IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 061751/2023

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

E.M. KUBUSHI **DATE: 08 March 2024**

TSHITADINGAKA CONTRACTORS CC Applicant
REGISTRATION NUMBER: 2005/024471/23

and

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD Respondent

***Delivered**: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be **08 March 2024**.*

JUDGMENT

KUBUSHI, J

[1] The application, in Part A thereof, revolves around an interim interdict sought by the Applicant to interdict and restrain the Respondent from removing the Applicant's name from the Respondent's Register (the National Register of Contractors).[1] The interim relief is sought pending the review application in Part B of the application.

[2] The Respondent is the Construction Industry Development Board, a juristic person established as such in accordance with the provisions of section 2 of the

[1] As defined in section 1(s) of the Construction Industry Development Board Act No. 38 of 2000.

Construction Industry Development Board Act.[2] ("the Act"). Section 16 of the Act authorises the Respondent to establish a public sector register of contractors. In terms of section 17(1) of the Act, the Respondent shall keep and maintain a register of the prescribed particulars of contractors who are registered with the Respondent.

[3] The Applicant is said to be a level one B-BBEE construction company with 17 years of experience specialising in civil engineering and construction industries with numerous successfully completed projects under its belt. The Applicant operates largely in the public sector with the majority of its projects emanating from State contracts. The Applicant is registered as a contractor with the Respondent under CRS number 211733. Before the institution of this application, the Applicant was, on application to the Respondent, awarded a Grade 7 CE registration. Section 17(2) of the Act provides that a contractor may apply to the Board to amend its category status. The Applicant had, previously, applied to the Board to be upgraded and be awarded a 7 CE grading, after alleging that it meets all the requirements. The application was granted on 9 April 2021, and the Applicant was promoted to grade 7 CE.

[4] On 9 May 2022, the Respondent is said to have received an anonymous complaint through the KPMG hotline that the Applicant had been approved for a grading that it was not entitled to. Specifically, the anonymous tipoff stated that the Applicant had submitted a four-year learnership that did not entitle the Applicant to its upgrade. Upon receipt of the complaint, the Respondent launched an investigation, wherein the Applicant was requested to respond and supply information. The report was finalised on 7 July 2022 and was referred to the Board for a decision. On 8 August 2022, the Applicant received a notice of intent to remove the Applicants grading with the Respondent. The Applicant responded to the said notice and provided the documentation requested. It appears that the documentation provided did not satisfy the Board and at its sitting on 27 October 2022, the Board made a decision to remove the name of the Applicant from the Register. The Applicant's name was removed from the Register on 6 March 2023, with the Applicant only becoming aware of such removal on 12 June 2023 when it was handed a hard copy of the Notice of Removal attached to the papers as annexure "FA14". On 27 June 2023, the Applicant instituted an urgent application against the Respondent, that was in turn opposed.

[2] Act No. 38 of 2000.

[5] When the application was initially instituted the relief sought was for an order in the following terms:

> 5.1. That this application be heard as an urgent application in accordance with Rule 6(12)(b) and that Applicant's non-compliance with the rules of court relating to service of documents and time frames be condoned;
>
> 5.2. Pending the final determination of the relief sought under Part B below:
>
> > 5.2.1. The Respondent be ordered to restore the Applicant's registration on the Respondent's Register;
> >
> > 5.2.2. The Respondent be interdicted and restrained from removing the Applicant's registration pending the finalisation of Part B;
>
> 5.3. An order, conditionally on the Respondent failing to agree to a variation of the 90-day period mentioned by section 5 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), that the honourable court order a variation of the said 90-day period in terms of section 9 of the PAJA by reducing the said period by ordering the respondent to furnish written reasons for its administrative action mentioned under Part B before the close of business the 31st of July 2023;
>
> 5.4. That the costs of the urgent relief sought under Part A stand over for determination with the relief sought under Part B and Part C save in the event of opposition of the relief sought under Part A in which event a costs order will be sought against the Respondent for the relief sought under Part A;

[6] On 24 July 2023, the application was struck from the roll for lack of urgency.

[7] When the matter appeared again for the hearing of Part A of the application, the Applicant uploaded an updated Draft Order setting out the relief that it sought in the following terms:

> 7.1. Pending the final determination of the relief sought under Part B:
>
> > 7.1.1. The Respondent be ordered to restore the Applicant's registration on the Respondent's Register.

