

SOUTH AFRICA / JUDGMENT

Ngaraga Properties (Pty) Ltd v MEC Responsible for Education Limpopo Province and Others (6752/2021) [2023] ZALMPPHC 67 (8 August 2023) [2023] ZALMPPHC 67

COURT

Limpopo High Court, Polokwane

BEFORE

M V Semenya

CASE / FILE NUMBER

6752/2021

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IN THE HIGH COURT OF

SOUTH AFRICA;

LIMPOPO DIVISION;

POLOKWANE

CASE NO: 6752/2021

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE:

08 AUGUST 2023

AJP

SEMENYA M.V

In

the matter between:

NGARAGA
PROPERTIES (PTY) LTD
APPLICANT
And
MEC
RESPONSIBLE FOR EDUCATION
FIRST
RESPONDENT
LIMPOPO
PROVINCE
HEAD
OF LIMPOPO DEPARTMENT OF EDUCATION
SECOND
RESPONDENT
LION
MATCH PRODUCTS (PTY) LTD
THIRD
RESPONDENT
MOLEBOPEN
TRADING ENTERPRISES CC
FOURTH
RESPONDENT

JUDGMENT

Heard: 15 JUNE 2023

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.

The date for the hand-down is deemed to be 08 August 2023.

SEMENYA AJP:

- [1] The applicant in this matter seeks a declaratory order that the interim interdict granted by MG Phatudi J on the 5 May 2023 is an interlocutory order that has no final effect of a judgment within the meaning of section 18 (2) of the Superior Courts Act, 10 of 2013 (the Act). The effect of the declarator, if granted, would be that the pending appeal will not suspend the interim order.
- [2] A brief factual background of the issues between the parties is that the first and second respondents (the Department) awarded a tender to manufacture, warehouse, package and distribute sanitary pads to school girls at quintal 1-3 public schools within the Limpopo Province to the third respondent. The Department entered into a 3 years' contract with the third respondent pursuant thereto.

- [3] Aggrieved by the award, the applicant, being the only other contender in the said tender, launched a review application against the decision of the Department to award the tender to the third respondent.
- [4] Pending the outcome of the review application, the applicant approached this court on an urgent basis with an interdict application. Having heard argument on behalf of the applicant and the third respondent, the court, among others, granted the applicant the following interim order:

“Pending the final determination of the applicant’s review application pending in this court under case number 6752/2021, the Department and the third respondent are interdicted and restrained from taking any steps to perform their respective obligations in terms of the written contract (contract concluded by them pursuant to the of the LDE/B03/2020/21 (LDE/B04/2019/20) for the manufacturing, warehousing packaging and distribution of sanitary pads for girls in quintile 1-3 public schools for a period of three years (bid) to the third respondent and to conclude the contract with the third respondent in respect of and in pursuance of the ward of the bid.”

- [5] The third respondent applied for leave to appeal against this interim order. The application was dismissed. The Supreme Court of appeal granted leave to appeal to the full court of this Division on petition. The appeal is still pending.
- [6] The judgment in the review application was already delivered as at the date of the hearing of this application. The order was granted in favour of the applicant, which was the applicant in the review application as well. The parties were nonetheless agreeable that the issue raised in this application is still alive in that the appeal is still pending. I agree with the parties this regard.
- [7] The third respondent is opposing the application and has also launched a counter-application. In its application, the third respondent argues that this court should, if it grants an order that the interim order falls within the meaning of section 18 (2), order that in terms of section 18(3) exceptional circumstances exist which empowers the court not to suspend the interim order.
- [8] In the meantime, the third respondent has also launched an application for leave to appeal the order of this court in the review application.
- [9] Section 18(1) to (3) of the Act provides as follows:

“(1) Subject to subsection (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 subsection (3), unless the court under exceptional circumstance 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 subsection (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 so orders and that the other party will not suffer irreparable harm if the court so orders.”
- [10] It is common cause between the applicant and the third respondent that the interim order granted by MG Phatudi J on the 5 May 2022 is temporary. The third respondent contends that the interim order, though temporary, is final in effect and falls under section 18(1) on the basis that the continued suspension of the contract negatively and irreversibly impacts on the health, livelihoods and Constitutional rights of the schoolgirls it was intended to benefit. The third respondent contends further that the fact that the Supreme Court of Appeal has granted leave to appeal the interim order of Phatudi J is indicative that the temporary restraining order is of final effect.
- [11] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[1] (AUTA) the court said that:
- “...Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.*
- [12] The applicant contends that the third respondent’s reliance on the harm that the schoolgirls will suffer if the order is granted is misplaced. The applicant argues that, in terms of section 18(3), the third respondent is required to prove on a balance of probabilities that it, and not the schoolgirls, will suffer irreparable harm if the order sought by the applicant is granted. The applicant submits that there is no order that precludes the Department from procuring sanitary pads for the schoolgirls by other means pending the resolution of the issues between the parties in order to prevent any harm to the schoolgirls.
- [13] In the unreported case of *Tswelopele Local Municipality v H T Pelatona Projects (Pty) Ltd*[2], the court was called upon to deal with issues which were similar to the one before this court. The municipality was interdicted from implementing or acting upon its decision to award a public tender for the refurbishment and expansion of a sewer pumping station. The court in that case said that the right to protection of economic interest which is entrenched in the Constitution in the form of transparent and fair procurement systems should not override the right to dignity, health and adequate sanitation.

- [14] I find the applicant's argument that the third respondent cannot rely section 18(3) and the harm that would be suffered by the schoolgirls to be without merit. In Pelatona the harm occasioned on the residents of the township, and not on the Municipality as the appellant, was considered. In other words, the interests of the beneficiaries of the tender was found to be of importance in the determination on whether the interim order has a final effect. I agree with that court's sentiments in that regard. It is further in line with the reasoning of the Constitutional Court in OUTA, above.
- [15] The harm that would be caused to the beneficiaries of the contract if the declarator is made is immediate, serious and ongoing in that the schoolgirls will miss school due to menstruation, which is what the tender sought to prevent. On the argument that the Department may still procure the sanitary pads by other means, there is no evidence before this court that proves that that can be done with immediate effect.
- [16] In the result, I find that the interim order granted by MG Phatudi J, has a final effect and is suspended by the Supreme Court of Appeal order that granted the third respondent leave to appeal. As in Pelatona, it is not necessary for this court to adjudicate on the third respondent's counter-application.

[17] In the result the following order is made:

17.1 The application for a declarator is dismissed.

17.2. The applicant is ordered to pay the costs of the application which shall include costs of the two counsel.

M V Semenya

Acting Judge President

Limpopo Division.

APPEARANCES: Counsel for the Applicant Adv. R Maphutha & P Mohlabi Instructed by Moeti Kanyane Attorneys Counsel for the 1st & the 2nd Respondents Adv. T Tshitereke Instructed by State Attorneys Counsel for the 3rd Respondent Adv. GD Harpur SC & AJ Devers Instructed by Zayeed Paruk Incorporate Counsel for the 4th Respondent Adv. None Instructed by Molebopen Trading Enterprise CC

Date of Hearing : 15 June 2023

Date of Judgment : 08 August 2023

[1] 2012

(6) Sa 223 (CC) at 25

[2] (2214)/2022)

[2022] ZAFSHC 184 (3 August 2022)

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