

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

Case No: 4866/2014

In the matter between:-

MAKHUBU CIVILS CC

Applicant

and

ICON CONSTRUCTION PTY (LTD)
THE DIHLABENG LOCAL MUNICIPALITY
PRO-CARE CONTRACTORS (PTY) LTD

1st Respondent
 2nd Respondent
 3rd Respondent

JUDGMENT BY: TSATSI, AJ

HEARD ON: 11 DECEMBER 2014

DELIVERED ON: 29 JANUARY 2015

INTRODUCTION

[1] This was an urgent interdict to grant the applicant leave to intervene as a party in the review application, instituted by the first respondent against the second respondent. This matter was heard on 11 December 2014. I delivered a ruling the following day, which was 12 December 2014, dismissing the application with costs. I was subsequently requested to provide reasons for my ruling. These are those reasons. There was no appearance for the third respondent.

The urgent application against the three respondents was for:

- “1. That the Applicant’s noncompliance with the rules of court in relation to time periods and service, be and is hereby condoned, with the application to be heard as an urgent application in terms of Rule 6 (12).
2. That the applicant be is hereby given leave to intervene as a party in the application brought in the above matter.
3. That a rule nisi be issued, calling upon the Respondents to show cause on Thursday the 22nd of January 2015 at 9h30 or so soon thereafter as Counsel may be heard, why the order should not be granted in the following terms:
 - (a) That the order granted by this court on 21 November 2014 in terms whereof the tender in relation to Public Contract BW37/2014, in relation to the construction of Reservoirs, Pipelines and Appurtenant Works at Fouriesburg/Masheng, be and is hereby rescinded;
 - (b) That the First and Second Respondents, and only the in the event of opposition by the Third Respondent, the Third Respondent, jointly and severally, the one paying the other to be absolved, are directed to pay the Applicant’s costs in this application;
- (4) That pending the outcome of this application, the order referred to in 3 (a) above be stayed and the Second Respondent is interdicted and restrained from awarding the tender to the First Respondent or any other party;
- (5) Further and alternative relief”.

FACTS

- [2] The second respondent awarded a tender to the third respondent. There were proceedings instituted by the First respondent under the above case number for a variation order granted by this

Court. In such proceedings this Court granted an order on 21 November 2014 in terms whereof the award of a public contract BW37/2014, in relation to the construction of reservoirs, pipelines and apartment works at Fourisburg/Mashaeng to the third respondent, was reviewed and set aside.

- [3] The order granted on 21 November 2014 directed that the tender be awarded to the first respondent, subject to the proviso that such order was to be suspended for a period of ten days. The purpose of granting such a suspension was to afford the applicant an opportunity to approach the Court with a view of placing representations before this Court with regard to the order. This was allegedly due to the fact that the applicant had submitted a bid in relation to the tender and was the second highest scoring bidder in the bid evaluation by consulting engineers appointed by the second respondent.
- [4] It was stated in the applicant's affidavit that the applicant sought to intervene in these proceedings to place information before this court with regard to the period of the validity of tenders, in which regard it will be submitted that the portion of the order relating to the award of the tender to the first respondent was erroneously granted, in the period of the validity of tenders had expired. The applicant further stated that it was no longer possible for an award of the tender by the first respondent by the second respondent to be made.

ISSUES

- [5] The issue in this application was whether or not the applicant satisfied the requirements of an interim interdict, made out a case on a balance of probabilities, to be granted the relief sought.

SUBMISSIONS

- [6] It was submitted on behalf of the applicant that the applicant was joined as a party to the original application. The applicant sought to rescind the order of the 21 November 2014. The said order should have been served on the applicant. The purpose of the urgent application was to give the applicant an opportunity to be heard. The only option that the applicant had was concomitant application for rescission. The applicant should be joined as a party to exercise its right. The judgment was erroneously granted. Counsel for the applicant further submitted that this matter could not be referred back to second respondent for consideration.
- [7] It was submitted on behalf of the first respondent that the applicant was served with the order on 26 November 2014. Counsel for the first respondent argued that it was wrong of the applicant to apply to this court to have the order of 21 November 2014 rescinded because he believed that the order was wrong. Counsel for the first respondent argued that this was not a legitimate process that could be followed. The reason being that a party may consider a judgment to be wrong or “erroneously granted” was of little consequence. He further stated that what this term means was that under the rules of court was a procedural irregularity and no mistake in respect of the order itself.

