Reportable:	YES/**NO**
Circulate to Judges:	**YES**/NO
Circulate to Magistrates:	**YES**/NO
Circulate to Regional Magistrates:	**YES**/NO

HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: 1721/2015

Heard: 04-09-2015

Supplementary Heads: 09-09-2015

Delivered: 18-09-2015

In the matter between:

TSHENOLO RESOURCES(PTY) LTD **APPLICANT**

AND

THE MEC: NORTHERN CAPE PROVINCIAL GOVERNMENT: DEPARTMENT OF ROADS AND PUBLIC WORKS **1ST RESPONDENT**

NUCON ROADS AND CIVILS (PTY) LTD **2ND RESPONDENT**

JUDGMENT

KGOMO JP

1 This opposed application for an interdict was brought on urgency by the applicant company, Tshenolo Resources (Pty) Ltd, based in Randburg Gauteng Province. Tshenolo Resources seeks to interdict and restrain the Member of the Executive Council of the Northern Cape Provincial Government for Roads and Public Works (the MEC/ the Department) as First Respondent and Nucon Roads and Civils (Pty) Ltd, qua Second Respondent, from performing the acts set out below.

2 Pending the finalisation of a review to be instituted in accordance with the prayer captured in para 3 below, in terms of which Tshenolo Resources will seek the review and setting aside of the decision taken by the MEC or his Department to award the contract, styled DRPW003/2014 – Project: Upgrading of Road MR 950 from N14 intersection Dithakong (Phase 2, 10 km) in the Joe Morolong Local Municipality in the John Taolo Gaetsewe District Municipality, to Nucon Roads:

2.1 That the MEC and Nucon Roads be and are hereby interdicted and restrained from in any way further implementing the road upgrading decision;

2.2 That these respondents be and are hereby barred from executing or performing the works commensurate with the said decision, alternatively those works that are to be executed in terms of the Service Level Agreement (SLA) believed to be concluded between the MEC and Nucon Roads consequent upon the taking of that decision;

2.3 That the MEC pays the costs of this application but should Nucon Roads join issue it too pay the costs jointly with the MEC in the conventional manner.

3 Tshenolo Resources then seeks the indulgence that it be ordered to institute review proceedings with 5(five) days of this order to set aside the MEC’s road upgrading decision, to prosecute the review

application on an urgent basis, and to arrange the first available and suitable date with the Registrar of this Court for the hearing of such urgent review relief.

4 That the order contained in prayers (paragraphs) 2.1 and 2.2 above, shall serve as an interim interdict with immediate effect.

5 Two interlocutory matters were raised for prior adjudication. The first of which was lack of urgency. It is common cause between the parties that no competitive bidding process was followed prior to the award of the road upgrading contract to Nucon Roads by the MEC. Urgent review and interlocutory remedies are available to challengers to the outcome and process of a state tender. See **Steenkamp NO v Provincial Tender Board Eastern Cape**, 2007(3) SA 121 (CC) at 142H-143A (para 51). It is therefore not only prudent but also necessary for challengers of non-observance of the constitutionally ordained processes, the state organ and the defenders of the award to adjudicate their dispute before the Court before any significant progress on the contract has been made. In **Darson Construction (Pty) Ltd v City of Cape Town and Another** 2007(4) SA 488(C) the Court stated at 506E-H:

"On the facts of this matter, applicant could, indeed, have sought an interdict immediately after the award of the contract to second respondent on 17 December 2004. It is true that applicant was invited to appeal, but, objectively seen, the appeal was the incorrect remedy. In any event, when applicant became aware that second respondent was on site and had begun work in terms of the contract, it could immediately have approached the Court to interdict second respondent pending the outcome of its appeal. By that time it was clear that first respondent was going ahead and allowing second respondent to execute the contract despite applicant's appeal. An application for an interdict would, in

all probability, have brought to the fore that the decision of 17 December 2004 was invalid and would have prevented the loss which applicant seeks to recover had applicant, in addition, been able to show its entitlement to the contract. An examination of the correspondence sent by or on behalf of applicant from 10 February until the launch of the application demonstrates that applicant knew that it had the right to approach the court for relief. It regularly threatened to do so but failed to follow up on its threats."

