REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-032601

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

Date: 14 August 2023 E van der Schyff

In the matter between:

MEC RESPONSIBLE FOR ECONOMIC DEVELOPMENT, GAUTENG	APPLICANT
and	
SIBONGILE VILAKAZI	FIRST RESPONDENT
THANDIWE GODONGWANA	SECOND RESPONDENT
LENTSWE MOKGATLE	THIRD RESPONDENT
DAVID MAIMELA	FOURTH RESPONDENT
THEMBISA FAKUDE	FIFTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant (MEC) approached the urgent court for a declarator that the order granted by Nyathi J on 18 May 2023 (the May 2023-order) is final in effect, alternatively, and in the event that the court finds that the May 2023-order is not final in effect, that the execution of the order be suspended pending the finalisation of the appeal.

Background

[2] The respondents in this application initially approached the court on an urgent basis. The application concerned an administrative action performed by the MEC, in that she dissolved the Board of the Gauteng Growth and Development Agency (Proprietary) Limited (the board) and terminated the membership of several board members. The decision is challenged in the review application.

[3] It is evident from the founding papers in the review application that the dispute that arose that led to a breakdown of trust between the MEC and the board primarily revolves around the appointment of a Chief Executive Officer (CEO) for the Gauteng Growth and Development Agency (Proprietary) Limited (GGDA). It is not necessary for the purposes of this application to deal with this issue and the pending review in detail. It is important to note, however, that it is only the board's stance regarding the appointment of the CEO that is questioned and criticised by the MEC in the review application.

[4] I pause to note that the dispute arose after the chairperson of the board approached the newly appointed MEC to explain the process that was followed in identifying a suitable candidate to appoint as CEO of GGDA. The chairperson of the board explained that a costly and expensive process was followed in identifying the most suitable candidate for the post. The erstwhile MEC was involved throughout the process. The new MEC, the applicant in these proceedings, was

requested to concur with the board's decision and to appoint the identified candidate as the CEO. However, in this section 18 application, it is for the first time alleged by the respondents (the applicants in the review application) that the CEO's appointment was already finalised and approved by the previous MEC. Whether this position is indeed correct, is objectively determinable. This situation is, however, not determinative of the issues underpinning this application.

[5] Except for this dispute and the board's stance regarding the appointment of the CEO, the MEC did not explicitly take issue with any other decision or conduct of the board or with the manner in which the GGDA was managed at that point in time. She terminated the respondents' board membership after she invited the board members to make representations and indicated that she was of the view that they were usurping her statutory powers to appoint a CEO, by prescribing which candidate she must appoint.

[6] Before Nyathi J, the respondents sought interim relief pending the finalisation of the review of the MEC's decision to terminate their board membership. In the May 2023-order the MEC's decision to dissolve the board of the GGDA and to terminate the respondents' board membership was suspended pending the finalisation of the review envisaged in Part B. The respondents were reinstated as directors of the GGDA pending the finalisation of the review. In addition, the appointment of new directors, if any, in substitution of the respondents was set aside, and the MEC was interdicted from appointing any directors to the board in substitution of the respondents, pending the finalisation of the review application.

The GGDA

[7] The Gauteng Growth and Development Agency (Proprietary) Limited Act 5 of 2003 (the GDA) was promulgated to provide for the management of a company known as Gauteng Growth and Development Agency (Pty) Ltd (GGDA). The Gauteng

Provincial Government is the only stakeholder, and the MEC exercises the powers and duties of the Gauteng Provincial Government as shareholder of the Company.[1]

[8] The objects of the GGDA are to: enable economic development that is focused on creating sustainable jobs; drive growth to provincial growth domestic products and employment rates; strategically position the Province into a globally competitive city region; facilitate partnerships and create linkages across the Province in order to maximise service delivery outcomes; and support the development of the key sectors of the economy in line with established economic and industrial policies of the Province.[2] The functions of the GGDA are to: undertake or invest in the identified projects, and enable increased private sector investment.[3]

[9] The GGDA is managed by a Board of Directors (Board). The MEC must appoint the Board. The Board must consist of a minimum of 9 and a maximum of 11 members. The MEC appoints the Chairperson of the Board and the Chief Executive Officer (CEO) of the Board.[4]

Urgency

[10] The aspect that renders this application sufficiently urgent to be dealt with is the fact that the GDA provides for the GGDA, a company, to be managed by its Board of Directors. The public interest requires the GGDA to be properly managed by its board. The order that is sought to be appealed was granted in the urgent court, and those facts continue to be relevant and urgent.

Discussion

Declarator

[1] S 5 of the GDA.

[2] S 3 of the GDA.

[3] S 3A of the GDA.

[4] S 8 of the GDA.

