# IN THE HIGH COURT OF SOUTH AFRICA

# FREE STATE DIVISION, BLOEMFONTEIN

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| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/NO** |

Case No.: **4662/2020**

In the matter between:

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| **MGP CONSTRUCTION AND ENGINEERING CONSULTANTS** [Registration number: 2008/132829/23] | Applican |
| and | |
| **MATHJABENG LOCAL MUNICIPALITY** | First Respondent |
| **SIMPHONYA CIVILS AND PROJECTS** | Second Respondent |
| **ZOMKI-ISIZWE CONSULTING ENGINEERS** | Third Respondent |
| **MATSAPA JV STIMMER CONSTRUCTION** | Fourth Respondent |

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**CORAM:** I VAN RHYN, A J

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**HEARD ON:** 4 OCTOBER 2021

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**DELIVERED ON:** 17 NOVEMBER 2021

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INTRODUCTION.

[1] Applicant seeks interim relief pending the finalisation of action proceedings instituted against the first respondent. The application is opposed by the first respondent. In summation, the application deals with a prohibitory interdict and declaratory relief against the exercise of statutory power by an Organ of State.

[2] The applicant, not described as a legal entity in the founding affidavit, is MGP Construction & Engineering Consultancy with principal place of business in Bloemfontein. M. G. Phetheni ("Mr Phetheni"), as the sole director of the applicant, represents the applicant in these proceedings. I assume the applicant is a company since Mr Phetheni is the director of the applicant.

[3] The first respondent is Matjhabeng Local Municipality, an Organ of State as mentioned in s 239 of the Constitution and properly established in terms of the Local Government: Municipal Structures Act, 117of 1998. First respondent is situated in Welkom.

[4] The second, third and fourth respondents are not cited in full in that it is not alleged whether these entities are close corporations, companies or partnerships/firms or unincorporated bodies. These entities, whose further particulars are unknown to the applicant, are apparently construction and building contractors/engineers from Welkom. The second and fourth respondents did not oppose the application. The application was not served upon the third respondent. At the hearing of the matter and faced with the failure to serve the application upon the third respondent, applicant abandoned any relief claimed against the third respondent.

[5] The first respondent failed to file its answering affidavit within the time allowed and brough a substantive application for condonation. The application for condonation was not opposed. Condonation was granted at the hearing of the application.

THE RELIEF CLAIMED

[6] On 2 December 2020 the applicant launched an application requesting for the following orders to be granted:

(1) That pending the finalization of the action proceedings to be instituted by the applicant against the first respondent, the first respondent be prohibited from performing the following acts:

(1.1) Allowing the second, third and/or fourth respondents, and or any

other third party to continue with the construction of the roads, internal streets, sidewalks and storm water drains of phase 2, 3, 4 and 5 Meloding, Virginia, with effect from date of the order.

(1.2) Continuing to pay the invoices submitted by the second, third and/or fourth respondents and/or any third party in respect of work done on phase 2, 3, 4 and 5, Meloding, Virginia from the funds awarded by way of Municipal Infrastructure Grant number MIG/FS1152/R, ST/16/17.

(2) That it be declared that the contract entered into between the first respondent and the second respondent as well as the third respondent in respect of the construction of roads, internal streets, sidewalks and storm water of phase 2, 3, 4 and 5, Meloding, Virginia, to be null and void.

(3) That the respondents pay the costs of this application jointly and severally, the one paying the others to be absolved.

[7] The applicant's case is that it was appointed in 2015 by the first respondent "on a turn-key basis to rehabilitate and construct the roads in Meloding, Virginia" which appointment was "at risk meaning that" the applicant had to solicit funds itself from the Department of Cooperative Governance and Traditional affairs ("COGTA") for the construction of the said roads. The applicant appointed surveyors and engineers to compile a technical report containing plans and drawings for the proposed project. The technical report was submitted to COGTA for evaluation. The applicant contends that a total amount of R128 000 000.00 was approved for the project under a Municipal Infrastructure Grant referred to above.

