

SOUTH AFRICA / JUDGMENT

Arocon Mbokodo CC v Mogalakwena Local Municipality (2650/2024) [2024] ZALMPPHC 57 (7 June 2024) [2024] ZALMPPHC 57

COURT

Limpopo High Court, Polokwane

BEFORE

Monene

CASE / FILE NUMBER

2650/2024

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FLYNOTES:

ADMINISTRATIVE

– Tender – Interim

interdict –

Municipality

entered a contract with a service provider – Contract work

is not commenced with or concluded – Remains

valid –

Seeks to contract another service provider for same work whilst

first contract subsists – Prima facie

right established –

Applicant and public purse will suffer irreparable harm –

Convenience in the interests of

justice favours granting of

interim interdict – No alternative remedy – Interdict

granted.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO:2650/2024

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO THE JUDGES: YES / NO

(3)

REVISED.
Signature

Date: 2024/06/07
In

the matter between: AROCON
MBOKODO
CC
APPLICANT
And
MOGALAKWENA
LOCAL MUNICIPALITY
RESPONDENT

JUDGMENT

MONENE AJ

- [1] At times the conduct of some state organs more so at the local sphere of government in this country is mindboggling and indeed more incredulous than fiction. A municipality enters a contract with a service provider pursuant to delivery of a service to the community. The contract work is not really commenced with, is not concluded, nor successfully repudiated and is for all intents and purposes still valid. The municipality then puts the same contract to tender for the same scope of work and seeks to contract another service provider whilst the first contract subsists. All this done ostensibly with advice from or at least the presence of well manned legal administration offices. Mogalammakapane!!! The Bapedi from Ga-Sekhukhune or Ga- Mphahlele or the Batswana would exclaim from being utterly flabbergasted by how all this happens not much more than the Nrebeles from Mokopane who would exclaim, "Mmudu!!!Tjo tjo!!!Yho Yhoo!!! Monro wa banro!!!"
- [2] This is an urgent application for interim interdictory relief brought in the wake of the respondent putting out to tender the work and scope of a contract to construct a road within its geographic area against the common cause reality that that very contract was previously awarded to the applicant. The relief is sought pending the

determination

of action proceedings brought by the applicant in which the applicant as plaintiff therein seeks to enforce specific performance in terms of the contract against the respondent as defendant therein.

- [3] The respondent mounts a challenge against the application contesting first its urgency and in the main, while admitting that it remains contracted to the applicant, averring that the applicant has within grasp an alternative remedy in the form of a damages claim.

- [4] I am called upon to determine whether the matter deserves enrolment on the urgent court roll and if so whether, on the merits, it musters the requirements for interim interdictory relief.

THE FACTS IN BRIEF

- [5] Following a tender process, the applicant was the successful tenderer in respect of a tender issued by the respondent in 2021.
- [6] The contract (Contract Number 18-2020/2021) between the parties consequently concluded between the parties on 4 November 2021 was for the completion of a road between the Mabusela and Masoge villages inclusive of a stormwater project.
- [7] A site handover agreed to by the parties to take place on 23 November 2021 was cancelled by the respondent resulting in the site not being handed over in an apparent repudiation of the contract which repudiation was not accepted by the applicant.
- [8] After this impasse the applicant, on 8 August 2023, caused summons to be issued against the respondent seeking an order for specific performance in terms of the contract. This action is pending.
- [9] On 29 February 2024 the respondent published a new tender for the completion of the same Mabusela/Masoge villages road and stormwater.
- [10] The applicant then brought this application on an urgent basis seeking an interim interdict pending the determination of the pending action proceedings.
- [11] The matter served before Kganyago J's urgent roll on 2 April 2024 and was by agreement removed on account of the papers being in excess of 500 pages. Subsequently, the matter was post an application to the Judge President, by agreement enrolled as a special allocation to serve before me.
- [12] I am thus called upon to determine the urgency of the matter and if so enrolled then establish whether the applicant has adequately traversed the trite requisites for an interim interdict.

REGARDING URGENCY

- [13] I note the respondent's contention that urgency remains an issue before me much as I note that counsel for the respondent did not, in submissions made before me, per se proceed to aggressively pursue the point.
- [14] I must state from the outset that, in my view, it would be a circuitous, imprudent, and wasteful exercise to deploy scarce judicial resources at special allocations only to sidestep dealing with the merits of opposed applications meagerly insulated by dismissing those motions on the technical basis of urgency. Once a matter is given a special allocation more so by agreement between the litigants, it must, in my view, be disposed of on the merits and not on such dilatory in limine points as urgency. In that regard points in limine should, in

my view, only be magnified if they are dispositive of applications.

