

SOUTH AFRICA / JUDGMENT

Naphtronics (PTY) LTD v Ngaka Modiri Molema District Municipality (M379/15) [2018] ZANWHC 51 (25 October 2018) [2018] ZANWHC 51

COURT

North West High Court, Mafikeng

BEFORE

A.M. Kgoele

CASE / FILE NUMBER

M379/15

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE NUMBER: M379/15

In

the matter between:-

NAPHTRONICS

(PTY) LTD

APPLICANT

And

NGAKA

MODIRI MOLEMA DISTRICT MUNICIPALITY

RESPONDENT

APPLICATION

FOR LEAVE TO APPEAL

KGOELE

J

DATE

OF HEARING

: 14

SEPTEMBER 2018

DATE

OF JUDGMENT :

25 OCTOBER 2018

FOR

THE APPLICANT : Adv. P Mokoena (SC)
 With
 Him Adv. E Mokutu
 FOR

THE RESPONDENT : Adv. J L Van der Merwe (SC)
 With
 Him Adv. L K Van der Merwe

JUDGMENT

KGOELE J.

INTRODUCTION

- [1] This is an application for leave to appeal the judgment including the costs Order of this Court granted on the 25 May 2018. The grounds upon which the application for leave to appeal was based were drafted in a long and convoluted manner and I am of the view that it is best to quote them verbatim. They were couched as follows:-

“1. The learned judge erred in finding that the third respondent circumvented the entire procurement process without any sound and/or valid reason therefor (see par 39 of the judgment). The honourable court should have found that in the light of her finding that there was an emergency situation as a result of violent protest and where “...the dire situation necessitated emergency measures to be applied by the Administrator ...” that it was fully justified for the Administrator to engage with the first respondent to render services and eventually to appoint the first respondent after this step was approved of by the Emergency Bid Adjudication Committee. The court should have found that such conduct was justified in terms of regulation 36 read with the applicant’s supply change management policy under the circumstances prevailing.

2. The Honourable Court erred in finding that the Administrator under the circumstances prevailing had to consult with the Manager: Supply Change Management (or any other municipal official) before appointing the first respondent to render emergency security services. The Honourable Court should have held that the first respondent had adequately explained that: (a) there was hostility from the side of municipal officials, (b) he could not rely on them, (c) that he, in terms of his appointment from the Northwest Provincial Government was entitled, in his discretion, to make use of officials of the applicant or to bypass them, and (d) he did what was reasonable under the circumstances. The court should have held that the Administrator held consultations with the team of experts appointed by the Northwest Government to assist him and advise him, and he placed the final decision to appoint the first respondent before an Emergency Bid Adjudication Committee, consisting of inter alia members of the team of advisers as well as an official of the applicant who was

regarded to be trustworthy and who was clearly suitable to serve on such committee and that these steps were adequate under the circumstances of this matter.

1. The Honourable Court erred in finding that the Emergency Bid Adjudication Committee fell outside of the structures of the applicant. The Honourable Court should have held that the Administrator was duly authorised to appoint a fresh Bid Adjudication Committee in terms of the powers and mandate of his appointment and had adequately explained why that was done. The honourable court should have found that in any event under the circumstances there was no requirement to have a Bid Adjudication Committee deciding on the appointment under the circumstances prevailing, but that this step that the Administrator took was sensible and made the process followed by him transparent.
2. The court should have held that the Emergency Bid Adjudication Committee, consisted of members of impeccable integrity s there was no contrary evidence.
3. The Honourable Court erred in finding that the Administrator acted alone and then subsequently placed the matter before the Emergency Bid Adjudication Committee as an effort to ratify what was already done illegally (see par 42) as there was no reason to reject the evidence of the Administrator on the papers.
4. The Honourable Court erred to doubt and apparently to reject the evidence of the Administrator in various respects. See paragraph
41. The court in this regard erred in finding that there is doubt whether the team of experts were already appointed at the time when the Administrator claims that he consulted them. The court should have had regard to the fact that the team of experts were already appointed at the same time as the appointment of the Administrator and should have accepted the uncontroverted evidence of the third respondent, which is supported by the fact that one of the members co-signed the service level agreement on 29 October 2014 and that the minutes of the meeting of the Bid Adjudication Committee was presented to the court by the applicant itself as part of the founding affidavit and stated that this committee approved the appointment of the first respondent.
5. The court should further have taken into account that the Administrator is no longer in control of the documentation of the applicant and therefore it could not have been expected of the Administrator or the first respondent to provide corroborative evidence or documentation for the allegations by the Administrator of which he had personal knowledge.
6. The Honourable Court erred in holding that the Administrator should rather have extended the contract of Tshireletso to also render the emergency services required instead of appointing the first respondent. The court erred in holding that the Administrator did not explain why this was not done. The court should have taken regard of the explanation by the Administrator that Tshireletso did not co-operate with him and did not succeed to maintain law and order and that the appointment of the Tshireletso itself was under suspicion and

