

SOUTH AFRICA / JUDGMENT

Rustenburg Local Municipality and Others v OS Holdings (Pty) Ltd (2358/2024)

[2024] ZANWHC 188 (17 July 2024)

[2024] ZANWHC 188**COURT**

North West High Court, Mafikeng

BEFORE

S Mfenyana

CASE / FILE NUMBER

2358/2024

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NUMBER: 2358/2024****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates:**

NO

Circulate to Regional

Magistrates: NO

In the matter between: -

RUSTENBURG

LOCAL MUNICIPALITY

1st

Applicant

MUNICIPAL

MANAGER:

2nd

Applicant

RUSTENBURG LOCAL

MUNICIPALITY

THE

EXECUTIVE MAYOR:

3rd

Applicant

CHAIRMAN:	BID EVALUATION COMMITTEE 4th Applicant
CHAIRMAN:	BID ADJUDICATION COMMITTEE 5th Applicant and OS HOLDINGS (PTY) LTD Respondent Coram: Mfenyana J
Delivered:	This judgment was handed down electronically by circulation to the parties’ representatives via email. The date for hand-down is deemed to be 10h00 on 17 July 2024. ORDER (1) The order of this court granted ex parte on 15 May 2024 is reconsidered
and substituted with the following:	“The application is struck off the roll for lack of urgency.” (2) The rule nisi issued on 15 May 2024 is discharged. (3) The applicant shall pay the costs of the reconsideration application on the scale as between attorney and client.

JUDGMENT

MFENYANA J

INTRODUCTION

- [1] On 15 May 2024, pursuant to an ex parte application by the applicant, (OS Holdings), I granted an order interdicting and restraining the respondents from adjudicating bid responses submitted in respect of tender number: RLM/BTO/0081/2023/24, pending the final determination of the main application under case number 927/2024. The said application is pending before this court and set down for hearing on 15 November 2024.
- [2] Together with the order, I issued a rule nisi, calling upon the respondents and any other interested person to appear before court on 15 November 2024 to show cause why the order

should not be made final. The respondents were permitted to anticipate the return date on 24 hours' notice to the applicant. The respondents anticipated the return date and set the matter down for hearing on 3 June 2024.

[3] For ease of reference, in this judgment, the parties are referred to as they are in the main application.

[4] In this application, the respondents seek reconsideration of the order granted on 15 May 2024, and for the rule nisi to be discharged in its entirety. The application is brought in accordance with the provisions of Rule 6(12)(c) of the Uniform Rules of Court.

[5] OS Holdings opposes the application.

[6] In terms of rule 6(12)(c) a party against whom an order was granted in its absence in an urgent application, may by notice, set the matter down for reconsideration

of the order. The rationale behind the rule is that, at the rehearing of the matter, the court is given the benefit of argument from the party

seeking reconsideration as the initial application would have been granted in the absence of that party.

[7] The dispute between the parties relates to two tenders (RLM/BTO/0100/2022/23 and RLM/BTO/0081/2023/24 advertised by the first respondent on 13 February 2023 (first tender and 18 November 2023 (second tender), respectively.

[8] The essence of the applicant's contention is that it ought to have been awarded the first tender as it met all the requirements.

[9] In the founding affidavit, the deponent, Ms. Nomsa Olivia Nteleko (Nteleko) contends that OS Holdings was the only bidder who passed functionality, and that the Bid Evaluation Committee (BEC) recommended that OS Holdings be appointed. For this assertion, the applicant relies on the minutes of a meeting of the Bid Adjudication Committee (BAC) held on 11 October 2023, at which the first tender, inter alia, was deliberated on. At that stage the bid validity period (for the first tender) had been extended to 12 October 2023.

[10] Among the issues noted at the meeting, is a query raised by the BAC in respect of OS Holdings which it is recorded, had not been addressed by the BEC. In summary, the meeting noted that OS Holdings had been recommended by the BEC, however the BAC was still not satisfied with the response received from the BEC in respect of the queries raised, and could thus 'not adequately confirm the linking of 2 municipal accounts ... due to insufficient evidence provided.' In the minutes, the BAC recommended that the bid be re-advertised for a period of 30 days.

