



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D4178/2020

In the matter between:

TANSNAT DURBAN (PTY) LTD

Applicant

and

ETHEKWINI MUNICIPALITY

First Respondent

**THE KWAZULU-NATAL DEPARTMENT
OF TRANSPORT**

Second Respondent

MVIMBENI HOLDINGS (PTY) LTD

Third Respondent

EMA LE RONA TRADING ENTERPRISE 69 (PTY) LTD

Fourth Respondent

UNITRANS PASSENGER (PTY) LTD

Fifth Respondent

KZT COUNTRY CURISER (PTY) LTD

Sixth Respondent

MARINPINE TRANSPORT (PTY) LTD

Seventh Respondent

RIPPLE EFFECT 40 CC

Eighth Respondent

IKHWEZI BUS SERVICE (PTY) LTD

Ninth Respondent

RSV TRUCK AND BUS CC

Tenth Respondent

UTHUKELA TRANSPORT SERVICE (PTY) LTD

Eleventh Respondent

LETONN INTERNATIONAL (PTY) LTD

Twelfth Respondent

ORDER

The application for leave to appeal is dismissed.

JUDGEMENT IN APPLICATION FOR LEAVE TO APPEAL

HENRIQUES J

Introduction

[1] This is an application for leave to appeal the order granted on 7 September 2020 dismissing the applicant's application for certain declaratory relief. An *ex tempore* judgment was handed down and was amplified by the additional reasons delivered electronically on 3 November 2020, in response to the request for reasons.

[2] It is common cause that the applicant instituted the application which forms the subject matter of this application for leave to appeal on 3 July 2020. The application was not opposed by any of the respondents. The first respondent however, filed an explanatory affidavit setting out its position in relation to the relief sought by the applicant and its stance in relation to the interpretation of the tender provisions.

[3] Counsel for the first respondent held a watching brief at the unopposed hearing, and at the hearing of the application for leave to appeal. Although no oral submissions were made by the first respondent, its stance was as contained in the explanatory affidavit.

Basis for the application

[4] In summary, the applicant submits as its basis for the application for leave to appeal that there is a reasonable prospect that another court would come to a different conclusion and in addition, that there is a compelling reason why the matter should be referred to an appeal court.¹

[5] Although the applicant submitted that it seeks leave to appeal to the full court of this division, at the hearing of the application for leave to appeal, Mr Harpur SC, who appeared for the applicant, conceded that given the nature of the issues for

¹ Paragraph 3 of the applicant's application for leave to appeal.

determination specifically those relating to interpretation, it was perhaps apposite for the Supreme Court of Appeal to deal with the appeal in the event of leave to appeal being granted.

[6] Before addressing the grounds of appeal as amplified by the supplementary grounds of appeal, it is appropriate at this juncture to deal with the applicable test in applications for leave to appeal.

The applicable test in an application for leave to appeal

[7] Applications for leave to appeal are governed by ss 16 and 17 of the Superior Courts Act 10 of 2013 ('the Act'). Section 17 provides that '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.'

[8] The applicant has indicated in the notice of application for leave to appeal that the application is premised on the provisions of s 17(1)(a)(i) and (ii) of the Act. In paragraphs 4 and 3 on page 2 of the initial notice of application for leave to appeal, the applicant relied on the test as being 'that another Court may reasonably come to a different conclusion ...'. The references in the footnote are to the decisions of *S v Rens*² and *Zweni v Minister of Law and Order*.³ These decisions were prior to the enactment of the Act.

[9] The test as suggested by the applicant, is no longer the one which applies, and will be dealt with hereinafter. Reasonable prospects of success has previously been defined to mean that there is a reasonable possibility that another court may come to a different decision.⁴ In defining 'reasonable prospects', the courts often rely on *S v Smith*⁵ where the court held the following:

'What the test of reasonable prospects of success postulates is a dispassionate

² *S v Rens* 1996 (1) SA 1218 (CC).

³ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

⁴ *Van Heerden v Cronwright & others* 1985 (2) SA 342 (T) at 343I.

