



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

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

Case number: **6192/2023**

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

**THE ACTING MUNICIPAL MANAGER OF THE
METSIMAHOLO LOCAL MUNICIPALITY**

1st Respondent

FUSI JOHN MOTLOUNG

2nd Respondent

HELGARDT MULLER N.O.

3rd Respondent

EHEILA MARTINA HENDRIKA MULLER N.O.

4th Respondent

HELGARDT MULLER N.O.

5th Respondent

CHANTE GAIL COETZEE N.O.

6th Respondent

CORRIE PLOOS VAN AMSTEL N.O.

7th Respondent

**EXECUTIVE MAYOR OF THE METSIMAHOLO
LOCAL MUNICIPALITY**

8th Respondent

**COUNCIL OF THE METSIMAHOLO LOCAL
MUNICIPALITY**

9th Respondent

**THE SPEAKER OF THE COUNCIL OF THE
METSIMAHOLO LOCAL MUNICIPALITY**

10th Respondent

THE METSIMAHOLO LOCAL MUNICIPALITY

11th Respondent

LUCAS FISCHER

12th Respondent

CORAM:

LOUBSER, J

HEARD ON:

6 DECEMBER 2023

DELIVERED ON:

21 DECEMBER 2023

- [1] This is an urgent application that came before this court on 6 December 2023. The application papers comprised of more than 1200 pages, and in the circumstances, judgment was reserved. The applicant is a registered political party, commonly known as the DA. The second respondent is the acting municipal manager of the municipality in question, in his personal capacity. The third to seventh respondents are the trustees of the Lizelle Sake Trust. The seventh respondent is the arbitrator in arbitration proceedings to which reference will be made later herein. The twelfth respondent is the speaker of the council of the municipality, in his personal capacity.
- [2] The applicant seeks certain interdictory relief on an urgent basis pending the final adjudication of a future review application in which certain declaratory relief is sought. The declaratory relief is aimed at finding the trust and the municipality guilty of contempt of court, and declaring a certain waiver decision, the arbitration award, an approval decision and the new settlement agreement unlawful and to review it and set it aside. The applicant avers that it is making these applications in order to, *inter alia*, safeguard public funds held by the municipality against unlawful

appropriation and to guard against contemptuous conduct by the municipality. In the review application, the applicant will also seek an order that the trust return to the municipality all the payments it had already received pursuant to the impugned decisions.

- [3] The starting point of the applicant's case is a services agreement entered into between the municipality and the trust during 2013 for the provision and installation of engineering services pertaining to water and sewer systems. This agreement made it plain that the municipality is not liable for the costs of the design, installation and provision of the water and the sewer systems, which would take place on land owned by the trust and to be applied for as a township establishment. Only two years later, however, a dispute arose between the parties concerning the implementation of *inter alia* this services agreement. Invoking the arbitration clause in the services agreement the matter went to arbitration and the trust delivered a statement of eight claims during 2019, totalling roughly R138.5 million. Claim 1 was for an amount of roughly R42 million plus 10% interest calculated over a period plus cost of suit.
- [4] The claims advanced by the trust were not founded on the express terms of agreement but upon "the surrounding circumstances against which the water and sewage agreement was concluded". Eventually the municipality was advised by its own attorneys that in terms of the agreement, the municipality was not indebted to the trust in any form or fashion and that it did not have to pay any of the claims. Despite this advice, the municipality proceeded to enter into a partial settlement agreement with the trust on 7 July 2023. In terms of this partial settlement agreement, the municipality would pay the trust R27.8 million in respect

of claim 1. It appears that these payments were not budgeted for in the budget of the municipality.

- [5] When the applicant became aware of this partial settlement agreement, it launched proceedings in this Division on an urgent basis to obtain interim relief pending future review proceedings to have the partial settlement reviewed and set aside. The matter came before Reinders, J who made an order on 28 July 2023 to the effect that, pending the review, the municipality and its officials are prohibited from making any payments to the trust in respect of the partial settlement agreement and that the agreement is suspended. In the present application, which is founded on the same facts and circumstances as set out above, the applicant alleges that the municipality and the trust then took a number of steps to circumvent the order of Reinders, J and made themselves guilty of contempt of court in the process. In the envisaged review proceedings, the applicant seeks to have those steps reviewed and set aside, while it also seeks to have those involved committed for contempt of court.
- [6] It needs mentioning that Reinders, J in her order also ruled that the normal time limits and procedures will apply in respect of the review proceedings. So far the municipality has filed no opposing papers in the review proceedings, and those proceedings are presently stalled.
- [7] The steps taken by the trust and the municipality to circumvent the order of Reinders, J are the following, according to the applicant and the papers before the court: The municipality and the trust informed the arbitrator that they have abandoned their rights and obligations in the partial settlement agreement. In other words, that the partial settlement agreement did not exist any more. The arbitrator then proceeded with

the arbitration proceedings by entertaining an application for summary judgement by the trust in respect of claim 1, which application the municipality did not oppose by way of an answering affidavit. Summary judgement was then granted in favour of the trust. The applicant does not criticize the arbitrator, but contends that the respondents have mislead him to continue with the arbitration despite the order of Reinders, J. The municipality could not resort to self-help abandoning the partial settlement agreement. They could only do so with the intervention of a court of law in a so-called self-review application.¹ The applicant estimates that the municipality's liability under the arbitration award is around R100 million.

