IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Case number: 3685/2015

In the matter between:

PRO- CARE CONTRACTING (PTY) LTD	Applicant
and	
MOQHAKA LOCAL MUNICIPALITY	1st Respondent
THE MUNICIPAL MANAGER: MOQHAKA LOCAL MUNICIPALITY	2nd Respondent
LOHAN CIVIL (PTY) LTD	3rd Respondent

JUDGMENT: MOCUMIE, J

HEARD ON: 13 AUGUST 2015

DELIVERED ON: 14 AUGUST 2015

Ex Tempore Judgment: Urgent Application

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1. The opposing and replying papers in this matter were filed on 13 August 2015, immediately after Motion court which adjourned at 11h00. The arguments were heard from 12h00 until 16h50.The judgment that follows will not be as comprehensive as it would have been had there not been serious time constraints prevailing. Judgments referred to by both counsel will not be specifically highlighted due time constraints but the principles encapsulated in those judgments albeit not all will be considered from time to time when certain points are made. The applicant, represented by Mr Louw, has approached this court on an urgent basis to seek

interim relief against the 1st, 2nd and 3rd respondents pending institution of a review in terms of R53 of the Practice Rules of this court. The 3rd respond is the successful bidder in the tender in dispute; cited only as an interested party. Mr Louw submitted that the applicant became aware albeit it not through the 1st respondent that its bid was unsuccessful sometime in June 2015. It then sought such decision from the 1st respondent without success. By 14 July, the 1st respondent sent communication informing it of its decision but without full reasons. As a result, it approached this court on 21 July 2015 for an order compelling the 1st respondent to provide it with more details and relevant documentation including any recommendations made by the relevant Committees responsible for the evaluation and adjudication of tenders. Such order was granted on the same day. The applicant could only have insight of all these documentation after this court order by 28 July 2015. Only then could it appreciate what had happened and brief counsel to challenge the decision(s) of the respondents. Thus this application.

2. Mr Ayayee, appearing on behalf of the 1st respondent, argued that there was no urgency in the matter as the applicant had failed to make out a case for urgency as required by Rule 6(12) (b) in that by 14 July 2015 the applicant was aware of the fact that it was unsuccessful and the reasons for its exclusion including that its bid was unresponsive. Notwithstanding the sparse details provided as it alleged, he submitted, the applicant should have approached this court then. He submitted further that the applicant had failed to satisfy the requirements for the granting of an interim interdict as set out in *Setlogelo v Setlogelo* [1] which are: (a) a prima facie right ;(b) a well-grounded apprehension or irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) a balance of convenience in favour of the granting of the interim relief; (d) the absence of any other satisfactory remedy. These requirements have been confirmed recently by the Constitutional

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227. See also *Eriksen Motors Welkom Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691C-E.

Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[2].

3. The authoritative case on urgent applications is the old but still reliable case of *Luna Meubelvervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)*[3] where the court stated:

> *'The following factors must be borne in mind. They are stated thus, in ascending order of urgency:*
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> 1. *The question is whether there must be a departure at all from the times prescribed in Rule 6 (5) (b). Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge on duty for that week.*
> 2. *Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed his papers by the previous Thursday.*
> 3. *Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing in the next Court day at the normal time of 10.00 a.m. or for the same day if the Court has not yet adjourned.*
> 4. *Once the Court has dealt with the cases for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next Court day at the normal time that the Court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even if that be at night or during a weekend.*

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[2] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).
[3] *Luna Meubelvervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136*H*-137*F*.

Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith.'

4. The authoritative decision on interim and final interdicts remains the decision of *Setlogelo v Setlogelo*[4] to which both the Supreme Court of Appeal and the Constitutional Court also refer and rely upon.

5. Mr Ayayee submitted that the applicant has failed to satisfy any of the *Setlogelo* requirements, highlighting the requirement of 'balance of convenience' as expanded and adapted by the Constitutional Court recently in *National Treasury and Others v Opposition Urban Tolling Alliance*[5].