- [8] Counsel for the second respondent argued that the applicant alleged in his affidavit that he did not take issue with the relief sought and granted to the first respondent in terms whereof the award of the tender was reviewed and set aside. The applicant further said that due to the expiry of the period of the tenders, it was not appropriate for an order to have been granted that the tender be awarded to the first respondent. It was counsel for the second respondent's argument that the applicant's allegation is not supported by any reasons or facts.

THE LAW

- [9] The test to be applied in an urgent interdict is to establish on the papers before the court a *prima facie* right, which may though established is open to doubt, (see CB Prest, **Law and Practice of Interdicts**, Juta 1996 Page 57).
- [10] The requirements for an urgent interdict are: a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right; and the balance of convenience favours the granting of interim relief and the applicant has no alternative remedy. For details consideration of this requirement see **LF Boshoff Investment (Pty) Ltd v Cape Town Municipality** 1969 (2) SA 256 (LPD) at 267 A-F.
- [11] Rule 6 (12) states that:

- “(12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.
- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.”

[12] The mere existence of urgency does not justify an applicant not using Form 2 (a), but the applicant may deviate from the form to the extent justified by the exigencies of the case by, for example, using shortened time periods, advance nomination of the date of hearing, omitting notice to the registrar and adaptation of the wording: See: **Republicanise Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk** 1972 (1) SA 773 (A) at 782A-G.

[13] The following is what the court said in **Caledon Street Restaurant CC;**

“It is incumbent on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification thereof by the applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The applicant will have to demonstrate sufficient loss or damage were he to be compelled to rely solely or substantially on the normal procedure. The court is

enjoined by rule 6 (12) to dispose of an urgent matter by procedures “which shall as far as practicable be in terms of these rules”. That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case. Practitioners must accordingly again be reminded that the phrase “which shall as far as practicable be in terms of these rules” must not be treated as *pro non scripto*. The mere existence of some urgency cannot therefore necessarily justify an applicant not using Form 2 (a) of the First Schedule to the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance, is merely a *rule nisi* without interim relief.”

[14] In **Shapiro v SA Recording Rights Association Ltd** 2008 (4) SA 145 W Gautschi AJ (as he then was) at p 152, in Minister of Local Development White J held that an applicant for intervention has to satisfy the court that:

- “(i) He has a direct and substantial interest in the matter of the litigation which could be prejudiced by the judgment of the court ...
- ii) the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a prima facie case or defence.....”

[15] The requirements for the rescission of judgment are similar to the ones of removal of bar, in that the applicant must give:

- (1) a satisfactory explanation for the delay;
- (2) the application must be *bona fide* and not simply to delay;

(3) a *bona fide* defence must be established which is not patently unfounded and is based on facts, if proved, constitute a valid defence. **Nathan (Pty) Ltd v All Metals (Pty) Ltd** 1961 (1) SA 297 at 300.

[16] In **Chetty v Law Society, Transvaal** 1985, (2) SA 756 (AD) Miller JA, on behalf of the unanimous Court, dealt with the term “sufficient cause” or “good cause” when used in the context of an application for rescission of a Judgement. At 765 D-E he said:

“For obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of rules was nevertheless permitted to have a judgement against him rescinded on the grounds that he had reasonable prospects of success on merits.”

APPLICATION OF THE LAW TO THE FACTS

[17] I am of the considered view that there is no urgency in this matter. The applicant dragged its feet after it was served with the order on 26 November 2014. The applicant only approached this court on 10 December 2014. The applicant had been dilatory in bringing this application.

[18] It is trite that urgent applications are regulated by Rule 6 (5) and Rule (6) (12) of the Rules of Court. In terms of Rule 6 (5) (a) applications, other than the ones brought *ex parte*, shall be brought on Notice of Motion as near as may be in accordance with Form 2 (a) of the First Schedule to the Rules. Rule 6 (5) (b) provides that in the Notice the applicant shall set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether he intends to oppose such application, and shall further state that if no such notification is given, the application will be set down for hearing on a stated day, not being less than 10 days after the service of the Notice on the respondent. The other issue of lack of urgency regarding this matter was that the notice of motion was not as far as possible in compliance with form 2 (a) of Schedule 1 to the rules. The notice of motion deviated from form 2(a) by failing to stipulate time periods for the filing of notices and papers, suitably abridged in accordance with the urgency of the matter. I am of the view that the applicant misconstrued the degree of urgency and should have given more notice and indicated time periods for filing of papers and defending of the matter than it had to the respondents. (See Caledon **Street Restaurants CC v D' Aviera** [1998] JOL 1832 (SE).

