

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: **27th October 2023** Signature: [Redacted]

CASE NO: 098500/2023

DATE: 27TH OCTOBER 2023

In the matter between:

DOWN TOUCH INVESTMENTS (PTY) LIMITED

Applicant

and

TRANSNET SOC LIMITED

First Respondent

RUMDEL CONSTRUCTION (PTY) LIMITED

Second Respondent

Neutral Citation: *Down Touch Investments v Transnet SOC and Another*
(098500/2023) [2023] ZAGPJHC --- (27 October 2023)

Coram: Adams J

Heard: 24 October 2023 – The ‘virtual hearing’ of this Urgent Application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 27 October 2023 – 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 10:30 on 27 October 2023.

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 applicant's urgent application be and is hereby struck from the roll for lack of urgency.
 - (2) The applicant 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 applicant (Down Touch) for interim interdictory relief against the first respondent (Transnet) and the second respondent (Rumdel). Pending the determination of final relief sought in part B of the notice of motion, the applicant seeks an order, on an urgent basis, interdicting and restraining Transnet from implementing the award of a tender relating to the rehabilitation and upgrading of roads in the Port of Durban for a period of twenty-four months ('the tender') to Rumdel. Down Touch also seeks an order suspending the operation of any contract or service level agreement concluded between Transnet and Rumdel arising from the award of the tender, as well as an order interdicting the respondents from in any way further performing any construction related to the works arising from the award of the tender.

[2]. In part B, Down Touch applies, also on an urgent basis, for an order, reviewing and setting aside Transnet's decision to disqualify as non-functional

the applicant's tender. Applicant's judicial review application is based on the provisions of the Promotion of Administrative Justice Act¹ ('PAJA') and is directed at Transnet's decision to disqualify its bid on the basis that it did not meet the threshold score of sixty points in respect of the 'functionality evaluation' to even be considered. In a nutshell, the case of Down Touch is that Transnet had incorrectly scored its bid in respect of the functionality criteria and contends that, in respect of the applicable criteria, it should have been scored differently and awarded maximum points.

[3]. The question to be considered in this application is whether a case has been made out on behalf of Down Touch for the interim relief claimed. In particular, the issue to be decided is whether the applicant has demonstrated the existence of a *prima facie* right, worthy of protection by an interim interdict. The aforesaid issue can be decided on the basis of the case presented by Down Touch in which it is averred that functionality criteria were scored incorrectly by Transnet. The criteria are the following: (a) previous experience in respect of (i) geotechnical study and topographic survey, (ii) detailed design for roads – heavy rehabilitation and upgrade; (b) environmental policy; (c) programme; (d) health and safety roles and responsibilities; (e) health and safety training matrix; (f) health and safety overview of the baseline risk assessment; and (g) health and safety cost breakdown sheet.

[4]. Had it been awarded full points for these functionality criteria, so Down Touch contends, it would have passed the functionality stage and, once it did so, it would have been the cheapest tender and therefore would have won the bid. Down Touch therefore complains of an unlawful disqualification from the tender process and on that basis intends to have judicially reviewed and set aside the award of the tender to Rumdel, but that will be only in part B of the application.

[5]. A close reading of the bid documents submitted on behalf of Down Touch reveals, as was found by Transnet, that there were material shortcomings in the tender by Down Touch in relation to the functionality criteria.

¹ Promotion of Administrative Justice Act, Act 3 of 2000.

[6]. It is so that Transnet, as the procuring entity should consider only acceptable tenders. An acceptable tender is defined in the Preferential Procurement Policy Framework Act² ('the PPPFA') as any tender which in all respects, complies with the specifications and conditions of a tender as set out in the tender document. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*³, the Constitutional Court stated that tender processes require 'strict and equal compliance by all competing tenderers on the closing day for submission of tenders'.

[7]. On my reading of the papers, Down Touch's tender did not comply with the specifications and conditions of the tender and Transnet correctly disqualified their bid. The interpretation by Down Touch of the tender documents and the applicable legal principles, aimed at justifying its non-compliance with the specifications and the conditions of the tender, is misguided. So, for example, Down Touch contended that it had submitted an environmental policy and an integrated safety health and environmental policy in compliance with one of the functionality criterion requirements. The document submitted by Down Touch, which purportedly complied with this requirement, was in fact a plan and not an environmental policy. In fact, it is evident *ex facie* the document that it is not a policy. The simple fact of the matter is that objectively there was non-compliance with this particular requirement and Down Touch was correctly scored by Transnet at zero in respect of this functionality criterion.

[8]. A further example relates to the health and safety roles and responsibilities criterion. Down Touch averred that it could not and did not provide the required information because Transnet required appointment letters, and these could only be produced by the successful tenderer when these appointments had been made. However, Down Touch ought reasonably to have known that this is not what was required. All that was required was to provide details of the roles and responsibilities of the legal appointees, not that these legal appointees must be appointed, and appointment letters provided. Down Touch partially complied by

² Preferential Procurement Policy Framework Act, Act 5 of 2000;

³ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para [60];

providing the roles and responsibilities for four of the seven legal appointees. However, again there was non-compliance and they were rightly not given full scores for this criterion.