⁵ *S v Smith* 2012 (1) SACR 567 (SCA) at paragraph 7.

decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’ (Footnote omitted.)

[10] With the enactment of s 17 of the Act, the test has now obtained statutory force and is to be applied using the word ‘would’ in deciding whether to grant leave. In other words, the test is ‘would another court come to a different decision’? In the unreported decision of the *Mont Chevaux Trust v Goosen*⁶ the Land Claims Court held, albeit obiter, that the wording of the subsection raised the bar for the test that now has to be applied to any application for leave to appeal. In *Notshokovu v S*,⁷ it was held that an applicant ‘faces a higher and stringent threshold, in terms of the Act [when] compared to the provisions of the repealed Supreme Court Act 59 of 1959’.

[11] In *Acting National Director of Public Prosecutions & others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions & others*,⁸ Ledwaba DJP, writing for the full court considered the test as envisaged in s 17 of the Act. At para 25 of the aforementioned judgment, he dealt with the test set out in the *Mont Chevaux Trust* case where Bertelsmann J held the following:

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. 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.’

[12] The reference in section 17(1)(a)(ii) does not contain an exhaustive list of

⁶ *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC).

⁷ *Notshokovu v S* [2016] ZASCA 112 para 2.

⁸ *Acting National Director of Public Prosecutions & others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions & others* [2016] ZAGPPHC 489.

criteria and the authorities have held that each application for leave to appeal must be decided on its own set of unique facts. An applicant for leave to appeal must, however, show that there is a compelling reason why the appeal should be heard.

[13] Our courts, in considering what constitutes ‘other compelling reasons’ have held that the substantial importance of a case to a party constitutes a compelling reason. Other compelling reasons include the following, namely, whether the decision appealed against involves an important question of law, whether the administration of justice requires the appeal to be heard, and whether the matter is of public importance as it will have an effect on future matters.⁹

[14] When considering an application for leave to appeal on the basis of the existence of a compelling reason, the court must have a strong reason to grant leave to appeal on this basis, and a court must ‘give careful and proper consideration to the reason advanced before categorising it as compelling. Section 17(1)(a)(ii) should therefore not be invoked for flimsy reasons’.¹⁰

[15] In this specific instance, the court is enjoined to determine whether another court *would* (my emphasis) come to a different decision, alternatively if there is some other compelling reason for leave to appeal to be granted.

Grounds of Appeal

[16] The applicant’s grounds for leave to appeal were comprehensively set out in the notice of application for leave to appeal filed on 9 September 2020 as amplified by supplementary grounds of appeal filed on 19 November 2020. I propose for the sake of convenience to use the headings as referred to by the applicant in the respective grounds of appeal for ease of reference.

The unopposed application

[17] The application served on the unopposed motion court roll on 7 September

⁹ *Minister of Justice and Constitutional Development & others v Southern Africa Litigation Centre & others* 2016 (3) SA 317 (SCA) at 330 A-C, *Zuma v Democratic Alliance & others* 2018 (1) SA 200 (SCA) at 227D-G.

¹⁰ *School Governing Body Grey College, Bloemfontein v Scheepers & others (South African Teachers Union Intervening)* [2019] JOL 41823 (FB) para 6.

2020. The first respondent delivered a notice to abide and an explanatory affidavit as referred to in the introduction. The explanatory affidavit dealt with the basis upon which the first respondent chose to abide by the decision of the court, but also revealed the reasons why it could not consent to the order and required a determination to be made in relation to the crisp issue of interpretation of the closing time for the submission of the expression of interest.

[18] Whilst it is not a requirement that heads of argument are submitted in unopposed applications, the applicant's counsel nevertheless delivered concise heads of argument. These heads of argument concisely encapsulated the applicant's contentions and the applicable law relied upon by the applicant relating to the interpretation of the deadline for the submission of the expression of interest document as stipulated in the first respondent's notice of extension.¹¹ It would be noted that whilst the applicant's founding papers referred to an agreement and the legal concept of estoppel as alternate grounds for the declaratory relief, no such reference was made in the heads of argument.

