

SOUTH AFRICA / JUDGMENT

Hunadi -a- Mahlakudi Construction & Enterprise v Mulalo Business Enterprise CC and Others (6400/2020) [2020] ZALMPPHC 90 (20 October 2020) [2020] ZALMPPHC 90

COURT

Limpopo High Court, Polokwane

BEFORE

Naude

CASE / FILE NUMBER

6400/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

(1)

REPORTABLE:

NO/YES

(2)

OF

INTEREST TO OTHER JUDGES: NO/YES

(3)

REVISED.

CASE

NO: 6400/2020

In

the matter between:

HUNADI-A-MAHLAKUDI
CONSTRUCTION &
ENTERPRISE
APPLICANT
and
MULALO
BUSINESS ENTERPRISE CC
1st
RESPONDENT
SEKHUKHUNE
DISTRICT MUNICIPALITY
2nd
RESPONDENT
WARD
29 BUSINESS FORUM
3rd RESPONDENT

JUDGMENT

NAUDE AJ:

[1] The Applicant brought an urgent application on 20 October 2020 wherein the Applicant applied for a final interdict to be issued. The Applicant contends that the First Respondent issued an invitation for tenders for the De Hoop/Malekana Water Scheme Contract under tender number SKB/1-35/2018/1 and local Ngwaabe small and medium enterprises (SMME'S) were invited to carry out work on the project implementation, which included the supply of mobile toilets, the supply of Diesel, the supply of water and the provision of plant for Hire (which includes TLB's, Escavators, tipper trucks and other necessary equipment). The Applicant submitted a tender to the first Respondent by hand on the 19th of June 2020. According to the Applicant, the First Respondent accepted the proposal of the Applicant in writing, agreeing that the Applicant would perform the works indicated on Bill 5, 6 and 9 of the project for the De Hoop/Malekane water scheme, under tender specification SK8/3/1 - 35/2018/19 for the total price of R10 205 637.00.

[2] On 18 August 2020, Nkopodi Lazy Makabate ("Makabate") attended to the office of the First Respondent along with the other

appointed sub-contractors on the appointment to finalise the sub-contracting rates negotiations and review the scope of the work.

The Applicant contends that a partly written and partly oral agreement was established between the Applicant, represented by Makabate, and the First Respondent, represented by Peter White on the 14th of July 2020. According to the Applicant, the rates and quantities for which the work would be done was agreed upon by all parties on the 18th of August 2020. The Applicant has proceeded to source the necessary employees and equipment to perform in terms of the Applicant's

obligations and rented a TLB, a tipper truck, hired employees, and subcontracted some of the construction work between the parties. All this has been done between the 20th and the 26th of August 2020. On 29 August 2020 a group of people blocked the Applicant's employees from unloading material at the site. While blocking the unloading of material, the unknown people indicated that they were still waiting for their issue with Mr. White to be corrected.

[3] On 3 September 2020 a meeting was called by Mr. White with Makabate and individuals of Ward 29. There were approximately 40 people present. After this meeting, approximately three weeks passed during which period the Applicant did not get permission to commence occupation of the site and proceed with the work. On 24 September 2020 an e-mail was forwarded to the Applicant wherein the following was stated:-

"The provisional appointment letter that Mulalo Business Enterprises has granted you as a sub-contractor, is greatly disregarded by the community and the business forum under Ward 29. Therefore, it is with regret to inform you about the withdrawal of your provisional appointment as a sub-contractor due to the power that the community and the business forum holds under Ward 29. The decision of the withdrawal as stated above, stems from the power the community and the business forum holds."

[4] It is this letter that sparked the bringing of the urgent application by the Applicant against the Respondents on 20 October 2020 on which date a final order was issued in the following terms:-

- (a) The matter is declared urgent as envisioned in Rule 6(12) of the rules of Court and that the ordinary process of service and filing is dispensed with, and is ordered to occur as set out in the notice of motion.
- (b) The First Respondent is ordered to immediately honour its contractual commitments to the applicant and maintain the applicants appointment to perform the items on bills 5, 6 and 9 on the project issued by the second respondent under the tender specification SK8/3/1 - 35/2018/19, for the De Hoop/Malekane Water Scheme.
- (c) The third respondent is ordered to immediately cease harassing, intimidating, exercising improper influence or enticing the first respondent to end its contract with the applicant.
- (d) The third respondent is ordered not to come within 5 kilometres of the construction site where tender SK8/3/1 - 35/2018/19 is being performed, or to instruct individuals to come within 5 kilometers of the business site.
- (e) The first and third respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.
- (f) The first respondent may apply for reasons within 10 days.

