

SOUTH AFRICA / JUDGMENT

Lesego Thabang Masilo (Pty) Ltd and Another v Transnet Group Capital and Another

(28215/2020) [2023] ZAGPPHC 574 (18 July 2023)

[2023] ZAGPPHC 574

COURT
North Gauteng High Court, Pretoria

BEFORE
Nyathi

CASE / FILE NUMBER
28215/2020

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO 28215/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

(4)

Date: 18 July 2023

Signature:

In

the matter between:

LESEGO
THABANG MASILO (PTY) LTD
1st
Applicant
LESEGO
THABANG
MASILO
2nd
Applicant
And
TRANSNET
GROUP CAPITAL
1st
Respondent
REG
NO: 1[...]
BOZ
TECHNICAL SERVICES AND PROJECT
2nd
Respondent
MANAGEMENT
(PTY) LTD
REG
NO: 2[...]

JUDGMENT

NYATHI J

A.

INTRODUCTION

[1] This is an interlocutory application in terms of Rule30A of the Uniform Rules of Court in a pending review application (the main application) by the applicants. The order sought is in the following terms:

1.1 That the first respondent be ordered to dispatch to the Registrar of the above Honourable Court within 10 days of the granting of this order the full and complete record of its decision to any matter in question in the main application, which are or have at any time been in the first respondent's possession or control as envisaged in terms of Rule 53 (1) of the Uniform Rules of Court, and to notify the applicants that it has done so;

[2] The said record is to include but not limited to:

(a) The written submission by TRANSNET FREIGHT to TRANSNET GROUP CAPITAL in relation to the sufficiency of the funds as requested by the Chairperson of the NATIONAL ACQUISITION COUNCIL on the resolution of 17 April 2019.

- (b) The contract of the second respondent referred to as contract 4[...].
 - (c) Records of all deliberations of the NAC which resulted in the withdrawal of tender number 3[...].0[...].
 - (d) The records that relate to the making of the decision which the applicants seek to be reviewed and set aside.
- [3] In the event of the first respondent seeking to exclude certain documents from the record of his decision/submission/approval, the first respondent is hereby ordered to provide a detailed index of such documents and reasons thereof to justify the exclusion of such documents.
- [4] In the event of the applicants disputing the exclusion of one or more of the documents listed in paragraph two above from the record of each decision submission approval, the applicants are hereby granted leave to approach the above Honourable Court on the same papers, supplemented, if necessary, for further appropriate relief.
- [5] The applicants seek costs of this application.
- [6] At the commencement of the hearing Mr. Monnakgotla placed on record that prayers 2(a) and 2(b) in the Notice of Motion will no longer be pursued because as regards the former, the documents became available as part of the annexures and as for the latter, an undertaking was made on behalf of the respondents that the documents will be dispatched soon.
- [7] This then leaves prayers 2(c) and 2(d) up for contention in this application.

B. BRIEF BACKGROUND

- [8] On 25 October 2018 the first respondent advertised a tender for the supply and delivery of quarry material containing tender number 3[...].0[...] and the closing date of the tender was stipulated as 22 November 2018. Afterwards, an extensive procurement process which entailed the submission of written applications and attending of briefing sessions was pursued.
- [9] On 14 June 2019 the applicants received correspondence from the first respondent dated 2 May 2019 advising that it has decided to withdraw the tender because of what it characterized as the “change in circumstances” and that therefore there was no longer a need for the goods and services previously sought. It is this decision that the applicants seek to review. In terms of the review application the first respondent was required to deliver the record of the proceedings, as contemplated in Rule 53.
- [10] On 4 August 2020 the first respondent delivered to the applicants what it reported to be the full and complete record as requested. The applicants insists that this record is incomplete. A further supplementary record was subsequently delivered, this too, so allege the applicants, is incomplete.

[11] Through this interim application the applicants seek an order compelling the first respondent to dispatch the full record of its decision to cancel and/or withdraw tender number 3[...].0[...], together with the record of proceedings leading up to the impugned decision for the cancellation.

[12] The first respondent opposes this application and rests its opposition on the premise that:

12.1 The documents had already been provided;

12.2 request for the contract between translate 3 trail and the second respondent is irrelevant; and lastly;

12.3 that no request for specific documents was made, but rather that the applicants' request was general in nature and could not be complied with.

C. INADEQUACY OF THE RECORD/THE MISSING DOCUMENTS

[13] Having regard to the concession made and accepted by the parties in paragraph [6] above at the commencement of this hearing, what remains outstanding and subject of this application, are the following:

13.1 Records of all deliberations of the NAC which resulted in the withdrawal of tender number 3[...].0[...].

13.2 Records relating to the making of the decision which the applicants seek to be reviewed and set aside.

D. APPLICANTS' SUBMISSIONS:

[14] The applicants submit that the purpose of Rule 53 is primarily intended to operate in the applicants' favour. It is there to ensure that review applications are not launched in the dark and the applicant would be at the mercy of the respondent's answering affidavit to apply to amend, at great cost, its notice of motion and supplement its founding affidavit. The records allow the applicant to properly assess the lawfulness of the decision maker's process.

