IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Not Reportable
Case no: 3719/2023

In the matter between:

MOHAU MOLUTSI CIVIL WORKS (PTY) LTD	First Applicant
TLHABO YA LESTSATSI TRADING & PROJECTS 47 CC	Second Applicant
MOHAU MOLUTSI CIVIL WORKS (PTY) LTD// TLHABO YA LESTSATSI TRADING & PROJECTS 47 CC JOINT VENTURE	Third Applicant

and

NALA LOCAL MUNICIPALITY	First Respondent
THE MUNICIPAL MANAGER: NALA LOCAL MUNICIPALITY	Second Respondent
ZM & NIKIWENONO CONSTRUCTIONS CC	Third Respondent
TSHEMEDI LEFIKA PATSO (PTY) LTD	Fourth Respondent
TSHEMEDI JV ZM & NIKIWENONO CONSTRUCTION JOINT VENTURE	Fifth Respondent

Coram: Opperman, J

Heard: 27 July 2023

Delivered: 28 July 2023. This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 28 July 2023. The date and time of hand-down is deemed to be 15h00 on 28 July 2023

Summary: Urgent application – interim interdict pending review application

JUDGMENT

[1] This is an urgent application for an interim interdict pending the outcome of judicial review proceedings to be instituted in terms of Rule 53 of the Uniform Rules of Court.

[2] The third to fifth respondents did not participate in the litigation. The first and second respondents oppose the application for the interim interdict.

[3] The parties were in agreement at the commencement of the hearing of the matter that the application is urgent and it was ordered that the matter proceeded so and in terms of Rule 6(12) of the Uniform Rules of Court.

[4] The parties also agreed that condonation may be granted to the first and second respondents to file "a further affidavit"[1] in the main application.

[5] The cause of the litigation is related to the construction of a paved road and stormwater channel along the Sebotsa and Monnamocho roads in Bothaville: Free State Province and the tender issued for the works thereon.

[6] The Nala Local Municipality advertised a tender calling for bidders to submit their bids for their possible appointment for the construction of the stormwater channel in April 2023 in Tender No: NLM/TS/008/2022-2023.

[7] The compulsory briefing was scheduled for 2 May 2023 and the closing date for submission of bids was the 22nd of May 2023. On about the 26th of June 2023 the applicants learned of the appointment of the fifth respondent as the successful bidder.

[1] The Notice of Motion accompanied by the founding affidavit were served on 18 July 2023, the Notice to Oppose and the answering affidavit were served on 24 July 2023, the replying affidavit followed on the 25th of July 2023 and the condonation application for the further affidavit on the 27th of July 2023.

[8] What then followed was an allegation of unlawful administrative action as articulated in a letter dated 11 July 2023[2] from the attorney for the applicants addressed to the first and second respondents:

7.1 The successful bidder is Tshemedi Lefikapatso JV which submitted a bid for the total amount of R10 592 098.00 and our client submitted a bid for R10 272 027.70;

7.2 At bid evaluation stage, the committee found or identified arithmetic errors or effected arithmetic corrections on the tender pricing of Tshemedi Lefikapatso JV of R10 592 098.00 and the price was changed to R10 185 969.75, in other words it was reduced with the amount of R406 128.25;

7.3 The Municipality effected the arithmetic corrections without following the procedure applicable thereto in that Tshemedi Lefikapatso JV was not invited at evaluation stage or adjudication stage and even prior to the appointment to either agree or not agree to the change in the tender price;

7.4 At bid evaluation stage, our client's tender was one of the responsive bidders or tenders, or rather our client's tender was evaluated and it was found to be responsive;

7.5 At bid adjudication stage, our client's tender was not part of the bidders which were considered by the bid adjudication committee, in fact our client's name does not even appear from the lists of bidders whom their bids were adjudicated, in other words our client's bid was never adjudicated and or was eliminated from participating the bid adjudication committee for no logical, lawful or sound reasons.

8. It is based on the above, that the award of the tender to Tshemedi Lefikapatso JV was not only unlawful, but was also irregular, and it is on this basis that we request the Municipality to give us an undertaking before the close of business today that having regard to the irregularities identified above, the commencement or implementation of the project will not take place or is rather suspended pending the filing of the review application in the Free State Division Bloemfontein either by our clients or the Municipality, and in this regard we invite the Municipality to give us a written undertaking before the close of business today that the Municipality will file the review application against its own decision hereof within 30 days from date hereof.

9. Should we not receive your written undertakings by the close of business today 11 July 2023, we have instructions to approach the Free State Division, Bloemfontein on an urgent basis with an

[2] Pages 67 to 72.

> urgent application to interdict the Municipality from proceeding with the implementation or commencement of the project pending the filing of the review application.

[9] The first and second respondents denied the allegation and endeavored to explain their actions in their answering and further affidavits. The fact remains that the Municipality effected the arithmetic corrections without following the procedure applicable thereto in that the applicants were not invited at evaluation stage or adjudication stage or even prior to the appointment of the contractor; to make an input. The *audi alteram partem* dictum was not applied.

[10] In *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) the atmosphere in law in which cases that is of the nature *in casu* must be adjudicated, was stated.

> HEADNOTE:
> On 28 April 2012 the North Gauteng High Court granted an interdict restraining the SANRAL (the government agency in charge of national roads) from proceeding with its controversial 'e-tolling' system, an electronic tagging-and-tolling system that was to be implemented in Gauteng province to finance SANRAL's upgrading of the province's freeways. In an application for leave to appeal to the Constitutional Court —
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> Held: The high court interdict had the effect, for as long as it was in place, of preventing the national executive from fulfilling its statutory and budgetary responsibilities. Before making an order of such nature a court was obliged to consider — in addition to the usual common-law requirements for the granting of an interim interdict — the doctrine of separation of powers, which barred the judiciary from meddling in executive or legislative matters unless the intrusion was constitutionally mandated. The court had to take into account the interests of the government and the extent to which the requested interdict would intrude on executive terrain, particularly if it interfered with the allocation of public resources, which was a policy issue at the core of the executive domain. Such interference was unwarranted, except where there was proof of unlawfulness, fraud or corruption. In the present case the high court had, by preventing SANRAL from performing its statutory duties, meddled in fiscal affairs, and done so without even touching on the issue of separation of powers. The court had also ignored the substantial financial harm the interdict would cause the government. The high court's deafening silence on the issue of separation of powers, in conjunction with the balance of convenience, justified interference with the high court order. Interdict accordingly set aside on appeal. (Paragraphs [27], [44] – [47] and [65] – [73] at 232B – E, 236E – 237D and 241B – 242I.)

[11] In *Webster v Mitchell* 1948 (1) SA 1186 (WLD) the court articulated the test for an interim interdict.

HEADNOTE:

In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of applicant, he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted. Subject, if possible, to conditions which will protect the respondent.

[12] In *Setlogelo v Setlogelo* 1914 AD 221 at page 227 Innes JA, dealing with the peremptory requirement to demonstrate irreparable harm, ruled:

> That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such a case the test must be applied where the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party.

[13] In *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) at paragraph [50] it was ruled that the *Setlogelo* requirements *supra*, in respect of an interdict, still found application within a constitutional democracy.

> Under the Setlogelo test, the prima facie right that the claimant must establish is not merely the right to approach a Court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*.

[14] The irreparable harm averred and proven by the applicants are that

> 30. The applicants stand to suffer severe financial harm if they are not granted the interim relief. They tendered to execute the project for an amount of **R10 272 027-70.**

31. If the interim interdict is not granted and the construction in (sic) left to proceed nonetheless, it is unlikely that during the hearing in due course, which might occur towards the end of the year, the project would be completed with a high possibility being that the Court will not set aside the tender as it would be impractical to do so.

32. The applicants will thus be left with no alternative remedy to sue for damages, because they will not be in a position to demonstrate that there was intentional wrongdoing on the part of the municipality to succeed in an action for delictual damages.

[15] It is a reality of this case that the fifth respondent has already taken custody of the site and that resources may be wasted should they continue and just to be halted at a later stage. The applicants attempted alternative remedies by, for instance, requesting the first and second respondents to stop the implementation of the project until final determination of the review application. The request was not entertained.

[16] It is also a fact that the project must be finalized in order to serve the interest of the community. The dispute between the parties has to be adjudicated expeditiously. The request that the interdict be operative pending the finalization of the review is too broad. It might take months; if not years, and the prejudice to all the parties involved might be extensive. The order of this court will therefore include an instruction on the institution of the review proceedings.

[17] The costs for this application will be costs in the review application if the review application follows and is concluded.

[18] **ORDER**

It is ordered that:

1. Condonation is granted to the applicants to enroll the application in terms of Rule 6(12) of the Uniform Rules of Court.

2. Condonation is granted for the filing of a further affidavit by the first and second respondents in terms of Rule 6(5)(e) of the Uniform Rules of Court.

3. Pending the final determination of the review application, which is to be brought under Part B of this application, it is ordered that:

3.1 The first respondent is interdicted from taking any further steps to implement tender NLM/TS/008/2022-23: Construction of paved road and stormwater channel in Sebotsa and Monnamocho Road, including but not limited to concluding or implementing any agreement in respect of the tender with the third to fifth respondents or commencing or continuing with any construction in terms thereof.

3.2 The first and second respondents are interdicted and restrained from handing over control of the site, which is a subject of the tender, to the third to fifth respondents.

3.3 The third, fourth and fifth respondents are interdicted and restrained from implementing any agreement in respect of the tender with the first respondent or commencing or continuing with any construction in terms thereof.

4. The relief granted in paragraph 3 above is to operate as an interim order with immediate effect pending the final determination of the review to be sought in Part B of this application.

5. It is further ordered that the applicants must institute litigation on the review application within 60 (sixty) days of the date of this order. Failure of which the interim interdict shall lapse automatically.

6. The parties are granted leave to apply to this court on the same papers, duly amplified, to adjudicate the issue of costs should the lapsing of the interim interdict in paragraph 5 take effect. Otherwise, costs are to be costs in the review application.

[redacted]

M OPPERMAN, J

APPEARANCES

For the applicants:	**O.K. CHWARO**
Instructed by:	Modiboa Attorneys Incorporated KLERKSDORP c/o McIntyre Van Der Post Attorneys BLOEMFONTEIN
For the first & second respondents:	**L.A. ROUX**
Instructed by:	Maritz – Willemse Attorneys WELKOM c/o Hill McHardy & Herbst Incorporated BLOEMFONTEIN