IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal No: A 01//20

WCC No: 16998 /2014

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LTD **Appellant**

and

CITY OF CAPE TOWN **First Respondent**

DISTINCTIVE CHOICE SECURITY CC **Second Respondent**

Coram: Baartman, J et Gamble, J et Wille, J

Date of Hearing: 31st of July 2020

Date of Judgment: 11th of August 2020

JUDGMENT

WILLE, J;(Baartman J et Gamble J, concurring)

INTRODUCTION

[1] This is an appeal solely directed against a costs order issued out by the court a quo. The matter involved a review application[1], at the instance of the second respondent against the first respondent.[2] The appeal is with leave, granted by the SCA on the 11th of September 2019. The review concerned an award of a tender[3], in which the second respondent was initially unsuccessful. The appellant was the initial successful '*tenderer'* before this was set aside on review with the consent of the first respondent.

[2] The second respondent[4] launched the review application on an urgent basis and the respondents to the review application, were obliged to file their opposition to the application within (5) days of service thereof, failing which the relief contended for, would be sought on an unopposed basis. The first respondent filed a notice of intention to oppose, so it contends, to '*safeguard its position'* while it attended to the preparation of the record in accordance

[1] The 'review'
[2] Together with other respondents
[3] The 'tender'
[4] The second respondent abides the decision of the court in this appeal

with the provisions of Rule 53[5] and, in order to obtain further legal advice regarding the further conduct of the matter.

[3] After the first respondent filed the review record and after obtaining the appropriate legal advice, it withdrew its opposition to the merits of the review application.[6] The first respondent filed an '*explanatory affidavit*' conceding the merits of the review, but at the same time, opposed the granting of any cost order for the reasons set out in its affidavit.

[4] The appellant initially opposed the review application, but thereafter, in view of the concessions made by the first respondent, the only issue left for determination by the court a quo was, the issue of costs. The appellant filed its opposing papers on the merits on the 2nd of July 2015.[7] The court a quo ordered that the costs of and incidental to the review application were to be paid jointly and severally[8], by the appellant and the first respondent.

[5] The core issue in this appeal is the '*costs order levied against the appellant*' albeit, on a joint and several basis. The appellant takes the position that the first respondent, falls to be solely liable for the costs of and incidental to the review proceedings. This is so, they say, because, prior to the hearing of the review application, the first respondent withdrew its opposition to the relief sought by the second respondent, save for the fact that no tender was made in connection with the costs of and incidental to the review application.

A BRIEF HISTORY OF THE LITIGATION

[5] The Uniform Rules of Court

[6] This occurred by service of the notice of withdrawal on the 1st of July 2015

[7] These opposing papers were dated and signed on the 23rd of June 2015

[8] The one paying the other to be absolved

[6] During September 2012, the first respondent published a tender for the supply of protection services for its various council sites around the City of Cape Town. A large number of security service providers,[9] including the appellant and the second respondent submitted offers in response to the advertised tender.

[7] In May 2014, the appellant was advised by the first respondent that its offer had been successful and that the tender had been awarded to it, on the basis set out in a letter to the appellant. During June 2014, the first respondent notified the second respondent that its offer had not been successful. This, in turn, prompted the second respondent to seek '*reasons'* from the first respondent as to why its tender bid was unsuccessful. The second respondent was advised that its tender was not recommended, essentially due to budgetary constraints.

[8] Thereafter, the second respondent pursued an internal appeal against the decision of the first respondent, in connection with the awarding of the tender to the appellant. During August 2014, the first respondent, partially upheld the second respondent's internal appeal, but this did not result in the first respondent accepting the second respondent's bid, for the security services. In the month following, the second respondent launched its review application.

[9] During October 2014, the first respondent filed a notice of its intention to oppose the review application and in April of the following year, the appellant was placed in possession of , inter alia, the second respondent's supplementary founding affidavits[10].

[9] Ninety-two in number
[10] After the record in terms of Rule 53 had been filed

[10] At the end of June 2015, the first respondent filed its notice of withdrawal of its opposition to the review application and further filed an '*explanatory affidavit'* wherein it conceded the merits of the second respondent's review application, but disputed liability for the costs of and incidental to the review application. As mentioned, the appellant thereafter delivered its opposing affidavit the day after the first respondent's notice of withdrawal. This opposing affidavit having been prepared and deposed to before the notice of withdrawal to the primary relief, by the first respondent.

[11] As a direct consequence[11], the appellant withdrew its opposition to the relief sought by the second respondent and only in March 2016, an order was granted[12], setting aside and reviewing the tender, together with an order that the costs would be determined at a later date.

THE APPELLANT'S CASE

[12] It is submitted, inter alia, that despite the first respondent conceding the merits of the relief in the review application[13], it took no steps '*itself'* to have its decision set aside. The argument is that the first respondent must have been acutely aware of the irregularities in its '*tender processes*' and it was accordingly completely unnecessary to oppose the review application. The appellant also takes issue with the finding by the court a quo that its conduct in opposing the application, was reckless or untoward in any manner.

