IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No. 2958/2022

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: NO

12 October 2022

In the matter between:

INZALO ENTERPRISE MANAGEMENT SYSTEMS (PTY) LTD	**Applicant**
and	
MOGALE CITY LOCAL MUNICIPALITY	**First Respondent**
MAKHOSANA MSEZANA N.O	**Second Respondent**
MAKHOSANA MSEZANA	**Third Respondent**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be **12 October 2022.**

Summary: Application – for the implementation of an order pending the outcome of leave to appeal or appeal to the Supreme Court of Appeal. The requirements for the granting of an order in terms of section 18 of the Superior Courts Act 10 of 2013 considered – applicant bears the onus to prove the existence of 'exceptional circumstances' and should discharge the onus imposed by section 18(3) to show irreparable harm – application granted.

JUDGMENT

Molahlehi J

Introduction

[1] This is an opposed urgent application instituted in terms of section 18 of the Superior Courts Act, (the Act).[1] In this regard, the applicant seeks an order to declare the execution and the operation of the order made by this court on 14 June 2022 (14 June 2022 order) not suspended consequent to the petition filed with the Supreme Court of Appeal (SCA) by the respondents on 15 September 2022. The petition is filed by the first respondent, Mogale City Local Municipality (the municipality).

[2] The essence of the 14 June 2022 order, which the applicant seeks to enforce pending the application for leave to appeal to the SCA, interdicted and restricted the municipality from implementing its decision to appoint a service provider for the development and supply of a MSCOA Financial Management System (the financial system). The order further directed the municipality to provide the applicant with written reasons for the appointment of Solvem, the company that is alleged to have

[1] Act number 10 of 2013.

been appointed as a service provider to develop a financial system for the municipality.

[3] The brief history of this matter is that after the above order, the municipality instituted leave to appeal against the order. This court dismissed the leave to appeal on 15 August 2022.

[4] On 7 September 2022, the applicant instituted contempt of court proceedings against the municipality and the municipal manager. It is apparent, as was the case in the main application, that the respondents did not, in the contempt proceedings, dispute the irregularity and the unlawfulness of the impugned tender issued by the municipality to Solvem. The municipality further indicated that it intended to institute a self-review of the awarding the impugned tender.

[5] On 7 September 2022, the municipality filed a petition to the Supreme Court of Appeal (the SCA) to set aside the 14 June 2022 order. That petition is still pending before the SCA.

[6] The applicant's contempt of court application was heard on 7 September 2022, and the judgment was delivered on 21 September 2022. In that matter, Manoim J, after finding that the matter deserved to be treated as urgent, proceeded to find that: (a) the respondents were in contempt of the 14 June 2022 order, and (b) directed that the respondents provide written reasons for the impugned decision within seven days of that order.

Preliminary points

[7] The applicant has raised the following preliminary points:

(a) The late filing of the answering affidavit.

(b) Lack of authority of the municipal manager to defend the proceedings.

(c) Lack of authority to depose to the answering affidavit by the municipal manager.

(d) Issue *estopel*

(e) *Res judicata*

The late filing of the answering affidavit

[8] The municipality and the municipal manager have not made a substantive application for condonation of the late filing of the answering affidavit. However, it seems to me that the interest of justice directs that the late filing of the answering affidavit should be condoned. In terms of the times set out in the notice of motion, the respondents were required to file their answering affidavit by no later than 17h00 on Monday, 26 September 2022.

[9] The notice of motion is dated 22 September 2022, and the respondents' answering affidavit was filed by email at 12h35 on 27 September 2022. The period of the delay is in my view, is not excessive, and it should be noted that it occurred in the context where the applicant required the municipality to prepare its answer over the weekend. It seems to me, based on these facts, it is in the interest of justice that the late filing of the answering affidavit deserves to be condoned.

Lack of authority to institute and depose to the answering affidavit by the municipal manager.

[10] The applicant has challenged both the authority to oppose the proceedings and depose to the answering affidavit by the municipal manager. In support of its contention that the municipal manager does not have the authority to institute proceedings on behalf of the municipality, the applicant referred to the case of Kouga Municipality v SA Local Government Bargaining Council,[2] where the applicant's application was dismissed for failing to prove that the employee of the municipality had authority to institute and prosecute the proceedings on behalf of the municipality.

[11] The other case relied upon by the applicant in support of its contention is Acting Municipal Manager v Madibeng Black Business Chamber.[3] In that case, the municipal manager relied on the general delegation given by the municipality to prove authority to institute and prosecute the legal proceedings on behalf of the municipality.