6 Over a short few days all papers and concise Heads were filed, even though some processes reached me during the morning of the hearing, resulting in supplementary heads on one issue being subsequently filed. The issues were relatively fully ventilated. There was no prejudice perceived or claimed**. I was satisfied that urgency was established.**

7 The second preliminary issue related to Tshenolo Resources' legal standing. This issue is only persisted in by Nucon Roads. The historical background will facilitate the determination of this issue and also bring us closer to whether Tshenolo Resources have made out a *Prima facie* case for the interim relief sought. I therefore interweave it with the merits.

8 Tshenolo Resources submitted a bid for the construction and/or upgrading of Phase 1 of the road already described, but was not a "responsive bidder" (meaning the company was unsuccessful). Phase 1 was in fact awarded to another company named Down Touch Investments (Pty) Ltd, and has by now basically completed it. Down Touch is not a party to these proceedings.

9 After the awarding of the Phase 1 tender to Down Touch Investments by the MEC, Nucon Roads filed review proceedings in Case 1797/2014 on 15 October 2014 and impugned that the awarding process in Phase 1 to have been attended by material irregularity and/or illegality (in the administrative sense) or some malfeasance. The respondents cited were the MEC (First Respondent) and Down Touch (Second Respondent). Down Touch did not oppose the Case 1797/2014 review application. It must be added that emanating from what has already been mentioned as regards who the parties were, it can be safely inferred that Tshenolo Resources was not a party to the Case 1797/2014 proceedings.

10 The further relief that Nucon Roads sought in Case 1797/2014 went as follows:

"B2. That the First Respondent's decision to award the tender, being

"Upgrading of Road MR950 from N14 intersection towards Dithakong (Phase 1 10km) in Joe Morolong Local Municipality in John Taolo Gaetsewe District Municipality"

("the project"), to the Second Respondent, be reviewed and set aside;

B3. That the subsequent conclusion of the contract and/or service level agreement between the First Respondent and the Second Respondent for rendering of the services and works in terms of the tender, be set aside;

B4. That the First Respondent be ordered to award and give the tender to the Applicant and to conclude a contract and/or service *level agreement with the Applicant in respect of the rendering of the services and works in terms of the tender;*

B5. Alternatively, that the First Respondent be ordered to re-evaluate and adjudicate all bids/tenders submitted in respect of the project within 14 days from the date of granting of this order."

11 On 20 February 2015 (four months after Case 1797/2014 was filed on 15 October 2014) Phatshoane J and Lever AJ in that matter ordered the following:

"Having heared Adv Danzfuss SC assisted by Adv Pienaar for the Applicant and Adv Mphaga SC assisted by Adv Pheto for the respondents and having read the other documents filed of record;

IT IS ORDERED: (BY AGREEMENT)

1. That the decision of the First Respondent [THE MEC] to award the tender as referred to in paragraph B2 of the Notice of Motion, is declared unlawful and invalid;

2. That the parties will furnish factual information on affidavit, to be filed on or before 4 March 2015, as well as further submissions on:

2.1 What would be in the public interest when determining a just and equitable remedy;

2.2 Whether there is any other remedy available to the Applicant to protect and enforce its private interest other than a new tender process;

2.3 Any other information considered relevant.

3. That the matter is set down for further hearing on 11 March 2015 at 09.30".

12 Three months after the Phatshoane J et Lever AJ order quoted in para 11 hereof Erasmus AJ ordered on 29 May 2015 (in the same Case No.1797/2014) that:

"Having heared Adv Sieberhagen for the Plaintiff and having read the other documents filed of record;

IT IS ORDERED: (BY AGREEMENT)

1

1.1 Nucon will be appointed within a period of 30 days to execute the upgrade in respect of what is known as Phase 2 of the upgrade process of road MR950 from the N14 intersection towards Dithakong comprising the next 10 km section of said road. With "next 10 km section of the said road" the section of the road following the section which is currently under construction by Down Touch Investments (Pty) Ltd of the said road, is meant.

