Local Municipality v DDP Valuers and Another* (1284/2017) [2020] ZASCA 70 (18 June 2020)

Coram: PONNAN, VAN DER MERWE and MOKGOHLOA JJA and GORVEN and MATOJANE AJJA

Heard: 13 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 18 June 2020.

Summary: Appeal – application for leave to appeal to Supreme Court of Appeal referred for oral argument in terms of s 17(2)*(b)* of Superior Courts Act 10 of 2013 (the Act) – judges considering application should not refer it to the court for determination of whether or not proposed appeal would have practical effect or result within meaning of ss 16(2)*(a)* and 17 (1)*(b)* of the Act – matter moot and raised no legal issue requiring adjudication.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Pretorius J sitting as court of first instance):

The application for leave to appeal is dismissed with costs.

JUDGMENT

Van der Merwe JA (Ponnan and Mokgohloa JJA and Gorven and Matojane AJJA concurring)

[1] This application for leave to appeal was referred to the court for oral argument, in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. However, as shall presently become apparent, the first order of business is to determine whether a decision on the proposed appeal would have any practical effect or result, within the meaning of s 16(2)*(a)*(i) of the Superior Courts Act. This question must be answered against the background that follows.

[2] Section 229(1)*(a)* of the Constitution empowers a municipality to impose rates on property. Section 30 of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) provides that a municipality intending to levy a rate on property must cause a general valuation to be made of all rateable properties in the municipality and a valuation roll to be prepared in respect of all those properties. Section 31 of the Rates Act obliges a municipality to determine a date of valuation that may not be more than 12 months before the start of the financial year in which the valuation roll is to be first implemented. In terms of s 32, the valuation roll takes effect from the start of that financial year and remains valid for such subsequent financial years as the municipality may decide, but in total for not more than five financial years.

[3] Section 33 provides that a municipality must before the date of valuation designate a person as municipal valuer. It may designate a person in private practice, after having followed an open, competitive and transparent process in accordance with Chapter 11 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA). Section 34 of the Rates Act sets out the functions of a municipal valuer. Subsections 34*(a)-(d)* provide for the valuation of all rateable properties within a municipality, as well as for the preparation and submission of the general valuation roll. In terms of subsec 34*(e)-(i)*, a municipal valuer has additional subsidiary duties (residual services). These include: to consider and decide on objections to the valuation roll; to attend meetings of an appeal board and to prepare a supplementary valuation roll whenever this becomes necessary.

[4] During May 2013 the applicant, the Madibeng Local Municipality (the Municipality) invited tenders for the compilation of a new valuation roll and residual services in respect of the period from 1 July 2014 to 30 June 2018 (the tender). Bidders were required to tender a fixed price for the compilation of the valuation roll, as well as fees to be charged per individual item of residual services required. Amongst the 15 bids submitted in response to the invitation to tender, were those of the first respondent, DDP Valuers (Pty) Ltd (DDP) and the second respondent, Activa Valuation Services (Pty) Ltd (Activa).

[5] The Municipality awarded the tender to an entity known as Dijalo Property Valuers (Dijalo), despite the fact that the fixed price tendered in its bid had been approximately three times that of DDP and twice that of Activa. The Municipality appointed Dijalo to render the services envisaged in the tender in terms of a service level agreement entered into during September 2013.

[6] DDP approached the Gauteng Division of the High Court, Pretoria (the high court) for the review and setting aside of the Municipality's decision to award the tender to Dijalo. The Municipality and Dijalo opposed the application. The matter came before Makgoba JP. After hearing full argument, he upheld a point *in limine* to the effect that DDP had failed to exhaust its internal remedies prior to approaching the court. He dismissed the application with costs. DDP successfully appealed against this order to this court. This court substituted the order of Makgoba JP with an order dismissing

the point *in limine* with costs and remitted the matter for a decision on the merits.[1] Upon a consideration of the merits, Makgoba JP held that the evaluation of the bids had been affected by material irregularities. On 13 November 2015 he made an order reviewing and setting aside the decision to award the tender to Dijalo and remitting the matter to the Municipality 'for reconsideration in terms of section 8(1)*(c)*(i) of the Promotion of Administrative Justice Act 3 of 2000'. He directed the Municipality and Dijalo to pay the costs of the application jointly and severally.