[11] The respondents contend that the declaratory relief sought is incompetent. I disagree. A declaratory order is a ruling that is explanatory in nature. It is necessary to clarify the uncertain position as to whether the May 2023-order is an order having the effect of a final judgment.

[12] When can it be held that a decision or order is 'final in effect'? Can it be said that an order that is prejudicial to a company and can cause irreparable harm to the company, an order that goes beyond preserving the *status quo*, is final in effect? In the early case of *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd,*[5] the court held that in determining whether an order is final in effect, regard should not be had 'to whether or not the one party or the other has by the order suffered an inconvenience or disadvantage' but to whether the order bears directly upon, and in that way affects, the decision in the main suit. In *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club,*[6] the court reiterated that the fact that an order could well prove to be prejudicial to a company does not justify a contention that the order is a final and definitive order.

[13] In *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation,*[7] the court had to decide whether an interim interdict that prohibited the infringement of a patent was final in effect, in circumstances where the patent would have expired prior to the determination of the final interdict. In the matter of Cipla, the applicant, acknowledged the general rule that interdicts granted pending final relief were not appealable. It, however, argued that, although the interdict was interim in form, it was final in effect, because the pending infringement action was unlikely to be determined before the expiry of the patent on 3 December 2018. Since the final interdict claimed in the infringement action could itself not endure beyond 3 December 2018, Cipla submitted that the interim order in effect finally disposed of

[5] 1948 (1) SA 839 (A).

[6] 1977 (2) SA 38 (A).

[7] 2018 (6) SA 440 (SCA).

the interdictory relief, and concluded, that the granting of the interim interdict was appealable.[8]

[14] In determining the question as to whether the interim interdict was appealable, Gorven AJA explained that the phrase ‘final in effect’ means that an issue in the suit had been affected by the order to such an extent that the issue could not be revisited by the court of first instance. Gorven AJA explained that the fact that the granting of an interim interdict gave rise to prejudice on the person against whom it operated did not in itself render such an order appealable. The only prejudice that might make such an order appealable was prejudice that in some way affected the final determination of an issue in the suit or stood in the way of an issue being determined at a later date. Gorven AJA held that Cipla's argument that the interim interdict against it was 'final in effect' because the patent would have run its course by the time the main action came to be considered, boiled down to the argument that Cipla was prejudiced because 'time could not be recalled'. This kind of prejudice, he held, did not render the order of the court *a quo* appealable. The court *a quo* had not finally decided the *res judicata* issue, and it would in future be considered by the court considering the infringement action. Gorven AJA concluded that the order was not final in effect, was in form and effect an interlocutory interdict, and not appealable.[9]

[15] It is evident from the form and effect[10] of the May 2023-order, that interim relief was granted. The court that will in future decide the review application can come to a decision that confirms the decision to dissolve the board and terminate the respondents’ board membership, thereby overturning the May 2023-order, or the reviewing court may set aside the decision to terminate the respondents’ board membership. The May 2023-order is thus a decision that is susceptible to alteration by the court of first instance.

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[8] *Supra* at 441A-B.

[9] *Supra* 441C-F.

[10] *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA).

[16] The order is not definitive of the rights of the parties, nor does it have the effect of disposing of a substantial portion of the relief claimed[11] – the order only provides for the respondents' reinstatement pending the final review. The MEC's counsel stressed that the respondents' term as board members may expire before the appeal, or the review is heard and that the reinstated directors will be able to convene meetings and exercise the ordinary powers of directors and make binding decisions in their capacity as directors. This, she submitted, renders the decision to reinstate them, albeit pending the determination of the review, a final decision. Based on the case law referred to in paragraphs and above, none of these factors render the order a final order or an order having the effect of a final order.

[17] I do not agree with the MEC's counsel's submission that the granting of leave to appeal by Nyathi J, as a matter of course, renders the May 2023-order an order of final effect. It has been held in, amongst others, *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty)* Ltd[12] that the fact that leave to appeal has been granted on a question of appealability does not mean that the decision in respect of which leave is given is indeed appealable. Section 18(2) of the Superior Courts Act 10 of 2013 was crafted specifically to provide that where interlocutory orders, not having the effect of a final judgment, are appealed, such orders are not suspended pending the appeal. The May 2023-order falls in this category.

[18] In the result, it needs to be determined whether the MEC makes out a case in terms of s 18(2) of the Superior Courts Act to have the operation and execution of the May 2023-order suspended.

Section 18(2) and (3) of the Superior Courts Act

[11] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

[12] 1986 (2) SA 555 (A) at 561D-E. See also *FirstRand Bank Ltd t/a First National Bank v Makaleng* [2016] ZASCA 169 para 15, and Cronshaw and another v Fidelity Guards Holdings (Pty) Ltd 1996 (3) SA 686 (A) at 689B-D.

