

**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 No.: 2214/2022

In the matter between: -

TSWELOPELE LOCAL MUNICIPALITY

Applicant

and

H T PELATONA PROJECTS (PTY) LTD

Respondent

CORAM: N.M. MBHELE, AJP *et* J.J. MHLAMBI, J *et* M. OPPERMAN, J

HEARD ON: 25 JULY 2022

DELIVERED ON:

[1] What gave rise to this appeal is an order by a single Judge of this division declaring that the filing of the notice of application for leave to appeal by the appellants (Municipality) does not have an effect of suspending an interim order granted on 23 May 2022 (Interim interdict) in favour of the respondent (Pelatona) and dismissing the municipality's counter application.

Background

Pelatona approached the court a quo on urgent basis for the following relief:

1. That the applicant's non-compliance with the Rules of Court in relation to service and time limits be condoned and the application be heard as a matter of urgency in terms of the provisions of rule 6(12).

2. That it be declared that any steps taken by the first respondent (the "Municipality") and/or the fourth and fifth respondents (collectively the "JV") to implement or act upon the Municipality's decision to award the public tender: **"SCM/TSW/11/2021-2022 Bultfontein/Phahameng Refurbishment of Sewer Pump Station"** (the "tender") subsequent to the granting of the order embodied in annexure A to this notice of motion (the court order), constitutes or shall constitute a breach of the court order.

3. That in the event of the Municipality taking any further steps to implement or act upon its decision to award the tender to the JV, that the applicant be granted leave to approach the court, on the same papers amplified, if necessary, for an order finding the third respondent in contempt and that she be imprisoned for a period of 1 (one) month, alternatively that this court imposes upon her such sentence as it considers appropriate.

4. That in the event of the JV taking any further steps to implement or act upon the Municipality's decision to award the tender to it, that the applicant be granted leave to approach the court, on the same papers amplified, if necessary, for an order finding the directors of the fourth and fifth respondents in contempt and that they be imprisoned for a period of 1 (one) month, alternatively that this court imposes upon them such sentences as it considers appropriate.

5. That the Municipality be ordered to pay the costs of this application on a scale as between attorney and client. If any of the other respondents

oppose, then and in that event, that the opposing respondents be ordered to jointly and severally pay the costs of the application, the one paying the other to be absolved, on a scale as between attorney and client.”

- [2] Concomitant with the above prayers the appellant moved for the suspension of the interim interdict pending the final determination of the application for leave to appeal.
- [3] On 20 May 2022 Pelatona brought an urgent application before Daffue, J in terms whereof the Municipality would be interdicted or restrained from implementing or acting upon its decision to award a public tender in respect of the refurbishment of the sewer pump station in Phahameng township / Bultfontein to the then second and third respondents pending final adjudication of a review application that was yet to be instituted.
- [4] The interim interdict granted by Daffue, J restrained the respondents from in anyway further implementing the decision of the Municipality to award the public tender: **SCM / TSW/11/2021-2022: BULTFONTEIN/ PHAHAMENG** refurbishment of Sewer Pump Station to the joint venture of the then second and third respondents.
- [5] On 31 May 2022 the Municipality lodged an application for leave to appeal the interim interdict. Subsequent to the filing of the application for leave to appeal the Municipality allowed the then second and third respondents to execute their duties in terms of the tender as awarded.
- [6] Pelatona approached the court a quo on urgent basis alleging that the Municipality and the then second and third respondents violated the terms of the interim interdict and are therefore in contempt.

- [7] The Municipality resisted the contempt of court application and raised a defence that its actions were informed by legal advice it received that the filing of the leave to appeal application suspended the operation of the interim interdict.
- [8] The court a quo did not grant the contempt of court application but made a declaratory order as stated above. Aggrieved by the declaratory order granted by the court a quo, the Municipality approached this court on appeal in terms of section 18 (4) of the Superior Courts Act (SC Act). It is this declaratory order that is the subject of this appeal.
- [9] The municipality, in its notice of appeal and before us, contended that the court a quo erred in granting the declaratory order in view of the fact that the interim interdict is not an interlocutory order and that it has the effect of a final judgment and order. It contended, further, that Pelatona failed to allege on a balance of probabilities it would suffer irreparable harm if the court did not order the execution of the order and that the municipality will not suffer irreparable harm if the court so orders. It contended, further, that there are reasonable prospects of success on appeal.
- [10] The parties are at variance on the status of the interim order. The question was whether it was automatically suspended by the filing of the application for leave to appeal as contemplated in Section 18 (1) of the SC Act or whether it falls under section 18 (2). If it is found that the interim interdict falls under Section 18(1) of the SC Act, its operation was automatically suspended by the filing of the leave to appeal. If found to be falling under Section 18(2) the second leg is to determine whether it is the interlocutory order which has the final effect. If it is found to be lacking the effect of finality, it cannot be suspended.
- [11] The court a quo found that the interim interdict was merely aimed at regulating the process pending the review and that it has no final effect as it does not dispose of the main dispute between the parties. I must hasten to

say that the interim interdict in the current matter was not incidental to the pending review. It was brought separate from the pending review proceedings. It had a life of its own.