[19] In dismissing the application, an *ex tempore* judgment was handed down after the court had the benefit of considering the review application instituted by the applicant under case no. D1710/2020. The first respondent, whilst submitting no grounds of opposition, as traditionally one would see in an answering affidavit, its explanatory affidavit expressed its views and interpretation of the deadline for the submission of the expression of interest document as well as the extension of the date and time for lodging of the expressions of interest.

[20] In such explanatory affidavit, the first respondent indicated that the extension of the closing date was extended from 24 January 2020 to 28 February 2020 and such extension document was to be read as forming part of the contract documents (being the initial contract no 70-1171). As the court understands the first respondent's submissions, the extension related only to the date for the delivery of tender offers with the stipulated time of 'at or before 11h00' remaining unaltered.

¹¹ Annexed hereto as "A" are the heads of argument and draft order prayed.

[21] The applicant's contention is contrary to the first respondent's submission in that the applicant argues that on a proper interpretation of the addendum,¹² it had until midnight on 28 February 2020 to lodge its tender offer. This crisp issue of interpretation fell to be adjudicated at the hearing of the application. After consideration, the court was unconvinced that the applicant had made out a case for the declaratory relief it sought and dismissed the application.

[22] Paragraph 8 of the application for leave to appeal contains an extract from the first respondent's explanatory affidavit albeit not the complete extract of what was submitted by the first respondent. Paragraph 14 in its entirety reads as follows:

'The First Respondent did not, and does not, deliberately seek to prevent the Applicant from lodging the response. Indeed, it may well be beneficial to the First Respondent's ratepayers if the response is taken into consideration when adjudicating the responses submitted by all interested parties.'

[23] The context for such submission, is to be found in paragraph 15 of the first respondent's explanatory affidavit in which the following is stated:

'On the other hand, the First Respondent believes that it may not simply agree to accept the Applicant's response for the following reason: If it does not and the Applicant's contention that it had until midnight to submit its response is subsequently held to be correct, then the First Respondent, by accepting the response after 11h00, may have prejudiced the interests of other parties who submitted responses timeously. These other parties are the named Third Respondents in this matter'.

The Judgment

[24] As previously mentioned, the applicant's heads of argument focused on the failure by the first respondent to specify a time in respect of the extended date for the submission of the expression of interest. It did not, in any way, deal with any of the alternate two grounds advanced in the founding affidavit.

[25] The applicant's heads of argument focused primarily on the interpretation of the addendum relating to the time by which the applicant was obliged to submit its tender offer. The applicant's argument was that the absence of a specified time in

¹² Pages 80 to 82 of the applicant's founding papers.

such document meant that the civil method of interpretation had to apply, hence by extension of the applicant's argument, the applicant had until midnight on 28 February 2020 to submit its expression of interest. In support of such contention, the applicant relied on the dictum in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and another*,¹³ which the court considered together with related authorities prior to delivering its judgment.

[26] At the hearing of the application for leave to appeal, it was raised with counsel for the applicant whether the applicant intended pursuing certain grounds of appeal relating to the allegations of irregularity which it submitted existed and the violation of the applicant's constitutional rights to a fair hearing.

[27] The court further enquired whether the applicant had obtained a transcript of the proceedings to support its submissions of an irregularity. Counsel for the applicant responded that neither the applicant nor its legal representatives saw the need to obtain such transcript. The court had however obtained a transcript of the hearing and made same available to applicant's legal representatives for consideration.

[28] The matter stood down to afford the applicant's legal representatives an opportunity to consider the transcript and make submissions thereon. The applicant's counsel submitted that the applicant persisted with its submissions that the court did not give it a fair hearing and more importantly did not engage with its counsel in relation to the difficulties which the court had nor did it provide detailed reasons for dismissing the application.

[29] The transcript being a full record of the proceedings reads as follows:

'Mr Harpur: 'May it please my Lady, I appear for the applicant in this matter. My Lady the municipality is represented here by a watching brief by my learned friend here, sitting next to me. I understand that my Lady was sent the concise heads of argument together with the draft order prayed. I don't think I wish to add anything to the concise heads my

¹³ *Dormell Properties 282 CC v Renasa Insurance Company Ltd and another* [2010] ZASCA; 2011 (1) SA 70 (SCA).