- [5] The Respondents immediately gave notice of their intention to apply for leave to appeal after the hearing of the matter on 20 October 2020 and a notice of application for leave to appeal was filed on the 21st of October 2020. The grounds for the application for leave to appeal are as set out in the notice for leave to appeal. The application for leave to appeal is still pending.
- [6] On 23 October 2020 the Applicant brought an urgent application in terms of Section 18 of the Superior Courts Act, 10 of 2013, in terms whereof the Applicant seeks an order handed down on 20 October 2020 be carried into effect pending the finalization of all appeal proceedings as envisaged in Section 18(3) of the Superior Courts Act, 10 of 2013, due to the fact that according to the Applicant, the Applicant will suffer irreparable harm if the order is not put into operation, where the First Respondent conversely will not suffer irreparable harm if the order is put into operation, and that the First Respondent be ordered to immediately comply, as far as they are able, with the order of the above Court made on the 20th of October 2020. It is this urgent application in terms of Section 18(3) of the Superior Courts Act, which is to be adjudicated upon by this court.
- [7] Before proceeding with the judgment, I deem it necessary to mention that while the Applicant believes that the matter is urgent, the Respondents did not necessarily concede that it was and challenged the urgency thereof. In this court's view, the matter was indeed urgent and sufficient grounds for urgency was made out by the Applicant. then proceed with the judgment.
- [8] At the core of this matter is the determination of whether the order of 20 October 2020 is final or interlocutory. It was not disputed between the parties that the order is indeed a final order. I agree. A characterisation of the order as final will automatically suspend their operation and execution as contemplated in Section 18(1) of the Act. The success of that application lies in the Applicant convincing this Court that the requirements as laid down in Section 18(2) and (3) of the Act have been met.
- [9] The primary legal principles other than case authority governing the suspension of court orders is Section 18 of the Act. The Section provides:
- "(1) Subject to sub-sections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to sub-section (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

- (3) A court may only order otherwise as contemplated in sub-section (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in sub-section (1) -
- (i) the court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
 - (iv) such order will be automatically suspended, pending the outcome of such appeal;
 - (v) for the purposes of sub-sections
- (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or notice of appeal is lodged with the registrar in terms of the rules."
- [10] An applicant pursuing an application in terms of Section 18(1) or (2) must satisfy three jurisdictional factors. These are that:
- (a) The existence of exceptional circumstances;
 - (b) The applicant will suffer irreparable harm if the suspension in either subsection is not granted; and
 - (c) The respondent will not suffer irreparable harm if relief in either subsection is granted to the applicant.

The factors in (b) and (c) here above must be established on a balance of probabilities. The absence of anyone of the three requirements will be adequate to dismiss the application. The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another, 1961 (2) SA 118).

[11] In *Incubeta Holdings and Another v Ellis and Another* (2013/ 30879) [2013] ZAGPJHC 274; 2014 (3) SA 189 (GSJ) (16 October 2013) at paragraph 11 thereof it was held as follows:-

"This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf . *Fismer v Thornton*, 1929 AD 17 at

- p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

1. The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
3. the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
4. Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

(See in this connection Ruby's case, *supra* at pp. 127-8; also *Rood v Wallach*, 1904 T.S. 257 at p. 259; *Weber v Spira*, 1912 G.T.P.O. 331 at pp. 334-4; *Rand Daily Mails Ltd. v Johnston*, 1928 W.L.D. 85; *Frankel v Pirie*, 1936 E.D.L. 106 at pp. 114-6; *Leask v French and Others*, 1949

(4) SA 887 (CJ at pp. 892-4; *Ismail v Keshavjee*, 1957

(1) SA 684 (T) at pp. 688-9; *Du H Plessis v Van der Merwe*, 1960

(2) SA 319 (O).) Although most of the cases just cited dealt with the exercise of the Court's discretion under a statutory provision or Rule of Court, the statute or Rule concerned did not prescribe the nature of the discretion except in broad general terms (e.g. secs. 36 and 39 of Proc. 14 of 1902 (T) empower the Court to give directions as "may in each case appear to be most consistent with real and substantial justice") and the same general approach would be appropriate to the exercise of a discretion under the aforementioned rule of practice."

