



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/ NO
Of Interest to other Judges:	YES/ NO
Circulate to Magistrates:	YES/ NO

Case no: 5857/2022

In the matter between:

KIR PROJECTS

APPLICANT

and

ACTOPHAMBILI ROADS

1ST RESPONDENT

SOUTH AFRICAN NATIONAL ROADS AGENCY

2ND RESPONDENT

MANOPIX

3RD RESPONDENT

HEARTY OAK

4TH RESPONDENT

CORAM:

LOUBSER, J et MTHIMUNYE, AJ

HEARD ON:

7 AUGUST 2023

JUDGMENT BY:

MTHIMUNYE, AJ

DELIVERED ON:

26 OCTOBER 2023

- [1] This is a two-pronged application in terms of the common law and / or section 6 of the Promotion of Administrative Justice Act 3 of 2000, wherein the applicant seeks to review and set aside tenders awarded by the first respondent to the

third and fourth respondents' joint venture. It is apposite to mention that the first respondent was appointed by the second respondent as the main contractor to perform certain works. In turn, the first respondent appointed the third and fourth respondents as its sub-contractors. It is the first respondent's tenders for appointment of the sub-contractors that is the subject of these proceedings. The applicant is one of the bidders that were unsuccessful.

- [2] In Part A, of the Notice of Motion the applicant seeks, on an urgent basis to interdict, in the interim, the first respondent from concluding an agreement with, and handing over the construction site for Traffic Accommodation under Contract Numbers R.30-012-2019/1 and R.30-010-2021/1 for the periodic maintenance of National Route R30, Section 1 to Section 2 Brandfort, and maintenance of National Route R30, Section 1 from Glen Lyon Interchange to the third and fourth respondents. Further, to be interdicted from performing any functions and obligations arising from any Service Level Agreement (s), and/or agreement (s) concluded with the third and fourth respondents, including making any payments to the third and fourth respondents.
- [3] In Part B, the applicant seeks the following orders: an order declaring the first respondent's decision not to award the impugned tender to the applicant unlawful, such decision to be reviewed and set aside in accordance with section 6 of the Promotion of Administrative Justice Act 3 of 2000, or applicable common law. Pursuant to that, any contract concluded between the first respondent and the third and fourth respondents joint venture in consequence of the award of the tender to the third and fourth respondents, be reviewed and

set aside, and the reward of the tender to the third and fourth respondents be substituted with an order appointing the applicant in accordance with the provisions of section 8 of the Promotion of Administrative Action Act 3 of 2000 or applicable common law.

[4] The historical timeline to this application is as follows: the tenders were awarded by the first respondent on 19 October 2022 and accepted by the third and fourth respondents on 20 October 2022. The applicant avers that only on 20 November 2022 did it become aware of the tender awards which is why this application was then launched on 23 November 2022. Despite this averment by the applicant, it is clear from the papers that the notification of tender awards was indeed emailed by first respondent to the applicant advising them of the tender results, which the applicant confirms it later discovered in its spam account around 7 November 2022. The urgent relief in Part A was set down for hearing on 5 December 2022 but on that day, the applicant removed the application from the roll. Thereafter the Applicant took his time to prosecute the relief sought in Part B. It is also important to mention that tender works were for a period of approximately six months.

[5] In its answering papers, the first respondent first and foremost raised a number of points *in limine*, one being the non-joinder of Sirobi Civils, a joint venture partner of the first respondent. The applicant contended that although it does not dispute this joint venture, the issue *in casu* is not the identity of the main contractor but rather the decision-maker whose decisions form the subject matter of these review proceedings. At the hearing of the matter, these were

not raised and what was placed for determination, what whether or not this court has the authority to entertain this application, given the delay in the applicant's prosecution thereof, which delay has resulted in the proverbial horse having bolted.

- [6] This court then sought an explanation from the applicant why, when Part A fell through in December 2022, it did not follow through with Part B whilst the construction was still proceeding, albeit only 20% thereof was left. In fact, the respondent submitted that at the time this application for an interdict was sought, the successful bidders had already established itself on site and well on its way to complete the project, with 50% of the project costs already expended. At that time, the applicant should have been aware of a need to urgently prosecute the review application. The applicant's submission in this regard was that its correspondent attorneys were furnished with correspondence on 21 January 2023 requesting full answers from the first respondent and for the project to be halted. The first respondent rejected the applicant's request on 7 March 2023. It was only thereafter, that the Applicant could apply for the date and due to impracticalities, it could not approach the Deputy Judge President for an expedited date.

- [7] At the time this matter was heard on 7 August 2023, both tenders had been fully executed and the sub-contractors fully paid. In terms of the status update filed by the first respondent, the contract was completed on 21 April 2023 and final payments were made. The effect hereof is that the present proceedings before this court is no more than an academic exercise which would have no

practical effect on the impugned decision of the first respondent. The question may then be regarded as moot in the circumstances. The Applicant submitted that even if the matter is moot, the court has a discretion to exercise based on the interests of justice.

- [8] Section 7 of PAJA regulates the procedure for judicial review and it provides:

(1) Any proceeding for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date...

- [9] This section is self-explanatory in that it sets out two requirements for judicial review proceedings viz. that the application must be brought without unreasonable delay and that it must be brought within one hundred and eighty days. These requirements were clearly explained by the Supreme Court of Appeal in **Opposition to Urban Tolling Alliance v South African National Roads Agency Limited** [2013] 4 All SA 639 (SCA) as follows:

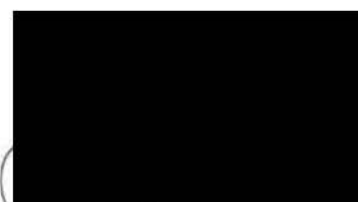
"At common law application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned.... Up to a point, I think Section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days per se as unreasonable, Before the effluxion of 180 days, the first inquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period this issue of unreasonableness is pre-determined by the

legislature: it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension, the court has no authority to entertain the review application at all"

[10] Although Counsel for the applicant argued that this court may adjudicate an application which is moot if it is in the interest of justice, it was not clear what *in casu* would be the interest of justice to justify the court's entertainment of this matter. On the basis of the provisions of section 7(1) of PAJA and the judgment cited above, this court is of the view that the applicant's leisurely approach in prosecuting Part B without any zealously has caused an unreasonable delay, and as such the court does not have the authority to entertain the review application. In any event, the matter has become moot as a result, and the orders sought by the applicant would have no practical effect.

[11] Consequently, the following order is made:

1. The application is dismissed with costs, including the costs of the urgent application of 5 December 2022.



D. P. MTHIMUNYE, AJ

I concur:



P. J. LOUBSER, J

For the Applicant:

Instructed by

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For the Respondents:

Instructed by:

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