

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Reportable: YES

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Case number: 2214/2022

In the matter between:

HT PELATONA PROJECTS (PTY) LTD

Applicant

And

TSWELOPELE LOCAL MUNICIPALITY

First Respondent

BOITSHOKO PERCIVAL DIKOKO N.O

Second Respondent

BOITSHOKO PERCIVAL DIKOKO

Third Respondent

**NSM PROFESSIONAL SERVICES AND
GENERAL PROJECTS**

Fourth Respondent

[as joint venture partner of NSM Professional Service
And general Projects JV Tamane Civils]

TAMANE CIVIL CONSTRUCTION (PTY) LTD

Fifth Respondent

[as joint venture partner of NSM Professional Service and
general Projects JV Tamane Civils]

JUDGMENT BY:

C REINDERS, ADJP

HEARD ON:

10 JUNE 2022

DELIVERED ON:

13 JUNE 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 08h00 on 13 JUNE 2022.

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- [1] The applicant is HP Pelatona Projects (Pty) Ltd. The first respondent is the Tselopele Local Municipality (the "municipality"), whilst the second and third respondents are the municipal manager of the first respondent. The fourth and fifth respondents are respectively NSM Professional Services and General Projects (Pty) Ltd and Tamane Civils (Pty) Ltd, the two partners of the joint venture (the "JV") as described in the heading. On 20 May 2022 under the same case number the applicant brought an urgent application for an interim interdict with immediate effect in terms whereof the respondents be interdicted and restrained from implementing or acting upon the decision of the municipality to award a public tender in respect of the refurbishment of the sewer pump station in Bultfontein/Phahameng to the fourth (then the second) and fifth (then the third) respondents pending final adjudication of a review application to be instituted.
- [2] The order issued on 23 May 2022 included, amongst others, the following relief:
- “2. Pending the final adjudication of a review application to be instituted on/before 27 May 2022, the respondents are interdicted and restrained from in any way further implementing or acting upon the decision of the first respondent to award the public tender: **SCM/TSW/11/2021-2022: BULTFONTEIN/PHAMANG Refurbishment of Sewer Pumpstation** to the joint venture of second and third respondents.
 3. The order in paragraph 2 above shall serve as an interim interdict with immediate effect.

4. Should the applicant fail to institute review proceedings as contemplated in 2 above, paragraphs 2 and 3 of this order shall lapse."

Daffue J further laid down truncated periods with the aim of finalising the intended review application as swiftly as possible within such time frames. For purposes of this judgment reference to the aforementioned prayers 2, 3 and 4 will be "the order".

[3] In adjudicating the matter Daffue J considered the four well known requirements for interim relief and comprehensively dealt with the relevant case law. He dealt with the defences of the first respondent. None of the defences ostensibly relied upon included that relief would amount to final relief. It was ostensibly amongst others submitted that the applicant therein had not proven any of the requirements of an interim interdict. Those arguments have been clearly rejected and the court found the requirements of an interim interdict to have been proven and granted the orders as aforesaid.

[4] A notice of application for leave to appeal was filed by the first respondent on 31 May 2022, prompting the application before me. It suffices to say that the first respondent, having filed the "application for leave", on legal advice holds the view that the order of Daffue J has final effect entitling it to note an appeal against the order, resulting in the suspension thereof based on the provision of s18(2) of the Superior Court's Act 10 of 2013 (the "Act"). I do not intend to deal for purposes hereof with the factual matrix herein save to say that the applicant seeks relief on an urgent basis declaring that any steps taken by the municipality and/or the JV to implement or act upon the first respondent's decision to award the public tender: **"SCM/TSW/11/2021-2022 Bultfontein/Phahameng Refurbishment of Sewer Pump Station"** subsequent to the granting of the court order, constitutes or shall constitute a breach of the said order.

[5] First respondent prays that the aforementioned relief claimed by applicant be dismissed with costs. Concomitantly it moves for a suspension of the aforesaid interim relief in terms of s18(3) of the Act pending the final determination of the application for leave to appeal.

[6] *In Pepcor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd 2021 (5) SA 115 (SCA)* at para [16] the Supreme Court held that the traditional requirements (that an order is not appealable because it is not final in effect) have been subsumed under the broader constitutional "interest of justice" standard.

See also: *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19 at paragraph [40] where reference was made to *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC wherein Moseneke DCJ (as he then was) set out the principle as follows:

"This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is 'the interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. 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."

The Deputy Chief Justice also dealt with the role of separation of powers in relation to appealability as follows:

"A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever."

- [7] During argument I was referred to the unreported judgment of Naidoo J with a similar factual matrix. In *SS Mtakati v SH Ntombela N. O. and three others* (Case number: 1248/2021 delivered on 16 April 2021) the court had to adjudicate on the nature of an interim interdict granted by Mhlambi J. I had the privilege of reading the reasoning of Naidoo J and I agree with the conclusions reached therein.
- [8] In my view the very purpose of the order of Daffue J was to regulate the process pending the review. In doing so he considered all the requirements of an interim order. The order clearly does not have final effect nor does it dispose of any of the main disputes between the parties. The administration of justice will fall into disrepute if a disgruntled in such circumstances can negate a court order by merely filing some sort of notice of leave to appeal. Where a party feels disgruntled with an order which is clearly interim in nature, it should in my view prompt an application in terms of s18(2). The present counter-application is nothing but an afterthought having been faced with the relief sought by the applicant herein. Even if I am wrong in this view,

I am not persuaded that the relief sought in the counter-application should be granted in these circumstances. However, I clearly cannot find the first respondent to be acting *mala fide* herein — I have to accept that it acts upon legal advice negating *mala fides*.

[9] For the reasons stated the counter-application cannot succeed. In essence I am required by the applicant to grant a declaratory order herein. A High Court has a discretion to grant such an order. In *casu* I consider it to be appropriate to assume such jurisdiction and to adjudicate therefore whether I should issue the declarator sought. I am satisfied that prayer 2 of the Amended Notice of Motion should be granted, however I am not prepared to grant a punitive cost order as sought in view of my finding of absence of *mala fides*. I might add that the applicant also moved for orders that leave be granted to it to supplement its papers to apply to this court, should it be necessary, for orders of contempt of court against the municipal manager of the first respondent and the directors of the joint venture. I do not intend to grant such relief as the applicant as *nuntius* does not need such leave.

[10] Accordingly I make the following orders:

9.1 It is declared that the filing of the notice of application for leave to appeal dated 31 May 2022 does not have the effect of suspending the operation of the court order dated 23 May 2022 under case number 2214/2022.

9.2 The counter-application is dismissed.

9.3 The respondent to pay the costs of the application and the counter-application.

C.REINDERS, ADJP

On behalf of the Applicant:

Adv W van Aswegen

Instructed by:

Peyper Attorneys
BLOEMFONTEIN

On behalf of the first respondent:

Instructed by:

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