further that under the emergency circumstances the Administrator could take no chances and had to rather appoint the first respondent which could render the extensive services required.

7. The Honourable Court erred in finding that the administrator should have mentioned the reasons for the emergency appointment in either the service level agreement or the letter of appointment dated 4 November 2014. The court should have held that it was sufficient that the motivation and reasons for the proposed appointment of the first respondent was set out in the documentations presented to the applicant to the Emergency Bid Adjudication Committee and the court should have found that therefore the requirement of providing written reasons for deviating from the ordinary procurement processes as a result of the emergency were complied with. The court should have taken cognisance of the applicant's failure to present the court with correct and truthful evidence and its failure to produce the complete set of documents that served before its Emergency Bid Adjudication Committee.
8. The Honourable Court erred in holding that the three year term of the contract rendered the contract to be invalid because it exceeded the probable time of an emergency. The court also erred in that regard in finding that there was no explanation for the duration of the contract. The court should have found that it was explained that the contract in fact was terminable at the choice of the applicant on a bi-annual basis, which was reasonable under the circumstances where the first respondent had to employ a huge number of professional security guards, which could only be sourced should they be offered permanent employment. The court should have noted that the applicant failed to reconsider the contract after six months, but instead at that stage tacitly confirmed the contract for a further half year period by repeatedly requesting the first respondent to continue to render the services. In the result there was nothing untoward in the term of the contract and no prejudice for the applicant resulted therefrom or needed to result therefrom.
9. The Honourable court thus erred in setting aside the contract.
10. Alternatively the Honourable Court erred in, having found that the appointment of the first respondent should be set aside, by not making an order that is fair and just in the wake of the setting aside of the contract and under circumstances as set out by the court in paragraphs 55 to 57, 59, and 61.
11. The Honourable Court erred in suggesting in paragraph 67 that the pending arbitration could deal with the issue of profit or benefit resulting from, the services rendered. The court should have found that because the contract is set aside, therefore it is for the court itself to ensure that an equitable order is made in terms of the authorities cited in the judgment in paragraphs 58, 62 and 63.

12. The court should have held that in the absence of the applicant Municipality placing evidence before the court to the contrary that the amounts claimed by the applicant were the reasonable amounts for the services rendered and should have awarded that to the first respondent. At best for the applicant the court has made its order subject to such qualifications as the court might have regarded to be reasonable.
13. The court should also have found that the basis for the arbitration would fall away if the contract is set aside and for that reason also the court should have dealt with the remedy in favour of the applicant itself.
14. The Honourable Court erred in granting costs against the first respondent. The court should have held that the conduct of the officials of the applicant, both during the time that services were rendered as well as the way in which this application was conducted, justified a costs order in favour of the first respondent even if the contract had to be set aside: the first respondent evidently was treated unfairly by the applicant and the first respondent was clearly entitled to relief of some kind.
15. In the result, the Honourable Court erred in not dismissing the application with costs, alternatively in not granting suitable equitable relief to the first respondent, with such costs, which order of costs, in that event should have ensured that the first respondent would not be out of pocket as result of the litigation in the light of the suffering caused by the applicant.”

