



IN THE HIGH COURT OF SOUTH AFRICA;
LIMPOPO DIVISION; POLOKWANE

CASE NO: 6752/2021

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE: 08 AUGUST 2023 AJP SEMENYA M.V

SIGNATURE: _____

In the matter between:

NGARAGA PROPERTIES (PTY) LTD

: APPLICANT

And

MEC RESPONSIBLE FOR EDUCATION

: FIRST RESPONDENT

LIMPOPO PROVINCE

HEAD OF LIMPOPO DEPARTMENT OF EDUCATION: SECOND RESPONDENT

LION MATCH PRODUCTS (PTY) LTD

: THIRD RESPONDENT

MOLEBOPEN TRADING ENTERPRISES CC

: FOURTH RESPONDENT

JUDGMENT

Heard: 15 JUNE 2023

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **08 August 2023**.

SEMENYA AJP:

[1] This is an application for leave to appeal the judgment and order of this court granted in the review application launched by the applicant. The application for leave to appeal is brought by the respondents in the main application. The parties in this application are cited as they were in the main application.

[2] The test in an application of this nature has been laid down in section 17 of the Superior Courts Act 10 of 2013 as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;”

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a).

[2] The order sought to be appealed relates to the finding that the decision of the Department to award a tender for the manufacturing, warehousing, packaging and distribution of sanitary pads to schoolgirls of certain class of schools within the Limpopo Province was invalid. The award was subsequently set aside.

[3] The grounds of appeal are the following:

3.1 that the court erred and misdirected itself in its finding that the financial statements of Lion Match Company are not those of the applicant;

3.2. in finding that the Department of Education disqualified the applicant in the review application on the basis of failing to show that it owns the machinery it will use in the manufacturing of sanitary pads. The third respondent contends that the court ought to have found that the applicant was not disqualified. It was simply not awarded points on functionality because it failed to show that it had the necessary machinery to manufacture the required sanitary pads;

3.3 in overemphasizing what it found to be the irregularities in the applicant's bid.

3.4 in concluding that reconsideration is just and equitable when it is in fact to the prejudice of the learners.

[4] It was not in dispute that the applicant requested reasons for its disqualification from the Department. It was further not disputed that the initial reason given to the applicant in response to the request was that it did not own manufacturing machines. The review application was

launched based on that reason, among others. The applicant was entitled to act based on this reason. I agree with the applicant's submission that the Department is changing tune when it argues that lack of ownership was not a disqualifying factor and that the applicant was not disqualified based on that reason.

[5] This court found that the third respondent is a legal entity with its own personality. The court was of the view that it was required to submit financial statements of its own entity and not those of a company. Further that the Department unfairly treated the applicant in that the third respondent did not own the machinery to manufacture sanitary pads. It is not in dispute that there were other irregularities in the third respondent's bid. The third respondent argues that another court may find this court gave the irregularities the weight that they did not deserve in that they are not material in nature. It was further argued that the bid document did not state that they are disqualifying.

[6] With regard to the order made by this court, the third respondent argues that a just and equitable order would have been that of allowing the third respondent and the Department of Education to continue with the implementation of the contract pending the completion of the reconsideration of the tender award.

[6] Although this court enjoyed a wide discretion in its determination of what would be a just and equitable remedy, I find that there are reasonable prospects that the appeal court may find that the order granted by this court is unjust in relation to the circumstances of this case, in particular,

the rights of the schoolgirls to education, dignity and wellbeing. The weight attached to the irregularities pointed out in this court's judgment may also be found to be irrational.

[7] I am of the view that there are reasonable prospects of success on appeal. In the result I make the following order:

- i. Leave to appeal to the full court of the Limpopo Division of the High Court is granted.
- ii. Costs are to be costs in the cause.

M V Semenya
Acting Judge President
Limpopo Division.

APPEARANCES:

Counsel for the Applicant	: Adv. R Maphutha & P Mohlabi
Instructed by	: Moeti Kanyane Attorneys
Counsel for the 1st & the 2nd	
Respondents	: Adv. T Tshitereke
Instructed by	: State Attorneys
Counsel for the 3rd Respondent	: Adv.GD Harpur SC & AJ Devers
Instructed by	: Zayeed Paruk Incorporate
Counsel for the 4th Respondent	: Adv. None
Instructed by	: Molebopen Trading Enterprise CC
Date of Hearing	: 15 June 2023
Date of Judgment	: 08 August 2023