[8] On 23 October 2015 the applicant received a letter of appointment from the first respondent, which appointment was accepted by the applicant on 29 October 2015. The applicant and the first respondent concluded a Service Level Agreement on the 4th February 2017. Second and third respondents were appointed by the applicant as subcontractors for the project. The applicant

submitted an invoice in the amount of R 1 020 741.23 to the first respondent in respect of the technical report, drawings and sourcing of finance from COGTA. The invoice was settled by the first respondent.

[9] The applicant was informed that the project could not commence due to the failure of COGTA to transfer the grant for the project to the first respondent's bank account. Despite numerous enquiries at the municipal office at Virginia, commencement of the project was delayed with the prospect that it will commence during the 2017/2018 financial year. On 23 April 2018 Mr Phetheni received information from an undisclosed informer that the applicant had been deceived regarding the financing of the project. The project had indeed commenced with phase 1 already completed. An inspection at the site confirmed that phase 1 regarding the construction of the roads, streets and sidewalks had been completed and Mr Phetheni found workers of both the second and third respondents at the site.

[10] Investigations conducted by Mr Phetheni revealed that funds had been released by COGTA. On 23 October 2018 Mr Phetheni concluded that the mayor of the first respondent awarded the contract/service level agreement, concluded with the applicant, to the second and third respondents who, subsequently utilised the plans and drawings submitted by the applicant, for the project. On 20 November 2020, Mr Phetheni again inspected the site which revealed that, by then, the second and third respondents were already engaged with phase 2 of the project.

[11] Applicant contends that the Service level Agreement confers a clear right upon it with the result that in the event of the application not succeeding, the applicant will suffer irreparable harm and financial loss. The applicant, through Mr Phetheni, has endeavoured to resolve the matter amicable but without any success. No alternative remedy is available to the applicant. Due to the first respondent's breach of a valid Service Level Agreement concluded with the applicant "... the balance of convenience favours the applicant".

THE FIRST RESPONENT'S CASE

[12] The first respondent raises three challenges, which it contends, are fatal to the application. Firstly, the relief sought by the applicant is essentially in the form of an interdict pending the finalization of an undisclosed action. At the hearing of the matter, it was revealed that the applicant instituted an action for payment of an amount of R 128 000 000.00 against the first respondent. The defendant in the action (first respondent) filed an exception in respect of the plaintiff's (applicant) particulars of claim, whereafter further progress in respect of the action came to a halt.

[13] The applicant in effect seeks a declaratory order that the appointment of second, third and fourth respondents and any other third party for the construction of phases 2 to 5 be declared null and void. To succeed the applicant will have to demonstrate that the appointment of the second, third and fourth respondents in respect of phases 2 to 5 is unlawful. The declaratory relief sought is in the form of a judicial review under the provisions of the Promotion of Administrative Justice Act[1] ("PAJA") alternatively the common law. Under the common law, such application has to be brought as soon as reasonable possible and without unreasonable delay whilst in terms of section 7 of PAJA, an application is to be brought without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in accordance with internal remedies, have been concluded, or as soon as the applicant became aware of the facts upon which the relief is sought. Applicant became aware of the facts on 23 October 2018, yet failed to bring its application within the prescribed timeframes or apply for condonation.

[14] An application for judicial review must be brought in accordance with the procedure prescribed by rule 53 of the Uniform Rules of Court. An administrative decision, such as the one by the mayor of the first respondent who allegedly granted the applicant's contract to the second, third and fourth respondents, cannot be reviewed without a proper record to be filed by the administrator/decision maker, with the result that court will be unable to adjudicate upon the declaratory relief sought by the applicant. Consequently,

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[1] Act 2 of 2000.

the first hurdle for the applicant to obtain the interdictory relief has not been addressed. Mr Louw, counsel on behalf of the first respondent contends that on the aforesaid basis alone, the application ought to be dismissed with costs. The applicant's failure to adhere to the timeframe for bringing an application for judicial review has not been complied with and in the absence of an application for condonation it forms the second preliminary point raised on behalf of the first respondent.

