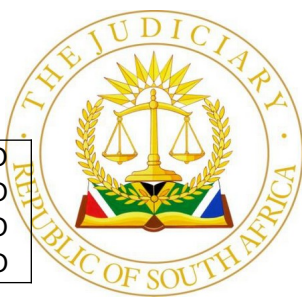


Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: UM185/2023

In the matter between:

**MEC FOR HEALTH NORTH WEST PROVINCE
GOVERNMENT**

Applicant

and

**BROWN MOGOTSI FOUNDATION
MEDI-WARE (PTY) LTD
(REGISTRATION NUMBER 2012/0247717)**

**First Respondent
Second Respondent**

JUDGEMENT

DIBETSO-BODIBE AJ

INTRODUCTION

[1] This an application for leave to appeal against the Judgement and order given by this Court, in an urgent application for interim relief on 22 September 2023. Given the urgency of the matter, the court first issued an order on 26 September 2023 and reasons for judgement was handed down on 29 September 2023. The terms of the order granted on 26 September 2023 were the following:

- “1. The Applicant’s non-compliance with the Rules of this Court as regard the time limits, forms and service is condoned and the matter is heard as semi-urgent in terms of Rule 6(12) of the Uniform Rules of Court.*
- 2. Non-compliance with the provisions of section 35 of the General Law amendment Act No. 62 of 1955 is condoned.*
- 3. The First Respondent is hereby interdicted and restrained from in any way implementing the decision to award the tender under Bid Number NWDOH 04/2023: Food Catering Services at Various Health Facilities and Nursing Colleges in the North West Province for a period of four (4) years, pending the finalisation of the review proceedings which are to be instituted in respect of the award of the aforementioned tender.*
- 4. The Second Respondent, including any other bidders concerning the tender under Bid No. NWDOH 04/2023 are interdicted from commencing any work under the said tender pending the finalisation of the review application which is to be instituted in respect of the awarding of the aforementioned tender.*
- 5. The orders under 3 and 4 above shall operate as an interim interdict with immediate effect, pending the finalisation of the*

review application, which application shall be instituted within thirty (30) court days from the granting of this order.

6. *The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.*
7. *Reasons for this order will be handed down electronically by circulation to the parties or their legal representatives by email on Friday, 29 September 2023 at 14h00.”*

GROUNDS FOR APPEAL

[2] The Applicant raised the following grounds for appeal:

[2.1] That the Court erred in condoning the First Respondent's non-compliance with the time limits, forms and manner of service and hearing the matter as semi-urgent in terms of Rule 6(12), and condoning the First Respondent's non-compliance with Section 35 of the General Law Amendment Act No. 62 of 1955.

[2.2] That the court erred in finding that the First Respondent had locus standi without having provided proof of legal personality and that it was obliged to attach its purported constitution.

[2.3] That the court erred in finding that the Applicant's Head of Department had informed the First Respondent in his letter dated 01 August 2023 that the tender had not yet been awarded when it had in fact already been awarded.

[2.4] That the court erred in having admitted the evidence of the whistleblower and that the mere fact that hearsay evidence is from a whistleblower does not render it automatically admissible.

- [2.5] That the court erred in finding that the First Respondent has established strong prospects of success and that the review is likely to succeed.
- [3] The Second Respondent also filed an application for leave to appeal and over and above the issues stated by the Applicant, the Second Respondent contended that the court erred in accepting that the First Respondent had the requisite standing in judico on the basis that it was acting in terms of Section 38(d) of the Constitution, for the advancement of the right in Section 27(1)(a) and (b) of the Constitution and that this case had nothing to do with the provisions of Section 27 of the Constitution.
- [4] The court dismissed the First Respondent's request to have the application for leave to appeal postponed for its heads of argument to be filed. Furthermore, no oral argument was presented on behalf of the First Respondent as Counsel was only briefed in the morning of 03 November 2023, the date of the hearing of the matter.

URGENCY AND NON-COMPLIANCE WITH SECTION 35 OF THE GENERAL LAW AMENDMENT ACT NO 62 OF 1955

- [5] This matter was before Petersen J on 15 September 2023 and it was postponed to 22 September 2023, with time frames for the parties to exchange the pleadings. When the matter came before me on 22 September 2023, both parties have had an opportunity to exchange pleadings meaning that the time lapse between the initial appearance on 15 September 2023 and the subsequent appearance on 22 September 2023 rendered the non-compliance with Section 35 of the General Law amendment Act, 1955 moot. Similarly, the time frames in terms of urgency were relaxed and there is therefore nothing untoward for the court to state that the matter came before it on semi-urgent basis.

LOCUS STANDI

- [6] Section 38(d) of the Constitution of the Republic of South Africa, 1996 entitles anyone acting in the public interest to approach a competent court and seek remedies when they feel that a fundamental right is infringed or threatened. This is a broader and more liberal approach to locus standi and imply a deviation from the traditional rules of locus standi, which required parties to have some real interest in the proceedings. Thus, individuals and groups who would want to bring cases to a court of law on matters affecting public interest are allowed standing even though they do not have a real and personal interest in the matter. In fact, such litigant need not be acting primarily in their own interest. Their primary desire must be to benefit the public.
- [7] Section 38(d), therefor introduces a radical departure from the common law rules that regulated the issue of locus standi. This is because the applicant in a public interest action is not a direct bearer of the right concerned and need not have a direct interest in the remedy sought. In the circumstances, the deponent to the founding affidavit need not attach any company resolution or constitution, the standing being purely in the public interest and not for the benefit of the company, Brown Mogotsi Foundation.

PROSPECTS OF SUCCESS

- [8] The Department decides the pre-requisites of a valid tender and failure to comply with the prescribed conditions would result in the tender being disqualified. This can only be tested if an interdict is granted pending review. The correspondence from the office of the Head of the Department regarding the date of the outcome of the tender and who the successful tenderer was, is tainted with suspicion of corruption having taken place and this Court is, in my view, correct in subjecting the whole process for review.

PROVISIONS OF SECTION 27(1) NOT APPLICABLE TO THE FIRST RESPONDENT'S CASE

[9] The Second Respondent in its application for leave to appeal stated that the court erred in accepting that the First Respondent had the requisite standing in judicio on the basis that it was acting in terms of Section 38(d) of the Constitution of the Republic of South Africa, 1996 for the advancement of the Bill of Rights in Section 27(1)(a) and (b) of the Constitution and that this case had nothing to do with the provisions of Section 27 of the Constitution.

[10] The tender was to provide “catering services” for a period of four years, at the various health facilities within the North West Province. It is this catering services which according to the Second Respondent, does not fall under Section 27(1)(a) and (b) of the Bill of Rights.

[11] As stated by the Constitutional Court in **S v Makwanyane 1995 6 BCLR 665 (CC)** at para 9:

“an interpretation of the Bill of Rights should be “generous and purposive” and demonstrate a commitment to the underlying constitutional value of the language used.”

[12] Section 39 provides that when interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom,

(b) must consider international law, and

(c) may consider foreign law.

[13] Section 27 of the Bill of Rights provides that everyone has the right to have access to-

(a) health care services, including reproductive health care,

(b) sufficient food and water, and

(c)

[14] Catering services is the business of providing food services and, therefore forms part of the right to health care and the right to food which is implicitly protected by the African Charter through a combined reading of the rights to life, health and development. So, broadly speaking the right to sufficient food is a socio-economic right and the government has not yet passed legislation specifically on this right and as envisaged by Section 27(2) of the Bill of Rights. In the circumstances, I am of the view that catering services to the various health facilities by government is well covered under Section 27(a) read with Section 27(b) of the Bill of Rights.

[15] In conclusion, the purpose of the order in this case was to preserve the First Respondent's rights by not allowing further implementation of the tender, pending review. Furthermore, I do not agree that in terms of Section 17 of the Superior Court Act, the appeal would have a reasonable prospect of success, for reasons as stated above. Finally there is a real possibility that the review application may be concluded before the appeal in this matter is heard, either by a Full Court of this Division or by the Supreme Court of Appeal. For these reasons, this application is dismissed.

O.Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Delivered: This judgement 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 email and by release to SAFLII

Date of Hearing : 03 November 2023

Date of Judgment : 16 February 2023

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