6. Having considered the requirements set out in *Luna Meubels* above, I was satisfied that the application was urgent because the application could not be allowed to have been set down in accordance with the normal court roll. Firstly, it could not be expected of the applicant to rush to court without anything in writing from the respondents. But not only something in writing, but in particular the decision(s) of the 1st respondent and the relevant Committees and other relevant documents which indicate why its bid was found to be unresponsive. This would enable it to determine whether to challenge the decision(s) of the 1st respondent or accept same. Had it come to court without such details, surely this court would have had to say the application was premature and unfounded. This is so, taking into account that the successful bidder had already moved on site to start with the work tendered for; which is in dispute between the applicant and the respondents. To treat the matter as an ordinary application would have frustrated the very purpose of an urgent application in the prevailing circumstances. I was also of the considered view that the very crux of this application was to allow the

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[4] *Setlogelo v Setlogelo* above.
[5] *National Treasury and Others v Opposition to Urban Tolling Alliance and others* above.

parties to be heard by a court of law on whether the decision of the 1st and 2nd respondent should be set aside, if such decisions are found to have been made unlawfully and contrary to the provisions of s217 of the Constitution and relevant legislations governing municipalities including the 1st respondent. None of that could have been properly dealt with until we had ,proverbially, jumped over the first hurdle i.e until a ruling had been made that the application was urgent. For these reasons I granted prayer 1 of the Notice of Motion.

7. I will revert to prayer 2 hereafter.

Prima facie right

8. As far as the first *Setlogelo* requirement (prima facie right) is concerned, I am satisfied that the applicant has established a prima facie right. It formed part of a number of bidders who were considered for a particular bid. The decision that found its bid to be unresponsive is an administrative one subject to be reviewed by a court of law. This was the agreed premise from which this case proceeded.

Irreparable harm

9. The second requirement caused no consternation between the parties suffice to say that parties made their submissions clear. Mr Louw indicated that the harm the applicant will suffer will of course be financial. The applicant is in business. To the extent that its livelihood had been adversely affected, it had every right to approach this court. Mr Ayayee made the point that the 1st respondent will not only suffer financially by being exposed to possible 'Stay In' costs from the 3rd respondent for the period it would not have worked pending the review application; but the community it serves will continue suffer harm in that the sewerage spillage complained of may contaminate the river from which the community gets its water supply.

10. As alluded to earlier on, the sewerage problem 1st respondent complained about, it is common knowledge that this problem has plagued 1st respondent for a long time. To use that now in these proceedings as leverage to prevent the applicant from seeking relief from this court is neither fair nor justifiable in the circumstances. The work to be done, as it stands unrefuted, is for renovation of existing work. No more harm than already suffered can be expected in the time it will take this court to dispose of the review application. 1st respondent is in any event expected to put interim measures in place which can alleviate the plight of the community such as putting up tanks which can be used later for some other project(s).

Balance of Convenience

11. With regard to prayer 3, taking into account what the Constitutional court has said in the *Urban Tolling*[6] case on how the enquiry on 'the balance of convenience' should be conducted under our constitutional dispensation; I am conscious that once work is stopped, it will have adverse consequences on the community and reflect badly on the 1st respondent; and create the impression that 1st respondent was not taking its responsibility to provide its community with a safe and healthy environment seriously. However not to interdict 1st and 3rd respondent from commencing with work flowing from a highly contested bid will lead to the same situation in which the Constitutional Court found itself in *AllPay*[7] where work of 20 months complicated the resolution of the case after the Constitutional Court found that the bid was unlawful and unconstitutional. Similar cases are well known in this Division and other Divisions across the country. Surely the Constitutional Court cannot be understood to say or suggest and encourage courts not to consider each case on its own facts.

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[6] *National Treasury and Others v Opposition to Urban Tolling Alliance and others* above.

[7] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC).

