

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

26 February 2024

Case No:33009/22

In the application or leave to appeal between:

APTITUDE TRADING ENTERPRISE (PTY) LTD

Applicant

and

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

First Respondent

**THE MUNICIPAL MANAGER THE CITY OF
TSHWANE METROPOLITAN MUNICIPALITY**

Second Applicant

In re:

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

First Applicant

**THE MUNICIPAL MANAGER THE CITY OF
TSHWANE METROPOLITAN MUNICIPALITY**

Second Applicant

and

APTITUDE TRADING ENTERPRISE (PTY) LTD

First Respondent

MDONSENI TRADING & PROJECTS (PTY) LTD

Second Respondent

LTC HOLDINGS CC

Third Respondent

**BATELINE INVESTMENTS (PTY) LTD &
FURTHER PARTIES**

Fourth to
One Hundred and Third (4th- 103rd) Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

SK HASSIM J

1. On 31 August 2023, the City of Tshwane Metropolitan Municipality (“**the CTMM**”) applied for an extension of time by which it had to comply with an earlier court order. I issued an order on 31 August 2023 extending the time to 30 November 2023 alternatively to an earlier date.¹ Reasons for the order were handed down on 11 October 2023. I extended the time period subject to the CTMM submitting regular reports.

2. Aptitude Enterprises (Pty) Ltd (“**Aptitude**”) who had had opposed the application for an extension of time seeks leave to appeal the whole of my order.

3. The application for an extension of time stems from an application by Aptitude to declare the CTMM’s decision to award a tender invalid and to set it aside.

4. On 28 November 2022, Ferreira AJ declared the decision to award the tender invalid and set it aside. The agreements concluded consequent upon the award of the tender were also set aside (“**the Ferreira AJ order**”). The CTMM was ordered to appoint new service providers by 28 February 2023 under a fresh process. However, to ensure

¹ The order reads:

“1 The orders contained in paragraph 46.1 and 46.2 of the judgment by EJ Ferreira AJ (Ferreira AJ”) delivered on 28 November 2022 and as extended by the orders of Khumalo J and Van Niekerk AJ on 27 February 2023 and 2 June 2023 respectively, are extended to 30 November 2023 alternatively to the date when a decision is made by the [CTMM] on Tender HHS 05-2022/23 whichever is earlier, subject to the following:

1.1. The applicants presenting to this court reports as follows:
....”

that services to the community were not interrupted, Ferreira AJ suspended the orders until 28 February 2023 finding that it was just and equitable under section 8 of the Promotion of Administrative Justice Act, Act No 3 of 2000 (“**PAJA**”) to do so.

5. The effect of the suspension of the Ferreira AJ orders was that until 28 February 2023 the service providers who had been appointed under an invalid tender process would render the services under the invalid tender for a period of three months. The invalid tender was thus kept alive for three months.

6. Not having appointed new service providers, the CTMM applied for an extension of the time within which it had to appoint new service providers. On 27 February 2023, the Ferreira AJ orders were suspended until 31 May 2023. On 2 June 2023, after the extended suspension lapsed on 31 May 2023, the Ferreira AJ orders were further suspended until 31 August 2023. On that day I suspended those orders until 30 November 2023.

7. Mr Laka SC who appeared with Mr Makola for the CTMM opposes the application for leave to appeal. He argued that the orders I granted on 31 August 2023 regulate procedure, do not have the effect of a final order and do not settle a dispute. He submitted that the orders are therefore not appealable. I disagree. In my view, the suspension of the Ferreira AJ orders sanctioned the implementation of a decision to ensure the uninterrupted supply of water to the community despite the decision being set aside because it was invalid. The orders create substantive rights and obligations. They are not orders regulating court procedure.

8. Mr Laka also argued that the requirements of section 17(1)(a)(i) and (ii) of the Superior Courts Act, Act No 10 of 2013 (“**the Superior Courts Act**”) have not been met and that section 17(1)(c) thereof does not apply in this case. He submitted that the appeal does not have reasonable prospects of success and there is no compelling reason why the appeal should be heard. For these reasons he moved for the application for leave to appeal to be dismissed. I did not understand Mr Laka to rely on section 17(1)(b), namely that the issues are of a nature that the decision will have no practical effect or result.

9. In my view, the orders which I issued are final in effect. I granted an extension. A different court will not be deciding whether to extend the suspension to 30 November 2023. My decision has resolved that dispute.

10. Mr Laka has not raised section 17(1)(b) as a ground for opposing the application for leave to appeal. However, section 17(1)(b) requires that I must be satisfied that the issues are not of such a nature that the decision on appeal will have no practical effect.

11. I am persuaded by the argument by Mr Els, who appeared with Mr Louw for Aptitude, that if it was not competent to extend the period for which the Ferreira AJ orders were suspended, then the question arises whether the payments made to the service providers under the tender award after 28 February 2023 were lawful. Similarly, if it was not competent to revive the Ferreira AJ orders on 2 June 2023 by extending the suspension of the orders retrospectively, the lawfulness of the payments to the service providers arises. In the circumstances this is not the type of case where the decision on appeal will have no practical effect.

12. The grounds on which leave to appeal is sought and the arguments raised in support thereof, engage several important issues. One of them being whether it is competent for a court to extend the time over which an order setting aside invalid administrative action has been suspended under the discretion to grant a just and equitable order under section 8 of PAJA.

13. In my view the law is settled that the Constitutional Court can extend the period over which a declaration that legislation is inconsistent with the Constitution of the Republic of South Africa, 1996 is suspended to allow the legislature an opportunity to craft suitable remedial legislation. But this in my view does not answer the question whether it is competent for a judge in a division of a High Court (sitting as a court of first instance) to extend the period over which an order setting aside invalid administrative action is suspended when another judge in the same division (also sitting as a court of first instance [in this case Ferreira AJ]) had earlier found in the exercise of a true discretion under section 8 of PAJA that it is just and equitable to suspend the operation of an order for three months only.

14. In my view the law is also settled that an extension of the period over which the declaration of legislation being inconsistent with the Constitution is suspended, must be granted before the period of suspension lapses. Once the period has expired, the law is invalid. But again, this does not answer the question whether the principle applies in the case of an order made under section 8 of PAJA. Nor does it answer the question whether it is competent to resuscitate an order that lapsed by extending its suspension retrospectively to a time before it lapsed. These are not the only jurisdiction questions.

15. Another is whether it was competent for me to consider the correctness of the extensions granted on 27 February 2023 (by Khumalo J) and on 2 June 2023 (by Van Niekerk AJ) before I decided to extend the time fixed by Ferreira AJ's order. I was of the view that it was not competent to do so.²

16. In my view, these are important jurisdictional issues.

17. I am satisfied that the appeal has a reasonable prospect of success. Furthermore in my view, the question whether the payments made to service providers after 28 February 2023 or 31 May 2023 were lawful, constitutes a compelling reason to grant leave to appeal. Even though leave to appeal is sought against the whole of my order, no grounds are advanced why there exist reasonable prospects of success that another court would find that I erred in extending the Ferreira J order subject to the conditions and obligations imposed on the CTMM or that I erred in making the orders in paragraphs 2 to 6 or the costs order in favour of Aptitude. Leave to appeal is therefore not granted against the whole of my order but only a portion thereof as reflected in the order which I make hereunder.

18. I have considered whether leave to appeal to the Supreme Court of Appeal or to the Full Court should be granted. The extension of the period over which an invalid act, in this case a tender, may lawfully be given effect to is an important question of law and may have a bearing on the lawfulness of the payments made to the service providers

² Para 10 of the reasons for my order.

and may also have a bearing on the question whether what may have been irregular payments are open to a legal challenge.

19. In my view the issues which arise are deserving of the attention of the Supreme Court of Appeal.

20. Consequently, I make the following order:

- (a) The applicant, Aptitude Enterprises (Pty) Ltd is granted leave to appeal the following portion of my order to the Supreme Court of Appeal:

“1. The orders contained in paragraph 46.1 and 46.2 of the judgment by EJ Ferreira AJ (Ferreira AJ) delivered on 28 November 2022 and as extended by the orders of Khumalo J and Van Niekerk AJ on 27 February 2023 and 2 June 2023 respectively, are extended to 30 November 2023 alternatively to the date when a decision is made by the second applicant on Tender HHS 05-2022/23”

- (b) The costs of the application for leave to appeal shall be costs in the appeal.



S K HASSIM

Judge: Gauteng Division, Pretoria
(electronic signature appended)

Applicant's Counsel: Adv APJ Els
 Adv NG Louw

Respondent's Counsel Adv AP Laka SC
 Adv TM Makola

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 February 2024.