MERITS

- [2] It is important at the outset to regurgitate the test as enunciated in the Superior Courts Act 10 of 2013 as far as applications for leave to appeal are concerned which serves as a yardstick in the determination of this matter. Section 17 thereof provides:-

“17. Leave to appeal

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:-
 - (a)
 - (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”
- [3] The applicant in his heads of argument made the following submissions regarding this test:-

“The test for the granting of leave to appeal is well known and need not be repeated. We will submit that there is a reasonable prospect that a court of appeal may hold that the contract in question should not have been set aside. Furthermore, there is also a reasonable prospect that it may be held on appeal that if the contract had to be set aside, an order should have been made to ensure that a just and equitable situation results. We submit also that the cost order is grossly unfair and that a court on appeal may well set it aside.” [My emphasis added]

- [4] This test has been interpreted by Bertelsmann J in the light of the Superior Courts Act 10 of 2013, to include a measure of certainty as follows in the case of *The Mont Chevaux Trust (IT2012/28) v Tina Goosen and 18 Others LCC 14R/2014:-*

“The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different

conclusion, see *Van Heerden v Cronwright & Others 1985 (2) SA 342 (T)* at 343H.

The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against”. [Emphasis added]

- [5] It is settled law at the present moment that the standard and/or threshold applicable to applications for leave to appeal is higher than before, and or more stringent. Therefore, the correct approach in application of this nature is as correctly reflected in the heads of arguments compiled by the respondent.
- [6] I have thoroughly interrogated the grounds of appeal as set out by the applicant in its notice of motion, including the reasons and/or arguments submitted by its Counsel Advocate Van der Merwe SC, and have realised that in exception of an authority the applicant now resort to of *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others (CCT333/17; CCT13/18 [2018] ZACC23; 2018 (10) BCLR 1179 (CC)*. I had in the judgment handed by this Court, dealt with all the issues raised in this application. I am of the view that there is no need to re-harsh the issues therein by repeating my finding and the reasoning in the said judgment except to say that, I abide by the said finding and the reasons therein. I however wish to add the following.
- [7] The authority that has heavily swayed the applicant to appeal this matter especially in as far as the issue of “just and equitable remedy” is concerned, has been taken into consideration in the

determination

of this application for leave to appeal. In my view, the reasoning and the principle dealt with in that matter, as heavily relied upon by Counsel representing the applicant, does not take this issue further. My reason is that, as correctly conceded to by Advocate Van der Merwe SC during the submissions in Court, it can hardly be said that this Court did not exercise its discretion at all in coming to a decision that I arrived at on this issue. The applicable test where a measure of

discretion has been applied has been set out succinctly in the matter of Numsa v Fibre Flair CC t/ a Kango Canopies (2000) 21 ILJ 1079 (LAC) at 1081 G-1082A as follows:-

“When a Court of first instance gives a decision on a matter entrusted to its discretion, a Court of appeal can interfere only if the decision is vitiated by misdirection or irregularity or is one to which no Court could reasonably have come – in other words if a judicial discretion was not exercised.”

- [8] The submission that the Court erred in relying on the arbitration in the absence of this Court making a specific Order which would validate the arbitration, and which would give the Arbitrator the power to adjudicate the matter, has no merit as well. It was common cause between the parties that the arbitration was suspended pending the decision on the validity of the contract by this Court. Unfortunately, the ground of Appeal as amplified by the applicant,

implies that I should have found that the basis for the arbitration process would have fallen away if the contract is set aside and for that reasons, I should have decided the remedy or this issue of just and equitable remedy in favour of the applicant.

- [9] These submissions flies against my findings in paragraphs 67 and 68 of the judgment this Court handed down wherein I stated that the interest of an innocent third party as advanced by Naphtronics’s Counsel regarding the profit or benefit accrued are largely in the domain of the arbitration process which Naphtronics had already embarked upon.
- [10] The applicant’s Counsel insists that this Court should have couched its Order the same way in which the Court in the matter of State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (CCT254/16)

- [2017] ZACC 40; 2018 (2) SA 23 (CC), was couched as follows:-

“... In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled. Whether any such rights did accrue remains a contested issue in the arbitration, the merits of which were never determined because of the Arbitrator’s holding or jurisdiction”. [My emphasis added]

- [11] I do not see any difference in the outcome and/or practical effect of the Order in the Gijima above and the one in my judgment except to say that wording of the Order is obviously different. The finding that I made in paragraphs 67 and 68 of my judgment in my view still validate the arbitration and gives the Arbitrator the power to adjudicate the issue which was before it but for the validity of the contract concluded between the parties which is what applicant contends for in their grounds of Appeal. I fully agree with the submissions by the respondent’s Counsel that this new authority that was not referred to during the adjudication of the main application does not take the issue any further.

- [12] In addition, in terms of Section 3 of the Arbitration Act 42 of 1965, the arbitration agreement shall not be capable of being terminated except by consent of all the parties concerned. Furthermore, the section provides that the Court may at any time of the application of any party to an arbitration on agreement and on good cause shown:-
- (a) set aside the arbitration agreement; or
 - (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
 - (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred to arbitration
- [13] As correctly submitted by the respondent's Counsel Advocate Mokoena SC, there was and there is no application before this Court as contemplated in section 3 of the Arbitration Act. In my view, and as I have already found, the intended arbitration proceedings are equipped to deal with issues of damages since application proceedings are non-suited to determine issues of profit and losses between litigants and there are no reasonable prospect that this issue would succeed in an Appeal.
- [14] Lastly, applicant's Counsel's contention that applicant did not know that the appointment was unlawful or irregular is highly improbable in the circumstances of this matter. With the risk of repetition, I wish to re-iterate that nowhere in the applicant's affidavits or written submissions has it been averred that applicant's appointment was preceded by a mandatory tender advertisement or a quotation or a bid submission following the request for quotations ("RFQ") or Request for Proposals ("RFP"). The applicant also overlooked the flawed timelines depicting the events surrounding how its appointment was done which had been dealt with thoroughly in my judgment. It is clear that all of these were taken into account in the discretion that I exercised and in further, deferring the issue to the forum that is best placed to deal with this issue.

COSTS

- [15] The issue of costs is another issue which involves a measure of discretionary powers. The submissions of the applicant's in this regard were as follows:-

"The Honourable Court erred in granting costs against the first respondent. The Court should have held that the conduct of the officials of the applicant, both during the time that services were rendered as well as the way in which the application was conducted, justified a cost order in favour of the first respondent even if the contract had to set aside: the first respondent evidently was treated unfairly throughout. It cannot be made responsible for the conduct of the Municipality or its Administrator, and for the costs of setting aside their own actions."

[16] It is common cause that the conduct of the third respondent (Mr Nair who was the administrator then) has been a subject of applications in this Court. These Courts albeit differently constituted, dealt with the exact times when the other contracts including the contract which is the subject matter in casu, were concluded as I had already indicated in my judgment. Although the facts of the said applications were not exactly similar,

they are not far apart from each other. Of importance as I had already alluded above they dealt with the same principles and or law, which are the integral part of the issues in casu. This might be the reason why Nair chose not to oppose this application but to just depose to an explanatory affidavit. In my view, this is one classic case where the outcome was clearly foreseeable or ought to have been foreseen by the applicant in view of the fact that there is already a Full Bench Court decision on the conduct of Nair regarding the conclusion of similar contracts during this emergency situation. As has been stressed by the Supreme Court of Appeal in the matter of Patmar Exploration (Pty) Ltd and Others v Limpopo Development Tribunal and Others (1250/2016) [2018] ZASCA19; 2018[4] SA 107 (SCA) , High Court Judges in the same Division are bound by judgments of that Division unless they are clearly wrong.

[17] Coupled with the fact that the finding which I had already made above that it is highly impossible that its appointment was questionable, I exercised my discretion in not deviating from the norm that costs follows a successful litigant. The fact of the matter is that the same issue was rejected in those judgments, and the Courts clearly has to prevent abuses of the process of the law if it is clearly threatened.

[18] My conclusion is that on a conspectus of facts, I am of the view that there are no prospects that the appeal would succeed. Furthermore, there are no issues of law and/or public importance which warrant the granting of the application for leave to appeal.

[19] Consequently, the following Order is made:

19.1 The application for leave to appeal is dismissed with costs, such costs to include costs occasioned by the employment of two Counsel.

A.M. KGOELE

JUDGE OF THE HIGH COURT

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