1.2 The said appointment will be on the terms, conditions and rates (including) preliminaries and generals) as contained in Nucon's tender of Phase 1 on the aforesaid project, adjusted in accordance with the terms and conditions of aforesaid tender, subject thereto that the scope of work will be adjusted appropriately to give effect to the aforesaid.

2

Nucon will renounce the costs order granted in its favour on 20 February 2015 upon fulfilment of the following conditions:

2.1 Receipt of the letter of appointment as envisaged by clause 2 above; and

2.2 Receipt of payment of an amount of R35 000.00 within a period of 30 days from date hereof, as part of contribution towards the costs under Case Number 1797/14."

13 It is common cause, or at least not disputed, nor is it material to the outcome of this application, that the Notice of Set Down for the hearing of 29 May 2015 in Case 1797/2014 was not served on Down Touch, neither did the latter oppose the proposed and resultant order. It may have been by design because Down Touch retained the Phase 1 project which was apparently 95% complete at that stage.

14 Early during his argument I enquired from Adv S Grobler, counsel for Tshenolo Resources, why the agreement between Nucon Roads and the MEC, which Erasmus AJ made an order of Court on 29 May 2015 (para 12 above), was not dealt with in the applicant's (Tshenolo Resources') founding papers. His response was that Tshenolo Resources was unaware of the application and/or the order. This is incorrect because Tshenolo Resources was indeed aware thereof, because it has appended as Annexure FA9 an instrument directed to "Nucon Roads and Civils (Pty) Ltd" dated 24 July 2015 which reads in part:

"*Appointment Letter: Tender No.DRPW 003/2014*
Project name: Upgrading of Road MR950 from N14 intersection towards Dithakong (Phase 2 10km) in Joe Morolong Local Municipality in John Taolo Gaetsewe District Municipality.

Contract price: R54 878 686-15 (Fifty Four Million and Eight Hundred and Seventy Eight Thousand Six Hundred and Eighty Six Rand Fifteen Cents)

We refer to the above matter and wish to confirm your appointment to carry out the above mentioned works under the above mentioned tender ***and in terms of the settlement***

agreement, which was made an order of court on the 29th of May 2015 under case number 1797/14.

The document was written by Mr K Nogweli, Head of Department (HOD), in the MEC's Department. So all that Tshenolo Resources had to do was to uplift and copy the contents of the file from the Registrar's office.

15 Asked what effect Erasmus AJ's order has on the current interim interdictory relief sought, Mr Grobler invoked the decision of Master of the Supreme Court **(North Gauteng High Court, Pretoria v Motala NO** 2012(3) SA 325 (SCA). The headnote captures the ratio succintly at 325C-D in these terms:

"It is so that all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. However, as stated in Lewis & Marks v Middel 1904 TS 291, when an order is 'null and void; ***and upon proof of invalidity the decision may be disregarded****….without the necessity of a formal order setting it aside'. Where, in making an order, a judge usurps a power expressly reserved, by statutory enactment, for the master of the high court, such order is a nullity and pronouncement to that effect is unnecessary. It is, after all a fundamental principle of our law that a thing done contrary to a direct prohibition of law is of no force and effect. It follows that the court a quo's conclusion that the appellant had acted in contempt of such order cannot be supported".*

16 From p331J-333E (paras 12-14) of the Motala NO decision the gravemen of the decisions cited there relate to cases in which an order was given against or affecting a party adversely who has not been cited in the proceedings. Per contra, Down Touch was cited in

the Case Number 1797/2014 proceedings. It was the company's choice not to join issue. It has no demur.

