

SOUTH AFRICA / JUDGMENT

Channel Construction (Pty) Ltd v Transnet SOC and Others (2024/111291) [2025] ZAGPJHC 51 (21 January 2025) [2025] ZAGPJHC 51

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

2024/111291

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2024-111291

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

NO

24/01/2025

In

the matter between:

CHANNEL
CONSTRUCTION (PTY) LTD
Applicant
(Registration number
2004/009100/07)
and
TRANSNET
SOC LTD
First Respondent
(Registration number
1990/000900/30)
MBALI
INDUSTRIAL SOLUTIONS
Second Respondent
(PTY) LTD
(Registration number
2005/046349/23)
BUREAU
VERITAS (PTY)
Third Respondent
(Registration number
2006/014342/07)
DORMAC
(PTY) LTD
Fourth Respondent
(Registration number
2008/001056/07)
PRO
AUTO RUBBER CC
Fifth Respondent
(Registration number
2010/129334/23)
6SIGMA
(PTY) LTD
Sixth Respondent
(Registration number
2018/435091/07)
ISIPHETHU/AMABUTHO
JV
Seventh Respondent
STEFANUTTI
STOCKS (PTY) LTD
Eighth Respondent
(Registration number
2003/022221/07)
AMULET
GROUP (PTY) LTD
Ninth Respondent
(Registration number
2015/158294/07)
MMK

GAUGES BICS ENGINEERING JV
Tenth Respondent
ENELAD
(PTY) LTD
Eleventh Respondent
(Registration number
2017/230579/07)
AFRICA
PROJECTS CONSULTANTS
Twelfth Respondent
(Registration number
2018/273082/07)
DAMIEN
SHIPYARDS (PTY) LTD
Thirteenth Respondent
(Registration number
2007/007944/07)
GUERRINI
MARINE
Fourteenth Respondent
CONSTRUCTION CC
(Registration number
1995/053307/23)
ZM
SERVICES (PTY) LTD
Fifteenth
Respondent
(Registration number
2024/097893/07)

JUDGMENT

FISHER J

Introduction

- [1] This is the “A” part of an application relating to the review of a decision in terms of which the applicant’s bid under a tender put out by the first respondent, Transnet was rejected. The dismissal of an internal appeal and the award of the tender to second respondent, Mbali are also sought to be reviewed.
- [2] The other tenderers have been cited as interested, but the only opposition is by the first and second respondents. I will refer to the first and second respondents as “the respondents.”
- [3] The review itself is contained in part B of the application.
- [4] This “A” part of the application was brought urgently. It seeks, in essence, to interdict the implementation of the tender pending the final outcome of the review.

- [5] The “A” part of application initially came before the urgent court but was allocated to this court to be heard as a special motion.
- [6] The respondents continue to deny that matter is urgent. In light of the special allocation and the need for certainty and finality for the parties I have decided to entertain it on the basis that it has sufficient urgency to be heard in this context.
- [7] I thus turn to the case made out in the founding affidavit.

Founding

facts

- [8] The applicant conducts business in the engineering and construction industry and has performed work on tenders for Transnet in the past.
- [9] It is important that Transnet is a State Owned Company (SOC).
- [10] The request for proposals (RFP) in relation to the tender was published on 31 January 2024.
- [11] The tender is for the replacement of what is known as the Sturrock Dry Dock (SDD) Inner caisson gate at the port of Cape Town.
- [12] On 9 May 2024 the applicant submitted its tender. This is the tender in issue.
- [13] On 06 September 2024 Transnet sent a letter authored by Mr M S Hogg, Transnet’s executive manager: infrastructure procurement to the applicant in terms of which the applicant was informed that on evaluation of its bid by the Bid Adjudication Committee (BEC) was found not to meet the compulsory minimum requirements of the tender which required the credentials of the engineer on the project to be a Pr. Eng. Or Pr. Tech.
- [14] The requirement that the Engineer on the project meet these minimum credentials was set out clearly. It was, furthermore, made clear in the RFP documents that non-responsive tenders in relation to these mandatory qualifications would be disqualified.
- [15] The engineer proposed by the applicant in its bid was a certain Mr Paardenkooper who is a Control and Instrumentation Engineer.
- [16] Although Mr Pardenkooper is very experienced in the industry and has managed similar projects to the one in issue, it is not disputed that his qualifications do not, strictly speaking, meet the mandatory qualifications required under the tender.
- [17] The applicant appealed the decision notified under Mr Hogg’s letter to disqualify it from the tender process.
- [18] The grounds of appeal stated were, essentially, that Mr Paardenkooper was an experienced engineer; had previously worked on caisson projects for Transnet and was the most qualified person to conduct the works.

- [19] It seems, thus, that what was contended for was that the bid was substantially compliant in that the qualifications of Mr Paardenkooper were, at least, equivalent to those required under the tender.
- [20] The applicant, to drive this position home, submitted further that the tender was similar in relation to the methodology for the works required on a previous tender – the Robinson Drydock Tender which the applicant was awarded.
- [21] Transnet explained, at some length, in its response to the appeal how the qualifications required under the tender differed from those of Mr Paardekooper's. It explained further that, in its view, it did not, at law, have the latitude to vary the criteria *ex post facto*.
- [22] The applicant responded by way of a letter dated 23 September 2024 which served, at least in part, to amend the appeal grounds.
- [23] The applicant now contended that the tender process was not competitive or fair in that Transnet had abused the regulatory

framework relating to public procurement. This abuse, it alleged, was the imposition of the minimum qualification criteria for the purposes of deliberately eliminating bidders such as the applicant.

