



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 23998/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:
NO
(3) REVISED.

13 JUNE 2023

DATE

EI FRANCIS

In the matter between:

HLANIKI INVESTMENT HOLDINGS (PTY) LTD

Applicant

and

THE CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY

Respondent

JUDGMENT

FRANCIS J

1. This is an application by the applicant for leave to appeal to the full bench of this court, alternatively to the Supreme Court of Appeal against the whole of my judgment and order, delivered on 3 November 2022. This was after I had dismissed the applicant's action with no order as to costs on the grounds that the agreement was invalid since it extended for a period of more than three

budgetary years contrary to section 33 of the Local Government: Municipal Finance Management 56 of 2003 (MFMA).

2. The applicant has raised several grounds for leave to appeal contained in its application for leave to appeal dated 22 November 2002. It is unnecessary to repeat those grounds for leave to appeal save to indicate that the application for leave to appeal centres around my decision to dismiss the applicant's claim on the basis that the Service Level Agreement (SLA) it concluded with the respondent offended section 33 of the MFMA. A further ground is that this court had *mero motu* raised the issue of legality and dismissed the claim on the basis of non-compliance with the procurement requirements such as section 33 of the MFMA, without declaring the contract concluded between an organ of state and the public illegal or void, as the case may be, without exercising its remedial powers under section 172(1)(b) of the Constitution to ensure that its order is just and equitable as between the parties in particular the public.
3. The applicant's application for leave to appeal is on the grounds in terms of the provisions of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (the Superior Court Act). The aforesaid section provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success.
4. I had found that nothing prevented this court to deal with the issue raised by the respondent around the provisions of section 33 of the MFMA. I had found that this court was not sitting as a review court. It was required to determine

whether the plaintiff was entitled to damages for the loss of its bargain being the net profit which it would have made in relation to phase 3 and 4 for the project of the years 2017 and 2018 since the claim for the loss of profits in relation to the outstanding portion of phase 2 of the project was settled between the parties.

5. I had found that the plaintiff had called two witnesses in support of its case. Both witnesses namely Ntsikeni and Maluleke dealt with the provisions of section 33 of the MFMA. Ntsikeni was a former employees of the respondent and was keenly aware of the provisions of the section. They were aware that the section had a possible impact on the matter. The applicant's attorney Burton Meyer had been involved in an attempt to amend the SLA or an addendum and also referred to the provisions of section 33 in his correspondence with the respondent prior to instituting the proceedings in this court. He had also indicated that a deviation might have to be sought.

6. I had found that section 33 of the MFMA was not specifically raised as a plea in the matter. This court could not ignore the fact that the tender that was awarded to the plaintiff went beyond the three-year financial budgetary year of the respondent. Public funds were involved and this court could not turn a blind eye to non-compliance with the provisions of section 33 of the MFMA. This court had not *mero motu* raised the issue of section 33 of the MFMA. This was raised during closing arguments and both parties were invited to file further supplementary heads of arguments which they did. The plaintiff did not amend its particulars of claim to deal with the implications of non

compliance with the provisions of section 33 of the MFMA. Deviation should be sought from National Treasury. The plaintiff persisted with its contractual claim and contended that the respondent's arguments were misconceived.

7. I had found that the respondent's arguments were not misconceived. Since the SLA went beyond the three-year financial budgetary period there should have been compliance with the provisions of section 33 of the MFMA. There simply was non-compliance with the provisions of the section. I had taken into account that the applicant's claim of phase 2 was settled between the parties and then dismissed the action.
8. The applicant has raised nothing new in its application for leave to appeal. All the issues that it raised were dealt with by me in my judgement. There are no prospects of success on appeal.
9. I am not persuaded that a proper case has been made out by the applicant for leave to appeal.
10. In the circumstances the following order is made:
 - 10.1 The application for leave to appeal is dismissed with costs of one counsel.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR APPLICANT : J G SMIT INSTRUCTED BY CLIFFE
DEKKER HOFMEYER INC

FOR RESPONDENTS : D WATSON WITH C TABATA
INSTRUCTED BY SALIJEE GOVENDER
VAN DER MERWE INC

DATE OF HEARING : 13 APRIL 2023

DATE OF JUDGMENT : 13 JUNE 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 13 June 2023.