



**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

Appeal number: A1/2016

In the matter between:

Q-CIVILS (PTY) LTD

Appellant

and

LTE HOLDINGS (PTY)LTD t/a LTE CONSULTING
(Registration Number: 2000/020739/07)

1ST Respondent

HENDRIK SMIT

2ND Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

3RD Respondent

CORAM:

RAMPAI, J, REINDERS, J *et* HINXA, AJ

HEARD ON:

8 AUGUST 2016

JUDGMENT BY:

REINDERS, J

DELIVERED ON:

20 OCTOBER 2016

- [1] This is an appeal against an order granted by Bokwa AJ on 14 October 2015. Leave was granted to the full bench by the *court a quo* on 26 November 2015.
- [2] The Appellant is Q-Civils (Pty) Ltd (“Q-Civils”), a civil construction company and the applicant in the *court a quo*. The First Respondent is LTE Holdings (Pty) Ltd t/a LTE Consulting (“LTE Consulting”) a firm of engineers, whilst the Second Respondent, Hendrik Smit (“Smit”) is employed on site by LTE Consulting. The Third Respondent is Mangaung Municipal Municipality (the “Municipality”), who appointed LTE Consulting to oversee the implementation of a contract concluded between Q-Civils and the Municipality for the rehabilitation of the Kenneth Kaunda Road in Bloemfontein.
- [3] On 25 September 2015 Q-Civils brought an urgent application on an *ex parte* basis. Moloi J granted a *rule nisi*, (returnable 15 October 2015), and the following relief operated as an interim interdict with immediate effect pending the outcome of the application:
- “2.1 That permission be given to applicant to perform the necessary works in terms of the heavy rehabilitation contract: Kenneth Kaunda Road, contract no.:T1327B between Applicant and Third Respondent outside of the hours stated in the aforesaid contract until 22h00;

2.2 That the First Respondent be prohibited from letting Second Respondent act as engineer in terms of the aforesaid contract since the Second Respondent is not a qualified engineer as such;

2.3 That Second Respondent be prohibited and interdicted from threatening and/or intimidating and/or falsely accusing the Applicant.”

[4] LTE Holdings and Smit thereupon brought an application in terms of Uniform Rule 6(12)(c) for reconsideration of the order. On 14 October 2015 Bokwa AJ handed down judgment, setting aside the order granted by Moloi J with costs. Q-Civils was granted leave to appeal against this order, and advances the following grounds of appeal:

- “1. The learned judge erred in not taking into account that the applicant has a clear right to perform its contractual obligations properly without any unlawful interference, especially having regard that the project involves millions of rands;
2. The Learned judge erred in not taking into consideration that the applicant followed due process and already requested permission to work after hours and that there was a lack of meaningful response;
3. The Honourable Court erred in not finding that the matter is urgent as the quality of the road is being compromised;
4. The court *a quo* erred in finding that the matter was not urgent, for according to the Court the applicant knew the attitude of the first and second respondent as set out in Annexures “TK15” and “TK16”;
5. The Honourable Judge erred in not taking into account the oral evidence that the e-mail sent on 23 September 2015 at 11h18 was

brought to the attention of Judge Moloi in chambers before the order was obtained;

6. The court *a quo* erred by referring and taking into consideration the requisites for a final interdict, while the court was asked to reconsider the application for a temporary interdict;
7. The Learned Judge erred in not finding that the applicant had a clear right in the circumstances, or at the very least a *prima facie* right;
8. The Honourable Judge erred in not finding that the applicant had in the circumstances a well-grounded apprehension of irreparable harm having regard to the fact that the quality of the road is being compromised and the second respondent is threatening to have the contract cancelled;
9. The Learned Judge erred in not taking into account that the balance of convenience favours the applicant;
10. The court *a quo* erred in not finding that the applicant had no other satisfactory remedy, especially having regard to the fact that the applicant had already submitted a request to the first respondent to work after hours and also informed the first respondent about the second respondent's threats;
11. The Learned Judge erred in finding that the applicant has failed to satisfy any of the requirements of an interim interdict;
12. The Honourable Judge erred in not following the approach as set out in the cases of *Webster v Mitchell* 1948(1) SA 1186 (W) at 1189 and *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688;
13. The court *a quo* erred in not finding that the threats made by the second respondent to the applicant ought to be considered serious,

especially in the light of the fact that the value of the contract is more than R30 million rands and the second respondent as the representative of the engineer, who in turn is a representative of the municipality, has the necessary influence to have the contract cancelled;