[7] In the meantime, the Greater Taung Local Municipality (Taung Municipality) also invited tenders to compile a valuation roll. The tender was awarded to Activa. In terms of a service level agreement entered into on 21 June 2013, Taung Municipality appointed Activa to provide the services 'detailed in Schedule 1 hereto and in the Service Provider's submission attached hereto as Annexure "A"'. No Annexure 'A' was, however, attached to the agreement. According to Schedule 1 to the agreement, Activa only had to compile a valuation roll in respect of the period from 21 May 2013 to 30 June 2018, at a fixed price.

[8] By the date of Makgoba JP's remittal order, Dijalo had submitted the valuation roll to the Municipality. Thus, the latter only required residual services for the remaining period of the tender, that is until 30 June 2018. In these circumstances, so the Municipality said, it decided to cancel the tender and to invoke reg 32 of the Municipal Supply Chain Management Regulations promulgated in terms of s 168 of the MFMA under GN R868, *GG* 27636, 30 May 2005 in respect of residual services.

[9] Regulation 32 provides:

'**32. Procurement of goods and services under contracts secured by other organs of state**

(1) A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if –

(a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;

(b) the municipality or entity has no reason to believe that such contract was not validly procured;

[1] *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146.

(c) there are demonstrable discounts or benefits for the municipality to do so; and

(d) that other organ of state and the provider have consented to such procurement in writing.

(2) Subregulation (1)*(c)* and *(d)* do not apply if –

(a) a municipal entity procures goods or services through a contract secured by its parent municipality; or

(b) a municipality procures goods or services through a contract secured by a municipal entity of which it is the parent municipality.'

[10] In terms of ss 111 and 112 of the MFMA each municipality must have and implement a supply chain management policy which must be fair, equitable, transparent, competitive and cost-effective. Regulation 32 gives effect to s 110(2)*(c)* of the MFMA. This section exempts a municipality from following a competitive tender process if a municipality 'contracts with another organ of state for . . . the procurement of goods and services under a contract secured by that other organ of state, provided that the relevant supplier has agreed to such procurement.'

[11] The Municipality obtained documentation from Taung Municipality in respect of the tender process that had been followed prior to the appointment of Activa, as well as the service level agreement with Activa. The Municipality said that there was no reason to believe that the contract with Activa had not been validly procured by Taung Municipality in accordance with its supply chain management policy. Per letter dated 24 February 2016, the Municipality appointed Activa to perform residual services for the period from 25 February 2016 to 30 June 2018. According to the appointment letter, Activa would be remunerated in accordance with the service level agreement between it and Taung Municipality. As I have said, this agreement did not provide for fees for residual services. Activa accepted the appointment in writing on 29 February 2016. This appointment took place with the consent of Taung Municipality, but no contract was entered into in respect thereof between it and the Municipality.

[12] When the Municipality's appointment of Activa became known, DDP again approached the high court. It essentially contended that Makgoba JP's order had obliged the Municipality to reconsider the award of the tender and that the Municipality failed to do so. It also argued that, in any event, the appointment of Activa could not validly have been made under reg 32. It accordingly sought the review and setting aside

of the 'failure to reconsider the awarding' of the tender and of the decision to appoint Activa to execute the tender. DDP also claimed an order that the tender be awarded to it. The Municipality opposed the application mainly on the basis that the tender had been cancelled and that Activa had been validly appointed under reg 32 to perform only residual services.

[13] The court a quo (Pretorius J) held, in essence, that the tender had not been cancelled, that the award thereof had to be reconsidered by the Municipality and that it had failed to do so. In respect of the Municipality's reliance on reg 32 it held, *inter alia*, that the services that Activa had to provide to the Municipality fell outside the scope and ambit of its service level agreement with Taung Municipality. It held that in terms of the service level agreement with Taung Municipality, Activa only had to compile a valuation roll whereas in terms of its appointment by the Municipality, it had to render only residual services. The court a quo declined to award the tender to DDP and on 19 September 2017 ordered the following, with costs to be paid by the Municipality:

'2. The first respondent's failure to reconsider the awarding of Tender Number RFT 10/3/2013 for the Compilation of a New General and Supplementary Valuation Roll for the period 2014-2018 (hereinafter "the Tender") is reviewed and set aside;

3. The first respondent's decision to appoint the second respondent as Municipal Valuer and/or to execute the Tender is reviewed and set aside;

4. The awarding of the tender is remitted to the first respondent for reconsideration in terms of section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000.'

