



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 890/2016

In the matter between:

BABEREKI CONSULTING ENGINEERS CC

Applicant

and

**THE MINISTER: DEPARTMENT OF WATER
AND SANITATION**

1st Respondent

VHARANANI PROPERTIES (PTY) LTD

2nd Respondent

BLOEMWATER

3rd Respondent

**THE MINISTER: DEPARTMENT OF HUMAN
SETTLEMENTS**

4th Respondent

**THE PREMIER: FREE STATE PROVINCIAL
GOVERNMENT**

5th Respondent

NKETOANA LOCAL MUNICIPALITY

6th Respondent

SETSOTO LOCAL MUNICIPALITY

7th Respondent

TOKOLOGO LOCAL MUNICIPALITY

8th Respondent

CORAM: MOKGOBO, AJ

HEARD ON: 10 JUNE 2016

JUDGMENT BY: MOKGOBO, AJ

DELIVERED ON: 30 JUNE 2016

[1] This is an application for leave to appeal against the whole of the judgment and order of my brother, **Phalatsi AJ** (as he then was) granted on 15 April 2016 under case number 890/2016.

[2] The applicant seeks leave to appeal the judgment on various grounds as set out in its supplementary grounds of appeal. The grounds relied upon by the applicant are the following:

2.1 The learned Acting Justice erred in uplifting the interim interdict granted by **Chesiwe AJ**.

2.2 The learned Acting Justice misdirected himself by having reference to the totality of the evidence presented for purposes of the reconsideration application, especially since the second respondent specifically relies upon certain paragraphs in its affidavit to support the reconsideration application.

2.3 The learned Acting Justice could not have regard to any allegation made in the affidavit, nor was the applicant called upon for purposes of the reconsideration under the Rule 6(12) (c) notification to answer to any other allegations.

2.4 The learned Acting Justice erred in holding that the applicant had failed to establish a prima facie right. In this context, the Acting Justice made the following errors:

2.4.1 He failed to properly consider that none of the other respondents, most notably the first respondent, alleged that the agreement upon which Babereki relies did not overlap with that of second respondent;

2.4.2 Indeed, the learned Acting Justice failed to properly consider or appreciate as far as the applicant and the first respondent is concerned, and when the matter served before **Chesiwe AJ**, it was common cause between the parties that the rights given to the second respondent and the applicant overlapped.

2.4.3 The learned Acting Justice erred in finding that the only way in which the applicant could prove the terms its agreement, was by putting up the document itself.

2.4.4 The learned Acting Justice erred by not properly considering the totality of the evidence on the question. Most notably:

2.4.4.1 The absence of any dispute between the Applicant and the First Respondent as to the terms of the agreement and its extent;

2.4.4.2 The absence of any countermanding evidence tendered by the Second Respondent;

2.4.4.3 The fact that after the Applicant had temporarily abandoned one of the construction sites, that it was common cause between the parties that the second respondent had later occupied the exact same site – to such an extent that the officials of the Municipality concerned thought it was the Applicant who had returned.

2.5 The learned Acting Justice erred by not finding that the second Respondent's absence at the initial hearing was wilful. The learned Acting Justice failed to consider the evidence proffered by the applicant, pertaining to the letter calling for cessation sent, media reports after the applicant was instituted, etc. A probable finding must have been that the second respondent knew about the proceedings.

[3] A substantial number of grounds of appeal have been raised, however, during argument **Adv. Gobler** limited his grounds to the following issues namely: His first contention was that the

reconsideration application before **Phalatsi AJ** was based on the following papers:

- Notice of motion
- Founding affidavit of Babereki
- Reconsideration application
- Minister's affidavit and
- paragraphs 3,4,5 and 6 of the Vheranani application.

He submitted that **Chesiwe AJ**, when she granted the interim order, was satisfied that Babereki had made out a proper case in its founding affidavit. **Phalatsi AJ** was therefore not enjoined to ventilate any issue beyond that. He further argued that the balance of issues including the granting of the interim interdict were to be reserved for later adjudication as it is evident from paragraph 7 of 2nd respondent's reconsideration application. Secondly, he contended that it is a basic principle of the law of evidence that proof of a primary fact can be done in various ways. It can be done by viva voce evidence or affidavit. Appending a document like in the present matter is not a requirement. He further submitted that applicant has proved the infringement of its rights and for his proposition he referred me to paragraph 23.6 on page 29 of the paginated papers. He further contended that failure on the part of any of the respondents to reply on or deny the averments is by implication an admission of such infringement. He is of the view that the contract in the present matter was not an issue and it was not necessary to append it to the papers. Lastly, he contended that 2nd respondent was aware of the date of the hearing and his absence was wilful. He argued that in lieu of service by the Sheriff, the news of the application

was in the public domain and 2nd respondent ought to have known about the date of the initial hearing. He is of the view that the probable finding by **Phalatsi AJ** ought to have been that 2nd applicant's absence was wilful. In conclusion he submitted that there are reasonable prospects that the full bench confronted with the same facts will come to a different conclusion.

