

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: ✓ |

Date: **18th March 2022** Signature: _____

A handwritten signature in black ink, appearing to be "P. J. M.", is written over the signature line.

CASE NO: 5495/2022

DATE: 18TH MARCH 2022

In the matter between:

THE SCIENTIFIC GROUP (PTY) LIMITED
ORTHO-CLINICAL DIAGNOSTICS

First Applicant
Second Applicant

and

SOUTH AFRICAN NATIONAL BLOOD SERVICES (NPC)
BIO-RAD LABORATORIES (PTY) LIMITED
IEPSA (PTY) LIMITED
SITETECH SUPPLIES (PTY) LIMITED

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Coram: Adams J

Heard: 15 March 2022 – The 'virtual hearing' of this Urgent Application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 18 March 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 18 March 2022.

Summary: Urgent application – Uniform Rule of Court 6 (12) – the applicant should set forth explicitly the reasons why the matter is urgent – why is it claimed that substantial redress would not be afforded at a hearing in due course – Rules of Court and Practice Directives can only be ignored at a litigant's peril – application struck from the roll for lack of urgency –

ORDER

- (1) The first and second applicants' urgent application be and is hereby struck from the roll for lack of urgency.
 - (2) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first and the second respondents' costs of the urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, where so employed.
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JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the first applicant (TSG) and the second applicant (Ortho) for interim interdictory relief against the first respondent (SANBS) and the second respondent (Bio-Rad). Pending the determination of final relief sought in part B of the notice of motion, the applicants seek an order, on an urgent basis, interdicting and restraining SANBS from implementing the award of a tender relating to the supply of blood automation instruments and related consumables by SANBS to Bio-Rad. The applicants also seek to interdict SANBS from concluding any contract or service level agreement with Bio-Rad arising from the tender.

[2]. In part B the applicants apply for a review and the setting aside of the decision by SANBS to award the tender to Bio-Rad.

[3]. SANBS and Bio-Rad oppose the urgent application *inter alia* on the grounds that the application is not urgent. In the event that it is determined that there is any urgency, then it is submitted, on behalf of the respondents, that the urgency is entirely self-created. The applicants, so SANBS and Bio-Rad allege, have been aware since the beginning of November 2021 that it was unsuccessful in its tender. It has, since the early part of December 2021, been aware of the reasons for which it was unsuccessful in its tender. Despite this, it only launched the urgent application on 14 February 2022, that is two months after the applicants learnt of the reasons for TSG's bid failure and three months after it was first informed that its tender was unsuccessful,

[4]. In any event, so the respondents contend, the interim relief claimed by the applicants in this urgent application is academic in that the contract that TSG seeks to interdict was concluded on 11 January 2022 – more than a month before TSG launched the application, and more than two months before the date on which it was set down for hearing.

[5]. I find myself in agreement with these submissions. The simple fact of the matter is that on 3 November 2021, TSG was informed that their bid was unsuccessful. On 18 November 2021, they sought clarity from SANBS on the rejection of their bid and on 26 November 2021 SANBS responded in detail to this enquiry. Importantly, on 6 January 2022, in response to a demand from TSG that they retract the award of the tender to Bio-Rad, SANBS, through their legal representatives, made it abundantly clear that they refuse to retract the award of the tender.

[6]. Despite the foregoing, and the supposed urgency of the matter, TSG only launched the urgent application on 14 February 2022.

[7]. What is more is that the 'irregularities' complained of by the applicants in relation to the bid, were based on decisions to adjust the BB-BEE criteria of the *Request for Quotes* and to request the parties to quote for both clusters of sites rather than the sites being divided into two clusters, all of which occurred during May 2021. The question to be asked rhetorically is why did the applicants not then object to the tender process.

[8]. In sum, there are two difficulties which the applicants face relative to the issue of urgency. The first relates to the fact that as early as May 2021 SANBS took the decisions complained of. It is reasonable to expect the applicants, if they were as aggrieved by the decisions as they would have the Court believe, to have taken action then. Secondly, during November 2021, SANBS awarded the tender to Bio-Rad and shortly thereafter they made it clear that they would not be changing their mind about that decision. By then, it should have been crystal clear to TSG that it needed to take action in order to protect its alleged right to be fairly treated in public procurement processes. The applicants did nothing. Instead, they engaged in addressing further demands to the SANBS, when it would have been clear that legal action ought to be commenced sooner rather than later. All the same, there is no explanation, let alone an acceptable one, why the applicants did not launch their urgent application during January 2022.