[14] Pretorius J dismissed the Municipality's application for leave to appeal. The order of the judges that considered its petition to this court included the following:

'2. The application for leave to appeal is referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

3. At the hearing of the application for leave to appeal, the parties must, apart from other issues, address with reference to s 16(2) of the Act, the question

(a) whether a decision on appeal would have any practical effect or result;

(b) if not, whether the application for leave to appeal should be dismissed on this ground.

(c) The parties must be in a position to argue the appeal itself if the court hearing the application for leave so directs.'

[15] As the appointment of Activa expired on 30 June 2018, the matter is now clearly moot. With reference to the decisions of this court in *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) paras 5-6 and *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571; 2016 (2) SA 121 (SCA) paras 11-14, the Municipality urged us to nevertheless determine the appeal. These decisions state that despite the mootness of a matter, this court has a discretion to determine it where such matter presents a discrete legal issue of public importance that would affect matters in the future and on which the adjudication of this court is required.

[16] During argument counsel for the Municipality experienced considerable difficulty in formulating the legal issues that would require determination under this test and, in the process, deviated from the heads of argument. As I understood the argument, however, the determination of the following legal points was proposed:

(a) whether an organ of state's decision to cancel a tender is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA);

(b) whether, after the cancellation of a tender that had been awarded, an organ of state may procure the same goods or services under reg 32;

(c) the proper interpretation of the phrase 'under a contract secured by another organ of state' in reg 32, particularly whether the first organ of state had to be a party to a contract with the second organ of state;

(d) the proper interpretation of the phrase 'demonstrable discounts or benefits' in reg 32(1)*(c)*.

[17] In respect of (a) the Municipality argued that divergent views had been expressed by this court, on the one hand, in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC and Others* [2017] ZASCA 30 and on the other, in *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd* [2015] ZASCA 167; [2016] 1 All SA 332 (SCA); 2016 (2) SA 494 (SCA) and *SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others* [2016] ZASCA 104; [2016] 3 All SA 669 (SCA). This is not correct. The question cannot be determined in the abstract. In *Nambiti* and *SAAB* this court held that the cancellation of a tender by an organ of state prior to its adjudication does not constitute administrative action under PAJA. The *ratio* common to these judgments was that in such

circumstances, the cancellation of the tender constitutes the exercise of executive authority. The court reasoned that the decision of an organ of state to procure goods or services is an executive act and the reversal of that decision, without more, is of the same nature. (See *Nambiti* paras 25 and 31 and *SAAB* paras 18-21.) Both these judgments recognised, however, that the position would be different when a public tender is cancelled during the tender process, as would be the case on the Municipality's version. On its case, the Municipality cancelled the tender after the award thereof had been set aside and it was ordered to reconsider the matter. This was also the factual position in *Valozone*. In such a case 'principles of just administrative action are of full application' (*Nambiti* para 32) or, put differently, principles of administrative justice continue to govern the relationship between the organ of state and the tenderers (*SAAB* paras 16-18 with reference to *Logbro Properties CC v Bedderson NO and Others* [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA)). Thus, a decision of an organ of state to cancel a tender after it was awarded, would generally be reviewable under PAJA.

[18] The point mentioned in (a) also does not arise on the factual findings of the court a quo. It held, rightly or wrongly, that as matter of fact, the tender had not been cancelled. The same applies to (b), which is also premised on a cancellation of the tender. In addition, the court a quo held on the facts that Activa was not appointed to render the same services to the Municipality as those that it had been contracted to render to Taung Municipality. It is not controversial that on the latter factual finding, reg 32 could find no application. It follows that the interpretation of reg 32 envisaged in (c) and (d), is not implicated.

[19] For these reasons the application for leave to appeal falls to be dismissed with costs. There is, however, a further aspect that I am constrained to address.