12. On the issue that the applicant will not succeed in court on its application as submitted by Mr Ayayee, I am not persuaded that such a blanket assumption can be made. It is only upon a thorough perusal of the papers laid bare by the 1st respondent and made available to a panel of two Judges upon application by the applicant that such a conclusion or a different one for that matter can be reached. To make the assumption at this stage that the applicant has no prospects of success will literally amount to shutting the door of this court to the applicant; which is in direct conflict with its constitutional right to access to courts provided for in s34 of the Constitution of our country.

Alternative remedy

13. On the submission that the applicant in any event has an alternative remedy in the form of damages, I do not wish to engage in this possibility that such claim may be lodged. Even if the applicant was to pursue that route, the 1st respondent would suffer financial prejudice either way. The fact that the 1st respondent may lose funds already allocated in this financial year for this purpose can be dealt with within its own finance management structures. As I see it, the funds have already been ring-fenced for this purpose and cannot be used for any other purpose especially as this matter ought to be resolved by this court in less than three months. Without preempting the outcome of the court of review, the consideration of the alternative remedy which the applicant may institute later may just legitimize conduct which may be found to be unlawful by that court. That cannot be the correct approach.

14. To show that this court has indeed given attention to all the factors placed before it particularly the prejudice the 1st respondent has submitted it will suffer, ie that the community will be adversely affected by any delay of this matter, and that the funds may be taken back by the provincial financial authority, this matter will receive preferential treatment. It will, in consultation with the Judge President of this Division, be placed on the roll on any Monday during this term. In that way the R53 review can be expedited and disposed of finally with all parties able to

move on without any doubt in their minds. For these reasons I am inclined to grant prayer 3 of the Notice of Motion.

15. I now revert to prayer 2 of the Notice of Motion. In my considered view ,based on the conclusion I have come to in respect of prayers 1 and 3 ,it would make no sense at all not to grant prayer 2 as well for the simple reason that not doing so would fly in the face of the findings I have already made. I am thus inclined to grant prayer 2 as well. From the discussion above, I am satisfied that the applicant has satisfied all the *Setlogelo* requirements.

16. Finally, on these facts, the applicant came timeously to court; ie before the horse had already bolted. No work has commenced yet. Without putting too much emphasis on the sewerage problem which has plagued Moqhaka municipality for a very long time; in my considered view; the balance of convenience favours the applicant, to have this matter resolved once and for all by a court of law; conscious of the separation of powers between the different arms of government as always; and deferring that which should be deferred to the relevant arm of government if and when necessary.

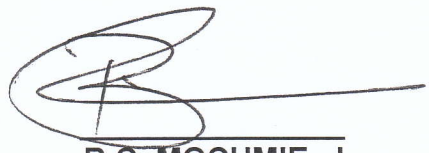
17. In so far as costs are concerned the general rule applicable is well known and need no repeat suffice to say that I have no reason to deviate from it.

18. In the result I grant the following order:

ORDER

1. An order is granted in terms of prayers 1, 2, 3 and 4 of the Notice of Motion.
2. The applicant is to enroll the application in terms of Rule 53 within 10 days from the date of this order, on 28 August 2015.

3. The 1st and 2nd respondents to file their replying affidavit within 5 days from the date on which the applicant would have filed the application in terms of Rule 53, on 4 September 2015.
4. The applicant to file its replying affidavit within 5 days from the date on which the respondents would have filed their answering affidavit, on 11 September 2015.
5. The application in terms of Rule 53 to receive preferential allocation and be enrolled on any Monday during this term, in consultation with the Judge President of this Division.
6. Costs of the application to be costs in the cause.



B.C. MOCUMIE, J

APPEARANCES

On behalf of the appellant:	Adv Louw (FS Bar) Instructed by: Payper Attorneys Bloemfontein
On behalf of the respondent:	Adv Ayayee (Jhb Bar) Instructed by: Majavu Incorporated Johannesburg