[19] Section 18(2) of the Superior Courts Act provides that unless the court, under exceptional circumstances, orders otherwise, the operation and execution of an interlocutory decision that is the subject of an appeal is not suspended pending the appeal. Section 18(3) prescribes that a court may only order 'otherwise', that is, order the suspension of the operation and execution of the interlocutory order, if the party who applies for the operation and execution of the interlocutory order to be suspended, in addition, proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not grant the order, and that the other party will not suffer irreparable harm if the court orders that the operation and execution of the interlocutory order are suspended.

[20] Three jurisdictional requirements must be met for a court to exercise its discretion to grant or refuse the application:[13]

i. The existence of exceptional circumstances;

ii. Proof on a balance of probabilities that the applicant will suffer irreparable harm if the interlocutory order is put into operation (the presence of irreparable harm if the order is put into operation and executed pending the appeal);

iii. Proof on a balance of probabilities that the respondent will not suffer irreparable harm if the interlocutory order is not put into operation and executed (the absence of irreparable harm if the order is not put into operation and executed pending the appeal).

Exceptional circumstances

[21] The question as to whether exceptional circumstances exist is a question of fact,[14] and it must be derived from the actual predicament in which the litigants find

[13] *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ).

[14] *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ); *Dlamini v Ncube and Others* (01355/2023) [2023] ZAGPHJC 379 (18 April 2023).

themselves. It refers to circumstances that are out of the ordinary, unusual, uncommon, atypical, or rare.[15]

[22] *In casu,* the MEC contends exceptional circumstances are found therein that the May 2023-order compels the shareholder, the MEC, to forge a relationship with a board in whom she has lost all trust, and which board has made unfounded allegations of illegality and imputations of corruption when she seeks to exercise a power vested in her by law. This situation will endure until September 2024 or the finalisation of the review application, whichever occurs first. The MEC further contends that if she appoints a CEO, as she is statutorily mandated to do, the board will not cooperate with the CEO.

[23] The MEC informs the court that since the respondents' reinstatement, they have acted prejudicially to the affairs of the GGDA. The reinstated chairperson of the GGDA, for instance, sought to replace a chairperson of one of the GGDA's various subsidiaries on the day of his reinstatement without being authorised by the board. The reinstated board members took issue with the MEC's decision to fill the vacancies on the board to ensure that the minimum number of directors is appointed. The chairperson informed the MEC that she would not convene a shareholder's meeting until she had obtained advice. The reinstated board members held meetings excluding the board members appointed by the MEC. The respondents deny the Minister's allegations, and in turn, claim that the GGDA was mismanaged in their absence. The MEC denies this allegation.

[24] The existing dispute is indicative of the tension created between a legislative framework that gives Government, in this instance, Provincial Government, through the relevant MEC, the power to make senior appointments in a state-owned entity, the GGDA, on the one hand, and the principles of good governance

[15] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at par [37]; *FourieFismer Inc and Others v Road Accident Fund; Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund* (17518/2020; 15876/2020; 18239/2020) [2020] ZAGPPHC 293 (8 July 2020); *MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156H-157C.

as outlined in the King IV report which recommends that the board appoints the Chief Executive Officer, on the other.

[25] The MEC's statutory powers and best practice good governance principles should, however, not be regarded as opposing or irreconcilable. The *Handbook for the appointment of persons to boards of state and state controlled institutions*, published by the Department of Public Service and Administration, provides best practice guidelines to promote uniformity in the appointment, of persons to boards of state and state controlled institutions, and the respective role-player's duties and functions. Although the Handbook represents a stand-alone practical document that is not a governance instrument, it promotes the primary pillars of fairness, accountability, responsibility, and transparency. It supports the basic values and principles governing public administration set out in Chapter 10 of the Constitution.

[26] More importantly, section 195 of the Constitution provides that public administration in all organs of state and public enterprises must be governed by the democratic values and principles enshrined in the Constitution.

[27] In this context, it is unfathomable that the parties in question were not able to resolve their dispute through mediation or another alternative dispute resolution mechanism. Due to the break in trust, and the communication breakdown that ensued, it became impossible to merge the two opposing viewpoints. On the one hand, the MEC opined that she is under no legal obligation to consider the board's recommendation. On the other hand, the respondents, in a converse view based on the principles of good governance best practice, regarded the appointment of the CEO to follow the recommendation of the board, specifically after an expensive and comprehensive process was followed to identify a preferred candidate. (Although it is now averred by the respondents that the CEO's appointment was finalised and concluded by the time the current MEC was appointed, the papers indicate that this was not regarded to be the position prior to the MEC's decision to dissolve the board.)

[28] Both parties are equally to blame for the current situation. Whilst the MEC's incomprehensible refusal to mediate the dispute fueled the discord, the insinuations of corruption, dishonesty, and state capture, contained in the respondents' papers, widened the rift between the parties. The question is, however, whether the mistrust between the parties constitutes an exceptional circumstance.

[29] It does not. The first reason for coming to this conclusion is the MEC's acquiescence to the May 2023-order, as evinced by FAA8 to the founding affidavit, an aspect dealt with below. The MEC does not explain what subsequently caused the change of heart that led to this application, but it is significant that the MEC reinstated the respondents as board members, or at least the second respondent, pursuant to the order being handed down.

[30] In addition, I must consider that the GDA determines that the GGDA is managed through its board. The MEC is not part of the day-to-day management of the GGDA. The GDA does not provide for a situation where no board exists. Although the MEC informs the court that she invoked the provisions of the Memorandum of Incorporation to fill vacancies on the board, she does not inform the court when she filled the vacancies and how many appointments she made. She does not inform the court whether the reinstatement of the respondents caused the maximum number of directors to be exceeded. It is not in the public interest for the GGDA to be rudderless, or for individuals to perform functions that should be performed by the board of directors.

[31] It remains open to the parties to refer the dispute regarding the appointment of the CEO to mediation or another alternative dispute resolution mechanism or even approach the court on the basis of a stated case. The existence of the dispute *per se*, need not impact on the GGDA's functionality. If the averment contained in the respondents' answering affidavit that the appointment of the CEO was already

finalised and concluded before the applicant's appointment as MEC, and that a CEO was already lawfully appointed under the auspice of the erstwhile MEC turns out to be correct, the dispute that arose regarding the CEO's appointment can no longer be a point of contention. Dysfunctionality will only be a consequence of the parties, or one party, not adhering to the Constitutional prescript captured in s 195 of the Constitution.

[32] In the result, the MEC did not make out a case that exceptional circumstances exist that necessitate the suspension of the May 2023-order. It is consequently not necessary for this court to continue with the s 18(2) enquiry.

Miscellaneous

[33] Due to the conclusion I came to, it is not necessary to deal with the issue of non-joinder raised by the respondents.

[34] An aspect not pertinently raised by any party, but that is relevant to these proceedings, is the effect and consequence of annexure FAA8 to the MEC's founding papers. Annexure FAA8 is a letter dated 22 May 2023. This letter was directed to Ms. T. Godongwana, the second respondent, by the MEC. It is necessary to have regard to the content of this letter.

> 'RE: MATTER BETWEEN MS SIBONGILE VILIKAZI AND OTHERS VD MEC ECONOMIC DEVELOPMENT AND ANOTHER (CASE NO:032601/23)
>
> 1. The above subject refers.
> 2. In a judgment on 18 May 2023, it provided for, amongst others, but pending the application of the finalization of the review application, the decision taken to "dissolve the board of the GGDA and to terminate the board membership of the applicants with the GGDA is hereby suspended with effect from 24 March 2023."

3. In accordance with the judgment, I hereby wish to confirm that you are reinstated as a Director of the GGDA SOC Ltd.
4. In reinstating your membership, I wish to request that the Shareholder will be given an opportunity to convene a Shareholders meeting as per the Companies Memorandum of Incorporation (MOI) Within 10 days of this notice.
5. Your cooperation in this regard will be appreciated.'

[35] This letter is indicative of the fact that the MEC acquiesced in the interim order granted by Nyathi J on 18 May 2023.

[36] Trollip J said in *Gentiruco AG v Firestone SA (Pty) Ltd:*[16]

> 'The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with the intention to appeal, shows that he acquiesces in the judgment or order.'

[37] Innes CJ held in *Standard Bank v Estate Van Rhyn*:[17]

> 'If a man asked clearly and unconditionally acquiesced in and decided to abide by the judgment it cannot thereafter challenge it.'

[38] The consequence that FAA8 might have for the success of the appeal cannot be ignored.

ORDER

In the result, the following order is granted:

[16] 1972 (1) SA 589 (A) at 600A
[17] 1925 AD 246 at 274.

1. The application is dealt with as an urgent application in terms of Rule 6(12), and non-compliance with the forms and service provided for in the Rules of Court are condoned;

2. The order handed down by Nyathi J on 18 May 2023 is an interim order that does not have the effect of a final judgment;

3. The section 18(2) application is dismissed, and costs are costs in the appeal.

_____

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	Adv. M. Sello SC
With:	Adv. N.P. Manala
Instructed by:	Mncedisi Ndlovu & Sedumedi Attorneys
For the respondents:	Adv. M. Majozi
Instructed by:	Ngeno Mteto Inc.
Date of the hearing:	10 August 2023
Date of judgment:	14 August 2023