- [15] It is from that premise that I am inclined to enroll this matter as urgent and hear and determine the merits thereof for it certainly cannot be in the interests of justice that heads of court allocate matters on special allocation, secure judges from a very limited base; that litigants secure counsel, and in this particular matter expensive heavy artillery senior counsel who engaged in extensive preparation at great cost to litigants; that matters are recircled on the escapist probable ruse of them not being urgent.
- [16] Even if I be wrong in that approach, I find that the urgency juristic fact of the absence or presence of substantial redress in due course is, on the facts, favoring the applicant. Should the applicant's interim relief application be heard in the normal course, the applicant shall not have substantial redress at all as the proverbial horse shall have long been down the turf with the new tender proceeded with, appointments made, and new contracts entered; effectively allowing a small itch involving one party to evolve into septic leprous wounds affecting and infecting more parties.
- [17] Accordingly, without unnecessarily saddling this judgement with a plethora of authority simply for purposes of sounding erudite, I exercise my discretion in favour of finding the matter to be deserving of being heard urgently and thus proceed to hear it as such.

THE PARTIES' CONTENTIONS ON THE MERITS

- [18] While in the answering affidavit the respondent appeared to take issue with the applicant's ability to satisfy all four requirements of an interim interdict, it appeared in argument before this court that the key dispute lay in whether the applicant has an alternative remedy to the interdictory relief sought.
- [19] Accordingly, post briefly looking into what answers the facts before me provide regarding a prima facie right, harm or reasonable apprehension of such and the balance of convenience, I shall deal with the requirement of an alternative remedy.

Ad prima facie right

- [20] The applicant submits that the right it seeks to protect arises from the contractual relationship between it and the respondent.
- [21] The respondent hoists several submissions to protest the existence of the applicant's prima facie right in casu, to wit:
- [21.1] That there is no prima facie right because the applicant's prospects of success in the pending action are "zero" owing to the contract having been entered into subject to availability of funds and the contract having a clause in terms of which it could resile or withdraw from the contract.
- [21.2] That the "delay" of the applicant in instituting the action a year after the respondent refused to hand over the site results in the applicants right to interim relief being forfeited.

[21.3] That there was an irregularity or irregularities in the process leading to the appointment of the applicant as the winning bidder.

[21.4] That because the budget availability to which that contract was subjected never materialized no contractual rights vested in the applicant.

[22] Volume not always being an equivalent of cogency and correctness, I find it self-evident that none of the above grounds based on which the respondent contests the first requirement of an interim interdict are sustainable.

[23] There is no dispute that the parties entered a contract and that to date that contract subsists. There is equally no dispute that the intended new tender is for the same scope of work for which the two parties are contracted.

[24] It calls for no rocket scientist nor a Sidney Kentridge QC nor a Thembeke Ncqukaitobi to help determine whether the applicant has at least a prima facie right arising from the contractual relationship. There is no evidence remotely suggestive of the respondent having resiled from or withdrawn from the contract. Counsel for the respondent had to concede that the respondent never communicated any pull out from the contract. On the respondent's own version, the contract is still in place. Furthermore, protestations about the availability of funds to carry through the contract as well as fresh not pleaded allegations of the contract having been allegedly procured irregularly do not subtract from the applicant's current contractual rights at all, that is, unless and/or until the contract is set aside. The less said about a delay in prosecuting an action ipso facto, without any legal process, disentitling a party from seeking interim relief the better because that does not negate the applicant's clear contract-based rights at all. The sentiment clearly arises from a misplaced reading, misunderstanding and misapplication of *National Council of Societies for the Prevention of Cruelty to Animals v Peter Openshaw* (462/07) [2008] 78(RSA) and because it is a misreading which even if correct would be inapplicable to the question of the existence of a prima facie right I see no need to expand on the context and meaning of that authority in casu.

[25] I have no hesitation thus in finding that the applicant has a prima facie right in casu.

Ad harm being suffered or reasonably apprehended.

[26] The applicant submitted that should an interim interdict not be granted it will suffer from the consequent appointment of new parties to perform work for which it has already been appointed. It argued that the failure to protect, at least in the interim, the sanctity of its contract with the respondent would subject it not only to commercial loss but will by extended reasoning erode its right of access to courts for meaningful effective relief as its specific performance-gearred pending action will become moot.