- [4] Counsel for both the 1st and 2nd respondents oppose the application. They contend that applicant had failed to establish a *prima facie* right which would entitle it to be granted the interim interdict and secondly applicant had failed to demonstrate to the court the alleged infringements of its right. They further contend that it was incumbent upon applicant to have attached the necessary evidence to its founding affidavit to demonstrate to the court the alleged infringement of its rights by 2nd respondent and it has exclusive rights emanating from its contract with 1st and 3rd respondents. The 2nd respondent further contends that its application for reconsideration was based on the relief sought in its notice of motion and founding affidavit and not on limited grounds as alleged by applicant. It is therefore both their submissions that Phalatsi AJ was correct in dismissing the interim order.
- [5] The test for granting an application for leave to appeal is whether the appeal would have a reasonable prospect of success.
- [6] I have read the well-crafted judgment of my colleague, **Phalatsi AJ**, the Notice of Motion, founding affidavit of Babereki, reconsideration application and the Vheranani affidavit. I agree

with **Adv Gobler** that the papers mentioned above, save the judgment of course, were the only papers placed before **Phalatsi AJ**, during the reconsideration application. It must be pointed out at this stage that the basis of the reconsideration application was about whether the applicant (Babereki) made out a case for the granting of an interim order in its founding papers. (see paragraph 3 reconsideration application at page 264 of the papers). The Babereki affidavit was the crucial document upon which the interim order was granted. It was therefore incumbent upon **Phalatsi AJ** to have regard to such affidavit to determine whether the legal requirements have been satisfied for the granting of the interim order.

- [7] It was an express averment in the Babereki Affidavit that the contract concluded by the 1st and 2nd respondents infringes upon its rights. The contract relates to the provision of the same services for the areas mentioned in the Notice of Motion. The specifics as to how the rights were infringed are not clear from the affidavit. Significantly, what is further lacking from the affidavit is an averment that Babereki has exclusive rights to render the services in the areas concerned and 2nd respondent has been allocated the same units allocated to Babereki on the same site. Without such express averments in the affidavit, the contract and the scope of works to show the infringement, it is difficult if not impossible to conclude that applicant had made out a proper case for the granting of the interim order. **Phalatsi AJ** was in my opinion correct by having found that Babereki had failed to show a prima facie right.

- [8] On the issue of non-appearance by 2nd respondent, **Phalatsi AJ** had addressed the matter. His finding is legally sound and he cannot be faulted. In addition to his reasoning, I can add that it was never and it could never have been the intention of the legislature that news in the media is proper service of court proceedings. The contention by **Adv. Gobler** is in my view without merit.
- [9] Based on the above reasons, I am not persuaded that there is any reasonable prospect of success on any of the grounds raised.
- [10] In conclusion **Adv Gobler**, submitted that costs occasioned as a result of a postponement on 3 June 2016 be costs in the appeal if leave is granted. In the event leave to appeal is not granted, each party carry its costs of the day. He submits that the state of the court file cannot be ascribed to the applicant as the file was with **Phalatsi AJ**. Counsel for both 1st and 2nd respondents submitted that it was the responsibility of applicant to ensure that the court file was in order and the wasted costs occasioned by the postponement on 3 June, be borne by applicant.
- [11] The postponement of the matter was at the instance of applicant due to papers that were not properly paginated. The explanation that the file was with **Phalatsi AJ**, is in my view no justification for its failure to ensure that the papers are in order. Fairness and justice dictate that respondents cannot be saddled with costs occasioned by no fault on their part.

[12] The following order is made:

- (a) Application for leave to appeal is dismissed with costs including the wasted costs occasioned by the postponement on 3 June 2016.

MC MOKGOBO, AJ

On behalf of Applicant: Adv. Grobler
Instructed by:
Mphafi Khang Inc.
Bloemfontein

On behalf of 1st Respondent: Adv. Motete SC
Instructed by:
Hahn and Hahn Attorney
C/o Symington & De Kok
Bloemfontein

On behalf of 2nd Respondent: Adv. TL Marolen
Instructed by:
Ramabulana Attorneys
C/o Bezuidenhouts
Bloemfontein