Lady, I submit that the papers make out a case and I ask for the relief set out in the draft order prayed.'

Court: 'Sorry you are here as a watching brief?

Mr Mlaba: It is Mlaba C.

Court: Yes, and you are not here to make any submissions?

Mr Mlaba: 'No my Lady, we have submitted an explanatory affidavit.

Court: An explanatory affidavit?

Mr Mlaba: Yes M' Lady

Court: And what is contained in there is the municipality's view and as I understand it?

Mr Mlaba: Exactly M'Lady. And the only issue that was between the parties was the question of costs, which we have agreed upon that there shall be no order as to costs.

Court: Okay. Sorry, Sorry Mr Harpur. So as I understand the position, the municipality's view is as contained in the explanatory affidavit, you are not here to offer any assistance to the court apart from a watching brief that you hold today?

Mr Mlaba: Yes.

Court: 'Okay Thank you. Mr Harpur why do you say that the silence of the time, in that – well, as I understand the position, you are saying that because of that email from Mhlongo, which only extended the date and not the time you had until midnight, is that the position?'

Mr Harpur: 'That is correct, my Lady.'

Court: 'Can you assist me with that, that email that was sent by Mr Mhlongo,

where do I find that in these papers.'

Mr Harpur: 'My Lady, if I can look in the index. This is the one that extended the time to

Court: 'Extended the date

Mr Harpur: But did not specify a time on that.

Court: 'The date, yes'.

Mr Harpur: Yes. Sorry M' Lady, I was looking at – there is the extension of the closing date.....

Court: 'That is the one on page 78, is that right, where it extends the closing date, 'SN2.?

Mr Harpur: 'I was looking at page 80, my Lady, which according to the index is the extension, notice of the extension of the closing date.'

Court: 'That's 81.'

Harpur: 'Yes um

Court: okay'.

Mr Harpur: Yes, that is at 81, "This addendum is to be read as forming part of the contract document and serves to inform you the closing date of the tender has been extended to 28 February 2020.' I think that was the initial extension.

Court: 'No. That is the subsequent extension'.

Mr Harpur: Oh, that is a subsequent one... yes that is correct my Lady. So there was no time stipulated, so the common law is that if there is no time stipulated on a date stipulated then the time runs until midnight on that date And then the tender was made around 11h45am on that date

and the municipal official was under the impression that the time period was 11h00 am and that is why she refused to accept it'

Court: 'This is an application for a declaratory order as set out in paras 1 (a), (b), (c) and (d) of the notice of motion which appears at indexed pages 1 and 2. The first respondent has elected not to oppose the application and has served and filed a notice to abide together with an explanatory affidavit. Its view in relation to the closing time and date for the extension is set out in the explanatory affidavit. Essentially the tender document, made provision for the expression of interest to be submitted on/before Friday, 24 January 2020 at or before 11h00 o clock. It appears that there was an exchange of correspondence between the applicant's attorney of record and the legal and compliance officer of the first respondent who then responded at page 78 of the papers dealing with *inter alia* the review application which is not the subject matter of the application which serves before me but in terms of which, it is recorded that in light of the undertaking, the closing date for the submission of bids was extended to 28 February 2020. The document is silent in relation to the time. An addendum, which appears at page 81 of the indexed papers makes provision for the addendum to form part of the contract documents and also makes provision for the closing date to be extended to 28 February 2020. Similarly nothing is said about the time. I have considered the application papers placed before me, together with the explanatory affidavit, as well as the heads of argument submitted by the applicant. I am not satisfied that the applicant is entitled to the relief that it seeks and consequently, the application is dismissed.'

[30] It is evident that counsel for the applicant was invited to make submissions, and indeed did so. The transcript does not support the allegations that the court did not engage with counsel. On the contrary, the court raised a query with applicant's counsel after he indicated that he had nothing further to add to the heads of argument. Notwithstanding this election, the court engaged applicant's counsel regarding the issue of the time for submission of the expression of interest document.

