



CONSTITUTIONAL COURT OF SOUTH AFRICA

Provincial Government: North West Province and Another v Tsoga Developers CC and Others

CCT 91/15

Date of hearing: 29 September 2015

Date of judgment: 24 March 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the attachment of funds from a government department's bank account, for the payment of a debt accruing under a court order.

In 2008, the North West Department of Public Works (Department) awarded a tender for the construction of the Brits Main Hospital to a joint venture between the first respondent, Tsoga Developers CC (Tsoga), and a third party, Ilima (Pty) Ltd (Ilima). In August 2009 Ilima was liquidated, and in 2010 the Department cancelled the tender contract, being contractually entitled to do so upon the insolvency of either of the parties to the joint venture. Tsoga claimed it was entitled to be paid for work carried out and materials supplied prior to the cancellation and that it had suffered damages as a result of the cancellation. In June 2010, the Department entered into an initial settlement agreement in terms of which it agreed to pay Tsoga approximately R23 million. Upon the Department's failure to pay the settlement amount, Tsoga instituted proceedings in the North West High Court, Mahikeng (High Court). The parties ultimately reached a further settlement which was made an order of the High Court in May 2013 (settlement order).

In April 2014, the Department brought an application before the High Court for the rescission of the settlement order. That application was dismissed. The Department then applied for leave to appeal but that application was subsequently abandoned. In September 2014, Tsoga caused a writ of execution to be issued for the attachment of

44 vehicles belonging to the Department. In November 2014, the Department entered into another agreement with Tsoga in which it acknowledged that it owed Tsoga approximately R47 million, comprising the original judgment amount from the settlement order, VAT, interest and legal costs. Shortly thereafter, the Department paid R20 million to Tsoga and undertook to pay the balance of the debt by 28 February 2015. When it failed to do so, Tsoga caused a second writ of execution to be issued attaching funds held in the Department's bank account in the sum of approximately R30 million.

In response to this attachment, the Provincial Government: North West Province and the Director General of the Office of the Premier (collectively, the applicants) brought a two part application before the High Court. Part A requested the urgent suspension of the execution of the attachment of the 44 vehicles and the bank account pending the finalisation of Part B. In Part B, the applicants sought – under the Promotion of Administrative Justice Act (PAJA) – the review and setting aside of the initial settlement agreement concluded in June 2010. They argued that the initial settlement agreement was concluded unlawfully, and that the attachment of the bank account was unconstitutional because it directed the attachment of provincial revenue funds. The High Court held that the applicants lacked standing to bring the application under the State Liability Act (Act) and had failed to meet the requirements for the interim relief sought. Part A of the application was thus dismissed. Part B of the application was heard by the High Court on 29 October 2015. Judgment stands reserved.

In this Court, and pending the High Court's determination of Part B, the applicants sought leave to appeal against the High Court's dismissal of Part A and the return of the funds which were attached in terms of the second writ of execution. The funds have since been transferred to Tsoga's attorneys' trust account. The applicants persisted with the arguments advanced in the High Court, and further argued that the attachment prevented the Department from fulfilling its constitutional obligations and interfered with the Province's monetary policies.

Tsoga argued that since the funds were held in its attorneys' trust account, there was no danger of the money being dissipated, pending the finalisation of Part B. It further argued that the review application lacked merit and, under PAJA, was five years out of time. Tsoga also contended that the matter did not raise a constitutional issue because the transferred funds came from the Department's own account which did not form part of the provincial revenue fund.

In a unanimous judgment written by Madlanga J, this Court held that the revenue fund argument raised several complex questions which could not be adequately answered based on the information placed before this Court. Additionally, this Court found that since Part B of the application had been heard in the High Court, it would not be in the interests of justice to pronounce on that issue. This Court also considered whether the interests of justice dictated that it entertain the appeal against refusal of interim relief. It acknowledged that the refusal of the interim relief by the High Court had final effect because the Department no longer had access to the money. However, it found that the applicants had failed to show irreparable harm. The judgment asserted that irreparable

harm could not be demonstrated by bald unsubstantiated allegations; more was required. In addition, this Court found that in the unlikely event that the funds were dissipated; the Attorneys Fidelity Fund provides a mechanism for reimbursement.

The judgment also accepted that there were prospects of success in the Part B application in relation to the argument that the attachment had breached the Act. The judgment also held that non-compliance with the formal steps required by the Act – in this case, lack of service – may be a violation of the principle of legality. However, this Court found that there were several other relevant considerations, including the fact that even if the applicants were to succeed in the Part B application, the High Court order would not automatically fall away. Unless challenged and set aside, that order had to be complied with. Having considered the relevant factors, it was concluded that it was not in the interests of justice to grant leave to appeal. Accordingly the applicants were ordered to pay the costs of the first and second respondents, including the costs of two counsel.