[12] To be successful, the Applicant needs to demonstrate the existence of all three the requirements that must be established in respect of Section 18 (1) and (3). These are the existence of exceptional circumstances, that the Applicant will suffer irreparable harm and that the First Respondent will not. To establish whether or not exceptional circumstances are present, each case must be assessed on its own peculiar facts.

[13] In their endeavour to show exceptional circumstances, the Applicant relies heavily on the fact that the Applicant wish to claim for specific performance of the agreement, as the Applicant wish to perform the work as indicated on the waybills and the tender form. The Applicant contends that if the order of 20 October 2020 is suspended pending the outcome of the appeal, the rule of law will be undermined, as the Third Respondent would have gotten away with their oppressive and illegal conduct, and extortion would

be countenanced. The Applicant further contend that if an order as prayed for in the present matter in terms of Section 18 of the Act is not granted, the entire legal process that the Applicant lodged will be rendered moot, as the two or three months delay it may take to finalize the matter will be enough to ensure that the Applicant's application is rendered moot, since most items on the waybill will be completed in the project by then.

[14] What constitutes exceptional circumstances depends on the facts of each case. (See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H remarked that:

'1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different "

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

To summarise, the context is essential in the process of considering what constitutes exceptional circumstances.

[15] As regards exceptional circumstances in the *Incubeta* case, Sutherland J stated at paragraph 25 to 27 stated:

"[25] Turning to the circumstances of these litigants, what is relevant , in my view, is the following:

25.1 If the order is not put into operation, the relief will, regardless of the outcome of the application for leave to appeal, be forfeited by *Incubeta* because the short duration of the restraint will expire before exhaustion of the appeal processes.

25.2 The only value in the relief is to stop the breach and protect legitimate interests during the precise period of the next 4.5 months. Unrebutted evidence in the affidavits alleges a breach is taking place at this very time.

25.3 Damages are not an appropriate alternative remedy precisely because the very relief obtained is posited on the absence of such a remedy being available. This places a restraint interdict in a different position to other forms of relief, such as money claims, where the aspect of irreparable harm is a factor extraneous to the substantive relief procured.

25.4 Ellis will, on the probabilities, be without work for 4.5 months and without pay. This will be financially detrimental.

25.5 Significantly, no allegation is made that Ellis or his family will endure true hardship during this short period.

25.6 If the appeal is won, Ellis's loss of earnings can be sued for and the quantum is feasible to compute, including the loss of interest or lost opportunity cost of being out of funds and any such interest expended on borrowing for living expenses, if necessary.

25.7 Moreover, Security under Rule 48

(12) is available.

[26] I have made no reference to the 'merits' of the case which resulted in the interdict. In my view they are not pertinent to this kind of enquiry. The considerations that are valuable presuppose a bona fide application for leave to appeal or an actual appeal. No second guessing about the judgment per se comes into reckoning.

[27] Do these circumstances give rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'

[16] In the present matter the Applicant, although insisting on claiming for specific performance of the agreement, and might not be able to do so, will still be able to claim for substantive relief at a later stage in that the Applicant can claim for damages. Counsel for the Applicant argued that it is the Applicant's right to claim for specific performance and if this order is not granted his right to claim for specific performance will be ousted. In reply Counsel for the Respondent argued that to claim specific performance is not an absolute right, it is an election that a party can make to claim for specific performance, alternatively damages. In my view, the fact that the Applicant specifically elects to claim for specific performance which he will probably not be able to do at a later stage if this order is granted, does not leave the Applicant without any remedy or alternative relief and consequently does this not constitute in my view an exceptional circumstance as required by Section 18 of the Act.