7.1.2. The Respondent be interdicted and restrained from removing the Applicant's registration pending the finalisation of Part B.

7.2. The Respondent is ordered to pay the costs of part A of the Application on a party and party scale.

[8] The requirements for an interim interdict are trite and have been laid down more than a century ago in *Setlogelo*,[3] as confirmed by our highest court in *OUTA*,[4] are:

> "...The test requires that an applicant that claims an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy."

[9] The question for determination is whether the Applicant has satisfied all the requirements for interim relief. The Applicant's requirements for interim relief are set out in its founding papers as follows:

Prima Facie Right

[10] The Applicant submits that it has a *prima facie* right in that the Applicant has been conducting its day to day business with a grade 7CE registration with the Respondent. The Applicant was registered with 7CE grading already during April 2021 and have been awarded tenders in line with the registration with the Respondent. The Applicant's *prima facie* right extends well beyond the simple registration as the registration is a *sine qua non* for both current tenders and prospective tenders, accordingly, the Applicant's *prima facie* right extends to its rights to trade and by further implication the Applicant's employees' rights to, *inter alia,* an occupation. In oral argument in Court, the Applicant's Counsel submitted that, in essence, the right which the Applicant seeks to protect is its right to tender. In light of the aforementioned, the Applicant contends that a *prima facie* right that is sought to be protected by the granting of this interdict has been established.

Well Founded Apprehension of Irreparable Harm:

[11] It was proposed on behalf of the Applicant, in this regard, that the Applicant will suffer irreparable harm should this order not be granted. This being so since the

[3] Setlogelo v Setlogelo 1914 AD 221 at 227.
[4] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) para 40.

Applicant will be unable to conduct its businesses and will suffer immense financial harm as it will not be considered for any tender projects and will be removed from current active Ditsong Museums project and tender PWR 124/20. The contention is that the aforementioned will result in the Applicant's employees being laid off, and will effectively destroy the Applicant's business and lead, to the Applicant suffering from severe and irreparable financial harm. It will further ultimately lead to the viability of the Applicant's business being diminished to a point that the Applicant will not be able to recover from any damages it may suffer as a result of the Respondent's unfair administrative action.

Balance of Convenience:

[12] The submission by the Applicant in this respect, is that the prejudice it will suffer should the order sought not be granted clearly outweighs any possible prejudice the Respondent might suffer if the order is granted. The Applicant is said to stand to lose all of its income and future business and all of its employees stand to lose their livelihoods should the Applicant's name not be restored on the register of contractors.

No Other Satisfactory Remedy

[13] The Applicant contention is that it has no alternative remedy. As it is, it has already initiated a review in terms of PAJA. The Applicant argues that it has taken all the necessary steps to provide the Respondent with all the necessary information and an opportunity for the Respondent to restore the Applicant's name on the register of contracts, but, the Respondent has simply failed to do so and did not even respond to the correspondence from the Applicant's attorneys of record. The submission, according to the Applicant, is that the only effective remedy in order to fully protect its rights as set out above, is for this Court to interdict the Respondent pending the finalization of the review application in terms of PAJA.

[14] Furthermore, the damages to be suffered by the Applicant will be difficult to quantify since the removal of the Applicant's name from the Register will continuously lead to financial losses of the Applicant and will continue for the unforeseeable future which will make it difficult, if not impossible, to quantify the damages. This is over and above the fact that there is no general right to damages caused by unlawful administrative acts.

[15] In opposing the interim relief sought by the Applicant, the Respondent's proposition is that the Applicant has not established all the requirements for the interim interdict in that firstly, the Applicant has an alternative remedy which it has failed to exercise; secondly, the Applicant has not satisfied the element of irreparable harm; thirdly, in the circumstances of this matter the balance of convenience does not favour the Applicant, and lastly, the Applicant has failed to show reasonable prospects of success on review.

[16] It is the Respondent submission that the Applicant has not established that it does not have an alternative remedy. This is so, according to the Respondent, because the Applicant is afforded redress to the administrative decision made by the Respondent for relief in terms of section 19(7) of the Act. Thus, the Respondent argues that in order for the Applicant to be successful in obtaining an interim interdict, it must show that no other satisfactory remedy is available. But, the fact is, in terms of section 19(7) of the Act, there is an alternative remedy that is available to the Applicant under these circumstances, and the Applicant has failed to invoke it.

[17] Counsel for the Respondent submitted in oral argument that section 19(7) of the Act, very clearly states what the alternative remedy that the Applicant should follow, is. Counsel argued further that at the time that the papers were drafted there was no application in accordance with section 19(7) of the Act before the Respondent. The contention being that the Applicant's application in terms of section 19(7) of the Act, for the Respondent to consider that the Applicant be allowed to proceed with the tenders that have already been awarded to it prior to the removal of its name from the Register, was launched only after the application had been struck off the roll for lack of urgency. This, according to Counsel, is the correct course open to the Applicant and that process is currently pending.

[18] Section 19(7) of the Act provides that a contractor whose name and particulars are removed from the register in terms of this section, during the currency of a public sector contract, may be permitted to complete the construction works or portion thereof, as determined by the Board.

[19] It is evident from the above passage that section 19(7) of the Act provides for a contractor whose name and particulars are removed from the register in terms of this section and who has already been awarded a contract or who was busy with a

contract at the time the name is removed from the Register. In terms of this section, such a contractor may be permitted to complete the construction work or a portion thereof.

[20] It is common cause that the Applicant is a contractor whose name and particulars have been removed from the register and that its name was removed as such, during the currency of a public sector contract. The Applicant may, therefore, be permitted in terms of section 19(7) of the Act to complete the construction work or a portion thereof. However, is this an alternative remedy to the relief that the Applicant seeks in these papers?

[21] The Notice of Removal (annexure “FA14”) that was sent by the Respondent to the Applicant notified the Applicant of the removal of its name from the Register of Contractors. The relief sought by the Applicant in the papers before Court is to restore the Applicant's registration on the Respondent's Register. It is, thus, evident that the Applicant does not seek relief that the Respondent must make the decision under section 19(7) of the Act. It is not the relief sought in the application. What the Applicant seeks is that pending the review proceedings, its name be restored to the Respondent's Register. The Applicant is more concerned with new tenders going forward and not tenders that have already been granted.

[22] Section 19(7) of the Act, is therefore, not an alternative remedy available to the Applicant as the Respondent seeks to argue.

[23] The Respondent submits in the Heads of Argument that the Applicant cannot state that it will suffer irreparable harm as it has suitable alternative remedy available to it which it has not invoked. Having concluded that section 19(7) of the Act is not an alternative remedy available to the Applicant under the circumstances of this application, this argument cannot be sustained. Nevertheless, the Respondent’s further submission that the Applicant cannot say that it will face financial hardship if it is not allowed to tender because there is no way of knowing how many tenders will be successful or not successful, is correct. The Applicant seeks to remain on the Respondent’s Register so that it can be able to bid for any construction tender that is advertised. That right to tender, the Applicant has conceded, does not guarantee that the Applicant will eventually obtain the tender whether its bid is the best one or not. Even if that right, the right to tender, as the Applicant refers to it, is protected, that does

not guarantee that the Applicant will be granted the tender it bids for. As such, without knowing whether a tender will be allocated to it or not, it will not be possible for the Applicant to establish that it will suffer irreparable financial harm which might lead to the collapse of its businesses and eventually its employees being laid off.

[24] Similarly, on the same reasoning, the balance of convenience does not favour the Applicant.

[25] In conclusion, the *prima facie* right that the Applicant seeks to protect on its own and the fact that it does not have an alternative remedy but to approach court as it did, do not assist the Applicant in its claim for the interim relief it seeks. This is so because the evidence tendered by the Applicant is not persuasive enough for establishing the requirements of apprehension of irreparable harm or that the balance of convenience favours the Applicant. Having found as such, it is not necessary to traverse the issue of reasonable prospects of success on review. The application falls to be dismissed on the two aforementioned requirements.

[26] The Respondent as the successful litigant is entitled to the costs of suit.

[27] The application is dismissed with costs.

E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 17 October 2023

Date of judgment: 08 March 2024

APPEARANCES:

For the Applicants: Adv L Van Gass instructed by Brandon Swanepoel Attorneys

For the Third Respondent: Adv S Swiegers instructed by MC Incorporated Attorneys