

SOUTH AFRICA / JUDGMENT

Golekane Projects (Pty) Ltd and Others v MEC for the Transport, Road and Community Safety and Another (1807/2011) [2012] ZANWHC 20 (17 May 2012)

[2012] ZANWHC 20

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

1807/2011

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IN THE NORTH WEST

HIGH COURT

MAFIKENG

CASE NO.:

1807/2011

In the matter

between:

GOLEKANE PROJECTS
(PTY) LTD1ST
APPLICANT
MMATHATO PROJECTS
CC2ND
APPLICANT
MOMANTU
DEVELOPMENT PROJECT CC3RD
APPLICANT
IKANENG RONA
TRADING ENTERPRISE CC4TH
APPLICANT
SESUPO TRADING
ENTERPRISE CC5TH
APPLICANT
KWAPELE
CONSTRUCTION CC6TH
APPLICANT
ADD UP TRADING
ENTERPRISE CC7TH

APPLICANT
OLIHILE
DISTRIBUTORS CC8TH
APPLICANT
LEBOKEDI
CONSTRUCTION & PROJECTS CC9TH
APPLICANT
MOIPOLEDI
BUSINESS ENTERPRISE CC10TH
APPLICANT
SEBL TRADING 24
CC11TH
APPLICANT
MASHMAC
CONSTRUCTION CC12TH
APPLICANT
REBAONE
ELECTRICAL AND
CONSTRUCTION CC
.....13TH
APPLICANT
MACHABO PROJECTS
CC
.....14TH
APPLICANT
FACTOTUM
MARKETING AND
PROMOTIONS CC
.....15TH
APPLICANT
MOREKGOMO
BUSINESS ENTERPRISE CC16TH
APPLICANT
BONTOBE
COMMUNICATION CC17TH
APPLICANT
and
MEC FOR THE
DEPARMENT OF TRANSPORT
ROAD AND
COMMUNITY SAFETY
.....1ST RESPONDENT
L F MASENYA CHIEF
DIRECTORATE2ND
RESPONDENT

DATE OF HEARING : 10 MAY 2012
DATE OF JUDGMENT
: 17 MAY 2012
FOR THE
APPLICANTS : ADV S J MSIZA
FOR THE
RESPONDENTS : ADV W R MOKHARE SC

JUDGMENT

LANDMAN J:

[1] The applicants have individually instituted actions against the MEC for the Department of Transport, Roads and Community Safety of the North West Province and the Chief Directorate of the Department.

[2] The applicants failed to serve a notice contemplated in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act”) on the first respondent. The application which serves before me is an application for condonation in terms of section 3(4) of the Act. Section 3(4) of the Act reads:

“4

(a) If an organ of state relies on a creditor’s failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that –

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.”

[3] It is common cause that the individual applicants and the first respondent entered into various extended Public Works Programmes (EPWP) contracts for the period commencing 26 September 2006 to 30 September 2009, and that the respondents failed to provide some of the applicants with the work to be executed in terms of their respective contracts.

[4] It is also common cause that some of the applicants, who had commenced work, were ordered by the first respondent to cease executing their contract until they were notified to recommence their work.

- [5] The only point raised by Mr W R Mokhare SC, who appeared for the respondents, was that the applicants are non-suited because their claims against the respondents have prescribed in terms of section 11 of the Prescription Act No. 68 of 1969 (“the Prescription Act”);).
- [6] Mr Mokhare submitted in his heads that the applicants’ cause of action arose in 2006. The summons was issued on 28 November
2011. The cause of action prescribed in 2009.
- [7] In the course of addressing me Mr Mokhare submitted that the cause of action of the applicants’ (at least some of them) arose when the first respondent, so he contended, made it clear that it would not honour the contract in October 2006.
- [8] It is trite law that a breach of contract by one party does not put an end to the contract. See *Bekazaku Properties (Pty) Ltd v Pam Golding Properties* 1996 (2) SA 537 (C).
- [9] The other party is entitled to keep the contract in place and, on the termination of the contract by effluxion of time, sue for specific performance.
- [10] The result is that prescription commenced running in September 2009. The three year prescription period (see section 11(d) of the Prescription Act) would expire in September 2012.
- [11] The applicants have shown that their contracts have not prescribed.
- [12] I turn to consider whether the applicants have shown that good cause exists for their failure to serve the required notice and that the first respondent is not unreasonably prejudiced by their failure.

Good cause

- [13] The applicants were obliged to have served their notices on the first respondent by December 2009. The applicants set out the facts and circumstances relating to their failure to do so in the founding affidavit. I do not intend setting out the details. The explanations can be described as weak but the merits of their cases are particularly strong. The applicants were hampered by a lack of resources. The first respondent must have been aware of their financial position as the contract was part of the Expanded Public Works Maintenance Programme.

Prejudice to the respondents

- [14] The applicants allege that the respondents will not suffer any prejudice. The respondents do not deal with this allegation in their answering affidavit. The respondents, however, state that they wish to rely on their answering affidavit to a previous application for condonation which was withdrawn.

The previous answering affidavit only deals with prejudice in the context of the allegation that the contracts have prescribed.

[15] Mr Mokhare submitted that the applicants have not shown good cause. They also have not demonstrated that the first respondent is not prejudiced. A delay of more than two years would, he submitted certainly prejudice the first respondent.

[16] I am not satisfied that the respondent have been unreasonably prejudiced by their failure to serve the notices timeously. The application is one for an indulgence but the opposition is not at all warranted. The respondents should pay the costs of opposition.

[17] In the premises I make the following order:

1. The applicants' failure to timeously serve the notice contemplated by section 3(4) of the Institute of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is condoned.
2. The respondent is to pay the costs of opposition.

A A LANDMAN

JUDGE OF THE HIGH COURT

ATTORNEYS:

For the Applicants : Gura Tlaletsi instructed by Modzuka & Magolego Inc

For the Respondents : State Attorney

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Prepared on 13 October 2026 · Esheria