[9]. There are further examples. I do not intend dealing with all of them in detail. Suffice to say that, in my view, the criticism levelled at the assessment by Transnet of Down Touch's tender documents, is without merit. Moreover, in certain instances, such as the requirement relating to the programme, Down Touch accepted that Transnet's assessment was on the money. However, they contend that Transnet had an obligation, without identifying the origins of this obligation, to 'simply ask for an updated document'. I agree with the submission made by Mr Hulley SC, who appeared on behalf of Transnet, with Ms Segeels-Ncube, that Transnet had no such obligation but more importantly, it had no discretion to do so. The point is simply that Transnet's right to obtain clarification from a tenderer is limited to any matter that could give rise to ambiguity in a contract arising from the tender offer. Transnet was not entitled (or obliged) under the tender to request a usable version of Down Touch's programme.

[10]. In sum, I am of the view that, on the evidence before me, Down Touch did not submit an acceptable tender. It was correctly disqualified from the bid, which, in turn, means that it has not established a *prima facie* right. For this reason alone, Down Touch's application should fail.

[11]. There is another reason why the applicant's Urgent Application should fail and that relates to urgency. Transnet and Rumdel 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 case on behalf of the respondents is that Down Touch does not make out a case for urgency as envisaged by the Uniform Rules of Court and the case authorities.

[12]. In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*⁴, Notshe AJ commented on the rule regulating urgent applications and held as follows:

[6] The import thereof is that the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.'

[13]. A party seeking to approach the Court on an urgent basis needs to justify why his matter is so urgent as to warrant other litigants being shifted further down the queue. As was held by Plaskett J in *Mlezana and Others v South African Civic Organisation*⁵:

'The judicial system, not unlike the private individual, does not take kindly to people who push to the front of the queue. The doctrine of urgency was developed and encapsulated in the rules of court in order to allow those for whom the wait in the queue would not be worth it unless they push in front, to do just that without attracting dirty looks from those behind them.'

[14]. Moreover, the applicant must justify the invasion of the respondent's rights to proper notice and an adequate opportunity to prepare. (*Luna Meubel Vervaardigers (Edms) Bpk v Makin & another t/a Makin Furniture*

⁴ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 (23 September 2011);

⁵ *Mlezana and Others v South African Civic Organisation* (3208/18) [2018] ZAECHGHC 114 (12 November 2018) at para [5], quoting from Norman Manóim 'Principles Regarding Urgent Applications' in Nicholas Haysom and Laura Mangan (Eds) *Emergency Law* at 79;

*Manufacturers*⁶). The applicant must fully set out the facts supporting the conclusion advanced; mere lip service will not do.

[15]. *In casu*, as correctly submitted by Mr Hulley, Down Touch alleges merely that it stands to ‘suffer significant prejudice should the interdict not be granted’ because ‘if the works start and the work is performed, it means that Down Touch’s chances of obtaining adequate relief ultimately at the review stage is diminished significantly’ and that ‘the irregularity must not become practically insulated against attack’. Besides these facts being entirely unsubstantiated, it is not explained why this would necessarily mean that substantial redress at a hearing in due course cannot be obtained.

[16]. In any event, Down Touch’s urgency is self-created. It waited approximately a month from the time it was informed that its bid was not successful on 30 August 2023. It was provided with its scoring on 1 September 2023. The suggestion that it could not bring the application until after the debriefing session is contrived. According to Down Touch, its attorney of record held instructions as early as 1 September 2023 to bring the present application in the absence of an undertaking from Transnet to halt the implementation of its decision. However, in reply, Down Touch says it couldn’t bring the urgent until it was afforded the true reasons for its failings. But it was aware of these reasons by 7 September 2023 when it received a detailed breakdown of why its tender had fallen short.

[17]. Down Touch’s attorneys had instructions on 1 September already to bring this application, if the undertaking was not made by 4 September 2023. If Down Touch genuinely needed the ‘true’ reason for its failings, it would not have instructed its attorneys on 1 September already to bring this application. According to Down Touch, at this stage it did not know the true reasons and without the true reasons it could not bring the application.

⁶ *Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin Furniture Manufacturers)* 1977 (4) SA 135 (W) at 114B;

[18]. The reliance on the 21 September 2023 debriefing session is clearly an attempt to explain the delay between 30 August 2023 to 21 September 2023 where there is in fact no explanation. The urgency is self-created.

[19]. In my view, there has been non-compliance with the provisions of Uniform Rule of Court 6(12)(b), 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.’

[20]. 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*⁷, 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 *Esorfranki 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

⁷ *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others* (74192/2013) [2014] ZAGPPHC 191 (14 March 2014);

peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.’
(Emphasis added)

[21]. For all of these reasons, I am not convinced that Down Touch has 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

[22]. 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*⁸.

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

[24]. Accordingly, I intend awarding costs in favour of the first and the second respondents against the applicant.

Order

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

- (1) The applicant’s urgent application be and is hereby struck from the roll for lack of urgency.
- (2) The applicant 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.

L R ADAMS

*Judge of the High Court
Gauteng Division, Johannesburg*

⁸ *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

HEARD ON: 24th October 2023 – as a videoconference on *Microsoft Teams*.

JUDGMENT DATE: 27th October 2023 – judgment handed down electronically

FOR THE APPLICANT: Adv S Grobler SC

INSTRUCTED BY: Peyper Attorneys, Sandton

FOR THE FIRST RESPONDENT: Adv Garth I Hulley SC, together with Adv L Segeels-Ncube

INSTRUCTED BY: Malatji & Co Attorneys, Sandton

FOR THE SECOND RESPONDENT: Advocate Indhrasen Pillay SC

INSTRUCTED BY: Cox Yeats, Sandton