[13] The crux of the argument by the appellant is that the court of first instance incorrectly held that the appellant opposed the application at its own risk, because of the standard prayer contained in the second respondent's notice of motion, when it launched the review

[11] As no litigation occurred thereafter, save for a dispute about the outstanding issue regarding costs
[12] By agreement
[13] At a very late stage

proceedings. The appellant submits that it acted in good faith and was a victim, so to speak, and accordingly, should not be held liable for any of the costs associated with the review application.

[14] Further, had the court a quo applied the principles as set out in the *Biowatch*[14] matter, the first respondent would have been held to be solely responsible for the costs of the review application.

[15] This argument is fortified by the submission that although the court a quo did make reference to the *Fuel Retailers*[15] matter in its judgment, it did not strictly apply the legal principles set out in this matter, when it rendered its joint and several finding in connection with the liability for the costs of the review application.

THE FIRST RESPONDENT'S CASE

[16] It is the first respondent's case that there was no misdirection by the court a quo and accordingly, there is no room for any interference on appeal. It is contended that after the first respondent had investigated all the issues raised in the review application and after having considered the review record, it decided not to contest the relief. This course of action by the first respondent, it is submitted, was reasonable, prudent and even exemplary in the circumstances.

[14] Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC)
[15] Fuel Retailers Association of Southern Africa v Director-General Environment, Mpumalanga Province 2007 (6) SA 4 (CC)

[17] Further, it is submitted that the filing of the notice of opposition by the first respondent was a legitimate response and one that does not '*automatically attract'* the risk of an adverse costs order. It is advanced that no mala fides or gross irregularity can be placed at the door of the first respondent. Finally, it is argued, that the court a quo was correct in the exercise of its discretion in awarding costs on a joint and several basis, taking into account the particular circumstances of the review application.

DISCUSSION

[18] The issuing out of a costs order is generally a matter of the exercise of '*judicial discretion'* in the true sense. An appeal court only has room to interfere if it is shown that this discretion was not exercised judicially or that the court a quo misdirected itself materially in the exercise of this discretion. The review in this matter was a review under PAJA[16] and was not a '*legality review'* in the strict sense. This, in my view is relevant, because the review under PAJA, in this case, was essentially a review in connection with '*unlawful or irregular'* administrative action.

[19] Although the appeal in connection with the costs awarded by the court a quo must to some extent be viewed as separate from the merits, and because a decision on the review application was eventually not sought, this does not mean that any decision on costs must be completely isolated and distanced, from the merits. I say this because, at the end of the day the first respondent's decision in the tender process was set aside and the second respondent was the successful party in the review application. One of the primary issues is, why under

[16] Promotion of Administrative Justice Act, 3 of 2000

these circumstances, should the appellant have to bear the burden of carrying some of the costs of and incidental to the review proceedings.[17]

[20] The appellant submits that the court a quo did not place enough emphasis on the '*constitutional character*' of the review application, because the judicial review proceedings, in this matter, in essence amounted to a defence of fundamental rights, in connection with certain unlawful administrative action. In *Biowatch*, the following legal principles were set out which bear emphasis, namely;

> '*If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door*'

[21] In the appropriate circumstances, a failure on the part of a court to give reasons why the *Biowatch* approach to costs was not applied, may very well constitute a reason for a court of appeal to interfere with the costs order made by the court of first instance.[18]

[22] Because, inter alia, of the nature of the review under PAJA, in my view, the court a quo was obliged to apply the *Biowatch* principles, when it rendered its findings in connection with the issue of costs. This approach has been recognised and followed by the courts, and most prominently by a Full Bench of this Division, in *Fidelity Security Services (Pty) Ltd v*

[17] Albeit, on the basis of a joint and several liability
[18] Hotz and Others v University of Cape Town 2017 (7) BCLR 815 (CC) – par 37

The City of Cape Town[19]. It seems to me that the circumstances in the current matter are closely comparable. Binns-Ward J, writing for the court, (at para [11], emphasis added), said that;

> *'The approach of the court a quo overlooked the constitutional character of the litigation and the established principles applicable in respect of the determination of costs in such cases'*

[23] I say this also because in terms of Section 8 (1) (f) of PAJA, a court specifically has the right to grant an order as to costs, when dealing with a review application. Further, an analysis of the decided authorities in dealing with review proceedings of this nature, reveals that the more prevalent approach is that the successful party is entitled to its costs, with the court always retaining a discretion to make an order which seems just and equitable, taking into account the position of the party against whom any such costs order is levied.

[24] In *Parag*[20], Williamson JP, held that with reference to *illegality and irregularity* issues, costs would seldom not be awarded against the tribunal or other authority where its decision is successfully taken on review.

[25] In my view, a number of factors need to be considered when a costs award is issued out in circumstances such as these, taking into account, inter alia, Section 8 (1) (f) 8 of PAJA. Further, a contextual approach, in my view, falls to be adopted.

