

SOUTH AFRICA / JUDGMENT

Dr Ruth Segomotsi Mompati District Municipality v Izwelethu Cemforce CC (M509/22) [2025] ZANWHC 44 (28 February 2025)

[2025] ZANWHC 44

COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

M509/22

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG

CASE NO:M509/22

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO
Circulate to Regional
Magistrates: YES/NO
In the application

between: DR
RUTH SEGOMOTSI MOMPATI
DISTRICT
MUNICIPALITY
APPLICANT
And
IZWELETHU
CEMFORCE CC
RESPONDENT
In

re:

IZWELETHU
CEMFORCE CC
APPLICANT
And
DR
RUTH SEGOMOTSI MOMPATI
DISTRICT
MUNICIPALITY
RESPONDENT

This

judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII.

The

date and time for hand-down is deemed to be 28
February 2025 at 16h00.

ORDER

1.

The application brought by the respondent against the applicant under Case Number M509/2022 (adjudication proceedings) is stayed pending the outcome of proceedings launched by the applicant against the respondent under Case Number M426/2020 (review proceedings).

2.

The respondent is ordered to pay the costs of this application on a party-and-party basis on Scale B.

JUDGMENT

REDDY J

Introduction

- [1] There are potentially two applications before this Court. First, an application to stay the proceedings, if unsuccessful, will require this Court to consider the second, an enforcement application.
- [2] The respondent is the Dr Ruth Segomotsi Mompoti District Municipality, (the Municipality), in an interlocutory application seeks a stay of these proceedings against the applicant, Izwelethu Cemforce CC, (Cemforce). This application is opposed by Cemforce. The essence of the relief sought by the Municipality is that these proceedings be stayed pending the finalization and outcome of an application brought by the Municipality against Cemforce in Case No: M426/2020 (the review application) as well as the final determination of the adjudication proceedings in Case No: 805/2021, (the adjudication proceedings). The Municipality is the respondent in convention and Cemforce the applicant. I employ this nomenclature for the purposes of brevity.

The version of the Municipality

- [3] On 22 September 2016, the Municipality awarded Cemforce bid RDM2016-016A for the Rural Sanitation Programme for 2016 -2019. On 29 September 2016, Cemforce accepted the award. Pursuant to the award and its acceptance, a written contract became extant.
- [4] The Municipality contends that the awarding of the tender, its implementation and exorbitant expansion is vitiated by material irregularities. These irregularities were laid bare and were the subject of an internal investigation. The investigation attained its zenith by a decision that on the principles of good governance and legality an application to review and set aside the entire tender and award thereof was initiated. This review proceedings have been dismissed on a point in limine, with the merits having not being considered. These findings are the subject of an appeal.
- [5] The adjudication proceedings in Case No: 805/2021; the very adjudication process that led to the award that Cemforce requests to make an order of court, is the subject of a dispute. This action has not been finalized. Cemforce has filed an exception to the particulars of claim which was to be adjudicated on 24 February 2023.
- [6] The Municipality asserts that the granting of the enforcement application would serve no purpose in law since the entire subject matter of the findings of the adjudication board is still to be determined in the action proceedings. The logical approach would be that the granting of orders for monies allegedly due and ancillary claims should stand over, pending the entire dispute relating to the adjudication board's decision, being finalized.

The version of Cemforce

- [7] Cemforce contends that in terms of an awarded tender, it performed services to the value of about R35 million for the Municipality. For these services Cemforce was not compensated. Some two (2) years earlier, prior to a review instituted by the Municipality, Cemforce submitted a dispute to an Adjudication Board under the provisions of Clause 10 of the contract. On 08 September 2020, the Adjudication Board ordered the Municipality to pay the amounts now claimed in the

Notice of Motion in the enforcement application. Notwithstanding the order of the Adjudication Board, the Municipality failed to comply.

- [8] On 03 November 2020, after receipt of the Adjudication Board's decision, the Municipality issued a Notice of Dissatisfaction in terms of Clause 10.6.1.2 of the contract with the whole decision of the Adjudication Board and subsequent award being referred to this Court for a de novo consideration of the dispute between the parties.
- [9] Following an impasse of approximately six (6) years from the award of the contract to Cemforce, the Municipality asserted that the appointment of Cemforce had been unlawful, alleging that there had been irregular procurement. On 04 August 2022, the Municipality's review application was dismissed by Snyman J (now Reid J)

- [10] On 28 September 2022, the enforcement application was issued. The Municipality did not file any opposition as prescribed in terms of the Uniform Rules of Court (the Rules). The enforcement application was then set down on an unopposed basis to be considered on 16 February 2023. On 15 February 2023, the Municipality simultaneously filed a Notice to Oppose and an application to stay. No answering affidavit was filed to the enforcement application.
- [11] The essence of the Municipality's application to stay, is a legal request that the outcome of the enforcement application be stayed pending the finalization of the review application, as well as the adjudication proceedings the Municipality has initiated. In respect to the adjudication proceedings under Case NO 805/2021, Cemforce filed an exception. The hearing of the exception was set down to be heard on 28 July 2022.