[19] The short notice may have prejudiced the respondents' right to have more time to prepare for an adequate defence. This matter was not dismissed simply because the applicant did not satisfy the requirements of an interdict but because the applicant made

of the procedure relating to matters of urgency, was a misuse, indeed an abuse, of the process of the court and it was why the application was dismissed. There must be a marked degree of urgency before it will be justifiable not to use Form 2 (a). See: **Mangala v Mangala** 1967 (2) SA 415(E).

- [20] There are material difficulties regarding the relief sought by the applicant. In its notice of motion, the applicant sought rescission of the entire order. However in its founding affidavit, the applicant, stated that the reason for the urgent application by the applicant was to place information before this Court with regard to the period of the validity of tenders, in which regard the portion of the order relating to the award of the tender to the first respondent, was erroneously granted, in that the period of the validity of all tenders had expired. There are material differences within the relief sought in that the applicant stated that it did not take issue with the relief sought and granted to the first respondent in terms of which the award of the tender was reviewed and set aside. At the same time the applicant stated that it was not appropriate for an order to have been granted that the tender be awarded to the first respondent. The applicant also asked this court to award the contract to it not to the first respondent, and it relied on section 8 of PAJA. I am of the considered view that this court was not empowered to award the contract to the applicant or any other party. This was not the matter before this court. This court could only deal with what was before it, which was an application to intervene in the review application. I was unable to understand exactly which relief the applicant wanted this court to grant.

- [21] The applicant sought leave to intervene so that he could obtain a *rule nisi* to rescind part and or a portion of the order granted on 21 November 2014. The intention was to rescind the order because the applicant believed that the order was wrong. The fact that the applicant considered the order to be wrong was of little consequence. This meant this was a procedural irregularity and not mistake of the order itself (see: **Colyn v Tiger Food Industry LTD /a Meadow Feed Mills Cape** 2003 (6) SA 1 (SCA) (I was referred to this case by the first respondent's counsel).
- [22] I am of the view that the applicant did not give a satisfactory and *bona fide* explanation why it delayed in launching this application, when it did on an urgent basis. Neither had the applicant shown "good cause" why part and or a portion of the order of 21 November 2014 should be rescinded. I am not convinced that the applicant's allegations constituted a *prima facie* case or defence.
- [23] In making application to intervene the test is whether or not a party has a 'direct and substantial interest' 'in the subject matter of the action. A mere financial interest is an indirect interest and may not require joinder of a person having such interest (see **Leibowitz v Schwartz** 1974 (2) SA 661 (T)). Different views exist whether or not the court has discretion once it is shown that the applicant was the necessary party in such proceedings. In one instance it was stated that once this has been shown the court proceeds to determine the matter "*in accordance with the requirements of convenience and common sense*". This view was rejected in other cases. However it was subsequently stated

that the court has such a discretion (see **Harding v Basson** 1995 (4) SA 449 (C) at 501H-I).

[24] My view was that the applicant's interest in intervening was mainly motivated by financial interest as the applicant's goal was to have the tender not awarded to the first respondent. It was argued on behalf of the applicant that the court should award the contract to the applicant under section 8 of Promotion of Administrative Justice Act (PAJA). The court may grant application to intervene which will include direct and substantial interest of the applicant which is not simply a financial interest. (**Hartland Implements (Ems) BPK v Emal Eiendomme BK** 2002 (3) SA 653 (NC) at 663E-H.)

[25] I am of the view that the matter was not of sufficient urgency to justify the applicant approaching the court on the notice provided for in the notice of motion. My view was that, to the extent that I may have a discretion to grant application to intervene, the facts of this matter did not qualify, for me to exercise such a discretion in the applicant's favour.

[26] In light of the preceding I am not convinced that the applicant satisfied all the requirements of an interim interdict. The applicant's right, whatever it may be, had to be balanced with the respondents' right to have the relief sought granted. Applying to court to have the order of 21 November 2014 rescinded either wholly or a portion thereof, was not the only alternative that the applicant had. Since the applicant's concern seemed to be of a

procedural error in the order and not an error in the order itself, the applicant's other alternative, if granted leave to intervene, could have been an appeal against the order. The applicant could also have asked that the matter be remitted back to the second respondent for re-consideration. I am of the view that the balances of the requirements for the grant of an interim interdict are not satisfied. The applicant failed to make out a case on a balance of probabilities for the relief sought. It is my view that the application should fail.

[27] I accordingly make the following order:

27.1 The application is dismissed with costs.

E. K. TSATSI, AJ

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