[31] In line with the practice of this division and other divisions, *ex tempore* judgments are often delivered in both unopposed and opposed applications. In such instances, it is common practice that the reasons will be provided on written request of any party alternatively, the reasons will be provided by the court on its own accord.

[32] Notwithstanding the lack of formal opposition, the narrow issue was restricted to a determination of the document relating to the extension of the deadline for tender offers and specifically the time for such submissions. The law relating to the applicability of the civilian method of calculation is settled. Confronted with the issue of interpretation, the court either accepted the interpretation advanced by the applicant or declined it. On this premise, further engagement with counsel for the applicant was unnecessary.

[33] Practitioners are or ought to be *au fait* with the principal that the functions of courts and judicial officers are not restricted to rubber stamping orders in unopposed applications. It does not axiomatically follow that in the absence of opposition, the granting of an order will be a foregone conclusion.

[34] It frequently occurs, especially in motion court proceedings, that unopposed applications are granted or dismissed in instances where the papers do not make out a case. The discretion of a judicial officer to afford a party the opportunity to supplement its papers, is dependent on the merits of each matter, and in my view, was not an appropriate order in this matter, regard being had to the crisp issue to be determined.

[35] The applicant's contention that the grant of the order seemed to be a foregone conclusion, coupled with its contentions of suffering a fundamental injustice, is by any standard baseless. The record patently reflects the court's engagement with both the applicant's and the first respondent's counsel.

[36] At the hearing, counsel for the applicant was at liberty and not constrained by the court to make such submissions as he deemed fit, however elected to confine the applicant's submissions to that contained in the concise heads of argument. To

suggest *ex post facto* that the grant of the judgment was a violation of its fundamental and constitutional rights can only be deemed to be the expressions of a disgruntled litigant and inconsistent with the election of its legal representative.¹⁴

Reasons for the judgment and the lack of reasons

[37] In my view, and as contemplated by Uniform Rule 49(1)(c), it was inherently unnecessary to indicate that further reasons would be provided in light of the fact that an *ex tempore* judgment was delivered. In such judgment, the court's finding that the contract documents stipulated the time for the delivery of the expression of interest document and the addendum simply extended the date for such delivery. The addendum formed part of the contract documents and had to be read in conjunction therewith.

[38] Post the handing down of the judgment on 7 September 2020, the applicant as it is entitled, requested reasons for the judgment and same were duly furnished. The court delivered an *ex tempore* judgment indicating that it was not satisfied that the applicant had made out a case for the relief sought. In dismissing the application, the court had the benefit of considering the submissions of the applicant's counsel, reading the application papers and authorities referred to, coupled with reference to the review application papers. In my view, it was neither reasonable, nor necessary for the court to contemporaneously indicate that full reasons for the order would be provided as brief reasons were placed on record at the time of the hearing.

[39] It is common practice in this division, which all practitioners are undoubtedly aware of, that a party may request reasons for a judgment (supplementary or additional) and judicial officers are obliged to positively respond to such a request. The applicant's supposition regarding its uncertainty as to whether reasons for the judgment would be furnished, belies the common practice in this division and in any event such submissions were rendered moot by the furnishing of additional reasons pursuant to the applicant's request.

[40] The applicant's complaint relating to the lack of reasons is substantially

¹⁴ *Saloojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141E.

without merit and the applicant's right to pursue the application for leave to appeal was not in any manner prejudiced.

Specific grounds of appeal

[41] To avoid repetition and the further prolixity of this judgment, it is in my considered view, not necessary to deal with the specific grounds of appeal raised by the applicant previously dealt with in this judgment.

[42] The court, in the exercise of its judicial functions afforded the applicant a fair and reasonable opportunity to present its submissions. As previously alluded to, the court harboured no issues, queries or difficulties in determining the application, hence, no probative value could be achieved in raising them with the applicant's counsel.

[43] Its warrants mentioning that the applicant's counsel did not invite the court to raise any queries or difficulties that it may have had. The applicant's focus on the lack of opposition and the misconception that the first respondent's explanatory affidavit was supportive of its application, is misguided and ill-conceived in my view. As previously stated in this judgment, the first respondent whilst abiding, did not consent to the relief sought by the applicant, but rather deferred to the court the determination of the extended date and closing time for tender offers to be submitted.

[44] As already indicated, the court provided written reasons and in any event, there can be no prejudice to the applicant and nor can it be said that the court committed a grave lapse of duty or that it breached the applicant's rights as additional written reasons were provided. In addition, on receipt of the reasons, the applicant was given an opportunity to supplement the grounds of appeal in the application for leave to appeal, which it duly did.

The deadline: 11:00

[45] The applicant indicates that its expression of interest was lodged, however acceptance thereof was refused by the municipal official. It is common cause that the applicant's expression of interest was lodged outside of the stipulated time. All the other tenderers understood the extension, as contained in the addendum, to apply to

the closing date, extending such date from 24 January 2020 to 28 February 2020, with the time remaining the same being 11h00.

[46] The applicant's submission in paragraph 35(f) of the grounds of appeal is accordingly incorrect. The addendum, on any interpretation, extended only the closing date and was silent on the time, which time was stipulated in the original tender document. In addition the addendum specifically stated that it was to be read as forming part of the contract documents hence the contract documents and its requirements remained unchanged save for the closing date.

[47] It was submitted on behalf of the applicant that 11h00 was capable of two meanings: 11 o'clock in the morning or 11 o'clock at night, albeit that the applicant's case was not premised on such interpretation. Such submission is neither persuasive nor rational. Irrespective of the use of digital time or analogue time, 11h00 giving it its ordinary and businesslike meaning, must refer to 11 o'clock in the morning. Had the first respondent intended to refer to 11 o'clock at night, it would have stipulated 23h00.

[48] From a practical perspective, it could never have been the intention nor stipulation of the first respondent that the time deadline was to be outside of business hours. There would be no access to the tender box, no personnel to empty the box at 11 o'clock at night nor midnight or to ensure that expressions of interest filed outside the time deadline will not be slipped into the box.

[49] The applicant persisted with its contention that the time deadline was midnight as premised in its founding papers and heads of argument. The applicant cannot attempt to interpret what the first respondent intended, and as already indicated by the first respondent, this was a task for the court to do. In addition, it is disingenuous of the applicant, in one breath, to attempt to interpret or place an interpretation on what the intention of the first respondent was, in order to support its interpretation, to enable it to obtain the order. Although the first respondent does not dispute what the normal common law position is, it leaves the interpretation contended for by the applicant, correctly so in my view, in the hands of the court.

[50] The applicant, cannot in its founding affidavit, contend for a particular interpretation and in the alternative, allege an agreement concluded between itself and the first respondent. In any event, the fact that the first respondent indicated that it was its intention that the time of 11h00am would stand, disavows any express or implied agreement being concluded between the parties.

[51] The first respondent's purported failure to respond to the applicant's suggestion of an agreement does not, in my view, translate to acquiescence or the conclusion of an agreement. Although the applicant may not have understood the mental reservation, it appears that other applicants did understand that the extension of the date had no bearing on the set time contained in the contract documents. This is evident from the fact that other parties, like the third to twelfth respondents, knew and did in fact file the expressions of interest timeously by 11h00am on 28 February 2020.

[52] In its initial grounds of appeal, the applicant indicated that it relied on the common law principle that in the absence of a stipulated time in the addendum, the deadline would be at midnight. In the alternative, the applicant asserted the conclusion of an agreement and further in the alternative that the applicability of the principles of estoppel should apply against the first respondent. However, during the course of the argument, at the hearing of the application for leave to appeal, Mr Harpur submitted that the press release (the addendum) superseded and replaced the contract document, and consequently the applicant was entitled to accept that no time period was stipulated in the addendum.

[53] Such issue was raised for the very first time at the application for leave to appeal and was never raised in the initial founding affidavit or at the hearing of the application. The applicant's counsel was requested to refer the court to the specific paragraphs in the applicant's founding affidavit to support this assertion. In response, it was submitted that the founding affidavit must be considered holistically and counsel proceeded to read the entire founding affidavit into the record. Such conduct was neither helpful nor of any assistance in clarifying the court's enquiry which reinforced the court's finding that the applicant's assertion of supersession was never the applicant's case from inception.

[54] The explanatory affidavit of the first respondent set out its stance and its interpretation and what it intended by granting such extension. This would have formed part of the overall factual basis which the court would have considered in determining whether the applicant's interpretation was correct. The first respondent did not accept that the applicant's expression of interest had been lodged on 28 February 2020.

[55] On the applicant's own version, when it attempted to do so on that Friday at 11h45 am, it was not accepted as the municipal officials informed the applicant that the closing time was 11h00am and the applicant had tendered the expression of interest after the closing time at 11h45 am. It is not correct that it lodged its expression of interest in the time frame allowed; at best for the applicant it attempted to do so after 11h00am.

[56] This is borne out by paragraphs 11 of the explanatory affidavit¹⁵ which records the following:

'The Applicant, on 28 February 2020, lodged with the relevant Municipality's representatives its response to the requested for expressions of interest. However, it did so after 11h00 hours. Those officials, believing that such responses had to be submitted before 11h00 hours, declined to accept the same'.

and paragraphs 97 and 98 of the founding affidavit which reads as follows:

'Michelle Pearton advised me, in my response to whether I could deliver the tender document at that point in time, namely approximately 11:45am on 28 February 2020, that this would not be possible as the tender box was physically closed at 11h00AM and that all the tender documents in the tender box were physically cleared out of the box by employees of the municipality.

It was accordingly impossible to deliver the expression of interest on 28 February 2020 although I tendered to do so, and but for the refusal by Michelle Pearton and the advice that the tender box was already closed, I would have delivered the expression of interest from Tansnat timeously on 28 February 2020.'

¹⁵ Indexed page 181.

It is common cause that the applicant failed to timeously deliver its expression of interest document on or before 28 February 2020 at or before 11h00.

[57] The interpretation which the court arrived at relating to the addendum and contract documents, and the reasons for such interpretation, have been comprehensively dealt with in the additional written reasons.

[58] The argument advanced that estoppel is applicable is in my view incorrect. The basis for the applicant's contention was in the further alternative and was premised on the basis that the first respondent was estopped from asserting that the time limit was 11h00am on 28 February 2020. The reliance on this further alternative remedy had to be dependent on the court's interpretation of whether or not the absence of a stipulated time in the addendum, meant that no time was stipulated and that the civil method of computation of time applied. The applicant alleged it had been agreed between only the applicant and the first respondent

'that the time limit for the delivery of Tansnat's expression of interest was extended until 28 February 2020 without any express time stipulation on that date by which the expression of interest should be delivered.'¹⁶

Such contention cannot be sustained as the addendum contained the specific requirement that it was to be read as part of the contract documents.

[59] In order for estoppel to apply, this court would have to find that an agreement was concluded between the applicant and the first respondent, and further to agree with the applicant's interpretation relating to the time deadline. There is nothing to support or premise this finding upon and pertinently, such finding would have the effect of excluding all other interested parties and compromising their rights. It would have the effect of giving an unfair advantage to the applicant and prejudicing other applicants, the very event the first respondent was concerned about and indicated it could not do in its explanatory affidavit.

[60] This court's finding that the applicant's interpretation of the time deadline is neither tenable nor sustainable renders the reliance on estoppel nugatory and of no

¹⁶ Paragraph 62 of founding affidavit, indexed page 20.

assistance to the applicant. In relation to the submissions that estoppel is applicable on the basis that the first respondent had been negligent, this was once again not an argument advanced at the hearing of the unopposed application.

[61] Acknowledgment is found in the applicant's grounds of appeal at paragraph (r) which reads as follows:

'It has accordingly left this decision for the Court whilst at the same time offering no active opposition to it'.

Supplementary grounds of appeal

[62] In relation to the supplementary grounds of appeal that were filed, the court reaffirms the reasons contained in the additional written reasons filed on 3 November 2020. The applicant's repeated reference to the events that transpired before Van Zyl J or the findings by that court is of no significance to the judgment of this court. The applicant has not deemed it necessary nor appropriate to file a transcript of the argument, nor the *ex tempore* judgment of Van Zyl J; hence this court is not in a position to advance any comments in respect thereof.

[63] The applicant makes submissions in relation to the closing time which were not dealt with in the initial affidavit and in the application which served before me. It was never the applicant's contention that the time of 11h00 was ambiguous or uncertain. Its contentions related to the fact that no time was stipulated. It cannot now, at this stage, offer alternative submissions and make new submissions in relation to the interpretation based on the additional reasons filed.

[64] The tender documents relied on for the submission of expression of interest is annexed to the original application papers. Page 39 refers to annexure "C", page 40 refers to annexure "D", although headed "Procurement Document", appears to be the first page of the tender document. Pages 41 to 70 appear to be the entire tender document. Part "E" of the document, on indexed page 42, which has been referred to in the judgment, sets out the date and time for submission of the expression of interest.

[65] It clearly refers to the closing date of Friday, 24 January 2020 at or before

11h00. Page 39 referred to in paragraph 5 of the supplementary grounds of appeal is annexure “C” to the tender document. This document sets out the contract title and sets out where the tender documents are available from and to whom enquiries can be made. It also sets out how the expressions of interest will be weighted, considered, evaluated and also that there will not be a clarification meeting. Page 44, which is page 4 of the actual tender document, falls under the title “The submission Procedures and Submission Data”. It makes reference to the closing time and closing date. The applicant selectively refers to the document in isolated parts and not as a holistic document to advance submissions favourable to its contention regarding the stipulated time period or lack thereof in the addendum. Such selective references do not assist in arriving at a judicial evaluation of the reasonable meaning and interpretation of the contract document and addendum.

[66] The supplementary grounds of appeal raises further submissions which were not advanced at the hearing nor contained in the applicant’s founding papers. By way of illustration: the applicant seems to suggest that the time was at best ambiguous and at worse meaningless. Further it was suggested that the expression of interest, by failure to mention the time, entitled the applicant to deliver its expression of interest during normal business hours, that is until 16h30. These contentions were never previously advanced or submitted to the court to consider prior to the delivery of the judgment.¹⁷

[67] Even in the event that the court is obliged to consider such ‘new submissions and arguments’, I remain unmoved that such additional submissions can shift the scales in favour of the applicant. At any level, the applicant on its founding papers, and with due consideration to the additional submissions, has failed to advance a sustainable case.

[68] For the reasons submitted in support of the judgment, these supplementary submissions do not assist the applicant’s case.

Conclusion

¹⁷ *Shraga v Chalk* 1994 (3) SA 145 (N) at 150G-151E; *RAS and others NNO v Van Der Meulen and another* 2011 (4) SA 17 (SCA) para 16.

[69] Having considered the various grounds of appeal and the detailed application for leave to appeal, I remain unconvinced that the applicant has met the tests set out in s 17, namely that there are reasonable prospects of success alternatively that there are compelling reasons to grant leave to appeal.

[70] I am also mindful of the fact that in deciding whether to grant leave to appeal the court must take cognisance of the higher threshold that needs to be met before leave to appeal is granted. There must be more than a mere possibility that an appeal court will find differently on both the facts and the law.

[71] As elucidated to in the reasons for judgment, the issues subject to determination bear no novelty as a point of law and the authorities in relation to the issue for consideration are clear and unequivocal.

[72] In the result, I am not satisfied that the applicant has made out a case that warrants the granting of the application for leave to appeal as there are no reasonable prospects that another court would come to a different conclusion nor that other compelling reason/s exists for the appeal to be heard.

Order

[73] The application for leave to appeal is dismissed.

HENRIQUES J

Case Information

Date of Hearing : 11 December 2020

Date of hearing of the original application : 7 September 2020

Request for reasons filed : 9 September 2020

Application for leave to appeal filed with the Registrar : 9 September 2020

Date request for reasons received : 30 September 2020

Additional reasons Delivered : 3 November 2020

Supplementary grounds of appeal filed : 19 November 2020

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Third to Twelfth Respondents: No opposition

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand down is deemed to be 09h30 on 8 February 2021.