Submissions by applicant

- [12] Adv Rip SC contended that this Court is not required to adjudicate on any of the disputes raised in the adjudication or the pending litigation in Case No: 805/2020. The contention continued that it was common cause that the contract has come to an end. Following the termination of the contract, the disputed payment certificates were issued in April 2020. Simply put, the disputed payment certificates need not detain this Court.
- [13] Adv Rip SC further submitted that it is common cause that Clause 10.6.1.2 of the contract makes it legally permissible for the Municipality to differ with the Adjudication Board's decision. Where this occurs, the Municipality may refer to what formed the fulcrum of the dispute that led to the adjudication at court. To this end, the Municipality has given notice of such a dispute and
- referred the matter to court under Case No: 805/2020. The latter case is the proceedings that are of relevance to the application to stay the current matter.
- [14] The nub of the Municipality's application Adv Rip SC continued, is that the Municipality requests nothing other than an interim order stopping the finalization of the present matter pending the final determination of Case No: 805/2020.
- [15] Adv Rip SC asserts that the authorities referred to by Adv Grobler SC, are distinguishable from the matter in casu. In *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* 2013 JDR 2441 (GSJ) at para 9, the following was held:

'It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of Adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement.' See: *Zingwazi Contractors CC v Eastern Cape Department of Human Settlements and Others*

- [2021] ZAECHGHC 50; [2021] 4 All SA 299 (ECG); 2021 (6) SA 557 (ECG) (11 May 2021).

- [16] The discernible characteristic of the present matter and the authorities referred to was that in latter matters the contracts were extant and it logically made sense ‘that when one has a building contract underway and construction is being done on a daily basis, one does not wish to stop the construction for any length of time in order for an arbitration to take place. It is for this reason that the adjudication process is there as a temporary and provisional solution that the reciprocal obligations of the parties can continue, and effect be given to the contract pending the arbitration process.’
- [17] Adv Rip SC avows that in the present matter, there is no extant contract. The contract has been terminated either by the Municipality or Cemforce. Moreover, there are no reciprocal obligations in the form of continuing construction giving to an extant contract. At present, the dispute is whether Cemforce is owed the sum of money it claims following the termination of the agreement. On these facts, the argument progressed, an adjudication does not create the type of impasse that one would have been wary of, whilst construction activities were underway.

Submissions by respondent

- [18] Adv Grobler SC maintains that the application to stay is simply aimed at stymieing of Cemforce’s rights. It serves no valid purpose. The exposition of the salient facts demonstrate that the litigating conduct of the Municipality has been inexcusable at every stage. The inescapable inference is that the Municipality does not want to honor the contract. The review application was nothing but a ruse to circumvent payment of contractual obligations, notwithstanding Cemforce acquiescence with the terms of the contract.
- [19] Adv Grobler SC contended that to grant an application to stay now, would quintessentially disregard the terms of the agreement that had been concluded between the parties. Such an order would cause the diametrically opposed effect on what had been specifically agreed. An order to stay would have a countervailing effect paving the way for the Municipality to breach the agreement.
- [20] Adv Grobler SC underscored that endorsing the Municipality to breach the agreement materially impacts upon the court’s discretion and of course together with this, there is in any event no basis for this Court to stay the proceedings pending the finalization of any later properly prosecuted dispute. Whilst there may be overreach in terms of the court’s discretion, the court’s discretion is limited. Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa, page 308.
- [21] Simply put, there is no appeal. Furthermore, the Municipality is not prosecuting the adjudication award with any robustness. Cemforce is in the process of applying to the court for the striking out of the entire claim of the Municipality, as it failed to comply with an order to amend its particulars of claim.

[22] Adv Grobler SC concluded that courts are not to act on abstract ideas of justice and equity. The threshold that must be met is that of legal principle, which has been interpreted to mean that an order to stay is only granted where a clear and proper case is made. *Kent v Transvaalsche Bank* 1907 TS 765, *Belmont House (Pty) Ltd v Gore and Another* NNO 2011 (6) SA 173 (WCC). The Municipality's application to stay is motivated by sheer malevolence and should be dismissed with a punitive cost order. It follows that a proper case has been made for the relief sought in the enforcement application in the absence of opposition. Similarly, the Municipality should be mulcted with a punitive cost order.