[20] As I have mentioned at the outset, s 16(2)*(a)*(i) of the Superior Courts Act provides that 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 that ground alone. In terms of s 16(2)*(a)*(ii) this question must be determined without reference to any consideration of costs, save in exceptional circumstances.

Subsections 16(2)*(b)*-*(d)* are aimed at eliminating appeals that would have no practical effect or result, where leave to appeal has already been granted.[2]

[21] Section 17(1), in turn, reads as follows:

'**17. Leave to appeal**.

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

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)*(a)*; and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

In terms of s 17(1)*(b)* therefore, the judges considering the application for leave to appeal are required to satisfy themselves that the proposed appeal would have a practical effect or result. Subsections 17(2)*(b)*-*(f)* deal specifically with applications for leave to appeal directed to this court.[3]

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[2] Superior Courts Act 10 of 2013 s 16(2)*(b)*-*(d)*:

'*(b)* If, at any time prior to the hearing of an appeal, the President of the Supreme Court of Appeal or the Judge President or the judge presiding, as the case may be, is *prima facie* of the view that it would be appropriate to dismiss the appeal on the ground set out in paragraph *(a)*, he or she must call for written representations from the respective parties as to why the appeal should not be so dismissed.

(c) Upon receipt of the representations or, failing which, at the expiry of the time determined for their lodging, the President of the Supreme Court of Appeal or the Judge President, as the case may be, must refer the matter to three judges for their consideration.

(d) The judges considering the matter may order that the question whether the appeal should be dismissed on the ground set out in paragraph *(a)* be argued before them at a place and time appointed, and may, whether or not they have so ordered—

(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or

(ii) order that the appeal proceed in the ordinary course.'

[3] Superior Courts Act s 17(2)*(b)*-*(f)*:

'*(b)* If leave to appeal in terms of paragraph *(a)* is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

(c) An application referred to in paragraph *(b)* must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal likewise designated.

(d) The judges considering an application referred to in paragraph *(b)* may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require,

[22] These provisions give effect to a principle of long standing. See *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others* 2001 (2) SA 872 (SCA) para 7. This court has said that the object of the principle is to reduce the heavy workload of appeal courts. See *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA) at 1141D. I venture to say that the principle also serves another equally important purpose, namely to ensure that matters that truly deserve the attention of appeal courts, especially of this court, are not delayed by the burdening of these courts with matters that fall within the ambit of s 16(2)*(a)*(i) of the Superior Courts Act.

[23] It goes without saying that these objects would be defeated when an application for leave to appeal is referred to the court for determination of the question of whether or not the contemplated appeal would indeed have any practical effect or result. And such a referral would negate the safety net provided for in subsec 16(2)*(b)*-*(d)*. As a general rule the judges of this court that consider an application for leave to appeal should have little difficulty in determining whether the appeal would have any practical effect or result. And in terms of the rules of this court they could, in case of doubt, request that the record of the court below or any part thereof be placed before them.[4] Finally, s 17(2)*(d)* provides the judges with the option to order that this question be argued before them at a time and place appointed, if they are of the opinion that the circumstances so require. Save in exceptional circumstances, therefore, an application for leave to appeal should not be referred to the court under s 17(2)*(d)* for it to determine whether an appeal would have any practical effect or result. As I have said, that is an issue that the two judges should first satisfy themselves of before either granting leave

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order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.'

(e) Where an application has been referred to the court in terms of paragraph *(d)*, the court may thereupon grant or refuse it.

(f) The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[4] SCA rule 6(6):

'*Request for further documents*. -

(6) The judges considering the application may call for

(a) submissions or further affidavits;

(b) the record or portions of it; and

(c) additional copies of the application.'

or referring the application for leave to the court for determination. To refer that anterior question to five judges of this court for determination, as occurred here, is plainly counter-intuitive. For, as Navsa JA observed in *Radio Pretoria v Chairperson of the Independent Communications Authority of South Africa and Another* [2004] ZASCA 69; [2004] 4 All SA 16 (SCA) 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 (see the *Coin Security* case, supra, at para [7] (875A-D)).’

[24] The application for leave to appeal is dismissed with costs.

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C H G VAN DER MERWE

JUDGE OF APPEAL

APPEARANCES

For applicant:	L Kutumela (heads prepared by T Motau SC and L Kutumela)
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