- [27] The respondent counters by stating that even if the new tenderers are appointed the applicant will suffer no irreparable harm because "if applicant convinces a court, it would be easy to calculate the damages (what it would have made on the project) and moreover, the municipality is able to pay if it must". To say that this reasoning floors the court with manifest shock is an understatement. God be with us all!!!
- [28] It seems to me utterly uncalled for and callous in the extreme for a state organ to defend its possibly irregular and unlawful conduct by openly advocating a preparedness to spend monies irregularly and fruitlessly from the public purse by paying for the same services twice.
- [29] In this regard I feel compelled to refer to the counsel of the apex court in the land in the matter of Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007(3) SA 121 (CC) where in slightly different circumstances the following was, inter alia, stated in temperate words less exasperate than of this court:
- " In my view this spiral of litigation is likely to delay, if not weaken the effectiveness of or grind to stop the tender process. That would be to the considerable detriment of the public at large. The resources of our state treasury, seen against the backdrop of vast public needs, are indeed meagre. The fiscus will ill-afford to recompensate by way of damages disappointed or initially successful tenderers and still remain with the need to procure the same goods or service."
- [30] I cannot rightly and in the interests of justice find that there is no irreparable harm to be suffered by the applicant in that redress thereto is allegedly available and sustainable in the form of an avoidable, unnecessary, and clearly pre-meditated wasteful and fruitless expenditure from the public purse. There is, in my view, neither rationality, nor equity nor justice in that approach.
- [31] I thus duly find that should the interim relief sought not be granted the applicant will suffer irreparable harm. So too will the public purse, if I may add and that should be no minor consideration even it be that the Setlogelo v Setlogelo harm concept of 1914 imagined harm only in the context of it attaching to the interdict applicant. The year now is of course not colonial 1914 but 2024 in a constitutional era.

Ad balance of convenience

- [32] Arguing the balance of convenience the respondent in its heads of argument submitted that convenience favours service delivery so that members of society can benefit from the completion of the road and stormwater in question. It was further submitted that the new tender promises to be less expensive than the currently existing contract.
- [33] I am not persuaded by this argument. Firstly, there is no reason submitted as to why the ratepayers and residents can only benefit from the service if it is offered by the intended yet unknown tenderer and not if the current contract which does not have to go through tedious procurement processes first is implemented. Secondly, the alleged latent financial prudence ethic appears to me to be a ruse in the light of the supra stated intentions of the respondent

to post a successful damage claim, pay both the new successful tenderer and the applicant. Thirdly this willingness to pay more than once for one service which, it was submitted, the respondent "can pay if it must", belies the assertion that the current contract should not be honored because funds are not available. Fourthly, the residents and "ratepayers"(assuming that the villagers in Mabusela and Masoge are paying rates) have been kept in limbo without

the road and stormwater completion since before 2020 when the tender was advertised to date, with the respondent having no iota of the service delivery urgency ethic which has apparently suddenly befallen them, such that convenience would suggest speedy delivery and assuming that there was a reason to suggest that speedy completion cannot be effected by carrying through the existing contract.

[34] Convenience clearly in the interests of justice favours the granting of the interim interdict than it does the dismissal thereof.

Ad the question of an alternative remedy

[35] Addressing the absence of an alternative remedy both parties highlighted the question of damages with the applicant stating that damages are in law not available as a remedy and the respondent submitting that a claim for damages is available to the applicants as an alternative remedy.

[36] Both Mr. Sasson on behalf of the applicant and Mr. Williams SC on behalf of the respondent pegged their submissions on their mutually exclusive understandings of what the Constitutional Court established in Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007

(3) SA 121 (CC)("Steenkamp") regarding the availability of damages claims in tender disputes. In that regard Mr. Sasson argued that Steenkamp has abolished damages as a remedy available pursuant to tender disputes. Mr. Williams submitted that his understanding was that a damages claim was, post Steenkamp, still available. Both suggested that whether there is an alternative remedy depended on whether I interpreted Steenkamp in accordance in tandem with either of them.

[37] As invited by the two parties, I have perused Steenkamp and found its ratio to be unhelpful to either of the parties' course. As I understand Steenkamp it was about whether administrative failures of tender boards were wrongful in a delictual sense such that those who fell victim to such irregularities could lodge damages claims and found, in a split decision, that those administrative glitches or breaches of statutory duties by tender boards cannot be a basis of claiming damages. That is the context under which the following paragraph immediately preceding the words from Steenkamp at paragraph 55(3) referred to supra arose:

"Imposing delictual liability on the negligent performance of functions of tender boards would open the prospect of potential claims of tenderers who had won initially. This will be to the detriment of the invaluable public role of tender boards. A potential delictual claim by every

successful tenderer whose award is upset by a court order would cast a long shadow over decisions of the tender boards. Tender boards would have to face review proceedings brought by aggrieved unsuccessful tenderers. And should the tender be set aside it would then have to contend with the prospect of another bout of claims for damages by the initially successful tenderer..."