The law

[23] In *Kent v Transvaalsche Bank* 1907 TS 765 at 774, Innes CJ postulated the following when addressing a stay in proceedings:

"[The appellant] also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the

Insolvency Law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word 'equity' in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all."

[24] In applying parallel reasoning and placing reliance on *Kent*, the Court in *Jorgensen Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1979

(3) SA 1331 (W) (*Jorgensen*) at 1340B-D held that "[t]he Courts do not however act on abstract ideas of justice and equity. They must act on principle".

[25] In *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* [2009] ZASCA 49; 2010

(2) SA 289 (SCA) (*Clipsal*) at para 17 the Supreme Court of Appeal quoted both *Kent* and *Jorgensen* with approval.

Discussion

[26] Turning now to the primary issue before this Court namely, a stay of the proceedings. The court's rules should be used sensibly to ventilate the core issues between the parties. A balanced approach needs to be struck between the ventilation of the genuine issues between the parties and an unnecessary formalistic approach to litigation. However, this Court is also not a court of equity, and rules are to be followed to, among other things, protect and uphold the integrity of the court system. *J.P.R.D v L.S.D* (20916/2018) [2023] ZAWCHC 296 (23 November 2023) at para 27.

- [27] Unquestionably, this Court possesses the power to regulate its process. This power is derived from the Constitution of the Republic of South Africa, 1996. It provides that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each, has the inherent power to protect and regulate their own process, and to develop the common law, considering the interests of justice. See: s173 of the Constitution.
- [28] It is incontrovertible that the relief contended for by the Municipality is procedural and not substantive relief. Resultantly, a decision to stay may be influenced by fairness, equity and what is in the best interests of justice. The dawn of democracy eschewed in a codified standard which is the interests of justice. To this end, this Court axiomatically is clothed with an inherent power to protect and regulate its own process in terms of the pyramid of courts.
- [29] In *Mokone v Tassos Properties CC and Another* 2017
- (5) SA 456 (CC), the following was held regarding the interests of justice:
- [67] Put simply, this says the mentioned Courts may regulate their own process taking into account the interests of justice. I will say nothing about equity but, based on this, I do not see why proceedings may not be stayed on grounds dictated by the interests of justice. Whatever the import of what was said by courts previously may be, the Constitution lays down its own test; and it has everything to do with the interests of justice.
- [68] In this context, the idea of interests of justice is quite wide. I will not attempt to delineate what it encompasses. Suffice it to say, what justice requires will depend on the circumstances of each case.
- [69] Coming to the matter before us, at first instance, it came before the Boksburg Magistrate's Court. That Court does not have the section 173 power. But, rightly or wrongly, that Court did hold the eviction proceedings in abeyance. It took the view that, until the High Court had determined the validity and enforceability of the right of pre-emption, it could not conclude that Ms Mokone was liable to be evicted. The matter went on appeal to the High Court. The High Court does have the section 173 power. It was well within that Court's power to regulate its process by holding the determination of the appeal in abeyance pending the final determination of the litigation that is pending before the High Court. This it could do if it was in the interests of justice so to do. It did not. Before us Ms Mokone persisted in her quest for a stay. May we grant her this wish?
- [70] In the litigation pending before the High Court, Ms Mokone has pleaded that the purchaser, Blue Canyon, knew of the existence of the right of pre-emption before it took transfer of the leased premises. If that is indeed so, the purchaser's ownership obtained upon transfer to it may well be assailable. It seems unjust to require Ms Mokone to be uprooted and her business brought to a halt or destroyed in circumstances where the purchaser might not have been an innocent player when it purchased or took transfer of the leased premises. The interests of justice dictate that the eviction proceedings be held in abeyance pending

finalisation of the action in which Ms Mokone is seeking to enforce the right of pre-emption.” (footnotes omitted)

[30] In the premises, I find that it is in the interests of justice to stay the proceedings pending the determination of the proceedings under Case No 805/ 2022. This finding is underscored by the fact that the relief contended for is essentially procedural and not substantive relief.

Costs and order

[31] There is no basis for the respondent not to be ordered to pay the costs.

[32] Consequently, I made the following order:

1. The application brought by the respondent against the applicant under Case Number M509/2022 (adjudication proceedings) is stayed, pending the outcome of proceedings launched by the applicant against the respondent under Case Number M426/2020 (review proceedings).
2. The respondent is ordered to pay the costs of this application on a party-and-party basis on Scale B.

A REDDY

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA,

NORTH WEST DIVISION MAHIKENG

APPEARANCES

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Date of hearing:

19 August 2024

Date of judgment:

28 February 2025.

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