- [8] It would appear then that the applicant has a reasonable prospect of success in the application to review and set aside the waver decision of the municipality and the arbitration award that followed. To make things worse the municipality entered into a new settlement agreement with the trust in terms of which the trust would be paid R43.2 million, by the payment, *inter alia*, of R5 million per month. This payment is also not budgeted for, as required by legislation. The terms of the new agreement do not differ much from the arbitration award, but the rate of interest is now much higher. Again, it would appear that there is a reasonable prospect that the decision to enter into a new agreement for payment to the trust, could be successful. If so, the new agreement could also be set aside.

- [9] Now in urgent applications for an interim interdict, an applicant must show urgency, a *prima facie* right (even if open to some doubt), a well-grounded

¹ EFF v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) at par.74.

apprehension of irreparable harm, that the balance of convenience favours the granting of the relief, and that the applicant has no other satisfactory remedy. Here the urgency lies in the fact that monthly payments are made to the trust in substantial amounts and in terms of the new agreement. The applicant avers that it is acting in the public interest in an effort to safeguard public funds held by the municipality against unlawful appropriation. I therefore find that the applicant has shown a *prima facie* right in respect of the interim relief sought. On the facts of the matter, the remaining requisites for interim relief have also been complied with.

[10] Lastly, it is clear that a court has to consider the review application to determine whether a *prima facie* right has been shown.² The prospects of success of the review application, as discussed above, therefore supports the finding that the applicant has succeeded in showing a *prima facie* right.

[11] In the premisses, I grant the following order:

11.1 The applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods is condoned and this application is dealt with as a matter of urgency under Uniform Rule 6(12).

11.2 Pending the final adjudication of the review application:

² Eskom Holdings v Vaal River Development Association 2023(5) BCLR 527 (CC) par 62-67.

- 11.2.1 the first, second, third, fourth, fifth, sixth, ninth, tenth, eleventh and twelfth respondents are interdicted from taking any steps to implement the eleventh respondent's decision to waive and/or abandon its rights ("**the waiver decision**") in respect of the partial settlement agreement concluded on 7 July 2023 between the eleventh respondent and the Lizelle Sake Trust (which was suspended by this Court's order of 28 July 2023 under case number 3570/2023 ("**the order**"));
- 11.2.2 the waiver decision is suspended;
- 11.2.3 the first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh and twelfth respondents are interdicted from taking any steps to implement the arbitration award made by the seventh respondent on 13 October 2023 in respect of the first of eight claims advanced by the Lizelle Sake Trust ("**the arbitration award**");
- 11.2.4 the arbitration award is suspended and/or stayed;
- 11.2.5 the first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh and twelfth respondents are interdicted from taking any steps to implement the decision taken by the Council on 19 October 2023 to approve a new settlement agreement with the Lizelle Sake Trust ("**the approval decision**");
- 11.2.6 the approval decision is suspended;

- 11.2.7 the first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh and twelfth respondents are interdicted from taking any steps to implement the settlement agreement concluded between the eleventh respondent, the second respondent, the Lizelle Sake Trust and/or the fifth respondent ("**the new settlement agreement**");
- 11.2.8 the new settlement agreement is suspended; and
- 11.2.9 the third, fourth, fifth and sixth respondents are directed, within seven days, to return to the eleventh respondent the full quantum of any funds received by the Lizelle Sake Trust pursuant to the partial settlement agreement, waiver decision, arbitration award, approval decision or new settlement decision.
- 11.3 The costs of Part A of this application, including the costs of two counsel, are costs in the review proceedings.
- 11.4 Opposing papers in the review proceedings, if any, must be filed no later than 15 February 2024, whereafter the normal rules shall apply.



PJ LOUBSER, J

On behalf of the Applicant:
Instructed by:

Adv. A. Stein SC, with him Adv. D. Sive.
Minde Schapiro & Smith Inc, Bellville,
c/o Symington & De Kok,
Bloemfontein.

On behalf of the Third to Sixth

Respondents (the Trust):

Adv. J.G. Smit

Instructed by:

NLA Legal Inc, Sandton,
c/o E.G. Cooper Majiedt Inc,
Bloemfontein.

On behalf of the Third to Sixth

Respondents (the Trust):

Adv. M. Khoza SC, with him Adv. R.M.
Mahlatsi

Instructed by:

Raphela Attorneys Inc, Sandton,
c/o Fixane Attorneys,
Bloemfontein.