- [24] The applicant went further and alleged corruption on the part of Transnet in that it is alleged that the award was backdated.

The arguments raised

- [25] The applicant alleges that it has met the requirements for an interim interdict.
- [26] The *prima facie* right relied on is simply that it has a constitutional right to review the decisions involved.
- [27] It contends further that, in order to properly exercise this right of review, the status quo must be preserved because, if this is not done, it will be met by a *fait accompli*.
- [28] The balance of convenience, it argues serves it. This, it says is because of the potential irretrievable loss and the direct impact on its constitutional rights whereas the only prejudice suffered by Transnet is a delay to the project.
- [29] It submits that these considerations, taken together with the fact that it will be difficult if not impossible to claim damages, means that it has no satisfactory remedy other than the interim interdict.
- [30] The applicant argues further that it has prospects of success in the review.
- [31] The respondents argue that no case has been made out for interdictory relief. They say that this is especially so because the application impacts on conduct that flows from statutory powers and functions referred to in section 156 of the Constitution.

- [32] They make the point that the prima facie right as identified by the applicant is inapposite in relation to the inquiry to be undertaken in the context of the facts and particularly the first defendant's public function.
- [33] A further point made by the respondents is that they intend to raise a point in limine to the effect that the application has been brought outside of the 180 day limit imposed by PAJA for the bringing of reviews.
- [34] The argument is to the effect that if, as it appears to be the case, a central complaint of the applicant is that the tender was drawn with the aim of deliberately excluding the applicant, that the review should have been brought at the stage of publication of the RFP in January 2024 and not, as it was, in September 2024 which is approximately 7 months after this publication and after its tender was disqualified.
- [35] The argument is that there should be an application for condonation in that the application was not brought within the 180 day limit in PAJA. Such an application, argue the respondents would have poor prospects of success.

Applicable legal principles

- [36] The legal inquiry in an application for an interim interdict is well settled. The applicant must establish prima facie the existence of a right; a well-grounded fear of irreparable harm; that the balance of convenience is served by the interdict and that there is no other appropriate remedy. These are known as the Setlogelo requirements or the Setlogelo Test.[1]
- [37] As set out above, the applicant argues that it has met this test.
- [38] However, what is not specifically addressed by the applicant is that in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) Sa 223 (CC)[2] (OUTA) the Constitutional Court put a gloss on these requirements in circumstances where the interdict sought was against organs of state and in restraint their statutory power.
- [39] This particular prejudice, the Court termed "separation of power prejudice". This conveyed that the proposed interference with the statutory function involved was part of the general prejudice which had to be weighed in the balance.
- [40] The Constitutional Court made the point in OUTA that the existence of mala fides is an important consideration in this inquiry. The Court quoted with approval the decision in Gool[3] as follows:
- "The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of an allegation of mala fides the Court does not readily grant such an interdict."[4]
- [41] The Court clarified that such an interdict would be granted "only in the clearest of cases." [5]

- [42] The Court furthermore, whilst not defining the “clearest of cases” pointed out that an important consideration would be whether the harm apprehended amounted to a breach of one or more of the fundamental rights in the Bill of Rights.[6]
- [43] The weighing up inquiry which a court has to engage in when determining whether a case has been made for an interdict takes into account the prospects of success in the review. The stronger the prospects of success the less not for the balance of convenience to favour the applicants; the weaker the prospects of success the greater the need for the balance to favour the applicants.[7]
- [44] With these principles in mind, I move to a discussion of the merits.

Discussion

- [45] In OUTA the Court put the position relating to the prejudice to the separation of powers thus[8]:

“A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.” (emphasis added)

- [46] The respondents argue further that the applicants have conceded that they fell outside of the strict requirements of the tender and that this makes their prospects of success negligible to non-existent.

- [47] The right relied on by the applicant is not correctly framed. The fact that a person has the right of review does not, in and of

itself, constitute the required right. If this were a correct characterisation of the right then every person bringing a review

would automatically get past the hurdle of establishing a prima facie right. This is not the law.

- [48] In fact, the determination moves from the premise that State entities which are carrying out their public function need to be free

to act in this context unless there are special considerations which are at play and which defer to the doctrine of separation of powers.

- [49] From a general perspective, as long as a State entity is carrying out its function in good faith, it would require the clearest of cases to thwart its progress.

- [50] The applicant has not shown that this is one such case and neither has it shown that the prospects of success on the review favour it.

Order

[51] I make the following order:

Part A of the application is dismissed with costs such costs to be taxed according to scale C.

FISHER J

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 21 January 2025.

Heard:

28 November 2024

Delivered:

21 January 2025

APPEARANCES:

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Adv. R R Kisten

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[1] Setlogelo v Setlogelo 1914 AD 221 at 227.

- [2] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC).
- [3] Gool v Minister of Justice 1955 (2) SA 682 (C).
- [4] OUTA at para 43.
- [5] Id at para 26 and 47.
- [6] Id at para 47.
- [7] Olympic Passenger Service Pt Ltd v Ramie an 1957 (2) SA 382 (D) at 383D-G, cited with approval in Eriksen Motors Welkom Ltd v Protea Motors Warrenton 1973 (3) SA 685 (A) at 691F-G. See also Simon NO v Air Operations of Europe AB [1998] ZASCA 79; 1999 (1) SA 217 (SCA) at 231G.
- [8] OUTA at para 6

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