[12] I deal first with the issue of lack of authority to depose to the answering affidavit by the municipal manager. This issue is often conflated with the issue of authority to institute or defend proceedings by either an attorney or an individual. In clarifying the issue, the SCA in Ganes and Another v Telecom Namibia Ltd,[4] held that it is irrelevant whether a person had been authorised to depose to the founding affidavit (this would include the answering affidavit). The court further held that:

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[2] (2010) 31 ILJ 1211.
[3] (2022) ZAPHC 171 (25 March 2022).
[4] 2004 (3) SA 615 (SCA).

"The deponent to an affidavit in motion proceedings need not be authorised to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised."

[13] It is trite that the procedure to follow when challenging authority to institute proceedings is that set out in rule 7(1) of the Uniform Rules of the Court (the Rules). The duty to prove authority arises only when the authority to prosecute the process is formally challenged by issuing the notice in terms of rule 7(1) of the Rules.[5]

[14] In the present matter, the applicant availed itself of the procedure in rule 7(1) in challenging the authority of the municipal manager to defend the present application. The challenge of the authority of the municipal manager is raised in the context where the application is, as stated earlier, instituted the application on an urgent basis. It is important to note in this regard that the notice of motion and the founding affidavit was filed on 22 September 2022. The answering affidavit was filed on 27 September 2022. The notice calling upon the respondents to prove authority was filed the following day, 28 September 2022.

[15] In applying the principles discussed earlier, it is clear that the point raised by the applicant concerning the municipal manager's authority to depose to the answering is unsustainable.

[16] As concerning issue of authority to defend the application**,** it is clear in the above circumstances that the municipality and the municipal manager were not afforded sufficient time to arrange for a meeting council to convene and consider

[5] *Firstrand Bank v Fillis* 2010 (6) SA 565.

taking a resolution to authorise opposition to the applicant's application. It is also important to note that the issue was not formally raised in the main application. In my view this application and the contempt application are part of the main application. It can thus be inferred that the municipal manager's authority having not been challenged in the main application can be taken to have been accepted.

Issue *estoppel*

[17] The municipality contends that the applicant is *estopped* from instituting the section 18 application because it was brought after (a) the unsuccessful leave to appeal, (b) unsuccessful application of recusal of the presiding judge, and (c) the outcome of the contempt of court application.

[18] I agree with the applicant's contention that the above point, including others that I have found to be unnecessary to deal with in this judgment, are ill-founded. It is correctly pointed out that section 18 of the Act applies to both in relation to an application for leave to appeal to the high court or the SCA.

[19] The leave to appeal by the municipality in the present matter is instituted in terms of section 17 (2) (b) of the Act,[6] which as indicated earlier was launched on 15 September 2022.

Res judicata

[6] Section 17 (2) (b) of the Act provides:
"(2) (b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

[20] The municipality contends that the matter is *res judicata* because of the Manoim J's judgment. There is no merit in this contention because there is no prove that the requirements of *res judicata* has been satisfied. As indicated earlier the Manoim J's order has two elements to it, namely, contempt of court and *rule nisi* calling on the municipality to deliver written reasons for its decision to award the tender.

[21] The other point raised by the municipality which bears no merit is that relating to the contention that the applicant should institute review application. The issue in this application has nothing to do with review but rather whether the court should uplift the automatic suspension of the enforcement of the 14 June 2022 order which suspension was consequent the leave to appeal to the SCA.

Urgency

[22] The principles governing urgency were discussed in the main judgment and will thus not be repeated in this judgment. In the present matter the municipality has however emphasised in its answering affidavit the contention that the urgency is self-created.

[23] It is trite that an applicant is not entitled to rely on the urgency that is self-created when seeking a deviation from the rules. In *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*,[7] the court held that:

[7] 2016) 37 ILJ 2840 (LC) at para 26.

"… the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately or risk failing on urgency."

[24] In Golding v HCI Managerial Services (Pty) Ltd and others [2015] 1 BLLR 91 (LC) at para 26, the court held that:

"[26] Urgency must not be self-created by an applicant as a consequence of the applicant not having brought the application at the first available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately or risk failing on urgency."

[25] In University of the Western Cape Academic Staff Union and Others v University of the Western Cape,[8] the court held that:

"… if the applicants seeks this Court to come to its assistance it must come to the Court at the very first opportunity, it cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency."

[26] The case of the applicant in the present matter is that urgency arose from the time the municipality filed the petition with the SCA in terms of section 18 of the Act. In other words, the urgency was triggered by the filing of the leave to appeal to the

[8] (1999) 20 ILJ 1300 (LC) at para 15. 8.

SCA. The application was filed about four days after the petition was filed with the SCA.

[27] The applicant contends that applications brought under section 18 of the Act are by their "nature very urgent," and also that urgency arises from the fact the two previous orders were granted on the basis of urgency, i.e the order interdiction the municipality from proceeding with the impugned tender and the contempt of court order made by Manoim J.

[28] It is further argued on behalf of the municipality that urgency arises from the fact that the municipality continues to perpetuate unlawfulness in not complying with the interdict.

[29] Before dealing with whether the applicant has made out a case for urgency, I pause to deal briefly with the provision of section 18 of the Act upon which the applicant relies on in launching this application.

The principles underlying the provisions of section 18 of the Act

[30] The relevant parts of section 18 of the Act provides as follows:

> "(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) ... ...

(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.

(4) If a court orders otherwise, as contemplated in subsection (1)—

the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal."

[31] The principles fused in section 18 of the Act are summarised in University of the Free State v Afriforum and Another,[9] as follows:

"[9] . . . Section 18(1) thus states that an order implementing a pending judgment appeal shall only be granted 'under exceptional circumstances. The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended.

[9] (929/2016) [2016] ZASCA 165; [2017] 1 All SA 79 (SCA); 2018 (3) SA 428 (SCA) (17 November 2016.

[10] It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not if the order is granted."

[32] In my view, the urgency in this matter is not as alleged by the municipality self-created. It may of course, have been ideal for the applicant to have sought the section 18 relief at the time the municipality filed the leave to appeal because that process also suspended the enforcement of the 14 June 2022 order. The suspension of the enforcement of the order as a result of the leave to appeal, however, fell away when the application for leave to appeal was dismissed. That, however, did not detract from the right of the applicant to seek relief when the circumstances changed, consequent the application for leave to appeal to the SCA. The application for leave to appeal to the SCA has no connection with the suspension of the implementation of the order of 14 June 2022 consequence of the leave to appeal being dismissed by this court.

[33] It is common cause that the applicant filed the section 18 application about four days after the municipality filed the application for leave to appeal to the SCA.

[34] The issue of whether there exist exceptional circumstances to warrant granting the relief sought is a matter of factual determination. In the main judgment this court found that the municipality undermined its own procurement policies, the principle of legality and the Constitution resulting in the undermining of the fair administrative right of the applicant. The court further found that the illegal conduct of the municipality continued even beyond the awarding of the tender.

[35] It is important to note both in the main case and in the contempt of court proceedings the municipality did not dispute the irregularity of the awarding of the tender. In both processes the municipality in fact expressed the view that it was intend on instituting self-review.

[36] In my view, allowing the suspension of the implementation of the order of 14 June 2022 to stand consequent the application for leave to appeal to the SCA would amount to countenancing the illegal conduct of the municipality and the municipal manager to continue unabated. Accordingly, I agree with the applicant that there exist exceptional circumstance which entitles the applicant to an order that the operation of the 14 June 2022 order is not suspended following the filing of the leave to appeal to the SCA.

[37] I am further in agreement with the applicant that the continued illegal conduct of the municipality in particular that relating to allowing the development of the

financial system in the absence of a formal appointment letter will result in an irreparable harm. On the other hand, there is insufficient information relating to the alleged damage that the municipality will suffer if this court was to order otherwise. In this regard the municipality has not provided the details about the development of the new financial system. There is also no information about the progress on the investigation of the illegal warding of the tender. The municipality has also not provided any information as the current role of the old service provider. For this reasons I am in agreement with the applicant that there is no likelihood that the municipality would suffer irreparable harm if the relief prayed for by the applicant was to be granted.

[38] In light of the above, I am of the view that the applicant's application stands to succeed.

Order

[39] In the premises the following order is made:

1. The late filing of the answering affidavit is condoned.
2. The second respondent has the authority to defend and prosecute the defence against the application on behalf of the second respondent.
3. The operation and execution of the court order granted by this court on 14 June 2022 under case number 2022/2958 is not suspended pending the decision of any application for leave to appeal or of any appeal in terms of section 18 of the Superior Courts Act, 10 of 2013.

4. The respondents are to pay for the costs of this application, the one paying the other to be absolved.

E MOLAHLEHI J

Judge of the High Court Gauteng Local Division, Johannesburg

Representation

For the applicant: Adv W. H. Pocock

Instructed by: Di Siena Attorneys Respondents:

For the respondent: Adv. JJ Botha

Instructed by: Smith Van der Watt Inc.

Heard: 29 September 2022

Delivered: 12 October 2022