[38] I cannot understand Steenkamp to be an authority to the notion that for as long as there is a sniff of a tender, contractual obligations cannot lead to damages claims and am thus unwilling to be seduced to a view that Steenkamp put paid to the availability of damages claims against municipalities in tender matters under all circumstances. Clearly, Steenkamp only dealt with damages claims arising from disputes centered around delictual liability based on negligence of tender boards and does not in my view extend to contractual disputes between the municipality and its contractual partners.

[39] Having so found however, I cannot find that the continued availability of a damages claim in law necessarily means that it constitutes an alternative remedy for the applicant. That is so on account of the following considerations:

[39.1] As already alluded to supra when this court dealt with the requirement of irreparable harm, it is offensive to this court's sense of justice to find there to exist an alternative remedy in a premeditated intention or readiness of the respondent to spend to engage in wasteful, reckless, and irregular expenditure of having to pay twice for the same service from the public purse. I refuse the invitation by the respondent to this court to say a clearly unwarranted and possibly unlawful conduct on their part of being willing to pay damages to the applicant when same is avoidable constitutes an alternative remedy. In my view, an alternative remedy must have a rational and lawful basis and not be one mired in possible fiscal irregularity more so to the detriment of meagre state resources.

[39.2] Any party has a right to prefer a particular relief and cannot have a particular relief forced upon it, more so by its opponent. The applicant chose to vindicate its rights arising from the contract by way of seeking specific performance. That is its choice, and it is not available to the respondent to visit a remedy of damages upon the applicant. In the context of seeking specific performance whether alive to the availability of damages or not, it cannot justly be said that a remedy the applicant does not seek as one suitable to vindicate its rights is an alternative. A party cannot be forced to adopt a cause of action or relief it does not seek even if it may appear to a court that that relief is more attractive. What more for an approach which suggests that an opponent in litigation can force or direct an opposing party to go an alternative relief route when a court cannot. This principle was expounded on by the apex court in the land in *Baloyi v Public Protector and Others* 2022(3) SA 321(CC) at paragraphs 40 and 42 respectively in the following terms:

"... The following dictum of the Supreme Court of Appeal in Makhanya, which squarely addressed a contractual cause of action in the employment context, is apposite in this regard: ...when a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact. When he or she says that the claim is to enforce a right derived from the constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point ..."

"...a court might be of the view that a litigant should have pursued a different cause of action, or that she would have had a better chance of success had she done so ..."

[39.3] Furthermore, entities like the applicant do not only benefit monetarily from tenders won such that damages may be a sufficient alternative balm. They ordinarily also seek to establish and grow a brand and to build a resume of work previously done as a steppingstone for sustainability in future endeavors of a commercial lifetime.

[40] In the premises I find that the applicant does not have an alternative remedy to the interim interdict it currently seeks.

[41] Having thus found that the applicant in casu has satisfied all the four requisites of an interim interdict I find the way factually and legally cleared to grant the applicant that relief.

REGARDING COSTS

[42] The applicant has achieved success in this matter and there is thus no reason to deviate from the normal course of costs following the event.

[43] The applicant had prayed for those costs to be on a punitive scale. Much as I decried the conduct of the respondent in acting recklessly by seeking to advertise a new contract atop another, I am not persuaded that this is case for a punitive costs order. This court has seen far worse conduct more deserving of such a stern frown and in this matter, I have not been persuaded in that direction.

[44] Accordingly costs against the respondent on an ordinary scale should be on an ordinary scale.

[45] In the result, I make the following order:

[45.1] Non-compliance with the normal rules of court is in terms of uniform rule 6(12) is condoned and the matter is heard on an urgent basis.

[45.2] The respondent is forthwith interdicted and restrained from continuing with the public tender process under Bid/Contract number 29-2023/2024 for the completion of the Mabusela and Masoge roads and stormwater project.

[45.3] The order in 45.2 supra shall operate as an interim interdict, with immediate effect, pending the finalization of the action instituted by the applicant against the respondent on 8 August 2023.

[45.4] The respondent shall pay the costs of this application on scale B.

MS MONENE

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on: 3 May 2024 Judgment delivered on : 07June 2024 For the Applicant: Adv. A A Basson
Instructed by Thomas & Swanepoel Attorneys : Tel: - 015 307 1027 : Email: maryka@tslegal.co.za
For the Respondent: Adv. J O Williams SC : Instructed by Ntsako Popela Maake Attorneys : Tel:
015 291 3848 : Email: pcmaake@pmaakeattorneys.co.za

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