17 The thrust of the other cases in Motala NO implicate a situation where a statute repose certain powers in particular functionaries and a Court goes ahead and arrogate to itself the powers it did not possess or it usurped such powers. See cases cited in the aforementioned paras 12-14 of the Motala NO judgment. See further Minister of Home Affairs and others v Somali Association of South Africa and Another 2015(3) SA (SCA) para 27; and Jayiya v Member of the Executive Council for Welfare Eastern Cape, and Another 2004(2) SA 611 (SCA) para 17.

18 What is troubling in this matter is that the applicant, Tshenolo Resources:

18.1 Appears to have studiously avoided dealing with Erasmus AJ's order in its Founding Affidavit, where it should make out a proper case for the relief sought. In Lewis & Marks v Middel 1904 TS 291, cited with approval at p332B-D of the Motala NO judgment the following situation must, at least, arise: **"upon proof of invalidity the decision may be disregarded".** This step Tshenolo Resources did not take;

18.2 The Phatshoane J et Lever AJ order, pursuant to the parties' agreement, envisaged:

2.1 What would be in the public interest when determining a just and equitable remedy pursuant to the nullification of the awarding of the tender to Down Touch and not to Nucon Roads.

2.2 Whether there was any remedy available to the Nucon Roads to protect and enforce its private interest other than a new tender process;

2.3 Any other information considered relevant.

18.3 The process culminated in the Erasmus AJ's order granted by consent on 29 May 2015.

19 In his Answering Affidavit, on behalf of the Department, Mr Kholekile Nogwili, the HOD, justify the Erasmus AJ Court Order route as follows:

19.1 *"6.2 I attach hereto as Annexures AA1-AA4, copies of 4[Four] newspaper articles relating to the public violence and protests that arose during August 2014 due to the community's dissatisfaction with the establishment of roads and infrastructure in the Joe Morolong Municipal area. There is a real concern that the violence will again erupt, with the same damage and threat to the lives and disruption of education if the interim relief is granted".*

19.2 "9.1 I deny that the Phase 2 project would have gone out on tender during the beginning of 2015 as the Department did not have an approved budget for the Phase 2 project to commence with any tender process.

9.2 No tender specifications for the construction process of Phase 2 has even been drafted and no advertisement has been approved by me in my capacity as the head of the department, as is required in terms of policy.

9.3 The Phase 2 project that forms the basis of this dispute was an ad hoc project initiated due to public interest as well as the court order granted on 29 May 2015.

9.4 The Phase 2 project was therefore dealt with in an ad hoc manner pursuant to the application filed by Nucon under Case Number [1797/2014]".

19.3 "11.3 I confirm that the Department is authorised by the National Treasury Practice Guidelines to procure services by other means than invitations for competitive bids in, for example, cases of urgency, emergency or where early delivery is of critical importance or where immediate action is necessary in order to avoid a dangerous and risky situation. The accounting officer of a department is then authorised to procure services per quotation and negotiations or otherwise in any manner to the best interest of the State.

11.4 I submit that the agreement entered into with Nucon, and the granting of the subsequent court order, was necessitated by urgency and where early delivery is of critical importance and where immediate action was necessary in order to avoid a dangerous and risky situation".

PRIMA FACIE RIGHT

20 Mindful that I am not here seized with the mooted or impending review proceedings, I must therefore be astute to say only enough for purposes of the interim interdict application. Therefore the final word on whether or not, administratively speaking, the process was attended by invalidity will come from the review itself, which Tshenolo Resources postulated it would lodge in a matter of five days of a successful order.

21 It is in that context that the procurement process must be viewed. In **Allpay Consolidated Investment Holdings (Pty) Ltd and**

<u>Others v Chief Executive Officer, South African Social Security Agency, and Others</u> 2014(1) SA 604 (CC) in para 56 the Court held:

"*F Approach to remedy*

56. Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. The rights or expectations of an unsuccessful bidder will have to be assessed in that context".

See also **<u>Judicial Service Commission and Another v Cape Bar Council and Another</u>** 2013(1) SA 170(SCA) at 177A-G (para13). Issues of practicality may yet militate against the setting aside of the agreement endorsed by Erasmus AJ.

22 There were vague rumblings, no more than that, that Erasmus AJ may have been deliberately misled. I did not get a whiff of that in the papers. The applicant may have to produce that evidence in the proposed review proceedings in due cause, if it exists. This case is certainly, at least on the facts before me, a far cry from what has been stated in City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd, 2008(3) SA (SCA) at paras 14 and 15 where Ponnan JA remarks:

"[14] Moreover, s 38(5) specifically prohibited the defendant's council from delegating or assigning those functions. Here, of course, we are dealing not merely with the form in which the statute requires a transaction to be clothed, but with something more fundamental. The statute expressly confers sole power upon a specified entity, to the exclusion of any other person or entity, to extend or vary an existing tender agreement. The linguistically plain meaning of the section severely restricts the power (vires) to enter into a transaction of that kind to the defendant's council.

[15] Section 217 of the Constitution requires contracts for services or goods by an organ of state such as the defendant to accord with a system that is fair, transparent, competitive and cost-effective. Against that backdrop, the mischief that s 38 of the Act seeks to prevent is plain. It is to eliminate nepotism, patronage, or worse, and to entrust the council of the defendant with a sole power which is to be exercised independently by it to achieve those ends. If the conclusion of contracts were to be permitted without any reference to the defendant's council and without any sanction of invalidity, the very mischief which the legislation seeks to combat could be perpetuated".

23 As far as Tshenolo Resources' *locus standi* is concerned, I am satisfied, on the facts and the jurisprudence, that it was entitled to bring this application. Mr Wandile Bozwana, the deponent for Tshenolo Resources, states that he was aware of the court battle pertaing to Phase 1 and knew that Phase 2 would go on tender in due course. He intended to tender but the wait was to be in vain. If s 217 of the constitution has not been complied with the citizenry is entitled to ask questions and if need be to impugn the circumvented process and by so doing to eliminate nepotism, patronage or even corruption. See **<u>Ersofranki Pipelines (Pty)</u>**

Ltd and One Onother v Mopani District Municipality and Eight Others, (2014) ZASCA 21 [2014] 2 All SA 493 (SCA).

24 In my view, for the aforegoing reasons, the applicant, Tshenolo Resources, has not succeeded in satisfying the requirements of an interim interdict set out **Setlogelo v Setlogelo** 1914 AD 221 at 227; and **Knox D'Archy Ltd v Jamiesen** 1996(4) SA 348 (SCA) at 360G-362G; and cases there cited.

25 Going forward, the remedy lies in the hands of Tshenolo Resources. As far as the respondents are concerned the interim prohibition to implement the Phase 2 project of the road construction/upgrade that I imposed when I reserved judgment on 04 September 2015 hereby dissipates or is discharged with this order.

26 In view thereof that Tshenolo Resources is unsuccessful with its application, the costs will follow the result. Although it was mooted that I should order that the costs of this application be costs in the review application such order would not be competent now that the interim relief is refused.

27 In the result I make the following order:

The application by Tshenolo Resources (Pty) Ltd, the applicant, for an interim interdict is dismissed with costs.

F DIALE KGOMO

JUDGE PRESIDENT

Northern Cape High Court, Kimberley

Counsel:

For the Applicant:	Adv. S Grobler
Instructed by:	Duncan & Rothman
For the 1st Respondent:	Adv. A Stanton
Instructed by:	Office of the State Attorney
For the 2nd Respondent:	Adv. C.D Pienaar
Instructed by:	Haarhoffs