[15] The applicants rely on the decision of *Democratic Alliance v Acting National Director of Public Prosecutions*[1] where the SCA held that:

"Without a record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's rights in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before the court with all the issues being ventilated, would be infringed".

[16] In placing reliance on the aforementioned case, it is trite law that an applicant in review proceedings is entitled to the full and complete record of the decision sought to be reviewed. (See: *South African Football Association v Stanton Woodrush (Pty) t/a Steven Smidt & Sons* 2003 (3) SA 313 (SCA).

E. MEANING OF RECORD

[17] The phrase “a record of proceedings”, has been described in *Johannesburg City Council v The Administrator, Transvaal, and Another*[2] by Hiemstra J (as he then was) as follows:

“The words record of proceedings cannot be otherwise construed, in my view, than as a loose description of the documents, evidence,

arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal.”

[18] In *City of Cape Town v South African National Road Agency Ltd*[3] it was held that:

“Any record of deliberations by the decision-maker would be relevant and susceptible to inclusion to the record ... the content of the deliberations can often be the clearest indication of what the decision-maker took into account and what it left out of account.”

[19] In *Helen Suzman Foundation v Judicial Service Commission*[4] the majority stated the difference as follows (at 15B–C):

“It is helpful to point out that the rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing

expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.”[5]

F. RESPONDENTS' CASE

[20] The first respondent opposes the filing of the deliberations of the NAC which resulted in the withdrawal of the tender and the records relating to the making of the decision. The first respondent contends that this is not a request for a specific document, but merely asserts generality.

[21] Mr. Motepe for the respondents argued that the question to be answered is:

“When NAC took the decision to cancel the tender, what was before it?”

He then proceeded to answer by referring to annexure “SV4” which is a submission by Transnet Group Capital to the NAC asking for the tender to be cancelled. In paragraph 9 thereof it bears the caption “reasons for proposed none award of business.”

It then substantiates as follows: “it came to the project team's attention that the formation material forms part of the national contract that Transnet freight rail has in place after evaluation of the quarry material tender was concluded. Transnet freight rail confirmed that there is already an existing contract (4[...]) For the supply and delivery of quarry material and that the material will be issued as a free issue and hence the request to cancel this inquiry.”

G. DISCUSSION

[22] While the above may be true, the correct answer to the above inquiry, in my opinion, lies in the proper interpretation of the question. It is not only what was before the NAC that is required to be availed, but the record of the deliberations of the NAC meetings where the above documents were before it as well as the deliberations that took place. This should normally include the agenda and minutes of the meetings and where recorded, the record and possibly transcripts thereof.

[23] The Helen Suzman Foundation matter referred to above makes that abundantly clear.

[24] Regarding the issue of costs, the law is settled and no case has been made for a departure from the basic rule that costs ought to follow the cause.

H.

CONCLUSION

[25] The applicants have made a compelling case for the relief sought; in the result the following order is made:

1. The first respondent is hereby ordered to dispatch to the Registrar of above Honourable Court, the following documents:
 - a. Records of all deliberations/submissions which led to the approval by the national acquisition council on 17 April 2019, to withdraw the first respondent's tender number 3[...].0[...].
 - b. Records relating to the making of the decision/approval by the national acquisition council on 17 April 2019, which resulted in the withdrawal of the tender number 3[...].0[...].
2. In the event of the first respondent seeking to exclude certain documents from the record office decision / submission / approval, the first respondent hereby order to provide detailed index of such documents and the reasons thereof to justify the exclusion of such documents. In the event of the applicants disputing the exclusion of one or more of the documents listed in paragraph four above, from the record of his decision/submission/approval, the applicants are hereby granted leave to approach the above Honourable Court on the same papers, supplemented, if necessary, for further appropriate relief.
3. The first respondent is hereby ordered to pay the costs of this application.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 23 May 2022 Date of Judgment: 18 July 2023 On behalf of the Applicants: Adv. L. Monnakgotla Instructed by: Ntantis Attorneys. E-mail: siphathekile@ntantisattorneys.co.za; yanga@ntantisattorneys.co.za On behalf of the Respondents: Adv. J. Motepe SC With: Adv. Hlalethoa Instructed by: DIALE MOGASHOA Attorneys. E-mail: Donald@dm-inc.co.za

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 18 July 2023.

- [1] Democratic Alliance v Acting National Director of Public Prosecutions and Others 2012 (3) SA 486 (SCA).
- [2] Johannesburg City Council v. The Administrator, Transvaal and Another 1969 (2) SA 72 (T).
- [3] City of Cape Town v. SANRAL Ltd [2013] ZAWCHC (High Court SANRAL)
- [1] [4] Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC); See also Makate v Joosub NO (unreported, GP case no 57882/19 dated 30 June 2020).
- [5] Quoted from Erasmus Superior Court Practice – RS 20, 2022, D1-107 footnote 8.

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Prepared on 13 October 2026 · Esheria