- [11] On 10 November 2023, the municipality advised the applicant that it had not been selected for the first tender. On 18 November 2023 the first respondent advertised the second tender. The closing date for the second tender was 31 January 2024. The applicant did not submit a response to the second tender.
- [12] On 14 February 2024, ostensibly based on legal advice obtained, the applicant filed an application for the review and setting aside the respondents' decision not to appoint the applicant in respect of the first tender. The review application is still pending before this court, and no date has been allocated therefor.
- [13] Pending the determination of the review application, the applicant caused a letter to be addressed to the respondents on 16 February 2024 demanding that the respondents should provide an 'unconditional undertaking' that the evaluation and adjudication and awarding of the second tender would not be proceeded with. The respondents refused to provide such undertaking.
- [14] On 1 March 2024 the applicant brought an urgent application. The relevant part of the notice of motion reads:
- "Interdicting and/ or restraining the respondents from adjudicating the tender bids submitted in respect of tender number: RLM/BTO/0081/2023/24."*
- [15] The application was struck off the roll for lack of urgency. The applicant's contention in this regard is that the applicant sought to "preserve" the pending review proceedings.
- [16] Having been struck off the roll for lack of urgency, the applicant proceeded to enrol the matter in the ordinary course and was allocated the date of 15 November 2024. A notice of set down was served on the respondents on 18 April 2024. After the service of the notice of set down the applicant caught wind that the respondents were proceeding with the adjudication of the tender despite the pending applications. This prompted the applicant to address another letter to the respondents, again seeking an undertaking by 2 May 2024. Again, the demand was met with a refusal from the respondents.
- [17] It is on the basis of this refusal that the applicant, again on 15 May approached this court on an urgent, ex parte basis. It contended that the respondents' refusal to give an undertaking coupled with all its actions in inter alia, not providing the record, failing to comply with a PAIA request, are part of a concerted effort by the respondents to frustrate the applicant and undermine the application to be heard on 15 November 2024, as well as the review application.
- [18] The applicant contended that it would not be afforded substantial redress in due course, if the respondents were permitted to finalise the adjudication of the second tender, as the proceedings of 15 November 2024 would have no practical effect.

- [19] Concerning the review application, it is common cause that no hearing date has been allocated at this stage and the applicant filed an application in terms of rule 30A(1) for the respondents to comply with Rule 53(1)(b) and file the record. I must hastily state in this regard, that the merits of the review and the hearing of 15 November 2024 are not relevant to the determination of the present application.
- [20] In the affidavit filed in support of the reconsideration application, in answer to the applicant's averments, the respondents aver that OS Holdings did not disclose all the relevant information to the court in obtaining the order in the absence of the respondents.
- [21] It is the respondents' further averment that they were taken by surprise by the order obtained by the applicant, and the material non-disclosure of relevant facts by the applicant. They contend that there was no basis for the applicant to approach the court on an urgent basis as urgency had been determined and found not to exist on 1 March 2024. It was on that basis that the applicant obtained the date of 15 November 2024. Notably, the respondents contend that the grounds of urgency in this application, largely mirror those in the previous urgent application and were opposed in the answering affidavit filed in that application.
- [22] I do not intend to deal in detail with the respondents' reasons for the opposition as set out in the answering affidavit, save to note that with regard to urgency, the respondents pointed out that the applicant had been aware as early as 10 November 2023 that the second tender had been published, and should have approached the court at that stage to interdict the advertisement.
- [23] The respondents further raised the defence of *lis pendens alibi* in that by the applicant's own admission, the same matter is pending before this court, albeit under a different case number. That matter is due to be heard on 15 November 2024. Thus, the respondents aver that the applicant misled the court by withholding the answering affidavit which led to the application being struck off for lack of urgency.
- [24] At the hearing of the matter on 15 May 2024, the applicant was adamant that this application differs from the matter to be heard on 15 November 2024 in that the bases for each of the applications are different. In the present application, Mr Monnakgotla contended on behalf of the applicant, the aim is to interdict the respondents from disregarding the process of court and 'preserve', lest it be rendered nugatory by the respondents' decision to proceed with the adjudication of the second tender. In the application to be heard on 15 November 2024, the purpose is to interdict the respondents from proceeding with the adjudication as the respondents have refused to give an undertaking, he further contended. The more Mr Monnakgotla pointed out the distinction between the two applications, the more they appeared the same.

[25] I deem it necessary at this stage to deal with these preliminary issues raised by the respondents. It is trite that an ex parte application places only one side before the court. For that reason, it requires utmost good faith on the part of the applicant.[1] In *Cooper v First National Bank of SA Ltd*[2] the Supreme Court of Appeal (SCA) noted that failure to make full disclosure of all known material facts that might reasonably

influence a court to come to a decision, may lead the court to refuse the application or to set aside the ruling easily on that ground alone, in spite of the fact that there was no wilfulness or mala fides on the part of the applicant. I align myself with these sentiments.

[26] The respondents contend that the applicant withheld the answering affidavit from the court wherein the issue of lack of urgency was dealt with sufficiently. In addition, the respondents challenged the applicant's locus standi to interdict the second tender. They contended that the outcome of the second tender has no bearing on the applicant's rights in respect of the first tender. In this regard, I should iterate that the applicant did not respond to the second tender.

[27] Mr Motlogelwa, on behalf of the respondents, responding to a question from the court, on whether the determination of the second tender would not render the first tender moot, submitted that this does not bar the court from entertaining a matter on the grounds of justiciability. He further submitted that section 217 of the Constitution[3] enjoins organs of state to follow a fair, equitable, transparent, competitive and cost-effective system when procuring goods and services. He further submitted further that the first tender has in any event, lapsed. This was disputed by the applicant. Mr Monnakgotla argued that the decision to readvertise the tender had been taken on 11 October 2023 before its expiry on 12 October 2023.

