IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE
CASE NO: 4835/2023

In the matter between:

WESTERN CAPE PROVINCIAL MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	Applicant

and

CENTRAL KAROO DISTRICT MUNICIPALITY	First Respondent
SPEAKER OF THE COUNCIL OF THE CENTRAL KAROO DISTRICT MUNICIPALITY	Second Respondent
ACTING MUNICIPAL MANAGER, CENTRAL KAROO DISTRICT MUNICIPALITY	Third Respondent
HENDRIK TRUMAN PRINCE	Fourth Respondent

Bench: P.A.L. Gamble, J

Heard: 21 April 2023

Delivered: 25 April 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 25 April 2023

JUDGMENT – LEAVE TO APPEAL

GAMBLE, J:

1. On 3 April 2023 this Court granted an application by the applicant ("the MEC") declaring the appointment of the fourth respondent ("Prince") as the Acting Municipal Manager of the first respondent ("the Municipality") on 2 February 2023 as null and void in terms of s54A(1)(b) of the Local Government: Municipal Systems Act, 32 0f 2000 ("the Systems Act").

2. On 19 April 2023 Prince lodged an application for leave to appeal that judgment, alleging in the main, that this Court erred in finding that his work experience at the Municipality as a senior manager could not be taken into account when the requisite period of experience under the Systems Act was considered. The Municipality does not seek leave to appeal the order.

3. When the matter was argued on Friday 21 April 2023, Prince's counsel, Mr van der Schyff, informed the Court that leave was sought to the Supreme Court of Appeal ("SCA"). The application for leave to appeal is opposed by the MEC with Mr de Waal SC appearing on his behalf as before.

4. In terms of s17(1) of the Superior Courts Act, 10 of 2013, leave to appeal may only be granted if –

> (i) the appeal has 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.

5. The primary issue that arises in this application is the question of mootness. It is common cause that Prince's appointment expires on 30 April 2023 – that is the express wording of s54A(2A)(a) of the Systems Act. Any prospective appeal, whether it be to the SCA or to a Full Bench in this Division, will not be heard by that date. In the circumstances, if leave be granted, when any such appeal is ultimately heard it

will be moot. This is common cause between the parties and disposes of any argument that a prospective appeal has reasonable prospects of success.

6. Mr van der Schyff submitted that there was a compelling reason why such an appeal ought to be heard, notwithstanding that the matter was moot. He argued that the question of the legal consequences (if any) of Prince's so-called "*de facto* experience" with the Municipality was important and should be considered by another court for 2 reasons.

8. Firstly, it was said that the issue was of importance, generally, as there was a necessity for finality to be obtained regarding the position of *de facto* experience, given the likelihood of similar situations arising elsewhere in the country in respect of other potential candidates. Secondly, it was said that Prince might wish to apply for a different senior management position with the Municipality in the future and would want to be assured of the validity of his *de facto* experience when doing so.

9. As regards the latter argument, there is nothing in the Court's judgment which precludes Prince from applying for another position with the Municipality. Any such application will fall to be determined on its merits with due regard for the relevant provisions of the Systems Act and the Regulations promulgated thereunder. It is not for an appellate court to give an advisory opinion on that score and there is thus no basis to grant leave to appeal on that leg of counsel's submissions.

10. Turning to the first point, the question of mootness and the circumstances where appellate courts will consider matters of public interest were dealt with comprehensively by the SCA in Stransham-Ford[1], a case in which the court *a quo* was approached to authorise an assisted suicide for a terminally ill person, who unbeknownst to the Judge in that court, had already died before the order was granted. In refusing to deal with the matter, the SCA had the following to say.

"[21] I have given consideration to whether the fact that the arguments advanced on behalf of Mr Stransham-Ford engaged constitutional issues detracts from these

[1] Minister of Justice and Correctional Services v Estate Stransham-Ford 2017 (3) SA 152 (SCA)

principles. In my view they do not. Constitutional issues, as much as issues in any other litigation, only arise for decision where, on the facts of a particular case, it is necessary to decide the constitutional issue. Dealing with the situation where events subsequent to the commencement of litigation resulted in there no longer being an issue for determination, Ackermann J said in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others:*

> '*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.*'

At the time that Fabricius J delivered his judgment there was no longer an existing controversy for him to pronounce upon. The case was no longer justiciable.

[22] Since the advent of an enforceable Bill of Rights, many test cases have been brought with a view to establishing some broader principle. But none have been brought in circumstances where the cause of action advanced had been extinguished before judgment at first instance. There have been cases in which, after judgment at first instance, circumstances have altered so that the judgment has become moot. There the Constitutional Court has reserved to itself a discretion, if it is in the interests of justice to do so, to consider and determine matters even though they have become moot. It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument.

[23] The common feature of the cases, where the Constitutional Court has heard matters notwithstanding the fact that the case no longer presented a live issue, was that the order had a practical impact on the future conduct of one or both of the parties to the litigation. In *IEC v Langeberg Municipality*, while the relevant election had been held, the judgment would affect the manner in which the IEC conducted elections in the future. In *Pillay* the court granted a narrow declaratory order that significantly reduced the impact on the school of the order made in the court below. In

Pheko, while the interdictory relief that had been sought had become academic, a decision on the merits would affect its claim for restitutionary relief.

[24] This case presents an entirely different picture. Relief was sought specifically tailored to Mr Stransham-Ford's circumstances. The order expressly applied only to any doctor who provided him with assistance to terminate his life. The caveat in para 4 of the order left the common law crimes of murder and culpable homicide unaltered. No public purpose was served by the grant of the order. In any event, I do not accept that it is open to courts of first instance to make orders on causes of action that have been extinguished, merely because they think that their decision will have broader societal implications. There must be many areas of the law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task. The courts have no plenary power to raise legal issues and make and shape the common law. They must wait for litigants to bring appropriate cases before them that warrant such development. Judge Richard S Arnold expressed this well when he said: '

> *[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do* …'" [Internal references omitted]

11. In the result, I conclude that the applicability and legality of *de facto* experience under the Systems Act must await future litigation.

ORDER OF COURT:

12. In the result the application for leave to appeal is dismissed with costs, such costs to be payable by the fourth respondent only.

GAMBLE, J

APPEARANCES

For the applicant: Mr. H.J. De Waal SC
Instructed by State Attorney
Cape Town.

For the respondent: Mr J Van der Schyff
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