[26] It is indeed regrettable that all the outstanding costs issues were not the subject of negotiation and settlement by the parties. This may, at the very least, have led to an *apportionment* of these costs, by agreement. The result is that valuable court time and

[19] Fidelity Security Services (Pty) Ltd v The City of Cape Town and Others (A250/2018) [2019] ZAHWCHC 2 (6 February 2019)
[20] Parag v Ladysmith City Council and Another 1961 (3) 714 at 716 A - C

unnecessary costs have now been utilized on arguing the issue of costs, which in my view, should have and could have, been negotiated and settled. The second respondent is clearly entitled to its costs of and incidental to the review application, but what bears scrutiny is to what extent, if any, should the appellant be held to carry any share of these costs.

[27] The issue of a '*joint and several liability'* for costs needs to be examined, particularly taking into account the nature of the proceedings in the court a quo. According to *Voet*[21], - *consortes lites* - are condemned in costs and they ought as a general principle to bear the costs in equal shares. However, our courts have the discretion to make a different allocation depending on the circumstances of each case, read with the specific nature of the litigation.[22] It is accepted, as a general principle, that an aliquot share of costs is permissible where co-litigants are involved.

[28] That having been said, in my view, no grounds exist for contending that the appellant should be liable for an aliquot share of the second respondents costs of the review application and the subsequent costs on appeal. The first respondent failed to make any tender in connection with the costs of the review application at all, this despite conceding the relief. This, even after all the relevant and appropriate material was filed in order for them to properly consider their position, going forward. Further, I am not convinced that the first respondent could seriously contend for the position that it was only in a position to make a determination in connection with the merits of the review application, once the record was filed in accordance with Rule 53. It is not clear how the appellant's obligation arises to be held partially responsible for the second respondent's costs, essentially due to a failure on the part of the first respondent, to act expeditiously.

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[21] Commentarius 42 1 24

[22] De Drukpers Maatschappy v Oosthuizen 1915 CPD 401 at 410

[29] In addition, we now regrettably also have to determine for the parties, the '*costs of the hearing on costs'* in the court a quo and, also the costs of the '*hearing of the costs*' of this appeal. It is so that no conditional cross-appeal was filed by the first respondent. In my view the filing of a cross-appeal in these circumstances, was of necessity required, taking into account that the first respondent contends, alternatively, so it seems, for some sort of apportionment of the costs, on a joint and several basis, with the appellant.

[30] I say this, inter alia, because the order granted in the court a quo did not make reference to the liability of the appellant for any portion of the costs of the review application, on a joint and several basis.

[31] The first respondent was obliged in law to make available and file the necessary record in terms of Rule 53. This record was voluminous and had to be perused and analysed by all the parties to this appeal. The first respondent had no choice but to properly collate and file this record as a matter of law. Further, in my view, it is not open for the first respondent to take the position that only once this record had been filed and digested, it was in a position to properly assess its legal position going forward.

[32] Further, in the judgment of the court a quo, the following significant findings were made and these findings were left unchallenged by the first respondent, namely;

> *'The first respondent was aware that there were irregularities in its tender process'*
>
> *'I do not agree with the first respondent's submission that its functionaries in the evaluation and adjudication of the tender acted bona fide and not grossly irregular'*

'There were no good grounds nor exceptions in this matter for the court to depart from the general rule, that, a successful party is entitled to its costs'

[33] In the circumstances of this review application, a major portion of the costs incurred would have been consumed by the collating and copying of the Rule 53 record and the first respondent is undoubtedly solely liable for these costs as the *lawful custodian* of these documents.

[34] Taking into account the '*constitutional nature'* of the review proceedings and, taking into account the conduct of the appellant, in these circumstances, I can find no legal grounds for awarding costs against the appellant on a joint and several basis, with the first respondent. Put in another way, I cannot find any conduct on the part of the appellant, in these circumstances, that would attract an adverse costs order being levied against it, albeit on a joint and several basis, with the first respondent. The appellant filed its notice of intention to oppose in order to protect its position and then, taking into account the timing of the filing of the notice of withdrawal of opposition by the first respondent, did nothing untoward thereafter. Further, after all, it is not the first respondent that sought a joint and several costs order against the appellant, but rather the second respondent.

[35] The order made in the Supreme Court of Appeal makes provision for the costs of the application for leave to appeal, and the costs to it, for leave to appeal. These costs were ordered to be costs in the appeal and will accordingly follow the result on appeal.[23]

[36] In the result, I propose that the following orders are made:

[23] Supreme Court of Appeal order dated the 11th of September 2019

1. That the appeal is upheld and that the costs order made by the court of first instance is set aside and substituted with an order in the following terms:

    1.1 That the first respondent shall be solely liable for the costs of and incidental to the review application.

    1.2 That the first respondent shall be liable for the costs incurred in respect of the hearing on the issue of liability for costs in the review application.

2. That the first respondent is ordered to pay the appellant's costs of and incidental to this appeal, such costs to include the costs of the application for leave to appeal before the *court a quo* and the costs incurred in the application for leave to appeal to the SCA.

WILLE, J

I agree, and it is so ordered;

BAARTMAN, J

I agree;

GAMBLE, J