

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO:4291/2023

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO THE JUDGES: YES / NO
(3) REVISED.

Signature [Redacted Signature]

Date: 19/11/2024

TUBATSE SECURITY SERVICES PTY LTD

APPLICANT

And

MABOTWANE SECURITY SERVICES CC

1ST RESPONDENT

SEKHUKHUNE DISTRICT MUNICIPALITY

2ND RESPONDENT

In re:

MABOTWANE SECURITY SERVICES CC

1ST APPLICANT

BROWN DOGS SECURITY SERVICES CC

2ND APPLICANT

LETONA 6 SECURITY PTY LTD

3RD APPLICANT

And

SEKHUKHUNE DISTRICT MUNICIPALITY

1ST RESPONDENT

M N RAMPEDI

2ND RESPONDENT

TUBATSE SECURITY SERVICES PTY LTD

3RD RESPONDENT

JUDGMENT (LEAVE TO APPEAL)

MONENE AJ

- [1] This is an application for leave against a decision of this court delivered on 20 August 2024 in which this court reviewed and set aside a tender award to the current applicant and ordered the tender process to be started *de novo*. The application is opposed by the current first respondent which had been the applicant in the initial application and the second respondent in *casu*, the tender issuing municipality.
- [2] From the notice of application for leave to appeal and the heads of argument filed by the applicant, the grounds upon which this court's judgement was

assailed and based on which it is submitted there are reasonable prospects of another court finding differently were in pith the following:

2.1 That this court ought to have recused itself from hearing the application. This ground was abandoned by the applicant at the hearing of this application for leave to appeal.

2.2 That this court misapplied the test for exhaustion of internal remedies regard being had to section 7(2)(b) and (c) of the Promotion of Administrative Justice Act No.3 of 2000("PAJA").

2.3 That another court would find that read both textually and contextually the bid specification wording did not exclude an interpretation that permitted for one bidder to be awarded all four contracts in the four clusters.

2.4 That there are reasonable prospects of another court finding that the municipal manager of the second respondent was empowered to deviate from the recommendations of the Bid Adjudication Committee as he indeed did in this matter.

2.5 That this court misdirected itself in the costs order it made.

- [3] The parameters within which leave to appeal contestations are to be determined are catered for in section 17 (1) (a) of the Superior Courts Act No 10 of 2013 (“the Act”) provides as follows:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) *the appeal would have a reasonable prospect of success; or*
 (ii) *There is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration;”*

- [4] In ***Ramakatsa and Others v African National Congress and Another*** (724/2019) [2021] ZASCA 31(31 March 2021) (“**Ramakatsa**”) at para 10, the Supreme Court of Appeal held as follows:

“I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly mean that the threshold granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably

arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

- [5] ***Four Wheel Drive Accessory Distributors CC v Rattan No 2019 (3) SA 451 (SCA) para 34 at 463*** counsels us that a conclusion that there are reasonable prospects of success must have a sound and rational basis. Expanding on this counsel for the first respondent, Mr Louw, correctly submitted that the test is not whether there is a possibility of another court finding differently but whether there are reasonable prospects that another court would find differently or whether there is some other compelling reason why the appeal should be heard.

AD THE MISSAPPLICATION OF THE INTERNAL REMEDIES EXHAUSTION TEST

- [6] Apposite to this ground is the following finding by this court when it dismissed the applicant *in casu*'s point in *limine* that the applicants in the main matter had not exhausted internal remedies prior prosecuting the review application:

*“As I understand the **Bato star** principle on exhaustion of internal remedies at paragraph 25 of that judgement, a key rationale behind the principle is the due regard a court must give to pre-litigation decisions of internal appeal structures, bearing in mind special expertise or experiences such structures may have. It is not and cannot have been merely a pedantic approach which routinely sees fatality for the mere fact of not going through internal appeals. I understand neither **Bato Star** nor **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd and Others 2014(5) SA 138(CC)** at para 123 to be authority to a proposition which suggest that a court, particularly one seating at special allocation, should cop out of deciding review applications on a dilatory point of failure to exhaust internal remedies more so in matters were allegations and proofs of irregular expenditure as pointed out by the Auditor-General in casu relating to this tender are commonplace. The courts have a duty to intervene in situations where chapter 9 institutions like the Auditor General regarding this tender have pointed out financial irregularities detrimental to the general populace. Courts cannot and should not, in my view, bury their heads in the sand of immaterial non-compliances in the face prima facie illegality.”*

- [7] Key to Mr Maphutha’s submissions on this score in moving the leave to appeal application is that exhaustion of internal remedies is as per section 7(2) (b) and (c) of PAJA, coined in peremptory terms and can only be deviated from or exemption from compliance therewith granted in exceptional circumstances

upon application by the party seeking not to exhaust them. It is common cause that before this court when it exempted failure to exhaust internal or condoned same, there was no application.

[8] In contesting this point both Mr Makoti and Mr Louw, on behalf of the respondents to this application, argued in favour of the court's finding and consequent order, pointing out that the court's finding while not expressly referring, on this score, to ***Koyabe and Others v Minister for Home Affairs and Others 2010(4) SA 327(CC)*** which dealt with the rationale for exempting failure to exhaust internal remedies, applied the principles thereof to the tee.

[9] Mr. Maphutha argued further that a key aspect of the court's reasoning in dismissing the failure to exhaust internal remedies point was the court's reference to the Auditor-General's adverse findings a factor which was, although referred to in the papers, was not up for determination and the findings of which were not remotely suggested to be adverse on the applicant in these proceedings. He was not challenged on this point, and I am unable to fault him on it too.

[10] I do not understand it to be available to a court hearing a leave to appeal to agree with the respondents simply because they are wont to heap praises on a court as opposed to an applicant who wraps a court on the knuckles for probable

misapplications of the law. What, in my view, is needed from a court hearing a leave to appeal application is a dispassionate relook at what the court has decided oblivious of any possible brown nosing or perceived attack on its judicial ego.

[11] I am inclined to agree that there are reasonable prospects that another court would find that the spirit and letter of section 7(2) (b) and (c) of PAJA needed to be upheld. Absent an application for exemption or condonation, another court could well find that the exhaustion of internal remedies point out to have been upheld.

AD THE MEANING OF THE BID SPECIFICATION TEXT ON WHO WAS TO BE
APPOINTED PER CLUSTER

[12] The terms of reference of the tender in question were couched in the following terms:

"6.2 Respondents are advised that this tender will be awarded to four (04) preferred security services providers as per the four(04) clusters.

6.3 Respondents are allowed to bid for all clusters if they wish"

[13] Despite being referred to and addressed on ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*** on the approach to interpretation of texts by the applicant and it being submitted that this court erred in its interpretation of the above tender specification text, I am not persuaded that another court would reasonable find the intended meaning of the text to have permitted for a situation where only one bidder could be awarded for all four clusters. As stated in the judgement, one bidder counted four times does not amount to four bidders at all.

[14] Accordingly, I am unable to find for the applicants on this ground.

AD THE ACCOUNTING OFFICER'S AUTHORITY AND/OR COMPETENCE TO
DEVIATE FROM THE RECOMMENDATIONS OF THE BID ADJUDICATION
COMMITTEE.

[15] Heavy weather was made by the applicant as to the meaning to be attached to clause 222 of the Municipality's Supply Chain Policy which reads as follows:

"222. If a bid other than one recommended in the normal course of implementing this policy is approved, then the Accounting Officer must, in writing and within ten working days, notify the Auditor General, the Provincial Treasury and the National Treasury of the reasons for deviating from such recommendation..."

[16] It was argued by the applicant that the municipal manager's deviation from the Bid Adjudication Committee was informed and empowered by this clause in the Supply Chain Policy and submitted further that pursuant thereto the National treasury had in fact gone on to approve the deviation.

[17] That, in short, premised the applicant's contention that there are reasonable prospects that another court would find that this court erred in finding that clause 222 found no application where the Bid Evaluation Committee and the Bid Adjudication Committee had, as in casu, made similar recommendations.

[18] I have had a relook at clauses 220 to 222 of the Supply Chain Policy and found it to be curiously arranged to a point of no absolute clarity as to under what circumstances clause 222 finds application. That alone, says to me that it is reasonable that another court could find that the municipal manager deviated as empowered by this clause, that is, regardless of what attitude the Auditor-General or Treasury took when informed of the reasons for deviation by the municipal manager.

[19] In those premises I cannot justly say I am not persuaded by the applicant on this ground.

AD THE COSTS ISSUE

[20] Rapping me over the knuckles on my costs finding the applicant, while acknowledging that costs lie primarily within the discretion of the court, submitted in the notice of application for leave to appeal that this court erred in ordering costs of counsel on scale C against the applicant as third respondent in the main matter in circumstances where such scale was neither sought nor justified by any pleaded facts.

[21] In submissions in court the applicant's counsel, Mr Maphutha amplified the protest against the costs order by arguing further that it was a misdirection to order costs against the applicant who was the third respondent in circumstances where the offensive conduct which was reviewed and set aside was not conduct of the applicant but that of the municipality. A costs order under those circumstances ought to have been directed against the municipality and not the applicant which had not been an active participant in the impugned decision as it had not awarded the tender to itself.

[22] In opposing this ground Mr Louw on behalf of the first respondent in this application posited the following:

22.1 That the scale of costs for counsel was discretionary and further that this court had exercised that discretion judiciously.

22.2 That the applicant had, in its notice of application for leave to appeal, not raised the point about the only party being worthy of being mulcted with costs being the municipality and that therefore it was impermissible to raise it only in argument.

[23] It remains human not to like being told that one is wrong and this court also being not extra-terrestrial, would also not be immune from those human tendencies. But, looking at the costs order I made I am unable to say another court would not interfere with it. That is so even if the amplification of the ground of costs beyond the costs scale is not considered for the reasons raised in the objection by the first respondent, an objection which, in the interests of justice, I do not at any rate uphold.

[24] Accordingly, I am inclined to grant leave to appeal on this ground of costs.

[25] In the final analysis therefore, I am persuaded that leave to appeal on the grounds of failure to exhaust internal remedies, the powers of the accounting officer to deviate and on the costs order ought to be granted. That finding is premised on my conviction that there are reasonable prospects that another court would find

differently on those points. I have chosen to employ the word “would” as opposed to “could” and in line with the law as it stands despite this court’s remarks in the unreported matter of ***Action Tinyiko Ngoveni and Another v Premier Limpopo Province and 6 Others (02/2022) Limpopo local Division, Thohoyandou [26 June 2024]*** which suggested that perhaps what the legislature meant by “would” was merely a stronger version of “could” because I am persuaded that another court would find differently to my findings on the issues reflected upon *supra*. For completion’s sake those remarks were the following:

*“I momentarily pause, digress a bit and note that the court in **Ramakatsa**, while not per se answering the question of whether ‘would’ infers a more strenuous test than ‘could’, went on to itself employ the word ‘could’. I venture to state here, albeit uninvited to go so far, that, it would in my view not be humanly possible nor permissible for a court seating as a court determining a leave to appeal application to make a finding on what a court of appeal **would do**. Such a finding would have some definitiveness which would not only be prejudging the consequent appeal and thus conflating the leave and appeal stages but would, if the appeal subsequently fails, disrespectfully suggest rather that the court granting the leave was in its injudicious soothsayer sighting of the future, some kind of false prophet. Courts*

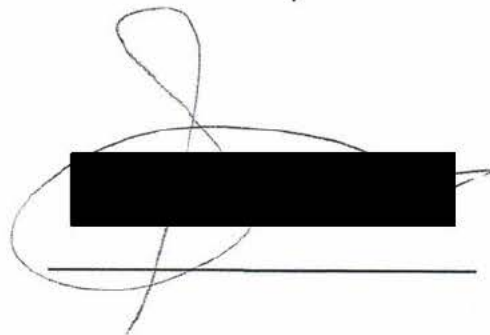
are, as we are taught, steeped in the facts and law realm of this planet and have no jurisdiction in the prophetic spiritual other worldly. In my view therefore, despite the employ of the word "would" by the legislature in the Act, the actual rational intended meaning remains "could", which is not only a lesser attainable threshold but one judiciously and rationally permissible. Perhaps that is why the SCA in Ramakatsa did not pronounce with any definiteness on the debate at "high court level" on the could/would interpretation."

[26] There is, in my view, nothing exceptional militating for the appeal in this matter to be heard by the Supreme Court of Appeal. Counsel for the applicant expressly sought for leave to be granted for hearing in the Full Court of this division and so shall it be ordered.

[27] Resulting from all the above, the following order is made:

27.1 Leave to appeal to the Full Court of this Division against the judgement and orders of this court dated 20 August 2024 is granted.

27.2 The costs of this application will be costs in the appeal.

A handwritten signature in black ink is written over a solid black rectangular redaction box. The signature is fluid and cursive, with a large loop at the top. Below the redaction box, there is a horizontal line.

MALOSE.S. MONENE

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

Heard on : 11 November 2024

Judgement delivered on : 19 November 2024

For the Applicant : Adv. M R Maphutha

: *Instructed by Kutullo Kgafane Attorneys*

: *Tel: 015 230 4000*

: *Email: bafanantsoane@gmail.com*

For the First Respondent : Adv. N G Louw

: *Instructed by Albert Hibbert Attorneys*

: *Tel: - 012 346 4633*

: *Email: albert@hibbertlaw.co.za*

For the Second Respondent : Adv. M Z Makoti with Adv R Mushiana

: *Instructed by P K Legodi Inc Attorneys*

: *Tel: 012 100 3345*

: *Email: pk@legodiinc.com*