[12] In his judgment, Daffue, J set truncated timelines for the filing and adjudication of the review proceedings to try and ameliorate the effects of the interim interdict.

[13] It is not in dispute that there are 6548 additional households in Phahameng whose sanitary needs are not catered for in the current sewer reticulation network. The impugned tender process was aimed at refurbishing and expanding the capacity of the Bultfontein/Phahameng sewage pumping station which is struggling to keep up with the inflow of sewage from various new developments. Sewer spillage have become prevalent in Phahameng resulting in certain access points into the township unpassable. There is another ongoing project involving 1200 toilet structures which must be connected to the existing sewer pump system which is barely coping.

[13] **Section 18 (1) to (3) of the Superior Courts Act 18 of 2013**, provides that:

18 Suspension of decision pending appeal

- “(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is **not** suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”

[14] Although the issue of the appealability of the interim interdict is yet to be determined by a Court seized with the Application for leave to appeal it is apposite to deal with whether the interim interdict is final in effect or not for the purpose of determining this appeal. In **Zweni v Minister of Law and Order**¹ the court set out the guidelines for an order that is final in effect as follows:

“ A ‘judgment or order’ is a decision which as a general principle, has three attributes, first the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least substantial portion of the relief claimed in the main proceedings.... ”

[14] It is well established that the constitutional interests of justice requirement takes precedence over the common law standard of appealability. In **National Treasury And Others v Opposition to Urban Tolling Alliance**² the Constitutional Court observed that while Courts were reluctant to hear appeals against interim orders which had no final effect and which were to be reconsidered when final relief was to be determined, this rule was not an inflexible one. Thus, the question of whether an appeal against an interim order should be entertained depends on the interests of justice standard to be considered on a case-to-case basis. The court remarked as follows:

“[24] It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule. In each case, what best serves the interests of justice dictates whether an appeal against an interim order should be entertained. That accords well with developments in case law dealing with when an appeal against an interim order may be permitted.

¹ Zweni v Minister of Law and Order 1993 (1) SA 523 at 532J- 533A

² National Treasury and Others v Opposition to Urban Tolling Alliance (CCT 38 / 12) [2012] ZACC 18

[25] This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is “the interests of justice”. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.

[26] A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever.”

[15] The effects of the interim interdict on the community of Phahameng is further delay to access to proper and adequate sanitation which is a basic right. The community at Phahameng continues to live with sewer spillage and faecal waste running in their streets on daily basis pending all these court processes.

[16] The argument that the municipality failed to keep up with the population growth and to supply proper sewer system timeously does not address the hazardous health standards and the indignity confronting the community of

Phahameng currently. The effects of the interim order on the community are irreversible. One day without proper sanitation is unbearable.

[17] It is so that Government procurement was entrenched in the constitution to ensure transparency, fairness and competitiveness but the right to protection of economic interests must, in my view, be weighed against the right to dignity, health and adequate sanitation when determining which party would be worse off if the interim interdict persists.

[18] It is clear from the above that the interim interdict granted on 23 May 2022 falls within the purview of Section(18) (1) of the SC Act and that the counter application by the Municipality was not necessary. The appeal ought to succeed.

[19] It is for the above reasons that the following order was issued on 03 August 2022:

1. The appeal succeeds
2. The order of Reinders, ADJP dated 13 June 2022 is set aside and replaced with the following order:
3. The application for contempt of court by the applicant is dismissed;
4. The counter application by the first respondent is struck off the roll
5. Each party to pay its own costs.

N.M. MBHELE, AJP

I concur.

J.J. MHLAMBI, J

I concur.

M. OPPERMAN, J

Appearances:

For the Applicant: Adv. Notshe, SC
with Adv Ayayae

Instructed by Hill McHardy & Herbst Inc.

Bloemfontein

For the Respondent: Adv. J. W. Steyn

Instructed by FJ Senekal Inc.

Bloemfontein