[9]. In my view, there has been non-compliance with the provisions of Uniform Rule of Court 6(12), which reads as follows:

‘(b) In every affidavit or petition filed in support of the application under para (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.’

[10]. On behalf of the applicants it was submitted that the application is urgent. TSG, so the applicants contend, did not sit on its hands after it learned on 3 November 2021 that its bid had been unsuccessful. It continuously engaged with SANBS to seek reasons and to further make enquires in relation to the rejection of its bid and prefaced its challenges to the SANBS's tender process. This contention is not born out or supported by the evidence. Even on TSG's own version, by at least 6 January 2021, they should have realised that they needed to launch the urgent application. They did not do so. And that does not even take into account, as already indicated, that as early as May 2021 alarm bells should have sounded for them and they should have commenced legal proceedings against SANBS.

[11]. I therefore do not accept the applicants' contentions in that regard. In my view, the applicants should have launched this application as soon as SANBS

made it clear to them that they would not be reconsidering their decision to award the tender to Bio-Rad. If they did so, urgency would not have been an issue now.

[12]. In my view, the salient facts in this matter are no different from those in *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others*¹, where Fabricius J held as follows at para 12:

‘[12] It is my view that Applicant could have launched a review application calling for documents, amongst others in terms of the Rules of Court, in February 2016. On its own version, it was also ready to launch an urgent application by then, even without the so-called critical documents. The threatened internal appeal also did not materialize.

[13] In the meantime, First Respondent has been in possession of the site since 28 January 2016. Third Respondent's Contract Manager made an affidavit stating that offices, toilets, septic tanks, electricity facilities, generators, storage facilities, bore-holes and access roads have all been established. By 16 May 2016, Third Respondent had done about 500 000 cubic metres of excavation, had surveyed the pipe-line and had procured about 70km of pipe at a cost of about R 188 million. Personnel have been employed.

[14] I do take into account that the whole project will take 24 months to complete. I do not however agree with Applicant's Counsel, who submitted in this context, that for those reasons the needs of the community played no significant role. Having regard to the whole history of the matter, which is set out in great detail in *Esofranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* ZASCA 21 (28103/2014), the interest of the particular community that requires the supply of water, remains a relevant consideration, both in the context of self-created urgency and the balance of convenience, which does not favour the Applicant at this stage at all.

[15] This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self-created. Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives can only be ignored at a litigant's peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.’ (Emphasis added)

¹ *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others* (74192/2013) [2014] ZAGPPHC 191 (14 March 2014);

[13]. For all of these reasons, I am not convinced that the applicants have passed the threshold prescribed in Rule 6(12)(b) and I am of the view that the application ought to be struck from the roll for lack of urgency.

Costs

[14]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*².

[15]. I can think of no reason why I should deviate from this general rule.

[16]. Accordingly, I intend awarding costs in favour of the first and second respondents against the first and second applicants. In that regard, it requires mentioning that the third and fourth respondents, who were the other unsuccessful bidders, played no part in this litigation. In any event, no relief was sought against any of them by the applicants, hence them not opposing the application.

Order

[17]. Accordingly, I make the following order: -

- (1) The first and second applicants' urgent application be and is hereby struck from the roll for lack of urgency.
- (2) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first and the second respondents' costs of the urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, where so employed.

² *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

L R ADAMS

*Judge of the High Court
Gauteng Division, Johannesburg*

HEARD ON:	15 th March 2022 – as a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	18 th March 2022 – judgment handed down electronically
FOR THE FIRST AND SECOND APPLICANTS:	Adv Omphemetse Mooki SC, together with Adv Sechaba Mohapi
INSTRUCTED BY:	Werksmans Attorneys, Sandton
FOR THE FIRST RESPONDENT:	Adv Carol Steinberg SC, together with Advocate Janice Bleazard
INSTRUCTED BY:	Norton Rose Fulbright SA Incorporated, Sandton
FOR THE SECOND RESPONDENTS:	Advocate Henry Martin, together with Advocate Kendall Turner
INSTRUCTED BY:	Hogan Lovells Johannesburg Inc, Sandton
FOR THE THIRD AND FOURTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance