

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: ✓ |

Date: **7th November 2023** Signature: _____

CASE NO: 2023-086842

DATE: 7TH NOVEMBER 2023

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL:
HUMAN SETTLEMENTS AND INFRASTRUCTURE
DEVELOPMENT, GAUTENG PROVINCE**

First Applicant

**THE DEPARTMENT OF INFRASTRUCTURE
DEVELOPMENT, GAUTENG PROVINCE**

Second Applicant

and

GLADAFRICA PROJECT MANAGERS (PTY) LIMITED

First Respondent

NGCOBO, JUSTICE SANDILE N O

Second Respondent

**THE ARBITRATION FOUNDATION OF
SOUTHERN AFRICA**

Third Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL:
DEPARTMENT OF HEALTH, GAUTENG PROVINCE**

Fourth Respondent

Neutral Citation: *MEC: Human Settlements and Infrastructure Development,
Gauteng and Another v GladAfrica Project Managers and 3 Others*
(086842/2023) [2023] ZAGPJHC --- (07 November 2023)

Coram: Adams J

Heard: 25 October 2023

Delivered: 07 November 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 07 November 2023.

Summary: Urgent application – for interim interdictory relief to stay arbitration and arbitration proceedings, pending judicial review – the applicants should demonstrate a *prima facie* right – judicial review of decision relating to public procurement and appointment of service provider – review based on the doctrine of legality – factual basis for review not proven – *prima facie* right not demonstrated – requirements for interim interdict not fulfilled – urgent application dismissed.

ORDER

- (1) The first and the second applicants' urgent application be and is hereby dismissed with costs.
- (2) The first and the second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first respondent's costs of the urgent application, such costs to include the costs consequent upon the utilisation of Senior Counsel, where so employed.

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the first applicant (The MEC) and the second applicant (The GDID) for interim interdictory relief against the first respondent (GladAfrica) and the three other respondents. The second to the

fourth respondents played no part in the urgent court proceedings and it is assumed that they have elected to abide the decision of this court. Pending the determination of final relief sought in part B of the notice of motion, the applicants seek an order, on an urgent basis, interdicting GladAfrica and the second respondent (Justice Ngcobo), who has been appointed as the Arbitrator in an arbitration between the applicants and GladAfrica, from taking any further steps and/or proceedings in any manner with the arbitration hearing currently before Justice Ngcobo. Therefore, in a nutshell, what the applicants seek in this urgent application is a stay of the arbitration proceedings, pending the outcome and the final adjudication of part B of the notice of motion.

[2]. In part B, the applicants apply for a judicial review and the setting aside of the decision taken by the applicants and/or the fourth respondent on 18 January 2019, to appoint GladAfrica as a Professional Service Provider (PSP) to provide professional services (specifically architectural, mechanical, electrical, civil and structural engineering services) at the Bertha Gxowa, the Far East, the Pholosong, the Tambo Memorial and the Tembisa Hospitals in Gauteng. The applicants also apply to have the said decision declared constitutionally invalid, as well as for an order that any contract and/or Service Level Agreement (SLA) entered into between the MEC and GladAfrica, pursuant to the appointment of the latter company as a PSP, be declared void *ab initio*. Ancillary and alternative relief are also sought in part B, such as an order that GladAfrica repays all the profits it has obtained from the 'impugned contracts'.

[3]. In the arbitration before Justice Ngcobo, GladAfrica claims an amount of about R57 million from the MEC and the GDID, which amount represents their agreed fees for professional services rendered pursuant to and in terms of a SLA concluded between the parties after GladAfrica was appointed to a panel of PSP's in terms of the award of a public procurement tender.

[4]. The judicial review application by the applicants, which is in fact a so-called 'self-review', is based on the legality principle and they contend that their challenge of the said decision entitles them to an interim interdict. GladAfrica opposes the urgent application and avers that the applicants have failed to make

out a case for the interdictory interim relief sought in the urgent application. The question to be considered in this application is therefore whether a case has been made out by the applicants for the interdictory relief sought. In particular, the issue to be decided is whether the applicants have demonstrated a *prima facie* right, which requires and is worthy of protection by an interim interdict.

[5]. The applicants rely, for the relief which they seek *in casu*, on an assertion that, at the time when GladAfrica was appointed to render the services in question, there was no approved or appropriated budget for such services to be rendered. There was no approved or appropriated budget, so it is alleged by the applicants, by the GDID or by the Gauteng Department of Health (GDoH) or by the Gauteng Provincial Treasury (GPT). This then means, so the case on behalf of the applicants continue, that there has been a contravention of s 38(2) of the Public Finance Management Act¹ (PFMA), which, in turn meant, that the appointment by the GDID of PSPs to undertake new condition assessments at the Healthcare Facilities were unlawful and fell afoul of the legality principle.

[6]. Section 38(2) of the PFMA reads as follows:

‘(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.’

[7]. Therefore, in their application for interdictory relief, the applicants contend that the elements of an interim interdict have been established, in that they have grounds to pursue the self-review application contemplated under part B of the notice of motion.

[8]. Mr Konstantinides SC, who appeared on behalf of the first respondent, submitted that, on a broad conspectus of the totality of the facts presented in the papers and the serious contradictions, as well as the preponderance of the evidence put up in answer by GladAfrica, the applicants have failed – at a factual level – to make out a case, not even a *prima facie* one, that their self-review application has prospects of success. What the applicants did, so the argument continues, was to attempt to engineer a basis for their application (when none exists), when faced with arbitration proceedings to compel payment. They also

¹ Public Finance Management Act, Act 1 of 1999;

seek refuge in a self-review process, so the argument continues, to scupper the legal process consented to in the SLA to enforce payment.

[9]. I find myself in agreement with these submissions. The claim by the applicants that there was no approved budget or an appropriated budget for the services to be rendered by GladAfrica, is belied by the objective documentary evidence, in particular documentation emanating from the applicants themselves. The allegations by the applicants relating to the foregoing, are also contradictory in that, as correctly pointed out by GladAfrica, the case of the applicants was initially to the effect that there was no approved budget at all for the services to be rendered and that version later changed to one to the effect that the budget was not approved for the complete scope of the work to be done. There are further material contradictions, which detract from the version of the applicants.

[10]. Moreover, many of the documents produced by GladAfrica in this application were prepared by the GDID and signed by numerous of its personnel. No evidence whatsoever is adduced by the applicants with recourse to those individuals whose names appear on the documents. No affidavit(s) have been put up by the GDID's personnel to contest the accuracy of what transpired and which is embodied in writing. These documents, in particular, contradict the version of the applicants that the services to be rendered were not budgeted for.

[11]. So, for example, the applicants assert that a Mr Mahapa, whose name appears in the letter of 18 January 2019, 'was among the officials who consulted on several occasions with the current legal representatives of the applicants. He knows full well the founding affidavit I have deposed to before this court. He agrees and aligns with the founding affidavit. If he had a different view, he would have informed me and the legal representatives. He did not do so'. No confirmatory affidavit by Mr Mahapa is produced. This, in my view, entitles the court to draw an adverse inference to the effect Mr Mahapa is not comfortable with the version of the applicants. Importantly, Mr Mahapa seemingly does not contest or distinguish the content of the said letter of 18 January 2019 and the references therein to the existence of a budget, which, in my view, places doubt on the applicants' claim that there was no approved budget.

[12]. The further point is that the failure on the part of the applicants to secure the evidence of any of the persons named in the correspondence who worked at GDID at the relevant time, to gainsay the express content of the documentary evidence put up by GladAfrica, raises serious questions as to the probity of the allegations concerning the existence of a budget. As correctly submitted on behalf of GladAfrica, when the recommendation was made by Mr Mahapa that the PSP's be appointed (included in which was GladAfrica), there was a positive recordal that the OHS project had been allocated a budget of R215 million in the Estimated Capital Expenditure ('ECE') for the 2018/2019 financial year. This, in my view, puts paid to the applicants' assertion that the charges relating to the services to be rendered by GladAfrica were not budgeted for by the applicants and the GDoH.

[13]. By all accounts, funds had in fact been 'appropriated' by the relevant provincial government departments for the fees to be charged by the PSPs, in particular GladAfrica, in respect of professional services to be rendered in relation to compliance with the occupational, health and safety (OHS) regulations at the various hospitals in Gauteng. This much was spelt out, as I have already indicated, in the communiqué dated 18 January 2019 from the GDID's Mr Mahapa, in his capacity as the Internal Project Manager, which letter was endorsed by a number of officials of the GDID. In the relevant part, the said missive reads as follows: -

'The project has been allocated a budget of R215 million in the ECE for the 2018/2019 financial year'.

[14]. For all of these reasons, I am not convinced that the applicants have made out a case for the interim interdictory relief sought by them. They have not, in my view, demonstrated that, at a factual level, they are entitled to self-review the decision which they will in due course seek to have set aside. The applicants' case therefore falls to be dismissed.

Costs

[15]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are

good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*².

[16]. I can think of no reason why I should deviate from this general rule.

[17]. Accordingly, I intend awarding costs in favour of the first respondent against the first and the second applicants. In that regard, it requires mentioning that the third and fourth respondents, who were the other unsuccessful bidders, played no part in this litigation. In any event, no relief was sought against any of them by the applicants, hence them not opposing the application.

Order

[18]. Accordingly, I make the following order: -

- (1) The first and the second applicants' urgent application be and is hereby dismissed with costs.
- (2) The first and the second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first respondent's costs of the urgent application, such costs to include the costs consequent upon the utilisation of Senior Counsel, where so employed.

L R ADAMS

*Judge of the High Court
Gauteng Division, Johannesburg*

² *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

HEARD ON:	25 th October 2023
JUDGMENT DATE:	7 th November 2023 – judgment handed down electronically
FOR THE FIRST AND THE SECOND APPLICANTS:	Advocate J Motepe SC, together with Advocate N C Motsepe
INSTRUCTED BY:	Galananzhele Sebela Attorneys Inc, Bruma, Johannesburg
FOR THE FIRST RESPONDENT:	Adv N Konstantinides SC
INSTRUCTED BY:	Van Hulsteyns Attorneys, Sandown, Sandton
FOR THE SECOND, THE THIRD AND THE FOURTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance