Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 14485 / 2021

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 4 May 2023
Date of judgment: 8 May 2023

In the matter between:

JK STRUCTURES CC	Applicant
and	
THE CITY OF CAPE TOWN	First Respondent
THE CITY MANAGER, CAPE TOWN	Second Respondent
NEJENI CONSTRUCTION & MANAGEMENT (PTY) LTD	Third Respondent
MARTIN AND EAST (PTY) LTD	Fourth Respondent

JUDGMENT
(Applications for leave to appeal and in terms of s 18 of Act 10 of 2013)

BINNS-WARD J:

[1] The first and second respondents in the principal proceedings, the City of Cape Town and the City Manager - the latter presumably acting on behalf of the City, have applied for leave to appeal against the judgment of this court delivered on 20 February 2023. The outcome of the principal proceedings turned on the proper interpretation of the Construction Industry Development Board Act 38 of 2000 ('the CIDB Act') and, in particular, the related regulations. The judgment in the principal proceedings held that the City's misinterpretation of the regulations resulted in it applying the incorrect contractor grading qualifications in terms of the CIDB Act for the purposes of tender 134Q/202/21, thereby wrongly excluding from consideration contractors with a grading lower than 7CE.

[2] The invitation to tender concerned a 'framework agreement', in terms of which the City intended to appoint a panel of up to three contractors with whom it would, during the three-year term of the framework agreement, individually conclude, as and when required, a number of construction works contracts for the replacement of sewer pipes. The value of the contemplated construction work contracts would vary according to the nature and extent of the work required in each instance, but no such contract would exceed R6 million in value.

[3] It was not in issue that, in terms of the regulations, contractors with a registered grading of 4CE and above were considered to be capable of undertaking a construction works contract valued at up to R6 million. That much followed from regulation 17 and the range of tender values ('TVR') set out therein in Table 8 (reproduced in para 29 of the principal judgment). The judgment in the principal case held that the City's tender invitation should have been open to contractors with a grading of 4CE or above, and that consequently the tender submitted by the applicant ('JKS'), which had a registered grading of 6CE (which denoted a certified capability to undertake a construction works contract of a value up to R20 million), had been wrongly excluded from consideration.

[4] The principal judgment is listed on SAFLII, *sub nom. JK Structures CC v City of Cape Town and Others* [2023] ZAWCHC 31 (20 February 2023). The orders made in the principal judgment speak for themselves. The tender process was set aside, but the order was suspended for six months to enable the City to make alternative arrangements for the procurement of the services concerned.

[5] The application for leave to appeal was heard together with an application by JKS, in terms of s 18(1) and (3) of the Superior Courts Act ('the Act'), for an order putting into effect the judgment obtained in its favour in the principal case notwithstanding any pending application for leave to appeal or appeal by the City against the judgment. In the alternative to its application in terms of s 18 of the Act, and in the event of this court being minded to grant the City leave to appeal, JKS applied for an order, ostensibly in terms of s 17(5) of the Act, imposing as a condition of such leave a direction that JKS's bid in respect of tender 134Q/202/21 be remitted to the City for reconsideration as an acceptable bid.

[6] The questions for determination in the application for leave to appeal are whether (i) the contemplated 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. It is only if it is able to form a positive opinion on either or both of those propositions that this court (or the SCA on 'petition') is empowered to give leave to appeal; see s 17(1)(a) read with s 17(2)(b) of the Superior Courts Act 10 of 2013.

[7] In a recent judgment on an application to that court for leave to appeal, the Supreme Court of Appeal held that '[t]*he test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist*'; see *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021) at para 10.

[8] I have underlined part of the passage quoted from the judgment in *Ramakatsa* for highlighting purposes because in the current matter there were no material disputes of fact. (The City points out that this court misconstrued the evidence concerning the tender value of the framework contract - treating it as R180 million instead of R80 million. Accepting that to be so, the error was immaterial to the outcome of the principal case, as Mr *Farlam* SC for the

City readily acknowledged.) Being concerned wholly with a question of statutory interpretation, the decision of the principal case turned exclusively on a matter of law.

[9] The first matter for determination is therefore whether I am able to form the opinion that there is a reasonable prospect that another court might on appeal conclude that this court erred in law in its construction of the applicable regulations. The principal judgment sets forth in detail this court's reasoning in support of the interpretive conclusions reached. There is no need to repeat that reasoning here.

[10] The issue in contestation was whether the municipal manager's contention that the 'tender value' - that is the budgeted expenditure in respect of the framework contract, viz. R80 million over three years - was the value to be applied for the purposes of regulation 17 of the CIDB Act regulations, or whether, as found by the court, the maximum value of each the individual construction works contracts that might be concluded pursuant to the framework agreement was the relevant measure. (The distinction between 'framework agreements' and 'construction works contracts' – also called 'works project contracts' – and the manner in which the two types of contract interrelate is described in para 12-14 of the principal judgment.) As explained in the principal judgment, a 'framework agreement' is *not* a 'construction works contract'. The legislation is not concerned with framework agreements, *only* with construction works contracts. It is common ground that the legislation makes no reference to framework agreements (see para 24-25 of the principal judgment).

[11] As discussed in para 38 of the principal judgment, the municipal manager's construction of the legislation (as to which, see the text of the manager's memorandum quoted at para 15) was founded on a misconceived apprehension of the import of regulation 25(1B). (Regulations 25(1), 25(1B) and 25(3) are quoted at para 5 of the principal judgment.) The municipal manager's interpretation of the legislation is not only inconsistent with the language of the regulations and governing statute, it is also a construction which, if applied, would be inimical to the achievement of the stated objects of the Construction Industry Development Board Act (as to which, see para 18-25 of the principal judgment).

[12] In argument in support of the application for leave to appeal, counsel for the City stressed that the municipal manager's opinion was reportedly supported by senior counsel's advice. I understood the thrust of the submission was to suggest that this supported the reasonable possibility that another court might agree with the municipal manager's interpretation of the regulations. There is nothing in the point in my view. If the manager's interpretation was consistent with the opinion he obtained, as one would imagine is the case, then the opinion relied upon was demonstrably wrong for exactly the reasons given in the judgment. The proper construction of a statutory provision is not determined by a head count.

[13] Suffice it to say that, having dispassionately reviewed the principal judgment, I find it most unlikely that another court would construe the statutory provisions differently. Otherwise expressed, I consider that the contemplated appeal would have very poor prospects of success. I am therefore unable to form the opinion that s 17(1)(a)(i) of the Act requires me to have in order to grant leave to appeal in terms of that subparagraph.

[14] The enquiry consequently turns to the possible existence of some other compelling reason why an appeal should be heard; see s 17(1)(a)(ii) of the Act. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17 (25 March 2020); 2020 (5) SA 35 (SCA), which also concerned an application for leave to appeal, Cachalia JA observed (in para 2) that '*A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. <u>But here too, the merits remain vitally important and are often decisive</u>*. [The applicant] *must satisfy this court that it has met this threshold*'. (See also *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17 (15 March 2016); 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) at para 24.)

[15] The implication in the sentence in the learned judge's observation in *Caratco* that I have underlined is that appeals are primarily meant to be about obtaining different results, not second opinions. Even if there is an important point of law or an issue of public importance in point, no purpose is served by it being reconsidered on that basis alone by another court on appeal if the prospect of interference with the judgment at first instance is remote. The filtering object of s 17(1) would be subverted were meritless questions sent on appeal when

there was no compelling reason for the matter in question to deserve the attention of a higher court.

[16] The matter did indeed raise an important question of law. That much was acknowledged in the treatment in the principal judgment of JKS's application for condonation in terms of s 9 of the Promotion of Administrative Justice Act 3 of 2000. But having been settled by the principal judgment, there is nothing to indicate that the question of the proper interpretation of the regulations will, or should, be a matter of future dispute. On the contrary, the evidence was to the effect that the City's procurement officials, being persons with expertise and experience in the field and the authors of the City's procurement *Guidelines* document (2014), had understood and previously applied the regulations consistently with the construction thereof that was upheld in the principal judgment. For what it was worth, the Construction Industry Development Board also provided JKS's attorneys with a letter indicating that that was also the way in which the Board interpreted the regulations. The dissonant opinion was that of the City's municipal manager, who, by directive dated 4 August 2020, required the City's procurement officials to discard the relevant provisions of the City's existing *Guidelines* and apply his own interpretation of the regulations - an interpretation that the principal judgment, for the reasons therein fully set out, found to be erroneous.

[17] The regulations have been in force since between 2004 and 2006.[1] There was nothing in the evidence to suggest that the issue that arose out of the municipal manager's misinterpretation of the regulations has manifested elsewhere in the country. It is improbable, having regard to the starkly anomalous effect of the municipal manager's construction, that they have been interpreted that way by any other organs of state. If they had been, it is unlikely that the better part 20 years would have passed without an earlier challenge by a contractor finding itself in a position similar to that of JKS in the current matter.

[18] This case is therefore distinguishable, for example, from the type of matter with which I had to deal in *Brackenfell Trailer Hire (Pty) Ltd and Others v Minister of Transport* [2019] ZAWCHC 30 (20 March 2019); 2019 (2) SACR 62 (WCC), in which,

[1] See the dates of commencement set out in GN 692 in *GG* 26427 of 9 June 2004, as amended and supplemented in GN R1333 of 2004 (wef 12 November 2004) and GN 751 of 22 July 2005.

notwithstanding my opinion that there were poor prospects of an appeal court differing from this court's finding on the import of the legislative provisions there in issue – an opinion vindicated in the appeal court's judgment in *Minister of Transport v Brackenfell Trailer Hire (Pty) Ltd and Others* (707/2019) [2021] ZASCA 5; 2021 (1) SACR 463 (SCA) ; [2021] 2 All SA 72 (SCA) (14 January 2021), I granted leave to appeal to the Supreme Court of Appeal because the evidence demonstrated an inconsistent application of the legislation by prosecuting and road traffic authorities throughout the country, and a nationally binding determination was accordingly desirable.

[19] Therefore, with the dictum in *Caratco*, quoted above, in mind, I find myself also unable to form the opinion posited in s 17(1)(a)(ii) of the Act that is necessary to grant leave to appeal.

[20] The application for leave to appeal will be dismissed accordingly.

[21] It remains open to the City, if so advised, to apply further to the Supreme Court of Appeal for leave to appeal. That means that it is necessary to consider JKS's application in terms of s 18 of the Act and the relief it seeks in the alternative thereto, purportedly in terms of s 17(5).

[22] Section 18 of the Act provides as follows in relevant part:

> '**Suspension of decision pending appeal**
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> (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) …
>
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
>
> (4) …

> (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[23] The provisions of s 18(1) and (3) are in large part a codification of the common law position that was authoritatively expounded in *Reid and Another v Godart and* Another 1938 AD 511 and, in relation to the Supreme Court Act 59 of 1959, in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A), at 544-5. The proper approach to s 18 of the Act was settled in *University of the Free State v Afriforum and Another* [2016] ZASCA 165 (17 November 2016); [2017] 1 All SA 79 (SCA); 2018 (3) SA 428 (SCA) at para 5-15. (See also *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) from para 28, and *Premier for the Province of Gauteng and Others v Democratic Alliance and Others* [2020] ZASCA 136 (27 October 2020); [2021] 1 All SA 60 (SCA) at para 9-15.)

[24] The general rule is that the effect of a judgment is immediately suspended when an application for leave to appeal against it is lodged. It remains so suspended until the determination of any ensuing appeal, unless the court, exceptionally, directs otherwise. The appeal court has held that the requirements in s 18 of the Act have increased the threshold for obtaining an order that a judgment should be implemented notwithstanding undetermined appeal-related proceedings; see in this regard *University of the Free State* supra, at para 11, *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34 (1 April 2016) at para 24-26 and *Incubeta Holdings and Another v Ellis and Another* [2013] ZAGPJHC 274 (16 October 2013); 2014 (3) SA 189 (GSJ) at para 24.

[25] In my judgment, JKS has failed to establish that it will suffer irreparable harm if the judgment is suspended pending the determination of any ensuing appeal. I accept that with the passage of time that might intervene between now and the determination of any appeal, JKS will be deprived of the opportunity of obtaining appointments to undertake construction work contracts with the City in terms of any framework agreement put in place in terms of a fresh tender process, but the loss of a particular opportunity does not amount to irreparable

loss within the meaning of s 18 of the Act. JKS is not prevented by the loss of opportunity in this case from availing of alternative corporate opportunities in the construction industry. The City of Cape Town is not the only employer in the industry. The effect of the judgment is that the current framework agreement is set aside. Whether JKS would consequently obtain an appointment as a service provider in terms of any fresh procurement process undertaken by the City is an open question, in other words speculative.

[26] It would be a rare case where a litigant who has won an award in money or an order directing the opposite party to render some or other performance or to desist from some or other allegedly objectionable conduct would not to some extent be disadvantaged by the delay imposed on the enforcement of the judgment attendant on its suspension because of the lodging of an appeal. That sort of disadvantage is an inherent feature of the law. And insofar as time passed is opportunity forever spent, the delay in obtaining finality in the litigation and the ordinarily attendant disadvantages nevertheless do not constitute 'exceptional circumstances' within the meaning of s 18(1) of the Act, or 'irreparable harm' within the meaning of s 18(3). On the contrary, as I have noted, they are commonplace consequences of the generally applicable rule when either an appeal or an application for leave to appeal is pending.

[27] JKS did, however, identify some factors that might support an application to the President of the Supreme Court of Appeal for an expedited hearing of any appeal that could ensue pursuant to the grant of leave to appeal by that court. Indeed, in its answering papers in the s 18 application, the City implied that it would not oppose, and in fact would cooperate with JKS to bring any appeal to a hearing on the most efficient basis possible. At the hearing, Mr *Farlam*, while opposing the suggestion by JKS's counsel that this court should specify a timetable to expedite any appeal that might ensue, indicated that the City would have no objection to the court mentioning in the judgment the existence of the readily apparent features of the matter that make it deserving that any appeal be afforded some priority. I have desisted from fixing a timetable, as requested, because I am doubtful that it would it be appropriate for this court to purport to interfere in matters that are regulated by the rules and procedures of the appeal court.

[28] JKS's application in terms of s 18 of the Act was ill-advised. In the context of the refusal of the City's application for leave to appeal, it is not necessary to consider its application in the alternative, purportedly brought in terms of s 17(5) of the Act. It bears remarking, however, that the nature of the relief sought by JKS in the latter regard[2] was not of the procedural character related to a pending appeal that the subsection appears to contemplate.

[29] In the result, orders will issue in the following terms:

1. The application by the first and second respondents in the principal proceedings for leave to appeal is dismissed with costs, including the fees of two counsel.

2. The application in terms of s 18 of the Superior Courts Act 10 of 2013 by the applicant in the principal proceedings is refused with costs.

A.G. BINNS-WARD
Judge of the High Court

[2] See paragraph [5] above.