14. The Learned Judge erred in not taking into account that it is in the interest of the applicant and the third respondent that the project be completed in time and that the quality of the road is not compromised. The Court should furthermore have taken into account that the public at large will benefit by the completion of the road and that respondents will not be prejudiced;
15. The Honourable Court erred in setting aside the order made by Judge Moloi on 25 September 2015.”

[5] The dominant purpose of Rule 6(12)(c) is to afford an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his/her absence. In **ISDN Solutions (Pty) Ltd v CSDN Solutions CC** 1996 (4) SA 484 (W) at 486H-487C Faber AJ articulated as follows:

“The rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order...The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto.”

See also: **National Director of Public Prosecutions v Braun** 2007 (1) SA 189 (C).

- [6] In support of the application for reconsideration before Bokwa AJ respondents filed an affidavit headed “Affidavit in support of reconsideration in terms of Rule 6(12)(c).” Q-Civils in turn filed an answering affidavit hereto. The respondents in their mentioned affidavit dealt with the merits of the matter. In regards to such affidavits in terms of Rule 6(12)(c) procedures see the unreported judgment of this court by Van Zyl J in **Docmania Six BK h/a DLB Cleaning and Gardening Services v Segabokeng JV Poloko Trading 541 en Andere** (Application Number 336/2010) delivered on 29 January 2010; 5 February 2010 (reasons furnished) and in particular paras [14] to [20] thereof.

See also: **South African Airways Soc v BDFM Publishers (Pty) Ltd** 2016 (2) SA 561 (GJ).

- [7] Bokwa AJ was therefore merely called upon in terms of Rule (6)(12)(c) to reconsider the provisional order granted. He was not called upon to finally adjudicate the matter as would be the case on the return date (or as in the case of anticipation of the return date of a *rule nisi* as envisaged in Rule 6(8).) From his judgment it would appear that this is exactly what he did and in so adjudicating applied the principles of a final order. I say so for the reason that the learned acting judge in par [21] of his judgment stated that the question was whether a clear right was established by the applicant with reference to **Nienaber v Stuckey** 1946 AD 1049.

- [8] The provisional order that was granted was never final in its operation and clearly was of an interim nature. Prayer 3 of that

order stated that the relief granted was to operate as an interim order pending the outcome of the application. In this regard I am of the view that Bokwa AJ erred. However, I agree with the order by Bokwa AJ in uplifting the provisional order. I say so for the following reasons. It is Q-Civil's case that during September 2014 it submitted a tender relating to a contract with the Municipality. It is common cause that the General Conditions of Contract for Construction Works, Second Edition (2010) by the South African Institution of Civil Engineering ("the GCC"), is applicable to the contract. In terms of clause 5.8 of the GCC none of the works may be executed between sunset and sunrise unless the engineer's written permission is obtained subject to such conditions that may be laid down by the engineer. It is common cause that such permission had not been obtained or granted. Q-Civils in its founding papers stated that it became necessary to work outside the normal hours in view thereof that it is only provided with tar by its suppliers until approximately 17h00 each day, and that it takes about 40 minutes to empty the said trucks. Q-Civils averred that there could be five truckloads of tar at a time, and therefore extended time is required to empty each truck load. It further avers that it performs in terms of a time schedule and that it is imperative that the road is timeously finished.