[28] The respondents' contention in this regard was that while it is open to the BEC/ BAC to make recommendations, decision-making resorts within the province of the municipal manager, as the accounting officer. Thus, Mr Motlogelwa averred that there is no merit to this contention by the applicant. I agree. He further averred that the first respondent cannot be held hostage in discharging its mandate and responsibilities, contending further that the applicant in any event, enjoys no prospect of success in the review. These are briefly some of the contentions raised on behalf of the respondents.

[29] I also align myself with the sentiments expressed in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC & Others*[4] where the court observed as follows in relation to the rule 12 (6) (c):

"The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order. Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may

involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto... . The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended.”

- [30] In the answering affidavit filed on behalf of OS Holdings in response to the respondents’ application for reconsideration, the applicant denies that there has been a material non-disclosure. It avers that the grounds for the previous urgent application, and the present application, are distinct, as the previous application sought to prevent harm to the review application. In the present application, it seeks to prevent harm to the application set down for 15 November 2024, as proceeding with the second tender would render it nugatory.
- [31] There cannot be any merit to this distinction. Apart from being artificial, the issue is that the basis is the same, albeit that the applicant seeks to interdict different proceedings. The question is whether the applicant disclosed the material facts including the fact that the urgency was resisted by the respondents on the grounds set forth in the respondent’s answering affidavit in that application. At the heart of both applications is the quest by the applicant to restrain the adjudication of the second tender. Further, the same undertaking sought by the applicant in this application was already sought in respect of the previous application but was met with refusal from the respondent.
- [32] While Mr Monnagotla sought to draw parallels between this matter and the facts in *Rustenburg Local Municipality v Layer 3*, a decision of the Full Court of this Division, this related predominantly to the conduct of the first respondent in that matter
- and in the present matter. Mr Motlogelwa however argued that the two matters are distinct. He argued that in the present matter, the applicant has not demonstrated any *prima facie* right. That is indeed so. The greatest difficulty, in my view, is the suggestion, loaded in the applicant’s submission, that a court should predetermine the outcome of a matter, based on the facts, and a party’s conduct in a previous matter. This is untenable.
- [33] For purposes of reconsideration, the jurisdictional prerequisites for an application of that nature, have in my view, been satisfied. The order was obtained in the absence of the respondents without service on the respondents.
- [34] There can be no gainsaying that the alleged harm sought to be averted by the applicant was adequately dealt with in the respondents’ answering affidavit in the application heard on 1 March 2023. This affidavit did not form part of the proceedings of 15 May 2024 and was not brought to the attention of the court by the applicant. I do not agree with the applicant’s submissions that the said answering affidavit has no bearing in the present application. As I have already stated, the import of it is that it comprehensively dealt with the issue of urgency and various other shortcomings in the applicant’s case, including the basis for the applicant’s defence of *lis pendens alibi*. On that basis alone, the order of 15 May 2024 stands to be discharged. There is no doubt that the existing *ex parte* order resulted in an injustice to the respondents.

COSTS

[35] The general rule in respect of costs is that costs follow the result. The respondents argued that the applicant acted in bad faith, as it had no reason to seek the order, and failed to disclose material facts to the court. It is trite that in urgent and ex parte applications the applicant is required to disclose all material facts known to it at the time of lodging the application. In this case the applicant failed to disclose such material facts. They averred that the court should show its displeasure and order a punitive costs order. I agree with the respondents in this regard.

[36] In the result the following order is made:

- (1) The order of this court granted ex parte on 15 May 2024 is reconsidered and substituted with the following:
- (2) The rule nisi issued on 15 May 2024 is discharged.
- (3) The applicant shall pay the costs of the reconsideration application on the scale as between attorney and client.

S MFENYANA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant: L Monnakgotla Instructed by: Dirk Coetsee Attorneys c/o Maree & Maree Attorneys Email: dirk@dcvnlaw.co.za advlerato@rsabar.com lit2@maree-mareeattorneys.co.za
For the defendant: M Motlogelwa Instructed by: Setshedi Makgale & Matlapeng Inc.
maftownadmin@smnmattorneys.co.za Email: Motlogelwam65@gmail.com Date Reserved: 03 June 2024 Date of Judgment: 17 July 2024

- [1] See in this regard: Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA).
- [2] 2001
- (3) SA 705 (SCA).
- [3] Constitution of the Republic of South Africa, 1996.
- [4] 1996(4) (SA) 484 (WLD); See also: Industrial Development Corporation of South Africa Limited v Bakone Group of Companies (Pty) Ltd (2022/027186) [2023] ZAGPJHC 837 (24 July 2023) where the court added that “the audi alteram partem principle and the provisions of section 34 of the Constitution form the bedrock of Rule 6(12)(c).” Also: Oosthuizen v Mijs 2009 (6) SA 266 (W) para 267.
- [4] 1996(4) (SA) 484 (WLD); See also: Industrial Development Corporation of South

Africa Limited v Bakone Group of Companies (Pty) Ltd (2022/027186) [2023] ZAGPJHC 837 (24 July 2023) where the court added that “the audi alteram partem principle and the provisions of section 34 of the Constitution form the bedrock of Rule 6(12)(c).” Also: Oosthuizen v Mijs 2009 (6) SA 266 (W) para 267.

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Prepared on 11 October 2026 · Esheria