[17] Although it is appropriate to dismiss the application on the basis that one of the three jurisdictional facts have not been fulfilled, I still deem it important to explore whether or not the Applicant has satisfied the other two requirements. Against that background, I proceed to assess the other two, beginning with the existence of irreparable harm to the Applicant. It is apparent that one of the most objectionable matters to the Applicant is the fact that the Applicant will not be able to claim specific performance of the agreement and that the entire legal process that was lodged will be moot as the Respondents would have completed most of the items in the project on the waybill. The First Respondent contends that the tender project with the municipality is for the supply of clean running water to the community, the Respondents have already completed approximately two thirds of the project and if the order is granted as prayed for by the Applicant the Respondents will suffer irreparable harm in that if the order is implemented and the appeal later succeeds before the project is complete, the same exercise will have to be conducted to de-establish and re-establish site and the parties will again, have to perform some sort of reconciliation of the work performed, which will cause a further delay. On the same basis if the work on site is however completed by the Applicant before the appeal is heard, the appeal will become moot for the First Respondent as the Applicant would have conducted the work and would require payment therefor, whilst the

First Respondent will be left with another sub-contractor who should have performed the work and will have effectively have a double claim against the First Respondent.

[18] The First Respondent further argued that if the project is completed by the time the appeal is heard and the Applicant is successful in opposing the appeal, the Applicant will still be left with its claim for damages against the First Respondent and will accordingly not suffer any irreparable harm. However, the First Respondent will be left with irreparable harm in the form of a claim against it by the other sub- contractor who should have performed the work, as well as it will either be left in breach of its contract with the Second Respondent as it would have failed to complete the project timeously and without delay, or at the very least it's reputation with the Second Respondent would have suffered.

[19] The test is the absence of irreparable harm to the Respondent. In this instance it is clear that both the Applicant and Respondent will suffer harm if the order is granted, in the alternative if the order is refused. As already stated here above, where there is the potentiality of irreparable harm or prejudice to both Applicant and Respondent, the balance of hardship or convenience, as the case may be, should be considered. In considering the balance of hardship the Applicant will suffer if the order is refused weighed against the hardship the Respondents will suffer if the order is granted, I am in agreement with the First Respondent's argument that the irreparable harm to be suffered by the First Respondent is evident, whilst the harm which could be suffered by the Applicant is reparable by way of a potential damages claim if the appeal is not successful.

[20] The second leg of the test to the provisions of Section 18 clearly states proof on a balance of probabilities by the Applicant of-

- the presence of irreparable harm to the Applicant/victim, who wants to put into operation and execute the order; and
- the absence of irreparable harm to the Respondent/loser, who seeks leave to appeal. The Applicant must prove both in the confirmatory and not in the alternative as it is clearly stated "and" and not "or". Although it is clear to this court and cannot be denied that the Applicant will suffer some harm, it is not irreparable harm and will the Applicant be able to claim damages which possibly could repair to a great extent the harm the Applicant might have suffered, however the First Respondent will indeed suffer irreparable harm. In weighing up the harm the Applicant will suffer if the order is not granted, to the harm the First Respondent will suffer if the order is granted, the balance favours the First Respondent and as a result the Applicant has failed to prove on a balance of probabilities the second leg of the test. In the result, the application stands to be dismissed on this requirement as well.

[21] There is no reason why the costs should not follow the event and in this matter be paid by the Applicant. Both parties continue to make it fashionable to seek punitive costs in the event of the other failing. I still hold the view that, like in the other matters heard by this Court, no basis by either party exists for the granting of costs on a punitive scale. Accordingly, costs shall be assessed as on the scale between party and party.

[22] I therefore make the following order:-

1. The Applicant's non-compliance with the rules of this Honourable Court relating to notice and service and time limits is condoned and that the matter is heard as urgent in terms of Rule 6(12)(a);

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3. The Applicant is ordered to pay the costs of the application on a party and party scale.

M. NAUDE

ACTING JUDGE OF

THE HIGH COURT

APPEARANCES:

HEARD ON:

28 OCTOBER 2020

JUDGMENT

DELIVERED ON: 30 OCTOBER 2020

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