- [9] Q-Civils avers that on 18 September 2015 Smit was approached and same was requested to obtain the necessary permission to work after the normal working hours. According to them Smit has failed to do so. As far as I am concerned the relationship between the Q-Civils and the municipality is regulated by contract. The parties agreed on its working hours and the procedure to be

followed in case Q-Civils wished to work outside the agreed hours. This application is not a review of the decision of the engineer (and/or the municipality). The court is not at liberty to make decisions on behalf of contracting parties. Bokwa AJ in this regard was not convinced that Q-Civils was entitled to approach court whilst it was aware that it should follow an agreed process. He referred to an e-mail dated 23 September 2015 at 11:18 am by Smit (Annexure “TK16”) stating *inter alia* as follows:

“We will not unreasonably withhold permission for said (sic) work after hours but request that your client follow the agreed processes. Your letter was the first indication to LTE that Q-Civils wish (sic) to work outside the agreed working times”

as well as a further e-mail at 11:19 am (Annexure “TK15”) indicating:

“To date we have not received the request with motivation to extend the operating hours as defined in this clause.”

- [10] Although not stating so in specific terms, Bokwa AJ was not satisfied that Q-Civils has shown a *prima facie* right (though open to some doubt) that it was entitled to the relief that was granted on 25 September 2015. So seen I am of the view that he cannot be faulted and that he correctly uplifted the provisional order.

- [11] Without derogating from the above, the reasons forwarded by Q-Civils why it should be allowed to work after sunset and outside normal operating hours are flimsy. To me it seems as if same relates to arrangements which Q-Civils and its suppliers agreed upon and therefore the dilemma faced by Q-Civils was self-created. Be that as it may, Q-Civils should in the proper way first

have engaged and obtained the permission of the engineer as it has contractually agreed to do. The respondents objected to the court hearing the matter and stated that in terms of clause 10.7.1 of the GCC the parties have agreed to arbitration in case of a dispute. In view of the conclusions above it is not necessary to deal with the point save to mention that this kind of dispute (extension of working hours) seems to me to be exactly the kind of dispute to be adjudicated upon in a speedily and informal arbitration without resorting to court.

[12] According to the papers the tender was extended on 17 September 2016 and the new completion date of the contract was 22 April 2016. This appeal was heard after the expiring of the said date. The appeal might therefore have become academical and without any practical effect. It is trite that appeals of an academical nature should be struck from the roll as court orders should not be academical. In as far as Bokwa AJ merely reconsidered the provisional order dated 25 September 2015, I also had my reservations whether that order was appealable. However, we were not addressed on the last-mentioned point and I mention same in passing.

[13] In its heads of argument the respondents initially (and *in limine*) argued that the Q-Civils did not set security for costs of the appeal. At the commencement of the proceedings it was contended by Mr de Villiers, appearing on behalf of the respondents, that the appeal should be struck off for this reason. We made the arrangement that both parties argue the appeal *in toto* including this aspect. The respondents relied on the provisions of Rule 49(13)(a). The sub

rule entitles the court to strike the appeal off the roll. We were not prepared to do that as both parties were before court, had filed heads of argument and had already incurred the costs of being before us. No formal application has been launched by the respondents. In these circumstances it obviously serves justice better to hear the appeal than to strike it from the roll.

[14] Respondents moved for the costs of two counsel in case they are successful. The question is once again a matter of judicial discretion. Mr Steenkamp, on behalf of the appellant, referred us to **Motaung v Mothiba N.O.** 1975 (1) OPD at 631A-C wherein Steyn J aligned himself with the relevant considerations to be taken into account. These include, *inter alia*, the volume of the evidence dealt with by counsel, complexity of the facts or the law and the importance of the matter in issue. Mr de Villiers pressed hard upon us to accept that the good name and reputation of Smith was at stake and thus warranted the costs of two counsel to be employed. I am not convinced that this constitute good reason to permit the costs of two counsel.

[15] As far as prayers 2 and 3 of the Notice of Motion were concerned, no case has been made for the granting of those orders and they were correctly uplifted by Bokwa AJ.

[17] In all the circumstances the appeal stands to be dismissed and I would make the following order:

The appeal is dismissed with costs.

C. REINDERS, J

I concur.

M. H. RAMPAL, J

I concur.

M. D. HINXA, AJ

It is so ordered.

On behalf of appellant: Adv. M.D.J. Steenkamp
 Instructed by:
 Van der Berg & Van Vuuren Attorneys
 Bloemfontein

On behalf of respondent: Advv. R.F. de Villiers and S.M. van Vuren
 Instructed by:
 Van Zyl's Incorporated, c/o Phatsoane
 Henney Inc
 Bloemfontein