[15] The third preliminary point concerns applicant's contention that it requires the interdict *pendente lite* (pending the institution of some or other action by it against the first respondent) to preserve its clear right or claim, which in this case has not been stated and no case has been made out for the granting of the interdict. The applicant appended the letter of appointment dated 23 October 2015 by the Office of the Municipal Manager addressed to the applicant to the founding affidavit. The contents of the letter relevant to this application, are the following:

> "1. This letter serves to inform you that the client, Matjhabeng Local Municipality (MLM), has resolved to appoint your company to source funding, develop the business plan an manage the implementation of the project upon the approval of the required funding as per the Business Plan for the above-mentioned project.
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> 2. This appointment is for the inception (feasibility study) concept and viability (preliminary engineering design) engineering stages and project registration with the Municipal infrastructure Grant (MIG) or any other for the above-mentioned project".

And further:

> "6.4 The consultant's attention is drawn to the fact that this letter is provisional only, and that the MLM reserves the right to cancel the appointment if it is convinced from the information requested, or from the quality of the scoping report, that the Consultant does not have the necessary capacity to successfully undertake the assignment"

[16] On 14 February 2014 the first respondent, represented by its municipal manager and the applicant, represented by Mr Phetheni concluded a service

level agreement in terms whereof the first respondent engages the "Consulting Engineers-Contractor to provide professional services as described in Appendix 1" for the remuneration described in Appendix A2 and to complete such services as described in Appendix A3. The applicant did not attach copies of the appendices A1, A2 or A3 to the application. From the contents of the technical report, it is evident that the costs for the total scope of works for phase 1 has been computed at R17 375 3336.22. It includes the estimated professional fees for phase 1 for engineering design services in the amount of R 1 385 593.00. On the applicant's version it was allocated an appointment and concluded a contract which is evidently for the construction of 2km roads, internal streets, sidewalks and stormwater drains in Meloding, Virginia in respect of phase 1 of the project. The applicant has been paid for the work conducted in respect of phase 1. It was specifically pointed out in the appointment letter that "...subject to the consultant's performance the appointment may be considered for the extension of the remainder of the engineering stages at the sole discretion of the first respondent".

THE APPLICABLE LEGAL PRINCIPLES AND EVALUATION.

[17] In order to succeed in obtaining an interim interdict, whether it be prohibitory or mandatory an applicant must establish:

(17.1) the right that forms the subject matter of the main action and which the applicant seeks to protect is prima facie established, even though open to some doubt;

(17.2) There is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he/she ultimately succeeds in establishing the right;

(17.3) the balance of convenience favours the granting of the interim relief; and

(17.4) the applicant has no other satisfactory remedy.[2]

[18] In **Coalcor (Cape) (Pty) Ltd and Others v Boiler Efficiency Services CC**[3] it was held that the courts will not grant a prohibitory interdict restraining parties

[2] Setlogelo v Setlogelo 1914 AD 221 at 227.
[3] 1990 (4) SA 349 (C) at 359.

from performing acts that they are entitled to perform in terms of an administrative order on the ground that the order is subject to review. However, in subsequent decisions it was decided that the court has to evaluate the prospects of success in the review application and, if there are prospects of success, the court has a discretion to grant the interim relief in the form of a prohibitory interdict.[4] Even if it may be accepted that the first respondent through the mayor or municipal manager acted *in fraudem legis*, the decision which led to the appointment of the second, third and fourth respondents amounts to administrative action which must be challenged by means of a review application. The applicant has not ventured to explain the basis for contending that the appointment of the second, third and fourth respondents were "unprocedurally" and/or "irregularly" and/or "unlawfully".

[19] Interdicts are not concerned with past invasion of rights. The applicant became aware of the appointment of the second and third respondents during April 2018 when he inspected the actual site at Meloding, Virginia. During argument Mr Bahlekazi, who appeared on behalf of the applicant, conceded that the failure to append the annexures to the Service Level Agreement constitutes a difficulty due to the uncertainty that exist whether the applicant was indeed appointed for the whole project and not only in respect of Phase 1. However, from the contents of the technical report compiled by the applicant as well as the contents of the appointment letter, it is evident that applicant was only appointed for Phase 1, being 2km of road, and in particular for the submission to COGTA for funding, which included the sourcing of funds, developing a business plan and managing the implementation of the project upon approval of the required funding as per the business plan for the project.

[20] The Service Level Agreement makes no mention of Phases 2 to 5 and due to the failure to append the appendices setting out the scope of the work to be conducted and remuneration applicable, the applicant's right in terms of the substantive law cannot be determined. With a prohibitory interdict the applicant seeks to prevent the second and fourth respondents to continue with the

[4] Ladychin Investments (Pty) Ltd v South African National Roads Agency 2001 (3) SA 344 (N) at 356-357.

remainder of the project as it is undisputed that Phase 1 has been completed during 2018- 2019. Mr Bahlekazi, counsel on behalf of the applicant, conceded that the applicant has not made out a case for its appointment pertaining to phase 2 to 5 of the project and therefore prayed for an order in terms of prayers 1 and 2 of the notice of motion only in respect of the construction work, and payment of invoices regarding Phase 1.

[21] Mr Louw argued that the applicant has not made out any case whatsoever in that it has not demonstrated that it has any right in relation to Phase 2 to 5 in respect of the project. Furthermore, the appointment of the applicant in respect of Phase 1 was unlawful for want of compliance with the mandatory prescripts, *inter alia*, in that the appointment was made without following the prescribed bidding process, the applicant is prohibited to be appointed as a "consultant-contractor", failure to comply with section 217 of the Constitution and the relevant procurement regulations/policy.[5]

[22] In order to obtain the interim interdict, the right to be set up by the applicant is sufficient if it is *prima facie* established though open to some doubt. The facts as set out by the applicant, together with any facts set out by the respondents which the applicant cannot dispute, must be taken and consideration given to the inherent probabilities whether the applicant, could on those facts, obtain final relief at the trial. The facts set up in contradiction by the respondents should then be considered. Serious doubt is thrown upon the case of the applicant, not only through the first respondent's affidavit described above, but also on the applicant's own version[6]. The applicant is requesting an interim interdict against the exercise of a statutory power by an Organ of State. The court will only grant temporary restraining orders against the exercise of statutory power in exceptional cases and when a strong case for the relief has been made out by the applicant.[7]

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[5] Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd [2016] 4 All SA 60 (ECG) at [61] and Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd [2019] JOL 41747 (CC).
[6] Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA) at 228G.
[7] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC).

[23] Mr Louw contends that the applicant has failed to establish a prima facie right and has actually failed to demonstrate any right in relation to Phase 2-5 of the project. Similarly, that no likelihood of irreparable harm has been shown as the applicant has admitted payment of its invoice in respect of Phase 1. The balance of convenience does not favour the applicant and rather tilts in favour of the residents of Meloding and the first, second, third and fourth respondents[8]. The applicant has not taken the decision to award the contract for the construction work to the second, third and fourth respondents on review and for that reason alone, the application for the interim interdict should fail.[9] I agree with the first respondent's submissions in this regard.

[24] Mr Khokho, who appeared with Mr Bahlekazi for the applicant argued in reply that the application should be referred for oral evidence to ascertain the terms of the agreement reached between the applicant and the first respondent. However, a further factor militating against the applicant is that Mr Phetheni has known of the forthcoming construction work pertaining to Phase 2 since April 2018 and has only decided to launch this application for prohibiting further work in respect of the project during December 2020. The application was heard on 14 October 2021 and it is therefore quite possible that several phases of the project have in any event been finalized or progressed near to completion.

[25] I am satisfied that the applicant has not succeeded in establishing the requirements for an interim interdict and referral of the matter for evidence will not be of any assistance to the applicant.

[26] With regards to the costs I see no reason why costs should follow the result.

**ORDER.**

[27] In the result, I make the following order.

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[8] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) at [46] and [47].

[9] Aurecon South Africa (Pty) Ltd v City of Cape Town 2016 (2) SA 199 (SCA).

1. The application is dismissed with costs.

I VAN RHYN, AJ

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| On behalf of the Applicant: | ADV. N. M BAHLEKAZI and ADV KHOKHO |
| Instructed by: | MLOZANA ATTORNEYS BLOEMFONTEIN |
| On behalf of the First Respondent: | ADV. M. C. LOUW |
| Instructed by: | HILL, MCHARDY AND HERBST ATTORNEYS BLOEMFONTEIN |